

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES J. COTTER, JR., derivatively on
behalf of Reading International, Inc.,

Appellant,

v.

DOUGLAS MCEACHERN, EDWARD
KANE, JUDY CODDING, WILLIAM
GOULD, MICHAEL WROTONIAK, and
nominal defendant READING
INTERNATIONAL, INC., A NEVADA
CORPORATION

Respondents.

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Case Nos. 76981, 77648 & 77733

District Court Case
No. A-15-719860-B

Coordinated with:
Case No. P-14-0824-42-E

Appeal (77648 & 76981)

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

**JOINT APPENDIX TO OPENING BRIEFS
FOR CASE NOS. 77648 & 76981
Volume XXIV
JA5809 – JA6058**

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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 28th day of August, 2019, a true and correct copy of the foregoing **JOINT APPENDIX TO OPENING BRIEFS FOR CASE NOS. 77648 & 76981**, was served by the following method(s):

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By: /s/ Gabriela Mercado

1 (TS0000073). But before May 19, 2015, each of Adams, Kane and McEachern
2 communicated to EC their agreement to vote as RDI directors to terminate
3 plaintiff as President and CEO of RDI. App. Ex. 1 (EC 6/16/16 Dep. Tr.
4 175:17-176:8); App. Ex. 5 (Storey 2/12/16 Dep. Tr. at 96:5-91:4, 98:21-100:8,
5 100:14-101:11); App. Ex. 9 (Adams 4/28/16 Dep. Tr. at 98:7-17; 98:18-99:22);
6 App. Ex. 9 (Adams 4/29/16 Dep. Tr. at 378:15-370:5); *see also* App. Ex. 6 (TS
7 8/31/16 Dep. Tr. at 66:22-67:20) and App. Ex. 26 (Dep. Ex 131).

8 During their planning that predated the supposed May 21
9 meeting, Kane sent an email to Adams on May 18, 2016, in which he (Kane)
10 agreed to second the motion for plaintiff's termination:

11 See if you can get someone else to second the motion [to
12 terminate Plaintiff as President and CEO]. If the vote is 5-3 I
13 might want to abstain and make it 4-3. If it's needed I will vote.
14 It's personal and goes back 51 years. If no one else will second it
15 I will.

16 App. Ex. 19 (Dep. Ex. 81 at GA00005500).

17 Also prior to May 21, 2015, Kane and Adams discussed other
18 motions related to plaintiff's termination, such as the appointment of an
19 interim CEO. App. Ex. 9 (Adams 4/29/16 Dep. Tr. at 366:5-367:6); *see also*
20 App. Ex. 20 (Adams Dep. Ex. 82 at GA00005502-03). In a May 19, 2015 email
21 to Kane, Adams confirmed they had chosen sides in a family dispute:

22 Ed,

23 I am sorry, as I know your relationship with the family started
24 long before they were born. I also know—and now see for
25 myself—why SR placed such a high value on you and your
26 counsel. More than anyone else on the board, you worked
27 behind the scenes attempting to bridge every problem with the
28 kids. Lastly, I know that more than anyone else, you have been
at SR's side at every turn as he built his empire. I think you and I
share a [sic] *obligation to the family* based upon our
commitment to our friend.... Unfortunately, it seems that we
have no choice but to choose a side.

1 App. Ex. 21 (Adams Dep. Ex. 85 at GA00005544–45 (emphasis added); *see*
2 also App. Ex. 6 (TS 8/3/16 Dep. Tr. at 65:12–66:20). Where is the "interest" of
3 RDI in this admission? NRS 78.138(1).

4 In the face of a pre-arranged agreement among Adams, Kane
5 and McEachern to vote to terminate plaintiff, Gould warned that they all
6 could "face possible claims for breach of fiduciary duty if the Board takes
7 action without following a *process . . .*" App. Ex. 318 (Gould Dep. Ex. 318).
8 (Emphasis added). Storey used the term "kangaroo court," and observed as
9 to the non-Cotter directors that, "as directors *we can't just do what a*
10 *shareholder* [meaning EC and MC] *asks.*" App. Ex. 22 (Kane Dep. Ex. 116)
11 (emphasis added). Kane rejected their request to meet separately from the
12 Cotters, stating that "the die is cast." App. Ex. 23 (EK Dep. Ex. 117 at
13 TS000069).

14 The supposed May 21, 2015 special meeting was convened and
15 concluded with no termination vote having been taken. Sept. 23, 2016 JJC
16 Declaration In Support of Plaintiff's Motion ("JJC Decl.") ¶ 11.

17 On or about Wednesday, May 27, 2015, a lawyer representing
18 MC and EC in the California Trust Action sent an attorney representing
19 Plaintiff in that action a document outlining terms on which EC and MC
20 would resolve their disputes with him. *Id.* ¶ 12; App. Ex. 4 (MC 6/15/16
21 Dep. Tr. at 154:19–156:19); App. Ex. 32 (Dep. Ex. 322). Not coincidentally, EC
22 on May 27, 2015 emailed RDI directors stating "that the board meeting held
23 last Thursday [May 21] was adjourned, to reconvene this Friday, May 29,
24 2015. The board meeting will begin at 11:00 a.m. at our Los Angeles office."
25 JJC Decl. ¶ 13; App. Ex. 1 (MC 6/16/16 Dep. Tr. at 185:13-186:9); App. Ex. 35
26 (Dep. Ex. 340).

27 Once the termination threat had been made, Kane continued
28 misusing his position of trust and power as a director at RDI to pressure

1 Plaintiff to give in to the threat of his sisters and resolve his disputes with
2 them by acceding to their demands. For example, on May 28 Kane wrote
3 Plaintiff: "Ellen is going to present you with a global plan to end the
4 litigation and move the Company forward. If you agree to it, you, Ellen and
5 Margaret will work in a collaborative manner and you will retain your title."
6 App. Ex. 4 (Dep. Ex. 118 at EK 00000396 (emphasis added). Kane further
7 warned, "If it is a take-it-or-leave-it, then I STRONGLY ADVISE YOU TO
8 TAKE IT, even though I have not seen or heard the particulars." *Id.*
9 (emphasis added).

10 The supposed special board meeting on May 29 commenced and
11 Adams made a motion to terminate Plaintiff as President and CEO. In
12 response, Plaintiff questioned Adams' independence and/or
13 disinterestedness. JJC Decl. ¶ 15. Adams refused to speak to the subject,
14 and neither Gould nor any other RDI director received or required an
15 explanation from Adams. *Id.* The supposed special meeting was adjourned
16 until 6:00 p.m. that evening. Plaintiff was then told by Kane, McEachern
17 and Adams that he needed to resolve his disputes with his sisters by then or
18 they would to terminate him. *Id.* That threat was memorialized by director
19 Storey, whose contemporaneous handwritten notes state:

20 **long board discussion**

21 **ended with basically a command from "majority" – Jim go**
22 **settle something with sisters in next hour or you will be**
23 **terminated.**

24 App. Ex. 5 (Storey 2/12/16 Dep. Tr. at 110:6–12); App. Ex. 15 (Storey Dep.
25 Ex. 17) (emphasis added).

26 The Board reconvened telephonically around 6:00 p.m. and Ellen
27 Cotter reported that she and Margaret Cotter had reached an agreement in
28 principle with plaintiff to resolve their disputes. Ellen Cotter concluded
that, while no definitive agreement had been reached, she would have one

1 of their lawyers provide documentation to counsel for plaintiff. No
2 termination vote was taken. JJC Decl. ¶ 16; Motion App. Ex. 3 (MC 5/13/16
3 Dep. Tr. at 368:13–369:22); *see also* App. Ex. 15 (Dep. Ex. 17) and Ex. 1 (Kane
4 5/2/16 Dep. Tr. at 191:6–24). On Wednesday, June 3, 2015, counsel for EC
5 and MC transmitted a new document to counsel for JJC. JJC Decl. ¶ 17;
6 App. Ex. 3 (MC 5/13/16 Dep. Tr. at 377:7–24); App. Ex. 28 (Dep. Ex. 167).

7 A few days later, on June 7 and 8, 2015, Kane *admitted* that the
8 termination threat was in furtherance of the *interests of EC and MC, not RDI*.
9 In a June 8 email to Plaintiff, Kane stated that "there is no one more qualified
10 to be the CEO of this company than you." App. Ex. 2 (JCOTTER009286)
11 (emphasis added). A day earlier, Kane said "I want you to be CEO and run
12 the company for the next 30 years or more." *Id.* Kane thus confirmed that
13 when he, Adams, and McEachern threatened to terminate Plaintiff and
14 thereafter did so, they not only were not acting in the interests of RDI, but
15 that they were acting against of RDI's interests, *in breach of their fiduciary*
16 *duties*.

17 On June 8, 2015, Plaintiff advised EC and MC that he could not
18 accept their so-called settlement document. MC responded that she would
19 advise the RDI board of directors. JJC Decl. ¶ 18; App. Ex. 3 (MC 5/13/16
20 Dep. Tr. at 368:13–369:22); *see also* App. Ex. 3 (MC 5/12/16 Dep. Tr. at
21 271:22–279:7); App. Ex. 27 (Dep. Ex. 156). On Wednesday afternoon, June 10,
22 2015, EC transmitted an email to all RDI board members stating, among
23 other things, that "we would like to reconvene the Meeting that was
24 adjourned on Friday, May 29th, at approximately 6:15 p.m. (Los Angeles
25 time.) We would like to reconvene this Meeting telephonically Friday, June
26 12 at 11:00 a.m. (Los Angeles time) . . ." JJC Decl. ¶ 19.

27 When the termination vote was rescheduled for the next day,
28 Kane resumed pressuring Plaintiff stating on June 11, 2015: "I do believe

1 that if you give up what you consider 'control' for now to work
2 cooperatively with your sisters," Kane admonished, "you will find that you
3 will have a lot more commonality than you think." App. Ex. 5 (Kane Dep.
4 Ex. 306 at EK 00001613). **"Otherwise," Kane threatened, "you will be sorry**
5 **for the rest of your life, they and your mother will be hurt and your**
6 **children will lose a golden opportunity."** *Id.* Tellingly, Kane also wrote:

7 "[F]or now I think you have to concede that Margaret will vote
8 the B stock. As I said, your dad told me that giving Margaret the
9 vote was his way of 'forcing' the three of you to work together.
Asking to change that is a *nonstarter*."

10 App. Ex. 5 (Kane Dep. Ex. 306) (emphasis in original).

11 On Friday, June 12, 2015, a supposed RDI board of directors
12 special meeting was convened. Adams, Kane and McEachern voted to
13 terminate JJC (as did MC and EC). App. Ex. 10 (Kane 5/2/16 Dep. Tr. at
14 191:25–192:12, 193:–194:10); App. Ex. 5 (Storey 2/12/16 Dep. Tr. at 139:22–
15 140:11); *see also* App. Ex. 6 (TS 8/3/16 Dep. Tr. at 75:4–76:16 and 81:22–82:6).
16 Kane in deposition admitted that JJC was fired because he did not acquiesce
17 to the termination threat made by Kane, Adams and McEachern:

18 Kane:I—I said to him at one point, "Take it. You have nothing to
19 lose. You're going to get terminated if you don't. If you can work
20 it out with your sisters, it will go on and I will support you. I'll
21 even make a motion to see if the company will reimburse the
22 legal fees." I did not want him to go. And you, I'm sure, see
emails in there to that effect. Even though I voted—was voting
against him, I wanted him to stay as C.E.O.

* * *

23 Q.: But that resolution did not come to pass because Jim
24 Cotter, Jr., rejected it, correct?

25 Kane: He rejected it, yes.

26 Q.: And he got himself terminated, right?

27 Kane: Yes.

28 App. Ex. 1 (Kane 5/2/16 Dep. Tr. at 194–195 (objection omitted)).

b) The Aborted CEO Search

Rather than recite the record evidence regarding the CEO search again, Plaintiff respectfully refers the Court to his prior briefs and the evidence described therein and proffered therewith. *See* October 13, 2016 Oppositions to Partial MSJ No. 5 and Gould's MSJ and December 1, 2017 Supplemental Opposition to Partial MSJ Nos. 2 and 5. By way of summary, that evidence shows that the CEO search committee, comprised of MC, McEachern and Gould (after EC declared her candidacy and withdrew), effectively terminated the search on the same day EC declared her candidacy. That was the last day the committee had a substantive communication with Korn Ferry, the outside professional search firm employed and paid by RDI to lead the CEO search. Shortly thereafter, Korn Ferry was told to stand down, to not provide the agreed and paid for proprietary assessment of final qualified candidates and, in effect, to not interfere with the decision of MC, McEachern and Gould to ignore the fact that EC did not possess the experience and qualifications that they had agreed were the sine qua non to be selected as RDI's new CEO. The CEO search committee then presented (surprise!) EC as their choice, and did not present the full Board with the final three candidates as the previously set *process* prescribed. The Board dutifully agreed, and EC was made CEO. For Judy Coddington, a close family friend who had been a Board member for only two months, that was the result she previously had determined to bring about, because it was her view that RDI was a "family business" of which only a Cotter should be CEO. JJC Decl. ¶ 24.

c) The Matters Which Were the Subject of MSJ No. 6

Because the Court is familiar with the matters raised in Partial MSJ No. 6 and denied that motion, Plaintiff will not recite the record evidence bearing upon those matters. However, Plaintiff respectfully reminds the Court that it was director defendant Kane who, together with

1 Adams, authorized the exercise of the 100,000 share option, and did so
2 notwithstanding the fact that (1) questions he deemed needed to be
3 answered before doing so were not answered, and (2) the responses
4 provided were identified as insufficient by director Storey. Together with
5 the context of that conduct—to enable EC and MC to retain control of RDI—
6 Plaintiff respectfully submits that these facts alone preclude dismissal of this
7 action as against Kane.

8 **d) Gould's Recurring Intentional Misconduct.**

9 Rather than attempt to recite the record evidence contained in
10 Plaintiff's oppositions to the various motions addressing matters to which
11 Gould was a party, Plaintiff respectfully refers to Court to the motions.
12 However, for ease of reference and the convenience of the Court, Plaintiff
13 provides the following inventory of facts that he contends show that
14 director-defendant Gould engaged in intentional misconduct, meaning that
15 he intentionally failed of to act in the face of a known duty to act,
16 demonstrating a conscious disregard of his duties to RDI, and/or that he
17 intentionally acted with a purpose other than advancing the best interests of
18 RDI. The inventory of misconduct includes the following:

- 19 • Gould failed to take steps to prevent or to terminate the
20 efforts by Kane, Adams and McEachern to extort plaintiff.
- 21 • Gould failed to follow through and require Adams to
22 produce, and the Board assess, information regarding his
23 financial dependence on EC and MC, as a result of which Gould
24 allowed Adams to cast the decisive vote to terminate Plaintiff.
- 25 • Gould failed to require the Board to decide whether the
26 position taken by EC, that Plaintiff was required to resign as a
27 director upon termination as an executive, notwithstanding the
28 fact that Gould knew the position was erroneous, thereby
acquiescing to conduct that was erroneous if not improper.
- Gould acquiesced to the use of an executive committee he
knew at the time it was put in place would be used to limit the
participation of Plaintiff and Storey as directors.

1 • Gould acquiesced to stacking the RDI board with
2 unqualified loyalists to the Cotter sisters, even acknowledging at
3 the time that he did not have sufficient opportunity to make an
4 informed decision about whether to disagree or acquiesce.

5 • Gould as one of three members of the executive committee
6 allowed EC to manipulate the process and then took affirmative
7 steps to abort the CEO selection process, in order to bend to the
8 wishes of EC to be CEO.

9 • Gould admitted at the time and subsequently that MC
10 lacked real estate development experience, making her
11 unqualified to be the senior executive vice president of RDI
12 responsible for development of its valuable New York City real
13 estate, but he nevertheless acquiesced to her being given that
14 position and paid as if she were qualified.

15 • Gould acquiesced to EC's recommendation that Adams be
16 given \$50,000, without having any RDI basis for doing so.

17 • Gould took his cue from EC and Craig Tompkins and
18 directed the discussion at the 1 hour and 25 minutes telephonic
19 board meeting regarding the Patton Vision offer to the subject of
20 whether the controlling shareholders would approve, thereby
21 pre-empting and preventing any genuine consideration of how
22 RDI should assess and respond to that offer.

23 • Gould repeatedly acquiesced to RDI issuing and not
24 correcting erroneous SEC filings, including a June 15, 2015 Form
25 8-K that asserted the erroneous statement that Plaintiff was
26 required to resign as a director upon termination as a senior
27 executive, as well as a materially misleading if not erroneous
28 Form 8-K in January 2016 regarding the selection of CEO, which
included a statement from Gould implying that the selection of
EC was the result of a "thorough search process," when in fact
the process had been aborted and selection was not the result of
the proper process.

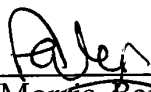
The motion papers are devoid of any explanation, much less
justification, for the conduct of Kane, McEachern and Adams in threatening
Plaintiff with termination in order to force him to settle trust disputes with
his sisters on terms that suited them, as distinguished from terms suitable to
RDI. The evidence regarding the aborted CEO search, for which MC, Gould
and McEachern are responsible, likewise raises disputed issues of material
fact that preclude dismissal of this action against any of them. Finally by

1 way of example, when viewed collectively and in context, as it must be,
2 Gould's recurring abdication of his fiduciary responsibilities evidences
3 disputed issues of material fact that require denial of Gould's separate
4 motion.

5 **IV. CONCLUSION**

6 For the reasons stated above, the Court should clarify,
7 reconsider, and vacate its rulings on Partial MSJ Nos. 1 and 2, and on
8 Gould's MSJ.

9 MORRIS LAW GROUP

10
11 By: 
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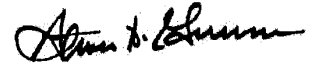
CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b)(2)(D) and E.D.C.R. 8.05, I certify that I am an employee of MORRIS LAW GROUP and that on the date below, I cause the following document(s) to be served via the Court's Odyssey E-Filing System: **MOTION FOR RECONSIDERATION OR CLARIFICATION OF RULING ON MOTIONS FOR SUMMARY JUDGMENT NOS 1, 2, AND 3 AND GOULD'S SUMMARY JUDGMENT MOTION AND APPLICATION FOR ORDER SHORTENING TIME** to be served on all interested parties, as registered with the Court's E-Filing and E-Service System. The date and time of the electronic proof of service is in place of the date and place of deposit in the mail.

DATED this _____ day of December, 2017.

By: _____

Exhibit 1



CLERK OF THE COURT

1 **ORDER**

2 Mark G. Krum (SBN 10913)
3 Lewis Roca Rothgerber Christie LLP
4 3993 Howard Hughes Pkwy, Suite 600
5 Las Vegas, NV 89169-5996
6 Tel: 702-949-8200
7 Fax: 702-949-8398
8 E-mail: mkrum@lrrc.com

9 *Attorneys for Plaintiff*
10 *James J. Cotter, Jr.*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 JAMES J. COTTER, JR., individually and
14 derivatively on behalf of Reading International,
15 Inc.,

16 **Plaintiff,**

17 **vs.**

18 MARGARET COTTER, ELLEN COTTER,
19 GUY ADAMS, EDWARD KANE, DOUGLAS
20 McEACHERN, TIMOTHY STOREY,
21 WILLIAM GOULD, and DOES 1 through 100,
22 inclusive,

23 **Defendants.**

24 **and**

25 **READING INTERNATIONAL, INC., a**
26 **Nevada corporation,**

27 **Nominal Defendant.**

28 **T2 PARTNERS MANAGEMENT, LP, a**
29 **Delaware limited partnership, doing business as**
30 **KASE CAPITAL MANAGEMENT, et al.,**

31 **Plaintiffs,**

32 **vs.**

33 MARGARET COTTER, ELLEN COTTER,
34 GUY ADAMS, EDWARD KANE, DOUGLAS
35 McEACHERN, WILLIAM GOULD, JUDY
36 CODDING, MICHAEL WROTONIAK, CRAIG
37 TOMPKINS, and DOES 1 through 100,
38 inclusive,

39 **Defendants.**

CASE NO.: A-15-719860-B
DEPT. NO. XI

Coordinated with:

Case No. P-14-082942-E
Dept. No. XI

Case No. A-16-735305-B
Dept. No. XI

Jointly Administered

Business Court

**[PROPOSED] ORDER REGARDING
DEFENDANTS' MOTIONS FOR PARTIAL
SUMMARY JUDGMENT NOS. 1-6 AND
MOTION *IN LIMINE* TO EXCLUDE
EXPERT TESTIMONY**

Date of Hearing: October 27, 2016
Time of Hearing: 8:30 a.m.

Lewis Roca
ROTHGERBER CHRISTIE
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

100040057_2

JA5820

1 and

2 READING INTERNATIONAL, INC., a
3 Nevada corporation,

4 Nominal Defendant.

5 THESE MATTERS HAVING COME BEFORE the Court on October 27, 2016, Mark G.
6 Krum appearing for plaintiff James J. Cotter, Jr. ("Plaintiff"); H. Stanley Johnson, Christopher
7 Tayback, and Marshall M. Searcy appearing for defendants Margaret Cotter, Ellen Cotter, Douglas
8 McEachern, Guy Adams, Edward Kane, Judy Coddington and Michael Wrotniak; Mark E. Ferrario
9 and Kara Hendricks appearing for Reading International, Inc.; and Ekwan Rhaw, Shoshana E.
10 Bannett appearing for William Gould, on the following motions:

- 11 • Individual Defendants' Motion for Summary Judgment (No. 1) Re: Plaintiff's
12 Termination and Reinstatement Claims;
- 13 • Individual Defendants' Motion for Partial Summary Judgment (No. 2) Re: The
14 Issue of Director Independence;
- 15 • Individual Defendants' Motion for Partial Summary Judgment (No. 3) On
16 Plaintiff's Claims Related to the Purported Unsolicited Offer;
- 17 • Individual Defendants' Motion for Partial Summary Judgment (No. 4) On
18 Plaintiff's Claims Related to the Executive Committee;
- 19 • Individual Defendants' Motion for Partial Summary Judgment (No. 5) On
20 Plaintiff's Claims Related to the Appointment of Ellen Cotter as CEO;
- 21 • Individual Defendants' Motion for Partial Summary Judgment (No. 6) Re:
22 Plaintiff's Claims Related to the Estate's Option Exercise, the Appointment of
23 Margaret Cotter, the Compensation Packages of Ellen Cotter and Margaret Cotter,
24 and the Additional Compensation to Margaret Cotter and Guy Adams; and
- 25 • Defendants' Motion *In Limine* to Exclude Expert Testimony of Myron Steele,
26 Tiago Duarte-Silva, Richard Spitz, Albert Nagy, and John Finnerty;
- 27
- 28

1 IT IS HEREBY ORDERED THAT the Motion for Partial Summary Judgment No. 1 is
2 DENIED. There are genuine issues of material fact as to the issues related to interested directors
3 participating in the process.

4 IT IS FURTHER ORDERED THAT Rule 56(f) relief is GRANTED with respect to
5 Motion for Partial Summary Judgment No. 2, and supplemental briefing will be discussed once
6 the relevant discovery is complete. The independence issue needs to be evaluated on a transaction
7 or action-by-action basis, because the independence related to each needs to be separately
8 evaluated; even though facts overlap, the Court cannot evaluate this in a vacuum. Motion for
9 Partial Summary Judgment No. 2 is CONTINUED pending Plaintiff's submission of a
10 supplemental opposition.

11 IT IS FURTHER ORDERED THAT Rule 56(f) relief is GRANTED with respect to
12 Motion for Partial Summary Judgment No. 3, because depositions have not been completed and
13 the relevant documents have not been produced. Motion for Partial Summary Judgment No. 3 is
14 CONTINUED pending Plaintiff's submission of a supplemental opposition.

15 IT IS FURTHER ORDERED THAT Motion for Partial Summary Judgment No. 4 is
16 GRANTED IN PART. As to the formation and revitalization (activation) of the Executive
17 Committee, the motion is GRANTED; as to utilization of the committee, the motion is DENIED.
18 Formation and revitalization includes a decision by the company to make use of their previously
19 dormant Executive Committee and put people on that Executive Committee.

20 IT IS FURTHER ORDERED THAT Rule 56(f) relief is granted with respect to Motion for
21 Partial Summary Judgment No. 5. Motion for Partial Summary Judgment No. 5 is CONTINUED
22 pending Plaintiff's submission of a supplemental opposition.

23 IT IS FURTHER ORDERED THAT Rule 56(f) relief is granted with respect to Motion for
24 Partial Summary Judgment No. 6. Motion for Partial Summary Judgment No. 6 is CONTINUED
25 pending Plaintiff's submission of a supplemental opposition.

26 IT IS FURTHER ORDERED THAT the Motion *in Limine* to Exclude Expert Testimony of
27 Myron Steele, Tiago Duarte-Silva, Richard Spitz, Albert Nagy, and John Finnerty is GRANTED
28 IN PART. With respect to Chief Justice Steele, he may testify only for the limited purpose of

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Las Vegas, NV 89169-5996

Lewis Roca
ROTHGERBER CHRISTIE

1 identifying what appropriate corporate governance activities would have been, including activities
2 where directors are interested, including how to evaluate if directors are interested. As to Dr.
3 Finnerty, the Motion *In Limine* was WITHDRAWN. As to the other experts, the motion is
4 DENIED.

5 DATED this 20 day of December, 2016.

6
7 
DISTRICT COURT JUDGE

8 Submitted by:

9 LEWIS ROCA ROTHGERBER CHRISTIE LLP

10 By: /s/ Mark G. Krum

11 MARK G. KRUM (SBN 10913)
12 3993 Howard Hughes Pkwy., Ste. 600
Las Vegas, NV 89169
Attorneys for Plaintiff

Exhibit 2



CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

JAMES COTTER, JR.

Plaintiff

vs.

MARGARET COTTER, et al.

Defendants
.....

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.
.
.
.
.

CASE NO. A-719860
A-735305
P-082942

DEPT. NO. XI

**Transcript of
Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTIONS

THURSDAY, OCTOBER 27, 2016

COURT RECORDER:

JILL HAWKINS
District Court

TRANSCRIPTION BY:

FLORENCE HOYT
Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript
produced by transcription service.

JA5825

1 of a breach whether they are in and of themselves a breach.
2 See, there's a different concept that I'm trying to deal with
3 as a trial judge than I think you're dealing with in your
4 motions, which it's your job.

5 MR. TAYBACK: There's two issues. One is could it
6 be a breach as a matter of law. And my answer to that
7 question is no. The second question is is there evidence that
8 it's a breach. And the answer to that is no, as well.

9 THE COURT: That's not what I said, Counsel. Is
10 this activity taken with other activities evidence of a breach
11 of fiduciary duty?

12 MR. TAYBACK: I understand his argument, plaintiff's
13 argument.

14 THE COURT: That's not his argument. That's what
15 trial judges think about.

16 MR. TAYBACK: The question -- it begs the question,
17 though, is what is the breach. There has to be a specific
18 thing that occurred that is a breach --

19 THE COURT: Uh-huh.

20 MR. TAYBACK: -- as opposed to saying, this is a
21 course of conduct. And that's the way plaintiff has
22 characterized it. And the course of conduct can be relevant
23 to a breach --

24 THE COURT: Yes.

25 MR. TAYBACK: -- but it begs the question what is

1 the breach, what is the breach. This is not the breach. This
2 is not a breach. It's not a valid basis for a breach claim.
3 And to say it might be relevant evidence of something else,
4 some other breach, that's a decision you could make.

5 THE COURT: You're not asking me to exclude evidence
6 of this, only to not instruct it or include it on a special
7 interrogatory that it could be found an independent breach --

8 MR. TAYBACK: That's correct.

9 THE COURT: -- as opposed to evidence of breaches
10 that have occurred.

11 MR. TAYBACK: That's absolutely correct.

12 THE COURT: I just needed you to say that, because
13 that's not what your motion says.

14 MR. TAYBACK: I believe it's not -- I believe
15 ultimately it wouldn't be relevant perhaps. But that's a
16 different question. That's a different question. And that's
17 not our motion. Our motion is to summarily adjudicate the
18 basis of this unsolicited offer as being a breach.

19 THE COURT: There is no -- there is no allegation of
20 the unsolicited offer as the breach of fiduciary duty claim.
21 It is one of many things that are alleged as evidence of
22 breach of fiduciary duty.

23 MR. TAYBACK: If I'm --

24 THE COURT: I pulled the complaint to read it again,
25 because --

1 MR. TAYBACK: I did, too.

2 THE COURT: Okay.

3 MR. TAYBACK: And if in fact we misunderstood what
4 his basis of the alleged breach is, then you're right, then
5 it's not an issue, then it's not an alleged breach how we
6 dealt with the -- how the company dealt with this unsolicited
7 offer. It's merely evidence. But it's only relevant evidence
8 if it relates to a breach. And certainly I think somewhere in
9 our motions we address the thing that he says was actually the
10 breach. But begs the question is what he's saying is the
11 breach. What occurred that breached a fiduciary duty by
12 individual directors, individual directors. For instance, Mr.
13 Wrotniak, who's never even been deposed, who's seemingly
14 collateral to every theory that's being proffered by the
15 plaintiff, was in the room to discuss this particular
16 unsolicited offer. What, if anything, did he do to breach any
17 duty, and what is the relevance, I suppose, to address Your
18 Honor's question, of how he did it to some other breach that
19 is alleged but unspecified at least in our conversation right
20 now as to what it is that plaintiff is saying breached a
21 fiduciary duty to the company.

22 THE COURT: Okay. Anything else?

23 MR. TAYBACK: Only if you have questions, Your
24 Honor.

25 THE COURT: I don't have any more. I asked you

1 them.

2 MR. KRUM: Your Honor, as I see this motion, the
3 partial issue is the one you identified. And it's not just
4 this motion, it's arguably all of them. But it's certainly
5 this one. It's certainly the executive committee motion. And
6 I've said this. I said it when we moved for leave to amend.
7 We pleaded the complaint this way, as you saw it. We haven't
8 alleged 10 or however many isolated acts as individual
9 unrelated fiduciary duty breaches. That's not the nature of
10 the case. And in point of fact the offer issues in some
11 respects sort of close the loop that begun with the seizure of
12 control of the company. So I can go through that whole
13 argument that you've obviously read and you understand better
14 than I do, because you try cases all the time. It's an
15 argument that is a practical, realistic, and legal issue from
16 the perspective of trying a case, it's an argument that has a
17 basis in the law of corporate fiduciaries.

18 THE COURT: So let me ask you a question. So you've
19 got your couple of breach of fiduciary duty claims and your
20 aiding and abetting claim, and it is your intention, I assume,
21 to submit special interrogatories to the jury.

22 MR. KRUM: Yes.

23 THE COURT: What are you going to ask them?

24 MR. KRUM: Well, I need to finish the discovery. I'm
25 not trying to be nonresponsive, Your Honor, but, for example,

1 we're talking about the offer. I haven't deposed a single
2 witness, so I can't tell you today whether I'm going to take
3 the position that what transpired with respect to the offer is
4 evidence only or is evidence and independent breach. Your
5 question is a perfectly correct question. I acknowledge that.

6 THE COURT: Okay. So when after you finish the
7 discovery are you going to be able to answer that question for
8 me? Because that impacts like six of these motions.

9 MR. KRUM: That, Your Honor, is on our whole list of
10 trial-related activities to perform. So obviously we'll turn
11 to that as quickly as we can after we complete the discovery.
12 Perhaps I can answer it when we speak on December 1st. I'll
13 do my best.

14 And, by the way, I have all sorts of arguments here
15 on this particular motion, a 56(f) argument about the facts
16 and the law.

17 THE COURT: I know.

18 MR. KRUM: But I assume you don't need to hear those
19 from me.

20 THE COURT: No. The reason I did this one next is
21 because it's the most closely related to the 56(f) issues.
22 And it makes it hard for you to finish when you don't have the
23 last little bit of information, haven't finished the depositions.
24 But I was hoping you could tell me what questions you thought
25 you were going to ask the jury.

1 will have to, as discussed, decide what exactly the special
2 interrogatories are going to be. But it is absolutely,
3 positively compelling evidence of what transpired here. It
4 was a whole exercise to seize and perpetuate control. So it's
5 not -- it's not -- you know, it's legal and therefore
6 everything is copacetic is just wrong as a matter of law.

7 I don't have anything unless you have questions for
8 me.

9 THE COURT: Thank you.

10 The motion related to the executive committee is
11 granted in part. As to the formation and revitalization of
12 the committee the motion is granted.

13 As to the utilization of the committee it's denied.

14 MR. KRUM: Point of clarification, Your Honor. By
15 revitalization are you referring -- is that something
16 different than -- that's activation? Is that what that is?

17 THE COURT: Activation. I think you called it
18 repopulation, putting people on it. I'm not including
19 utilization, which is the activities of the executive
20 committee afterwards.

21 MR. KRUM: And utilization includes the purposes for
22 which these other activities were done?

23 THE COURT: No. Formation and revitalization
24 include a decision by the company, whether it's a decision by
25 the company to make use of their previously dormant executive

1 plaintiff. There's no wrong to the company for the company
2 following the bylaws, following Nevada law, following the
3 terms of the contract, and on these facts, taking them as he
4 said, where people are fighting and its infecting the
5 operation of the company for the board to say, I'm picking
6 these two over that one. It's literally that simple.

7 THE COURT: Okay. Are you done?

8 MR. FERRARIO: Yes.

9 THE COURT: All right. The motion's denied, as
10 there are genuine issues of material fact and issues related
11 to interested directors participating in a process.

12 If I could go to the motion in limine related to
13 plaintiff's experts.

14 So, for the record, in September of 2013 I spoke on
15 a panel called Multijurisdiction Case Management Litigation
16 Being Pursued in Multiple Forums with Chief Justice Myron
17 Steele. I don't think it affects my ability to be fair and
18 impartial, but I make that disclosure to you just in case you
19 need it.

20 MR. SEARCY: Thank you, Your Honor. I'll try and go
21 through the four experts that were touched upon in our motion
22 in limine fairly briefly, because it's getting late.

23 THE COURT: And I've got to find them in the book.
24 So you keep going.

25 MR. SEARCY: Okay. If the Court has any questions,

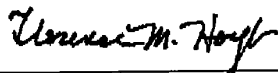
CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

**FLORENCE HOYT
Las Vegas, Nevada 89146**



FLORENCE M. HOYT, TRANSCRIBER

10/31/16

DATE

Exhibit 3

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

JAMES COTTER, JR.	.	CASE NO. A-15-719860-B
Plaintiff	.	A-16-735305-B
	.	P-14-082942-E
vs.	.	
	.	DEPT. NO. XI
MARGARET COTTER, et al.	.	
	.	Transcript of
Defendants	.	Proceedings
.....	.	

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTIONS IN LIMINE AND PRETRIAL CONFERENCE

MONDAY, DECEMBER 11, 2017

COURT RECORDER:

JILL HAWKINS
District Court

TRANSCRIPTION BY:

FLORENCE HOYT
Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript
produced by transcription service.

JA5835

APPEARANCES:

FOR THE PLAINTIFF:

MARK G. KRUM, ESQ.
STEVE L. MORRIS, ESQ.
AKKE LEVIN, ESQ.

FOR THE DEFENDANTS:

H. STANLEY JOHNSON, ESQ.
MARSHALL M. SEARCY, ESQ.
CHRISTOPHER TAYBACK, ESQ.
JAMES L. EDWARDS, ESQ.
MARK E. FERRARIO, ESQ.
KARA B. HENDRICKS, ESQ.
EKWAN RHOW, ESQ.

1 LAS VEGAS, NEVADA, MONDAY, DECEMBER 11, 2017, 10:24 A.M.

2 (Court was called to order)

3 MR. FERRARIO: Ms. Hendricks has something to take
4 up with you.

5 MS. HENDRICKS: I just have a question.

6 THE COURT: On what?

7 MS. HENDRICKS: On how many drives we each need.

8 THE COURT: Wait. That's not me. Wait. Don't go
9 there yet.

10 MS. HENDRICKS: Okay.

11 THE COURT: Who are you looking for?

12 MR. MORRIS: I'm so unaccustomed to being on the
13 plaintiff's side.

14 (Pause in the proceedings)

15 THE COURT: All right. So moving on. Good morning.
16 We were talking about the pro bono awards at the 8:00 o'clock
17 session this morning, and Mr. Ferrario didn't get one this
18 year, so I was giving him a hard time because nobody from his
19 firm did a lot of work. But apparently they did. It just
20 didn't get reported because it was done with a different
21 agency.

22 Right, Ms. Hendricks?

23 MS. HENDRICKS: Yes. We're getting that fixed right
24 now.

25 THE COURT: Okay. So before we start on your

1 motions I need to hit some practical problems. As those
2 lawyers who practice here in the Eighth all the time know, as
3 the chief judge I do not have a courtroom. That occurred
4 because when the Complex Litigation Center was investigated
5 for purposes of conducting the CityCenter trial we determined
6 that it had a structural issue and some electrical issues. As
7 a result, we did not renew the lease --

8 When was that, Mr. Ferrario?

9 MR. FERRARIO: It was 2013.

10 THE COURT: In 2013 we did not renew the lease, and
11 since that time we have been down one courtroom. The person
12 who gets screwed is the chief judge. So since 2013 we have
13 had the chief judge be a floater. Unfortunately for you guys,
14 I'm the first judge who kept my docket, because Business Court
15 cases have a lot of history and it's not one of those things
16 you can get rid of and assume somebody else is going to be
17 able to be familiar with it fairly quickly.

18 So the down side for all of you is that I don't have
19 a courtroom. Which is why sometimes we borrow Judge
20 Togliatti's courtroom when you guys see me, sometimes in this
21 courtroom. And you've been in the two Family Court courtrooms
22 a couple of times here. I also have judges who lend me their
23 courtrooms on a regular basis on the third floor, and
24 sometimes I have courtrooms in other places in the building I
25 borrow.

1 Recently I learned that I am going to be able on
2 behalf of the court to acquire the seventeenth floor that used
3 to be occupied by the Supreme Court and to build a new Complex
4 Litigation Center, because since 2013 every time we have a
5 complex trial we build out a courtroom, it costs a quarter of
6 a million dollars, and then when we're done with it we take it
7 back down to put it back in regular shape. And so finally the
8 County has realized that's probably not an effective use of
9 the funds, and so we're going to build out the seventeenth
10 floor as a complex litigation, jury, and criminal caseload
11 accommodated. Unfortunately, that's a construction project,
12 and it is in process. And when I say in process it means
13 they're still in the bid evaluation process and it has to now
14 go to something called long-term planning at County
15 management, which means that some day there'll be a courtroom
16 there. In the meantime --

17 MR. MORRIS: So our trial will start when the
18 construction is complete on 17?

19 THE COURT: No, no. You're going to start. I just
20 don't know where we're going to be, Mr. Morris. This is the
21 reason for the speech, because Mr. Ferrario says nobody
22 believes me that I don't have a courtroom. I don't have a
23 courtroom. So I will have a courtroom when I end being chief
24 judge. I'll go back to being a regular judge and I'll have a
25 courtroom, and then the new chief won't have a courtroom

1 unless we finish building out the seventeenth floor by then.

2 So right now the reason I'm telling you that is it
3 impacts your trial. The trial I am currently in is a bench
4 trial, so it's not a jury trial and we have moved from
5 courtroom to courtroom during our 10 days we've been in
6 proceedings so far. So we've not been in the same courtroom
7 every day. But that's sort of the life of being in this
8 department at the moment. That's the history.

9 Now let's go to the electronic exhibit part of our
10 problem. Brandi is the head of the Clerk's Office, Mike is
11 the head of IT, so they are the two people who are here to
12 make sure that they are able to interact with you -- and then
13 I'll let them leave while I hear your motions -- about the
14 electronic exhibit protocol. Because when we use the
15 electronic exhibit protocol there's two ways that we have to
16 deal with it, from an IT standpoint and from the Clerk's
17 Office standpoint. So instead of us hauling all the paper
18 volumes from courtroom to courtroom, depending on where we're
19 going to be, the clerk won't have to do that. They will have
20 the drives, as Ms. Hendricks mentioned earlier, for that
21 purpose so that Dulce will then -- after IT has cleared the
22 drives Dulce will then work with the drives, and then we
23 usually keep one that is called golden that we don't mess
24 with, and we have one that's a working drive. But I'll let
25 Mike explain that and Brandi explain it, because not all of

1 you have been through the electronic exhibit protocol in the
2 past.

3 Mike, you're up.

4 MR. DOAN: So this is a jury trial, so a high level.
5 We expect three drives, a working copy, a golden copy, and
6 then a blank for the jury that everything that gets accepted
7 or submitted in a group will be over on that drive.

8 Depending on the number of drives is just based on
9 the space. So if your teams, whoever's putting these drives
10 together -- we have problems if you get a million exhibits on
11 one drive or even 600,000 on one drive. Not so much even the
12 space, it's just navigating through those files. And so as
13 long as your team can navigate and view the files, that's okay
14 for us. We don't have like a set number. We just ask that
15 the drives be twice as big as the amount of the exhibits,
16 because in theory everything could get accepted, and therefore
17 everything would be stamped and there'd be duplicate on the
18 drive.

19 THE COURT: And when it's stamped there's a program
20 that goes through and it puts a stamp on each page of the
21 electronic exhibit that says it's admitted so that we have
22 your original proposed copy and then your admitted copy. The
23 one drawback for lawyers is if you decide you want to admit a
24 partial version of an exhibit, we cannot do that with
25 electronic exhibits. We need you to submit a replacement

1 electronic exhibit that includes only the pages that you are
2 offering. That will then have an exhibit marker placed upon
3 it. But I can't with the electronic exhibits admit pages 6
4 through 10 of the 25-page document.

5 So, Mike, what did I miss?

6 MR. DOAN: That's it.

7 THE COURT: Okay, Brandi. You're up.

8 MS. WENDELL: Have you already given them the
9 ranges? Do we have --

10 THE COURT: No, we have not done ranges yet.

11 MS. WENDELL: Okay. The protocol is pretty basic.
12 Your paralegals or your IT people that are going to be working
13 on those might have questions. Usually -- a lot of times on
14 all the other trials Litigation Services was used. They're
15 very familiar with this program. I'm not advocating for them
16 or anything, but if anybody's contracted with them, they're
17 pretty familiar with how to do it. It's really important that
18 you pay attention to the naming convention. Make sure there
19 are no letters in it. It has to be strictly numbers and then
20 .pdf. The last time there was a question about whether .tifs
21 worked, and Mike was able to verify that .tifs are -- we're
22 able to use those. But color photos can be done as long as
23 there's a little border up at the top for the stamping program
24 to mark all of the information.

25 Another thing that we have found useful, it's not in

1 the protocol, but at least a couple weeks before the trial
2 starts we do like a dry run, because your exhibit list, the
3 templates that Dulce went ahead and emailed to you, you cannot
4 change that, the formatting. It's critical because Mike's
5 team will do a validation, and it validates the exhibit
6 numbers to what is on the drive, each exhibit. And it'll
7 identify if there's something that's missed or skipped that's
8 on the list but it's not actually on the drive. And a lot of
9 times there's been some formatting problems when people try to
10 get creative. So, you know, just a little advice that we
11 found from trial and error that that is an important piece.

12 What else?

13 MR. DOAN: That's the biggest thing, is if you can
14 get with us -- and we'll make ourselves available as soon as
15 you're available to do like an initial run before you start
16 all printing and doing all these other things just so
17 everything can be tested for format so there's not a lot of
18 time wasted.

19 MS. WENDELL: The clerk must have -- the exhibit
20 list must be printed out.

21 THE COURT: Not in 2 font, Ms. Hendricks.

22 MS. HENDRICKS: [Inaudible] that was not our
23 office's fault, Your Honor.

24 MS. WENDELL: That should be in a binder so that the
25 clerk as you're actually offering and admitting the evidence

1 during the trial, she'll be working on that. Later that day
2 she'll be doing the electronic stuff or we'll have a second
3 clerk that'll be helping her. Antoinette is court clerk
4 supervisor, and so she's here to make sure that, you know, if
5 we have any questions that have to be answered.

6 A lot of times -- oh. Last trial somebody asked if
7 because the exhibit list itself was going to be like 14 of
8 those big binders, they asked if they could print on the front
9 and the back. That was in Judge Kishner's big trial. We let
10 them do it, and -- but the trial settled, so it wasn't an
11 issue.

12 THE COURT: It's not a good idea.

13 MS. WENDELL: It's not ideal, so --

14 THE COURT: Please don't do a front and back.

15 MS. WENDELL: Anybody have any idea how many
16 exhibits you're looking at?

17 THE COURT: We're going to start with them and do
18 our ranges first. But we're not quite there yet.

19 So if anybody has questions or your staffs have
20 questions, would you like contact information to reach out to
21 either Antoinette, Brandi, or Mike?

22 MR. TAYBACK: Yes.

23 MS. HENDRICKS: That would be great, Your Honor.

24 THE COURT: So tell them or give them business
25 cards.

1 MS. WENDELL: Okay.

2 MR. FERRARIO: If you all have cards, then that'd be
3 easiest.

4 THE COURT: They're County employees. Does that
5 mean they get cards?

6 MR. DOAN: Yeah.

7 THE COURT: Oh. Look at that.

8 MR. DOAN: You know, and it's best to have one point
9 of contact so then we don't get confused.

10 MS. WENDELL: I'm putting my cards away now.

11 THE COURT: Who do you guys want to be the person
12 that calls? Do they want to call Antoinette, they want to
13 call you, want call Mike?

14 MS. WENDELL: Well, Antoinette is -- she's not
15 Dulce's direct supervisor, but I can be the point of contact,
16 and then I can go ahead and let you guys know. My email
17 address and my phone number are both on here. If you could
18 pass some of these out, that'd be great. And then I'll
19 probably hand you off depending on the questions that come up.
20 Most of them are going to be technical questions, but I'll try
21 to help if I can.

22 THE COURT: All right. So do you have any more
23 questions for the Clerk's Office, the IT folks, in the
24 electronic exhibit protocol? You will notice because of what
25 happened in CityCenter in paragraph 6 it now says the exhibit

1 list will be font size 12, Times New Roman. So we're very
2 specific on what size, because the clerk's actually have to
3 work with the paper copy. And so although you can blow up the
4 Xcel spreadsheet and see it when it's 2 font, they can't. So
5 we have to have it in a larger font.

6 Any more questions?

7 Okay. Mr. Krum, how many exhibits do you think
8 you're going to have so I can set the exhibit ranges?

9 MR. KRUM: The answer is it's in the hundreds, not
10 in the thousands. So if --

11 THE COURT: So if I give you 1 to 9999, you will be
12 okay?

13 MR. KRUM: Yes.

14 THE COURT: All right. Who wants to have 10000 as
15 their start? Mr. Searcy, how many have you got?

16 MR. SEARCY: I think our approximation is basically
17 the same. It's in the hundreds, not the thousands. So if we
18 had 10000 to --

19 THE COURT: 1999 [sic]?

20 MR. SEARCY: Yeah, that would be perfect.

21 THE COURT: I have to give you lots of extras,
22 because if you're going to do partial exhibits, we need that
23 space to be able to add those. So if you've got subparts of
24 one exhibit, I need an exhibit number for each one of those.
25 So I'm giving you more than you need.

1 Mr. Ferrario, how many do you need?

2 MR. FERRARIO: Your Honor, Your Honor, I would
3 suspect our -- any exhibits we would introduce independent of
4 what Mr. Krum and the other defendants would be nominal. So
5 you can give us a very short range.

6 THE COURT: 20000 to 2499 [sic].

7 THE COURT: Who else wants exhibit lists that's not
8 one of those three? Anybody else need --

9 MR. TAYBACK: Counsel for Mr. Gould is sitting
10 behind me.

11 THE COURT: So Mr. Gould's counsel, you want about
12 the same range Mr. Ferrario has, 25000 to 30000?

13 MR. RHOW: That's fine, Your Honor. Just for
14 protocol --

15 THE COURT: Hold on. They've got to get your name,
16 because otherwise I'm going to get really -- I'm going to
17 screw up.

18 MR. FERRARIO: Can you let Ekwan speak today? He's
19 been here all -- he hasn't even got to argue one time, Your
20 Honor.

21 THE COURT: All right, Mr. --

22 MR. RHOW: I'm actually in this case. Ekwan Rhow,
23 Your Honor. Thank you.

24 THE COURT: Okay.

25 MR. RHOW: We can have a separate range for sure,

1 but is there any problem with incorporating Mr. Gould's
2 exhibits into the exhibits for Mr. Searcy that he presents?

3 THE COURT: There is absolutely no problem with your
4 exhibits being within their exhibit range, but I need to give
5 you a separate range for your own in case you all don't reach
6 an agreement.

7 MR. RHOW: I see.

8 THE COURT: So my exhibit ranges based on what I've
9 heard today is 1 to 9999 for the plaintiffs, 10000 to 1999
10 [sic] for the Quinn Emanuel folks and their associated, which
11 includes Mr. Edwards; right? Okay. And 20000 to 2499 [sic]
12 for Mr. Ferrario and his team. And, Mr. Krum, we gave you
13 25000 to 2999 [sic] for Mr. Gould.

14 Do we anticipate there is anyone else who's going to
15 need more numbers? Anybody else who's going to show up
16 randomly in the case?

17 All right. Any other stuff I need to do on your
18 part?

19 MS. WENDELL: No. Based on that, that's very good
20 news. The goal will be for all counsel to prepare your
21 exhibits and then everybody put them one drive. The only
22 reason why we do different drives is because if there's like
23 10,000 exhibits on one, like Mike said, so if there's any way
24 possible -- and you all have to use the same exhibit list
25 template. Now, if that's a problem to do that, then if your

1 exhibits are on your own hard drive, then your exhibit list
2 must be what is on that drive. So if two of you get together
3 or three of you get together, everything that's on that drive
4 must be one exhibit list, because it cross-checks and makes
5 sure it validates.

6 THE COURT: So it's okay for the plaintiffs to have
7 one drive and an exhibit list of 1 through 9999 -- or up to
8 that number, and the defendants to decide jointly they're just
9 going to use the 10000 to 1999 [sic], have one drive, and one
10 exhibit list?

11 MS. WENDELL: That is okay. But based on the size,
12 you know, we're -- I think that, you know, it's better to
13 always have one --

14 THE COURT: Yeah. But you're asking for
15 cooperation?

16 MS. WENDELL: Yes.

17 THE COURT: Just because you worked for Commissioner
18 Biggar for however many years and you could make them
19 cooperate doesn't make I can as a trial judge.

20 All right. So anybody else have more stuff?

21 Yeah. Your history will never die.

22 MS. WENDELL: I know. It's going to follow me out
23 of here in February.

24 THE COURT: All right. Anybody else have any more
25 questions for my IT team or my Clerk's Office team so that

1 they can leave and not have to sit here through your motion
2 practice?

3 Dulce wants you to set the dry run date today. We
4 have a holiday coming up, and you have asked me to let you go
5 the second week. I'm going to be able to accommodate that
6 request. I found some victim to go the first week.

7 MR. FERRARIO: So we start on the 8th now?

8 THE COURT: Plan is for you to start on the 8th. So
9 when do you want your dry run to be with your staff to bring
10 over the lists and the drives? It doesn't have to be you
11 guys. It can be your paralegals.

12 MR. FERRARIO: But you said you want enough time in
13 case there's glitches. So --

14 MS. WENDELL: If there's a glitch, then you'll need
15 time to fix it.

16 MR. FERRARIO: So at least the week before -- we
17 need it two weeks before; right?

18 THE COURT: Two weeks before is the week of
19 Christmas, so we'll be here the 26th through the 29th working
20 that week.

21 MR. FERRARIO: And then you guys will be here to do
22 that?

23 MR. DOAN: We'll make it work.

24 THE COURT: Some of them will be here.

25 MR. FERRARIO: I think it has to be that week in

1 case there's a problem. Because then the following week is
2 short, and then we're right up on trial and won't be able to
3 correct any of the stuff.

4 MR. KRUM: So why don't we say the 29th?

5 THE COURT: You guys all okay with the 29th? What
6 time do you want to meet?

7 MR. KRUM: I think we need to talk to the people who
8 are going to do it.

9 THE COURT: Okay. I would recommend the morning.
10 And the reason I recommend the morning is typically on the
11 weekend of New Year's Eve they try and get everybody out of
12 downtown by about 2:00 o'clock because of all the things that
13 happen in the streets here on that weekend.

14 MR. KRUM: Understood.

15 THE COURT: So -- and we will tell you what
16 courtroom we are able to find. I'm pretty sure on that day I
17 could get a courtroom on this floor. And if you guys want a
18 morning, if you can accommodate that, we'll do that.
19 Otherwise --

20 MR. FERRARIO: I'm going to tell you, Judge,
21 [inaudible] people are going to be in this trial, I think if
22 you could convince Judge Sturman to let you have this for the
23 length of the trial, that would [inaudible].

24 THE COURT: She has a trial that I had to vacate
25 when her mom became ill that I think she's going to try and

1 restart in January. I will know better when she actually gets
2 back to town. But we will talk to her. Her courtroom and
3 Judge Johnson's courtrooms are equipped differently than the
4 other courtrooms, so they are a little bit bigger.

5 MR. FERRARIO: Yes. This would accommodate
6 [inaudible].

7 THE COURT: I was thinking of putting you in
8 Potter's courtroom and having a special corner for you.

9 MR. KRUM: Your Honor, I've just been reminded that
10 it was presumptuous of me to speak for others.

11 THE COURT: You want to talk to the staff members to
12 see who's taking the week off?

13 MR. KRUM: Here's the question. And I'm now taking
14 Mr. Ferrario's line. Would it be possible for us to start the
15 following week so we could make --

16 THE COURT: No. We won't get done. If we do that,
17 we won't get done in time for me to do my February stuff.
18 It's a five-week stack. It starts on the 2nd of January. So
19 if you need to talk to your teams and see if being here on
20 January 2nd at 8:00 o'clock in the morning is a preference for
21 them instead of the 29th, which gives you -- you lose the
22 weekend, but you're here the rest of the time. It gives you
23 almost two weeks to straighten it out.

24 MR. KRUM: Okay.

25 THE COURT: And that's okay with me. Even though

1 Mike would say he needs two weeks before, January 2nd is okay
2 with me.

3 MR. KRUM: Okay. We will check with our people.

4 THE COURT: Okay. So any other electronic exhibit
5 lists?

6 So, Dulce, just mark them down that they are
7 planning to visit with you on January 2nd. I'm fairly certain
8 I can find a courtroom on January 2nd, but there's no
9 guarantees on that day.

10 All right. 'Bye, guys. Thank you for being here.
11 Antoinette, thank you for being here. I know it's going to be
12 exciting again.

13 All right. That takes me to the motions. Do you
14 have a preferred order you'd like to argue them in? I usually
15 try and do the summary judgments and then go to the motions in
16 limine.

17 MR. KRUM: That would be our suggestion, as well.

18 MR. TAYBACK: That makes sense, Your Honor. You can
19 go numerical order is fine.

20 THE COURT: Whatever you want to do.

21 Can I have my calendar. I don't need -- well, I
22 have notes all over the motions, so --

23 MR. FERRARIO: Are we on the clock?

24 THE COURT: You have until five till 12:00. So
25 we've got an hour.

1 (Pause in the proceedings)

2 MR. TAYBACK: Mr. Krum was just suggesting that I
3 raise the parties' -- both filed joint motions -- or filed
4 motions to seal. We'd ask you to grant them.

5 THE COURT: Is there any objection to any of the
6 motions to seal? They weren't all motions to seal. Some of
7 them were motions to redact, and that was appropriate. The
8 motions to seal I do have a question for Mr. Morris's office,
9 and so I'll ask you -- hold on, if I can find the one I wrote
10 the page on. Got a question. It was a process question, not
11 a substance question, so let me hit it before we go to the
12 next step.

13 When you sent me a courtesy copy and the courtesy
14 copy had a sealed envelope in that did you also file the
15 sealed version of the document that has like this sealed
16 envelope that's with the Clerk's Office?

17 MS. LEVIN: I don't believe, Your Honor.

18 THE COURT: And we have to do it that way --

19 MS. LEVIN: Okay.

20 THE COURT: Because otherwise I can't even grant
21 your motion now, because then it's going to get screwed up.

22 MS. LEVIN: I understand, Your Honor. And I think
23 that this was based on our conversations with the clerk, who
24 said you cannot submit it until you have the order. And we
25 were saying, but that --

1 THE COURT: No. You submit it when you file the
2 motion. When you file the motion with it, which is why you
3 have to file them at the counter. You can't efile when you're
4 filing under seal.

5 MS. LEVIN: Right.

6 THE COURT: And that's why it gets screwed up.

7 So I have some process concerns about the
8 plaintiff's filings related to that, and I'm going to let you
9 and Dulce talk about those after we finish the hearing to see,
10 if we can.

11 I'm going to grant the motion, but it may be that
12 you have to do something different to have a motion that
13 actually goes with it to the Clerk's Office instead of an
14 order. Because having the order will not accomplish what you
15 want.

16 All right. So to the extent that you asked
17 previously for a motion to seal and/or redact, it appears to
18 be commercially sensitive information related to financial
19 issues, and there's some other sensitive information that
20 relates to individuals' personal information, so I'm going to
21 grant the requests for sealing and redacting that have been
22 submitted.

23 Okay. You're up. What motion do you want to start
24 with?

25 MR. TAYBACK: It'll be Summary Judgment Motion

1 Number 1. And it also -- there's -- relates to Summary
2 Judgment Motion Number 2. So I will argue them jointly. They
3 were at least opposed jointly, and we replied jointly with
4 respect to those two motions.

5 THE COURT: Okay.

6 MR. TAYBACK: I'm here on behalf of the director
7 defendants Michael Wrotniak, Judy Coddington, Douglas McEachern,
8 Edward Kane, Guy Adams, Margaret Cotter, and Ellen Cotter. As
9 Your Honor will recall and as addressed in the briefing, Your
10 Honor said, and this is a truism, really, for any case, you've
11 got to analyze claims defendant by defendant, in this case
12 director by director, and transaction by transaction. And
13 that's, you know, just basic, basic legal analysis.

14 On top of that, sort of as an overlay, another thing
15 that I know Your Honor is well aware of is the recent law that
16 clarifies -- I see you chuckling --

17 THE COURT: I don't know anything about the Wynn-
18 Okada case. You don't know anything about it, because your
19 firm wasn't involved at all, and Mr. Ferrario doesn't know
20 anything, and Mr. Morris I'm sure was involved, too, because
21 he's been involved in some of the appellate process in that
22 case, too.

23 Right, Mr. Morris?

24 MR. MORRIS: Yes.

25 THE COURT: See, so we all know.

1 MR. TAYBACK: But all I need to know, all I need to
2 know and all I really care about here and all that matters
3 here is the language of the Supreme Court's opinion, because
4 that's really what animates the business judgment rule in
5 Nevada as we stand here now. And I think that combined with
6 the recent clarifications by the legislature regarding the
7 latitude afforded directors work together to set the bar very,
8 very high. I'm sure Your Honor has read the opinion multiple
9 times, applied it in that case, a case I'm not privy to, but
10 it's --

11 THE COURT: I did. I granted partial summary
12 judgment, which is on a writ.

13 MR. TAYBACK: And, as you well know --

14 THE COURT: Are we supposed to be calling somebody?

15 MR. FERRARIO: No.

16 THE COURT: I have a call-in number. I'm not in
17 charge of doing this.

18 (Pause in the proceedings)

19 THE COURT: Hold on. Apparently someone thinks
20 they're calling in.

21 MR. RHOW: It's okay, Your Honor. No need. I'm
22 here.

23 THE COURT: Oh. It was you?

24 MR. RHOW: Not necessary.

25 THE COURT: Okay. Good. I'm glad we don't have to

1 call you.

2 Okay. Keep going. So I granted partial summary
3 judgment, but I found some directors were not disinterested,
4 so not all of the directors were covered by the summary
5 judgment. I also in that case made a determination the
6 business judgment rule only applies to officers and directors,
7 it does not apply to the corporation itself. Just so you
8 know.

9 MR. TAYBACK: And I'm aware of that only through
10 having read the pleadings and having read now the court's
11 opinion here. But the question is as it applies to this case.
12 And as it applies to this case collectively that recent
13 guidance and the guidance from the legislature make it clear
14 that it's not really the province of a plaintiff or a court or
15 jury to come in and say the business judgment rule should be
16 overridden in order to second guess a particular decision made
17 by a corporation's directors or its officers. And if you
18 start at that premise, the idea that the applicable Nevada
19 statutes here elevate -- give that sort of latitude to
20 directors in the first instance and then you take it to sort
21 of the next level of analysis, that is to say, even if one
22 could rebut the presumption, even it's rebutted the standard
23 then for imposing liability is even higher, because there
24 remains still a two-prong test for which plaintiffs have to
25 show a material disputed issue of fact to proceed to trial.

1 Both an individual director on a particular transaction
2 breached their fiduciary duty and, secondly, that that
3 individual director did so with fraud, knowing -- as a knowing
4 violation of the law or engaged in intentional misconduct.

5 THE COURT: Well, you understand that finding is
6 only needed to make a determination as to whether the
7 individual officer or director is insulated from -- for
8 personal liability purposes, as opposed to derivative
9 liability, which would be funded through the corporation.

10 MR. TAYBACK: Correct.

11 THE COURT: Okay.

12 MR. TAYBACK: Though they are seeking personal
13 liability. Their complaint makes that clear.

14 THE COURT: I understand they are. But your motion
15 seemed to take the position that unless I found fraud they
16 need to be dismissed. And that's not how it works.

17 MR. TAYBACK: Well, but they do need to rebut the
18 presumption with respect to the business judgment rule.

19 THE COURT: That's a different issue, Counsel.

20 MR. TAYBACK: It is a different issue. And it's a
21 multiple-hurdle test.

22 THE COURT: Yes.

23 MR. TAYBACK: And with respect to that second hurdle
24 even the issue comes down to Your Honor's adjudicating their
25 claim for personal liability, then that's also part of the

1 motion.

2 But you don't need to get there, because they have
3 not established the evidence necessary to rebut the initial
4 presumption. And that's clear because when you look at what
5 governs the decision here by these individual directors on
6 termination, which I'm going to take that transaction because
7 that's the subject of our first motion for summary judgment,
8 if you look at that, what governs that decision are the
9 bylaws. And the bylaws which we've submitted are amply clear
10 that the board was given complete discretion, that officers,
11 including the CEO, serve at the pleasure of the board and can
12 be terminated with or without cause at any time.

13 With the bylaws being the operative rules of the
14 road, so to speak, and the law being what it is with respect
15 to the deference afforded boards and individual board members,
16 plaintiff's efforts to try to get around the idea that that
17 presumption should be applied here are based on generalized
18 allegations of disinterestedness. But you don't see specific
19 evidence in the record anywhere that any of the three
20 directors who voted to terminate Mr. Cotter, Jr. --

21 THE COURT: And you're including Mr. Adams in that,
22 are you?

23 MR. TAYBACK: I am including Mr. Adams in that.

24 THE COURT: Just checking. So what happens if I
25 make a determination that Mr. Adams is not disinterested? You

1 then do not have a majority of disinterested directors;
2 correct?

3 MR. TAYBACK: If you made that finding that would be
4 true. But it wouldn't change the liability, the claim against
5 Mr. McEachern or Mr. Kane.

6 THE COURT: You mean for personal liability?

7 MR. TAYBACK: I mean whether -- not whether or not
8 you can say we need to revisit that action, but whether or not
9 they were disinterested, whether they breached their fiduciary
10 duty. That would be adjudicated in their favor even if you
11 found against Mr. Adams on a particular transaction -- but I
12 would say you should not find against Mr. Adams on this
13 transaction. The evidence isn't that his -- that the decision
14 to terminate had any connection to his -- the level of his
15 income, the amount of his -- the amount of his income, the
16 amount of his expenditures, his continuity on the board.
17 There's no connectivity, which is required in order to find
18 disinterestedness even if disinterestedness was the standard.
19 Because I will say the standard in Nevada is not independence
20 for -- unless it's a transaction in which the director is on
21 both sides of the transaction or it's a change of control
22 circumstance. The termination of a CEO is an operational
23 matter where you don't get to the independence question unless
24 and until you have established a basis, a legitimate basis in
25 the law to show that the presumption should not apply.

1 In light of the law, in light of the bylaws, in
2 light of the undisputed evidence with respect to Mr. Adams,
3 Mr. Kane, Mr. Wrotniak, the Cotter sisters, and Ms. Coddling --
4 and, of course, Mr. Wrotniak and Ms. Coddling weren't even on
5 the board at the time of this transaction -- the fact is that
6 there's no basis upon which to allow plaintiff's claim to
7 proceed.

8 The last point that I want to make with respect to
9 Summary Judgment Motion Number 1 and 2 as it relates to that
10 point is the plaintiff has tried to really muddy the law. And
11 I think whatever you ultimately decide on this motion for
12 summary judgment -- and I absolutely believe that these
13 defendants are entitled to summary judgment on this record,
14 but whatever you decide the parties will be well served by
15 understanding Your Honor's view of the law. Because we do not
16 see eye to eye with the plaintiffs on the law. They strive to
17 import this Delaware entire fairness test.

18 THE COURT: I rejected that in Wynn, because that
19 was the part that the Okada parties argued once the writ came
20 back on [inaudible].

21 MR. TAYBACK: And notwithstanding that, I believe
22 the plaintiffs are still advocating for it. It shows up in
23 their papers.

24 THE COURT: I understand it's in their briefing.

25 MR. TAYBACK: And the law at least in Nevada with

1 respect to that is that it doesn't apply here. Independence
2 for the same reasons is not required for the benefit of the
3 business judgment rule where, as here --

4 THE COURT: You don't think the Shoen case says that
5 independence is required for application of business judgment
6 rule?

7 MR. TAYBACK: In Shoen to the extent it says that at
8 all it says it in the context of demand futility. It's not
9 the presumption that we're talking about here. And in fact
10 that's -- I believe that's exactly what certainly the Wynn
11 Supreme Court --

12 THE COURT: There's two Shoen cases; right?

13 MR. TAYBACK: Yes.

14 THE COURT: There's the first Shoen case and the
15 second one that they gave a different name to.

16 MR. TAYBACK: Independence is not required unless
17 you have a director who's on both sides of a transaction.

18 THE COURT: Okay.

19 MR. TAYBACK: I believe the law is amply clear on
20 that.

21 THE COURT: Okay. I think their analysis is
22 slightly broader than that, but okay.

23 MR. TAYBACK: Given the bylaws, given the fact that
24 entire fairness does not apply, you cannot simply get past or
25 rebut the presumption of the applicability of the business

1 judgment rule by saying a director is biased, a director has
2 some family connection, a director has income that's
3 attributable to the company. And that's really what this case
4 comes down to. Where the facts here are frankly undisputed
5 summary judgment is warranted.

6 That's it for Summary Judgment 1 and 2, Your Honor,
7 unless you have any questions.

8 THE COURT: No. It's okay.

9 Mr. Krum, Mr. Morris?

10 MR. KRUM: Good morning, Your Honor. Thank you.

11 So I have some argument to make about what are
12 pervasive misstatements of the law that were made with respect
13 to Number 1, as well as the other ones. That said, if I'm
14 listening, you're prepared to deny Number 1, just as you did
15 previously, nothing has changed, including the law; and if
16 that's the case, I'll just defer those comments till we get to
17 something else.

18 THE COURT: Well, then let me ask you a question.
19 Because when I read all these I have notes all over them,
20 because some of them are interrelated and the
21 disinterestedness issue is an issue that is involved in some
22 of the motions in limine, as well as this.

23 Can you tell me what evidence, other than what is
24 listed on page -- you had -- in your brief you had a list of
25 all of the company activities that you believe show decisions

1 that were made by certain of the directors that showed they
2 were interested. Can you tell me, other than that list -- and
3 I can't, of course, find it right now, but I'm looking for it
4 -- is there any other information other than from Mr. Adams
5 that you have that would provide a basis for the Court to
6 determine that they are not disinterested?

7 MR. KRUM: I'm sorry. That who is not disinterested
8 with respect --

9 THE COURT: Anyone except Mr. Adams and the two Ms.
10 Cotters. The two Ms. Cotters I think is fairly easy. They
11 didn't even move, from what I can tell. But, for instance,
12 for Mr. Kane.

13 MR. KRUM: Certainly, Your Honor. In our -- first
14 let me say I think the list to which you're referring is a
15 list that I had understood the Court to request when we last
16 argued summary judgment motions and was intended, Your Honor,
17 to identify the particular matters which we contend give rise
18 to or constitute breaches of fiduciary duty in and of
19 themselves as well as together with other matters. And so --

20 THE COURT: I don't know that that's the reason you
21 did it. I found it. It is on pages 5 and 6. I'm on the
22 Supplemental Opposition to Motion for Summary Judgment Number
23 1 and 2 and Gould Motion for Summary Judgment, and there is a
24 list that includes threats of termination if you don't get
25 along with your sisters and resolve the probate case --

1 MR. KRUM: Yes.

2 THE COURT: -- exercise of the options, the
3 termination, the method of the CEO search. All of those are
4 company transactions. What I'm trying to find out is, other
5 than for Mr. Adams, is there other evidence of a lack of
6 disinterestedness that you have other than what is included in
7 the list of activities that relate to their work as directors
8 which are on pages 5 and 6 of that brief in the bullet points.

9 MR. KRUM: Let me answer it this way, Your Honor. 5
10 and 6 was our effort to do what I just said. And what that
11 is, to try to be clear, is to identify particular activities
12 that we thought would be the subject of, as is appropriate,
13 either instructions or interrogatories to the jury with
14 respect to these particular matters.

15 So let's take Number 1 bullet point, the first
16 bullet point, the threat by Adams, Kane, and McEachern to
17 terminate plaintiff if he did not resolve trust disputes with
18 his sisters on terms satisfactory to them. That, Your Honor,
19 from our perspective is separate from the termination which is
20 the subject of Number 1. And on this --

21 THE COURT: I see that. But let me have you fall
22 back, because I certainly understand those may be issues that
23 you may want to submit interrogatories or just to include in
24 jury instructions related to breaches of fiduciary duty by
25 someone who survives this motion, who I don't grant it on

1 behalf of.

2 But my question is different. Other than these
3 which you've argued in your brief are evidence of a lack of
4 disinterestedness separate and apart from Mr. Adams, who you
5 have other evidence that is presented related to a lack of
6 disinterestedness, is there any evidence that has been
7 attached to your various supplements and other motions related
8 to a lack of disinterestedness for the other directors known
9 as Mr. Kane, Mr. McEachern, Mr. Gould, Ms. Coddington, and Mr.
10 Wrotniak?

11 MR. KRUM: The answer is yes, Your Honor. So I'm
12 going to try to do it a couple ways.

13 THE COURT: Tell me where to go. Because I looked
14 through this whole pile of about 2 foot of paper last night
15 trying to find it, and the only one I could find specific
16 allegations of a lack of disinterestedness, besides the two
17 Cotter sisters, was Mr. Adams.

18 MR. KRUM: Okay. Well, so, for example, with
19 respect to Mr. Kane in the response to MSJ Number 1 and 2 we
20 introduced evidence that showed that Kane was of the view that
21 he knew best what James Cotter, Sr., wanted in his trust
22 documentation.

23 THE COURT: I see he understood what Mr. Cotter,
24 Sr.'s plan was. How does that make him have a lack of
25 disinterestedness?

1 MR. KRUM: Well, the answer, Your Honor, is he acted
2 on that. That was the basis on which he decided to vote to
3 terminate the plaintiff. He -- and, for example, the evidence
4 includes an email from Mr. Adams to Mr. Kane in April or early
5 May 2015 in which Mr. Adams says, "This was difficult. We had
6 to pick sides in this family dispute. But we can take comfort
7 that Sr. would have approved our decision." And so the point
8 from our perspective, Your Honor, is Kane, in acting as a
9 director, in fact acted to carry out what in his judgment were
10 the personal interests of Sr. with respect to his trust
11 planning. And on that basis he voted to terminate Mr. Cotter.
12 There are emails from Mr. Kane to Mr. Cotter telling him, I
13 don't know what the sisters' settlement is but I urge you to
14 take it. Well, we think the evidence also shows that he knew
15 what it was, that it entailed Mr. Cotter giving up control of
16 the issues they've been litigating.

17 THE COURT: Under the Shoen analysis do you believe
18 that that contact and that information is sufficient to show
19 that Mr. Kane is not disinterested?

20 MR. KRUM: Well, the answer is, yes, we do, Your
21 Honor. And I hasten to add that the way Shoen puts it is that
22 disinterestedness and independence are a prerequisite to
23 having standing to invoke the business judgment rule.

24 THE COURT: I'm aware of that. Which is why we're
25 having this discussion. So -- but usually we have either a

1 direct financial relationship, even if it's not on both sides
2 of the transaction, or we have a very close personal or
3 familial relationship with the people who are subject to the
4 transaction. And simply believing you understand Sr.'s plan
5 -- estate plan does not, I don't think, rise to that same
6 level to show a lack of disinterestedness; but I'm waiting for
7 you to give me a spin on that argument I may not have thought
8 of.

9 MR. KRUM: Sure, Your Honor. The answer is -- and I
10 say this because I appreciate what the finder of fact -- what
11 the Court has to do now and what the finder of fact has to do.
12 The evidence has to be assessed collectively, not
13 individually. And you understand that. We've cited cases for
14 that. The other side disputes that. There's "The complaint
15 of acts and omissions upon which plaintiff's claims are based
16 must be viewed and assessed collectively, not separately in
17 isolation." That's the Ebix case that we've cited. And there
18 are other cases for that proposition. The point, Your Honor,
19 is "assessing whether a director was independent and in a
20 particular instance acted independently or whether the
21 director was disinterested as required or whether -- and made
22 the decision based entirely on the corporate merits, not
23 influence by personal or extraneous considerations," that was
24 CVV Technicolor, that's the test. And so, Your Honor, in
25 Shoen, just to go back to that, "Independence can be

1 challenged by showing that the directors' execution of their
2 duties is unduly influenced." If Kane made a decision based
3 in any respect on his view that Sr. intended for one or both
4 of the sisters to have something and Jr. was in the way of
5 that, that, Your Honor, at a minimum survives summary judgment
6 so the finder of fact can make a determination after
7 considering all the evidence whether the director acted and
8 decided in that particular instance entirely on the corporate
9 merits. So what is --

10 THE COURT: Let's skip ahead, then. Mr. McEachern.
11 What evidence of disinterestedness do you have for Mr.
12 McEachern? And if you could tell me where in the briefing it
13 is, I will look at it again. But, as I've said, other than
14 Mr. Adams I did not see evidence of disinterestedness as
15 opposed to allegations of breach of fiduciary duty.

16 MR. KRUM: Mr. McEachern attempted to extort Mr.
17 Cotter. Along with Mr. Kane and Mr. Adams he told Mr. Cotter,
18 you need to go resolve your disputes with your sisters and
19 we're going to reconvene at 6:00 o'clock and if you don't
20 you'll be terminated. Now, there's no dispute about that. We
21 have in evidence the testimony --

22 THE COURT: I understand that that's one of your
23 claims of breach of fiduciary duty. But I'm trying to
24 determine if there was any additional evidence, other than
25 those items that are those bullet points you put in the brief,

1 which are on pages 5 and 6 of your supplemental opposition,
2 that goes to Mr. McEachern. And then I'm going to ask you the
3 same question for Mr. Gould and Ms. Coddington and Mr. Wrotniak.

4 MR. KRUM: Your Honor, as a threshold matter, the
5 presumption can be rebutted by showing conduct in derogation
6 of the presumption. It's not simply a interest or
7 disinterested phenomenon, cite Shoen. Let me be clear. I
8 don't want to talk past you. The other side argues there are
9 only two circumstances in which interestedness matters. Well,
10 that's belied by Shoen. It says, "Business judgment rule
11 pertains only to directors whose conduct falls within its
12 protections. Thus, it applies only in the context of a valid
13 interested director transaction --" that's 138 -- 78.140,
14 excuse me "-- or the valid exercise of business judgment by
15 disinterested director in light of their fiduciary duties."
16 And to be a valid exercise, Your Honor, it has to be made in
17 the interest of the corporation.

18 So Mr. McEachern -- let me go through the list
19 mentally. He attempted to extort Mr. Cotter to resolve the
20 trust disputes in favor of the sisters, he voted to terminate
21 -- he decided not to terminate after he understood an
22 agreement had been reached to resolve those disputes. And
23 when that didn't come to pass he voted to terminate. He,
24 along with Mr. Gould, chose the wishes of the controlling
25 shareholders. Rather than to complete the process he had set

1 up, they aborted the CEO search. So, Your Honor, that's
2 squarely within the Shoen language of manifesting a direction
3 of corporate conduct in such a way as to comport with the
4 wishes or interests of the person doing the controlling.

5 Now, I heard you. You view that as a fiduciary
6 breach.

7 THE COURT: An allegation of a fiduciary duty
8 breach.

9 MR. KRUM: Allegation of fiduciary duty breach,
10 right. But that's -- if proven, that rebuts the presumption,
11 and off we go.

12 I skipped over Mr. McEachern's role in involuntarily
13 retiring Mr. Storey. Mr. McEachern, together with Mr. Adams
14 and Mr. Kane, in October and November -- September or October
15 I guess it was of 2015 comprised the ad hoc first time one
16 time special nominating committee. That committee had two
17 roles. One was to tell noncompliant director Timothy Storey
18 that he wasn't going to be renominated, and they explained to
19 him that the sisters, who controlled the vote, had told him
20 they weren't going to vote to elect him so he could either
21 resign and get a year's benefits of some sort or just be left
22 off.

23 What else did that committee do? They approved Judy
24 Coddington and Michael Wrotniak. Did they undertake to search
25 for candidates? No. Did they do anything that one would do

1 as a director of a nominating committee to identify and
2 recruit directorial candidates? No. What did they do? They
3 did what they were asked and told. Ellen Cotter gave them
4 Judy Coddington, good friend of Mary Ellen Cotter, the mother,
5 with whom Ellen Cotter lives, and Michael Wrotniak, husband of
6 Patricia Wrotniak, one of Margaret Cotter's few good friends.
7 And they obviously did virtually nothing, because promptly
8 after the company announced Ms. Coddington had been added to
9 board a shareholder brought to their attention there were lots
10 of Google articles that raised questions about Ms. Coddington's
11 relationship with her prior employer and the prior employer's
12 conduct.

13 So on the nominating issue, Your Honor, on the board
14 stacking our view is that all evidences loyalty to the
15 controlling shareholders. And that, Your Honor, would be
16 somewhere in the range of lack of independence or
17 disinterestedness.

18 THE COURT: So, Mr. Krum, if we're going to get
19 through all the motions this morning I need you to wrap up.
20 Because I think I have all the information I need on Motion
21 for Summary Judgment Number 1.

22 MR. KRUM: Okay. Certainly, Your Honor.

23 So just to finish the bullet points which you
24 brought to my attention, these directors, Kane, Adams,
25 McEachern, they're all on record dating back to the fall of

1 2014 that, yes, we should find a position for Margaret Cotter
2 at the company so she can have health insurance, but, no, she
3 can't be running our real estate. Well -- that's in the
4 emails we have in the evidence actually, Your Honor, the first
5 time around. And there's some more from Mr. Gould or
6 McEachern. We had some additional testimony that we added
7 this time. And so what happens? Ellen Cotter is made CEO
8 after the aborted CEO search, she says, I want Margaret to the
9 have the senior executive position, for which she has no prior
10 experience and no qualifications. And what do these people do
11 as committee members and board members? They say, where do we
12 sign.

13 So, Your Honor, it's an ongoing, recurring,
14 pervasive lack of independence or disinterestedness. And the
15 conclusion of that, Your Honor, of course, was by what they
16 did in response to the offer -- and I've sort of wrapped up
17 the whole thing without talking about the law I intended to
18 discuss -- and that is they ascertained what the controlling
19 shareholders wanted to do and they did it in an hour-and-
20 twenty-five-minute telephonic board meeting.

21 I didn't discuss what I intended to discuss, but I
22 tried to answer your questions.

23 THE COURT: I understand, Mr. Krum. But the
24 briefing was very thorough, which is why I tried to hit the
25 questions --

1 MR. KRUM: Understood.

2 THE COURT: -- because I had some questions after
3 reading it.

4 So Motion for Partial Summary Judgment Number 1 is
5 granted in part. It is granted with respect to Edward Kane,
6 Douglas McEachern, William Gould, Judy Coddington, and Michael
7 Wrotniak.

8 It is denied as to Margaret Cotter, Ellen Cotter,
9 and Guy Adams because there are genuine issues of material
10 fact related to the disinterestedness of each of those
11 individuals. As a result, they cannot at this point rely upon
12 the business judgment rule.

13 MR. TAYBACK: Your Honor, is there a ruling on the
14 aspect of the motion that goes to inability to hold the
15 individuals personally liable for this claim?

16 THE COURT: For the three that I didn't grant the
17 business judgment?

18 MR. TAYBACK: Correct.

19 THE COURT: No, you do not get a ruling to that
20 effect.

21 Did you want to go to your next motion for summary
22 judgment?

23 MR. TAYBACK: Yes, Your Honor.

24 THE COURT: And I'm trying to be consistent with the
25 decision I made in the Wynn based upon the facts that seem to

1 be slightly different on the conduct of directors. I've got
2 this thing in my head that nobody understands but me, so I'm
3 trying to draw that line by asking questions so I can figure
4 out where that is. Mr. Ferrario knows nobody understands but
5 me. And I can't say it in a way the Supreme Court will
6 understand, because they don't understand it, except for Chris
7 Pickering, and she won't be deciding your appeal.

8 MR. TAYBACK: Your Honor, we have a second motion.
9 It's Motion Number 2. It's also woven through some of the
10 other motions. For the sake of just clarity I'll address
11 Motion Number 2 separately, and I'll only --

12 THE COURT: Briefly.

13 MR. TAYBACK: -- briefly. I'll only say this. Even
14 if you go to the -- well, I've certainly said my piece
15 already, and I think you can just incorporate what I've said
16 previously on this point, that independence I do not believe
17 is a legal prerequisite to the invocation of the business
18 judgment rule. Even if you look at the Shoen case, which Your
19 Honor has discussed, where it talks about interestedness and
20 the word it uses "interestedness," the quote there is, "To
21 show interestedness a shareholder must allege that --" it's
22 talking about allegations in that case "-- allege that a
23 majority of the board members would be, quote, 'materially
24 affected' either to benefit or detriment by a decision of the
25 board in a manner not shared by the corporation and the

1 stockholders." To the extent there is a question of
2 independence, it's not the generalized allegations that I
3 think pollute the claims here, the transaction-by-transaction
4 claims that the plaintiff seems to be asserting. You can't
5 just say independence is lacking because there's -- one of the
6 directors favored one of the board members versus one of the
7 others, favored the sisters versus the brother. You have to
8 show that there's a material impact in the transaction itself
9 that was being voted upon, and that's the contention that
10 we're making with respect to independence and how plaintiff's
11 claims, all of them against all of the individual defendants
12 transaction by transaction should fail under a summary
13 judgment standard.

14 With that I'll stop, and then I'll allow him to
15 address it, and then I've got on Motion Number 3.

16 THE COURT: Okay. Mr. Krum, anything else on Motion
17 Number 2?

18 MR. KRUM: Just briefly, Your Honor, because I think
19 we have a fundamental -- I'm going to repeat myself in one
20 respect -- misapprehension of law. This is not a check-the-
21 box exercise.

22 THE COURT: No, it is not.

23 MR. KRUM: So in Shoen the court says, "Thus, as
24 with the Aronson test, under the Brehm test, director
25 independence can be implicated by particularly alleging that

1 the directors' execution of their duties is unduly influenced,
2 manifesting a direction of corporate conduct in such a way as
3 to comport with the wishes or interests of the person doing
4 the controlling."

5 Now, we know that's a demand case, but that doesn't
6 change the law, it just changes the application of the law.
7 And so the point isn't any more complicated than what it said
8 elsewhere in Shoen, and that is "Directors' discretion must be
9 free from the influence of other interested persons."

10 So Motion Number 2 is -- it's nonsensical, because
11 that has to be assessed based on facts and based on the
12 particular application. You just did it with respect to
13 Number 1. And so it doesn't work that way. And the -- in
14 Rails the court said, of which Shoen is cited with approval,
15 "Directorial interest exists whenever divided loyalties are
16 present." And we have this ongoing set of transactions that
17 entail furthering and protecting the interests of the Cotter
18 sisters. That, Your Honor, is a perfect example of
19 circumstances that show divided loyalties. Thank you.

20 THE COURT: Thank you.

21 Motion for Summary Judgment Number 2 is granted in
22 part. To the extent that you asked me to make a determination
23 as to whether there has been a showing of a lack of
24 disinterestedness there is a lack of disinterestedness for
25 Margaret Cotter, Ellen Cotter, and Guy Adams.

1 With respect to the other directors who were
2 involved in the motion there does not appear to be sufficient
3 evidence presented to the Court to proceed with a claim of
4 lack of disinterestedness.

5 Okay. That takes you to Number 3.

6 MR. TAYBACK: Your Honor, with respect to the Motion
7 for Summary Judgment Number 3, which relates to what's called
8 the patent vision expression of interest --

9 THE COURT: Yeah.

10 MR. TAYBACK: -- there are --

11 THE COURT: The unaccepted offer which may not have
12 been a real offer.

13 MR. TAYBACK: Not may not have been. Was admitted
14 by plaintiff --

15 THE COURT: Eh, you know.

16 MR. TAYBACK: Was admitted by the plaintiff was
17 nonbinding expression of interest that could have been
18 withdrawn or rejected at any point in time. Moreover, when
19 you look -- that in and of itself disposes of the claim,
20 because there are no damages that flow from that. There
21 cannot be. And that Cook case, which is a Delaware case, but
22 the Cook case really makes that clear.

23 THE COURT: I thought I wasn't supposed to look at
24 Delaware law according to you. You know the legislature can't
25 tell the court what it's allowed to look at.

1 MR. TAYBACK: And I did know that.

2 THE COURT: Okay.

3 MR. TAYBACK: I'm encouraging you to look at it.

4 THE COURT: I'm looking at all sorts of things, but
5 I'm trying to interweave it into the legislative intent
6 related to business judgment and the protections that we
7 should give to officers and directors in Nevada.

8 MR. TAYBACK: Yeah. And I think what it is is it's
9 factually analogous. It's factually analogous.

10 THE COURT: Right. I just had to give you a hard
11 time. Anything else you want to tell me?

12 MR. TAYBACK: The only other thing that I would tell
13 you is that when you look at what it is that the board members
14 can look at with respect to the consideration of potential
15 change of control overtures, call it expression of interest or
16 anything else, it's nonexclusive. It says they may consider
17 any of the relevant facts. And here the undisputed evidence
18 is that they did consider a lot of relevant facts, including
19 the views of the plaintiff, the views of the two Cotter
20 sisters, including the presentations of the board. And
21 they're entitled to rely upon that. And the reasonableness of
22 the decision is not something that can be second guessed at
23 this juncture based upon the showing that plaintiff has made.

24 THE COURT: Mr. Krum. Let's skip past a couple of
25 those arguments and focus on a different issue. Other than as

1 evidence of breaches of fiduciary duty, do you have any claim
2 of specific damages to the failure to accept the unsolicited
3 offer?

4 MR. KRUM: Well, first, Your Honor, the notion that
5 it's nonbinding and therefore it cannot result in damages is
6 belied --

7 THE COURT: No. I asked you a very direct question.

8 MR. KRUM: I'm sorry.

9 THE COURT: Do you have damages that you have
10 provided me evidentiary basis for strictly related to the
11 failure of the company or the directors to accept the
12 unsolicited offer?

13 MR. KRUM: Mr. Duarte Solis speaks to that in his
14 expert opinion which was the subject of a motion in limine you
15 denied in October of last year.

16 THE COURT: I know. But I'm asking you a question.
17 Do you have specific evidence of damages related to the
18 decision by the board not to accept the unsolicited offer?

19 MR. KRUM: No. The answer I have is the one I just
20 gave, Your Honor.

21 THE COURT: All right. So that's the only answer
22 you have. Okay. Anything else you want to tell me?

23 MR. KRUM: I just wanted to say again on law,
24 different point, though, intentional misconduct, one of the
25 ways that occurs is where the fiduciary acts with a purpose

1 other than advancing the best interests of the corporation. I
2 think the evidence on this subject, Your Honor, the offer
3 raises a question of fact, a disputed question of material
4 fact as to whether that's what the directors did.

5 Another category of intentional misconduct is where
6 the fiduciary intentionally fails to act in the face of a
7 known duty to act, demonstrating a conscious disregard for his
8 duties. That is a pervasive and recurring phenomenon here,
9 and I submit, Your Honor, with respect to the so-called offer
10 that's what happened. So the point is, as I said before on
11 the offer in particular, Your Honor, it sort of bookends this
12 whole sequence of events, starting with the seizure of
13 control. And you've read the papers, so I'll leave it at
14 that.

15 THE COURT: Anything else?

16 MR. KRUM: No.

17 THE COURT: Okay. Because of the failure of damages
18 related to an unenforceable, unsolicited, nonbinding offer, I
19 am granting the motion.

20 However, that does not preclude the plaintiff from
21 utilizing that factual basis for claims of a breach of
22 fiduciary duty. Okay?

23 MR. TAYBACK: Or for other alleged -- to prove other
24 alleged breaches you're saying it might be admissible as
25 evidence.

1 THE COURT: Well, it may be additional evidence of
2 breach of fiduciary duty. But they don't get to claim any
3 damages from it, since they haven't established damages
4 related to that because of the legal issues related to the
5 nature of the offer.

6 So what is your next motion for summary judgment, if
7 any? I think there were six.

8 MR. SEARCY: Your Honor, I'm addressing Motion for
9 Summary Judgment Number 5. That relates to the CEO search.
10 And --

11 THE COURT: Ready for me to say denied?

12 MR. SEARCY: If you'll let me --

13 THE COURT: You can talk, Mr. Searcy, but we're
14 leaving here in 25 minutes whether you guys are done or not.

15 MR. SEARCY: All right. Well, if you're going to --
16 before you say denied then let me just address a few of the
17 points in it. If you're going to say granted, then I'll
18 certainly sit down.

19 THE COURT: I'm not going to say granted.

20 MR. SEARCY: The point, Your Honor, is that there's
21 no dispute on the material facts here. There was a process
22 that was undertaken by the board here to appoint a CEO. The
23 board appointed a special committee, the special committee
24 hired a search firm, that search firm went out and got
25 information, they interviewed candidates, those candidates

1 were selected by the search firm Korn Ferry, and they were
2 considered along with internal candidates. The board -- or
3 the committee, rather, interviewed Ellen Cotter and decided
4 that she was the best candidate, and the board agreed with
5 that decision. And in the context of the law here you have a
6 majority of disinterested directors who agreed with that
7 decision. There's a presumption that all of this was
8 conducted in good faith. There hasn't been a rebuttal of the
9 presumption here, Your Honor, and, as a result, the motion
10 should be granted.

11 Are there particular issues, though, that I can
12 address for Your Honor?

13 THE COURT: Not that will cause you to be able to
14 get me to change my mind on denied.

15 MR. SEARCY: Okay. Are there any that I can at
16 least make an effort on, Your Honor?

17 THE COURT: Nope.

18 MR. SEARCY: Thank you, Your Honor.

19 THE COURT: All right. So that motion is denied.
20 Can we go to Number 6.

21 MR. SEARCY: Number 6 is mine, as well.

22 THE COURT: This has to do with the special bonus to
23 Mr. Adams.

24 MR. SEARCY: That's correct, Your Honor. There are
25 three main issues here. One has to do with the exercise of

1 options, and in that case there was an executive committee
2 that considered those options. There's no doubt, no dispute
3 that that was an existing plan, that the committee received
4 advice from counsel, and approved of the -- approved of the
5 exercise of the options.

6 THE COURT: Okay. Anything else?

7 MR. SEARCY: In addition to that -- and that's --
8 again, that is an exercise that is presumed to be done in good
9 faith and especially here, where the statute provides that you
10 can obtain information. And that's what the committee did.

11 In addition to that, Your Honor, there's the issue
12 of the payment to Mr. Adams that you just raised. That again
13 was approved by the board, approved by unanimous board who
14 were disinterested in the subject and are entitled to business
15 judgment on that subject.

16 And finally, with respect to Margaret Cotter's
17 appointment it's certainly within the board's discretion to
18 decide that someone who's worked for the company and been
19 affiliated with the company for approximately 20 years or so
20 has the qualifications to take on that job. And as Mr.
21 Tayback said, hiring someone to fill a role is certainly --
22 that's an operational decision that's within the discretion of
23 a board of directors, and certainly they're entitled to be
24 able to exercise the business judgment when it comes to that,
25 especially here. And with all of these decisions, Your Honor,

1 you're talking about a decision made by a majority of
2 disinterested directors, directors that you've found to be
3 disinterested.

4 THE COURT: Some directors I found to be
5 disinterested.

6 MR. SEARCY: Well, for those directors, though, Your
7 Honor, that you found to be disinterested, they constitute a
8 majority of the decision makers here. And --

9 THE COURT: Well, they're protected. Those people
10 are protected.

11 MR. SEARCY: And exercising their business judgment
12 they approved these decisions.

13 THE COURT: Okay. Anything else?

14 MR. SEARCY: Thank you, Your Honor. That's it.

15 THE COURT: Denied.

16 So you had Number 4 I think we didn't get to. Was
17 Number 4 reserved for this time, or had I ruled on it
18 previously?

19 MR. TAYBACK: Your Honor, you --

20 MR. KRUM: You ruled on it previously.

21 THE COURT: Okay. So that takes me to your motions
22 in limine. There were two that I think are important. One is
23 Mr. Gould's motion in limine to exclude irrelevant and
24 speculative evidence.

25 MR. RHOW: Your Honor, can I speak on this one?

1 THE COURT: It's your motion.
2 MR. RHOW: Thank you, Your Honor.
3 MR. FERRARIO: Hey, come on. This is his first
4 time.
5 MR. RHOW: I feel honored to actually --
6 THE COURT: Here's my first question.
7 MR. RHOW: By the way, is it tentative to grant?
8 I'd like to know that first.
9 THE COURT: My first question for you is one that
10 I'm going to ask all the people in motions in limine. Did you
11 have an opportunity to meet and confer with opposing counsel
12 before you filed the motion to see if there were areas of
13 agreement?
14 MR. RHOW: The answer is I don't think we did.
15 THE COURT: You know, we have a rule.
16 MR. SEARCY: I'm going to have to disagree with Mr.
17 Rhow. We actually did meet and confer with Mr. Krum on the
18 phone.
19 MR. RHOW: Oh. I'm sorry.
20 MR. SEARCY: Mr. Rhow wasn't part of the meet and
21 confer, but his associate, Shoshana Bannett, was.
22 THE COURT: Oh. Okay. All right.
23 MR. RHOW: Okay. I had looked at -- I should have
24 looked at Mr. Searcy.
25 THE COURT: Because usually -- usually I get a

1 declaration that tells me, we met and conferred on this
2 date --

3 MR. RHOW: Correct.

4 THE COURT: -- so that I can then gauge whether
5 somebody's being unreasonable or not. So it's your motion.

6 MR. RHOW: Thank you, Your Honor.

7 I think the motion was short and sweet on purpose.
8 During the deposition of Mr. Cotter, Jr., and it lasted days
9 and days and days, and throughout the questioning it was quite
10 clear that he was testifying based on not what he saw, what he
11 heard, what he observed; he was literally saying, here's what
12 I think -- thought at the time, here's what I was thinking Mr.
13 Gould was thinking and others were thinking and so therefore I
14 believe the claim is sufficient because of my subjective
15 belief as to what other directors were thinking. If that's
16 going to be part of this trial, first, this trial's not going
17 to be four weeks, it's going to be eight weeks; but, second,
18 there's nothing in the law, there's nothing based on common
19 sense that tells you that what the subjective beliefs of the
20 plaintiff are none of that is relevant, none of that is
21 relevant under the law, none that is relevant under common
22 sense. So to streamline this case, if he's going to talk
23 about what he saw, what he heard, certainly that's admissible.
24 But if he's going to talk about what he believes, that's
25 subjective and should not be part of this trial.

1 THE COURT: Thank you.

2 Ms. Levin, is this your motion?

3 MS. LEVIN: Yes, Your Honor.

4 As we said in our opposition, we believe this is an
5 improper and premature motion just because Mr. Cotter
6 obviously will be here at trial testifying.

7 THE COURT: So you want me to rule on the questions
8 and answers as they're given. So if somebody asks him, well,
9 did you talk to Mr. Adams about what he was going to do, he
10 can then tell me what he said.

11 MS. LEVIN: Correct, Your Honor.

12 THE COURT: Well, what did you think he meant?
13 That's speculation.

14 MS. LEVIN: Unless, of course, he's got a basis for
15 his belief. And I think that some of the deposition
16 testimony, those responses were invited by the very questions.
17 So to the extent that he has a basis to believe -- you know,
18 to state his belief I think that, again, it should be
19 determined on the question by question.

20 THE COURT: Okay. So the motion is denied. It's
21 premature. It's an issue that has to be handled at trial
22 based upon the foundation that is laid related to the issue.

23 So -- and plus you won't be here. You won't be
24 here; right?

25 MR. RHOW: I'm sorry?

1 THE COURT: You won't be here; right?

2 MR. RHOW: I don't know. I hope not. Is Your Honor
3 saying I should not be here or that my client won't be here
4 then?

5 THE COURT: That's what the business judgment ruling
6 deals with; right? So I granted your client's business
7 judgment rule motion. Well, you know, he may be a witness.

8 MR. KRUM: I'm sorry, Your Honor. Did I miss
9 something?

10 THE COURT: What?

11 MR. KRUM: We haven't had that motion argued yet,
12 Mr. Gould's motion.

13 THE COURT: I included Mr. Gould because you briefed
14 it relate to all of the motions for summary judgment and I
15 asked you questions about all the directors, except Mr. Adams.

16 MR. KRUM: I'm sorry. I didn't understand that,
17 Your Honor. I didn't answer as to Mr. Gould.

18 THE COURT: Do you want to tell me an answer to Mr.
19 Gould?

20 MR. KRUM: I do, because we have a hearing set for
21 the 8th on his motion, which is why misunderstood that.

22 THE COURT: I used it because it was included in
23 your opposition, the supplement to those motions.

24 MR. KRUM: That was confusion that we created, and I
25 apologize. The reason we did that, Your Honor, is that we

1 didn't have an opportunity to prepare a Gould brief, but we
2 didn't want to be accused of doing nothing. And some of the
3 evidence in those motions in our view did relate to Gould, and
4 we therefore put him on there.

5 That said, he filed two pieces of paper, they asked
6 me if we could have the hearing today. I told them no, I
7 wanted to respond. So -- but let me try to answer your
8 question with respect to Mr. Gould. So we start, Your Honor,
9 as we do, with the threat to terminate and the termination.
10 And I respectfully submit --

11 THE COURT: I will tell you that on your Mr. Gould
12 you've got the same list that we've already talked about.
13 What I'm trying to find out is -- and I understand the threat
14 is part of what you've alleged related to Mr. Gould along with
15 the other six or seven bullet points that are on pages 5 and 6
16 of the opposition. Is there something else related to Mr.
17 Gould, something like you have with Mr. Adams that would
18 establish a lack of disinterestedness?

19 MR. KRUM: Let me answer, and then you'll decide.

20 THE COURT: Yeah. That's what I'm trying to pull
21 out of you.

22 MR. KRUM: So, for example, with respect to the
23 termination Mr. Cotter raised the question of Mr. Adams's
24 independence before a vote was taken, and Mr. Gould asked Mr.
25 Adams, well, can you tell us about that. And Mr. Adams got

1 mad and said in words or substance, no. And Mr. Gould said,
2 okay. That, Your Honor, is a perfect example of a failure to
3 act in the face of a known duty to act. We're not talking
4 about someone who is unfamiliar with fiduciary obligations
5 here. Mr. Gould is a corporate lawyer.

6 So we get to the -- we get to the executive
7 committee, same meeting, June 12. Ellen Cotter says, I want
8 to repopulate the executive committee, Mr. Gould, would you
9 like to be on it. His testimony, his deposition testimony was
10 that he declined because he knew that it would take a lot of
11 time. Now, if he knew that it would take a lot of time, Your
12 Honor, how is it that it didn't occur to him that this was
13 what the sisters were doing in October of 2014 when they were
14 trying to circumvent the board?

15 THE COURT: These are all on your list of bullet
16 points.

17 MR. KRUM: Okay.

18 THE COURT: What I'm trying to find out is if
19 there's anything that's not on the list of bullet points that
20 are on pages 5 and 6 of your supplemental opposition that
21 relate to Mr. Gould. Because when I made my ruling I was
22 including Mr. Gould as someone because I specifically excluded
23 Mr. Adams and the two Ms. Cotters.

24 MR. KRUM: Bear with me. I'm mentally working.

25 THE COURT: I'm watching you. I'm watching him

1 work.

2 MR. KRUM: So I don't think we had the executive
3 committee there, but I just said that.

4 So then, Your Honor, the composition of the board.
5 So Mr. Gould was not a member of the nominating committee.
6 His testimony was that, on a Friday Ellen Cotter called me and
7 asked me if she could come to my office and she and Craig
8 Tompkins came to my office and showed me Judy Coddington's resume
9 and said we were going to have a board meeting on Monday to
10 put Ms. Coddington on the board. And Bill Gould said, this isn't
11 sufficient time, I can't do my job. But he voted for her
12 nonetheless. That, Your Honor, is the same thing that happens
13 over and over and over again with Mr. Gould. That is, in the
14 face of a known duty to act he chooses not to do so. That is
15 intentional misconduct. Your Honor, you've denied the motion
16 with respect to the CEO search. That is Mr. Gould. It is Mr.
17 Gould and Mr. McEachern who are the ones who together with
18 Margaret Cotter aborted the CEO search. Literally the last
19 time they spoke to Korn Ferry was the day Ellen Cotter
20 declared her candidacy. After the what did they do? They
21 told Craig Tompkins to tell Korn Ferry to do no more work.
22 And Mr. Gould, he was the one whose name was on a press
23 release saying, Ellen Cotter was made CEO following a thorough
24 search. She was not made CEO as a result of that search. She
25 was made CEO in spite of that search.

1 THE COURT: Okay. So all of those are issues that
2 I'm aware of considered when I had previously included Mr.
3 Gould in the granting of the summary judgment related to the
4 business judgment rule. The fact that I am denying certain
5 issues related to other summary judgments does not diminish
6 the fact that the directors that I found there was not
7 evidence of a lack of disinterestedness have the protection
8 the statute provides to them.

9 Okay. So let's go back to Mr. Cotter's Motion
10 Number 3. This is related to the coach.

11 MS. LEVIN: Your Honor, this motion should be denied
12 because the hiring of High Point, that's post hoc --

13 THE COURT: It's your motion. You wanted it
14 granted.

15 MS. LEVIN: I'm sorry. You know, the Court -- I'm
16 sorry. The Court should exclude the after-acquired evidence
17 on the -- in the form of any testimony or documents relating
18 to the hiring of High Point, because the breach of fiduciary
19 duty claims, they are -- they concern what the directors did
20 and knew at the time that they decided to fire the plaintiff.
21 So we cited the Smith versus Van Gorkom case, which holds post
22 hoc data is not relevant to the decision.

23 So at the time that they made this decision they did
24 not have nor did they rely on the High Point evidence. So
25 therefore the after-acquired evidence cannot be as a matter of

1 law relevant to their decision to terminate the plaintiff.
2 That would amount to a retroactive assessment of his ability,
3 which are not at issue. And I think that that's the -- you
4 know, the --

5 THE COURT: The problem I have with that is part of
6 what your client's position has been in this case is he is
7 suitable to be acting as the CEO, and if there is information
8 that is relevant to that suitability, that's where I have the
9 problem on this. I certainly understand from a decision-
10 making process that that information was not in the possession
11 of anyone who was making the decisions at the time. But given
12 the affirmative proposition by your client that he is suitable
13 to CEO, I have concerns about granting the motion at this
14 stage.

15 MS. LEVIN: Well -- okay. So -- but with respect to
16 the decision which you can agree that they could not use that
17 evidence to show that after the fact they made the right
18 decision because of the after --

19 THE COURT: No. That's a problem if your client is
20 saying he's suitable and therefore he should be able to be
21 CEO. Because part of what he originally asked for was to make
22 them make him be CEO.

23 MS. LEVIN: All right. And here at issue I believe
24 it's the -- we're seeking to void the termination.

25 THE COURT: I know.

1 MS. LEVIN: So -- but I think that even -- and I
2 think that in that respect if you were inclined to allow it on
3 his suitability, the problem then becomes first of all the
4 hiring of consultant doesn't necessary mean that somebody is
5 unsuitable.

6 THE COURT: Absolutely. It may mean they're trying
7 to get better.

8 MS. LEVIN: Exactly. And I was thinking -- when I
9 read these facts I was thinking about the analogy. If you
10 were a professional runner and you hire a runner coach --

11 THE COURT: Coach.

12 MS. LEVIN: -- doesn't mean that you're not a good
13 runner. You may --

14 THE COURT: You want to be better.

15 MS. LEVIN: Exactly. So that was --

16 THE COURT: I understand.

17 MS. LEVIN: So and the other thing is that, you
18 know, the opposition argues, well, but it looks like in his
19 own assessment he wasn't good for it. And that, of course,
20 again doesn't follow from that. And so then we get into the
21 category of even if there's a remote relevance, Your Honor,
22 then whatever that relevance is would be substantially
23 outweighed by the unfair prejudicial effect that that would
24 cause. Because, again, his assumed thoughts, then the jury
25 could think like, well, you know, he thinks he's not qualified

1 because he hired a coach. So all in all I believe that it's
2 unfairly prejudicial.

3 Just on the point of the unclean hands defense,
4 again they are citing the Fetish, Las Vegas Fetish case. But,
5 again, the unclean hands defense requires egregious misconduct
6 and serious harm caused by it. And they haven't further
7 substantiated that. So with that being said, our position is
8 to exclude it for those reasons.

9 THE COURT: Thank you.

10 MS. LEVIN: Thank you.

11 THE COURT: Mr. Searcy --

12 MR. SEARCY: I'll address that.

13 THE COURT: -- I am inclined to deny the motion.
14 But if the evidence is admitted at trial, to admit it with a
15 limiting instruction that says that it only goes to
16 suitability.

17 MR. SEARCY: And, Your Honor, I think that we're
18 okay with that.

19 THE COURT: Okay.

20 MR. SEARCY: I just want to clarify that we can
21 certainly ask Mr. Cotter about the Alderton documents --

22 THE COURT: You ask him about it, then I'm going to
23 give the limiting instruction, and we'll probably give it five
24 times or six times, and it'll be a written instruction, so
25 it's part of it. And if the plaintiff doesn't want me to give

1 the limiting instruction because they believe that calls to
2 much attention to it, they can, of course, waive that request.

3 MR. SEARCY: Thank you, Your Honor.

4 THE COURT: Okay. So think about whether you really
5 want the limiting instruction, come up with your text for the
6 limiting instruction, and then we'll talk about it when we
7 have our final pretrial conference as to whether you think you
8 really want it.

9 That takes me to the last motion in limine by Mr.
10 Cotter, which relates to the ability of Mr. Ferrario to
11 participate at trial, also known as Motion in Limine Number 2.

12 MR. KRUM: Thank you, Your Honor. I enjoy this very
13 much, showing that perhaps I've spent too many years in the
14 corporate governance jurisprudence. Three points, and it's
15 not complicated. First, as a general rule a nominal defendant
16 is not allowed to introduce evidence and defend the merits of
17 claims against the director defendants.

18 Second, the handful of exceptions to that are
19 exceptions where it's a serious fundamental corporate interest
20 that is challenged by the derivative suit, a reorganization or
21 restructuring, an effort to appoint a receiver. None of those
22 exist here.

23 Third, if you disagree with us on all of that,
24 there's a question of unfair prejudice and waste of time.
25 And, you know, the individual defendants are represented by

1 capable counsel. They don't need a second lawyer carrying
2 their water. And for a jury to have someone who represents
3 the company asking questions that imply conclusions adverse to
4 the plaintiff is, if not unfairly prejudicial, something
5 beyond that.

6 So that's the argument in a nutshell, Your Honor.
7 If you have any questions, I'd be happy to answer them.

8 THE COURT: Nope. Motion's denied.

9 All right. So let's go to your Motion in Limine
10 Number 1 regarding advice of counsel. I forgot we need to hit
11 that one. Ms. Levin.

12 And then we're going to go to the Chief Justice
13 Steel that I'm not going to really hear, because I didn't give
14 you permission to refile.

15 MS. LEVIN: Your Honor is familiar with the share
16 options, so if I talk about the share option, I don't --

17 THE COURT: I am.

18 MS. LEVIN: Okay. Well --

19 THE COURT: And also with the drama related to the
20 production and the creation and all the stuff about the advice
21 of counsel issue.

22 MS. LEVIN: Okay. I'll just --

23 THE COURT: But I also am aware the Nevada Supreme
24 Court has told us on a business judgment issue we cannot reach
25 behind the advice of counsel except to make a determination as

1 to essentially process issues, how the attorney was hired,
2 what the scope of the retention was, and those kind of issues,
3 as opposed to the actual advice.

4 MS. LEVIN: That's true, Your Honor. And so our
5 arguments are really twofold. Number one is that Adams and
6 Kane, who were two of the three directors on the compensation
7 committee, they testified, as the Court found in its October
8 27, 2016, hearing, that they relied solely on the substance of
9 advice of counsel to determine whether the authorization
10 decision to authorize the estate to invoke the option was
11 proper. So, unlike in Wynn or in Comverge, on which the
12 defendants rely, they did not rely on anything else. So if
13 they are asked at trial to explain why they authorized the
14 option, they must rely on that legal advice.

15 So the second point is that the defendants waived
16 the attorney-client privilege by partially disclosing
17 attorney-client privileged information. Now, they're saying
18 -- or RDI says in the opposition that individual directors
19 cannot waive the privilege.

20 THE COURT: That's the Jacobs versus Sands case.

21 MS. LEVIN: Exact, Your Honor. And I agree with
22 that. But, of course, RDI can only act through its officers
23 and directors.

24 THE COURT: That's the Jacobs versus Sands case.

25 MS. LEVIN: And the current officer -- and I think

1 in particular if you look at the Exhibit 4 that we attached
2 to our motion, is that that email was produced by Ellen
3 Cotter, who is a current CEO and is an officer and director,
4 and she --

5 THE COURT: I understand.

6 MS. LEVIN: So, in other words --

7 THE COURT: And then Mr. Ferrario clawed it back.

8 MS. LEVIN: Right. So she produced it, and so
9 there's a Supreme Court case that says, "The power to waive
10 the corporate attorney-client privilege rests with the
11 corporation's management and is usually -- and is normally
12 exercised by its officers and directors." And that's what
13 happened here.

14 So I think especially Exhibit 4, but even Exhibit 2
15 and 3, the 2 and 3 they raise the legal issues. 2 and 3
16 identify the legal issues of whether there was a reason why
17 Ellen Cotter could not exercise the option and whether enough
18 -- whether the trust documents did not pour over -- the share
19 option didn't pour over into the trust. But Exhibit 4
20 specifically seeks legal advice from the company attorney and
21 as to the legal rights of the estate to exercise the option in
22 light of the proxy language. So that is -- under our statute
23 is an attorney-client communication for the purpose of
24 obtaining legal advice. So they partially disclosed that, so
25 we believe there's a waiver issue. And under Wardleigh you

1 cannot use the attorney privilege both as a shield and a
2 sword, which is what they're now doing, is because what
3 they're going to say is, well, we partially disclosed but you
4 cannot find out what it was. But even the very --

5 THE COURT: But that's the Nevada Supreme Court
6 who's made that decision, not the rest of us. They were very
7 clear that we're not allowed to get behind that.

8 MS. LEVIN: Correct. But one thing that the Wynn
9 decision did not decide was the waiver issue. And that was in
10 Footnote 3 of the decision.

11 THE COURT: I made that decision separately after
12 that came back. But that's a case by case, and I haven't made
13 that decision in this case. In fact, my belief is you guys
14 have a writ pending on this issue still. Right?

15 MR. KRUM: I think the writ pending is on a
16 different privilege issue, Your Honor.

17 THE COURT: Okay.

18 MS. HENDRICKS: Your Honor, the writ relating to
19 this issue was filed by RDI, and the Supreme Court actually
20 came back and said the facts were analogous to Wynn and it
21 needed to make a decision, and that was shortly after you did
22 make the decision when we were back before you on it.

23 THE COURT: Yeah. We had a hearing.

24 MS. HENDRICKS: And we had the supplemental
25 briefing.

1 THE COURT: Yep. Okay. So anything else on this
2 one?

3 MS. LEVIN: Only -- the only thing is that the
4 partially disclosed privileged emails themselves show that the
5 board had information that would cause reliance on advice to
6 be improper. So that would --

7 THE COURT: Okay. So your motion's denied. Come up
8 here. I'm going to give you these. These are your I believe
9 documents you actually want sealed. Since I granted your
10 motion, it was on the calendar today, hopefully you can work
11 out with the Clerk's Office so they will actually take the
12 sealed documents and put them so they're part of the record in
13 some way.

14 MS. LEVIN: And I brought them with me, too.

15 THE COURT: Yeah. Good luck. You've got to do it
16 at the counter.

17 MS. LEVIN: Okay. Thank you.

18 THE COURT: Okay. So I am declining to hear again
19 the motion in limine on Chief Justice Steel. I've previously
20 made a ruling on that. I've reviewed your brief, and there's
21 nothing in it that causes me to change my mind.

22 I have already granted your motions to seal and
23 redact. It was on calendar for today.

24 And now we need to set our final pretrial
25 conference. I usually do it the week before.

1 MR. KRUM: The week before is fine, Your Honor.
2 (Pause in the proceedings)
3 THE COURT: The week before is fine?
4 MR. KRUM: The week before is fine, Your Honor.
5 THE COURT: What day are you guys arguing in the
6 Supreme Court?
7 MR. TAYBACK: That's the 3rd.
8 THE COURT: 3rd. So do you want to come in on --
9 MR. TAYBACK: 4th?
10 THE CLERK: [Inaudible].
11 THE COURT: No, I'm not seeing them on January 2,
12 you're seeing them on January 2.
13 How about on January 5 at 3:00 o'clock?
14 MR. TAYBACK: That's good. Thank you.
15 MR. KRUM: Perfect.
16 MR. FERRARIO: Thank you, Judge.
17 THE COURT: That will be your final pretrial
18 conference. At your final pretrial conference we're not going
19 to bring exhibits, because you're already going to deal with
20 that. But you are going to bring any jury instructions,
21 you're going to exchange your draft jury instructions. If you
22 have limiting instructions you think are appropriate, try and
23 have those, as well. And we're also going to deal with any
24 exhibits that you want in a notebook for the jury. The only
25 reason I suggest that is sometimes documents that we show on

1 screens aren't easily able to be seen by a juror. There's
2 contract documents and things you may want. If there are
3 selected items you want to have in a jury notebook, it will be
4 a single jury notebook. It will be not more than 3 inches.
5 So whatever we put in it has to fit in the 3 inches. And so
6 if you have things you think you want included in that, we'll
7 talk about that. And you're going to -- I will make final
8 decisions on voir dire questions at that time. I encourage
9 you to exchange them a week ahead of time.

10 MR. KRUM: Your Honor, with respect to exhibits we
11 have a date this week of Wednesday or Thursday for our exhibit
12 list. I think in view of today's developments it would be a
13 good idea to push that back to next week.

14 THE COURT: You guys need to get working on it.

15 MR. KRUM: No, we're working on it.

16 THE COURT: It takes a lot longer than you think it
17 does.

18 All right. Anything else that I missed?

19 MR. FERRARIO: There may be some utility to that,
20 Mark, in light of the rulings of the Court today, because the
21 complexion of the case has changed.

22 MR. KRUM: Well, that's -- we're working on it. We
23 understand that, Your Honor. So may we have until Wednesday
24 of next week you think, Mark?

25 MR. TAYBACK: Yeah, that's fine.

1 THE COURT: I still need to see representatives from
2 those parties who remain in the case at the calendar call on
3 December 18th. If you are out of town, I do not do call-ins
4 for calendar calls, Mr. Krum, so just make sure Mr. Morris and
5 Ms. Levin know whatever it is they need to say.

6 I am going to be asking you whether given the
7 rulings I made today it has changed the estimate that you
8 provided to me through Ms. Hendricks on December 4th as the
9 amount of time for trial. Because I need to negotiate for
10 space, and knowing the time that I need is important for me in
11 my space negotiations.

12 MR. RHOW: Your Honor, sorry. One point of
13 clarification as to Mr. Gould specifically. He is out of the
14 case entirely?

15 THE COURT: Well, I granted the motion on the
16 business judgment for him. My understanding is that is the
17 only way that you would be involved, because there are no
18 direct breach of contract claims against you. If there were
19 other types of claims against you that were not protected by
20 the business judgment rule, you might not be out. But I
21 didn't see that in the briefing. But I don't know your case
22 as well as you do.

23 MR. RHOW: Assuming that's the case, I just want to
24 make sure that no one's going to sanction me if I don't show
25 up.

1 THE COURT: Do you think you have any remaining
2 claims against Mr. Gould given my ruling today?

3 MR. KRUM: Your Honor, probably not. But I'll go
4 back through it.

5 THE COURT: If you could communicate if you think
6 there are any, and then I'll have to handle that on a
7 supplemental motion practice.

8 MR. RHOW: Understood, Your Honor.

9 THE COURT: Okay. So the people who I anticipate
10 will be here only in the capacity as witnesses would be --
11 okay, I've got to go back to this list -- Kane, McEachern,
12 Gould, Coddling, Wrotniak. That's all of them. So the people
13 who remain parties are Cotter, Cotter, Adams, and then Mr.
14 Cotter.

15 MR. TAYBACK: Yes, Your Honor. I understand that.

16 THE COURT: All right. So see you on the 18th.

17 MR. TAYBACK: Thank you, Your Honor.

18 MR. KRUM: Thank you.

19 MR. EDWARDS: Your Honor --

20 THE COURT: Yes, Jim.

21 MR. EDWARDS: -- on the 2nd is local counsel going
22 to be here for the exhibits? Do you want local counsel here?

23 THE COURT: Counsel does not need to be here. They
24 can send paralegals. So local counsel does not need to come
25 sit through it if they don't want to.

1 MR. EDWARDS: Okay.

2 THE COURT: But it may be helpful if local counsel
3 is going to be intimately involved in the process of doing it
4 for you to have someone here. But I leave that to work out
5 with your people.

6 Anything else?

7 MS. HENDRICKS: Your Honor, on the exhibit list did
8 we get an extra week, then, so we kind of work through these
9 issues?

10 THE COURT: I'm not involved in the exhibit list
11 issue. That's you guys on 2.67. I'm out of that.

12 MR. FERRARIO: Thank you, Your Honor.

13 THE PROCEEDINGS CONCLUDED AT 12:00 NOON

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CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

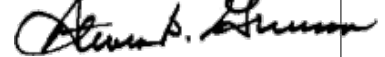
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES J. COTTER, JR. individually and
derivatively on behalf of Reading
International, Inc.,

Plaintiffs,

v.

MARGARET COTTER, *et al.*,
Defendants.

AND

READING INTERNATIONAL, INC., a Nevada
corporation,

Nominal Defendant.

Case No.: A-15-719860-B
Dept. No.: XI

Case No.: P-14-082942-E
Dept. No.: XI

Related and Coordinated Cases

BUSINESS COURT

**THE INDIVIDUAL DEFENDANTS'
OPPOSITION TO PLAINTIFF'S
MOTION FOR RECONSIDERATION OR
CLARIFICATION OF RULING ON
MOTIONS FOR SUMMARY JUDGMENT
NOS. 1, 2, AND 3**

Judge: Hon. Elizabeth Gonzalez
Date of Hearing: December 28, 2017
Time of Hearing: 9:00 a.m.

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1. I am a member of the bar of the State of California, and am an attorney with Quinn Emanuel Urquhart & Sullivan, LLP (“Quinn Emanuel”), attorneys for Defendants Margaret Cotter, Ellen Cotter, Guy Adams, Edward Kane, Douglas McEachern, Judy Coddington, and Michael Wrotniak (the “Individual Defendants”). I make this declaration based upon personal, firsthand knowledge, except where stated to be on information and belief, and as to that information, I believe it to be true. If called upon to testify as to the contents of this Declaration, I am legally competent to testify to its contents in a court of law.

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Despite having been provided every opportunity to establish a basis for his causes of action, Plaintiff now seeks “reconsideration” of the Court’s decision, particularly because it leaves only one challenged action—the RDI Board’s June 12, 2015 termination of Plaintiff as CEO and President—without a majority of disinterested, independent directors voting in its favor. Plaintiff’s motion should be rejected forthwith. Procedurally, Plaintiff has no basis to seek reconsideration. Plaintiff failed to comply with EDCR 2.24(a), which requires that he seek leave of the Court before filing any motion for consideration. Moreover, the Nevada Supreme Court has made clear that motions for reconsideration are to be granted “only in very rare

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1 instances” involving “new issues of fact or law.” Neither are present here; Plaintiff’s Motion for
2 Reconsideration admittedly reargues what was already in evidence before the Court.

3 Even if the Court were inclined to revisit the merits of its decision (which is both
4 unnecessary and unwarranted), it is plain that its ruling was not “clearly erroneous,” as is
5 required for reversal. Contrary to Plaintiff’s objections of “surprise,” the Individual Defendants’
6 Motion for Partial Summary Judgment (No. 2) re: the Issue of Director Independence covered all
7 claims, and their separate summary judgment motions—addressing particular issues—covered
8 all decisions that Plaintiff has identified as independent breaches. Of course, as both the Court
9 and Plaintiff’s own expert, Myron T. Steele, have noted, Plaintiff has to establish that RDI’s
10 directors were either interested or not independent *before* he can proceed on the merits of any of
11 his fiduciary duty claims against them.² As the record makes clear and the Court correctly
12 found, Plaintiff has not met—and cannot meet—this burden with respect to Directors Wrotniak,
13 Coddington, McEachern, and Kane. Plaintiff’s Motion for Reconsideration, which attempts to skip
14 to the “entire fairness” of certain transactions, entirely ignores this necessary first step. For the
15 reasons the Court previously found (which Plaintiff’s motion does nothing to disturb), its
16 December 11, 2017 ruling with respect to Directors Wrotniak, Coddington, McEachern, and Kane
17 was correct and should not be reconsidered.

18 ARGUMENT

19 **I. PLAINTIFF’S MOTION FOR RECONSIDERATION IS PROCEDURALLY** 20 **IMPROPER**

21 Plaintiff’s Motion for Reconsideration is procedurally defective. The Rules of Practice
22 for the Eighth Judicial District Court state, in relevant part:

23 No motions once heard and disposed of may be renewed in the same cause, nor
24 may the same matters therein embraced be reheard, *unless by leave of the court*
granted upon motion thereof, after notice of such motion to the adverse parties.

25
26 ² The Individual Defendants recognize that Steele’s testimony at trial is limited to what
27 a reasonable director would do, and that he will not be permitted to offer evidence as to the
28 requirements or standards of practice under Delaware law. Still, Plaintiff cannot ignore for
purposes of this motion the opinions proffered by his own witness, as reasonably considered and
applied by this Court.

1 EDCR 2.24(a) (emphasis added). Plaintiff did not comply with this Rule prior to filing his
2 Motion for Reconsideration; rather than filing a motion for leave with the Court and attaching a
3 copy of his proposed Motion for Reconsideration as an exhibit (as contemplated by the Rule),
4 Plaintiff filed his underlying motion directly with the Court. This was improper.

5 The purpose of EDCR 2.24 is to assist the Court in controlling the influx of matters to
6 which it must attend in the normal course of motion practice, such as the time required to
7 properly review the parties' filings or hearing arguments on the merits of the matter before it and
8 issuing an ultimate decision on the merits. These issues of judicial economy inherent in
9 EDCR 2.24(a) are also emphasized in subsection (c) of the Rule, which provides that "[i]f a
10 motion for rehearing is granted, the court may make a final disposition of the cause without re-
11 argument or resubmission or may make other such orders as are deemed appropriate under the
12 circumstances of the particular case." EDCR 2.24(c).

13 Plaintiff's filing of his Motion for Reconsideration without first requesting and then
14 receiving leave of this Court to do so has initially deprived the Court of its duty and ability to
15 make the threshold determination of whether to grant leave in the first instance. Moreover,
16 Plaintiff's filing without leave has required the Individual Defendants' counsel to spend time
17 formally responding to and opposing Plaintiff's Motion for Reconsideration, which they
18 otherwise may not have been required to do if Plaintiff had followed the clear mandate of
19 seeking leave of the Court prior to filing his motion. In light of this clear procedural defect,
20 Plaintiff's Motion for Reconsideration should be stricken.

21 **II. PLAINTIFF FAILS TO MEET THE NEVADA SUPREME COURT'S**
22 **STANDARD FOR RECONSIDERATION**

23 **A. Plaintiff's Motion for Reconsideration Revisits the Same Facts and Same**
24 **Legal Arguments Previously Raised**

25 Even considered on its merits, Plaintiff's Motion for Reconsideration fails to meet the
26 strict standard set by the Nevada Supreme Court for reconsideration of a court's judgment. A
27 motion for reconsideration is not a "do over." *See Merozoite v. Thorpe*, 52 F.3d 252, 255 (9th
28 Cir. 1995) ("Since [Plaintiff's] motion merely reiterated the arguments that he had already
presented to the district court, the motion was properly denied."). Rather, the Nevada Supreme

1 Court has made clear that motions for reconsideration are to be granted “[o]nly in very rare
2 *instances in which new issues of fact or law* are raised supporting a ruling contrary to the ruling
3 already reached.” *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976)
4 (emphasis added) (concluding that, because the “motion for rehearing raised no new issues of
5 law and made reference to no new or additional facts, . . . the motion was superfluous and, in our
6 view, it was an abuse of discretion for the district court to entertain it”). In Nevada, a district
7 court may reconsider a previously-decided issue only if “substantially different evidence is
8 subsequently introduced or the decision is clearly erroneous.” *Masonry & Tile Constr. Ass’n of*
9 *S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997).

10 Here, there is no new issue of fact or law raised in Plaintiff’s Motion for Reconsideration
11 that might generate a contrary ruling. This is not one of those “rare instances” in which
12 reconsideration is appropriate, and to do so would be an abuse of discretion, negating the
13 overriding policy in favor of finality of judgments. Instead, Plaintiff’s motion is nothing more
14 than an attempt to re-argue what was already in evidence before the Court during the summary
15 judgment phase. Plaintiff’s re-hash includes:

- 16 • An extended section focused primarily on Director Edward Kane and the RDI
17 Board’s months-long process in evaluating Plaintiff’s deficient performance as CEO
18 of RDI, which ultimately culminated in Plaintiff’s termination. (See Mot. for Recons.
19 at 15-21.) Plaintiff’s attack cites the exact same “evidence” and repeats—almost
20 verbatim—the same arguments that appear in Plaintiff’s Motion for Partial Summary
21 Judgment (pp. 5-8, 16-21), Plaintiff’s Opposition to the Individual Defendants’
22 Motion for Partial Summary Judgment (No. 1) re: Plaintiff’s Termination and
23 Reinstatement Claims (pp. 4-8), and Plaintiff’s Reply in Support of His Motion for
24 Partial Summary Judgment (pp. 3-7).
- 25 • The argument that “the acts and omissions of the individual director defendants must
26 be viewed collectively, not in isolation.” (Mot. for Recons. at 14-15.) In making this
27 legal point, Plaintiff cites the same four cases in exactly the same order as in his
28 Opposition to the Individual Defendants’ Motion for Partial Summary Judgment
(No. 5) re: the Appointment of Ellen Cotter as CEO (pp. 11-12).
- An attack on Director Judy Coddington, who—based on an assertion contained in a
declaration prepared by Plaintiff—is alleged to have voted for Ellen Cotter as
permanent CEO based on her purported “view that RDI was a ‘family business’ of
which only a Cotter should be CEO.” (Mot. for Recons. at 22 (citing JJC Decl.
¶ 24).) Plaintiff previously made this same argument citing the same evidence in his
Opposition to the Individual Defendants’ Motion for Partial Summary Judgment
(No. 2) re: Director Independence (p. 7).

- A section focused on the purportedly “aborted CEO search.” (Mot. for Recons. at 22.) Here, Plaintiff does not even pretend to introduce “substantially different evidence,” as required. Instead, he “respectfully refers the Court to his prior briefs and the evidence described therein and proffered therewith.” (*Id.* (citations omitted).)

A party is not entitled to reconsideration simply because “he or she is unhappy with the judgment.” *Khan v. Fasano*, 194 F. Supp. 2d 1134, 1136 (S.D. Cal. 2001). A motion for reconsideration is not the place for “the plaintiff to ‘reload and shoot again,’” *Butler v. Sentry Ins. Mut. Co.*, 640 F. Supp. 806, 812 (N.D. Ill. 1986), and it cannot “be utilized as a vehicle to reargue matters considered and decided in the court’s initial opinion.” *Matter of Ross*, 99 Nev. 657, 659, 668 P.2d 1089, 1091 (1983) (denying rehearing). Plaintiff’s arguments are admittedly and uncontrovertibly identical to those raised during motion practice and the various summary judgment hearings before the Court. Nothing new has been added; no intervening precedent has been identified nor any “substantially different” facts adduced. The Court need not proceed any further. Reconsideration is plainly unwarranted as a matter of law. *See Bundorf v. Jewell*, 142 F. Supp. 3d 1133, 1137 (D. Nev. 2015) (denying motion for reconsideration because it “primarily rehashes the same arguments that Federal Defendants raised—or could have raised—in the earlier summary judgment briefing”).

B. Plaintiff’s Motion for Reconsideration Is Without Substantive Merit

Even if the Court were inclined to revisit the substance of its ruling granting judgment in favor of Directors Michael Wrotniak, Judy Coddington, Douglas McEachern, and Edward Kane on all claims asserted against them in light of their disinterestedness and independence, it is plain that the Court’s December 11, 2017 ruling was correct a matter of law. Plaintiff’s arguments to the contrary are legally baseless and factually unsupportable.

1. The Court’s Decision Was Procedurally Proper and Did Not Overlook Evidence of Any Conduct, Acts, or Omissions

Plaintiff first contends that the Court’s ruling as to Directors Wrotniak, Coddington, McEachern, and Kane should be reconsidered because it did not give him “proper notice and adequate time to respond,” since the Individual Defendants “moved for partial summary judgment only on specific *issues*,” not entire “*claims*.” (Mot. for Recons. at 4 (emphasis in

original).) Plaintiff further asserts that the Court’s decision was somehow “*sua sponte*,” and that the Court failed to consider “additional issues not addressed in the MSJs,” such as “materially misleading and erroneous board materials published in public disclosures *and* process failures.” (*Id.* at 9-11 (emphasis in original).) None of Plaintiff’s assertions withstand scrutiny.

First, Plaintiff’s attempted distinction between “claims” and “specific issues” is meritless. Plaintiff’s Second Amended Complaint generically pleaded three causes of action against Directors Wrotniak, Coddington, McEachern, and Kane: (1) breach of the fiduciary duty of care; (2) breach of the fiduciary duty of loyalty; and (3) breach of the fiduciary duty of candor. (*See* Second Am. Compl. (“SAC”) ¶¶ 173-192.) Due to Plaintiff’s vague and obtuse pleading, the Individual Defendants consistently sought clarity from Plaintiff as to what specific RDI Board decisions he claims are actionable breaches as compared to what activities he considers to be mere evidence of entrenchment or misconduct. As a result, at the first summary judgment hearing held on October 7, 2016, the Court directed Plaintiff’s counsel to “give me more information” following the completion of discovery as to the specific breaches of fiduciary duty Plaintiff is alleging. (Ex. A to the Decl. of Noah Helpert in Supp. of Ind. Defs.’ Suppl. Mots. for Summ. J. (10/7/16 Hr’g Tr.) at 84:16-85:3.)

Plaintiff’s counsel finally complied with this directive in opposing the Individual Defendants’ Supplemental Motions for Summary Judgment, in which he set forth six “matters” that he claimed were “independently entailing or constituting breaches of fiduciary duty”: (1) the threat to terminate Plaintiff “if he did not resolve [the Cotter family] trust disputes”; (2) Plaintiff’s actual termination; (3) the authorization of the exercise of the 100,000 share option; (4) the permanent CEO search, which resulted in Ellen Cotter’s selection; (5) the decision to hire Margaret Cotter as Executive Vice President, Real Estate Development-New York; and (6) the Board’s response to the indications of interest presented by Patton Vision. (*See, e.g.*, Pl.’s Opp’n to Ind. Defs.’ Suppl. Mot. for Summ. J. Nos. 1 & 2 at 5-6.) Not surprisingly, the Individual Defendants moved for summary judgment on all six of these purportedly-actionable “breaches.” Contrary to Plaintiff’s baseless assertions (Mot. for Recons. at 8), there was therefore no disconnect between the “*claims* for breach of fiduciary duty” against

1 the Individual Defendants in the Second Amended Complaint and the “*issues*” covered in their
2 motions for summary judgment.

3 Second, Plaintiff was also clearly on notice that the Individual Defendants were moving
4 for summary judgment on all claims asserted against Directors Wrotniak, Coddington, McEachern,
5 and Kane. There was no surprise “*sua sponte*” ruling by the Court, nor anything procedurally
6 improper about its decision. Plaintiff conspicuously avoids that (i) the Individual Defendants’
7 Motion for Partial Summary Judgment (No. 2) on the Issue of Director Independence covered *all*
8 *claims*, and (ii) Plaintiff admittedly used the *same evidence* to question the disinterestedness and
9 independence of Directors Wrotniak, Coddington, McEachern, and Kane in every transaction or
10 cause of action at issue. (*See, e.g.*, Pl.’s Opp’n to Ind. Defs.’ Mot. for Partial Summ. J. (No. 2)
11 re: Director Independence at 1-10.)

12 Plaintiff has advocated, and the Court has accepted,³ a legal framework governing
13 Plaintiff’s Nevada law claims under which, “with respect to the challenged actions the individual
14 director defendants [can] . . . invok[e] the business judgment rule” if “the majority of those
15 making the challenged decisions were independent generally and independent specifically with
16 respect to the challenged decisions.” (*Id.* at 1.) Plaintiff’s expert, Myron T. Steele, has agreed,
17 emphasizing in his deposition that any decision by “a majority of independent, disinterested
18 directors . . . wouldn’t raise any issues under Delaware law.” (Decl. of Noah Helpert in Supp. of
19 Ind. Defs.’ Opp’n to Mot. for Recons., Ex. A (10/19/16 Steele Tr.) at 140:15-141:12.) As Steele
20 testified, Delaware has a “two-step analysis”; “[i]n the first step, if there are no facts sufficiently
21 pleaded to suggest a lack of independence and interest – in – interestedness, then you get – don’t

22 ³ For the reasons previously set forth in the Individual Defendants’ summary judgment
23 briefing relating to Plaintiff’s termination and reinstatement claims, the Individual Defendants
24 continue to disagree that this “independence-based” framework involving the potential
25 application of Delaware’s “entire fairness” test governs the particular Nevada law fiduciary duty
26 claims asserted by Plaintiff or is a pre-condition to the application of the Nevada business
27 judgment rule presumption. However, the Individual Defendants accept this framework for the
28 purposes of responding to Plaintiff’s Motion for Reconsideration only. The Individual
Defendants further reserve their rights with respect to the Court’s legal ruling as to whether a
genuine issue of material fact exists as a matter of law with the independence and/or
disinterestedness of Directors Guy Adams, Ellen Cotter, and Margaret Cotter, and as well as the
continued viability of any claims against them.

1 go to the next line of inquiry and reach any decision about whether there was any breach of
2 fiduciary duty because [the directors] get the benefit of the business judgment rule.” (*Id.*
3 at 150:6-151:8.) This is why, in his Expert Report, Steele emphasizes that the predicate inquiry
4 is whether “an independent and disinterested majority of directors” at RDI took an action before
5 he opines whether it could potentially constitute a breach of the Individual Defendants’ “duty of
6 loyalty to the Company” on the merits. (Decl. of Noah Helpen in Supp. of Renewed MIL re:
7 Myron Steele, Ex. D (Initial Steele Expert Report) at 3-4.)

8 Thus, while Plaintiff in his Motion for Reconsideration now identifies thirteen “matters”
9 of purported individual misconduct that he claims rebut the business judgment presumption (*see*
10 Mot. for Recons. at 12-13), he is putting the proverbial cart before the horse. The Court
11 correctly recognized this problem at the December 11, 2017 hearing, pointing out to Plaintiff’s
12 counsel that these are really “one of your claims of breach of fiduciary duty,” and that Plaintiff—
13 despite ample opportunity—still was not providing any “evidence of disinterestness as opposed
14 to allegations of [conduct allegedly constituting] breach of fiduciary duty.” (Ex. 3 (12/11/17
15 Hr’g Tr.) to Pl.’s Mot. for Recons. at 36:10-37:3; *see also id.* at 33:2-10, 33:13-17 (noting that, “I
16 looked through this whole pile of about 2 [feet] of paper last night trying to find it, and the only
17 [director] I could find specific allegations of a lack of disinterestedness, besides the two Cotter
18 sisters, was Mr. Adams”.)

19 Before Plaintiff can question the substantive merits of these thirteen RDI Board decisions
20 and proceed to trial on some kind of generalized usurpation and entrenchment theory against the
21 various Individual Defendants,⁴ he must first show that a majority of the directors involved in
22 these decisions were either interested or not independent—Plaintiff cannot simply skip this “first
23 step” in the legal analysis. *See Goldman v. Pogo.com, Inc.*, No. Civ. A. 18532-NC, 2002 WL
24 1358760, at *2 (Del. Ch. June 14, 2002) (“Only upon a showing by a challenger that raises a
25 reasonable doubt as to the independence and/or disinterestedness of a majority of a company’s
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27 ⁴ Given that two of the directors who he claims to be guilty of usurpation and
28 entrenchment are the controlling stockholders of the Company, it remains unclear to Defendants
who they usurped control from, and who they were attempting to entrench themselves against.

1 directors who approved the challenged transaction will the presumption of director fealty which
2 lies at the core of the business judgment rule be rebutted.”). To do so otherwise, as Plaintiff
3 advocates, would turn Nevada’s strong business judgment rule on its head, forcing defendants to
4 prove fairness on the merits before the business judgment presumption could be applied. *See*
5 *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 632, 137 P.3d 1171, 1178-79 (2006); NRS
6 78.138(3), (7). Even Plaintiff’s expert, Myron Steele, has agreed. At his deposition, he
7 conceded that “two independent, objective directors could disagree” on the proper process for a
8 board decision, and admitted that “[t]he mere fact that people have voted in a certain way
9 certainly is not dispositive on th[e] issue of breach of fiduciary duty.” (Decl. of Noah Helpert in
10 Supp. of Ind. Defs.’ Opp’n to Mot. for Recons., Ex. A (10/19/16 Steele Tr.) at 160:14-161:2.)

11 Ultimately, what Plaintiff calls “intentional misconduct” is merely a series of RDI Board
12 decisions, including and post-dating his termination, with which he disagrees. Standing alone,
13 these decisions are not themselves evidence of any breach of fiduciary duty, as the Court and
14 former Justice Steele have noted. To proceed to trial on fiduciary duty claims arising from these
15 transactions against Directors Wrotniak, Coddington, McEachern, and Kane, Plaintiff must, at a
16 minimum, first show that these directors were either interested in, or not independent with
17 respect to, each transaction alleged to be a breach of fiduciary duty. The Court correctly found at
18 the December 11, 2017 hearing that Plaintiff did not meet the required interestedness/non-
19 independence showing with respect to these four Defendants, and Plaintiff’s re-hash of his
20 previous arguments provides no basis to revisit that considered decision. Plaintiff’s claim that
21 the Court “did not adequately consider” purported “intentional misconduct by directors” (Mot.
22 for Recons. at 5) is therefore baseless, and his Motion for Reconsideration should be denied.⁵

23 ⁵ Putting aside that Nevada law applies here, the Delaware Supreme Court has noted
24 that “Delaware courts have often decided director independence as a matter of law at the
25 summary judgment stage,” and the Court’s choice to do so on December 11, 2017 certainly was
26 not an outlier. *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 649 (Del. 2014) (citing *In re*
27 *Transkaryotic Therapies, Inc.*, 954 A.2d 346, 369-70 (Del. Ch. 2008) and *In re Gaylord*
28 *Container Corp. S’holders Litig.*, 753 A.2d 462, 465 (Del. Ch. 2000)); *see also* *SEPTA v.*
Volgenau, C.A. No. 6354-VCN, 2013 WL 4009193, at *12-21 (Del. Ch. Aug. 5, 2013) (holding,
on summary judgment, that directors on the special committee were disinterested and
independent).

1 2. The Court Correctly Determined That Plaintiff Did Not Raise a Genuine
2 Issue of Material Fact as to the Disinterestedness or Independence of
3 Directors Wrotniak, Coddington, McEachern, and Kane

4 Even if the Court were to revisit its decision with respect to the disinterestedness or
5 independence of Directors Wrotniak, Coddington, McEachern, and Kane, it is clear that the Court’s
6 December 11, 2017 ruling was correct as a matter of law, and certainly not “clearly erroneous,”
7 as required by the Nevada Supreme Court for reversal. Plaintiff’s Motion for Reconsideration
8 provides no evidence—let alone “substantially different” evidence—to the contrary.

9 None of these four RDI directors were “interested” in *any* of the transactions placed at
10 issue by Plaintiff. In Nevada, “[n]o issue of self-interest exists where directors did not stand on
11 both sides of the transaction or receive any personal financial benefit.” *La. Mun. Police Emps.’*
12 *Ret. Sys. v. Wynn*, No. 2:12-cv-509 JCM, 2014 WL 994616, at *4 (D. Nev. Mar. 13, 2014)
13 (applying Nevada law); *see also* NRS 78.140(1)(a) (defining “interested director”); *Shoen*, 122
14 Nev. at 639, 137 P.3d at 1183 (“to show interestedness” in the context of analyzing futility of
15 demand, the board member must be “materially affected, either to [their] benefit or detriment, by
16 a decision of the board, in a manner not shared by the corporation and the stockholders”). Here,
17 there are no allegations, let alone evidence, that Directors Wrotniak, Coddington, McEachern, or
18 Kane stood on both sides of any challenged transaction or received any personal financial benefit
19 as the result of any decision by the RDI Board put at issue by Plaintiff. (*See* Mot. for Recons.
20 at 12-13 (listing thirteen transactions, none of which involved financial benefits accruing to these
21 four directors).) Accordingly, these directors are disinterested as a matter of law.

22 Instead, the only possible avenue for Plaintiff to challenge the decisions made by
23 Directors Wrotniak, Coddington, McEachern, and Kane is through a lack of independence. This is a
24 difficult task. “[T]here is a presumption that directors are independent,” *In re MFW S’holders*
25 *Litig.*, 67 A.3d 496, 509 (Del. Ch. 2013), *aff’d sub nom.*, *Kahn v. M & F Worldwide*, 88 A.2d
26 635 (Del. 2014), and “even proof of majority ownership of a company does not strip the directors
27 of the presumptions of independence, and that their acts have been taken in good faith and in the
28 best interests of the corporation.” *Aronson v. Lewis*, 473 A.2d 805, 815 (Del. 1984). Plaintiff
 “has the burden” to show “particularized facts that create a reasonable doubt to rebut the

1 presumption” that Directors Wrotniak, Coddington, McEachern, and Kane were independent of
2 Ellen and Margaret Cotter. *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845
3 A.2d 1040, 1050 (Del. 2004). This requires that he introduce facts showing that these four non-
4 Cotter directors are so “beholden” to Ellen and Margaret Cotter “or so under their influence that
5 their discretion would be sterilized.” *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993); *Shoen*,
6 122 Nev. at 639, 137 P.3d at 1183 (same); *In re AMERCO Deriv. Litig.*, 127 Nev. 196, 219, 252
7 P.3d 681, 698 (2011) (same).⁶ To raise a genuine issue of fact as to independence, Plaintiff
8 needs “particularized” facts showing that each of these directors “would be more willing to risk
9 his or her reputation than risk the relationship with” Ellen or Margaret Cotter. *Teamsters*
10 *Union 25 Health Servs. & Ins. Plan v. Baiera*, 119 A.3d 44, 59 (Del. Ch. 2015).

11 Plaintiff’s case is nothing more than a recitation of what the directors allegedly did,
12 coupled with his assertion that they could not possibly have done what they allegedly did if they
13 were independent, and, ergo, that they were not independent. The “evidence” submitted by
14 Plaintiff in his summary judgment papers and with his Motion for Reconsideration falls far short
15 of this stringent test to show lack of “independence” with respect to Directors Wrotniak,
16 Coddington, McEachern, and Kane.

17 (a) Michael Wrotniak

18 Plaintiff’s Motion for Reconsideration offers no new evidence or argument challenging
19 the independence of Director Michael Wrotniak. As established in the Individual Defendants’
20 prior briefing (*see* Ind. Defs.’ Mot. for Partial Summ. J. (No. 2) re: Director Independence at 21-
21 22; Ind. Defs.’ Reply in Supp. Mot. for Partial Summ. J. (No. 2) re: Director Independence at 8-
22 9), Wrotniak was clearly independent of Margaret and Ellen Cotter as a matter of law. The
23 alleged “close friendship” of which Plaintiff complains is actually between Margaret Cotter and
24 Wrotniak’s wife—not Wrotniak himself. (SAC ¶¶ 131-133.) In fact, the undisputed evidence
25 instead indicates that Margaret Cotter did not have a substantial “ongoing relationship” with

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27 ⁶ The Nevada Supreme Court has yet to make clear whether the “beholden” standard for
28 independence applies outside of the demand futility context. Nevada statute evaluates
independence solely on whether a director stands on both sides of a transaction. *See* NRS
78.140(1)(a).

1 Wrotniak; she would see him about “once a year” prior to his joining the RDI Board, and their
2 communications were mainly limited to “email” and focused on the topic of “show tickets.”
3 (HD#2 Ex. 6 (5/13/16 M. Cotter Dep.) at 314:10-327:18.)⁷

4 “Allegations of mere personal friendship or a mere outside business relationship, standing
5 alone, are insufficient to raise a reasonable doubt about a director’s independence.” *Beam*, 845
6 A.2d at 1050. Plaintiff’s allegations and evidence vis-à-vis Wrotniak fall well short of the kind
7 of “thick as blood relations” that could possibly undermine Wrotniak’s presumptive
8 independence. *See In re MFW S’holders Litig.*, 67 A.3d at 509 n.37 (no justified concerns
9 regarding independence where the parties “occasionally had dinner over the years, go to some of
10 the same parties and gatherings annually, and call themselves ‘friends’”); *Beam*, 845 A.2d
11 at 1051 (“Allegations that Stewart and the other directors moved in the same social circles,
12 attended the same weddings, developed business relationships before joining the board, and
13 described each other as ‘friends,’ even when coupled with Stewart’s 94% voting power, are
14 insufficient, without more, to rebut the presumption of independence.”); *La. Mun. Police Emps.’*
15 *Ret. Sys.*, 2016 WL 3878228, at *6-7 (applying Nevada law and finding that a 23-year friendship
16 with dominant stockholder, coupled with political contributions, threat against an opponent in an
17 election, and a million dollar charitable contribution did not disturb the presumption of
18 independence).

19 Similarly, the Cotter sisters’ participation in the proposal of Wrotniak as a nominee to the
20 RDI Board is irrelevant as a matter of law, and any argument to the contrary “has consistently
21 been rejected” by courts. *Andreae v. Andreae*, Civ. A. No. 11,905, 1992 Del. Ch. LEXIS 44,
22 at *13-14 (Del. Ch. Mar. 3, 1992) (also noting that “the relevant inquiry is not how the director
23 got his position, but rather how he comports himself in that position”); *In re W. Nat’l Corp.*
24 *S’holders Litig.*, No. 15927, 2000 WL 710192, at *16 (Del. Ch. May 22, 2000) (prior
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26 ⁷ In order to minimize the attachment of redundant paper, “HD#2” refers to exhibits
27 attached to the Declaration of Noah Helpen in Support of the Individual Defendants’ Motion for
28 Partial Summary Judgment (No. 2) re: the Issue of Director Independence, while “HD#1” refers
to exhibits attached to the Declaration of Noah Helpen in Support of the Individual Defendants’

1 relationship with, and nomination by, a significant or controlling shareholder “merely
2 establishes” that board member was “known and trusted,” not that director was “beholden”). In
3 light of the actual facts, the Court’s decision finding that Director Wrotniak was disinterested
4 and independent, and granting judgment in his favor on all claims, was not clearly erroneous.

5 (b) Judy Coddling

6 The only “evidence” of Director Judy Coddling’s purported lack of independence offered
7 by Plaintiff in his Motion for Reconsideration comes from his previously-submitted declaration,
8 in which he claims that Coddling once told him around the time of her appointment that “only a
9 Cotter should be CEO” of RDI. (Mot. for Recons. at 22 (citing JJC Decl. ¶ 24).) This argument
10 was already raised and refuted at the summary judgment stage. (*See* Ind. Defs.’ Mot. for Partial
11 Summ. J. (No. 2) re: Director Independence at 20 & nn.4-5.)

12 It is well established that a self-serving affidavit from a party will not defeat a summary
13 judgment motion. *See Clauson v. Lloyd*, 103 Nev. 432, 434-35, 743 P.2d 631, 633 (1987);
14 *Weeks v. Samsung Heavy Indus. Co., Ltd.*, 126 F.3d 926, 939 (7th Cir. 1997) (plaintiff’s own
15 uncorroborated testimony is insufficient to defeat a motion for summary judgment); *Dupont v.*
16 *United States*, 663 F. Supp. 2d 961, 966 n.13 (D. Haw. 2009) (“uncorroborated allegations and
17 ‘self-serving testimony’” do not “create a genuine issue of material fact”). Moreover, the
18 purported statement by Coddling identified in Plaintiff’s declaration is hearsay, which cannot be
19 considered on a motion for summary judgment. *See Henry v. Nanticoke Surgical Assocs., P.A.*,
20 931 A.2d 460, 462 (Del. 2007) (“The Court should not consider inadmissible hearsay when
21 deciding a Motion for Summary Judgment.”). Even on the merits, the purported statement from
22 Coddling—that either Ellen Cotter, Margaret Cotter, *or Plaintiff* should be CEO—actually
23 undermines his claim that Coddling is not independent from the Cotter sisters, as she was
24 apparently willing to contemplate his return as permanent CEO of RDI (which is what he seeks
25 in this lawsuit). And, of course, any purported policy consideration held by Coddling that one of
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27 Motion for Partial Summary Judgment (No. 1) re: Plaintiff’s Termination and Reinstatement
28 Claims.

1 the controlling stockholders of RDI would be best suited to run the Company is, itself, not
2 evidence that she is “beholden” to any of them.

3 As established in the Individual Defendants’ prior briefing (*see* Ind. Defs.’ Mot. for
4 Partial Summ. J. (No. 2) re: Director Independence at 19-20; Ind. Defs.’ Reply in Supp. Mot. for
5 Partial Summ. J. (No. 2) re: Director Independence at 7-8), Coddington was clearly independent of
6 Margaret and Ellen Cotter as a matter of law. Plaintiff himself has admitted that Coddington
7 “might” satisfy a “legal technical definition of independence.” (HD#2 Ex. 7 (5/16/16 J. Cotter,
8 Jr. Dep.) at 70:18-71:6.) It is also undisputed that Coddington has a “limited” relationship with
9 Ellen and Margaret Cotter; before Ellen Cotter asked Coddington to consider becoming a director,
10 she had met Coddington only five or ten times over the course of fifteen years. (*See* Ex. 16 (5/19/16
11 E. Cotter Dep.) to Pl.’s Opp’n to Ind. Defs.’ Mot. for Partial Summ. J. (No. 2) re: Director
12 Independence at 307:19-308:7.)

13 While Coddington does have a friendship with Mary Cotter, the mother of the Cotter
14 siblings who is not a defendant and is not herself a director or significant stockholder of RDI,
15 that relationship is entirely irrelevant to the legal issue of whether Coddington is “beholden” to
16 Ellen and Margaret Cotter, and therefore “unable to consider a business decision on the merits”
17 as it relates to their interests. *La. Mun. Police Emps.’ Ret. Sys.*, 2014 WL 994616, at *7. Indeed,
18 like Coddington, Plaintiff himself has had a “long-standing personal relationship” with his mother
19 but considers himself “independent.” (HD#2 Ex. 7 (5/16/16 J. Cotter, Jr. Dep.) at 71:8-72:15.)
20 Moreover, there exists no non-hearsay evidence establishing what Mary Cotter thinks as to the
21 intra-family fight, whether she has even communicated her feelings to Coddington, and whether
22 Mary Cotter’s view would be in any way material to Coddington’s exercise of her director duties.
23 “Mere insinuation is unfair and improper,” and Plaintiff’s pure speculation does not “support a
24 reasonable inference” that Coddington “could not act independently.” *In re W. Nat’l Corp.*
25 *S’holders Litig.*, 2000 WL 710192, at *16.

26 In addition, like Wrotniak, the fact that Ellen and Margaret Cotter supported Coddington’s
27 nomination to the RDI Board is irrelevant to the independence inquiry. *See White v. Panic*, 793
28 A.2d 356, 366 (Del. Ch. 2000) (“[T]he law is well-settled that [a defendant’s] involvement in

1 selecting [board members] is insufficient to create a reasonable doubt about their
2 independence.”); *Frank v. Elgamal*, C.A. No. 6120-VCN, 2014 WL 957550, at *22 (Del. Ch.
3 Mar. 10, 2014) (“Merely because a director is nominated and elected by a large or controlling
4 shareholder does not mean that [s]he is necessarily beholden to [her] initial sponsor.”). As with
5 Wrotniak, Coddling’s limited relationships with Ellen and Margaret Cotter are hardly the kind
6 that would support a finding that Coddling is “so under their influence that [her] discretion would
7 be sterilized.” *Rales*, 634 A.2d at 936. Accordingly, the Court’s decision finding that Director
8 Coddling was disinterested and independent, and granting judgment in her favor on all claims,
9 was not clearly erroneous.

10 (c) Douglas McEachern

11 Plaintiff’s Motion for Reconsideration offers no new evidence or argument challenging
12 the independence of Director Douglas McEachern. The entirety of Plaintiff’s attack focuses on
13 rehashing his previous objections to certain Board decisions supported by McEachern (*see* Mot.
14 for Recons. at 12-13, 15-23), but—as the Court correctly noted at the December 11, 2017
15 hearing—support for a particular transaction is not itself evidence of a lack of independence. *See*
16 *also Aronson*, 473 A.2d at 817 (“mere directorial approval of a transaction, absent particularized
17 facts . . . otherwise establishing the lack of independence or disinterestedness of a majority of the
18 directors, is insufficient” to support a breach of fiduciary duty claim). Plaintiff again offers
19 absolutely no evidence as to why McEachern’s discretion would be sterilized or why he would
20 be “beholden” in any way to Ellen or Margaret Cotter; he identifies no disqualifying financial
21 connection or personal relationship that would call into question McEachern’s impartial
22 judgment.

23 Instead, the actual evidence is that McEachern made considered decisions. For instance,
24 in determining whether to continue Plaintiff’s employment as CEO, McEachern concluded after
25 months of close scrutiny that Plaintiff lacked the necessary experience and management ability,
26 undercut fellow executives and wasted time, did not interact with staff, acted in an abusive
27 manner to RDI’s employees, had an inability to communicate with people and create trust, and
28 was not moving the Company forward. (HD#1 Ex. 7 (5/6/16 McEachern Dep.) at 49:25-50:7,

1 50:19-52:5, 112:18-114:15, 28:23-286:11, 292:25-293:9, 293:23-294:15.) As McEachern
2 testified, “from August of 2014 until [Plaintiff’s] termination, I cannot tell you one thing that we
3 did that created value for the company, one thing that Jim Cotter, Jr. managed to do. Nothing.”
4 (*Id.* at 292:2-5.) Plaintiff’s mere disagreement with McEachern’s business judgment as an RDI
5 director falls far short of his burden of identifying “admissible evidence” showing “a genuine
6 issue for trial” regarding McEachern’s independence. *Posadas v. City of Reno*, 109 Nev. 448,
7 452, 851 P.2d 438, 442 (1993); *Shuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434,
8 436, 245 P.3d 542, 543 (2010) (“bald allegations without supporting facts” are insufficient).

9 Moreover, as the Individual Defendants have repeatedly emphasized (*see* Ind. Defs.’
10 Mot. for Partial Summ. J. (No. 2) re: Director Independence at 5, 15, 23; Ind. Defs.’ Reply in
11 Supp. Mot. for Partial Summ. J. (No. 2) re: Director Independence at 4), Plaintiff has already
12 **admitted** that Director McEachern is **independent**. When asked at his deposition, “Mr.
13 McEachern, is he independent, in your view?” Plaintiff answered: “Yes. I mean, he’s – I mean,
14 again, he’s independent. He’s got no relationship with Ellen and Margaret or, you know, no
15 business relationship with Ellen and Margaret.” (HD#2 Ex. 7 (5/16/16 Cotter, Jr. Dep.) at 84:21-
16 85:1.) When pressed as to whether, “in your view, Mr. McEachern is independent and has
17 always been independent,” Plaintiff responded “Okay. Yes.” (*Id.* at 85:6-86:4.) Plaintiff, as in
18 prior briefing, never confronts this critical admission in his Motion for Reconsideration. This
19 alone is sufficient to warrant summary judgment in McEachern’s favor, and the Court’s decision
20 to do so was obviously not clearly erroneous.

21 (d) Edward Kane

22 As with Director McEachern, Plaintiff’s Motion for Reconsideration offers no new
23 evidence or argument challenging the independence of Director Edward Kane. Instead, Plaintiff
24 admittedly provides only a repeat of his previous complaints as to the **substance** of Kane’s
25 decisions as an RDI Board member, beginning with Plaintiff’s termination. (*See* Mot. for
26 Recons. at 15 (“As Plaintiff demonstrated in his own summary judgment motion and in his
27 oppositions to Partial MSJ No. 1, and as summarized again below, . . .”).) As with McEachern,
28 Plaintiff’s attempt to challenge the “entire fairness” of Kane’s decisions as an RDI Board

1 member is premature (and ultimately unsupportable). Plaintiff must first establish that Kane was
2 not disinterested or not independent—which he cannot do.

3 Plaintiff's attacks on Kane's independence in his previous filings were without legal
4 merit. Plaintiff has not identified any financial connection or monetary dependence between
5 Kane and the Cotter sisters, nor can he. Moreover, as previously established by the Individual
6 Defendants, Kane also has no "personal relationship" with Ellen or Margaret Cotter sufficient to
7 raise a triable issue of fact as to his independence. (*See* Ind. Defs.' Mot. for Partial Summ. J.
8 (No. 2) re: Director Independence at 16-17; Ind. Defs.' Reply in Supp. of Mot. for Partial Summ.
9 J. (No. 2) re: Director Independence at 5.) As Plaintiff has conceded (*see* Pl.'s Supp. Opp'n to
10 MSJ Nos. 1 & 2 at 8), the friendship of which he complains was actually between Kane and his
11 father, not between Kane and Ellen or Margaret Cotter.

12 Plaintiff has never cited any evidence indicating that Kane's friendship with James J.
13 Cotter, Sr. has resulted in him having a closer relationship with Cotter, Sr.'s daughters than with
14 his son. Indeed, while Ellen and Margaret Cotter have, at times, referred to Director Kane as
15 "Uncle Ed," so has Plaintiff. (HD#2 Ex. 3 (5/2/16 Kane Dep.) at 29:4-35:6; HD#2 Ex. 7
16 (5/16/16 Cotter, Jr. Dep.) at 83:6-12.) Plaintiff does not dispute that he has known Kane all of
17 his life and even visited Kane at his home as late as the spring of 2015, just weeks before his
18 termination, to personally implore Kane to help Plaintiff resolve his disputes with his sisters and
19 retain his position as CEO. (HD#2 Ex. 3 (5/2/16 Kane Dep.) at 35:10-22; HD#2 Ex. 8 (7/26/16
20 Cotter, Jr. Dep.) at 753:9-754:8.) Even if Kane were Ellen and Margaret Cotter's actual "uncle"
21 (and not Plaintiff's), that is considered a "more remote family relationship" that is "not
22 disqualifying" to a director's independence as a matter of law in Nevada. *In re Amerco Deriv.*
23 *Litig.*, 127 Nev. at 232-33, 252 P.3d at 706 (Pickering, J., concurring in part and dissenting in
24 part); 1 *Principles of Corporate Governance* § 1.26 (1994) (an uncle/nephew relationship does
25 not establish the parties as members of one another's immediate families).

26 In addition, Plaintiff has never explained why Director Kane's "understanding" that
27 James J. Cotter, Sr. intended for Margaret Cotter to control his personal estate would affect his
28 independence as an RDI Board member. (*See* Ind. Defs.' Reply in Supp. of Mot. for Summ. J.

1 (No. 1) re: Plaintiff’s Termination and Reinstatement Claims at 5-7.) As the undisputed
2 evidence establishes, it was actually Plaintiff who involved Kane in the trust settlement
3 discussions; Kane supported such a settlement because, as Kane explained to Plaintiff at the
4 time, he—like Plaintiff—believed that a settlement would end all the “ill feelings,” “enhance the
5 company, benefit [Plaintiff] and [his] sisters and allow [the Cotters] to work together going
6 forward.” Further, it would give Plaintiff the time to prove “that [he] do[es] in fact have the
7 leadership skills to run this company.” (Ex. 4 (5/28/16 emails between Kane and Cotter, Jr.) to
8 Pl.’s Opp’n to Ind. Defs.’ Mot. for Partial Summ. J. (No. 2) at 32-33.)

9 All evidence shows that Director Kane engaged in any settlement-related discussions on
10 exactly the terms *Plaintiff* requested prior to his termination (*see* Ind. Defs.’ Reply in Supp. of
11 Mot. for Summ. J. (No. 1) re: Plaintiff’s Termination and Reinstatement Claims at 5-7
12 (collecting evidence)); none of it shows the kind of bias in favor of Ellen and Margaret Cotter
13 (and against Plaintiff) required by law to challenge Kane’s independence. *See Beam*, 845 A.2d
14 at 1050. Indeed, while Plaintiff claims that Kane somehow “extorted” him, the actual evidence
15 is that Kane supported a negotiated resolution of the trust dispute because he knew by mid-June
16 that “there were votes there to terminate [Plaintiff]” and that he himself would be “voting against
17 him” if Plaintiff’s leadership deficiencies were not alleviated by the kind of further oversight and
18 more harmonious management structure contemplated in the pending settlement deal—
19 including, for example, oversight of Plaintiff’s management by an Executive Committee. (*See*
20 HDO Ex. 7 (6/9/16 Kane Dep.) at 596:13-25; HDO Ex. 5 (5/2/16 Kane Dep.) at 193:3-195:2.)⁸

21 Given the clear insufficiency of Plaintiff’s challenges, coupled with the fact that
22 Plaintiff—mere weeks before his termination—approved an SEC filing that identified Kane as
23 “independent” (HD#2 Ex. 11 (5/8/15 RDI From 10-K/A, Am. No. 1) at -5644 & -5665), the
24 Court’s December 11, 2017 that Plaintiff has not met his burden of showing a genuine issue for
25 trial with respect to Kane’s independence was not clearly erroneous.

26
27
28 ⁸ “HDO” refers to the Declaration of Noah Helpert filed in support of the Individual Defendants’ Opposition to Plaintiff’s Motion for Partial Summary Judgment.

1 **CONCLUSION**

2 For the reasons set forth above, the Individual Defendants respectfully request that the
3 Court deny Plaintiff's Motion for Reconsideration or Clarification of Ruling on Motions for
4 Summary Judgment Nos. 1, 2, and 3.

5 Dated: December 26, 2017

6 **COHENJOHNSONPARKEREDWARDS**

7
8 By: /s/ H. Stan Johnson

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EXHIBIT A

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES COTTER, JR., derivatively)
on behalf of Reading International,))
Inc.,))
Plaintiff,))
vs.) Case No.
MARGARET COTTER, ELLEN COTTER,) A-15-719860-B
GUY ADAMS, EDWARD KANE, DOUGLAS))
McEACHERN, TIMOTHY STOREY, WILLIAM))
GOULD, JUDY CODDING, MICHAEL))
WROTONIAK, and DOES 1 through 100,))
inclusive,))
Defendants,))
and) Case No.
READING INTERNATIONAL, INC.,) P-14-082942-E
a Nevada corporation,))
Nominal Defendant.))

(CAPTION CONTINUED ON NEXT PAGE.)

VIDEOTAPED DEPOSITION OF MYRON STEELE

Philadelphia, Pennsylvania

Wednesday, October 19, 2016

Reported by:

Susan Marie Migatz, RMR, CRR

JOB No. 2463323

PAGES 1 - 185

<p>1 T2 PARTNERS MANAGEMENT, LP, a) 2 Delaware limited partnership,) 3 doing business as KASE CAPITAL) 4 MANAGEMENT, et al.,) 5 Plaintiff,) 6 vs.) 7 MARGARET COTTER, ELLEN COTTER,) 8 GUY ADAMS, EDWARD KANE, DOUGLAS) 9 McEACHERN, WILLIAM GOULD, JUDY) 10 CODDING, MICHAEL WROTONIAK, CRAIG) 11 THOMPSON, and DOES 1 through 100,) 12 inclusive,) 13 Defendants,) 14 and) 15 READING INTERNATIONAL, INC.,) 16 a Nevada corporation,) 17 Nominal Defendant.) 18 _____) 19 20 Videotaped Deposition of MYRON STEELE, 21 taken at Greenberg Traurig, LLP, 2700 One Commerce 22 Square, 2001 Market Street, Philadelphia, 23 Pennsylvania, commencing at 10:25 a.m., before Susan 24 Marie Migatz, a Federally Approved Registered Merit 25 Reporter, Certified Realtime Reporter, Certified LiveNote Reporter, and Notary Public.</p> <p style="text-align: right;">Page 2</p>	<p>1 APPEARANCES: (Continued) 2 3 For Defendants William Gould and Timothy Storey: 4 5 BIRD MARELLA, P.C. 6 BY: EKWAN E. RHOW, ESQUIRE 7 SHOSHANA E. BANNETT, ESQUIRE 8 1875 Century Park East, 23rd Floor 9 Los Angeles, CA 90067 10 310-201-2100 11 erhow@birdmarella.com 12 sbannett@birdmarella.com 13 14 FOR NOMINAL DEFENDANT: (Via Teleconference) 15 16 GREENBERG TRAURIG, LLP 17 BY: MARK E. FERRARIO, ESQUIRE 18 2450 Colorado Avenue, Suite 400E 19 Santa Monica, California 90404 20 702-792-3773 21 ferrariom@gtlaw.com 22 23 ALSO PRESENT: 24 RUSS STRAIN, Videographer 25</p> <p style="text-align: right;">Page 4</p>
<p>1 APPEARANCES: 2 3 For the Plaintiff James Cotter, Jr.: 4 5 LEWIS ROCA ROTHGERBER, LLP 6 BY: MARK G. KRUM, ESQUIRE 7 3993 Howard Hughes Parkway, Suite 600 8 Las Vegas, NV 89169 9 702-949-8217 10 mkrum@lrrlaw.com 11 12 For Defendants Margaret Cotter, Ellen Cotter, 13 Douglas McEachern, Guy Adams, Edward Kane, Judy 14 Coddington, and Michael Wrotoniak: 15 16 QUINN EMANUEL URQUHART & SULLIVAN, LLP 17 BY: MARSHALL SEARCY, ESQUIRE 18 865 South Figueroa Street, 10th Floor 19 Los Angeles, CA 90017 20 213-443-3152 21 marshallsearcy@quinnemanuel.com 22 23 24 25</p> <p style="text-align: right;">Page 3</p>	<p>1 INDEX 2 3 MYRON STEELE PAGE 4 By Mr. Searcy 7 5 By Mr. Rhow 146 6 By Mr. Ferrario 171 7 8 9 EXHIBITS 10 NUMBER DESCRIPTION PAGE 11 12 Exhibit 441 Expert report with attached 13 exhibits 18 14 Exhibit 442 E-mail, 8/25/16, to Bole from 15 Krum, STEELE000808 21 16 Exhibit 443 E-mail, 8/25/16, to Bole from 17 Krum, STEELE000809-'810 27 18 Exhibit 444 Handwritten notes, STEELE000107- 19 '109 42 20 Exhibit 445 Summary of Rebuttal Opinion 63 21 Exhibit 446 Transcript of Deposition of 22 Margaret Cotter, 5/12/16 68 23 24 25</p> <p style="text-align: right;">Page 5</p>

<p>1 (Whereupon the video record 2 commenced: 3 THE VIDEOGRAPHER: We're now on the 4 record. 5 My name is Russ Strain representing 6 Veritext Legal Solutions. The date today is 7 October 19th, 2016. The time is 8 approximately 10:25 a.m. This deposition is 9 being held at the office of Greenberg 10 Traurig, 2001 Market Street, Philadelphia, 11 PA. 12 The caption of this case is James 13 Cotter, Jr., et al, versus Margaret Cotter, 14 et al, filed in the Eighth Judicial District 15 Court, Clark County, Nevada, Case 16 No. A-15-719860-B and Case 17 No. P-14-082942-E. 18 The name of the witness is Myron 19 Steele. 20 If counsel at this time would please 21 introduce themselves for the record. 22 MR. SEARCY: Marshall Searcy on 23 behalf of Judy Coddington, Michael Wrotniak, 24 Margaret Cotter, Ellen Cotter, Guy Adams, 25 Doug McEachern, and Ed Kane.</p> <p style="text-align: right;">Page 6</p>	<p>1 matter Cotter versus Cotter; is that right? 2 A. Yes. 3 Q. Have you had your deposition taken 4 before? 5 A. Yes. 6 Q. In how many instances? 7 A. One. 8 Q. So you've been deposed one time 9 previously? 10 A. I have. 11 Q. Are you familiar with the -- the 12 basic ground rules of depositions? 13 A. Yes. 14 Q. Okay. The most important, I suppose, 15 for today's purposes would be that we should try to 16 avoid talking over each other so that the court 17 reporter can take down everything. Do you 18 understand that? 19 A. Yes. 20 Q. And if you have any -- any questions 21 about any of my questions, if anything is unclear in 22 my question, you'll be sure to ask me for 23 clarification. 24 A. I will. 25 Q. Okay. And I'll do my best to clarify</p> <p style="text-align: right;">Page 8</p>
<p>1 MR. RHOW: Ekwan Rhaw and Shoshana 2 Bannett on behalf of Bill Gould. 3 MR. FERRARIO: Mark Ferrario on 4 behalf of Reading. 5 MR. KRUM: Mark Krum representing 6 plaintiff, James J. Cotter, Jr., and the 7 witness today. 8 THE VIDEOGRAPHER: The court reporter 9 is Susan Migatz of Veritext. Would the 10 court reporter please swear in the witness. 11 --- 12 MYRON STEELE, after having been first 13 duly sworn, was examined and testified as 14 follows: 15 --- 16 THE VIDEOGRAPHER: The testimony can 17 now proceed. 18 --- 19 EXAMINATION 20 --- 21 BY MR. SEARCY: 22 Q. Good morning, Justice Steele. 23 A. Good morning. 24 Q. You understand that I'm here on 25 behalf of certain individual defendants in this</p> <p style="text-align: right;">Page 7</p>	<p>1 it. If you don't ask me for a clarification, I'll 2 assume that you understand my question. Okay? 3 A. Fair enough. 4 Q. Okay. Now, we're going to look at 5 your expert report in a moment, but Exhibit A to 6 your expert report, is that your CV? Is that right? 7 A. I would assume so. I really didn't 8 look at the letter/number of any of the exhibits. 9 Q. All right. Well, we'll take a look 10 at it in a second just to make sure that everything 11 on it is true and accurate to your recollection. 12 Basically you've served as a judge in 13 Delaware in some form or another over the last how 14 many years? 15 A. Well, for 25 years from beginning to 16 end. 17 Q. Okay. And now you're currently 18 practicing law in Delaware? 19 A. Yes. 20 Q. Have you ever been a practitioner in 21 Nevada? 22 A. No. 23 Q. Have you ever had the opportunity to 24 write a paper on Nevada law? 25 A. No.</p> <p style="text-align: right;">Page 9</p>

<p>1 Q. During your time as a judge in 2 Delaware did you ever have a case that applied or 3 used Nevada law? 4 A. No. 5 Q. Have you ever, by yourself or working 6 with others, ever conducted any research into Nevada 7 corporate law? 8 A. The closest to that was participation 9 in an ABA seminar in Nevada in Las Vegas with 10 practicing lawyers from Nevada where the discussion 11 for the audience focused on similarities and 12 dissimilarities between Nevada and Delaware law. 13 That's one CL -- CLE out of many over the years, but 14 the only one where the focus was a comparison 15 between Nevada and Delaware. 16 Q. And do you recall when that CLE took 17 place? 18 A. No. 19 Q. Okay. 20 A. It was when I was still on the bench. 21 Q. For -- for purposes of that CLE did 22 you personally conduct any research into Nevada law? 23 A. I looked at the Nevada statutes and 24 compared them to our general corporation law; yes. 25 Q. For those purposes did you -- when</p> <p style="text-align: right;">Page 10</p>	<p>1 exculpation statute? 2 A. That's the only part of it that I 3 recall discussing. 4 Q. And do you remember there that there 5 was a discussion during that time that the Nevada 6 exculpation statute -- that's a mouthful, I'll get 7 it out -- that the Nevada exculpation statute was 8 broader than the Delaware statute? 9 A. Well, the distinction, as I 10 understood it at the time, was that Nevada allows 11 exculpation for a breach of duty of loyalty. 12 Delaware does not. 13 Q. Do you remember anything else that 14 was discussed on that panel? 15 A. Oh, there was some discussion about 16 why Nevada was doing this, whether it was to affect 17 the number of charters that it could attract to the 18 State, whether there was any case law that focused 19 on what that really would mean, and there was a 20 discussion about what implications that might have 21 for federal intervention into state space if things 22 went awry in a Nevada case where there was an 23 egregious breach of the duty of loyalty that 24 resulted in damage and then exculpation resulted in 25 no punishment for the directors.</p> <p style="text-align: right;">Page 12</p>
<p>1 you looked at the Nevada statutes, did you write 2 anything down? 3 A. No. 4 Q. Did you give any sort of presentation 5 at the CLE about the similarities or differences 6 between the Nevada statutes and Delaware statutes? 7 A. I -- it wasn't in the form of a paper 8 that was presented. It was more of a panel 9 dialogue. And the discussion was focused on 10 Nevada's adoption of exculpation for breach of duty 11 of loyalty as opposed to Delaware's 102(b)(7), which 12 would not allow that to occur. 13 Q. All right. And so you in that 14 presentation -- or I guess panel discussion is the 15 way you described it -- 16 A. Yes. 17 Q. -- that was a discussion between -- 18 was it law -- I'm sorry -- lawyers or judges from 19 Nevada and yourself? 20 A. All I remember are two attorneys 21 practicing in the area from Nevada. I don't 22 remember a Nevada judge being part of the panel. 23 Q. And you recall that there was a 24 discussion on the panel of the differences between 25 the Nevada exculpation statute and the Delaware</p> <p style="text-align: right;">Page 11</p>	<p>1 It was more of a political 2 discussion, what are the ramifications potentially 3 of that. It wasn't a discussion about which policy 4 is the better policy relative to corporate 5 governance. 6 Q. And in terms of the discussion on the 7 panel for exculpation for breach of duty of loyalty, 8 what was the panel's -- you said that the -- let me 9 back up for a second. 10 You said that the panel discussed the 11 ramifications of exculpation for breach of duty of 12 loyalty in terms of bringing in businesses into 13 Nevada; is that right? 14 A. Well, that was the -- ramifications 15 meaning what could one expect, worst case/best case 16 scenario. No one knew at the time what -- to my 17 knowledge, no one on the panel knew at the time what 18 the implications might ultimately be. There was 19 speculation about it. 20 Q. And is that -- part of the reason why 21 no one knew what the ramifications would be was 22 because the Nevada exculpation statute was so 23 different than the Delaware exculpation statute? 24 A. Well, different and had social policy 25 implications that follow exculpation for a breach of</p> <p style="text-align: right;">Page 13</p>

<p>1 duty of loyalty. It's contrary to the common law 2 and there are -- there are social policy 3 implications there. 4 And that's what drew us into the 5 discussion about if there's an egregious case, would 6 this result in, by way of example, an institutional 7 investor invested in a Nevada corporation running to 8 Washington, D.C., as a part of a group of 9 institutional investors and complaining to the SEC 10 and to Congress that there was an egregious result 11 and it was because Nevada went so far as to 12 exculpate for a breach of duty of loyalty. 13 It was pure discussion about what 14 could happen down the road with no factual basis to 15 support there would be such a case or that Congress 16 would do anything, but just like most CLEs, it was 17 talking heads on a panel discussing the issues. 18 Q. And in -- in preparation -- excuse 19 me -- for your report in this litigation, did you 20 have the opportunity to review the Nevada 21 exculpation statute? 22 A. I did look at it, yes. 23 Q. And is the text of that statute still 24 the same as it was when you were back on the panel? 25 A. To the best of my recollection. But</p> <p style="text-align: right;">Page 14</p>	<p>1 Q. Other than what you've just 2 described, have you ever been involved in any other 3 research or discussions involving Nevada corporate 4 law? 5 A. No. 6 Q. Okay. Would you agree, sir, that 7 you're not an expert in Nevada corporate law? 8 A. I would agree. 9 Q. In preparation for your expert 10 reports that you submitted, you submitted an initial 11 report and then a supplemental report; correct? 12 A. Correct. 13 Q. In preparation of those reports did 14 you conduct any research into Nevada corporate law? 15 A. No. 16 Q. Okay. In preparation of your initial 17 and expert report did anyone at your direction 18 conduct any research into Nevada corporate law? 19 A. I asked the associate who worked with 20 me in preparation of the report to document one 21 footnote you'll see in the report that refers to 22 Nevada looking from time to time to Delaware case 23 law for guidance where there was no existing Nevada 24 law. That's what I've understood largely because of 25 the CLE that I mentioned earlier, but I wanted</p> <p style="text-align: right;">Page 16</p>
<p>1 I don't -- I didn't research any changes from what 2 the Nevada lawyers told me and what I saw initially, 3 what was given to me in the materials, and what I 4 had seen most recently, which were in the papers 5 connected to this case. 6 Q. So in your research in preparation 7 for the papers in this case, did you observe that 8 the Nevada exculpation statute was still 9 fundamentally different than the Delaware 10 exculpation -- 11 A. Yes. 12 Q. -- statute? 13 A. Yes. 14 Q. And to your knowledge, has there ever 15 been any of the type of federal, we'll say, 16 interference or concerns about the Nevada 17 exculpation statute that was discussed at that -- 18 A. No. My focus my entire career has 19 been entirely on federal interference and internal 20 governance of Delaware charter corporations. 21 Q. Okay. So you -- so you're not aware 22 of any -- any federal interference when it comes to 23 Nevada corporations or in particular the Nevada 24 exculpation statute. 25 A. I am not.</p> <p style="text-align: right;">Page 15</p>	<p>1 something to document that. That is the extent to 2 which I looked into Nevada law because that was not 3 my role. 4 Q. When you say it was not your role, 5 you mean you didn't intend to or expect to provide 6 any expert testimony or opinion about Nevada 7 corporate law; is that right? 8 A. That's correct. 9 Q. The associate that you mentioned, 10 what is his or her name? 11 A. Diva Bole. Sorry; we have so many 12 and I'm not sure about your firm, but they come and 13 go. It's hard to keep up with them. 14 Q. All right. In terms of -- of 15 Ms. Bole's research -- and, you know, I've got an 16 e-mail here that may help us with the spelling of 17 her name -- 18 A. B-O-L-E. 19 Q. B-O-L-E. 20 In terms of her research into Nevada 21 law, do you know what she did to conduct any 22 research into Nevada law? 23 A. To my knowledge, she did what I asked 24 her to do, and that is document the one statement 25 that I just made so I could rely that that -- there</p> <p style="text-align: right;">Page 17</p>

5 (Pages 14 - 17)

<p>1 was some case law to support it. 2 Q. When you say "document the one 3 statement," do you mean put it in the expert report? 4 A. Yeah. It's a footnote. 5 Q. And the footnote that you're 6 referring to -- why don't we go ahead and attach 7 your expert report right now as the next exhibit so 8 we can refer to it. Let me see if I can pull it 9 out. 10 MR. SEARCY: Okay. We're going to 11 attach this as Exhibit 441. 12 --- 13 (Whereupon the document was marked 14 for identification purposes as Exhibit 441.) 15 --- 16 BY MR. SEARCY: 17 Q. And looking at Exhibit 441, that's a 18 copy of your expert report; correct? 19 A. Yes. 20 Q. And there's a footnote on Exhibit 21 441, Footnote No. 1 on Page 2; correct? 22 A. Correct. 23 Q. Okay. Is that the footnote that you 24 were referring to previously? 25 A. It is.</p> <p style="text-align: right;">Page 18</p>	<p>1 A. That's what it says and that's 2 correct. 3 Q. Okay. Because you don't have any 4 expertise or knowledge in Nevada law; correct? 5 A. Yes, just as I stated earlier. 6 Q. The cases that are cited in Footnote 7 1, those were put in the footnote by Ms. Bole; is 8 that correct? 9 A. Correct. 10 Q. And Ms. Bole, do you know where she 11 got those cases from? 12 A. Do you mean do I know whether she -- 13 Q. Well, let me ask it this way. 14 THE WITNESS: -- went to the 15 Reporters or Lexus-Nexus or -- 16 BY MR. SEARCY: 17 Q. It's correct that she received those 18 cases from plaintiff's counsel; correct? 19 A. I don't know the answer to that. 20 Q. So as you sit here right now, you 21 don't know whether Ms. Bole researched those cases 22 independently or whether she received the case 23 citations from plaintiff's counsel; correct? 24 MR. KRUM: Or both. 25 THE WITNESS: Well, what I know is</p> <p style="text-align: right;">Page 20</p>
<p>1 Q. Okay. And looking at Page 2, you 2 have a "SUMMARY OF OPINIONS." Do you see that? And 3 the very first sentence of it says: "Based on the 4 facts as I understand them, it is my opinion that a 5 court applying Delaware law" -- 6 A. Yes. 7 Q. -- "would conclude the following?" 8 So your opinion throughout the expert 9 report that we've attached now as Exhibit 441 has to 10 do with Delaware law; correct? 11 A. Yes. 12 Q. And it's a legal opinion about 13 Delaware law? 14 A. It's an expression of the analytical 15 framework that a Delaware court would use under what 16 I understand to be the factual circumstances here. 17 Q. And when you say "the analytical 18 framework," you mean the legal framework; right? 19 A. Yeah, the legal analysis, yes. 20 Q. Okay. And the Footnote 1 that's 21 added about Nevada courts -- 22 A. Yeah. 23 Q. -- that's on Page 2, that footnote 24 isn't intended to express that you have any 25 expertise or knowledge in Nevada law; correct?</p> <p style="text-align: right;">Page 19</p>	<p>1 when I asked her to document that, I 2 expected that it would appear only if she 3 had found the cases by whatever method, read 4 them, and concluded that they supported the 5 proposition that they state. Otherwise, 6 they wouldn't appear in the report. 7 BY MR. SEARCY: 8 Q. Okay. And did you ask Ms. Bole 9 whether she independently researched the cases that 10 are included in your Footnote 1? 11 A. I did not ask that question, no. 12 Q. Excuse me one second. 13 Let me hand you what we'll -- thank 14 you -- what we'll attach as the next exhibit. I 15 think it's Exhibit 442. 16 THE COURT REPORTER: That's right. 17 --- 18 (Whereupon the document was marked 19 for identification purposes as Exhibit 442.) 20 --- 21 THE WITNESS: I have one marked and 22 one unmarked. What do you -- 23 BY MR. SEARCY: 24 Q. Oh, I'll take the unmarked one back 25 from you so that I can share it with my colleague,</p> <p style="text-align: right;">Page 21</p>

<p>1 Mr. Rhow. Thank you. 2 Now, you see Exhibit 442 -- 3 A. I do. 4 Q. -- in front of you? 5 Okay. And Ms. Bole, who is the -- is 6 listed at the very top of this document; correct? 7 It appears to have been printed out from her 8 computer? 9 A. Yes -- well, I don't know whether it 10 was printed out from her computer or not, but her 11 name's at the top. 12 Q. Okay. And you see that it's a -- 13 there's an e-mail there from Mark Krum to Ms. Bole; 14 correct? 15 A. Yes. 16 Q. And it's dated Thursday, August 25th, 17 at 1:25 PM? 18 A. Yes. 19 Q. And the "Subject" is "Reading"? 20 A. That's what it says. 21 Q. Okay. And then the e-mail in Exhibit 22 442, the substance of it contains a number of case 23 citations; is that right? 24 A. It does. 25 Q. And if you compare those case</p> <p style="text-align: right;">Page 22</p>	<p>1 research she conducted to determine when or if a 2 Nevada court would ever apply Delaware law; correct? 3 A. I don't think the research went 4 beyond the footnotes; correct. 5 Q. And in preparing your expert report 6 you did not conduct any research yourself into 7 determining when a Nevada court would apply Delaware 8 law; correct? 9 A. I did not. 10 Q. And you don't -- you're not providing 11 any expert opinion on the circumstances under which 12 a Nevada court would apply Delaware law; correct? 13 A. Correct. That's why the footnote 14 starts with "It's my understanding that..." 15 Q. The term -- the use of the words 16 there, "It's my understanding...", are an indication 17 that you're -- you're borrowing that information 18 from someone else; is that right? 19 A. Yeah. 20 Q. Okay. 21 A. Based on my limited experience as I 22 described it with Nevada law, that's what Nevada 23 lawyers have explained to me. 24 Q. Okay. And the Nevada lawyer that 25 you're referring to, is it Mr. Krum or are you</p> <p style="text-align: right;">Page 24</p>
<p>1 citations to your Footnote 1 in your expert 2 report -- 3 A. Yes. 4 Q. -- those cited cases appear to be the 5 same; correct? 6 A. Yes. 7 Q. Okay. And your expert report that 8 you submitted in this case was signed by you on 9 August 25th; isn't that right? 10 A. That's correct. 11 Q. So from the e-mail at Exhibit 442, it 12 appears that Ms. Bole received the cases that are 13 contained in your Footnote 1 on the same day that 14 you signed the expert report; correct? 15 A. That appears to be so. 16 Q. And she received those from Mr. Krum, 17 who is plaintiff's counsel; correct? 18 A. Yes. 19 Q. Okay. And I believe you testified 20 earlier, but I just want to clarify, you're not 21 aware of what, if anything, Ms. Bole did to conduct 22 her legal research into Nevada law; correct? 23 A. I don't have personal knowledge of 24 how she did the research, no. 25 Q. And you're not aware of what, if any,</p> <p style="text-align: right;">Page 23</p>	<p>1 referring back to the -- 2 A. Both. 3 Q. -- members on the panel? 4 A. All three. 5 Q. Okay. So Mr. -- Mr. Krum is one of 6 the Nevada lawyers you spoke to. You described some 7 lawyers who were on a panel back when you were in 8 the judiciary. 9 A. Correct. 10 Q. Any other Nevada lawyers whom you've 11 spoken to? 12 A. No. 13 Q. Looking back at your report, I 14 believe there's one more footnote that's also 15 contained that makes a reference to Nevada law. Let 16 me have you turn to it. It's Footnote 162 on Page 17 121. 18 A. Page 121? 19 Q. Oh, I'm sorry; Page 21. I must have 20 misspoke. But the footnote is 162. 21 A. Yes. 22 Q. To your knowledge, Footnote 162 would 23 have been inserted into the expert report by 24 Ms. Bole; is that correct? 25 A. Correct.</p> <p style="text-align: right;">Page 25</p>

<p>1 Q. And do you know when she would have 2 inserted Footnote 162 into the expert report? 3 A. No. 4 Q. And do you know where -- whether 5 Ms. Bole conducted any research to locate the cases 6 that are contained in Exhibit 162? 7 A. Let me be careful as I answer that. 8 I certainly didn't see her do it, but the 9 understanding was if she were to develop cases as a 10 result of joint preparation of this report, it was 11 assumed she would read those cases and assure me 12 that they stood for the proposition that was recited 13 in the footnote. But did I look over her shoulder? 14 No. 15 Q. Did you have an expectation that she 16 would conduct her research into Nevada law 17 independently of plaintiff's counsel? 18 A. Yes. 19 Q. So if Ms. Bole didn't do that, then 20 she wouldn't have been following your instructions; 21 is that right? 22 A. No. That would have been my 23 expectation. If she cited a Nevada case, as she did 24 in this footnote, that basically signals the same 25 result as the Delaware cases, I assume she found</p> <p style="text-align: right;">Page 26</p>	<p>1 plaintiff's counsel, to Ms. Bole; correct? 2 A. That's what it says here. 3 Q. And it's dated Thursday, August 25th, 4 at 3:44 PM; correct? 5 A. Correct. 6 Q. And the body of the e-mail from 7 Mr. Krum to Ms. Bole contains a number of Nevada 8 case citations; correct? 9 A. Yes. 10 Q. And if you look at your Footnote 162, 11 there are a number of citations there; correct? 12 A. There appear to be three; yes. 13 Q. And a number of those citations 14 appear to be taken from Mr. Krum's e-mail; correct? 15 MR. KRUM: Objection. The documents 16 speak for themselves, foundation. 17 THE WITNESS: Two seem to be; yes. 18 BY MR. SEARCY: 19 Q. And, again, these case citations were 20 sent to Ms. Bole by Mr. Krum at 3:44 on the day that 21 you signed your report; correct? 22 MR. KRUM: Same objections. 23 THE WITNESS: They were in an e-mail 24 of that date; yes. 25</p> <p style="text-align: right;">Page 28</p>
<p>1 that case, read that case, and represented to me 2 that that is the holding of the case. 3 Q. Do you recall if, with respect to 4 Footnote 162, she represented to you that she had 5 read the cases and was aware of the holdings? 6 A. Not orally. That was the expectation 7 as my assistant. 8 Q. Let me show you Exhibit -- what we'll 9 mark as Exhibit 443. 10 You know what, I've handed that to 11 you, Justice Steele, but the court reporter will 12 have to mark it as Exhibit 443. 13 - - - 14 (Whereupon the document was marked 15 for identification purposes as Exhibit 443.) 16 - - - 17 BY MR. SEARCY: 18 Q. And have you ever seen Exhibit 443 19 before? 20 A. No. 21 Q. Okay. This also appears to be 22 another printout of an e-mail from Ms. Bole's 23 account; correct? 24 A. It appears to be so, yes. 25 Q. And it's an e-mail from Mr. Krum, the</p> <p style="text-align: right;">Page 27</p>	<p>1 BY MR. SEARCY: 2 Q. And with respect to Footnote 162, 3 that footnote is to a statement that under Delaware 4 law corporate directors and officers owe fiduciary 5 duties to a corporation and its stockholders. Do 6 you see that? 7 A. Yes. 8 Q. And then there's a citation to a 9 Delaware case in your Footnote 162? 10 A. Yes. 11 Q. And then there's the statement after 12 that: "The same is true under Nevada law." 13 A. Yes. 14 Q. Do you see that? 15 You're not claiming to provide any 16 opinion in this matter about the fiduciary duties of 17 directors under Nevada law; correct? 18 A. Correct. 19 Q. Okay. Let me ask you now some more 20 general questions -- 21 A. Sure. 22 Q. -- about your expert report. 23 What was the first contact that you 24 had between -- with anyone acting on behalf of the 25 plaintiff in this matter?</p> <p style="text-align: right;">Page 29</p>

<p>1 A. Well, it -- the first you mean the 2 first person who contacted me or the date or both? 3 Q. Thanks for the -- that's a fair 4 question. 5 Who was the first person who 6 contacted you about providing an expert opinion in 7 this matter? 8 A. The first and only person is 9 Mr. Krum. 10 Q. When did he contact you? 11 A. I don't remember. 12 Q. Do you recall who -- how soon it was 13 before the preparation of your expert report that he 14 contacted you? 15 A. No. 16 Q. Do you recall if it was a matter of 17 days? weeks? 18 A. I don't recall. If I -- I know it 19 was more than a matter of days. It was certainly 20 more than a matter of a week or two. So it -- to 21 answer your question, was it a matter of weeks? I 22 guess the answer to that has to be yes, although I 23 don't know how many weeks. 24 Q. All right. In your -- as you sit 25 here, you estimate it's more than one or two weeks;</p> <p style="text-align: right;">Page 30</p>	<p>1 Q. All right. Your best recollection, 2 though, is -- and I want to make sure that this is 3 correct -- more than one or two weeks. 4 A. Yes. 5 Q. Okay. But beyond that you can't be 6 more specific. 7 A. That's correct. 8 Q. Now, when Mr. Krum contacted you, 9 what did he say to you? 10 A. He contacted me and asked if I was in 11 a position to consider an expert witness report for 12 a case in Nevada and I said the first thing we have 13 to do, if I'm going to help, is a conflicts check. 14 So that was the first step. 15 And then he indicated to me, because 16 I stated I didn't find myself in a position to offer 17 an opinion on Nevada law, he said I'm interested in 18 whether you can give an opinion on Delaware law as 19 it may apply in this case. 20 And I said I can give an opinion 21 perhaps after I review what's available to me and it 22 will be basically the analytical framework that a 23 Delaware court would apply in attempting to resolve 24 the issues that are posed by the pleadings. 25 Words to that effect. Those</p> <p style="text-align: right;">Page 32</p>
<p>1 is that correct? 2 A. That's my best recollection, yeah. 3 Q. Is it fewer than three? 4 A. I really can't safely answer that. I 5 don't recall. I didn't -- I didn't focus on that. 6 Q. One or two weeks is your best 7 estimate? 8 MR. KRUM: No. Mischaracterizes the 9 testimony. 10 THE WITNESS: No. What I said was it 11 had to be more than a week and your question 12 said was it a few weeks, so if it's more 13 than a week or two, it could have been a few 14 weeks, yeah. 15 BY MR. SEARCY: 16 Q. Okay. And I'm not trying to put 17 words in your mouth with the -- with the deposition 18 testimony. 19 A. No. I -- 20 Q. That's quite all right. 21 A. Sorry. 22 Q. I'm just trying to get your best 23 estimate of how long it was before you prepared your 24 expert report that you spoke to Mr. Krum. 25 A. I don't have a clear recollection.</p> <p style="text-align: right;">Page 31</p>	<p>1 obviously aren't the exact words. 2 Q. Sure. When Mr. Krum indicated to 3 you or used the words "Delaware law as it may 4 apply," did he indicate to you that there might be 5 instances in the case where Delaware law might apply 6 instead of Nevada law? 7 A. He indicated to me, my best 8 recollection, similarly to the Footnote No. 1, that 9 where Nevada did not have developed law, Nevada 10 courts often looked to Delaware to see what the 11 Delaware answer would be. He never represented to 12 me that Delaware was a gap-filler to the extent that 13 a Nevada court was either obligated or even inclined 14 to follow Delaware law. Simply that they would look 15 to Delaware law, which is something I've heard my 16 entire career; not just from Nevada, but from any 17 other jurisdictions. 18 Q. And did -- 19 A. So that didn't surprise me at all. 20 Q. Okay. But you didn't see yourself 21 as -- as being asked to provide an expert opinion on 22 any aspect of Nevada law; correct? 23 A. He absolutely never asked for that. 24 He would have -- that would have been our last 25 conversation.</p> <p style="text-align: right;">Page 33</p>

<p>1 Q. You wouldn't have --</p> <p>2 A. I couldn't have done.</p> <p>3 Q. Right. Okay.</p> <p>4 And in terms of areas where a court</p> <p>5 in Nevada might look to Delaware law, did he</p> <p>6 indicate what those areas might be?</p> <p>7 A. No. He just made the general</p> <p>8 comment, as I recall.</p> <p>9 Q. And as you sit here today, are you</p> <p>10 aware of any areas where a Nevada court might look</p> <p>11 to Delaware law?</p> <p>12 A. I didn't -- let me state that a</p> <p>13 little more carefully.</p> <p>14 I made no inquiry. I only did what I</p> <p>15 was asked to do in what I believed to be a limited</p> <p>16 scope in order to provide the court guidance if the</p> <p>17 court wanted it about how Delaware would analyze</p> <p>18 this dispute.</p> <p>19 Q. Okay. After your initial</p> <p>20 conversation with Mr. Krum, did you decide to take</p> <p>21 the -- the engagement?</p> <p>22 A. Yes.</p> <p>23 Q. Okay.</p> <p>24 A. After the conflicts check.</p> <p>25 Q. Okay. After you ran the conflicts</p> <p style="text-align: right;">Page 34</p>	<p>1 A. Correct.</p> <p>2 Q. Is that material that's identified</p> <p>3 in -- in your expert report as Exhibit B?</p> <p>4 A. Yes, the --</p> <p>5 Q. I'm sorry; let me take that back.</p> <p>6 A. Whatever the exhibit number is.</p> <p>7 Q. Exhibit C, yeah.</p> <p>8 A. Whatever the exhibit letter is.</p> <p>9 Q. All right. And just for</p> <p>10 clarification, looking to Exhibit C of your expert</p> <p>11 report, that identifies the information that was</p> <p>12 considered; correct?</p> <p>13 A. Yes.</p> <p>14 Q. Okay. And to your -- and it's your</p> <p>15 understanding that Ms. Bole received the information</p> <p>16 considered that's on Exhibit C from Mr. Krum; is</p> <p>17 that right?</p> <p>18 A. Either from Mr. Krum or from me. I</p> <p>19 don't know whether the e-mails would reflect that he</p> <p>20 sent information to both of us or simply to me and</p> <p>21 some was sent by my office to Diva Bole or whether</p> <p>22 she received anything directly. I don't know the</p> <p>23 answer to that.</p> <p>24 Q. Do you recall if there was any</p> <p>25 information that Ms. Bole asked for from Mr. Krum</p> <p style="text-align: right;">Page 36</p>
<p>1 check, did you then prepare or start preparing a</p> <p>2 draft of your report?</p> <p>3 A. Did I start a draft? No, I did not</p> <p>4 start a draft of the report.</p> <p>5 Q. Who -- who did?</p> <p>6 A. Diva Bole did.</p> <p>7 Q. Okay. When did Diva start with her</p> <p>8 draft?</p> <p>9 A. I don't know the answer to that.</p> <p>10 Q. Do you know how long she spent on</p> <p>11 that?</p> <p>12 A. Some considerable time. Obviously we</p> <p>13 talked in the interim.</p> <p>14 Q. When you say "some considerable</p> <p>15 time," can you attach a hours figure to that?</p> <p>16 A. I can't, no. It may be and should be</p> <p>17 reflected in any bill that she appears on.</p> <p>18 Q. And do you know -- in terms of what</p> <p>19 Ms. Bole did to draft the report, do you know</p> <p>20 what -- what steps she took to draft the report?</p> <p>21 A. I know she read all the material that</p> <p>22 had been sent to us.</p> <p>23 Q. When you say all the material that</p> <p>24 had been sent to you, is that material that was sent</p> <p>25 by -- by plaintiff's counsel?</p> <p style="text-align: right;">Page 35</p>	<p>1 that was not provided for purposes of the report?</p> <p>2 A. Not to my knowledge.</p> <p>3 Q. Let me ask you more generally: Do</p> <p>4 you recall Ms. Bole asking Mr. Krum for any</p> <p>5 additional information?</p> <p>6 A. I don't recall.</p> <p>7 Q. Did you ever ask Mr. Krum for any</p> <p>8 additional information or documents?</p> <p>9 A. Either before or after the report was</p> <p>10 prepared?</p> <p>11 Q. Well, let me -- let me start with</p> <p>12 that.</p> <p>13 A. Yeah.</p> <p>14 Q. Before the report was prepared, did</p> <p>15 you ask Mr. Krum for any additional documents?</p> <p>16 A. I didn't ask him for any specific</p> <p>17 item, no.</p> <p>18 Q. Okay. Generally speaking, did you</p> <p>19 ask him for items?</p> <p>20 A. Generally, I had an understanding</p> <p>21 that he would send me any documents that he thought</p> <p>22 might be helpful to me in reaching the opinion or,</p> <p>23 after the opinion was written, any additional</p> <p>24 documents that may have come to his attention that</p> <p>25 would have bearing on the issues in the opinion.</p> <p style="text-align: right;">Page 37</p>

<p>1 Q. And how did you obtain that 2 understanding? 3 A. Just by conversation. 4 Q. You had a conversation with Mr. Krum 5 where Mr. Krum told you that he would send you 6 anything helpful; is that right? 7 MR. KRUM: Object to the 8 characterization of the testimony. 9 THE WITNESS: It -- I don't have a 10 specific recollection it was that broadly 11 stated. There's -- there was an 12 understanding that developed out of a 13 conversation that if there were any other 14 relevant documents that I would need, he 15 would send them to me because there -- there 16 is always the possibility that something 17 pops up that could alter the opinion and I 18 would want to know about it. 19 BY MR. SEARCY: 20 Q. Do you recall what Mr. Krum said to 21 you about sending all relevant documents? 22 A. No, not specifically. 23 Q. And do you have an understanding as 24 to whether or not the documents listed in Exhibit C 25 are all the relevant documents in the case?</p> <p style="text-align: right;">Page 38</p>	<p>1 I've seen. 2 Q. Okay. In terms of any of the 3 documents produced by any of the parties in 4 discovery, have you looked at any of those -- 5 A. No. 6 Q. -- additional documents? 7 Did you ever review the deposition 8 testimony of Jim Cotter, Jr.? 9 A. Yes. 10 Q. Okay. You did. Did you review all 11 the -- all the deposition transcripts from his 12 deposition, all the volumes? 13 A. All that I knew of. 14 Q. Okay. Do you recall how many you 15 reviewed? 16 A. No. 17 Q. Okay. Now, with respect to 18 Mr. Cotter, Jr.'s, deposition transcript, that's not 19 identified as being information considered in 20 Exhibit C; correct? 21 A. I don't -- I don't know. I haven't 22 looked at Exhibit C. 23 Q. All right. So Ms. Bole prepared the 24 first draft of the expert report; is that right? 25 A. Yes.</p> <p style="text-align: right;">Page 40</p>
<p>1 A. No. To my mind, they are not all the 2 relevant documents to the case. They were the 3 relevant documents to the opinion at the time I gave 4 it. 5 Q. Okay. And then when you say relevant 6 to the opinion, does that mean that they supported 7 the opinion? 8 A. Oh, they did in part or didn't in 9 part. It all depends on what they said and how they 10 stated it. 11 Q. Beyond the 17 documents -- or beyond 12 the documents that are listed in Exhibit C, are you 13 aware of any other relevant documents in the case? 14 A. That existed -- 15 MR. KRUM: Objection; vague. 16 THE WITNESS: -- before the opinion 17 or after? 18 BY MR. SEARCY: 19 Q. Let's start with before. 20 A. No. 21 Q. Okay. And I'll ask -- then I'll ask 22 you about after. 23 A. Yeah. I have seen motions for 24 summary judgment. I have seen the objection to my 25 report. Those are the additional documents that</p> <p style="text-align: right;">Page 39</p>	<p>1 Q. Do you recall how many drafts of the 2 expert report she prepared? 3 A. No; but it was more than one. 4 Q. Do you recall whether or not 5 plaintiff's counsel submitted any portions of the 6 draft from Ms. Bole? 7 A. I do not. 8 Q. Okay. You don't know whether 9 plaintiff's counsel might have written some portion 10 of the -- of the expert report? 11 A. To my knowledge, he didn't. 12 Q. Do you know either way? 13 A. What? 14 Q. Do you know either way? 15 A. With certainty? No. 16 Q. Okay. Do you recall how many drafts 17 there were of the expert report? 18 A. Three, I believe. 19 Q. Now, and did you take any notes of 20 your conversations with plaintiff's counsel? 21 A. The ones I produced are the notes I 22 took. 23 MR. SEARCY: Let's attach this as the 24 next exhibit. 25 THE COURT REPORTER: 444.</p> <p style="text-align: right;">Page 41</p>

<p>1 MR. SEARCY: What was that number 2 again? 3 THE COURT REPORTER: 444. 4 MR. SEARCY: 444. 5 THE WITNESS: Do you want me to give 6 these other exhibits back? 7 BY MR. SEARCY: 8 Q. Sure. That way we make sure that 9 they don't get lost. 10 A. That was why I asked the question. 11 Q. If you hand them to me, they'll 12 definitely get lost. 13 - - - 14 (Whereupon the document was marked 15 for identification purposes as Exhibit 444.) 16 - - - 17 BY MR. SEARCY: 18 Q. Justice Steele, are these your notes? 19 A. Yes. 20 Q. Okay. And these notes reflect your 21 conversation with Mr. Krum; is that right? 22 A. I'd have to read them to see whether 23 they're a combination or not of what I read and any 24 conversation with Mr. Krum, because Mr. Krum and I 25 had very little one-on-one conversation about the</p> <p style="text-align: right;">Page 42</p>	<p>1 know how Nevada procedure worked with that respect. 2 And there was another conversation 3 about production. He was to let me know what it -- 4 what the Nevada rules expected me to produce. 5 That's it. 6 Q. Okay. I want to focus on -- on the 7 facts for just a moment -- 8 A. Sure. 9 Q. -- or discussions about the facts. 10 You're not offering any expert 11 opinion about the facts of this case; correct? 12 A. I'm not sure what you mean by an 13 expert opinion about the facts. If -- if -- if your 14 question means am I suggesting that the facts that 15 are important to resolve these disputes are ones 16 that can be found in the absence of hearing 17 witnesses testify about them? Of course I can't 18 offer any opinion about what is fact and what is 19 not. 20 Q. When there are references in your 21 expert report to if a finder of fact finds 22 something -- 23 A. Yes. 24 Q. -- is that a reference to the fact 25 that you as an expert are not offering any opinion</p> <p style="text-align: right;">Page 44</p>
<p>1 facts. 2 I don't have an independent 3 recollection that's absolutely clear about whether 4 this -- these notes are taken from a conversation or 5 conversations with Mr. Krum or whether in part notes 6 taken after reading parts of depositions. But 7 certainly part of these notes come from conversation 8 with Mr. Krum. My -- since they're undated, it -- 9 it appears to me to be the first introduction to 10 what may be the dispute. And then having heard the 11 outline of it, I waited for documentation. 12 Q. You said that -- just a moment ago 13 that you had very little one-on-one conversation 14 with Mr. Krum about the facts -- 15 A. Yes. 16 Q. -- of the case. Did you have any 17 other conversations with Mr. Krum about the case 18 outside of one-on-one interactions? 19 A. What was going on. I had a 20 conversation about what's the procedure in Nevada; 21 what documents could I expect to get; what would be 22 available; if an expert report were to be prepared 23 in writing, whether my deposition would ultimately 24 be taken; whether I might be called upon to testify 25 as a witness or whether it would be taped. I didn't</p> <p style="text-align: right;">Page 43</p>	<p>1 as to what the facts are in the case; correct? 2 A. That -- that's correct. I'm not a 3 fact-finder and I don't in an expert report opine to 4 replace the fact-finder's conclusions about what 5 actually occurred, when, where, who said what, 6 whether X or Y witness was telling the truth or not. 7 That's not my understanding of the expectation of 8 any help that I could give to the Nevada court. 9 Q. So, for example, on the question of 10 whether or not a particular director is independent, 11 you're not offering any opinion on whether or not 12 that's the case; correct? 13 MR. KRUM: Objection; 14 mischaracterizes the testimony and the 15 document. 16 THE WITNESS: I assume that I'm to 17 answer unless I'm instructed not to answer 18 for some reason and then you battle it out, 19 which is the procedure that I'm used to? 20 BY MR. SEARCY: 21 Q. That's right. 22 A. And then we call a judge on the phone 23 and bother her about whether the objection should be 24 sustained or not. That's fine. 25 Q. That's right.</p> <p style="text-align: right;">Page 45</p>

<p>1 A. A little bit of facetiousness is 2 necessary -- 3 Q. I understand. 4 A. -- for me to get through the day 5 because I have some clear recollections of being 6 called at all hours and fully understand that. 7 It is correct that my report is not 8 meant to be a document finding what the ultimate 9 facts at issue would be and how to resolve disputed 10 facts. It is not. 11 What it's intended to do is to set up 12 the analytical framework that Delaware uses for 13 determining what standard of review applies in a 14 given fact situation. 15 Q. And you don't claim to have any 16 independent understanding of the facts in this case; 17 correct? 18 A. That's absolutely correct. 19 Q. In terms of the facts of the case, 20 other than conversations with Mr. Krum, what did you 21 do to acquaint yourself with the facts in this case? 22 A. Well, the first thing, if you don't 23 mind me explaining this in the context of the 24 Delaware analytical framework, the first step is to 25 look at the pleadings and make a determination from</p> <p style="text-align: right;">Page 46</p>	<p>1 determining the extent to which someone is either 2 independent or disinterested. 3 So what my report was trying to do 4 was highlight facts that suggest that there is a 5 dispute over independence or disinterestedness of 6 one or more director and that could affect the 7 process if a majority of disinterested, independent 8 directors did not resolve the process and vote on 9 the decision. 10 That's the essence of the report, 11 with the understanding that the ultimate trier of 12 fact, whether it's a jury or a judge in Nevada, 13 would have to make that determination. 14 Q. With respect to the process that you 15 just described -- 16 A. Yes. 17 Q. -- the first was looking at the 18 pleadings. 19 A. Yes. 20 Q. And I take it that in looking at the 21 pleadings, you assumed that the allegations 22 contained in the pleadings were true; correct? 23 A. Oh, yeah, that's correct. 24 Q. As you might on a motion to dismiss, 25 in other words.</p> <p style="text-align: right;">Page 48</p>
<p>1 reading the pleadings whether they sufficiently 2 plead facts that create a reasonable doubt about the 3 independence or disinterestedness of directors. 4 So I looked at the pleadings to 5 determine who the directors were and looked at what 6 was pleaded and suggest that there were facts 7 sufficient to question the reasonable doubt of the 8 independence and disinterestedness of some of the 9 directors. 10 With that in mind, the burden under 11 Delaware's analysis then shifts to the defendants to 12 establish that they were independent and/or 13 disinterested and that any decisional process in 14 which they engaged was fair and the result obtained 15 from that process was fair. 16 In Delaware we refer to that as the 17 entire fairness standard of review, and that's what 18 I was opining about. 19 Now, that's dependent ultimately, as 20 I think the Orchard case, which I cite in Kahn 21 versus -- I'm trying to think of the name of the 22 grocery store now, it's Dairy Mart, established, 23 that a judge cannot -- in Delaware cannot do that 24 based solely on documents in the record, that it 25 requires trial, because credibility is important to</p> <p style="text-align: right;">Page 47</p>	<p>1 A. Very similar. Perhaps in Delaware 2 not quite as strict as a motion to dismiss, but very 3 similar. 4 Q. Okay. Now, you also made reference 5 to a burden shifting taking place after the 6 review -- 7 A. Yes. 8 Q. -- and that you looked to whether 9 there was a -- was it fundamental fairness -- 10 A. No. 11 Q. -- in the transaction? 12 A. No. It's not a constitutional 13 concept. It's whether or not the pleadings raise a 14 reasonable doubt about the independence or 15 disinterestedness of one or more fiduciaries -- 16 usually, as in this case, directors, but it could 17 also be officers -- that would deprive them of 18 business judgment review and because in a control 19 situation like this one, it would rise to entire 20 fairness. 21 Q. Okay. Now, do you know if Nevada 22 courts apply an entire fairness principle? 23 A. I do not. 24 Q. Do you know if Nevada courts apply 25 any of the legal principles that you just described?</p> <p style="text-align: right;">Page 49</p>

<p>1 A. Well, business judgment. 2 Q. Okay. Beyond business judgment? 3 A. I don't know what Nevada's options in 4 the standard of review are. I do know Delaware's. 5 Q. Okay. 6 A. And my report was to opine on 7 Delaware; not Nevada. 8 Q. Okay. Beyond looking at the 9 pleadings, did you do anything else to acquaint 10 yourself with the facts or the allegations in this 11 case? 12 A. Yeah. I looked at depositions. And 13 ultimately I looked at -- post-report I looked at 14 the motions for summary judgment and the motion to 15 strike or whatever you -- however you characterize 16 your colorful objections to my report. 17 Q. Now, were you asked to prepare an 18 expert report in opposition to the motion for 19 summary judgment? 20 A. No. 21 Q. Did you consider submitting one? 22 A. I haven't considered it, no. 23 Q. Okay. 24 A. I -- sorry. 25 Q. Okay. The depositions that you</p> <p style="text-align: right;">Page 50</p>	<p>1 case. So I paid more attention to his deposition 2 probably than the others. 3 Q. Okay. 4 A. I know I read every bit of those four 5 volumes. 6 To be fair, I try to be conscious of 7 what it costs to retain me as an expert and only do 8 what's necessary. 9 Q. All right. 10 MR. SEARCY: Why don't we take our 11 first break? 12 THE WITNESS: Oh, we were having so 13 much fun. 14 THE VIDEOGRAPHER: Off the record at 15 11:21. This will end Disc No. 1. 16 - - - 17 (Whereupon there was a recess in the 18 proceedings.) 19 - - - 20 THE VIDEOGRAPHER: The time now is 21 11:40. Back on the record, beginning of 22 Disc No. 2. 23 BY MR. SEARCY: 24 Q. All right. Turning to Page 2 and 3 25 of your expert report, Justice Steele, there's a</p> <p style="text-align: right;">Page 52</p>
<p>1 looked at, did you look at all of the dep -- did you 2 read the entire depositions? 3 A. I didn't read the entirety of every 4 deposition. I skipped through parts that didn't 5 seem to me to be focused on my report. I was only 6 looking to questions and answers that described the 7 relationships between the parties, the 8 qualifications of the directors, the nature of the 9 process in which they engaged, and with a more 10 important focus on any facts that would raise a 11 reasonable doubt and then ultimately perhaps a 12 genuine issue of material fact about their 13 independence or disinterestedness. That was -- that 14 was my focus. 15 Q. Did anyone direct you to the 16 particular questions and answers that you reviewed? 17 A. No. 18 Q. So is it correct then that you 19 personally reviewed the deposition transcripts, you 20 skimmed the portions that didn't seem relevant, and 21 then you read the portions in more detail that did 22 seem relevant to your analysis? 23 A. Yeah. By -- by way of example, I 24 read all four of Mr. Kane's volumes because it 25 seemed to me that he was a critical defendant in the</p> <p style="text-align: right;">Page 51</p>	<p>1 section there titled "SUMMARY OF OPINIONS." 2 A. Yes. 3 Q. I want to take a look at a statement 4 in your "SUMMARY OF OPINIONS." You say "Based on 5 the facts as I understand them..." at the very first 6 sentence. 7 A. Yes. 8 Q. And when you wrote that, "Based on 9 the facts as I understand them...", does that mean 10 the facts that you've obtained from plaintiff's 11 counsel? Is that right? 12 MR. KRUM: Object to the 13 characterization of the testimony. 14 THE WITNESS: Well, based on the 15 documents that I obtained from plaintiff's 16 counsel. To the extent your question 17 suggests that based on the facts that he may 18 have related to me orally, no. Based on 19 what's in the pleadings and ultimately 20 what's in the motions for summary 21 judgment -- 22 BY MR. SEARCY: 23 Q. But you -- 24 A. -- and what was in the depositions. 25 Q. You made reference to the motions for</p> <p style="text-align: right;">Page 53</p>

<p>1 summary judgment. 2 A. Post-opinion. 3 Q. Post-opinion, okay. 4 A. To the extent my answer was 5 inarticulate, suggesting that based on facts that 6 were in the motion for summary judgment, that would 7 be incorrect. I misspoke. 8 Q. What I'm particularly interested in 9 is, though, you used the phrase "as I understand 10 them" in characterizing the facts there. 11 A. It means on how -- meaning how 12 they're pleaded. 13 Q. Right. 14 A. I don't -- I mean to say I don't 15 conclude that inconsistent facts, one side is 16 absolutely accurate and the other side who has 17 inconsistent interpretation of the facts or the 18 inferences drawn from them are incorrect and the 19 other is correct. Just as pleaded, the facts that I 20 had seen in the pleadings themselves and to some 21 extent from the depositions, that's what I'm basing 22 it on. 23 Q. So by use of the phrase "as I 24 understand them" there, you're highlighting that you 25 don't claim to have knowledge of what the actual</p> <p style="text-align: right;">Page 54</p>	<p>1 apply Delaware law in this case; correct? 2 A. That's correct. 3 Q. And you're certainly not providing 4 any opinion as to what a Nevada court would do or 5 should do in this case? 6 A. More importantly, I'm definitely not 7 impertinent enough to suggest what the Nevada court 8 should do, nor am I suggesting they would follow 9 this pattern that's used in Delaware. Just that 10 this opinion is designed to be helpful to the court 11 should the court choose to look at it and understand 12 how the analysis would occur in Delaware. That -- 13 that's -- that's all. That was all I was asked to 14 do. That's all I intended to do. 15 Q. Unless a Nevada court decides that it 16 should apply Delaware law, then your opinion 17 wouldn't have any relevance; is that right? 18 MR. KRUM: Objection; foundation. 19 THE WITNESS: No. I don't think the 20 opinion would have no relevance. I think 21 not knowing how developed Nevada law may be 22 on the precise issues here and offering no 23 opinion about whether that's good, bad, or 24 indifferent, it is possible that a Nevada 25 judge could look at the way Delaware does it</p> <p style="text-align: right;">Page 56</p>
<p>1 facts are; correct? 2 A. That is correct, yes. 3 Q. Okay. Then you go on to say: "...it 4 is my opinion that a court applying Delaware law 5 would conclude the following" in your summary; 6 correct? 7 A. Yes. 8 Q. So if I understand your summary 9 correctly, your opinion is providing a legal 10 framework to analyze the facts as set forth in the 11 pleadings; is that right? 12 MR. KRUM: Object to the 13 characterization of the testimony; asked and 14 answered. 15 You can answer again. 16 THE WITNESS: It's correct that I'm 17 trying to set out the analytical framework 18 that Delaware would apply. 19 BY MR. SEARCY: 20 Q. And that's an analytical legal 21 framework that a Delaware court might apply; 22 correct? 23 A. Yes. 24 Q. Okay. And you're not offering any 25 opinion as to whether a Nevada court would even</p> <p style="text-align: right;">Page 55</p>	<p>1 and conclude that that is a meaningful and 2 thoughtful way to apply the analysis in 3 Nevada. And, on the other hand, or not. 4 That's -- I'm not suggesting to her what she 5 should do. 6 BY MR. SEARCY: 7 Q. And if the answer then is or not, if 8 the court decides that Delaware law doesn't apply, 9 doesn't need to apply, then the opinion wouldn't be 10 relevant; correct? 11 A. Well, it's possible that -- 12 MR. KRUM: Same objection. 13 THE WITNESS: I'm sorry. 14 MR. KRUM: Go ahead. Same objection. 15 THE WITNESS: That's a little too 16 black and white. It may be that if Delaware 17 law doesn't apply, meaning it doesn't have 18 precedential value from the view of the 19 judge, knowing what the analysis is may 20 nonetheless be helpful to the judge in 21 approaching the issues that are raised by 22 the parties. 23 That's all this report is trying to 24 do. It's trying to be helpful. It's not 25 even trying to be instructive other than</p> <p style="text-align: right;">Page 57</p>

<p>1 this is the Delaware framework. It's not 2 suggesting to the judge what she ought to 3 do. It's saying hopefully this analytical 4 framework and the opinions you find here are 5 helpful to your analysis. That's -- that's 6 the extent of it. 7 BY MR. SEARCY: 8 Q. And the assistance that you're 9 offering is for the judge in this case; correct? 10 A. Uh-huh. 11 Q. Not for the finder of fact; correct? 12 A. Well -- 13 MR. KRUM: Objection; asked and 14 answered and mischaracterizes the testimony. 15 THE WITNESS: To some degree there's 16 a mix here. I'm not altogether sure 17 because, as we've agreed earlier, whether 18 the finder of fact would be a jury here or 19 whether it would be a judge. 20 But initially, at least under the 21 Delaware analytical framework, even though 22 we have no jury involved at all, the initial 23 analytical framework is the judge makes a 24 judgment based on the pleadings about 25 whether there's a burden shift, and that's</p> <p style="text-align: right;">Page 58</p>	<p>1 consider witnesses and their credibility and 2 context, I believe you said; correct? 3 A. Yeah, yeah. 4 Q. And you're not -- just to be clear, 5 you're not offering any opinion about what the 6 finder of fact should or should not find with 7 respect to credibility or context or any of those 8 other items; correct? 9 A. That -- that's correct. I'm simply 10 saying that if a Delaware judge were to look at the 11 pleadings here, there would be an issue raised about 12 the disinterestedness or the independence of the 13 majority of the directors who have taken an action 14 as fiduciaries and that as a result it would go to 15 the next stage. There would be the burden shift. 16 They would under entire fairness defend their action 17 by having the burden of establishing that indeed 18 they were independent and disinterested, and that 19 would end the case if the finder of fact reached 20 that conclusion. 21 Q. And what you're describing, the 22 framework you're describing, is the Delaware 23 framework. I understand. 24 A. No. I appreciate it. Yes is the 25 answer.</p> <p style="text-align: right;">Page 60</p>
<p>1 whether there's a reasonable doubt about the 2 independence or the disinterestedness of a 3 majority of the directors who have taken an 4 action to effectuate a transaction of kind. 5 To that extent the judge doesn't 6 decide or the finder of fact doesn't decide 7 at that stage what's a fact and what isn't a 8 fact; just that there is a reasonable doubt 9 about the independence and/or the 10 disinterestedness. 11 And that has to be examined at trial 12 where more than just what's on pieces of 13 paper can be explored. The credibility of 14 the witnesses and, most importantly, the 15 context under which all of this occurred can 16 be explored fully by the trier of the fact. 17 And then that determination is made 18 about whether a majority of the acting 19 fiduciaries were independent or 20 disinterested. 21 BY MR. SEARCY: 22 Q. So after the trier -- just so I 23 understand, you've described a framework whereby a 24 motion to dismiss might be considered and then 25 described a framework where a trier of fact would</p> <p style="text-align: right;">Page 59</p>	<p>1 Q. Okay. So then moving down your 2 "SUMMARY OF OPINIONS," on (i).a, (i).b, (ii), each 3 is prefaced with "if a finder of fact finds that a 4 majority of directors were entitled...", "if entire 5 fairness applies...", (ii), "if a finder of 6 fact...", do you see where I'm referring to? 7 A. Yes. 8 Q. And those are all -- all statements 9 that are made where you're not trying to -- to set 10 forth what the facts are in this case; correct? 11 MR. KRUM: Objection; vague and 12 ambiguous depending on what it means, asked 13 and answered. 14 BY MR. SEARCY: 15 Q. Let me -- let me restate the 16 question. 17 You're making an assumption there 18 about what the finder of facts might find; correct? 19 MR. KRUM: Objection; asked and 20 answered, mischaracterizes the testimony. 21 BY MR. SEARCY: 22 Q. You may answer. 23 A. Yes. I'm suggesting that if the 24 finder of fact reaches the following conclusion and 25 there are facts to support that. But there are</p> <p style="text-align: right;">Page 61</p>

<p>1 facts that are inconsistent with. So the finder of 2 fact has to reach that conclusion. I cannot. No 3 expert should resolve inconsistent facts that have a 4 bearing on a material issue, in my view, and I'm not 5 trying to do that here. 6 Q. And I understand. I just want to 7 make clear that you're -- you're making hypothetical 8 assumptions for the purposes of each of these 9 opinions that are summarized on Page 3; correct? 10 MR. KRUM: Objection; 11 mischaracterizes the testimony. 12 THE WITNESS: No. I wouldn't call 13 them hypothetical. There is a factual basis 14 for the fact-finder to reach that 15 conclusion. I'm only saying I'm not 16 attempting to suggest to the fact-finder 17 what that conclusion should be. 18 BY MR. SEARCY: 19 Q. You're just assuming that the 20 fact-finder would find a particular way; correct? 21 MR. KRUM: Same objection. 22 THE WITNESS: I'm assuming they 23 could. 24 BY MR. SEARCY: 25 Q. Okay. And then assuming that they</p> <p style="text-align: right;">Page 62</p>	<p>1 A. I understand it. 2 Q. I'll clarify it to make it clear. 3 A. Okay. 4 Q. Your rebuttal opinion is only 5 offering an analytical framework under Delaware law; 6 correct? 7 A. That's correct. 8 Q. It's not offering anything having to 9 do with Nevada law; correct? 10 A. Correct. 11 Q. It's not making any findings of fact; 12 correct? 13 A. Correct. 14 Q. Now, there's a footnote that's on -- 15 it's Footnote 2 on your rebuttal opinion. Do you 16 see that? 17 A. Yes. 18 Q. Okay. With respect to Footnote 2, 19 did you draft Footnote 2? 20 A. I did not. 21 Q. Okay. That had been drafted by your 22 associate? 23 A. Yes. 24 Q. At the end of Footnote 2 it states: 25 "I understand that the defendants in this action</p> <p style="text-align: right;">Page 64</p>
<p>1 could, then you provide your analytical framework 2 from Delaware law; correct? 3 A. Yes. 4 Q. Okay. Let me give you the next 5 exhibit. 6 THE COURT REPORTER: 445. 7 THE WITNESS: Thank you. 8 - - - 9 (Whereupon the document was marked 10 for identification purposes as Exhibit 445.) 11 - - - 12 BY MR. SEARCY: 13 Q. Do you recognize this exhibit? 14 A. I do. 15 Q. This is your supplemental -- I'm 16 sorry -- your rebuttal opinion; correct? 17 A. That's how it characterizes itself, 18 yes. 19 Q. Okay. And in terms of the opinions 20 provided in your rebuttal opinion, they don't 21 differ, correct, in terms of providing an opinion on 22 an analytical framework under Delaware law? 23 Let me restate that question -- 24 A. Oh, I understand it. 25 Q. -- because it was very poorly --</p> <p style="text-align: right;">Page 63</p>	<p>1 have filed a motion in limine because the Steele 2 Report stated that the opinions based therein were 3 based on what a court that applied Delaware law 4 would find." 5 A. Yes. 6 Q. And you say: "That phraseology was 7 intended to refer to my years of experience in 8 Delaware's well-versed body of law"; correct? 9 A. Yes. 10 Q. And then it states: "The Delaware 11 law on which I relied is law that informs any and 12 all Nevada statutes and cases applicable to the 13 matters discussed herein." What did you mean by 14 that last sentence? 15 A. I mean that the information that's 16 contained in both the original report and the 17 rebuttal may help the Nevada judge in the analysis 18 by informing them of how things work in Delaware. 19 It was not intended to mean the converse, which your 20 question implies, which informs means that it has 21 precedential value which a Nevada court will follow. 22 That's not what I said. 23 Q. That's -- that's what I was seeking 24 to clarify. 25 A. Well, I -- I -- I thought so.</p> <p style="text-align: right;">Page 65</p>

<p>1 Q. Right. So to be clear, you're not 2 suggesting with your Footnote 2 that Delaware law 3 has precedential value with respect to Nevada 4 statutes that you're aware of? 5 A. No, I'm not suggesting that. 6 Q. And are you aware of any Delaware law 7 that has been treated as precedential by Nevada 8 courts? 9 A. I -- I haven't -- no. 10 Q. So with respect to Footnote 2, that 11 last sentence is merely to suggest that a Nevada 12 judge might find the opinion of yourself about what 13 Delaware law says to be helpful; correct? 14 A. Correct. 15 Q. Let's turn back to your expert 16 report, your initial expert report. 17 On Page 4 there's a segment called 18 "FACTUAL BACKGROUND." 19 A. Yes. 20 Q. Do you see that? 21 A. Yes. 22 Q. Did you draft any portion of the 23 "FACTUAL BACKGROUND" in the expert report? 24 A. I reviewed it. I didn't draft it. 25 Q. Okay.</p> <p style="text-align: right;">Page 66</p>	<p>1 A. I read her deposition, but I don't 2 have distinct recollections at this stage of quotes 3 from it or questions asked. 4 Q. Do you recall if the cited portion of 5 the testimony says anything about Ms. Cotter or some 6 of the members of the board being angered? 7 A. If -- if you mean specifically 8 Margaret Cotter's deposition, I don't have a 9 distinct recollection. 10 Q. Let me show you her deposition, 11 Volume 1. 12 MR. SEARCY: Mark that as the next 13 exhibit. 14 THE COURT REPORTER: Exhibit 446. 15 MR. RHOW: What was 444? 16 THE COURT REPORTER: The handwritten 17 notes. 18 MR. RHOW: Great. And then 445 was? 19 THE COURT REPORTER: The second 20 report, the rebuttal report. 21 MR. RHOW: That's why I was confused. 22 444 is which exhibit? 23 THE COURT REPORTER: The handwritten 24 notes. 25 MR. RHOW: The handwritten notes,</p> <p style="text-align: right;">Page 68</p>
<p>1 A. I made edits and I obviously read it. 2 Q. Okay. Do you know who undertook the 3 initial drafting of the "FACTUAL BACKGROUND"? 4 A. Diva Bole. 5 Q. Do you know if she had the assistance 6 of plaintiff's counsel in putting this together? 7 A. I do not. 8 Q. Okay. 9 A. I have no basis to believe she did. 10 Q. But do you know one way or the other? 11 A. With certainty? No. 12 Q. Let me show you on Page 5 of the 13 expert report -- 14 A. Yes. 15 Q. -- there is a paragraph that 16 states -- it starts with "Although it angered his 17 sisters and some...members of the board..." Do you 18 see that? 19 A. Yes. 20 Q. And then there's a citation, Footnote 21 11, do you see that, to Margaret Cotter's deposition 22 testimony? 23 A. Yes. 24 Q. Do you recall if you reviewed 25 Ms. Cotter's deposition testimony?</p> <p style="text-align: right;">Page 67</p>	<p>1 okay. 2 MR. KRUM: What happened to the 3 index? 4 MR. SEARCY: Your guess is as good as 5 mine. This is what happens when we're 6 paralegals; right? 7 MR. KRUM: This is somebody's effort 8 to impair my ability to search the text. 9 Well, anyway, it's not mine to do. 10 Go ahead. 11 BY MR. SEARCY: 12 Q. If you'll turn to -- take a look at 13 Pages 81 and 82 and then 145 and 146, which are the 14 cited portions of the deposition. 15 A. Yes. 16 Q. Do you see anything in those cited 17 portions of the deposition about the Cotter sisters 18 or members of the board becoming angry? 19 A. No. 20 Q. Okay. So to the extent that that 21 statement is included in that paragraph, it's 22 certainly not supported by the deposition testimony 23 that's cited in Footnote 11; correct? 24 A. It's not supported by 81 and 82, no. 25 And it suggests that what it's referring to is after</p> <p style="text-align: right;">Page 69</p>

<p>1 the dash, that Margaret Cotter sought the position, 2 and the depositions of everyone involved were 3 replete with discussions about the extent to which 4 she was qualified for the position and who supported 5 her for that position, who did not, and it was an 6 integral part, as I understand the depositions, of 7 the interfamilial dispute which so concerned Ed 8 Kane. So that footnote I think is consistent with 9 at least the information after the dash. 10 Q. And when you say "the information 11 after the dash," that's the -- the last phrase, the 12 position MC sought with respect to the Company's New 13 York City real estate? 14 A. Yeah. The under -- yes. The 15 underlying facts are -- are rife with a dispute over 16 whether she was qualified for the position, should 17 have the position, whether someone with real estate 18 development expertise should be there as opposed to 19 management of theaters. And it -- it -- it runs 20 throughout all the depositions. 21 Now, maybe "angered" is a stronger 22 word than can be supported by the use of that 23 particular word, but it's certainly the basis of 24 the -- of considerable contention, as I read it, in 25 context throughout all the depositions.</p> <p style="text-align: right;">Page 70</p>	<p>1 BY MR. SEARCY: 2 Q. In preparing your expert report did 3 you look at the terms of the employment agreement 4 between Jim Cotter, Jr., and Reading? 5 A. No. 6 Q. Okay. Were you ever aware that 7 Mr. Cotter, Jr., had an employment agreement with 8 Reading -- 9 A. It was -- 10 Q. -- prior to submission of your expert 11 report? 12 A. It was -- yes. It was referred to in 13 the depositions. 14 Q. Did you ever ask to see that 15 employment agreement? 16 A. No. 17 Q. Okay. Would the employment agreement 18 have affected your analysis in this case? 19 A. My analysis of the standard of review 20 that would apply, whether or not entire fairness 21 would apply to the decision-making, and whether the 22 process for his termination was arguably consistent 23 or inconsistent with a breach of fiduciary duty? It 24 would not. 25 Q. Why not?</p> <p style="text-align: right;">Page 72</p>
<p>1 Q. It's fair to say, though, that when 2 you went through the drafts of the expert reports, 3 you weren't cite-checking the deposition 4 testimony -- 5 A. That's correct. 6 Q. -- that was cited; correct? 7 A. That's correct. I used the associate 8 much as -- much as I used a law clerk. They know 9 their job. I can rely upon it until I learn 10 differently, and I do rely upon it. 11 Q. For purposes of your expert report, 12 did you also have the associate conduct the initial 13 legal research? 14 A. No. We had discussions about the 15 research. That came -- that came from me. What 16 general principles of law applied and how we should 17 approach the opinion, that came from me. 18 Q. But in terms of asking for particular 19 cases that were consistent with those general 20 principles of law, did you ask the associate to 21 research those cases? 22 A. Yes. 23 MR. KRUM: Object. 24 THE WITNESS: Sorry. 25 MR. KRUM: That's okay.</p> <p style="text-align: right;">Page 71</p>	<p>1 A. Because from what I understood from 2 the depositions, he was continuing to be employed as 3 the CEO; and if he had a contract to terminate him 4 as of a date certain, it was after the date he was 5 terminated. You can infer nothing else from the -- 6 from the depositions. 7 Q. Let me see if I can understand your 8 testimony somewhat about the -- the CEO contract. 9 When you said he was continuing to be employed as a 10 CEO, do you mean continuing to be employed under the 11 contract? 12 A. No. I didn't take the contract into 13 consideration other than the references to it that I 14 read in the deposition suggested that he had a year 15 of benefits if he were terminated under the 16 contract. 17 Q. If the contract stated that 18 Mr. Cotter, Jr., could be terminated without cause, 19 would that have impacted your analysis? 20 A. It would not have impacted my 21 analysis on whether the process for his termination 22 constituted a breach of fiduciary duty. It's an 23 issue when you initiate a process to terminate 24 somebody, that process -- if you owe a fiduciary 25 duty to the corporation and to the minority</p> <p style="text-align: right;">Page 73</p>

<p>1 stockholders as well as the controlling 2 stockholders, then the process should be entirely 3 fair. Mr. Cotter himself was a stockholder. 4 So it wouldn't have had any impact on 5 my analysis of independence, of disinterestedness, 6 and of the process for termination. There was no 7 pretension by -- on anybody's account that I could 8 read in the depositions that he was being terminated 9 under a terminable at will provision of the contract 10 or terminated with or without cause. 11 Q. If there was an expression at a 12 meeting that Mr. Cotter, Jr., was being terminated 13 without cause under the agreement, would that impact 14 your analysis? 15 A. It -- 16 MR. KRUM: Asked and answered. 17 THE WITNESS: If there was never any 18 process developed, by committee or 19 otherwise, for considering his termination 20 and there weren't the trappings of a fulsome 21 process with a vote from -- by 22 disinterested -- by a majority of 23 disinterested and independent directors, I 24 wouldn't have had a -- I wouldn't have had a 25 fiduciary duty issue.</p> <p style="text-align: right;">Page 74</p>	<p>1 Go ahead. 2 THE WITNESS: There would be a 3 different analysis which would not involve 4 process, which would be important in 5 determining that his termination were 6 entirely fair. 7 BY MR. SEARCY: 8 Q. And how would that analysis be 9 different? 10 MR. KRUM: Same objections. 11 THE WITNESS: They would be acting 12 more administratively than they would be in 13 their role as formulators of a committee 14 process to be followed up by a full board 15 agenda where there was an agenda item and 16 they were acting as fiduciaries. 17 BY MR. SEARCY: 18 Q. Is the -- the hiring and firing of 19 executives something that you would characterize as 20 an administrative duty? 21 MR. KRUM: Objection; incomplete 22 hypothetical. 23 THE WITNESS: Yeah. Under -- under 24 Delaware law directors have the power to 25 hire and fire executives, that's correct.</p> <p style="text-align: right;">Page 76</p>
<p>1 But they initiated the process as a 2 transaction and then that implicates their 3 fiduciary duties. They didn't act as 4 officers monitoring a contract. 5 BY MR. SEARCY: 6 Q. Well, let me make sure that I can 7 unpack some of these concepts. 8 If it had been the case that 9 Mr. Cotter, Jr., had been terminated without there 10 being any process, under his employment agreement 11 which provides assuming for purposes of this 12 question that he can be terminated without -- let me 13 start again because I've already messed up my 14 question. 15 Is it your opinion that if 16 Mr. Cotter, Jr., had a contract that provided that 17 he could be terminated without cause, that if the 18 directors then simply fired him without undertaking 19 any process, then there would be no issues of 20 fiduciary duty that would arise from that? 21 MR. KRUM: Objection. 22 THE WITNESS: If -- 23 MR. KRUM: Wait a minute. It 24 contradicts the testimony, incomplete 25 hypothetical.</p> <p style="text-align: right;">Page 75</p>	<p>1 BY MR. SEARCY: 2 Q. And under Delaware law, when 3 directors hire and fire executives, that doesn't 4 necessarily raise issues of fiduciary duty; is that 5 correct? 6 A. Not necessarily. It depends -- 7 everything in Delaware depends on context. The 8 context that was arranged here implicated fiduciary 9 duties by the process that they instigated. 10 That's really the best response. 11 Q. Well, for purposes of your opinion, 12 it sounds like the issue that you're looking at is 13 the process that was undertaken by the directors in 14 their decision to terminate Mr. Cotter, Jr.; correct? 15 A. Yes, it's always an issue of process. 16 Q. But if no process had been 17 undertaken, then in your understanding under 18 Delaware law, then likely there would be no issue of 19 fiduciary duty with respect to the termination of 20 Mr. Cotter, Jr.; correct? 21 MR. KRUM: Objection; 22 mischaracterizes -- 23 THE WITNESS: It -- 24 MR. KRUM: -- mischaracterizes the 25 testimony, asked and answered.</p> <p style="text-align: right;">Page 77</p>

<p>1 THE WITNESS: Unless the action was a 2 sham, it has to be examined in the context 3 of what and why they were trying to achieve 4 the termination of Cotter, Jr., I'll call 5 him, for lack, JJC, however -- 6 BY MR. SEARCY: 7 Q. Sure. 8 A. -- however he's referred to in the 9 depositions, I think often as JJC. But, in any 10 event, it depends upon the context. 11 Q. With respect to your analysis in this 12 case, did you try to obtain any information about 13 any accomplishments that Mr. Cotter, Jr., had while 14 he was the CEO? 15 A. Other than reading the depositions 16 and the positions that the different directors took 17 on whether at a given point in time he was doing a 18 good job or he wasn't doing a good job or whether 19 the family feud was interfering with his ability to 20 do a good job and the references to -- I don't 21 remember the exact words, but something like 22 disruption of the sea sweep, all of these 23 references, there are good and bad statements made 24 about the quality of the work that he was doing 25 depending on --</p> <p style="text-align: right;">Page 78</p>	<p>1 review or consider any information that had to do 2 with any of his accomplishments as a CEO? 3 MR. KRUM: Asked and answered. 4 Go ahead. 5 THE WITNESS: The only review that I 6 did of Mr. Cotter's performance was to read 7 the depositions where there were various 8 views at different points in time commenting 9 on the quality or lack thereof of his 10 performance as CEO. 11 BY MR. SEARCY: 12 Q. As you sit here, are you able to 13 identify any of his accomplishments as a CEO? 14 A. No. 15 Q. So with respect to implications to 16 minority shareholders, are you able to identify any 17 accomplishments or benefits that would be lost to 18 minority -- minority shareholders but through 19 termination of Mr. Cotter, Jr.? 20 A. No. My focus would be more on the 21 process that replaced him and with whom he was 22 replaced. 23 Q. With respect to Mr. Cotter, Jr.'s, 24 termination, did you look at the bylaws of RDI? 25 A. No.</p> <p style="text-align: right;">Page 80</p>
<p>1 Q. Do you -- 2 A. -- depending on who was speaking. 3 Q. Okay. Do you recall any of the good 4 statements about the quality of the work that he was 5 doing? 6 A. Well, I understand Mr. Kane thought 7 he was doing a good job up to a certain point. The 8 real -- the real contextual issue here is the extent 9 to which the family feud interfered with the 10 exercise of fiduciary duty by the directors, were 11 they trying to solve the family feud here, focused 12 on that, were they ever focused on the implications 13 for the minority stockholders on the -- on the 14 actions -- with the actions they took. That -- 15 that's what I was looking at because that's what a 16 Delaware judge is concerned about. 17 The fiduciary duty is owed not just 18 to the controlling stockholders and the corporation 19 itself but also to the minority stockholders. 20 There's not a word of concern in any of the 21 depositions or your other expert reports about the 22 effect on the minority stockholders. 23 Q. Turning back to the -- the question 24 that I asked you, though, with respect to 25 Mr. Cotter, Jr.'s, performance as CEO, did you</p> <p style="text-align: right;">Page 79</p>	<p>1 Q. And did you undertake any 2 consideration as to what the bylaws said about the 3 discretion of the board of directors in hiring or 4 firing a CEO? 5 A. Not having read them, I couldn't have 6 done. 7 Q. Fair point. 8 Would those bylaws have impacted your 9 analysis at all if you had -- if you had reviewed 10 them? 11 A. Not the narrow scope of my analysis, 12 which was on the process they used, no. 13 Q. So, in other words, your review 14 wasn't about whether or not the board had the right 15 and the ability to terminate Mr. Cotter, Jr., but 16 just about the process that was used in terminating 17 him; is that correct? 18 A. Yes. And let me explain that answer. 19 Under Delaware law the fact that you have the 20 authority to act doesn't end the inquiry, 21 particularly in entire fairness review. Our law is 22 well-established that despite being authorized 23 either by the charter or the bylaws to take certain 24 action, when you take the action, it must be taken 25 equitably.</p> <p style="text-align: right;">Page 81</p>

<p>1 And the considerations within the 2 entire fairness review is whether or not that 3 hindsight review of what took place was entirely 4 fair, both as to the nature of the process and the 5 result. 6 So I would not have been impressed by 7 the fact that there was a bylaw authorizing them to 8 terminate officers because it's generally understood 9 under Delaware law you can. 10 Q. Is it -- 11 A. Or the directors can. I didn't mean 12 you. I apologize. 13 Q. Right. No. I understand. Thank 14 you. 15 Now, just returning to your -- your 16 process point again for a moment -- 17 A. Sure. 18 Q. -- if -- is it your -- is it your 19 testimony, is it your opinion, that under Delaware 20 law, if no process had been undertaken, then there 21 would be no entire fairness analysis or even 22 business judgment analysis that would have to be 23 undertaken at all in this case? 24 A. No, because even if a contract 25 provided, hypothetically, that he could be</p> <p style="text-align: right;">Page 82</p>	<p>1 there found that the termination of a CEO did not 2 give rise to any damages; correct? 3 A. The case says that, yeah, in its 4 context. And nothing in my report assessed or 5 attempted to assess a damage remedy, except for 6 reinstatement. 7 Q. Are you aware of any Delaware case 8 where a terminated CEO has been reinstated? 9 A. No. 10 Q. And in the opinion that you provide 11 in your report, is it your opinion that Delaware law 12 would provide for the reinstatement of a CEO who's 13 been terminated? 14 A. If the termination resulted from a 15 breach of fiduciary duty and after, in the case of a 16 controller context, as we have here, after entire 17 fairness review, what Delaware law would say is that 18 the chancellor or the vice chancellor, whoever was 19 sitting, one of the vice chancellors, has the 20 authority from English common law to craft a remedy 21 and there are no limits on the remedy that can be 22 crafted except that that court cannot award -- award 23 punitive damages. 24 So the object in equity is to craft a 25 remedy. There is the phrase that's often repeated</p> <p style="text-align: right;">Page 84</p>
<p>1 terminated at will or terminated without cause, 2 however you want to characterize it, if the people 3 making that decision who ultimately selected someone 4 from the controller to replace him who had -- who 5 has an ongoing familial dispute, it would be 6 analyzed to determine whether that process was 7 entirely fair to the corporation and all of the 8 stockholders, the minority as well as the 9 controlling stockholders. 10 If the decision were made solely by, 11 let's say, an independent, disinterested chairman of 12 the board that's authorized by the contract and the 13 bylaws, it may be a different issue. That's why I 14 keep repeating that it's entirely contextual. There 15 are no bright-line rules in Delaware. 16 Q. In your understanding of Delaware 17 law, are you aware of any case where a corporation 18 has been found to have been injured or damaged by 19 the termination of a CEO? 20 A. Not off the top of my head, no. 21 Q. And I believe you've cited to a case 22 called Carlson in your expert report; isn't that 23 right? 24 A. Uh-huh. 25 Q. And in the Carlson case, the court</p> <p style="text-align: right;">Page 83</p>	<p>1 "every wrong has a remedy." And you're supposed, 2 when you sit on that court, to fashion the 3 appropriate one. That is an alternative, void the 4 act and order the reinstatement. 5 Q. So your opinion on reinstatement is 6 based on general equitable principles as applied by 7 Delaware law? 8 A. Yes. 9 Q. Is that correct? 10 A. That's correct. 11 Q. But in terms of case precedent, 12 you're not aware of any Delaware court ever ordering 13 the reinstatement of a terminated CEO; correct? 14 A. That's correct. Sadly, there's -- 15 despite the -- what's sometimes referred to as the 16 rich body of Delaware law, every context doesn't 17 have a precedent. 18 Q. Are you aware of cases that hold the 19 converse, that a terminated employee should not be 20 reinstated? 21 MR. KRUM: Objection; incomplete 22 hypothetical. 23 THE WITNESS: I have no idea how to 24 answer that because I don't know what the 25 context would have been. Do I know of a</p> <p style="text-align: right;">Page 85</p>

<p>1 case under these circumstances that are in 2 issue if -- depending on how the facts are 3 resolved ultimately that has ever resulted 4 under Delaware law as a reinstatement of a 5 terminated CEO? I cannot point to a 6 particular case. It's a -- it's an 7 extraordinarily unusual fact situation. 8 BY MR. SEARCY: 9 Q. In terms of the process that was used 10 to terminate Mr. Cotter, Jr., in your opinion, what 11 are the deficiencies in the process that was used? 12 A. Well, the vote, as I recall it, was 13 not a majority of independent and disinterested 14 directors. The leadup to the event that caused the 15 termination had been preceded by a committee that 16 was with Mr. Storey acting as an ombudsman to help 17 resolve issues within the family to improve 18 performance. It had its suggested final review date 19 of June 30th, as I remember. 20 There was an accelerated process to 21 review the performance and to put on the agenda for 22 a directors meeting the status, as I recall the 23 phraseology, of the CEO, meaning Mr. Cotter. 24 There are ample suggestions of facts 25 from which the inferences can be drawn, alleged</p> <p style="text-align: right;">Page 86</p>	<p>1 explain, at least under the Delaware analytical 2 system, it's not a determination that's made until 3 after trial, that as a matter of fact the court 4 concludes that one was not independent and the other 5 was interested and not disinterested. 6 Q. Now, you mentioned familial ties of 7 Mr. Kane. 8 A. Yeah. 9 Q. Mr. Kane has those familial ties with 10 Mr. Cotter, Jr., as well; correct? 11 A. Yes. 12 Q. Okay. And Mr. Cotter, Jr., has 13 referred to him as Uncle Ed; correct? 14 A. Yes, there are references to that, 15 for sure. 16 Q. Mr. Kane was a friend of Mr. Cotter, 17 Sr., for many years; correct? 18 A. 50, as I recall. He went to law 19 school with him, if I have my facts correct. 20 Q. Other than those familial ties, are 21 you aware of any other familial ties that you 22 believe might show that he's not independent? 23 A. Well, the way in which the process 24 took place, Mr. Kane's, in my assessments, focus on 25 trying to remedy the feud within the family, to</p> <p style="text-align: right;">Page 88</p>
<p>1 facts depending on what's ultimately concluded to be 2 true, that there had been people already made up 3 their mind and that the purpose of that agenda item 4 was to terminate him. It wasn't to explore 5 alternatives. 6 There was no succession plan in 7 place. But, most importantly, the ties, both 8 financial in Mr. Adams' case and familial in 9 Mr. Kane's case, deprived the recommended vote of a 10 majority of disinterested, independent directors. 11 Q. All right. Let's, if we can, unpack 12 that a little bit. 13 You made mention of there not being a 14 majority of independent directors. For purposes of 15 your expert analysis, you assumed that Mr. Kane and 16 Mr. Adams were not independent; is that right? 17 A. Yeah. My expert opinion suggests 18 that there are facts in the record which could 19 result in a fact-finder determining that Mr. Adams 20 was not disinterested and Mr. Kane was not 21 independent. 22 Q. But you personally didn't come to any 23 factual conclusions about that; correct? You -- 24 instead you assumed the facts? 25 A. That's correct. As I've tried to</p> <p style="text-align: right;">Page 87</p>	<p>1 characterize it, the disputes within the family, to 2 reconcile the family, inferentially largely out of 3 his respect for Mr. Cotter, Sr., and his 4 long-standing friendship, it's clear that a 5 reasonable judge could conclude that he was more 6 interested in resolving the dispute within the 7 family and reconciling the family than he was 8 addressing the impact of this family and its members 9 continuing to be -- despite their controlling 10 shares, continuing to be operational officers within 11 the corporation than he was with the impact of this 12 continuing process of family feuding on the minority 13 stockholders, meaning the value of their shares. 14 There's no analysis or discussion of 15 analysis about that impact. He's all driven by what 16 Mr. Cotter, Sr., would have wanted and his distress 17 at the family's inability to work together. 18 Q. In preparing your expert report, did 19 you see any testimony by Mr. Cotter, Sr., that -- 20 I'm sorry; let me strike -- let me try that again. 21 In preparing your expert report, did 22 you see any testimony by Mr. Cotter, Jr., that his 23 inability to get along with his sisters was 24 impacting the company? 25 MR. KRUM: Objection; vague.</p> <p style="text-align: right;">Page 89</p>

<p>1 THE WITNESS: I'm not sure what you 2 mean by the testimony from him. There's 3 testimony rife through all the depositions 4 that the sea sweep was in distress because 5 of their inability to get along and their -- 6 their disagreements, people within the sea 7 sweep taking sides, that's throughout the 8 depositions. 9 BY MR. SEARCY: 10 Q. And one way to resolve that conflict 11 between Mr. Cotter, Jr., on one side, and his 12 sisters, on the other, would be to terminate one or 13 all of them; correct? 14 A. Yes; and -- yes, there are references 15 to that in -- by some of the directors, in 16 particular I think the two independent and 17 disinterested directors. 18 Q. And in terms -- you made reference to 19 that consideration by the disinterested directors. 20 Now, in your opinion is there anything in and of 21 itself about terminating one or all of the Cotter 22 family that would give rise to a breach of fiduciary 23 duty? 24 MR. KRUM: Objection; vague, 25 incomplete hypothetical.</p> <p style="text-align: right;">Page 90</p>	<p>1 evident passion in that regard when you read his 2 deposition is should that be his focus as a 3 fiduciary, preserving the family's interest, or 4 should he be looking at the broader picture of the 5 minority stockholders, the corporation itself, as 6 well as the interest of the controlling 7 stockholders, and that's what the ultimate finder of 8 fact will have to resolve. I can't -- I can't opine 9 on that. 10 All I can say is it's an issue that 11 would be of significant concern to a Delaware judge 12 in determining, once it's raised by the pleadings 13 under entire fairness, whether he can demonstrate 14 that his attention to the family concerns was 15 consistent with attention to the minority 16 stockholders and corporation itself benefit. 17 Q. Other than his friendship with Jim 18 Cotter, Sr., and other than his efforts to resolve 19 the family feud between Jim Cotter, Jr., and his 20 sisters, can you point to anything else that 21 indicates that Mr. Kane -- 22 A. Just -- 23 Q. -- might not be independent? 24 A. The interfamilial interaction, not 25 just the Memorial Day weekend when Jim Cotter came,</p> <p style="text-align: right;">Page 92</p>
<p>1 Go ahead. 2 THE WITNESS: No, I don't -- I don't 3 think there's anything that would suggest if 4 all three were terminated, it would be a 5 breach of fiduciary duty if a process was in 6 place and that was decided by disinterested, 7 independent directors. 8 In fact, I recall the discussion that 9 one of the alternatives might be -- and 10 Delaware law would support this -- that all 11 of the directors resign. When forced with a 12 breach of their fiduciary duty or 13 resignation, resignation is the alternative. 14 BY MR. SEARCY: 15 Q. So you've identified Mr. Kane's 16 efforts to resolve the family feud between 17 Mr. Cotter, Jr., and the Cotter sisters as an 18 indication of his familial interest; is that right? 19 A. Yes. 20 Q. Wouldn't resolution of that feud also 21 assist in the performance of the company? 22 A. It could. That's why it's important 23 to hear him testify and his credibility about his 24 motivation. What the issue that's raised by his 25 efforts and his, I think it's fair to characterize,</p> <p style="text-align: right;">Page 91</p>	<p>1 but the phone calls and everything else, can't be 2 read out of context. It can't be the predominant 3 set of facts, but it can't be ignored either. 4 Delaware law makes it clear that mere friendship is 5 not a disqualifier. So you have to read it in 6 context. 7 But that's additional -- those are 8 additional facts which one might conclude is 9 something extraordinary for an independent director. 10 But independent of anything else, it wouldn't be 11 significant. But drawn in with everything else in 12 context, it is significant. 13 Q. Now, you just mentioned a visit by 14 Jim Cotter, Jr., to Mr. Kane. 15 A. Yeah. 16 Q. Do you see that as being potentially 17 significant in considering Mr. Kane's independence 18 in terms of terminating Jim Cotter, Jr.? 19 A. Not necessarily with the act of 20 termination, but it's an indication of his concern 21 about the family. And the finder of fact will have 22 to weigh that significance in context with whether 23 it meets his duty as a fiduciary to the minority 24 stockholders and the corporation itself. What's 25 overriding what here? Is he focused on the object</p> <p style="text-align: right;">Page 93</p>

<p>1 of his exercise of his fiduciary responsibility or 2 is he swayed by his concern about the family? 3 You -- you can't reach that conclusion just on 4 pleaded facts and depositions. 5 Q. Other than Mr. Kane and Mr. Adams, 6 did you reach any conclusions or opinions about 7 whether any of the other directors in this case are 8 independent? 9 A. Well, I think it's clear, Ellen and 10 Margaret Cotter are not independent. 11 Q. Anyone else? 12 A. No. 13 Q. Okay. Now, in terms of 14 Mr. McEachern, you don't have any opinion on whether 15 or not -- 16 A. No. 17 Q. -- he's independent? 18 A. And, remember, when I say "opinion," 19 I mean have I seen pleaded facts that would suggest 20 either a lack of independence or disinterestedness 21 or the ab -- interestedness, I should say. 22 Q. Right. 23 A. Sorry; I misspoke. The answer to 24 Gould and to McEachern -- how do you pronounce his 25 last name?</p> <p style="text-align: right;">Page 94</p>	<p>1 I -- I only know what the pleadings and the 2 depositions suggest. And it appears it 3 would raise an issue in my mind as a 4 Delaware judge because it seems despite a 5 controller's ultimate decision and a vote on 6 directors at the annual meeting, that it's 7 sort of extraordinary to have people without 8 significant credentials come on largely 9 because they are related to the -- in some 10 way to the Cotter family. 11 BY MR. SEARCY: 12 Q. Let me -- let me just make sure that 13 I understand what your opinion is. Do you have an 14 opinion one way or the other as to whether or not 15 Mr. Wrotniak or Ms. Codding are independent? 16 A. No, I can't reach that conclusion. 17 As I've stated over and over, that would have to be 18 determined by the finder of fact. 19 Q. Are you offering any opinion in this 20 case as to whether they are independent directors or 21 not? 22 A. No. 23 MR. KRUM: Asked and answered. 24 THE WITNESS: The only opinion I've 25 offered is that examining the pleadings and</p> <p style="text-align: right;">Page 96</p>
<p>1 Q. McEachern. 2 A. -- McEachern -- God, I'm part Scott, 3 I should get that right -- and Storey, no. 4 Q. Okay. With respect to Judy Codding 5 or Michael Wrotniak, have you formed any opinion as 6 to whether they're independent? 7 MR. KRUM: Objection; incomplete 8 hypothetical. 9 THE WITNESS: Again, I haven't formed 10 an independent -- I haven't formed an 11 opinion that they are independent or not. 12 All I can say there are the circumstances of 13 their relationship relative to their 14 experience, training, and expertise to be a 15 director of that company would raise an 16 eyebrow in Delaware and it would be exam -- 17 examined carefully. 18 BY MR. SEARCY: 19 Q. But as you sit here and having 20 reviewed the materials that you have reviewed, you 21 don't have an opinion one way or the other in terms 22 of whether Mr. Codding -- I'm sorry -- Ms. Codding 23 or Mr. Wrotniak are independent; correct? 24 MR. KRUM: Asked and answered. 25 THE WITNESS: I can't resolve that.</p> <p style="text-align: right;">Page 95</p>	<p>1 the circumstances here raises a reasonable 2 doubt about their independence and would 3 have to be resolved by the finder of fact. 4 BY MR. SEARCY: 5 Q. Do you know what date Mr. Cotter 6 was -- Mr. Cotter, Jr., was terminated on? 7 A. My -- exact date? It's in May of 8 2015. 9 Q. Okay. 10 A. 27 sticks in my mind, but I'm not 11 positive. 12 Q. Do you know whether it might have 13 been as late as June 12th? 14 A. It could have been. 15 Q. Okay. In your opinion, is there any 16 breach of fiduciary duty by terminating Mr. Cotter, 17 Jr., on June 12th as opposed to June 30th? 18 MR. KRUM: Objection; incomplete 19 hypothetical. 20 THE WITNESS: I don't see the 21 significance of that. 22 BY MR. SEARCY: 23 Q. Okay. You don't see the significance 24 of it -- just so I can clarify, you don't see the 25 significance of it from a fiduciary duty</p> <p style="text-align: right;">Page 97</p>

<p>1 perspective?</p> <p>2 A. The process is the same whether it's</p> <p>3 June 12th or June 30th.</p> <p>4 Q. Then it doesn't make any difference;</p> <p>5 correct?</p> <p>6 A. Well, there was an -- there was an</p> <p>7 established -- at least in the minds of some of the</p> <p>8 witnesses -- and there's some testimony inconsistent</p> <p>9 with that and that's why I can't resolve it</p> <p>10 finally -- that he would be given until June 30th</p> <p>11 under the arrangement that had been made with</p> <p>12 Mr. Storey as the ombudsman and the two-person</p> <p>13 independent committee that was basically acting to</p> <p>14 supervise him in a -- in a way.</p> <p>15 Then the executive committee comes</p> <p>16 into existence. The process that results in</p> <p>17 terminating him doesn't go to June 30. That's --</p> <p>18 that's all I can recall. And so there's still the</p> <p>19 process implications, yeah.</p> <p>20 Q. And let me -- let me just, if I can,</p> <p>21 narrow the issue here, though. In terms of the</p> <p>22 decision whether to fire him on June 12th or to fire</p> <p>23 him on June 30th, the difference in those dates</p> <p>24 doesn't have any significance from a fiduciary duty</p> <p>25 perspective in your understanding; correct?</p> <p>Page 98</p>	<p>1 MR. KRUM: Same objections.</p> <p>2 THE WITNESS: Well, it depends on how</p> <p>3 you resolve the facts. There was already</p> <p>4 put -- it had already been put in place a</p> <p>5 plan to go to June 30th. The circumstances</p> <p>6 that would cause them to move from June 30th</p> <p>7 to June 12th are important. Everything is</p> <p>8 context.</p> <p>9 I -- I can't make that determination</p> <p>10 or opine on whether there's magic in</p> <p>11 June 12th or June 30th. It does affect the</p> <p>12 analysis of the process.</p> <p>13 BY MR. SEARCY:</p> <p>14 Q. And when you say there was a plan, I</p> <p>15 think you've testified to this earlier, there is</p> <p>16 disagreement as to whether or not there was a plan</p> <p>17 on whether to go to June 30th; correct?</p> <p>18 A. There is.</p> <p>19 Q. Okay. Do you know how many meetings</p> <p>20 the board of directors held before terminating</p> <p>21 Mr. Cotter, Jr.?</p> <p>22 A. Well, that's difficult to say. From</p> <p>23 the start of time or within what time frame?</p> <p>24 Q. With respect to deciding whether or</p> <p>25 not to terminate Mr. Cotter, Jr.</p> <p>Page 100</p>
<p>1 MR. KRUM: Objection; vague and</p> <p>2 ambiguous, asked and answered, may</p> <p>3 contradict the testimony.</p> <p>4 THE WITNESS: It's -- it's possible</p> <p>5 for the person reviewing the process to</p> <p>6 decide either way on that. They could</p> <p>7 decide that it was important that it didn't</p> <p>8 play out to June 30th and that the decision</p> <p>9 to change from the June 30th original plan,</p> <p>10 if that indeed she concludes was the</p> <p>11 original plan, was a breach of fiduciary</p> <p>12 duty.</p> <p>13 So firing on June 12th would be</p> <p>14 different than firing by coming back to a</p> <p>15 meeting and saying we've exhausted all of</p> <p>16 our efforts acting as ombudsman, the</p> <p>17 difficulties continue, we have to make a</p> <p>18 decision about what to do about it, one of</p> <p>19 those alternatives is to terminate</p> <p>20 Mr. Cotter, Jr. That could -- that could</p> <p>21 influence a judge.</p> <p>22 BY MR. SEARCY:</p> <p>23 Q. If the board had concluded that it</p> <p>24 exhausted all of its efforts by June 12th, is there</p> <p>25 any breach there?</p> <p>Page 99</p>	<p>1 A. Do you mean meetings where that was a</p> <p>2 subject on the agenda?</p> <p>3 Q. Correct.</p> <p>4 A. No, I don't know how many there were.</p> <p>5 Q. Okay.</p> <p>6 A. The best I can tell from the</p> <p>7 deposition, there was the one.</p> <p>8 Q. Okay. If there was more than one</p> <p>9 meeting where Mr. Cotter, Jr.'s, termination was</p> <p>10 discussed, would that impact your analysis?</p> <p>11 MR. KRUM: Objection; incomplete</p> <p>12 hypothetical.</p> <p>13 THE WITNESS: I don't know how to</p> <p>14 answer that. It depends on notice of the</p> <p>15 meeting; who appeared; who participated in</p> <p>16 the process; were they all independent,</p> <p>17 disinterested directors or were they Cotter</p> <p>18 directors as well as truly independent</p> <p>19 directors or those that were tainted in some</p> <p>20 way by their -- their interestedness and</p> <p>21 their lack of independence. There's too --</p> <p>22 too many variables.</p> <p>23 BY MR. SEARCY:</p> <p>24 Q. You can't say one way or the other --</p> <p>25 A. I cannot.</p> <p>Page 101</p>

<p>1 Q. -- as you sit here?</p> <p>2 A. I cannot.</p> <p>3 Q. If -- if all of the directors were</p> <p>4 present for multiple meetings where a discussion of</p> <p>5 Mr. Cotter, Jr., was on the agenda, would that</p> <p>6 impact your analysis?</p> <p>7 MR. KRUM: Same objections.</p> <p>8 THE WITNESS: Not really because I</p> <p>9 can appreciate the fact that there would be</p> <p>10 a discussion of a CEO's performance at a</p> <p>11 board meeting. Whether it focused on</p> <p>12 termination or not is the issue.</p> <p>13 BY MR. SEARCY:</p> <p>14 Q. In preparing your opinion did you</p> <p>15 review any of the meeting minutes from any of the</p> <p>16 board meetings where Mr. Cotter, Jr.'s, termination</p> <p>17 was discussed?</p> <p>18 A. No.</p> <p>19 Q. Okay. In review -- in preparing your</p> <p>20 opinion did you review any of the notes of any of</p> <p>21 the directors who participated in the meetings where</p> <p>22 Mr. Cotter, Jr.'s, termination was discussed?</p> <p>23 MR. KRUM: Assumes facts.</p> <p>24 THE WITNESS: No.</p> <p>25 MR. SEARCY: Why don't we take our</p> <p style="text-align: right;">Page 102</p>	<p>1 A. No.</p> <p>2 Q. And you don't have any knowledge as</p> <p>3 to the statutes governing the -- the use of</p> <p>4 executive committee -- committees under Nevada law?</p> <p>5 A. Not -- no, I have no -- no idea.</p> <p>6 Q. You provided an opinion about the</p> <p>7 executive committee of Reading in this case;</p> <p>8 correct?</p> <p>9 A. I -- I spoke to its formation, yes.</p> <p>10 Q. And were you aware when you</p> <p>11 formulated your opinion that an executive committee</p> <p>12 existed before plaintiff was terminated?</p> <p>13 A. That an executive committee?</p> <p>14 Q. Yeah.</p> <p>15 A. Yes, it did. There was one.</p> <p>16 Q. Okay. And you are aware that</p> <p>17 plaintiff was the chairman of that executive</p> <p>18 committee?</p> <p>19 A. I remember reading that in the</p> <p>20 deposition; yes.</p> <p>21 Q. Are you aware of any change to the</p> <p>22 delegation of authority that was given to the</p> <p>23 executive committee after plaintiff's termination?</p> <p>24 A. No.</p> <p>25 Q. And with respect to the executive</p> <p style="text-align: right;">Page 104</p>
<p>1 lunch -- do you want to take a lunch break</p> <p>2 now, Mark?</p> <p>3 MR. KRUM: Sure.</p> <p>4 MR. SEARCY: Okay.</p> <p>5 THE VIDEOGRAPHER: Off the record at</p> <p>6 12:41. This will end Disc No. 2.</p> <p>7 - - -</p> <p>8 (Whereupon there was a luncheon</p> <p>9 recess in the proceedings.)</p> <p>10 - - -</p> <p>11 THE VIDEOGRAPHER: The time now is</p> <p>12 1:54. Back on the record, beginning of Disc</p> <p>13 No. 3.</p> <p>14 BY MR. SEARCY:</p> <p>15 Q. Welcome back from lunch.</p> <p>16 A. Good afternoon.</p> <p>17 Q. Let me turn for a moment to the issue</p> <p>18 of executive committees.</p> <p>19 In your understanding and experience</p> <p>20 executive committees are permitted under Delaware</p> <p>21 law; is that right?</p> <p>22 A. Yes.</p> <p>23 Q. Okay. And do you have any knowledge</p> <p>24 as to whether executive committees are permitted</p> <p>25 under Nevada law?</p> <p style="text-align: right;">Page 103</p>	<p>1 committee instituted at RDI, are you aware of any</p> <p>2 actions taken by that committee?</p> <p>3 A. Any actions taken by them?</p> <p>4 Q. Yeah.</p> <p>5 A. I'm not sure I understand what you</p> <p>6 mean.</p> <p>7 Q. Are you aware of any -- well, maybe</p> <p>8 we can break it down.</p> <p>9 Are you aware of any -- anything that</p> <p>10 the executive committee ever did?</p> <p>11 A. Suddenly my -- my mind is not clear.</p> <p>12 I'm trying to -- are you talking about formal</p> <p>13 actions that they took?</p> <p>14 Q. Correct.</p> <p>15 A. I -- my focus was on how it was</p> <p>16 reformulated and populated in such a way that it did</p> <p>17 not have a majority of independent and disinterested</p> <p>18 directors.</p> <p>19 Q. Well, let me have you turn to Page 29</p> <p>20 of your report.</p> <p>21 A. Yes.</p> <p>22 Q. And this is your opinion on the</p> <p>23 creation of the executive committee; is that right?</p> <p>24 A. Yes.</p> <p>25 Q. Okay. And you're -- to the extent</p> <p style="text-align: right;">Page 105</p>

<p>1 that you express any concerns about the executive 2 committee, in your opinion it's because of the 3 exclusion of directors; is that right? 4 A. Yes. 5 MR. KRUM: Object. 6 THE WITNESS: Sorry. Yes. 7 BY MR. SEARCY: 8 Q. Not about any action that any -- 9 A. No. 10 Q. -- of the members of this committee 11 ever took? 12 A. No. 13 Q. Okay. Were you aware that Bill Gould 14 was asked to be a member of the executive committee? 15 A. I don't recall that. 16 Q. Okay. You never saw any testimony 17 about that? 18 A. I may have. I just -- it didn't 19 stick in my mind. 20 Q. Okay. And if he -- in your opinion, 21 if he were asked to be a member of the executive 22 committee, then he certainly wasn't being excluded 23 from it; correct? 24 MR. KRUM: Objection; assumes facts, 25 incomplete hypothetical.</p> <p style="text-align: right;">Page 106</p>	<p>1 Q. You didn't consider them to be 2 relevant? 3 A. It's -- it's relevant that you have 4 the authority to form an executive committee. 5 What's more important is did you implement that 6 authority in a way that was equitable and one that 7 didn't exclude directors who had equal 8 responsibility when an executive committee assumes 9 virtually all of the duties of the regular board. 10 That's when the factual question 11 comes up about whether or not it was fairly 12 organized in a way to either promote efficiency or 13 to exclude certain directors from the ultimate 14 decision-making process, and that's a contextual, 15 factual decision that has to be made by a finder of 16 fact. 17 Q. Okay. And in the context of what 18 you've just described, just to be clear, you didn't 19 review Mr. Gould's testimony about being asked to be 20 on the board; correct? 21 A. I didn't recall it. 22 Q. Okay. And you didn't look at what 23 the bylaws of RDI provided for? 24 A. I did not because it would make no 25 difference.</p> <p style="text-align: right;">Page 108</p>
<p>1 THE WITNESS: If he were asked and he 2 declined for his own personal reasons, then 3 it would be very difficult to argue that he 4 was excluded. 5 BY MR. SEARCY: 6 Q. Okay. Other than Mr. Gould, is there 7 anyone else you believe may have been excluded from 8 the executive committee? 9 A. Well, Mr. Storey was not on the 10 executive committee. 11 Q. Anyone else? 12 A. Not -- not that I recall. 13 Q. And Mr. Storey, in your 14 understanding, has resigned from RDI; correct? 15 A. He's no longer there, yes. I 16 don't know -- I don't recall the circumstances. 17 Q. Okay. In formulating your opinion 18 about RDI's executive committees, did you consider 19 RDI's bylaws? 20 A. No. 21 Q. Did you examine what the bylaws have 22 to say about the formation of an executive 23 committee? 24 A. No. But for the same reason I 25 explained earlier.</p> <p style="text-align: right;">Page 107</p>	<p>1 Q. Okay. And you didn't look to see 2 what actions, if any, the executive committee had 3 ever taken; is that right? 4 A. In that form? No. 5 Q. Okay. When you say "in that form"? 6 A. As repopulated. 7 Q. Okay. Did you ever take a look to 8 see what actions the executive committee took when 9 Jim Cotter, Jr., was chair of the executive 10 committee? 11 A. I -- I did not. 12 Q. So to be clear then, you didn't look 13 to see what actions the executive committee took 14 either before or after Mr. Cotter, Jr.'s, 15 termination; correct? 16 A. Well, the question becomes whether it 17 was the executive committee or the full board that 18 made the appointments that came after the 19 repopulation, so to speak, or the reconstitution of 20 the executive committee. 21 Q. Are you talking about the 22 executive -- well, let me backtrack. 23 When you're talking about the 24 appointments, which appointments are you referring 25 to?</p> <p style="text-align: right;">Page 109</p>

<p>1 A. The CEO and the title that was given 2 to Margaret Cotter. 3 Q. All right. With respect to the CEO 4 and the title given to Margaret Cotter -- 5 A. The succession is what I'm talking 6 about. 7 Q. Yeah -- neither of those actions were 8 taken by the executive committee; correct? 9 A. Not to my knowledge. That's why I 10 didn't explore it. 11 Q. Okay. Well, when you say that's why 12 you didn't explore it, can you explain what you 13 mean? 14 A. I didn't have any actual actions of 15 the executive committee to touch upon other than the 16 fact it was constituted in such a way that it had 17 the same powers as the board and it didn't have a 18 majority of independent directors. 19 Q. Okay. 20 A. But I'm not speaking to any 21 particular action it took. 22 Q. Okay. Well, I just want to clarify, 23 when you brought up the appointment of the CEO, when 24 you brought up the appointment of Margaret Cotter, 25 neither of those were actions that were taken by the</p> <p style="text-align: right;">Page 110</p>	<p>1 Q. Now, as you sit here, you don't have 2 any knowledge of what the terms of Mr. Heth's letter 3 provided for; correct? 4 A. I do not. 5 Q. Okay. And with respect to any 6 discussion undertaken by the board concerning 7 Mr. Heth's letter, you don't have any knowledge 8 other than what's set forth in the Complaint; is 9 that right? 10 A. Just from the pleadings. 11 Q. Okay. Now, when you say "the 12 pleadings," you mean the Amended Complaint; right? 13 A. Well, that's where the allegation 14 occurs; yeah. 15 Q. You haven't looked at any underlying 16 documents? 17 A. No. 18 MR. KRUM: That were produced on or 19 about the 15th of September, I should note. 20 MR. SEARCY: All right. 21 BY MR. SEARCY: 22 Q. With counsel's speaking objection in 23 mind, have you reviewed any documents since then? 24 A. No. At the point in time of my 25 opinion, I had some conversation at some point with</p> <p style="text-align: right;">Page 112</p>
<p>1 executive committee in your understanding; correct? 2 A. Yes. 3 Q. Okay. Has, to your knowledge, the 4 executive committee had any involvement in either of 5 those actions? 6 A. As an executive committee, no. 7 Q. And do you know who constitutes the 8 executive committee at RDI? 9 A. Right now? 10 Q. Yeah. 11 A. No. 12 Q. Okay. Let me ask you about an 13 expression of interest letter sent by a fellow named 14 Paul Heth to the company. Does that sound familiar 15 to you? 16 A. I don't remember the name Heth, but I 17 remember an expression of interest letter. 18 Q. Okay. Have you reviewed the 19 expression of interest letter submitted or -- I'm 20 sorry -- signed by Mr. Heth? 21 A. No. 22 Q. Okay. With respect to the expression 23 of interest, have you reviewed anything other than 24 plaintiff's Amended Complaint? 25 A. No.</p> <p style="text-align: right;">Page 111</p>	<p>1 Mr. Krum saying that there had been developments 2 since then. But I -- it wasn't the focus of my 3 opinion and it wasn't a focus of my attention as a 4 result. 5 Q. In formulating your opinion, did you 6 look at all at Nevada Revised Statute 78.138 4.(d)? 7 A. I did not. 8 Q. Do you have any knowledge as to 9 whether the board responded to Mr. Heth's letter? 10 A. From what I read in the materials 11 that were available to me, the board rejected any 12 further inquiries. But now I understand there have 13 been further solicitation by a prospective buyer and 14 there -- there's some action that might be taken as 15 a result of that. But I -- I'm not familiar with 16 it. 17 Q. Okay. Do you have any opinion on it, 18 on the currently undergoing discussions? 19 A. Well, I don't know what they are so I 20 couldn't have an opinion on them. But I -- if 21 there's more than what I saw, then that's a good 22 thing because, as you know from my report, the 23 concern I had at least from a Delaware perspective 24 was while there's the famous phrase "just say no," 25 it assumes a good-faith investigation, which doesn't</p> <p style="text-align: right;">Page 113</p>

<p>1 require necessarily lawyers and financial advisors, 2 but it does require a business plan to be reviewed 3 and thoughtful, good-faith entertaining of the 4 prospects of the -- of the inquiry. And that was -- 5 that was my express concern. 6 Q. Now, let me make -- let me make sure 7 I understand your -- your formulation of Delaware 8 law. 9 A. Sure. 10 Q. Under Delaware law the members of the 11 board of directors were not required to seek out an 12 independent investment banker; correct? 13 MR. KRUM: Object to the incomplete 14 hypothetical. 15 THE WITNESS: It's correct the law 16 does not mandate that they do so. 17 BY MR. SEARCY: 18 Q. Okay. Under Delaware law -- well, 19 let me ask you first: Do you know whether under 20 Nevada law directors are entitled to rely on 21 financial information presented to them by the CEO 22 and chairman of the board? 23 A. I don't know under Nevada law whether 24 they are or not. 25 Q. Are you aware that a valuation was</p> <p style="text-align: right;">Page 114</p>	<p>1 business plan, you weren't referring to a 2 requirement under Delaware law; is that right? 3 A. That's correct. It would just be one 4 fact in an analysis of whether there was a 5 good-faith response. 6 Or I should say a response made in 7 good faith. 8 Q. Were you shown the presentation made 9 to the board by Ellen Cotter? 10 A. I was not. 11 Q. Okay. So do you have any opinion as 12 you sit here as to -- 13 A. No. I wouldn't have made a factual 14 judgment on its quality or its significance or what 15 it should have been to the board. 16 Q. In preparing your expert opinion were 17 you ever shown a document called "The Mission, 18 Vision, and Strategy, 2015 Performance Results, 2016 19 Budget and Strategy"? 20 A. I was not. 21 Q. Okay. In your role as a legal expert 22 would you be able to offer an opinion one way or the 23 other as to whether a particular document is a 24 business plan or not? 25 A. No.</p> <p style="text-align: right;">Page 116</p>
<p>1 presented to the board by the CEO -- 2 A. I know -- 3 Q. -- in connection with the unsolicited 4 offer? 5 A. I'm sorry. 6 THE WITNESS: And I apologize to the 7 court reporter. 8 THE COURT REPORTER: Thank you. 9 THE WITNESS: I know that there was a 10 presentation made. The depositions reflect 11 that by the then CEO Ellen Cotter. 12 I don't know what was presented. I 13 do know it was presented in the absence of a 14 business plan which was supposed to be 15 produced but didn't exist apparently. But I 16 don't know the quality of the information or 17 the source of it. 18 BY MR. SEARCY: 19 Q. Is there a law or statute that you're 20 referencing under Delaware law that would require a 21 written business plan be in place? 22 A. No. Delaware law, as I've said 23 before, is highly contextual, doesn't require 24 lockstep check-the-box steps, no. 25 Q. So when you referred to the lack of a</p> <p style="text-align: right;">Page 115</p>	<p>1 Q. So if I showed you "The Mission, 2 Vision, and Strategy" document, you wouldn't be able 3 to opine one way or the other as to whether that was 4 a business plan? 5 A. Well, I have seen business plans. If 6 you showed me one specific to this corporation, 7 could I give you an opinion based on my experience 8 and expertise on whether it is a bona fide business 9 plan? The answer is no. 10 Q. Have you sent any bills to plaintiff 11 in this case or plaintiff's counsel? 12 A. My office probably has. 13 Q. All right. 14 A. I don't -- it may sound strange to 15 you as a practicing lawyer, but I don't pay much 16 attention to billing. 17 MR. RHOW: You're lucky. That's all 18 I pay attention to. 19 THE WITNESS: That comes -- all comes 20 from being temporary. 21 BY MR. SEARCY: 22 Q. Do you know if those bills were 23 collected for production in this case? 24 A. I have no idea. I don't even know 25 that there was a request -- a request for production</p> <p style="text-align: right;">Page 117</p>

<p>1 of the bills. 2 Q. Now, in terms of the documents that 3 were produced by you in this case, were there any 4 documents that you withheld? 5 A. No. 6 Q. Okay. No documents withheld on the 7 ground of work product? 8 A. No. 9 Q. Okay. On Page 26 of your expert 10 report, if you would take a look at that. 11 A. Yes. 12 Q. The last sentence in the very first 13 paragraph there that begins with "Neither Kane's nor 14 Adams' ties to EC and MC were disclosed to the 15 Company's stockholders." 16 A. I'm sorry; I couldn't hear you. 17 Q. Sure. I'll speak up. I apologize. 18 A. No. It's my fault. I was reading 19 while you were trying to point me to the place you 20 want me to read. 21 Q. If you look at that last sentence of 22 the first partial paragraph, it's the concluding 23 sentence of the first -- first paragraph there -- 24 A. Yes. 25 Q. -- about Kane's and Adams' ties --</p> <p style="text-align: right;">Page 118</p>	<p>1 one way or the other? 2 A. No. 3 Q. Why not? 4 A. Because I was not approaching this 5 from listing standards or from what representations 6 were made to the SEC about independence or 7 disinterestedness. I was approaching it solely from 8 the analytical framework that a Delaware court might 9 apply in this situation. 10 Q. So that in terms of the disclosures 11 to the company's stockholders that's referenced 12 there, how does that factor into the analytical 13 framework? 14 A. It's a question of whether or not 15 the -- it's an action that would result in 16 stockholder -- a need for stockholder approval or 17 not. It's -- it's a question of the duty of what is 18 called disclosure. If you make a disclosure, it 19 should be accurate. That's all. 20 Q. And to your knowledge, when plaintiff 21 certified that Kane and Adams were independent, was 22 he inaccurate? 23 MR. KRUM: Same objection. 24 THE WITNESS: I don't know what 25 standard he was using so I can't answer</p> <p style="text-align: right;">Page 120</p>
<p>1 A. Yes. 2 Q. -- did you review any filings by the 3 company in rendering your opinion that neither 4 Kane's nor Adams' ties were disclosed to the 5 company's stockholders? 6 A. Just the one footnote, 190. 7 Q. You didn't review any other 8 disclosures? 9 A. No. 10 Q. Okay. Did you review any SEC filings 11 filed -- signed by plaintiff? 12 A. No. 13 Q. So you didn't see any SEC filings 14 signed by plaintiff where he certified that Kane and 15 Adams were independent? 16 A. I read about it -- 17 MR. KRUM: Object -- 18 THE WITNESS: -- in the depositions. 19 MR. KRUM: Objection. 20 THE WITNESS: But I didn't review the 21 actual filing. 22 MR. KRUM: Vague and big as to 23 "independent." 24 BY MR. SEARCY: 25 Q. Would it have changed your opinion</p> <p style="text-align: right;">Page 119</p>	<p>1 that. I suspect he wasn't using the 2 Delaware legal standard. He may have been 3 using simply the NASDAQ listing 4 requirements. I don't know, just as I don't 5 know that -- until the finder of fact makes 6 the decision, whether there should have been 7 a disclosure, and I don't opine there should 8 or shouldn't have been about Kane or Adam 9 either -- Adams either. 10 BY MR. SEARCY: 11 Q. Okay. Earlier I think you mentioned 12 in connection with the termination of Jim Cotter, 13 Jr., that the board had put a plan in place to give 14 him until June 30th; is that right? 15 A. There are facts that -- yes, I did 16 say that, and there are facts in the depositions 17 that suggested that. 18 Q. Do you know what that plan was? 19 A. Only to the extent that it was a plan 20 to continuing the -- to continue the ombudsman 21 review by Mr. Storey and the two-person committee, 22 as I recall, at the time of Gould and Storey that 23 were charged with trying to improve his stewardship 24 of the corporation; and there was at least the view 25 on the part of Mr. Storey that that review would</p> <p style="text-align: right;">Page 121</p>

<p>1 continue until June 30. As I recall the deposition, 2 that fact was disputed by Mr. Kane. 3 Q. And others; correct? 4 A. Mr. Kane's is what I remember -- 5 Q. Okay. 6 A. -- because I spent so much time 7 reading Mr. Kane's depositions. 8 Q. Other than continuing the ombudsman 9 role until June 30, do you remember any other aspect 10 of the plan? 11 A. No. 12 Q. Do you know if there was any other 13 aspect of the plan? 14 A. No. 15 Q. Okay. And in your -- in your view, 16 in your opinion, was continuing the ombudsman role 17 until June 30 itself sufficient to satisfy fiduciary 18 duties? 19 A. It would still -- 20 MR. KRUM: Objection; incomplete 21 hypothetical. 22 THE WITNESS: It would still depend 23 upon the entire context. It would be more 24 beneficial to the view that things had 25 played out with an idea of the interest of</p> <p style="text-align: right;">Page 122</p>	<p>1 minority stockholders. The question is whether the 2 decision was influenced by the controlling 3 stockholders or whether it was an independent, 4 objective decision made by directors who were both 5 independent and disinterested. 6 Q. Other -- 7 A. It calls -- it calls into question a 8 review of the -- and an examination of their 9 reasoning for structuring a process why they did and 10 changing a process that at least some of them 11 believed was in place. 12 Q. Other than giving until -- 13 Mr. Cotter, Jr., until June 30th to improve his 14 performance, would there be any other benefit to 15 minority shareholders? 16 A. Well, the benefits would be the 17 confidence that the directors, who owe them a 18 fiduciary duty, were carrying out those duties with 19 the interest of the corporation and all of the 20 shareholders in mind and not just the interests of 21 the controlling stockholders and the feuding family. 22 Q. Anything else? 23 A. That's it. 24 Q. Okay. So to summarize, it would give 25 Mr. Cotter, Jr., until June 30th to improve his</p> <p style="text-align: right;">Page 124</p>
<p>1 the minority stockholders in the corporation 2 itself in mind as well as those of the 3 controllers. 4 Ending it earlier, before that had 5 completely played out, raises the specter of 6 the controlling stockholders who sought to 7 benefit if Mr. Cotter, Jr., were terminated 8 to be influencing the decision of the 9 fiduciaries. And, again, it's the lack of 10 focus on the minority stockholders that's 11 troubling throughout the entire process. 12 BY MR. SEARCY: 13 Q. With respect to the minority 14 stockholders, in your opinion how would continuing 15 Mr. Storey as ombudsman assist the minority 16 stockholders? 17 A. It would demonstrate that the 18 fiduciaries were letting the situation play out to 19 the very end to see if even those who did not 20 believe that Mr. Cotter, Jr., was doing the job of 21 CEO as they would have him do it, it would at least 22 give them the option to let it play out and see if 23 it -- if he was able to improve his performance. 24 And whether or not the CEO's 25 performance is favorable is clearly important to the</p> <p style="text-align: right;">Page 123</p>	<p>1 performance and it would potentially improve 2 confidence in the minority shareholders; correct? 3 MR. KRUM: Object to the 4 characterization of the testimony. 5 THE WITNESS: It could be the first. 6 I don't know the answer to that, the extent 7 to which another two weeks or so -- 8 BY MR. SEARCY: 9 Q. Right. 10 A. -- would have allowed him to improve 11 his performance to the satisfaction of an 12 independent disinterested fiduciary. But it's very 13 important that the fiduciaries demonstrate to the 14 minority stockholders, particularly in a controlled 15 situation, that they have all of the stockholders' 16 interests in mind and they're not being guided by a 17 bias or the controlling stockholders or concerned 18 that the controlling stockholders may remove them 19 from office at the next annual meeting if they don't 20 do -- if they don't act consistently with the 21 controlling stockholders' wishes. All minority 22 stockholders are concerned about that despite the 23 fact that they know they're buying into a controlled 24 company. 25 Q. And when you say controlling</p> <p style="text-align: right;">Page 125</p>

<p>1 stockholders may remove them from office at the next 2 annual meeting, are you referring to about officers 3 being removed? 4 A. No, no. I'm talking about not 5 reelecting the director. 6 Q. Okay. 7 A. That's an omnipresent concern under 8 Delaware law, that the directors aren't slavishly 9 following the controlling stockholders because 10 they're concerned about their director position. 11 Q. All right. With respect to 12 Mr. Cotter, Jr., he's actually still a director; 13 right? 14 A. Yeah. 15 Q. Okay. So he hasn't been removed from 16 that position, to your understanding; correct? 17 A. To my understanding, no. 18 Q. Okay. Are you aware of any minority 19 stockholder of RDI who was ever asked -- strike 20 that. 21 Are you aware of any minority 22 stockholder of RDI who is currently seeking to have 23 Mr. Cotter, Jr., reinstated as CEO? 24 A. I am not. 25 Q. Okay. And just to -- just to follow</p> <p style="text-align: right;">Page 126</p>	<p>1 that the process that cut it short raises 2 questions about whether those who cut the 3 process short, knowing that plan was already 4 in place and there may still have been hope 5 at least in the minds of two independent 6 directors that it could work, at least 7 should wait until June 30 to play out. It 8 was interrupted, and the concern of anyone 9 reviewing it would be why. 10 BY MR. SEARCY: 11 Q. So -- 12 A. And if the burden shifts, as my 13 opinion suggests it should, the defendant directors 14 should demonstrate that it was fair to cut it off 15 then. 16 Q. Hypothetically speaking, if the plan 17 had stayed in place until June 30th -- 18 A. Yeah. 19 Q. -- and I think I asked you this 20 before, but I'll ask it again for clarity's sake -- 21 would that plan -- even though there are directors 22 who dispute that that plan was in place, would that 23 plan have satisfied fiduciary duties? 24 A. Not alone, no. It would still be an 25 inquiry into the process. It would be one factor</p> <p style="text-align: right;">Page 128</p>
<p>1 up on this, other than Mr. Storey continuing his 2 ombudsman role until June 30th, is there any other 3 aspect of the plan that you believed satisfied 4 fiduciary duties? 5 MR. KRUM: Objection; vague and 6 ambiguous, don't know what it means, asked 7 and answered. 8 THE WITNESS: I am not sure what you 9 mean by am I aware of any other aspect of 10 the plan that satisfies -- 11 BY MR. SEARCY: 12 Q. Well, I think you -- 13 A. -- the fiduciary duties. 14 Q. You testified earlier that there was 15 a plan that was put in place and I think your 16 opinion was that that plan should have stayed in 17 place with re -- with respect to the termination of 18 Mr. Cotter, Jr., on June 30th. 19 MR. KRUM: I'm going to object to the 20 characterization of the testimony. Is that 21 a question you want him to respond? 22 MR. SEARCY: If he can. 23 THE WITNESS: Yeah. I'm not offering 24 an opinion that it should or should not have 25 stayed in place. I'm offering the opinion</p> <p style="text-align: right;">Page 127</p>	<p>1 removed that looked unfavorable at the time to the 2 directors who have been accused of breaching their 3 fiduciary duty by the Complaint. 4 Q. So in your opinion Mr. Cotter, Jr., 5 could have been fired on June 30th, after the 6 completion of the plan, and that still might be a 7 breach of fiduciary duties; is that right? 8 MR. KRUM: Objection; incomplete 9 hypothetical, asked and answered. 10 THE WITNESS: Depending on how the 11 facts developed at a hearing about the 12 context of the process and why people voted 13 the way they did and an exploration of their 14 objectivity by testing their independence 15 and their economic interest aligned with the 16 Cotter directors, it might have been. 17 BY MR. SEARCY: 18 Q. Let me ask you to turn to Page 29 of 19 your expert report. 20 A. Okay. 21 Q. And this portion of the expert report 22 concerns the CEO search and the decision to appoint 23 Ellen Cotter -- 24 A. Yes. 25 Q. -- as CEO; correct?</p> <p style="text-align: right;">Page 129</p>

<p>1 A. Yes. You're talking about Paragraph 2 C. on Page 29? 3 Q. That's right, Section C. 4 And I think you reiterated a point in 5 the first portion of that paragraph that you said 6 earlier, that there is no case -- or you're aware of 7 no case law that discusses the fiduciary duties and 8 standards applicable to the appointment of officers; 9 correct? 10 MR. KRUM: Objection. That misstates 11 the testimony, incomplete hypothetical. 12 THE WITNESS: That's what the report 13 says, yes, and that's what I think. 14 BY MR. SEARCY: 15 Q. You don't disagree with that 16 statement. 17 A. No. Well, I hope not. 18 Q. And in providing your opinion you 19 talk or you make mention of the CEO search 20 committee? 21 A. Yes. 22 Q. Are you aware of who the members of 23 the CEO search committee were? 24 A. I was. At this particular moment in 25 life I don't remember their names.</p> <p style="text-align: right;">Page 130</p>	<p>1 Gould. 2 Q. Yeah, there it is in the report, yes. 3 A. That just refreshed my recollection, 4 if I'm allowed to do that. 5 Q. You are. 6 And do you have any reason to believe 7 that either Mr. Gould or Mr. McEachern didn't carry 8 out their fiduciary duties in performing their 9 duties on the -- on the CEO search committee? 10 A. Well, I -- 11 MR. KRUM: Objection; foundation. 12 THE WITNESS: To be consistent with 13 what I testified to earlier, I'd start with 14 the proposition that I didn't see 15 information pleaded sufficient to raise a 16 question that there was a reasonable doubt 17 about their independence or their 18 disinterestedness. I make no judgment about 19 whether in fact someone breached their 20 fiduciary duty. 21 BY MR. SEARCY: 22 Q. Okay. And in your review of the 23 materials in this case did you see anything to 24 indicate that Mr. Gould or Mr. McEachern acted in an 25 interested way in conducting their services on the</p> <p style="text-align: right;">Page 132</p>
<p>1 Q. Okay. You're aware that Mr. Gould 2 was a member of the CEO search committee; correct? 3 A. I don't independently recall that 4 now. 5 Q. Okay. 6 A. But I don't dispute it. 7 Q. And you don't have any opinion on 8 Mr. Gould and whether he's an independent or 9 interested director? 10 A. I -- I didn't see facts alleged in 11 the Complaint that would give me reason to -- to 12 believe there was a reasonable doubt about his 13 independence or his disinterestedness. 14 Q. And do you recall that Mr. McEachern 15 was also a member of the CEO search committee? 16 A. As -- as I -- no, I don't recall. I 17 don't dispute it. 18 Q. Okay. And Ellen Cotter was on the 19 CEO search committee but recused herself. Do you 20 recall that? 21 A. I do recall that. 22 Q. Okay. And Margaret Cotter was also 23 on the committee. Do you recall that? 24 A. Yeah. I see that I had reported that 25 and cited to Footnote 211 was EC, MC, McEachern, and</p> <p style="text-align: right;">Page 131</p>	<p>1 CEO search committee? 2 MR. KRUM: Objection. 3 THE WITNESS: I'm not sure what you 4 mean by that. Interestedness is a term of 5 art for my culture. 6 BY MR. SEARCY: 7 Q. Okay. Let me see if I can ask it a 8 better way. 9 In terms of Mr. Gould's service on 10 the CEO search committee -- 11 A. Right. 12 Q. -- did you see anything that 13 indicated that he was acting in a way that was not 14 independent? 15 A. No. 16 MR. KRUM: Same objection. 17 BY MR. SEARCY: 18 Q. In respect to Mr. McEachern's service 19 on the CEO search committee, did you see anything 20 that indicated that he wasn't acting in an 21 independent fashion? 22 MR. KRUM: Same objection. 23 THE WITNESS: No. 24 BY MR. SEARCY: 25 Q. Okay. If you'll turn to Page 31 of</p> <p style="text-align: right;">Page 133</p>

<p>1 your expert report. 2 A. (Witness complies.) 3 Q. On the second paragraph, the -- the 4 last sentence, it's actually the first full 5 paragraph but second paragraph on the page, where it 6 starts out: "Moreover, a finder of fact" -- 7 A. Yes. 8 Q. -- "could find that these actions 9 constituted intentional misconduct..." 10 A. Yes. 11 Q. Is that a reference to intentional 12 misconduct under Nevada law? 13 A. Yes. 14 Q. Okay. 15 A. It -- I -- I don't know with 16 certainty what the case law in Nevada has stated 17 about how one defines in context intentional 18 misconduct. I'm taking it at its dictionary 19 meaning, which to me, since it doesn't parrot 20 violation of the law, which is in the statute, that 21 it must mean someone intentionally breached their 22 duty of loyalty knowing, when they did so, they were 23 doing so. 24 Q. Well, let me unpack a couple items on 25 that. I think you testified previously that the</p> <p style="text-align: right;">Page 134</p>	<p>1 sought and obtained as a result of a breach of 2 fiduciary duty. It simply means the directors can't 3 be held personally liable for their breach of 4 fiduciary duty in monetary terms. 5 Q. I want to focus on the Nevada law 6 aspect -- 7 A. Sure. 8 Q. -- here fro -- for our purposes, 9 because I think you said on Page 31, where you make 10 reference to intentional misconduct, you were -- you 11 were doing that with respect to Nevada law; correct? 12 A. I -- I had that phrase in mind. But 13 when I say with respect to Nevada law, in no way am 14 I suggesting that my interpretation of intentional 15 misconduct is my formulation of Nevada law. 16 It's -- I'm just taking two 17 dictionary words, putting them together, and 18 interpreting them consistent with my, I guess now, 19 46 years of practice and 25 years on the bench, they 20 must have some meaning and that's the meaning that I 21 give them. 22 Q. All right. Now, with respect to your 23 reference to the Nevada statute, I believe you said 24 when you prepared this sentence, were you referring 25 to it by memory, you didn't go --</p> <p style="text-align: right;">Page 136</p>
<p>1 exculpatory statute in Nevada is exculpatory also 2 with respect to alleged breaches of duties of 3 loyalty; correct? 4 A. Yes. 5 Q. Okay. In providing your opinion on 6 intentional misconduct on Page 31, just to be clear, 7 you didn't consult the Nevada statute? 8 A. I wouldn't -- well, I was aware of 9 the statute's reference to the exculpation for 10 breach of the duty of loyalty and two exceptions, 11 intentional misconduct and violation of the law. So 12 I was aware and consulted the statute to that 13 degree. 14 And what I represent here is while I 15 don't know if there is Nevada case law, taken out of 16 specific context, like there often is in Delaware, 17 where the term "intentional misconduct" is 18 interpreted, so I gave it the ordinary meaning that 19 I think a judge would give it, which is a knowing, 20 willful, dereliction of duty. 21 And I interpret it to be an 22 intentional breach of the duty of loyalty would be 23 an exception to exculpation, which, after all, at 24 least in Delaware, only means exculpation from money 25 damages; not from other remedies that could be</p> <p style="text-align: right;">Page 135</p>	<p>1 A. Yes. 2 Q. Okay. You didn't go and look it up, 3 you just remembered. 4 A. Yes. That's a fair comment. That's 5 correct. 6 Q. And in formulating this opinion about 7 intentional misconduct, is it also true that you 8 didn't consult with any Nevada case law? 9 A. I did not, no. 10 Q. Looking to the sentence above, is it 11 correct that the intentional misconduct that you're 12 opining about here concerns what you describe as 13 manipulation of the search for a new CEO? 14 A. Yes. 15 Q. And the -- first of all, is there any 16 other area in all of these expert reports where you 17 make reference to any intentional misconduct by 18 indi -- the individual defendants? 19 A. No. 20 MR. KRUM: Objection. These 21 documents speak for themselves. 22 BY MR. SEARCY: 23 Q. And you're not offering any opinion 24 on any other area of conduct as to whether that was 25 intentional misconduct by the individual defendants;</p> <p style="text-align: right;">Page 137</p>

<p>1 correct?</p> <p>2 A. Correct.</p> <p>3 Q. It's strictly limited to what we're</p> <p>4 looking at on Page 31.</p> <p>5 A. Correct.</p> <p>6 Q. Okay. Now, what you identify as</p> <p>7 potentially intentional misconduct is what exactly?</p> <p>8 A. Well, if this is viewed through the</p> <p>9 prism of entire fairness, then the defendants will</p> <p>10 have to establish that the process was fair.</p> <p>11 It's very difficult to reach a</p> <p>12 conclusion without trial about whether, once there</p> <p>13 is a process in place for hiring a CEO, to have it</p> <p>14 disrupted and suddenly the person that becomes the</p> <p>15 primary candidate is one of the controlling</p> <p>16 stockholders, without raising the concerns of at</p> <p>17 least the thoughtful judge in Delaware about why did</p> <p>18 the process play out the way it did in favor of a</p> <p>19 controlling stockholder when the board had taken</p> <p>20 pains to hire experts, to craft qualifications for</p> <p>21 the person they were seeking as the CEO, and then</p> <p>22 suddenly the process breaks down and the ideal</p> <p>23 candidate just happens to be one of the</p> <p>24 beneficiaries of a 70% trust or a trust holding 70%</p> <p>25 of the voting shares. I mean, that's just too</p> <p style="text-align: right;">Page 138</p>	<p>1 Delaware law?</p> <p>2 MR. KRUM: Objection; incomplete</p> <p>3 hypothetical.</p> <p>4 THE WITNESS: It would have raised</p> <p>5 the issue first, they would have had the</p> <p>6 authority to do that. So the question would</p> <p>7 be whether there were facts to establish</p> <p>8 that that was to the detriment of the</p> <p>9 corporation or the minority stockholders</p> <p>10 because it appeared to favor the controlling</p> <p>11 stockholder and whether or not the vote that</p> <p>12 was taken to make that happen was one that</p> <p>13 was carried by a majority of independent,</p> <p>14 disinterested directors.</p> <p>15 In the absence of a majority of</p> <p>16 independent, disinterested directors making</p> <p>17 that decision, it would have raised issues.</p> <p>18 BY MR. SEARCY:</p> <p>19 Q. Okay. If there was a -- let me ask</p> <p>20 you now -- and again it's a hypothetical -- if a</p> <p>21 majority of disinterested, independent directors</p> <p>22 voted to simply make Ellen Cotter CEO without</p> <p>23 undertaking any process, would that have raised any</p> <p>24 issue under Delaware law?</p> <p>25 MR. KRUM: Same objection.</p> <p style="text-align: right;">Page 140</p>
<p>1 extraordinary a coincidence not to be looked into.</p> <p>2 I don't know what the result should</p> <p>3 be and my opinion is not suggesting what the result</p> <p>4 should be. It all depends upon a test of the facts</p> <p>5 that are developed in context and looking and</p> <p>6 listening to witnesses who testify about their</p> <p>7 motivation and their actions to be able to judge</p> <p>8 their credibility. I'm in no position to do that.</p> <p>9 But it's an extraordinary set of</p> <p>10 circumstances that at least in my jurisdiction would</p> <p>11 be of concern to a judge sitting in equity</p> <p>12 understanding that the ultimate fiduciary is a</p> <p>13 member of the bench looking out after all of the</p> <p>14 interests, the shareholders, the controlling</p> <p>15 shareholders -- I should say the minority</p> <p>16 stockholders, the controlling stockholders, and the</p> <p>17 corporation itself.</p> <p>18 Q. Let me ask you this question</p> <p>19 hypothetically: At the time that the CEO search was</p> <p>20 conducted, you are aware that Ellen Cotter was the</p> <p>21 interim CEO; correct?</p> <p>22 A. Yes.</p> <p>23 Q. If the board of directors had simply</p> <p>24 appointed her as the CEO without undertaking any</p> <p>25 process, would that have raised any issue under</p> <p style="text-align: right;">Page 139</p>	<p>1 THE WITNESS: It would have raised</p> <p>2 the same issue I just articulated.</p> <p>3 BY MR. SEARCY:</p> <p>4 Q. What --</p> <p>5 A. There would have been a different</p> <p>6 context. There would have been no veil presented to</p> <p>7 the minority stockholders suggesting that there was</p> <p>8 a formal process. There wouldn't have been one in</p> <p>9 place that was disrupted. So it would have a</p> <p>10 bearing on what the outcome would be. But the issue</p> <p>11 would still be there.</p> <p>12 Q. Well, let me -- let me see if we can</p> <p>13 break this down a little bit, and maybe you can help</p> <p>14 me with this hypothetical.</p> <p>15 For purposes of appointing a CEO,</p> <p>16 Delaware law doesn't require any process; correct?</p> <p>17 A. That's correct.</p> <p>18 Q. Okay. And in this instance, if a</p> <p>19 majority of independent directors on the board</p> <p>20 simply appointed Ellen Cotter as CEO after she had</p> <p>21 been interim CEO without undertaking any process,</p> <p>22 that wouldn't raise any issues under Delaware law;</p> <p>23 correct?</p> <p>24 A. You qualified that by saying a</p> <p>25 majority of independent, disinterested directors;</p> <p style="text-align: right;">Page 141</p>

<p>1 right?</p> <p>2 Q. I did.</p> <p>3 A. Yes.</p> <p>4 Q. My statement was correct?</p> <p>5 A. Yeah, that would be correct.</p> <p>6 Q. Okay. And with respect to now taking</p> <p>7 it down to the CEO search committee, if a majority</p> <p>8 of independent and disinterested directors on the</p> <p>9 CEO search committee decided to recommend Ellen</p> <p>10 Cotter to the full board, that wouldn't raise any</p> <p>11 issues under Delaware law; correct?</p> <p>12 A. If it was a majority, it would not.</p> <p>13 Q. Okay. Now, let me just follow up</p> <p>14 with one more question. Under Delaware law, is</p> <p>15 there any provision in Delaware law that would</p> <p>16 require a CEO search committee to complete the use</p> <p>17 of an executive -- strike that. Let me see if I can</p> <p>18 ask this in a way that's actually in English.</p> <p>19 A. I know -- I know where you're going.</p> <p>20 Q. Okay.</p> <p>21 A. Don't worry about how you phrase it.</p> <p>22 I know where you're going.</p> <p>23 Q. Okay.</p> <p>24 MR. KRUM: Okay. Well, it may make a</p> <p>25 difference in how the testimony ultimately</p> <p style="text-align: right;">Page 142</p>	<p>1 BY MR. SEARCY:</p> <p>2 Q. On Page 31 of your expert report,</p> <p>3 towards the bottom there's a reference to the</p> <p>4 compensation committee --</p> <p>5 A. Yes.</p> <p>6 Q. -- that was asked to revise executive</p> <p>7 compensation.</p> <p>8 A. Yes.</p> <p>9 Q. Do you know what steps the</p> <p>10 compensation committee took in undertaking their</p> <p>11 review?</p> <p>12 A. No.</p> <p>13 Q. Do you know if they looked at any</p> <p>14 compensation studies?</p> <p>15 A. There -- there are references in the</p> <p>16 depositions to old and new valuations based upon</p> <p>17 comparable businesses and there's a discussion about</p> <p>18 whether some older ones actually were comparable</p> <p>19 businesses and they -- they took another look at</p> <p>20 businesses' valuation process for -- for</p> <p>21 compensation that they believed were more closer in</p> <p>22 kind to Reading.</p> <p>23 Q. And did you -- did you look at any of</p> <p>24 the compensation studies that the comp committee</p> <p>25 looked at?</p> <p style="text-align: right;">Page 144</p>
<p>1 is used, however.</p> <p>2 MR. RHOW: Just tell us what's in</p> <p>3 your mind right now. Go for it.</p> <p>4 THE WITNESS: I'm just trying to be</p> <p>5 helpful; that's all.</p> <p>6 BY MR. SEARCY:</p> <p>7 Q. Yeah, I appreciate that.</p> <p>8 Now, your understanding is that there</p> <p>9 was a -- a recruiting firm, an executive recruiting</p> <p>10 firm, that was used here?</p> <p>11 A. Yeah; Korn Ferry, if I recall.</p> <p>12 Q. And Korn Ferry started a search</p> <p>13 process?</p> <p>14 A. Yes.</p> <p>15 Q. Okay. Under Delaware law is there</p> <p>16 anything that requires that a CEO search committee</p> <p>17 complete the usage of a recruiting firm for a search</p> <p>18 process?</p> <p>19 A. That would not --</p> <p>20 MR. KRUM: Objection; incomplete</p> <p>21 hypothetical.</p> <p>22 Go ahead.</p> <p>23 THE WITNESS: There is no stricture,</p> <p>24 no mandate, no case law that says that's</p> <p>25 required.</p> <p style="text-align: right;">Page 143</p>	<p>1 A. I didn't look at the studies, but I</p> <p>2 knew that there were studies that they considered.</p> <p>3 Q. But you don't have any opinion as to</p> <p>4 the validity or invalidity of any of the studies, do</p> <p>5 you?</p> <p>6 A. No.</p> <p>7 Q. Okay. And you don't have any reason</p> <p>8 to believe that the committee didn't review those</p> <p>9 studies; correct?</p> <p>10 A. I -- I've seen no facts that</p> <p>11 suggested that they did not. I've seen facts that</p> <p>12 suggested they probably did. But I don't know.</p> <p>13 MR. SEARCY: All right. Why don't we</p> <p>14 take a quick break? I'm going to be trying</p> <p>15 to wrap this up on my end.</p> <p>16 MR. KRUM: Okay.</p> <p>17 THE VIDEOGRAPHER: Off the record at</p> <p>18 2:48. This will end Disc No. 3.</p> <p>19 ---</p> <p>20 (Whereupon there was a recess in the</p> <p>21 proceedings.)</p> <p>22 ---</p> <p>23 THE VIDEOGRAPHER: Back on the record</p> <p>24 at 2:57, beginning of Disc No. 4.</p> <p>25 MR. SEARCY: All right. I have no</p> <p style="text-align: right;">Page 145</p>

<p>1 further questions at this time. I reserve 2 all rights in the event that there are any 3 issues with outstanding document requests, 4 but I have no further questions for now. 5 BY MR. RHOW: 6 Q. Your Honor, Justice Steele, nice to 7 meet you. My name is Ekwan Rhow. I represent Bill 8 Gould and only Bill Gould and so I have some 9 questions for you -- 10 A. Sure. 11 Q. -- about your opinions. 12 First of all, in terms of your 13 background, clearly you are -- you've been a judge 14 for many years, but have you ever served on the 15 board of a company? 16 A. On the board of a regional hospital; 17 yes. 18 Q. Was that a publicly traded company? 19 A. It was not. 20 Q. All right. So in your career you've 21 never served on -- as a board member of a publicly 22 traded company; correct? 23 A. That -- that's correct; only non -- 24 nonprofits. 25 Q. All right. The judge in this case,</p> <p style="text-align: right;">Page 146</p>	<p>1 question is: Did you read Mr. Gould's deposition? 2 A. Yes. 3 Q. And I want to be clear, I'm not 4 implying otherwise. Did you read it or did your 5 associate read it? 6 A. Both. 7 Q. All right. And you said in your 8 testimony with Mr. Searcy that in some parts of the 9 depositions you would skim it and other parts you 10 read more carefully. 11 A. Right. 12 Q. And what happened with -- with your 13 review of Mr. Gould's deposition? 14 A. I skimmed the entire deposition. 15 Q. Okay. So there were no parts of 16 Mr. Gould's deposition that you read carefully? 17 A. That's correct. 18 Q. And I take it the fact that you 19 skimmed through it meant that for purposes of your 20 opinions you didn't view his testimony to be 21 important. 22 A. Well, I think his testimony is 23 important. I think all of the directors' testimony 24 is important. I looked at the pleading. 25 Having looked at the pleading and</p> <p style="text-align: right;">Page 148</p>
<p>1 her name is Judge Elizabeth Gonzalez. Do you have 2 any connection with her? 3 A. Not of which I'm aware. 4 Q. Never worked on committees with her? 5 I'm not implying you have, by the 6 way. I'm really asking it open-ended. 7 A. And -- and you -- you cause me pause 8 because my activity over the last 25 years with so 9 many judicial organizations makes me wonder because 10 I have served on committees, particularly those 11 focused on the formulation of business courts in 12 various states, and it could well be that she may 13 have been with me or me with her on a committee at 14 some point discussing business courts. 15 Q. And that's fine. I'm not -- that's 16 not -- the question is: Do you recall -- 17 A. I do not recall. 18 Q. -- or do you have any connections -- 19 A. No. 20 Q. -- with Judge Gonzalez? 21 A. No, none of which I'm aware of. 22 Q. And that's all that you're required 23 to testify to. 24 Now, as I told you, I represent Bill 25 Gould, not the rest of the directors. And my first</p> <p style="text-align: right;">Page 147</p>	<p>1 then skimming his deposition, I reached the 2 conclusion that I could find insufficient facts to 3 suggest to me there was a reasonable doubt about his 4 independence or his disinterestedness. So his 5 deposition as a result became less important to me. 6 Q. But separate and apart from 7 disinterestedness or a lack of independence, were 8 you or are you offering any opinion as to whether 9 Mr. Gould might have breached a fiduciary duty? 10 A. I am not. 11 Q. All right. And so that -- that's 12 what I wanted to get to next. 13 In terms of your report -- and I 14 first thought it was an oversight, but now from your 15 testimony, I'm beginning to think it was 16 intentional -- on Page 2, if you look at 441, you 17 define "defendants" to be the various individuals 18 stated there, but it doesn't include Mr. Gould. 19 A. It does not. 20 Q. And that was on purpose. 21 A. Yes. 22 Q. All right. And then in terms of each 23 of the opinions that you provided in this report, 24 those opinions only apply to the defendants as you 25 defined them and they do not apply to Mr. Gould.</p> <p style="text-align: right;">Page 149</p>

<p>1 A. That's correct.</p> <p>2 Q. All right. This could be shorter</p> <p>3 than I thought.</p> <p>4 A. I knew I was answering that question</p> <p>5 correctly.</p> <p>6 Q. I thought -- I honestly did think it</p> <p>7 might have been an oversight, but I'm glad you</p> <p>8 corrected that for me.</p> <p>9 Now, hang on.</p> <p>10 And to be clear, and this is what</p> <p>11 I -- I think you did cover this with Mr. Searcy --</p> <p>12 that based on your review of the Complaint, based on</p> <p>13 the various depositions you reviewed, you saw no</p> <p>14 evidence that supports the conclusion that, in fact,</p> <p>15 Mr. Gould was not independent and was interested?</p> <p>16 A. Yeah. And -- and let --</p> <p>17 Q. Is that true?</p> <p>18 A. Well, the way you phrased it causes</p> <p>19 me difficulty in answering it because what I've</p> <p>20 tried to do both in the report and here today is</p> <p>21 develop the Delaware two-step analysis.</p> <p>22 In the first step, if there are no</p> <p>23 facts sufficiently pleaded to suggest a lack of</p> <p>24 independence and interest -- in -- interestedness,</p> <p>25 then you get -- don't go to the next inquiry and</p> <p style="text-align: right;">Page 150</p>	<p>1 you recall that testimony.</p> <p>2 A. Yes.</p> <p>3 Q. If a -- if a director believes that a</p> <p>4 familial dispute is disrupting operations, is that a</p> <p>5 valid basis on which that director votes on a</p> <p>6 particular issue?</p> <p>7 MR. KRUM: Objection; incomplete</p> <p>8 hypothetical, depending upon what's there,</p> <p>9 it's asked and answered.</p> <p>10 THE WITNESS: I'm not sure I</p> <p>11 understand the question, to be honest.</p> <p>12 BY MR. RHOW:</p> <p>13 Q. Assuming that a director believes</p> <p>14 that a familial dispute is disrupting operations --</p> <p>15 A. Right, okay.</p> <p>16 Q. -- would that be something a board</p> <p>17 member can consider in deciding how to vote on a</p> <p>18 particular issue?</p> <p>19 A. Yes.</p> <p>20 Q. Do you believe that a familial</p> <p>21 dispute -- strike that.</p> <p>22 Do you believe that resolving a</p> <p>23 familial dispute that is disrupting operations is</p> <p>24 something that is in the interest of all</p> <p>25 shareholders?</p> <p style="text-align: right;">Page 152</p>
<p>1 reach any decision about whether there was a breach</p> <p>2 of fiduciary duty because they get the benefit of</p> <p>3 the business judgment rule.</p> <p>4 So there's no reason for me to carry</p> <p>5 the analysis of Mr. Gould any farther than that. So</p> <p>6 I reached no opinion about whether he breached his</p> <p>7 fiduciary duty or not. I just say the pleadings</p> <p>8 don't support the second step.</p> <p>9 Q. Okay. And so -- and when you say</p> <p>10 "the pleadings," what you did is you accepted each</p> <p>11 of the pleadings -- I'm sorry -- you accepted the</p> <p>12 allegations of the pleadings as true in forming your</p> <p>13 opinion about Mr. Gould.</p> <p>14 MR. KRUM: Well, objection;</p> <p>15 mischaracterizes the testimony.</p> <p>16 THE WITNESS: I -- I don't accept the</p> <p>17 pleadings as true or false. It's</p> <p>18 sufficiency to give rise to whether or not</p> <p>19 there is a reasonable doubt about an</p> <p>20 individual's independence or</p> <p>21 disinterestedness. That's all I say.</p> <p>22 BY MR. RHOW:</p> <p>23 Q. Okay. All right. Now, one of the</p> <p>24 things that was mentioned earlier was this concept</p> <p>25 of preventing familial disputes. I don't know if</p> <p style="text-align: right;">Page 151</p>	<p>1 MR. KRUM: Same objection.</p> <p>2 THE WITNESS: In context it could be.</p> <p>3 Equally so it may not be.</p> <p>4 BY MR. RHOW:</p> <p>5 Q. It depends on the facts.</p> <p>6 A. It depends on -- the fiduciary's</p> <p>7 focus should always be on the corporation and all of</p> <p>8 the stockholders; not finding a cure solely in</p> <p>9 solving familial disputes within a controller block.</p> <p>10 Q. There are situations, however, where</p> <p>11 a majority's -- strike that.</p> <p>12 There are situations where the</p> <p>13 controlling shareholders' interests are not</p> <p>14 different than the minority shareholders' interests.</p> <p>15 A. There can be, sure.</p> <p>16 Q. And so in this situation here are you</p> <p>17 assuming that there was a conflict?</p> <p>18 A. There is evidence to support a bias</p> <p>19 toward concerns about the family over concerns about</p> <p>20 the entire stockholder body.</p> <p>21 Q. All right. Did you review the</p> <p>22 deposition of an entity called T2?</p> <p>23 A. No.</p> <p>24 Q. Do you know who T2 is?</p> <p>25 A. No.</p> <p style="text-align: right;">Page 153</p>

<p>1 Q. Do you know the identities of any of 2 the minority shareholders? 3 A. No, although you could argue that 4 Cotter, Jr., is a minority stockholder. 5 Q. And you did review Cotter, Jr.'s -- 6 A. Yeah. 7 Q. -- deposition. 8 A. Yeah. So with that qualification. 9 It depends on whether you want to define him as one 10 or not because we don't know what the result's going 11 to be of the trust dispute. 12 Q. Okay. 13 A. At least I don't think so as of the 14 time of my reading of the documents. 15 Q. Another question about the interest 16 that a board member is supposed to be looking after 17 or -- or the variables that a board member has to 18 consider. Is board unity a valid consideration for 19 a board member when voting? 20 MR. KRUM: Objection; vague. 21 THE WITNESS: If the -- if the 22 context suggests to the thoughtful board 23 member that board unity is in the best 24 interest of the corporation and all of the 25 stockholders, it certainly can be. It's not</p> <p style="text-align: right;">Page 154</p>	<p>1 doubt about -- I say "about" rather than "as to," as 2 most lawyers -- an individual director's 3 independence or disinterestedness. That's where 4 that phrase comes into play. 5 Q. And to -- what you just said, is that 6 something you consider at the pleading stage? 7 A. Yes. 8 Q. Subsequent to the pleading stage is 9 that same standard of proof used? 10 A. And then it -- then you go to the 11 materiality standard. By way of example, you 12 examine, okay, there was a reasonable doubt on the 13 facts as pleaded about whether an individual 14 director had an economic interest so aligned with 15 controllers that it would dominate his or her 16 decision-making process and -- and so burden them 17 that they couldn't be objective. 18 Now, then there's a materiality 19 standard. You look at, well, okay, there's an 20 economic association there, how -- actual -- how 21 material would that really be to the director in 22 order to determine whether or not there is 23 interestedness. 24 Do you follow me? 25 Q. I do to a certain extent. It seems</p> <p style="text-align: right;">Page 156</p>
<p>1 an invalid consideration ab initio. 2 BY MR. RHOW: 3 Q. All right. I'm jumping around 4 because I'm moving around in the outline here. 5 You had mentioned reasonable doubt a 6 couple times. 7 A. Who? 8 Q. You had mentioned reasonable doubt? 9 A. Yes. 10 Q. Now, was that -- is that on purpose? 11 A. I'm sorry; I thought -- I really 12 didn't think it was somebody's name. I just didn't 13 hear you clearly. God, what a name. 14 Q. In expressing some of your opinions, 15 you said if there's a reasonable doubt about X, Y, 16 and Z. 17 A. Yeah. 18 Q. Is that the standard you're using for 19 your opinions? 20 A. That's what the Delaware -- yes. To 21 the extent the Delaware case law says when one is 22 reviewing the pleadings to determine whether or not 23 there is sufficient evidence to move to a standard 24 of a review other than business judgment, it is 25 whether the facts as pleaded create a reasonable</p> <p style="text-align: right;">Page 155</p>	<p>1 to me -- and maybe I'm -- you're the expert for sure 2 on Delaware law over me. But what I'm asking is 3 really what's the evidentiary standard, because it 4 seems like on a -- on a pleading attack you're 5 applying a reasonable doubt standard. On motions 6 subsequent to a pleading attack -- 7 A. Okay. 8 Q. -- what is the evidentiary standard? 9 A. Well, if -- if you've shifted the 10 burden to entire fairness, then it's preponderance 11 of the evidence that it's entirely fair or it's not. 12 Q. And so here you chose a reasonable 13 doubt standard because you were analyzing the 14 pleadings. 15 A. Because that's the first step that 16 the Delaware case law teaches you when you're 17 determining whether there should be a burden shift 18 or not. 19 Then when there's a determination 20 made about whether the defendants have carried their 21 burden, that takes place at trial where credibility 22 can be brought -- be brought into play, because 23 credibility can't be obviously brought into play 24 in pl -- in motion practice. 25 Q. Okay. In a situation where there</p> <p style="text-align: right;">Page 157</p>

<p>1 is -- in a situation where there is, in fact -- I'm 2 going back now -- in a situation where there is a 3 conflict between the interests of the majority 4 shareholder and the minority shareholder, what 5 should the board director do? 6 MR. KRUM: Incomplete hypothetical. 7 THE WITNESS: Let me try to -- that's 8 a kind of shift in analysis that I'm not 9 sure is in play here. A director owes 10 fiduciary duties to the entire stockholder 11 block and to the corporation itself. 12 The -- the test is whether that 13 director is capable of objectively 14 exercising that process. That director is 15 perfectly free to vote his or her conscience 16 so long as they're independent and 17 disinterested as they see the facts, whether 18 it favors the controller or whether it 19 favors the minority. 20 The importance is that the process 21 for reaching that decision be fair and that 22 the result be fair, and that's tested after 23 the burden shift, if there is one. 24 So I -- every director will face 25 decision-making processes at sometime during</p> <p style="text-align: right;">Page 158</p>	<p>1 BY MR. RHOW: 2 Q. Right. And -- 3 A. I know that's a long answer, but I 4 couldn't give a shorter one and really fully, I 5 think, respond to your question. 6 Q. Because there's a lot of different 7 variables that might exist in that situation. 8 A. Yeah. It's all about context. It 9 always is. 10 Q. I take it that it would be reasonable 11 for two directors to disagree as to how much 12 discussion might be necessary on a particular issue. 13 A. Oh, I agree with that. 14 Q. Two directors might disagree as to 15 the proper process that should be followed leading 16 up to a final decision. 17 A. They could. Even two independent, 18 objective directors could disagree on that. 19 Q. And there's nothing wrong -- 20 A. But that's the question. 21 Q. Whether -- 22 A. Whether they're independent and 23 disinterested. 24 Q. The mere fact that people have voted 25 a certain way certainly is not dispositive on this</p> <p style="text-align: right;">Page 160</p>
<p>1 his or her directorship where if you're a 2 director for a controlled corporation, they 3 might have to vote against the interest of 4 the controller -- controlling stockholder 5 block or against the minority stockholders. 6 But, look, the test is are they doing 7 it in good conscience, in good faith, are 8 they doing it objectively because they can 9 act objectively. 10 They -- the court will not substitute 11 its judgment for an independent, 12 disinterested director who votes after a 13 process where there's facts that satisfy 14 gathering all the information reasonably 15 necessary that one would want before making 16 the decision that are material to that 17 decision and then minutes that reflect 18 contemplative time consistent with the 19 complexity of the problem and then a robust 20 discussion in the board room with other 21 directors who participate in the decision, 22 whether it's a majority consisting solely of 23 independent and disinterested directors or a 24 full board. 25</p> <p style="text-align: right;">Page 159</p>	<p>1 issue of breach of fiduciary duty. 2 A. Correct. 3 MR. KRUM: Objection; incomplete 4 hypothetical. 5 BY MR. RHOW: 6 Q. For example, on the CEO search 7 process -- we've talked about this a little bit -- 8 A. Right. 9 Q. -- you agree that at least on that 10 committee there were two independent, noninterested 11 directors; right? 12 A. That's my recollection, yes. 13 Q. And to be clear, the business 14 judgment rule would then apply to that committee's 15 work? 16 MR. KRUM: Objection; incomplete 17 hypothetical. 18 THE WITNESS: Well, there's not a 19 majority of independent, disinterested 20 directors voting. 21 BY MR. RHOW: 22 Q. If both vote a certain way, there is 23 a majority. 24 A. If it can be carried by only two 25 votes; yeah, that's right.</p> <p style="text-align: right;">Page 161</p>

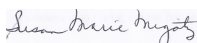
<p>1 Q. And so that the work of those 2 direct -- two directors, assuming they vote the same 3 way, is protected by the business judgment rule. 4 A. It would be. 5 MR. KRUM: Same objection. 6 BY MR. RHOW: 7 Q. It would be. 8 A. Yeah. Yes. Sorry. 9 Q. And so in that situation I just 10 posited where you have two independent directors, 11 both deciding that it's time to present a candidate, 12 that would be perfectly fine. 13 MR. KRUM: Same objection. 14 THE WITNESS: Well, if they're -- 15 yes, if they're independent and 16 disinterested. 17 BY MR. RHOW: 18 Q. Which, as far as you know, Doug 19 McEachern and Bill Gould were. 20 A. That's correct. 21 Q. This is a small point. Page 6 of 22 your report -- and we're back on 441 -- I'm looking 23 at the first sentence of the last paragraph. And, 24 again, I apologize for jumping around. I'm really 25 trying to shorten things.</p> <p style="text-align: right;">Page 162</p>	<p>1 A. Well, I don't know the answer to that 2 factually. 3 Q. Fair enough. 4 The ombudsman process that was set 5 up, that's something that you agree could have been 6 good for the company. 7 A. I agree it could have been. 8 Q. And why is that? 9 A. Because there was difficulty that was 10 perceived and there was rational action taken to 11 deal with it. 12 Q. The difficulty being the familial 13 dispute. 14 A. That's correct. 15 Q. And resolving that dispute would be 16 something that could be in the best interest of the 17 company. 18 MR. KRUM: Objection; incomplete 19 hypothetical. 20 THE WITNESS: Yeah. I'm not sure 21 what resolving the dispute -- I think it 22 would have a lot to do with how the dispute 23 was resolved. But it could be good for the 24 company, yeah. It certainly wasn't a breach 25 of fiduciary duty to attempt to resolve it.</p> <p style="text-align: right;">Page 164</p>
<p>1 A. No. That's all right. At least 2 you're jumping around in my report. I ought to be 3 able to find it. 4 Q. And what it reads, for the record, is 5 it says: "In September 2014, a committee, 6 comprising of McEachern, Storey, and the Cotters, 7 was formed in order to resolve issues between the 8 Cotters." 9 You don't believe that the formation 10 of the committee -- 11 MR. KRUM: Mark Ferrario? 12 MR. FERRARIO: Yeah. 13 MR. KRUM: You're making noise coming 14 through the phone. 15 MR. FERRARIO: Sorry, guys. 16 BY MR. RHOW: 17 Q. Your Honor, so you don't have any 18 issue with the fact that the committee, this 19 committee, was formed specifically to resolve issues 20 between the Cotters. 21 A. No. 22 Q. That's something that was good for 23 the company. 24 A. It could have been. 25 Q. Do you believe it was?</p> <p style="text-align: right;">Page 163</p>	<p>1 BY MR. RHOW: 2 Q. I think you had said earlier -- and I 3 have the term "extraordinary" in my notes -- that 4 you thought it was perhaps extraordinary that the 5 CEO search process started but then changed. I 6 don't want to put words in your mouth. Do you 7 recall that testimony? 8 A. Yeah. The extraordinary nature of it 9 was that it suddenly resulted in a controlling 10 stockholder being the CEO. 11 Q. What is your foundation for saying 12 that's an extraordinary situation? 13 A. My -- just my own experience in 14 looking at cases, that if -- if you are the judge 15 who is sitting there trying to determine whether or 16 not a controller has directors in this case under 17 her thumb doing her bidding resulting from a process 18 that does not appear facially to be one that has 19 been put together in the best interest of the 20 corporation and all of the stockholders, yet you 21 have a process in mind that could get an independent 22 CEO, you end up with a controlling stockholder? 23 That will always raise the hackles 24 and suspicions of a Delaware judge about whether or 25 not this was an independent, objective,</p> <p style="text-align: right;">Page 165</p>

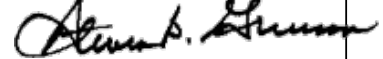
<p>1 disinterested decision-making process that was fair 2 to the corporation and all of the stockholders. 3 Q. And, again, I'm not trying to cut too 4 fine a line, but in the cases you're talking about, 5 were those CEO search committee situations? 6 A. Well, it -- no. 7 Q. And I'm not saying -- I'm not 8 implying that's necessarily dispositive. I'm 9 just -- I'm really asking -- 10 A. No. 11 Q. -- foundationally, were any of those 12 a situation where a CEO search committee was set up? 13 A. No. 14 Q. All right. Were any of those 15 situations where -- that -- that involved a family 16 member of a controlling group attempting to become 17 the CEO? 18 A. If you -- if you want to count Lord 19 Black and The Jerusalem Post and The Sun Times, that 20 was certainly the leader of a family who was trying 21 to exert his will over the other stockholders and it 22 was -- his actions were voided. 23 Q. This is a case that was before you? 24 A. On appeal, yeah; not on trial. 25 Q. Do you recall if any of that or --</p> <p style="text-align: right;">Page 166</p>	<p>1 other two characteristics, those two are not 2 disqualifying for a CEO. 3 MR. KRUM: Same objections. 4 THE WITNESS: They're not 5 disqualifying, but the last one certainly 6 raises issues. How -- how do you measure in 7 terms of the abilities of the CEO to lead 8 those qualities when one of the factors is 9 major shareholdings in the company and 10 you've got comments in depositions and 11 you've got expert reports that talk in terms 12 of, well, they're the controller after all, 13 at the end of the day they're going to make 14 the decision. 15 That's what makes a Del -- would make 16 a Delaware judge look twice at the 17 situation. Having major shareholdings in 18 the company doesn't speak to your ability to 19 lead the company. 20 BY MR. RHOW: 21 Q. But -- 22 A. It speaks to your interest in 23 success, the company's success. 24 Q. And it doesn't disqualify you from -- 25 A. That's corr -- you're absolutely</p> <p style="text-align: right;">Page 168</p>
<p>1 that -- did that situation involve an interim CEO 2 trying to become CEO? 3 A. No. 4 Q. All right. On Page 15 of, I'm back 5 to your report, 441, and I'm looking at the last 6 sentence of the first paragraph, and for the record 7 it says: "The reasons the CEO Search Committee 8 chose EC" -- Ellen Cotter -- "as CEO included the 9 fact that she was well known to the Board, provided 10 continuity, and had major shareholdings in the 11 Company." Do you see that? 12 A. Yes. 13 Q. The fact that she was well known, is 14 that an invalid criteria for a CEO? 15 MR. KRUM: Objection; vague, 16 incomplete hypothetical. 17 THE WITNESS: No. As I -- as I 18 stated earlier, there are no check-the-box 19 guidelines from Delaware courts about what 20 are valid and invalid considerations. In 21 context the court will look with hindsight 22 on whether the process and the ultimate 23 result were fairly determined. 24 BY MR. RHOW: 25 Q. All right. And so I take it for the</p> <p style="text-align: right;">Page 167</p>	<p>1 right about that. Again, it's all -- everything 2 taken together in context. 3 Q. And you would agree that for a board 4 of director considering these variables, each board 5 member is allowed to weigh those variables 6 differently. 7 A. That's correct. 8 MR. RHOW: Actually, now I need five 9 minutes because I might be done as well. 10 MR. KRUM: Okay. 11 THE VIDEOGRAPHER: Off the record at 12 3:23. 13 - - - 14 (Whereupon there was a recess in the 15 proceedings.) 16 - - - 17 THE VIDEOGRAPHER: Back on the record 18 at 3:28. 19 BY MR. RHOW: 20 Q. Just some -- some final closeout 21 questions. 22 So between the testimony you've given 23 today, the expert reports you've submitted in this 24 case, does that constitute all the opinions that you 25 intend to give in this case?</p> <p style="text-align: right;">Page 169</p>

<p>1 A. To my knowledge, yes. 2 Q. Okay. 3 A. I haven't been asked to do anything 4 more. 5 Q. And are you planning on doing any 6 additional work? 7 A. I have no plans to do any additional 8 work. 9 Q. And you haven't been asked to do any 10 additional work. 11 A. I have not. 12 Q. Do you have a sense of the total 13 amount that you've invoiced for the work you've 14 done? 15 A. I -- I'd hate to say and be wrong. 16 I'd say in the neighborhood of \$25,000 including the 17 associate, less than 50 for sure. 18 Q. Okay. 19 A. But I'm not -- I'm not positive. As 20 ignorant as it sounds, I don't pay any attention to 21 the billing process. 22 Q. That's good. That is a luxury to 23 have, for sure. 24 MR. RHOW: That's all I have. I 25 don't know if --</p> <p style="text-align: right;">Page 170</p>	<p>1 associates come and they go. Do you remember that? 2 A. Yes. 3 Q. And despite your best efforts in the 4 interview process, sometimes you get an associate in 5 and they just don't work out; right? 6 A. That's certainly correct. 7 Q. Sometimes you -- you get someone in 8 that is a marginal player, they get in there and you 9 find out when they're in the trenches, they're 10 actually very good; right? 11 A. That's correct. 12 Q. And probably the best way to evaluate 13 someone's ability to handle a position is to see how 14 they perform. Would you agree with me on that? 15 MR. KRUM: Objection; incomplete 16 hypothetical. 17 THE WITNESS: It's certainly an 18 important consideration. I'm not sure I 19 could go along with it's the best way. But 20 it's certainly a very important one. 21 BY MR. FERRARIO: 22 Q. Why don't you tell me any other thing 23 you think would be better in terms of evaluating how 24 somebody could perform in a particular position than 25 seeing how they actually do the job?</p> <p style="text-align: right;">Page 172</p>
<p>1 MR. SEARCY: Mark Ferrario? 2 MR. FERRARIO: I just have a couple 3 questions. 4 BY MR. FERRARIO: 5 Q. I just want to go to something that 6 Ekwan touched on and it had to -- it related to the 7 selection of Ellen as the CEO. As you were speaking 8 in response to his questions, you mentioned 9 something about evaluating the ability of a person 10 to lead. Do you recall that testimony? 11 A. I'm not sure specifically what you're 12 talking about, but generally yes. 13 Q. Do you recall -- if you're on a board 14 of directors -- and I know you haven't been on a 15 board other than this hospital board -- if you're on 16 a board of directors, probably the most important 17 decision you're going to make is hiring the CEO; 18 correct? 19 A. There is certainly literature to 20 support that, yes. 21 Q. Okay. And -- and actually this 22 dovetails into something you said at the beginning 23 of your testimony that -- when you mentioned you 24 didn't -- you didn't know the name or you couldn't 25 recall the name of your associate, you said</p> <p style="text-align: right;">Page 171</p>	<p>1 MR. KRUM: Same objections. 2 THE WITNESS: Well, what's missing, 3 Mark, from your question is a time frame. 4 BY MR. FERRARIO: 5 Q. Let's say -- 6 A. Wait. Let me finish, please. 7 Q. Okay. 8 A. And it depends on how long they're 9 performing in a job. As -- as Mr. Kane's own 10 deposition suggests, there was a time when he 11 thought Cotter, Jr., was doing a good job. Then 12 there became a time when he no longer thought so. 13 So, yes, I agree with you that if you 14 have a long period of time to observe someone who's 15 trained and who has experience and see performance, 16 that performance is a very important measure of a 17 CEO's ability and retention considerations. I don't 18 disagree with that at all. 19 Q. And I wasn't even speaking to -- to 20 Jim, Jr. I'm speaking to the board's decision to 21 hire Ellen as the CEO. How long did they have to 22 evaluate her performance in that position? 23 MR. KRUM: Same objection, incomplete 24 hypothetical. 25 THE WITNESS: I don't have a specific</p> <p style="text-align: right;">Page 173</p>

<p>1 recollection, but it wasn't long. 2 BY MR. FERRARIO: 3 Q. Well, when you say "wasn't long," 4 what do you mean? 5 A. She wasn't CEO long. 6 Q. How -- how long was she in that 7 position before they hired her? 8 A. My recollection is not clear, but it 9 was a year or less. 10 Q. Okay. You don't think that's long 11 enough to evaluate somebody's ability to perform in 12 a position? 13 MR. KRUM: Same objection. 14 THE WITNESS: It wouldn't have 15 sufficed for the president and CEO of the 16 hospital I served. 17 BY MR. FERRARIO: 18 Q. It wouldn't have? 19 A. No, it would not have. 20 Q. Okay. And why is that? 21 A. Because it wasn't -- there's so many 22 variables and emergencies and crises that can occur, 23 you need to be able to observe somebody over a 24 substantial period of time to gauge their reactions, 25 their preparation. A strategic plan is important</p> <p style="text-align: right;">Page 174</p>	<p>1 A. Yes. 2 Q. Okay. And then the board, after 3 reviewing her performance and looking at candidates 4 who had never worked for the company, chose to go 5 with someone who they had seen in action, and you 6 think that decision was improper? 7 A. I didn't reach that conclusion. I 8 reached the conclusion that it would be examined for 9 the fairness of the process and the fairness of the 10 result and that in order to determine the motivation 11 for people who confirmed her position as CEO, one 12 would have to listen to them testify about their 13 decision-making process and their reasons for voting 14 the way they did; and that the fact that she was one 15 of the controlling stockholders and the fact that 16 there was at least one director there who was 17 concerned about the family would raise questions in 18 the mind of a judge, all of which can be resolved, 19 but only after hearing the testimony. 20 I don't -- I reached no conclusion 21 about whether it was the correct decision or not or 22 whether it was a breach of fiduciary duty. I only 23 say it raises the issues that need to be resolved by 24 the trier of fact. That's all. 25 Q. Okay. And -- and you didn't go --</p> <p style="text-align: right;">Page 176</p>
<p>1 more than just for one year. Whether it's been 2 fulfilled, setting the criteria for performance 3 evaluation. All of that's important and has to be 4 observed over a period of time, unless they've done 5 something demonstrably egregious that would cause 6 you to want to terminate them earlier. 7 But it's very difficult to say this 8 is the CEO, this is the chairman of the board, this 9 is the president, the chief executive officer, 10 however you want to characterize it, over a period 11 of time of a year or so. 12 Q. Do you know how long Ellen had been 13 with the company? 14 A. I know it had been many years. 15 Q. Okay. 16 A. In a -- in a much reduced form of 17 role. 18 Q. But when you say "much reduced," why 19 don't you tell mean how much reduced? 20 A. Well, she wasn't the chief of all of 21 the operations in effect as CEO. She had her own 22 slice of the business that she was responsible for 23 handling. 24 Q. Okay. And then she ran the company 25 as interim CEO; right?</p> <p style="text-align: right;">Page 175</p>	<p>1 you didn't do a deep dive through the depositions to 2 see what, you know, the directors were considering 3 when they decided to hire Ellen. 4 A. I did not. 5 Q. Okay. And -- and I don't want you to 6 take this question the wrong way. Okay? But I 7 really don't know how else to ask it. 8 You have basically given us a report 9 that from my perspective appears to be a memo on 10 Delaware law as it may apply to the, as you said, 11 unique facts of this case. That's essentially what 12 you've done; correct? 13 MR. KRUM: Well, objection; 14 mischaracterizes the day of testimony. 15 THE WITNESS: You can characterize it 16 any way you want to. I'm not going to 17 respond to that question. 18 BY MR. FERRARIO: 19 Q. Do you disagree -- 20 A. That's a pejorative question. 21 Q. What? 22 A. That's a pejorative question. 23 Q. Well, it isn't, because I'm trying to 24 figure out, I've looked at probably hundreds of 25 expert reports during the course of my career and I</p> <p style="text-align: right;">Page 177</p>

<p>1 looked at your report and I listened to you today 2 and you said you are opining on Delaware law to the 3 extent it might apply here in the case we have in 4 Nevada; correct? 5 MR. KRUM: Objection; 6 mischaracterizes the testimony. 7 THE WITNESS: It is correct that I 8 have tried to describe an analytical 9 framework that would be used in Delaware 10 with the hope that it might be helpful to 11 the Nevada judge. It may or may not be. 12 BY MR. FERRARIO: 13 Q. Okay. And -- 14 A. I wasn't asked to offer an opinion as 15 a corporate government expert on what is the 16 appropriate way to hire or terminate a CEO. That 17 wasn't what I was asked to do. 18 Q. Okay. That's what we can get at. So 19 your goal here would be to assist the Nevada judge 20 were she to decide that Delaware law might apply. 21 MR. KRUM: No. Objection; misstates 22 the day of testimony. Was your phone not 23 working earlier, Mark? 24 MR. FERRARIO: No. I just -- I think 25 I just paraphrased pretty accurately what he</p> <p style="text-align: right;">Page 178</p>	<p>1 say about it. 2 Q. Your target audience is the judge and 3 in the event she wants to use or thinks Delaware law 4 would apply, you're trying to assist her at least 5 with one person's view on how this case may play out 6 under Delaware law. 7 MR. KRUM: Objection. 8 BY MR. FERRARIO: 9 Q. Isn't that accurate? 10 MR. KRUM: No. That mischaracterizes 11 the testimony. 12 So if you want to -- if you want to 13 repeat your prior testimony or if you want 14 to refer to it or however else you see fit 15 to answer. 16 MR. FERRARIO: I think -- I think I 17 quoted him pretty accurately. The target 18 audience for his report was the judge. 19 BY MR. FERRARIO: 20 Q. Correct, Judge Steele? 21 A. I think you can look at my answer to 22 the previous questions and get it without me trying 23 to restate it for a third or fourth time. 24 Q. Well, that's a straightforward 25 question. Is your target audience of your report</p> <p style="text-align: right;">Page 180</p>
<p>1 said. I may not have. He can tell me if 2 I'm wrong. 3 THE WITNESS: Well, I -- I -- I think 4 you're off. I can either read back or try 5 to have -- or ask to have read back -- I 6 can't have it -- 7 BY MR. FERRARIO: 8 Q. Well -- 9 A. -- read back anymore. But what I 10 tried to describe was to offer an example of how a 11 Delaware court would approach it and the analytical 12 framework that the Delaware judge would use in the 13 event that might be helpful to the Nevada judge. 14 I'm not opining that Delaware law 15 applies or that the Nevada judge should find that 16 Delaware law applies. I'm simply trying to be 17 helpful because I understand that from time to time 18 Nevada, as many other jurisdictions, at least read 19 Delaware cases, understand Delaware law, and will 20 decide whether it's helpful in resolving their 21 dispute. That's all I'm trying to do. 22 Q. Right. I think that's what I just 23 said. 24 A. Well, then why are we arguing about 25 it? That's what I said, and I have nothing more to</p> <p style="text-align: right;">Page 179</p>	<p>1 Judge Gonzalez? 2 A. Yes. 3 Q. Okay. And it's to assist her in the 4 event that she determines Delaware law should apply; 5 correct? 6 MR. KRUM: No. That's not what he 7 said and you know it's not what he said. 8 If you have anything to add to your 9 prior answers, please do. And if you don't, 10 just say so. 11 MR. FERRARIO: I believe that's what 12 he said. If he disagrees, he can tell me 13 that's not true. 14 THE WITNESS: I have answered that 15 question several times. 16 MR. KRUM: Okay. Next question if 17 you have any. 18 MR. FERRARIO: I -- I don't think he 19 answered it, but I'm not sure it's worth 20 pursuing. 21 BY MR. FERRARIO: 22 Q. Justice Steele, and, again, you 23 mentioned that you had looked at some Nevada 24 statutes. Did you look at 78.140? 25 A. I don't connect the number to any</p> <p style="text-align: right;">Page 181</p>

<p>1 particular statute; I'm sorry. 2 Q. Okay. Then that's fair. It's the 3 statute that deals with Restrictions on Transactions 4 Involving Interested Directors or Officers. 5 A. No, I didn't. 6 MR. KRUM: I object to the 7 characterization. That's inaccurate. 8 MR. FERRARIO: I'm reading from the 9 title, Mark. 10 MR. KRUM: Yeah. But it's still 11 inaccurate. It's the Nevada -- it's the 12 Nevada carveout from the common law rule. 13 So you can read the title, but if you read 14 the rule and put it in context -- go ahead, 15 next question. I spoke too much. Next 16 question. 17 MR. FERRARIO: Okay. 18 BY MR. FERRARIO: 19 Q. I just want to make it clear, you 20 didn't look at that section; correct, Justice 21 Steele? 22 A. I don't know what section you're 23 talking about so I can't answer your question. 24 Q. It was 78.140 titled "Restrictions on 25 Transactions Involving Interested Directors or</p> <p style="text-align: right;">Page 182</p>	<p>1 I declare under penalty of perjury 2 under the laws that the foregoing is 3 true and correct. 4 5 Executed on _____, 20____, 6 at _____, _____. 7 8 9 10 11 _____ 12 MYRON STEELE 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: right;">Page 184</p>
<p>1 Officers; Compensation of Directors." 2 A. I -- I did not. 3 Q. Okay. Thank you. 4 Okay. Let me see here. 5 No. I think that's it. Thank you 6 very much. 7 THE VIDEOGRAPHER: Any other 8 questions? Concludes? 9 The time now is 3:41. This concludes 10 the deposition, end of Disc 4 of 4. 11 - - - 12 (Witness excused.) 13 - - - 14 (Whereupon the videotaped deposition 15 adjourned at 3:41 p.m.) 16 - - - 17 18 19 20 21 22 23 24 25</p> <p style="text-align: right;">Page 183</p>	<p>1 C E R T I F I C A T E 2 3 I do hereby certify that I am a Notary 4 Public in good standing; that the aforesaid 5 testimony was taken before me, pursuant to notice, 6 at the time and place indicated; that said deponent 7 was by me duly sworn to tell the truth, the whole 8 truth, and nothing but the truth; that the testimony 9 of said deponent was correctly recorded in machine 10 shorthand by me and thereafter transcribed under my 11 supervision with computer-aided transcription; that 12 the deposition is a true and correct record of the 13 testimony given by the witness; and that I am 14 neither of counsel nor kin to any party in said 15 action, nor interested in the outcome thereof. 16 17 WITNESS my hand and official seal this 2nd 18 day of November, 2016. 19 20 21  22 _____ 23 Susan Marie Migatz 24 Notary Public 25</p> <p style="text-align: right;">Page 185</p>



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**EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

JAMES J. COTTER, JR.,

Plaintiff,

vs.

MARGARET COTTER, et al.,

Defendant.

READING INTERNATIONAL, INC.,

Nominal Defendant.

CASE NO. A-15-719860-B

**OPPOSITION TO PLAINTIFF'S
MOTION FOR RECONSIDERATION
OF RULING ON GOULD'S MOTION
FOR SUMMARY JUDGMENT**

Date: December 28, 2017
Time: 9:00 A.M.
Ctrm.: 10A

Assigned to Hon. Elizabeth Gonzalez,
Dept. XI

Trial Date: January 2, 2018

1
2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I. INTRODUCTION**

4 There is nothing new about William Gould in Plaintiff's Motion for
5 Reconsideration. Plaintiff has already made all of the same arguments attacking
6 Mr. Gould's entitlement to the business judgment rule in four supplemental
7 oppositions filed on December 1, 2017, and he made those same arguments again at
8 the December 11, 2017 hearing. Plaintiff still does not—and cannot—demonstrate
9 that Mr. Gould lacked independence or disinterestedness. Mr. Gould did not have
10 a direct financial or close personal relationship with any of the Cotter siblings or
11 personally benefit from any of the challenged decisions and Plaintiff does not claim
12 otherwise. As a result, the Court properly concluded that Mr. Gould was entitled to
13 the protection of the business judgment rule and granted summary judgment in his
14 favor. Plaintiff's Motion for Reconsideration should be denied.

15 **II. ARGUMENT**

16 **A. Plaintiff was afforded an adequate opportunity to be heard on**
17 **Mr. Gould's Motion for Summary Judgment, and he makes no new**
18 **arguments in his Motion for Reconsideration.**

19 Plaintiff's argument that he did not have an adequate opportunity to defend
20 himself because Mr. Gould's motion for summary judgment was set for January 8,
21 2018, and "not fully briefed" rings hollow.¹ Plaintiff first filed an opposition brief
22 to Mr. Gould's summary judgement motion in October 2016. He then filed another
23 *four supplemental briefs* opposing Mr. Gould's motion for summary judgment on
24 December 1, 2017. The four supplemental briefs included a brief addressing the

25 _____
26 ¹ Plaintiff raised this argument during the December 11, 2017 hearing and the
27 Court properly rejected it then. Ex. A (12.11.17 Hrg. Tr.) at p. 56-57. Plaintiff
28 concedes that Mr. Gould properly moved for summary judgment as to all claims
against him. Mot. for Reconsideration at 4.

1 specific grounds on which summary judgment was granted—Mr. Gould’s
2 independence and disinterestedness and entitlement to the business judgment rule.
3 See Suppl. Opp. to MSAs 1 & 2 and Gould’s Motion for Summary Judgment at 5-7,
4 9-10. In that brief (and the other supplemental oppositions), Plaintiff made the *very*
5 *same arguments* regarding Mr. Gould’s independence that he does in the Motion for
6 Reconsideration—that Mr. Gould’s actions or lack of action in his capacity as
7 a board member was sufficient to demonstrate a lack of independence. *Id.*² In fact,
8 Plaintiff expressly concedes that he already made all of the arguments about Gould
9 that appear in his motion for reconsideration, when he states “[r]ather than attempt
10 to recite the record evidence contained in Plaintiff’s oppositions to the various
11 motions addressing matters to which Gould was a party, Plaintiff respectfully refers
12 to [sic] Court to the motions.” Mot. for Reconsideration at 23. ***Plaintiff does not***
13 ***point to any new facts or arguments that Plaintiff was unable to raise before the***
14 ***Court granted summary judgment.*** And the Court made clear that it *considered*
15 those briefed arguments in deciding to grant summary judgment in favor of
16 Mr. Gould. Ex. A (12.11.17 Hrg. Tr. at 56:13-15; 22-23) (“I included Mr. Gould
17 because you briefed it relate[d] to all of the motions for summary judgment . . .
18 I used it because it was included in your opposition, the supplement to those
19 motions.”).

20 Plaintiff was afforded yet another opportunity to be heard on this matter at the
21 December 11, 2017 hearing. Plaintiff again raised the same arguments—namely,
22 that a lack of independence could be demonstrated merely by review of Mr. Gould’s
23 actions as a board member—that he does in the Motion for Reconsideration. Ex. A
24 (12.11.17 Hrg. Tr. at 57:22-59:25).

25 The Court correctly rejected these arguments. As the Court noted at the

26 ² Gould addressed the merits of this argument in more detail in his Supplemental
27 Reply in Support of Summary Judgment, and he incorporates that brief herein by
28 reference.

1 hearing, to show a lack of independence and/or disinterestedness for purposes of
2 rebutting the business judgment rule, Plaintiff must demonstrate that there is a direct
3 financial relationship or very close personal relationship with the people who are
4 interested in the transaction. *Id.* at 34:24-35:4. And here, Plaintiff does not contend
5 that Mr. Gould had any financial relationship to any of the Cotter siblings or that
6 Mr. Gould had a close personal relationship with any of the Cotter siblings. Mot.
7 for Reconsideration at 23-24. That is why his own paid expert witness, a former
8 justice on the Delaware Supreme Court, testified that there was no evidence that
9 called into question Mr. Gould's independence or disinterestedness. *See* Gould's
10 Supplemental Reply in Support of Summary Judgment at 3-4 (responding to
11 Plaintiff's Supplemental Oppositions). As a result, Plaintiff's expert agreed with the
12 Court and opined that Mr. Gould was entitled to the protections of the business
13 judgment rule. *Id.* ³

14 Simply put, the Court was correct to grant summary judgment in favor of
15 Mr. Gould on the basis that he was entitled to the protections of the business
16 judgment rule, and there is no basis to disturb the Court's decision. Plaintiff's
17 Motion for Reconsideration should be denied.

18 **III. CONCLUSION**

19 For the reasons stated above, and in Gould's Motion for Summary Judgment,
20 Reply in Support of Summary Judgment, and Supplemental Reply in Support of
21 Summary Judgment, Plaintiff's Motion for Reconsideration should be denied.

22
23 ³ To the extent that Plaintiff argues, based on Delaware law alone, that there are
24 other ways to rebut the business judgment presumption and that he has done so with
25 respect to Mr. Gould here, he fundamentally misunderstands and misapplies those
26 cases, as evidenced by the fact that his own expert witness, a former justice on the
27 Delaware Supreme Court who served on the Delaware Supreme Court when those
28 cases were decided, opined that there was no evidence that Mr. Gould lacked
protection of the business judgment rule.

December 26, 2017

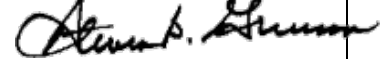
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NESSIM, DROOKS, LINCENBERG
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**EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

JAMES J. COTTER, JR.,

Plaintiff,

vs.

MARGARET COTTER, et al.,

Defendant.

READING INTERNATIONAL, INC.,

Nominal Defendant.

CASE NO. A-15-719860-B

**DECLARATION OF SHOSHANA E.
BARNETT IN SUPPORT OF
OPPOSITION TO PLAINTIFF'S
MOTION FOR
RECONSIDERATION OF RULING
ON GOULD'S MOTION FOR
SUMMARY JUDGMENT**

Date: December 28, 2017
Time: 9:00 A.M.
Ct. No.: 10A

Assigned to Hon. Elizabeth Gonzalez,
Dept. XI

Trial Date: January 2, 2018

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EXHIBIT A

Albert B. Linnon

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

JAMES COTTER, JR.

Plaintiff

VS.

MARGARET COTTER, et al.

Defendants

• • • • •

CASE NO. A-15-719860-B
A-16-735305-B
P-14-082942-E

DEPT. NO. XI

Transcript of Proceedings

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTIONS IN LIMINE AND PRETRIAL CONFERENCE

MONDAY, DECEMBER 11, 2017

COURT RECORDER:

JILL HAWKINS
District Court

TRANSCRIPTION BY:

FLORENCE HOYT
Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

APPEARANCES:

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JAMES L. EDWARDS, ESQ.
MARK E. FERRARIO, ESQ.
KARA B. HENDRICKS, ESQ.
EKWAN RHOW, ESQ.

1 LAS VEGAS, NEVADA, MONDAY, DECEMBER 11, 2017, 10:24 A.M.

2 (Court was called to order)

3 MR. FERRARIO: Ms. Hendricks has something to take
4 up with you.

5 MS. HENDRICKS: I just have a question.

6 THE COURT: On what?

7 MS. HENDRICKS: On how many drives we each need.

8 THE COURT: Wait. That's not me. Wait. Don't go
9 there yet.

10 MS. HENDRICKS: Okay.

11 THE COURT: Who are you looking for?

12 MR. MORRIS: I'm so unaccustomed to being on the
13 plaintiff's side.

14 (Pause in the proceedings)

15 THE COURT: All right. So moving on. Good morning.
16 We were talking about the pro bono awards at the 8:00 o'clock
17 session this morning, and Mr. Ferrario didn't get one this
18 year, so I was giving him a hard time because nobody from his
19 firm did a lot of work. But apparently they did. It just
20 didn't get reported because it was done with a different
21 agency.

22 Right, Ms. Hendricks?

23 MS. HENDRICKS: Yes. We're getting that fixed right
24 now.

25 THE COURT: Okay. So before we start on your

1 motions I need to hit some practical problems. As those
2 lawyers who practice here in the Eighth all the time know, as
3 the chief judge I do not have a courtroom. That occurred
4 because when the Complex Litigation Center was investigated
5 for purposes of conducting the CityCenter trial we determined
6 that it had a structural issue and some electrical issues. As
7 a result, we did not renew the lease --

8 When was that, Mr. Ferrario?

9 MR. FERRARIO: It was 2013.

10 THE COURT: In 2013 we did not renew the lease, and
11 since that time we have been down one courtroom. The person
12 who gets screwed is the chief judge. So since 2013 we have
13 had the chief judge be a floater. Unfortunately for you guys,
14 I'm the first judge who kept my docket, because Business Court
15 cases have a lot of history and it's not one of those things
16 you can get rid of and assume somebody else is going to be
17 able to be familiar with it fairly quickly.

18 So the down side for all of you is that I don't have
19 a courtroom. Which is why sometimes we borrow Judge
20 Togliatti's courtroom when you guys see me, sometimes in this
21 courtroom. And you've been in the two Family Court courtrooms
22 a couple of times here. I also have judges who lend me their
23 courtrooms on a regular basis on the third floor, and
24 sometimes I have courtrooms in other places in the building I
25 borrow.

1 Recently I learned that I am going to be able on
2 behalf of the court to acquire the seventeenth floor that used
3 to be occupied by the Supreme Court and to build a new Complex
4 Litigation Center, because since 2013 every time we have a
5 complex trial we build out a courtroom, it costs a quarter of
6 a million dollars, and then when we're done with it we take it
7 back down to put it back in regular shape. And so finally the
8 County has realized that's probably not an effective use of
9 the funds, and so we're going to build out the seventeenth
10 floor as a complex litigation, jury, and criminal caseload
11 accommodated. Unfortunately, that's a construction project,
12 and it is in process. And when I say in process it means
13 they're still in the bid evaluation process and it has to now
14 go to something called long-term planning at County
15 management, which means that some day there'll be a courtroom
16 there. In the meantime --

17 MR. MORRIS: So our trial will start when the
18 construction is complete on 17?

19 THE COURT: No, no. You're going to start. I just
20 don't know where we're going to be, Mr. Morris. This is the
21 reason for the speech, because Mr. Ferrario says nobody
22 believes me that I don't have a courtroom. I don't have a
23 courtroom. So I will have a courtroom when I end being chief
24 judge. I'll go back to being a regular judge and I'll have a
25 courtroom, and then the new chief won't have a courtroom

1 unless we finish building out the seventeenth floor by then.

2 So right now the reason I'm telling you that is it
3 impacts your trial. The trial I am currently in is a bench
4 trial, so it's not a jury trial and we have moved from
5 courtroom to courtroom during our 10 days we've been in
6 proceedings so far. So we've not been in the same courtroom
7 every day. But that's sort of the life of being in this
8 department at the moment. That's the history.

9 Now let's go to the electronic exhibit part of our
10 problem. Brandi is the head of the Clerk's Office, Mike is
11 the head of IT, so they are the two people who are here to
12 make sure that they are able to interact with you -- and then
13 I'll let them leave while I hear your motions -- about the
14 electronic exhibit protocol. Because when we use the
15 electronic exhibit protocol there's two ways that we have to
16 deal with it, from an IT standpoint and from the Clerk's
17 Office standpoint. So instead of us hauling all the paper
18 volumes from courtroom to courtroom, depending on where we're
19 going to be, the clerk won't have to do that. They will have
20 the drives, as Ms. Hendricks mentioned earlier, for that
21 purpose so that Dulce will then -- after IT has cleared the
22 drives Dulce will then work with the drives, and then we
23 usually keep one that is called golden that we don't mess
24 with, and we have one that's a working drive. But I'll let
25 Mike explain that and Brandi explain it, because not all of

1 you have been through the electronic exhibit protocol in the
2 past.

3 Mike, you're up.

4 MR. DOAN: So this is a jury trial, so a high level.
5 We expect three drives, a working copy, a golden copy, and
6 then a blank for the jury that everything that gets accepted
7 or submitted in a group will be over on that drive.

8 Depending on the number of drives is just based on
9 the space. So if your teams, whoever's putting these drives
10 together -- we have problems if you get a million exhibits on
11 one drive or even 600,000 on one drive. Not so much even the
12 space, it's just navigating through those files. And so as
13 long as your team can navigate and view the files, that's okay
14 for us. We don't have like a set number. We just ask that
15 the drives be twice as big as the amount of the exhibits,
16 because in theory everything could get accepted, and therefore
17 everything would be stamped and there'd be duplicate on the
18 drive.

19 THE COURT: And when it's stamped there's a program
20 that goes through and it puts a stamp on each page of the
21 electronic exhibit that says it's admitted so that we have
22 your original proposed copy and then your admitted copy. The
23 one drawback for lawyers is if you decide you want to admit a
24 partial version of an exhibit, we cannot do that with
25 electronic exhibits. We need you to submit a replacement

1 electronic exhibit that includes only the pages that you are
2 offering. That will then have an exhibit marker placed upon
3 it. But I can't with the electronic exhibits admit pages 6
4 through 10 of the 25-page document.

5 So, Mike, what did I miss?

6 MR. DOAN: That's it.

7 THE COURT: Okay, Brandi. You're up.

8 MS. WENDELL: Have you already given them the
9 ranges? Do we have --

10 THE COURT: No, we have not done ranges yet.

11 MS. WENDELL: Okay. The protocol is pretty basic.
12 Your paralegals or your IT people that are going to be working
13 on those might have questions. Usually -- a lot of times on
14 all the other trials Litigation Services was used. They're
15 very familiar with this program. I'm not advocating for them
16 or anything, but if anybody's contracted with them, they're
17 pretty familiar with how to do it. It's really important that
18 you pay attention to the naming convention. Make sure there
19 are no letters in it. It has to be strictly numbers and then
20 .pdf. The last time there was a question about whether .tifs
21 worked, and Mike was able to verify that .tifs are -- we're
22 able to use those. But color photos can be done as long as
23 there's a little border up at the top for the stamping program
24 to mark all of the information.

25 Another thing that we have found useful, it's not in

1 the protocol, but at least a couple weeks before the trial
2 starts we do like a dry run, because your exhibit list, the
3 templates that Dulce went ahead and emailed to you, you cannot
4 change that, the formatting. It's critical because Mike's
5 team will do a validation, and it validates the exhibit
6 numbers to what is on the drive, each exhibit. And it'll
7 identify if there's something that's missed or skipped that's
8 on the list but it's not actually on the drive. And a lot of
9 times there's been some formatting problems when people try to
10 get creative. So, you know, just a little advice that we
11 found from trial and error that that is an important piece.

12 What else?

13 MR. DOAN: That's the biggest thing, is if you can
14 get with us -- and we'll make ourselves available as soon as
15 you're available to do like an initial run before you start
16 all printing and doing all these other things just so
17 everything can be tested for format so there's not a lot of
18 time wasted.

19 MS. WENDELL: The clerk must have -- the exhibit
20 list must be printed out.

21 THE COURT: Not in 2 font, Ms. Hendricks.

22 MS. HENDRICKS: [Inaudible] that was not our
23 office's fault, Your Honor.

24 MS. WENDELL: That should be in a binder so that the
25 clerk as you're actually offering and admitting the evidence

1 during the trial, she'll be working on that. Later that day
2 she'll be doing the electronic stuff or we'll have a second
3 clerk that'll be helping her. Antoinette is court clerk
4 supervisor, and so she's here to make sure that, you know, if
5 we have any questions that have to be answered.

6 A lot of times -- oh. Last trial somebody asked if
7 because the exhibit list itself was going to be like 14 of
8 those big binders, they asked if they could print on the front
9 and the back. That was in Judge Kishner's big trial. We let
10 them do it, and -- but the trial settled, so it wasn't an
11 issue.

12 THE COURT: It's not a good idea.

13 MS. WENDELL: It's not ideal, so --

14 THE COURT: Please don't do a front and back.

15 MS. WENDELL: Anybody have any idea how many
16 exhibits you're looking at?

17 THE COURT: We're going to start with them and do
18 our ranges first. But we're not quite there yet.

19 So if anybody has questions or your staffs have
20 questions, would you like contact information to reach out to
21 either Antoinette, Brandi, or Mike?

22 MR. TAYBACK: Yes.

23 MS. HENDRICKS: That would be great, Your Honor.

24 THE COURT: So tell them or give them business
25 cards.

1 MS. WENDELL: Okay.

2 MR. FERRARIO: If you all have cards, then that'd be
3 easiest.

4 THE COURT: They're County employees. Does that
5 mean they get cards?

6 MR. DOAN: Yeah.

7 THE COURT: Oh. Look at that.

8 MR. DOAN: You know, and it's best to have one point
9 of contact so then we don't get confused.

10 MS. WENDELL: I'm putting my cards away now.

11 THE COURT: Who do you guys want to be the person
12 that calls? Do they want to call Antoinette, they want to
13 call you, want call Mike?

14 MS. WENDELL: Well, Antoinette is -- she's not
15 Dulce's direct supervisor, but I can be the point of contact,
16 and then I can go ahead and let you guys know. My email
17 address and my phone number are both on here. If you could
18 pass some of these out, that'd be great. And then I'll
19 probably hand you off depending on the questions that come up.
20 Most of them are going to be technical questions, but I'll try
21 to help if I can.

22 THE COURT: All right. So do you have any more
23 questions for the Clerk's Office, the IT folks, in the
24 electronic exhibit protocol? You will notice because of what
25 happened in CityCenter in paragraph 6 it now says the exhibit

1 list will be font size 12, Times New Roman. So we're very
2 specific on what size, because the clerk's actually have to
3 work with the paper copy. And so although you can blow up the
4 Xcel spreadsheet and see it when it's 2 font, they can't. So
5 we have to have it in a larger font.

6 Any more questions?

7 Okay. Mr. Krum, how many exhibits do you think
8 you're going to have so I can set the exhibit ranges?

9 MR. KRUM: The answer is it's in the hundreds, not
10 in the thousands. So if --

11 THE COURT: So if I give you 1 to 9999, you will be
12 okay?

13 MR. KRUM: Yes.

14 THE COURT: All right. Who wants to have 10000 as
15 their start? Mr. Searcy, how many have you got?

16 MR. SEARCY: I think our approximation is basically
17 the same. It's in the hundreds, not the thousands. So if we
18 had 10000 to --

19 THE COURT: 1999 [sic]?

20 MR. SEARCY: Yeah, that would be perfect.

21 THE COURT: I have to give you lots of extras,
22 because if you're going to do partial exhibits, we need that
23 space to be able to add those. So if you've got subparts of
24 one exhibit, I need an exhibit number for each one of those.
25 So I'm giving you more than you need.

1 Mr. Ferrario, how many do you need?

2 MR. FERRARIO: Your Honor, Your Honor, I would
3 suspect our -- any exhibits we would introduce independent of
4 what Mr. Krum and the other defendants would be nominal. So
5 you can give us a very short range.

6 THE COURT: 20000 to 2499 [sic].

7 THE COURT: Who else wants exhibit lists that's not
8 one of those three? Anybody else need --

9 MR. TAYBACK: Counsel for Mr. Gould is sitting
10 behind me.

11 THE COURT: So Mr. Gould's counsel, you want about
12 the same range Mr. Ferrario has, 25000 to 30000?

13 MR. RHOW: That's fine, Your Honor. Just for
14 protocol --

15 THE COURT: Hold on. They've got to get your name,
16 because otherwise I'm going to get really -- I'm going to
17 screw up.

18 MR. FERRARIO: Can you let Ekwan speak today? He's
19 been here all -- he hasn't even got to argue one time, Your
20 Honor.

21 THE COURT: All right, Mr. --

22 MR. RHOW: I'm actually in this case. Ekwan Rhow,
23 Your Honor. Thank you.

24 THE COURT: Okay.

25 MR. RHOW: We can have a separate range for sure,

1 but is there any problem with incorporating Mr. Gould's
2 exhibits into the exhibits for Mr. Searcy that he presents?

3 THE COURT: There is absolutely no problem with your
4 exhibits being within their exhibit range, but I need to give
5 you a separate range for your own in case you all don't reach
6 an agreement.

7 MR. RHOW: I see.

8 THE COURT: So my exhibit ranges based on what I've
9 heard today is 1 to 9999 for the plaintiffs, 10000 to 1999
10 [sic] for the Quinn Emanuel folks and their associated, which
11 includes Mr. Edwards; right? Okay. And 20000 to 2499 [sic]
12 for Mr. Ferrario and his team. And, Mr. Krum, we gave you
13 25000 to 2999 [sic] for Mr. Gould.

14 Do we anticipate there is anyone else who's going to
15 need more numbers? Anybody else who's going to show up
16 randomly in the case?

17 All right. Any other stuff I need to do on your
18 part?

19 MS. WENDELL: No. Based on that, that's very good
20 news. The goal will be for all counsel to prepare your
21 exhibits and then everybody put them one drive. The only
22 reason why we do different drives is because if there's like
23 10,000 exhibits on one, like Mike said, so if there's any way
24 possible -- and you all have to use the same exhibit list
25 template. Now, if that's a problem to do that, then if your

1 exhibits are on your own hard drive, then your exhibit list
2 must be what is on that drive. So if two of you get together
3 or three of you get together, everything that's on that drive
4 must be one exhibit list, because it cross-checks and makes
5 sure it validates.

6 THE COURT: So it's okay for the plaintiffs to have
7 one drive and an exhibit list of 1 through 9999 -- or up to
8 that number, and the defendants to decide jointly they're just
9 going to use the 10000 to 1999 [sic], have one drive, and one
10 exhibit list?

11 MS. WENDELL: That is okay. But based on the size,
12 you know, we're -- I think that, you know, it's better to
13 always have one --

14 THE COURT: Yeah. But you're asking for
15 cooperation?

16 MS. WENDELL: Yes.

17 THE COURT: Just because you worked for Commissioner
18 Biggar for however many years and you could make them
19 cooperate doesn't make I can as a trial judge.

20 All right. So anybody else have more stuff?

21 Yeah. Your history will never die.

22 MS. WENDELL: I know. It's going to follow me out
23 of here in February.

24 THE COURT: All right. Anybody else have any more
25 questions for my IT team or my Clerk's Office team so that

1 they can leave and not have to sit here through your motion
2 practice?

3 Dulce wants you to set the dry run date today. We
4 have a holiday coming up, and you have asked me to let you go
5 the second week. I'm going to be able to accommodate that
6 request. I found some victim to go the first week.

7 MR. FERRARIO: So we start on the 8th now?

8 THE COURT: Plan is for you to start on the 8th. So
9 when do you want your dry run to be with your staff to bring
10 over the lists and the drives? It doesn't have to be you
11 guys. It can be your paralegals.

12 MR. FERRARIO: But you said you want enough time in
13 case there's glitches. So --

14 MS. WENDELL: If there's a glitch, then you'll need
15 time to fix it.

16 MR. FERRARIO: So at least the week before -- we
17 need it two weeks before; right?

18 THE COURT: Two weeks before is the week of
19 Christmas, so we'll be here the 26th through the 29th working
20 that week.

21 MR. FERRARIO: And then you guys will be here to do
22 that?

23 MR. DOAN: We'll make it work.

24 THE COURT: Some of them will be here.

25 MR. FERRARIO: I think it has to be that week in

1 case there's a problem. Because then the following week is
2 short, and then we're right up on trial and won't be able to
3 correct any of the stuff.

4 MR. KRUM: So why don't we say the 29th?

5 THE COURT: You guys all okay with the 29th? What
6 time do you want to meet?

7 MR. KRUM: I think we need to talk to the people who
8 are going to do it.

9 THE COURT: Okay. I would recommend the morning.
10 And the reason I recommend the morning is typically on the
11 weekend of New Year's Eve they try and get everybody out of
12 downtown by about 2:00 o'clock because of all the things that
13 happen in the streets here on that weekend.

14 MR. KRUM: Understood.

15 THE COURT: So -- and we will tell you what
16 courtroom we are able to find. I'm pretty sure on that day I
17 could get a courtroom on this floor. And if you guys want a
18 morning, if you can accommodate that, we'll do that.
19 Otherwise --

20 MR. FERRARIO: I'm going to tell you, Judge,
21 [inaudible] people are going to be in this trial, I think if
22 you could convince Judge Sturman to let you have this for the
23 length of the trial, that would [inaudible].

24 THE COURT: She has a trial that I had to vacate
25 when her mom became ill that I think she's going to try and

1 restart in January. I will know better when she actually gets
2 back to town. But we will talk to her. Her courtroom and
3 Judge Johnson's courtrooms are equipped differently than the
4 other courtrooms, so they are a little bit bigger.

5 MR. FERRARIO: Yes. This would accommodate
6 [inaudible].

7 THE COURT: I was thinking of putting you in
8 Potter's courtroom and having a special corner for you.

9 MR. KRUM: Your Honor, I've just been reminded that
10 it was presumptuous of me to speak for others.

11 THE COURT: You want to talk to the staff members to
12 see who's taking the week off?

13 MR. KRUM: Here's the question. And I'm now taking
14 Mr. Ferrario's line. Would it be possible for us to start the
15 following week so we could make --

16 THE COURT: No. We won't get done. If we do that,
17 we won't get done in time for me to do my February stuff.
18 It's a five-week stack. It starts on the 2nd of January. So
19 if you need to talk to your teams and see if being here on
20 January 2nd at 8:00 o'clock in the morning is a preference for
21 them instead of the 29th, which gives you -- you lose the
22 weekend, but you're here the rest of the time. It gives you
23 almost two weeks to straighten it out.

24 MR. KRUM: Okay.

25 THE COURT: And that's okay with me. Even though

1 Mike would say he needs two weeks before, January 2nd is okay
2 with me.

3 MR. KRUM: Okay. We will check with our people.

4 THE COURT: Okay. So any other electronic exhibit
5 lists?

6 So, Dulce, just mark them down that they are
7 planning to visit with you on January 2nd. I'm fairly certain
8 I can find a courtroom on January 2nd, but there's no
9 guarantees on that day.

10 All right. 'Bye, guys. Thank you for being here.
11 Antoinette, thank you for being here. I know it's going to be
12 exciting again.

13 All right. That takes me to the motions. Do you
14 have a preferred order you'd like to argue them in? I usually
15 try and do the summary judgments and then go to the motions in
16 limine.

17 MR. KRUM: That would be our suggestion, as well.

18 MR. TAYBACK: That makes sense, Your Honor. You can
19 go numerical order is fine.

20 THE COURT: Whatever you want to do.

21 Can I have my calendar. I don't need -- well, I
22 have notes all over the motions, so --

23 MR. FERRARIO: Are we on the clock?

24 THE COURT: You have until five till 12:00. So
25 we've got an hour.

1 (Pause in the proceedings)

2 MR. TAYBACK: Mr. Krum was just suggesting that I
3 raise the parties' -- both filed joint motions -- or filed
4 motions to seal. We'd ask you to grant them.

5 THE COURT: Is there any objection to any of the
6 motions to seal? They weren't all motions to seal. Some of
7 them were motions to redact, and that was appropriate. The
8 motions to seal I do have a question for Mr. Morris's office,
9 and so I'll ask you -- hold on, if I can find the one I wrote
10 the page on. Got a question. It was a process question, not
11 a substance question, so let me hit it before we go to the
12 next step.

13 When you sent me a courtesy copy and the courtesy
14 copy had a sealed envelope in that did you also file the
15 sealed version of the document that has like this sealed
16 envelope that's with the Clerk's Office?

17 MS. LEVIN: I don't believe, Your Honor.

18 THE COURT: And we have to do it that way --

19 MS. LEVIN: Okay.

20 THE COURT: Because otherwise I can't even grant
21 your motion now, because then it's going to get screwed up.

22 MS. LEVIN: I understand, Your Honor. And I think
23 that this was based on our conversations with the clerk, who
24 said you cannot submit it until you have the order. And we
25 were saying, but that --

1 THE COURT: No. You submit it when you file the
2 motion. When you file the motion with it, which is why you
3 have to file them at the counter. You can't efile when you're
4 filing under seal.

5 MS. LEVIN: Right.

6 THE COURT: And that's why it gets screwed up.

7 So I have some process concerns about the
8 plaintiff's filings related to that, and I'm going to let you
9 and Dulce talk about those after we finish the hearing to see,
10 if we can.

11 I'm going to grant the motion, but it may be that
12 you have to do something different to have a motion that
13 actually goes with it to the Clerk's Office instead of an
14 order. Because having the order will not accomplish what you
15 want.

16 All right. So to the extent that you asked
17 previously for a motion to seal and/or redact, it appears to
18 be commercially sensitive information related to financial
19 issues, and there's some other sensitive information that
20 relates to individuals' personal information, so I'm going to
21 grant the requests for sealing and redacting that have been
22 submitted.

23 Okay. You're up. What motion do you want to start
24 with?

25 MR. TAYBACK: It'll be Summary Judgment Motion

1 Number 1. And it also -- there's -- relates to Summary
2 Judgment Motion Number 2. So I will argue them jointly. They
3 were at least opposed jointly, and we replied jointly with
4 respect to those two motions.

5 THE COURT: Okay.

6 MR. TAYBACK: I'm here on behalf of the director
7 defendants Michael Wrotniak, Judy Coddling, Douglas McEachern,
8 Edward Kane, Guy Adams, Margaret Cotter, and Ellen Cotter. As
9 Your Honor will recall and as addressed in the briefing, Your
10 Honor said, and this is a truism, really, for any case, you've
11 got to analyze claims defendant by defendant, in this case
12 director by director, and transaction by transaction. And
13 that's, you know, just basic, basic legal analysis.

14 On top of that, sort of as an overlay, another thing
15 that I know Your Honor is well aware of is the recent law that
16 clarifies -- I see you chuckling --

17 THE COURT: I don't know anything about the Wynn-
18 Okada case. You don't know anything about it, because your
19 firm wasn't involved at all, and Mr. Ferrario doesn't know
20 anything, and Mr. Morris I'm sure was involved, too, because
21 he's been involved in some of the appellate process in that
22 case, too.

23 Right, Mr. Morris?

24 MR. MORRIS: Yes.

25 THE COURT: See, so we all know.

1 MR. TAYBACK: But all I need to know, all I need to
2 know and all I really care about here and all that matters
3 here is the language of the Supreme Court's opinion, because
4 that's really what animates the business judgment rule in
5 Nevada as we stand here now. And I think that combined with
6 the recent clarifications by the legislature regarding the
7 latitude afforded directors work together to set the bar very,
8 very high. I'm sure Your Honor has read the opinion multiple
9 times, applied it in that case, a case I'm not privy to, but
10 it's --

11 THE COURT: I did. I granted partial summary
12 judgment, which is on a writ.

13 MR. TAYBACK: And, as you well know --

14 THE COURT: Are we supposed to be calling somebody?

15 MR. FERRARIO: No.

16 THE COURT: I have a call-in number. I'm not in
17 charge of doing this.

18 (Pause in the proceedings)

19 THE COURT: Hold on. Apparently someone thinks
20 they're calling in.

21 MR. RHOW: It's okay, Your Honor. No need. I'm
22 here.

23 THE COURT: Oh. It was you?

24 MR. RHOW: Not necessary.

25 THE COURT: Okay. Good. I'm glad we don't have to

1 call you.

2 Okay. Keep going. So I granted partial summary
3 judgment, but I found some directors were not disinterested,
4 so not all of the directors were covered by the summary
5 judgment. I also in that case made a determination the
6 business judgment rule only applies to officers and directors,
7 it does not apply to the corporation itself. Just so you
8 know.

9 MR. TAYBACK: And I'm aware of that only through
10 having read the pleadings and having read now the court's
11 opinion here. But the question is as it applies to this case.
12 And as it applies to this case collectively that recent
13 guidance and the guidance from the legislature make it clear
14 that it's not really the province of a plaintiff or a court or
15 jury to come in and say the business judgment rule should be
16 overridden in order to second guess a particular decision made
17 by a corporation's directors or its officers. And if you
18 start at that premise, the idea that the applicable Nevada
19 statutes here elevate -- give that sort of latitude to
20 directors in the first instance and then you take it to sort
21 of the next level of analysis, that is to say, even if one
22 could rebut the presumption, even it's rebutted the standard
23 then for imposing liability is even higher, because there
24 remains still a two-prong test for which plaintiffs have to
25 show a material disputed issue of fact to proceed to trial.

1 Both an individual director on a particular transaction
2 breached their fiduciary duty and, secondly, that that
3 individual director did so with fraud, knowing -- as a knowing
4 violation of the law or engaged in intentional misconduct.

5 THE COURT: Well, you understand that finding is
6 only needed to make a determination as to whether the
7 individual officer or director is insulated from -- for
8 personal liability purposes, as opposed to derivative
9 liability, which would be funded through the corporation.

10 MR. TAYBACK: Correct.

11 THE COURT: Okay.

12 MR. TAYBACK: Though they are seeking personal
13 liability. Their complaint makes that clear.

14 THE COURT: I understand they are. But your motion
15 seemed to take the position that unless I found fraud they
16 need to be dismissed. And that's not how it works.

17 MR. TAYBACK: Well, but they do need to rebut the
18 presumption with respect to the business judgment rule.

19 THE COURT: That's a different issue, Counsel.

20 MR. TAYBACK: It is a different issue. And it's a
21 multiple-hurdle test.

22 THE COURT: Yes.

23 MR. TAYBACK: And with respect to that second hurdle
24 even the issue comes down to Your Honor's adjudicating their
25 claim for personal liability, then that's also part of the

1 motion.

2 But you don't need to get there, because they have
3 not established the evidence necessary to rebut the initial
4 presumption. And that's clear because when you look at what
5 governs the decision here by these individual directors on
6 termination, which I'm going to take that transaction because
7 that's the subject of our first motion for summary judgment,
8 if you look at that, what governs that decision are the
9 bylaws. And the bylaws which we've submitted are amply clear
10 that the board was given complete discretion, that officers,
11 including the CEO, serve at the pleasure of the board and can
12 be terminated with or without cause at any time.

13 With the bylaws being the operative rules of the
14 road, so to speak, and the law being what it is with respect
15 to the deference afforded boards and individual board members,
16 plaintiff's efforts to try to get around the idea that that
17 presumption should be applied here are based on generalized
18 allegations of disinterestedness. But you don't see specific
19 evidence in the record anywhere that any of the three
20 directors who voted to terminate Mr. Cotter, Jr. --

21 THE COURT: And you're including Mr. Adams in that,
22 are you?

23 MR. TAYBACK: I am including Mr. Adams in that.

24 THE COURT: Just checking. So what happens if I
25 make a determination that Mr. Adams is not disinterested? You

1 then do not have a majority of disinterested directors;
2 correct?

3 MR. TAYBACK: If you made that finding that would be
4 true. But it wouldn't change the liability, the claim against
5 Mr. McEachern or Mr. Kane.

6 THE COURT: You mean for personal liability?

7 MR. TAYBACK: I mean whether -- not whether or not
8 you can say we need to revisit that action, but whether or not
9 they were disinterested, whether they breached their fiduciary
10 duty. That would be adjudicated in their favor even if you
11 found against Mr. Adams on a particular transaction -- but I
12 would say you should not find against Mr. Adams on this
13 transaction. The evidence isn't that his -- that the decision
14 to terminate had any connection to his -- the level of his
15 income, the amount of his -- the amount of his income, the
16 amount of his expenditures, his continuity on the board.
17 There's no connectivity, which is required in order to find
18 disinterestedness even if disinterestedness was the standard.
19 Because I will say the standard in Nevada is not independence
20 for -- unless it's a transaction in which the director is on
21 both sides of the transaction or it's a change of control
22 circumstance. The termination of a CEO is an operational
23 matter where you don't get to the independence question unless
24 and until you have established a basis, a legitimate basis in
25 the law to show that the presumption should not apply.

1 In light of the law, in light of the bylaws, in
2 light of the undisputed evidence with respect to Mr. Adams,
3 Mr. Kane, Mr. Wrotniak, the Cotter sisters, and Ms. Coddling --
4 and, of course, Mr. Wrotniak and Ms. Coddling weren't even on
5 the board at the time of this transaction -- the fact is that
6 there's no basis upon which to allow plaintiff's claim to
7 proceed.

8 The last point that I want to make with respect to
9 Summary Judgment Motion Number 1 and 2 as it relates to that
10 point is the plaintiff has tried to really muddy the law. And
11 I think whatever you ultimately decide on this motion for
12 summary judgment -- and I absolutely believe that these
13 defendants are entitled to summary judgment on this record,
14 but whatever you decide the parties will be well served by
15 understanding Your Honor's view of the law. Because we do not
16 see eye to eye with the plaintiffs on the law. They strive to
17 import this Delaware entire fairness test.

18 THE COURT: I rejected that in Wynn, because that
19 was the part that the Okada parties argued once the writ came
20 back on [inaudible].

21 MR. TAYBACK: And notwithstanding that, I believe
22 the plaintiffs are still advocating for it. It shows up in
23 their papers.

24 THE COURT: I understand it's in their briefing.

25 MR. TAYBACK: And the law at least in Nevada with

1 respect to that is that it doesn't apply here. Independence
2 for the same reasons is not required for the benefit of the
3 business judgment rule where, as here --

4 THE COURT: You don't think the Shoen case says that
5 independence is required for application of business judgment
6 rule?

7 MR. TAYBACK: In Shoen to the extent it says that at
8 all it says it in the context of demand futility. It's not
9 the presumption that we're talking about here. And in fact
10 that's -- I believe that's exactly what certainly the Wynn
11 Supreme Court --

12 THE COURT: There's two Shoen cases; right?

13 MR. TAYBACK: Yes.

14 THE COURT: There's the first Shoen case and the
15 second one that they gave a different name to.

16 MR. TAYBACK: Independence is not required unless
17 you have a director who's on both sides of a transaction.

18 THE COURT: Okay.

19 MR. TAYBACK: I believe the law is amply clear on
20 that.

21 THE COURT: Okay. I think their analysis is
22 slightly broader than that, but okay.

23 MR. TAYBACK: Given the bylaws, given the fact that
24 entire fairness does not apply, you cannot simply get past or
25 rebut the presumption of the applicability of the business

1 judgment rule by saying a director is biased, a director has
2 some family connection, a director has income that's
3 attributable to the company. And that's really what this case
4 comes down to. Where the facts here are frankly undisputed
5 summary judgment is warranted.

6 That's it for Summary Judgment 1 and 2, Your Honor,
7 unless you have any questions.

8 THE COURT: No. It's okay.

9 Mr. Krum, Mr. Morris?

10 MR. KRUM: Good morning, Your Honor. Thank you.

11 So I have some argument to make about what are
12 pervasive misstatements of the law that were made with respect
13 to Number 1, as well as the other ones. That said, if I'm
14 listening, you're prepared to deny Number 1, just as you did
15 previously, nothing has changed, including the law; and if
16 that's the case, I'll just defer those comments till we get to
17 something else.

18 THE COURT: Well, then let me ask you a question.
19 Because when I read all these I have notes all over them,
20 because some of them are interrelated and the
21 disinterestedness issue is an issue that is involved in some
22 of the motions in limine, as well as this.

23 Can you tell me what evidence, other than what is
24 listed on page -- you had -- in your brief you had a list of
25 all of the company activities that you believe show decisions

1 that were made by certain of the directors that showed they
2 were interested. Can you tell me, other than that list -- and
3 I can't, of course, find it right now, but I'm looking for it
4 -- is there any other information other than from Mr. Adams
5 that you have that would provide a basis for the Court to
6 determine that they are not disinterested?

7 MR. KRUM: I'm sorry. That who is not disinterested
8 with respect --

9 THE COURT: Anyone except Mr. Adams and the two Ms.
10 Cotters. The two Ms. Cotters I think is fairly easy. They
11 didn't even move, from what I can tell. But, for instance,
12 for Mr. Kane.

13 MR. KRUM: Certainly, Your Honor. In our -- first
14 let me say I think the list to which you're referring is a
15 list that I had understood the Court to request when we last
16 argued summary judgment motions and was intended, Your Honor,
17 to identify the particular matters which we contend give rise
18 to or constitute breaches of fiduciary duty in and of
19 themselves as well as together with other matters. And so --

20 THE COURT: I don't know that that's the reason you
21 did it. I found it. It is on pages 5 and 6. I'm on the
22 Supplemental Opposition to Motion for Summary Judgment Number
23 1 and 2 and Gould Motion for Summary Judgment, and there is a
24 list that includes threats of termination if you don't get
25 along with your sisters and resolve the probate case --

1 MR. KRUM: Yes.

2 THE COURT: -- exercise of the options, the
3 termination, the method of the CEO search. All of those are
4 company transactions. What I'm trying to find out is, other
5 than for Mr. Adams, is there other evidence of a lack of
6 disinterestedness that you have other than what is included in
7 the list of activities that relate to their work as directors
8 which are on pages 5 and 6 of that brief in the bullet points.

9 MR. KRUM: Let me answer it this way, Your Honor. 5
10 and 6 was our effort to do what I just said. And what that
11 is, to try to be clear, is to identify particular activities
12 that we thought would be the subject of, as is appropriate,
13 either instructions or interrogatories to the jury with
14 respect to these particular matters.

15 So let's take Number 1 bullet point, the first
16 bullet point, the threat by Adams, Kane, and McEachern to
17 terminate plaintiff if he did not resolve trust disputes with
18 his sisters on terms satisfactory to them. That, Your Honor,
19 from our perspective is separate from the termination which is
20 the subject of Number 1. And on this --

21 THE COURT: I see that. But let me have you fall
22 back, because I certainly understand those may be issues that
23 you may want to submit interrogatories or just to include in
24 jury instructions related to breaches of fiduciary duty by
25 someone who survives this motion, who I don't grant it on

1 behalf of.

2 But my question is different. Other than these
3 which you've argued in your brief are evidence of a lack of
4 disinterestedness separate and apart from Mr. Adams, who you
5 have other evidence that is presented related to a lack of
6 disinterestedness, is there any evidence that has been
7 attached to your various supplements and other motions related
8 to a lack of disinterestedness for the other directors known
9 as Mr. Kane, Mr. McEachern, Mr. Gould, Ms. Coddington, and Mr.
10 Wrotniak?

11 MR. KRUM: The answer is yes, Your Honor. So I'm
12 going to try to do it a couple ways.

13 THE COURT: Tell me where to go. Because I looked
14 through this whole pile of about 2 foot of paper last night
15 trying to find it, and the only one I could find specific
16 allegations of a lack of disinterestedness, besides the two
17 Cotter sisters, was Mr. Adams.

18 MR. KRUM: Okay. Well, so, for example, with
19 respect to Mr. Kane in the response to MSJ Number 1 and 2 we
20 introduced evidence that showed that Kane was of the view that
21 he knew best what James Cotter, Sr., wanted in his trust
22 documentation.

23 THE COURT: I see he understood what Mr. Cotter,
24 Sr.'s plan was. How does that make him have a lack of
25 disinterestedness?

1 MR. KRUM: Well, the answer, Your Honor, is he acted
2 on that. That was the basis on which he decided to vote to
3 terminate the plaintiff. He -- and, for example, the evidence
4 includes an email from Mr. Adams to Mr. Kane in April or early
5 May 2015 in which Mr. Adams says, "This was difficult. We had
6 to pick sides in this family dispute. But we can take comfort
7 that Sr. would have approved our decision." And so the point
8 from our perspective, Your Honor, is Kane, in acting as a
9 director, in fact acted to carry out what in his judgment were
10 the personal interests of Sr. with respect to his trust
11 planning. And on that basis he voted to terminate Mr. Cotter.
12 There are emails from Mr. Kane to Mr. Cotter telling him, I
13 don't know what the sisters' settlement is but I urge you to
14 take it. Well, we think the evidence also shows that he knew
15 what it was, that it entailed Mr. Cotter giving up control of
16 the issues they've been litigating.

17 THE COURT: Under the Shoen analysis do you believe
18 that that contact and that information is sufficient to show
19 that Mr. Kane is not disinterested?

20 MR. KRUM: Well, the answer is, yes, we do, Your
21 Honor. And I hasten to add that the way Shoen puts it is that
22 disinterestedness and independence are a prerequisite to
23 having standing to invoke the business judgment rule.

24 THE COURT: I'm aware of that. Which is why we're
25 having this discussion. So -- but usually we have either a

1 direct financial relationship, even if it's not on both sides
2 of the transaction, or we have a very close personal or
3 familial relationship with the people who are subject to the
4 transaction. And simply believing you understand Sr.'s plan
5 -- estate plan does not, I don't think, rise to that same
6 level to show a lack of disinterestedness; but I'm waiting for
7 you to give me a spin on that argument I may not have thought
8 of.

9 MR. KRUM: Sure, Your Honor. The answer is -- and I
10 say this because I appreciate what the finder of fact -- what
11 the Court has to do now and what the finder of fact has to do.
12 The evidence has to be assessed collectively, not
13 individually. And you understand that. We've cited cases for
14 that. The other side disputes that. There's "The complaint
15 of acts and omissions upon which plaintiff's claims are based
16 must be viewed and assessed collectively, not separately in
17 isolation." That's the Ebix case that we've cited. And there
18 are other cases for that proposition. The point, Your Honor,
19 is "assessing whether a director was independent and in a
20 particular instance acted independently or whether the
21 director was disinterested as required or whether -- and made
22 the decision based entirely on the corporate merits, not
23 influence by personal or extraneous considerations," that was
24 CVV Technicolor, that's the test. And so, Your Honor, in
25 Shoen, just to go back to that, "Independence can be

1 challenged by showing that the directors' execution of their
2 duties is unduly influenced." If Kane made a decision based
3 in any respect on his view that Sr. intended for one or both
4 of the sisters to have something and Jr. was in the way of
5 that, that, Your Honor, at a minimum survives summary judgment
6 so the finder of fact can make a determination after
7 considering all the evidence whether the director acted and
8 decided in that particular instance entirely on the corporate
9 merits. So what is --

10 THE COURT: Let's skip ahead, then. Mr. McEachern.
11 What evidence of disinterestedness do you have for Mr.
12 McEachern? And if you could tell me where in the briefing it
13 is, I will look at it again. But, as I've said, other than
14 Mr. Adams I did not see evidence of disinterestedness as
15 opposed to allegations of breach of fiduciary duty.

16 MR. KRUM: Mr. McEachern attempted to extort Mr.
17 Cotter. Along with Mr. Kane and Mr. Adams he told Mr. Cotter,
18 you need to go resolve your disputes with your sisters and
19 we're going to reconvene at 6:00 o'clock and if you don't
20 you'll be terminated. Now, there's no dispute about that. We
21 have in evidence the testimony --

22 THE COURT: I understand that that's one of your
23 claims of breach of fiduciary duty. But I'm trying to
24 determine if there was any additional evidence, other than
25 those items that are those bullet points you put in the brief,

1 which are on pages 5 and 6 of your supplemental opposition,
2 that goes to Mr. McEachern. And then I'm going to ask you the
3 same question for Mr. Gould and Ms. Coddington and Mr. Wrotniak.

4 MR. KRUM: Your Honor, as a threshold matter, the
5 presumption can be rebutted by showing conduct in derogation
6 of the presumption. It's not simply a interest or
7 disinterested phenomenon, cite Shoen. Let me be clear. I
8 don't want to talk past you. The other side argues there are
9 only two circumstances in which interestedness matters. Well,
10 that's belied by Shoen. It says, "Business judgment rule
11 pertains only to directors whose conduct falls within its
12 protections. Thus, it applies only in the context of a valid
13 interested director transaction --" that's 138 -- 78.140,
14 excuse me "-- or the valid exercise of business judgment by
15 disinterested director in light of their fiduciary duties."
16 And to be a valid exercise, Your Honor, it has to be made in
17 the interest of the corporation.

18 So Mr. McEachern -- let me go through the list
19 mentally. He attempted to extort Mr. Cotter to resolve the
20 trust disputes in favor of the sisters, he voted to terminate
21 -- he decided not to terminate after he understood an
22 agreement had been reached to resolve those disputes. And
23 when that didn't come to pass he voted to terminate. He,
24 along with Mr. Gould, chose the wishes of the controlling
25 shareholders. Rather than to complete the process he had set

1 up, they aborted the CEO search. So, Your Honor, that's
2 squarely within the Shoen language of manifesting a direction
3 of corporate conduct in such a way as to comport with the
4 wishes or interests of the person doing the controlling.

5 Now, I heard you. You view that as a fiduciary
6 breach.

7 THE COURT: An allegation of a fiduciary duty
8 breach.

9 MR. KRUM: Allegation of fiduciary duty breach,
10 right. But that's -- if proven, that rebuts the presumption,
11 and off we go.

12 I skipped over Mr. McEachern's role in involuntarily
13 retiring Mr. Storey. Mr. McEachern, together with Mr. Adams
14 and Mr. Kane, in October and November -- September or October
15 I guess it was of 2015 comprised the ad hoc first time one
16 time special nominating committee. That committee had two
17 roles. One was to tell noncompliant director Timothy Storey
18 that he wasn't going to be renominated, and they explained to
19 him that the sisters, who controlled the vote, had told him
20 they weren't going to vote to elect him so he could either
21 resign and get a year's benefits of some sort or just be left
22 off.

23 What else did that committee do? They approved Judy
24 Coddington and Michael Wrotniak. Did they undertake to search
25 for candidates? No. Did they do anything that one would do

1 as a director of a nominating committee to identify and
2 recruit directorial candidates? No. What did they do? They
3 did what they were asked and told. Ellen Cotter gave them
4 Judy Coddington, good friend of Mary Ellen Cotter, the mother,
5 with whom Ellen Cotter lives, and Michael Wrotniak, husband of
6 Patricia Wrotniak, one of Margaret Cotter's few good friends.
7 And they obviously did virtually nothing, because promptly
8 after the company announced Ms. Coddington had been added to
9 board a shareholder brought to their attention there were lots
10 of Google articles that raised questions about Ms. Coddington's
11 relationship with her prior employer and the prior employer's
12 conduct.

13 So on the nominating issue, Your Honor, on the board
14 stacking our view is that all evidences loyalty to the
15 controlling shareholders. And that, Your Honor, would be
16 somewhere in the range of lack of independence or
17 disinterestedness.

18 THE COURT: So, Mr. Krum, if we're going to get
19 through all the motions this morning I need you to wrap up.
20 Because I think I have all the information I need on Motion
21 for Summary Judgment Number 1.

22 MR. KRUM: Okay. Certainly, Your Honor.

23 So just to finish the bullet points which you
24 brought to my attention, these directors, Kane, Adams,
25 McEachern, they're all on record dating back to the fall of

1 2014 that, yes, we should find a position for Margaret Cotter
2 at the company so she can have health insurance, but, no, she
3 can't be running our real estate. Well -- that's in the
4 emails we have in the evidence actually, Your Honor, the first
5 time around. And there's some more from Mr. Gould or
6 McEachern. We had some additional testimony that we added
7 this time. And so what happens? Ellen Cotter is made CEO
8 after the aborted CEO search, she says, I want Margaret to the
9 have the senior executive position, for which she has no prior
10 experience and no qualifications. And what do these people do
11 as committee members and board members? They say, where do we
12 sign.

13 So, Your Honor, it's an ongoing, recurring,
14 pervasive lack of independence or disinterestedness. And the
15 conclusion of that, Your Honor, of course, was by what they
16 did in response to the offer -- and I've sort of wrapped up
17 the whole thing without talking about the law I intended to
18 discuss -- and that is they ascertained what the controlling
19 shareholders wanted to do and they did it in an hour-and-
20 twenty-five-minute telephonic board meeting.

21 I didn't discuss what I intended to discuss, but I
22 tried to answer your questions.

23 THE COURT: I understand, Mr. Krum. But the
24 briefing was very thorough, which is why I tried to hit the
25 questions --

1 MR. KRUM: Understood.

2 THE COURT: -- because I had some questions after
3 reading it.

4 So Motion for Partial Summary Judgment Number 1 is
5 granted in part. It is granted with respect to Edward Kane,
6 Douglas McEachern, William Gould, Judy Coddington, and Michael
7 Wrotniak.

8 It is denied as to Margaret Cotter, Ellen Cotter,
9 and Guy Adams because there are genuine issues of material
10 fact related to the disinterestedness of each of those
11 individuals. As a result, they cannot at this point rely upon
12 the business judgment rule.

13 MR. TAYBACK: Your Honor, is there a ruling on the
14 aspect of the motion that goes to inability to hold the
15 individuals personally liable for this claim?

16 THE COURT: For the three that I didn't grant the
17 business judgment?

18 MR. TAYBACK: Correct.

19 THE COURT: No, you do not get a ruling to that
20 effect.

21 Did you want to go to your next motion for summary
22 judgment?

23 MR. TAYBACK: Yes, Your Honor.

24 THE COURT: And I'm trying to be consistent with the
25 decision I made in the Wynn based upon the facts that seem to

1 be slightly different on the conduct of directors. I've got
2 this thing in my head that nobody understands but me, so I'm
3 trying to draw that line by asking questions so I can figure
4 out where that is. Mr. Ferrario knows nobody understands but
5 me. And I can't say it in a way the Supreme Court will
6 understand, because they don't understand it, except for Chris
7 Pickering, and she won't be deciding your appeal.

8 MR. TAYBACK: Your Honor, we have a second motion.
9 It's Motion Number 2. It's also woven through some of the
10 other motions. For the sake of just clarity I'll address
11 Motion Number 2 separately, and I'll only --

12 THE COURT: Briefly.

13 MR. TAYBACK: -- briefly. I'll only say this. Even
14 if you go to the -- well, I've certainly said my piece
15 already, and I think you can just incorporate what I've said
16 previously on this point, that independence I do not believe
17 is a legal prerequisite to the invocation of the business
18 judgment rule. Even if you look at the Shoen case, which Your
19 Honor has discussed, where it talks about interestedness and
20 the word it uses "interestedness," the quote there is, "To
21 show interestedness a shareholder must allege that --" it's
22 talking about allegations in that case "-- allege that a
23 majority of the board members would be, quote, 'materially
24 affected' either to benefit or detriment by a decision of the
25 board in a manner not shared by the corporation and the

1 stockholders." To the extent there is a question of
2 independence, it's not the generalized allegations that I
3 think pollute the claims here, the transaction-by-transaction
4 claims that the plaintiff seems to be asserting. You can't
5 just say independence is lacking because there's -- one of the
6 directors favored one of the board members versus one of the
7 others, favored the sisters versus the brother. You have to
8 show that there's a material impact in the transaction itself
9 that was being voted upon, and that's the contention that
10 we're making with respect to independence and how plaintiff's
11 claims, all of them against all of the individual defendants
12 transaction by transaction should fail under a summary
13 judgment standard.

14 With that I'll stop, and then I'll allow him to
15 address it, and then I've got on Motion Number 3.

16 THE COURT: Okay. Mr. Krum, anything else on Motion
17 Number 2?

18 MR. KRUM: Just briefly, Your Honor, because I think
19 we have a fundamental -- I'm going to repeat myself in one
20 respect -- misapprehension of law. This is not a check-the-
21 box exercise.

22 THE COURT: No, it is not.

23 MR. KRUM: So in Shoen the court says, "Thus, as
24 with the Aronson test, under the Brehm test, director
25 independence can be implicated by particularly alleging that

1 the directors' execution of their duties is unduly influenced,
2 manifesting a direction of corporate conduct in such a way as
3 to comport with the wishes or interests of the person doing
4 the controlling."

5 Now, we know that's a demand case, but that doesn't
6 change the law, it just changes the application of the law.
7 And so the point isn't any more complicated than what it said
8 elsewhere in Shoen, and that is "Directors' discretion must be
9 free from the influence of other interested persons."

10 So Motion Number 2 is -- it's nonsensical, because
11 that has to be assessed based on facts and based on the
12 particular application. You just did it with respect to
13 Number 1. And so it doesn't work that way. And the -- in
14 Rails the court said, of which Shoen is cited with approval,
15 "Directorial interest exists whenever divided loyalties are
16 present." And we have this ongoing set of transactions that
17 entail furthering and protecting the interests of the Cotter
18 sisters. That, Your Honor, is a perfect example of
19 circumstances that show divided loyalties. Thank you.

20 THE COURT: Thank you.

21 Motion for Summary Judgment Number 2 is granted in
22 part. To the extent that you asked me to make a determination
23 as to whether there has been a showing of a lack of
24 disinterestedness there is a lack of disinterestedness for
25 Margaret Cotter, Ellen Cotter, and Guy Adams.

1 With respect to the other directors who were
2 involved in the motion there does not appear to be sufficient
3 evidence presented to the Court to proceed with a claim of
4 lack of disinterestedness.

5 Okay. That takes you to Number 3.

6 MR. TAYBACK: Your Honor, with respect to the Motion
7 for Summary Judgment Number 3, which relates to what's called
8 the patent vision expression of interest --

9 THE COURT: Yeah.

10 MR. TAYBACK: -- there are --

11 THE COURT: The unaccepted offer which may not have
12 been a real offer.

13 MR. TAYBACK: Not may not have been. Was admitted
14 by plaintiff --

15 THE COURT: Eh, you know.

16 MR. TAYBACK: Was admitted by the plaintiff was
17 nonbinding expression of interest that could have been
18 withdrawn or rejected at any point in time. Moreover, when
19 you look -- that in and of itself disposes of the claim,
20 because there are no damages that flow from that. There
21 cannot be. And that Cook case, which is a Delaware case, but
22 the Cook case really makes that clear.

23 THE COURT: I thought I wasn't supposed to look at
24 Delaware law according to you. You know the legislature can't
25 tell the court what it's allowed to look at.

1 MR. TAYBACK: And I did know that.

2 THE COURT: Okay.

3 MR. TAYBACK: I'm encouraging you to look at it.

4 THE COURT: I'm looking at all sorts of things, but
5 I'm trying to interweave it into the legislative intent
6 related to business judgment and the protections that we
7 should give to officers and directors in Nevada.

8 MR. TAYBACK: Yeah. And I think what it is is it's
9 factually analogous. It's factually analogous.

10 THE COURT: Right. I just had to give you a hard
11 time. Anything else you want to tell me?

12 MR. TAYBACK: The only other thing that I would tell
13 you is that when you look at what it is that the board members
14 can look at with respect to the consideration of potential
15 change of control overtures, call it expression of interest or
16 anything else, it's nonexclusive. It says they may consider
17 any of the relevant facts. And here the undisputed evidence
18 is that they did consider a lot of relevant facts, including
19 the views of the plaintiff, the views of the two Cotter
20 sisters, including the presentations of the board. And
21 they're entitled to rely upon that. And the reasonableness of
22 the decision is not something that can be second guessed at
23 this juncture based upon the showing that plaintiff has made.

24 THE COURT: Mr. Krum. Let's skip past a couple of
25 those arguments and focus on a different issue. Other than as

1 evidence of breaches of fiduciary duty, do you have any claim
2 of specific damages to the failure to accept the unsolicited
3 offer?

4 MR. KRUM: Well, first, Your Honor, the notion that
5 it's nonbinding and therefore it cannot result in damages is
6 belied --

7 THE COURT: No. I asked you a very direct question.

8 MR. KRUM: I'm sorry.

9 THE COURT: Do you have damages that you have
10 provided me evidentiary basis for strictly related to the
11 failure of the company or the directors to accept the
12 unsolicited offer?

13 MR. KRUM: Mr. Duarte Solis speaks to that in his
14 expert opinion which was the subject of a motion in limine you
15 denied in October of last year.

16 THE COURT: I know. But I'm asking you a question.
17 Do you have specific evidence of damages related to the
18 decision by the board not to accept the unsolicited offer?

19 MR. KRUM: No. The answer I have is the one I just
20 gave, Your Honor.

21 THE COURT: All right. So that's the only answer
22 you have. Okay. Anything else you want to tell me?

23 MR. KRUM: I just wanted to say again on law,
24 different point, though, intentional misconduct, one of the
25 ways that occurs is where the fiduciary acts with a purpose

1 other than advancing the best interests of the corporation. I
2 think the evidence on this subject, Your Honor, the offer
3 raises a question of fact, a disputed question of material
4 fact as to whether that's what the directors did.

5 Another category of intentional misconduct is where
6 the fiduciary intentionally fails to act in the face of a
7 known duty to act, demonstrating a conscious disregard for his
8 duties. That is a pervasive and recurring phenomenon here,
9 and I submit, Your Honor, with respect to the so-called offer
10 that's what happened. So the point is, as I said before on
11 the offer in particular, Your Honor, it sort of bookends this
12 whole sequence of events, starting with the seizure of
13 control. And you've read the papers, so I'll leave it at
14 that.

15 THE COURT: Anything else?

16 MR. KRUM: No.

17 THE COURT: Okay. Because of the failure of damages
18 related to an unenforceable, unsolicited, nonbinding offer, I
19 am granting the motion.

20 However, that does not preclude the plaintiff from
21 utilizing that factual basis for claims of a breach of
22 fiduciary duty. Okay?

23 MR. TAYBACK: Or for other alleged -- to prove other
24 alleged breaches you're saying it might be admissible as
25 evidence.

1 THE COURT: Well, it may be additional evidence of
2 breach of fiduciary duty. But they don't get to claim any
3 damages from it, since they haven't established damages
4 related to that because of the legal issues related to the
5 nature of the offer.

6 So what is your next motion for summary judgment, if
7 any? I think there were six.

8 MR. SEARCY: Your Honor, I'm addressing Motion for
9 Summary Judgment Number 5. That relates to the CEO search.
10 And --

11 THE COURT: Ready for me to say denied?

12 MR. SEARCY: If you'll let me --

13 THE COURT: You can talk, Mr. Searcy, but we're
14 leaving here in 25 minutes whether you guys are done or not.

15 MR. SEARCY: All right. Well, if you're going to --
16 before you say denied then let me just address a few of the
17 points in it. If you're going to say granted, then I'll
18 certainly sit down.

19 THE COURT: I'm not going to say granted.

20 MR. SEARCY: The point, Your Honor, is that there's
21 no dispute on the material facts here. There was a process
22 that was undertaken by the board here to appoint a CEO. The
23 board appointed a special committee, the special committee
24 hired a search firm, that search firm went out and got
25 information, they interviewed candidates, those candidates

1 were selected by the search firm Korn Ferry, and they were
2 considered along with internal candidates. The board -- or
3 the committee, rather, interviewed Ellen Cotter and decided
4 that she was the best candidate, and the board agreed with
5 that decision. And in the context of the law here you have a
6 majority of disinterested directors who agreed with that
7 decision. There's a presumption that all of this was
8 conducted in good faith. There hasn't been a rebuttal of the
9 presumption here, Your Honor, and, as a result, the motion
10 should be granted.

11 Are there particular issues, though, that I can
12 address for Your Honor?

13 THE COURT: Not that will cause you to be able to
14 get me to change my mind on denied.

15 MR. SEARCY: Okay. Are there any that I can at
16 least make an effort on, Your Honor?

17 THE COURT: Nope.

18 MR. SEARCY: Thank you, Your Honor.

19 THE COURT: All right. So that motion is denied.
20 Can we go to Number 6.

21 MR. SEARCY: Number 6 is mine, as well.

22 THE COURT: This has to do with the special bonus to
23 Mr. Adams.

24 MR. SEARCY: That's correct, Your Honor. There are
25 three main issues here. One has to do with the exercise of

1 options, and in that case there was an executive committee
2 that considered those options. There's no doubt, no dispute
3 that that was an existing plan, that the committee received
4 advice from counsel, and approved of the -- approved of the
5 exercise of the options.

6 THE COURT: Okay. Anything else?

7 MR. SEARCY: In addition to that -- and that's --
8 again, that is an exercise that is presumed to be done in good
9 faith and especially here, where the statute provides that you
10 can obtain information. And that's what the committee did.

11 In addition to that, Your Honor, there's the issue
12 of the payment to Mr. Adams that you just raised. That again
13 was approved by the board, approved by unanimous board who
14 were disinterested in the subject and are entitled to business
15 judgment on that subject.

16 And finally, with respect to Margaret Cotter's
17 appointment it's certainly within the board's discretion to
18 decide that someone who's worked for the company and been
19 affiliated with the company for approximately 20 years or so
20 has the qualifications to take on that job. And as Mr.
21 Tayback said, hiring someone to fill a role is certainly --
22 that's an operational decision that's within the discretion of
23 a board of directors, and certainly they're entitled to be
24 able to exercise the business judgment when it comes to that,
25 especially here. And with all of these decisions, Your Honor,

1 you're talking about a decision made by a majority of
2 disinterested directors, directors that you've found to be
3 disinterested.

4 THE COURT: Some directors I found to be
5 disinterested.

6 MR. SEARCY: Well, for those directors, though, Your
7 Honor, that you found to be disinterested, they constitute a
8 majority of the decision makers here. And --

9 THE COURT: Well, they're protected. Those people
10 are protected.

11 MR. SEARCY: And exercising their business judgment
12 they approved these decisions.

13 THE COURT: Okay. Anything else?

14 MR. SEARCY: Thank you, Your Honor. That's it.

15 THE COURT: Denied.

16 So you had Number 4 I think we didn't get to. Was
17 Number 4 reserved for this time, or had I ruled on it
18 previously?

19 MR. TAYBACK: Your Honor, you --

20 MR. KRUM: You ruled on it previously.

21 THE COURT: Okay. So that takes me to your motions
22 in limine. There were two that I think are important. One is
23 Mr. Gould's motion in limine to exclude irrelevant and
24 speculative evidence.

25 MR. RHOW: Your Honor, can I speak on this one?

1 THE COURT: It's your motion.

2 MR. RHOW: Thank you, Your Honor.

3 MR. FERRARIO: Hey, come on. This is his first
4 time.

5 MR. RHOW: I feel honored to actually --

6 THE COURT: Here's my first question.

7 MR. RHOW: By the way, is it tentative to grant?
8 I'd like to know that first.

9 THE COURT: My first question for you is one that
10 I'm going to ask all the people in motions in limine. Did you
11 have an opportunity to meet and confer with opposing counsel
12 before you filed the motion to see if there were areas of
13 agreement?

14 MR. RHOW: The answer is I don't think we did.

15 THE COURT: You know, we have a rule.

16 MR. SEARCY: I'm going to have to disagree with Mr.
17 Rhow. We actually did meet and confer with Mr. Krum on the
18 phone.

19 MR. RHOW: Oh. I'm sorry.

20 MR. SEARCY: Mr. Rhow wasn't part of the meet and
21 confer, but his associate, Shoshana Bannett, was.

22 THE COURT: Oh. Okay. All right.

23 MR. RHOW: Okay. I had looked at -- I should have
24 looked at Mr. Searcy.

25 THE COURT: Because usually -- usually I get a

1 declaration that tells me, we met and conferred on this
2 date --

3 MR. RHOW: Correct.

4 THE COURT: -- so that I can then gauge whether
5 somebody's being unreasonable or not. So it's your motion.

6 MR. RHOW: Thank you, Your Honor.

7 I think the motion was short and sweet on purpose.
8 During the deposition of Mr. Cotter, Jr., and it lasted days
9 and days and days, and throughout the questioning it was quite
10 clear that he was testifying based on not what he saw, what he
11 heard, what he observed; he was literally saying, here's what
12 I think -- thought at the time, here's what I was thinking Mr.
13 Gould was thinking and others were thinking and so therefore I
14 believe the claim is sufficient because of my subjective
15 belief as to what other directors were thinking. If that's
16 going to be part of this trial, first, this trial's not going
17 to be four weeks, it's going to be eight weeks; but, second,
18 there's nothing in the law, there's nothing based on common
19 sense that tells you that what the subjective beliefs of the
20 plaintiff are none of that is relevant, none of that is
21 relevant under the law, none that is relevant under common
22 sense. So to streamline this case, if he's going to talk
23 about what he saw, what he heard, certainly that's admissible.
24 But if he's going to talk about what he believes, that's
25 subjective and should not be part of this trial.

1 THE COURT: Thank you.

2 Ms. Levin, is this your motion?

3 MS. LEVIN: Yes, Your Honor.

4 As we said in our opposition, we believe this is an
5 improper and premature motion just because Mr. Cotter
6 obviously will be here at trial testifying.

7 THE COURT: So you want me to rule on the questions
8 and answers as they're given. So if somebody asks him, well,
9 did you talk to Mr. Adams about what he was going to do, he
10 can then tell me what he said.

11 MS. LEVIN: Correct, Your Honor.

12 THE COURT: Well, what did you think he meant?
13 That's speculation.

14 MS. LEVIN: Unless, of course, he's got a basis for
15 his belief. And I think that some of the deposition
16 testimony, those responses were invited by the very questions.
17 So to the extent that he has a basis to believe -- you know,
18 to state his belief I think that, again, it should be
19 determined on the question by question.

20 THE COURT: Okay. So the motion is denied. It's
21 premature. It's an issue that has to be handled at trial
22 based upon the foundation that is laid related to the issue.

23 So -- and plus you won't be here. You won't be
24 here; right?

25 MR. RHOW: I'm sorry?

1 THE COURT: You won't be here; right?

2 MR. RHOW: I don't know. I hope not. Is Your Honor
3 saying I should not be here or that my client won't be here
4 then?

5 THE COURT: That's what the business judgment ruling
6 deals with; right? So I granted your client's business
7 judgment rule motion. Well, you know, he may be a witness.

8 MR. KRUM: I'm sorry, Your Honor. Did I miss
9 something?

10 THE COURT: What?

11 MR. KRUM: We haven't had that motion argued yet,
12 Mr. Gould's motion.

13 THE COURT: I included Mr. Gould because you briefed
14 it relate to all of the motions for summary judgment and I
15 asked you questions about all the directors, except Mr. Adams.

16 MR. KRUM: I'm sorry. I didn't understand that,
17 Your Honor. I didn't answer as to Mr. Gould.

18 THE COURT: Do you want to tell me an answer to Mr.
19 Gould?

20 MR. KRUM: I do, because we have a hearing set for
21 the 8th on his motion, which is why misunderstood that.

22 THE COURT: I used it because it was included in
23 your opposition, the supplement to those motions.

24 MR. KRUM: That was confusion that we created, and I
25 apologize. The reason we did that, Your Honor, is that we

1 didn't have an opportunity to prepare a Gould brief, but we
2 didn't want to be accused of doing nothing. And some of the
3 evidence in those motions in our view did relate to Gould, and
4 we therefore put him on there.

5 That said, he filed two pieces of paper, they asked
6 me if we could have the hearing today. I told them no, I
7 wanted to respond. So -- but let me try to answer your
8 question with respect to Mr. Gould. So we start, Your Honor,
9 as we do, with the threat to terminate and the termination.
10 And I respectfully submit --

11 THE COURT: I will tell you that on your Mr. Gould
12 you've got the same list that we've already talked about.
13 What I'm trying to find out is -- and I understand the threat
14 is part of what you've alleged related to Mr. Gould along with
15 the other six or seven bullet points that are on pages 5 and 6
16 of the opposition. Is there something else related to Mr.
17 Gould, something like you have with Mr. Adams that would
18 establish a lack of disinterestedness?

19 MR. KRUM: Let me answer, and then you'll decide.

20 THE COURT: Yeah. That's what I'm trying to pull
21 out of you.

22 MR. KRUM: So, for example, with respect to the
23 termination Mr. Cotter raised the question of Mr. Adams's
24 independence before a vote was taken, and Mr. Gould asked Mr.
25 Adams, well, can you tell us about that. And Mr. Adams got

1 mad and said in words or substance, no. And Mr. Gould said,
2 okay. That, Your Honor, is a perfect example of a failure to
3 act in the face of a known duty to act. We're not talking
4 about someone who is unfamiliar with fiduciary obligations
5 here. Mr. Gould is a corporate lawyer.

6 So we get to the -- we get to the executive
7 committee, same meeting, June 12. Ellen Cotter says, I want
8 to repopulate the executive committee, Mr. Gould, would you
9 like to be on it. His testimony, his deposition testimony was
10 that he declined because he knew that it would take a lot of
11 time. Now, if he knew that it would take a lot of time, Your
12 Honor, how is it that it didn't occur to him that this was
13 what the sisters were doing in October of 2014 when they were
14 trying to circumvent the board?

15 THE COURT: These are all on your list of bullet
16 points.

17 MR. KRUM: Okay.

18 THE COURT: What I'm trying to find out is if
19 there's anything that's not on the list of bullet points that
20 are on pages 5 and 6 of your supplemental opposition that
21 relate to Mr. Gould. Because when I made my ruling I was
22 including Mr. Gould as someone because I specifically excluded
23 Mr. Adams and the two Ms. Cotters.

24 MR. KRUM: Bear with me. I'm mentally working.

25 THE COURT: I'm watching you. I'm watching him

1 work.

2 MR. KRUM: So I don't think we had the executive
3 committee there, but I just said that.

4 So then, Your Honor, the composition of the board.
5 So Mr. Gould was not a member of the nominating committee.
6 His testimony was that, on a Friday Ellen Cotter called me and
7 asked me if she could come to my office and she and Craig
8 Tompkins came to my office and showed me Judy Coddington's resume
9 and said we were going to have a board meeting on Monday to
10 put Ms. Coddington on the board. And Bill Gould said, this isn't
11 sufficient time, I can't do my job. But he voted for her
12 nonetheless. That, Your Honor, is the same thing that happens
13 over and over and over again with Mr. Gould. That is, in the
14 face of a known duty to act he chooses not to do so. That is
15 intentional misconduct. Your Honor, you've denied the motion
16 with respect to the CEO search. That is Mr. Gould. It is Mr.
17 Gould and Mr. McEachern who are the ones who together with
18 Margaret Cotter aborted the CEO search. Literally the last
19 time they spoke to Korn Ferry was the day Ellen Cotter
20 declared her candidacy. After that what did they do? They
21 told Craig Tompkins to tell Korn Ferry to do no more work.
22 And Mr. Gould, he was the one whose name was on a press
23 release saying, Ellen Cotter was made CEO following a thorough
24 search. She was not made CEO as a result of that search. She
25 was made CEO in spite of that search.

1 THE COURT: Okay. So all of those are issues that
2 I'm aware of considered when I had previously included Mr.
3 Gould in the granting of the summary judgment related to the
4 business judgment rule. The fact that I am denying certain
5 issues related to other summary judgments does not diminish
6 the fact that the directors that I found there was not
7 evidence of a lack of disinterestedness have the protection
8 the statute provides to them.

9 Okay. So let's go back to Mr. Cotter's Motion
10 Number 3. This is related to the coach.

11 MS. LEVIN: Your Honor, this motion should be denied
12 because the hiring of High Point, that's post hoc --

13 THE COURT: It's your motion. You wanted it
14 granted.

15 MS. LEVIN: I'm sorry. You know, the Court -- I'm
16 sorry. The Court should exclude the after-acquired evidence
17 on the -- in the form of any testimony or documents relating
18 to the hiring of High Point, because the breach of fiduciary
19 duty claims, they are -- they concern what the directors did
20 and knew at the time that they decided to fire the plaintiff.
21 So we cited the Smith versus Van Gorkom case, which holds post
22 hoc data is not relevant to the decision.

23 So at the time that they made this decision they did
24 not have nor did they rely on the High Point evidence. So
25 therefore the after-acquired evidence cannot be as a matter of

1 law relevant to their decision to terminate the plaintiff.
2 That would amount to a retroactive assessment of his ability,
3 which are not at issue. And I think that that's the -- you
4 know, the --

5 THE COURT: The problem I have with that is part of
6 what your client's position has been in this case is he is
7 suitable to be acting as the CEO, and if there is information
8 that is relevant to that suitability, that's where I have the
9 problem on this. I certainly understand from a decision-
10 making process that that information was not in the possession
11 of anyone who was making the decisions at the time. But given
12 the affirmative proposition by your client that he is suitable
13 to CEO, I have concerns about granting the motion at this
14 stage.

15 MS. LEVIN: Well -- okay. So -- but with respect to
16 the decision which you can agree that they could not use that
17 evidence to show that after the fact they made the right
18 decision because of the after --

19 THE COURT: No. That's a problem if your client is
20 saying he's suitable and therefore he should be able to be
21 CEO. Because part of what he originally asked for was to make
22 them make him be CEO.

23 MS. LEVIN: All right. And here at issue I believe
24 it's the -- we're seeking to void the termination.

25 THE COURT: I know.

1 MS. LEVIN: So -- but I think that even -- and I
2 think that in that respect if you were inclined to allow it on
3 his suitability, the problem then becomes first of all the
4 hiring of consultant doesn't necessary mean that somebody is
5 unsuitable.

6 THE COURT: Absolutely. It may mean they're trying
7 to get better.

8 MS. LEVIN: Exactly. And I was thinking -- when I
9 read these facts I was thinking about the analogy. If you
10 were a professional runner and you hire a runner coach --

11 THE COURT: Coach.

12 MS. LEVIN: -- doesn't mean that you're not a good
13 runner. You may --

14 THE COURT: You want to be better.

15 MS. LEVIN: Exactly. So that was --

16 THE COURT: I understand.

17 MS. LEVIN: So and the other thing is that, you
18 know, the opposition argues, well, but it looks like in his
19 own assessment he wasn't good for it. And that, of course,
20 again doesn't follow from that. And so then we get into the
21 category of even if there's a remote relevance, Your Honor,
22 then whatever that relevance is would be substantially
23 outweighed by the unfair prejudicial effect that that would
24 cause. Because, again, his assumed thoughts, then the jury
25 could think like, well, you know, he thinks he's not qualified

1 because he hired a coach. So all in all I believe that it's
2 unfairly prejudicial.

3 Just on the point of the unclean hands defense,
4 again they are citing the Fetish, Las Vegas Fetish case. But,
5 again, the unclean hands defense requires egregious misconduct
6 and serious harm caused by it. And they haven't further
7 substantiated that. So with that being said, our position is
8 to exclude it for those reasons.

9 THE COURT: Thank you.

10 MS. LEVIN: Thank you.

11 THE COURT: Mr. Searcy --

12 MR. SEARCY: I'll address that.

13 THE COURT: -- I am inclined to deny the motion.
14 But if the evidence is admitted at trial, to admit it with a
15 limiting instruction that says that it only goes to
16 suitability.

17 MR. SEARCY: And, Your Honor, I think that we're
18 okay with that.

19 THE COURT: Okay.

20 MR. SEARCY: I just want to clarify that we can
21 certainly ask Mr. Cotter about the Alderton documents --

22 THE COURT: You ask him about it, then I'm going to
23 give the limiting instruction, and we'll probably give it five
24 times or six times, and it'll be a written instruction, so
25 it's part of it. And if the plaintiff doesn't want me to give

1 the limiting instruction because they believe that calls to
2 much attention to it, they can, of course, waive that request.

3 MR. SEARCY: Thank you, Your Honor.

4 THE COURT: Okay. So think about whether you really
5 want the limiting instruction, come up with your text for the
6 limiting instruction, and then we'll talk about it when we
7 have our final pretrial conference as to whether you think you
8 really want it.

9 That takes me to the last motion in limine by Mr.
10 Cotter, which relates to the ability of Mr. Ferrario to
11 participate at trial, also known as Motion in Limine Number 2.

12 MR. KRUM: Thank you, Your Honor. I enjoy this very
13 much, showing that perhaps I've spent too many years in the
14 corporate governance jurisprudence. Three points, and it's
15 not complicated. First, as a general rule a nominal defendant
16 is not allowed to introduce evidence and defend the merits of
17 claims against the director defendants.

18 Second, the handful of exceptions to that are
19 exceptions where it's a serious fundamental corporate interest
20 that is challenged by the derivative suit, a reorganization or
21 restructuring, an effort to appoint a receiver. None of those
22 exist here.

23 Third, if you disagree with us on all of that,
24 there's a question of unfair prejudice and waste of time.
25 And, you know, the individual defendants are represented by

1 capable counsel. They don't need a second lawyer carrying
2 their water. And for a jury to have someone who represents
3 the company asking questions that imply conclusions adverse to
4 the plaintiff is, if not unfairly prejudicial, something
5 beyond that.

6 So that's the argument in a nutshell, Your Honor.
7 If you have any questions, I'd be happy to answer them.

8 THE COURT: Nope. Motion's denied.

9 All right. So let's go to your Motion in Limine
10 Number 1 regarding advice of counsel. I forgot we need to hit
11 that one. Ms. Levin.

12 And then we're going to go to the Chief Justice
13 Steel that I'm not going to really hear, because I didn't give
14 you permission to refile.

15 MS. LEVIN: Your Honor is familiar with the share
16 options, so if I talk about the share option, I don't --

17 THE COURT: I am.

18 MS. LEVIN: Okay. Well --

19 THE COURT: And also with the drama related to the
20 production and the creation and all the stuff about the advice
21 of counsel issue.

22 MS. LEVIN: Okay. I'll just --

23 THE COURT: But I also am aware the Nevada Supreme
24 Court has told us on a business judgment issue we cannot reach
25 behind the advice of counsel except to make a determination as

1 to essentially process issues, how the attorney was hired,
2 what the scope of the retention was, and those kind of issues,
3 as opposed to the actual advice.

4 MS. LEVIN: That's true, Your Honor. And so our
5 arguments are really twofold. Number one is that Adams and
6 Kane, who were two of the three directors on the compensation
7 committee, they testified, as the Court found in its October
8 27, 2016, hearing, that they relied solely on the substance of
9 advice of counsel to determine whether the authorization
10 decision to authorize the estate to invoke the option was
11 proper. So, unlike in Wynn or in Comverge, on which the
12 defendants rely, they did not rely on anything else. So if
13 they are asked at trial to explain why they authorized the
14 option, they must rely on that legal advice.

15 So the second point is that the defendants waived
16 the attorney-client privilege by partially disclosing
17 attorney-client privileged information. Now, they're saying
18 -- or RDI says in the opposition that individual directors
19 cannot waive the privilege.

20 THE COURT: That's the Jacobs versus Sands case.

21 MS. LEVIN: Exact, Your Honor. And I agree with
22 that. But, of course, RDI can only act through its officers
23 and directors.

24 THE COURT: That's the Jacobs versus Sands case.

25 MS. LEVIN: And the current officer -- and I think

1 in particular if you look at the Exhibit 4 that we attached
2 to our motion, is that that email was produced by Ellen
3 Cotter, who is a current CEO and is an officer and director,
4 and she --

5 THE COURT: I understand.

6 MS. LEVIN: So, in other words --

7 THE COURT: And then Mr. Ferrario clawed it back.

8 MS. LEVIN: Right. So she produced it, and so
9 there's a Supreme Court case that says, "The power to waive
10 the corporate attorney-client privilege rests with the
11 corporation's management and is usually -- and is normally
12 exercised by its officers and directors." And that's what
13 happened here.

14 So I think especially Exhibit 4, but even Exhibit 2
15 and 3, the 2 and 3 they raise the legal issues. 2 and 3
16 identify the legal issues of whether there was a reason why
17 Ellen Cotter could not exercise the option and whether enough
18 -- whether the trust documents did not pour over -- the share
19 option didn't pour over into the trust. But Exhibit 4
20 specifically seeks legal advice from the company attorney and
21 as to the legal rights of the estate to exercise the option in
22 light of the proxy language. So that is -- under our statute
23 is an attorney-client communication for the purpose of
24 obtaining legal advice. So they partially disclosed that, so
25 we believe there's a waiver issue. And under Wardleigh you

1 cannot use the attorney privilege both as a shield and a
2 sword, which is what they're now doing, is because what
3 they're going to say is, well, we partially disclosed but you
4 cannot find out what it was. But even the very --

5 THE COURT: But that's the Nevada Supreme Court
6 who's made that decision, not the rest of us. They were very
7 clear that we're not allowed to get behind that.

8 MS. LEVIN: Correct. But one thing that the Wynn
9 decision did not decide was the waiver issue. And that was in
10 Footnote 3 of the decision.

11 THE COURT: I made that decision separately after
12 that came back. But that's a case by case, and I haven't made
13 that decision in this case. In fact, my belief is you guys
14 have a writ pending on this issue still. Right?

15 MR. KRUM: I think the writ pending is on a
16 different privilege issue, Your Honor.

17 THE COURT: Okay.

18 MS. HENDRICKS: Your Honor, the writ relating to
19 this issue was filed by RDI, and the Supreme Court actually
20 came back and said the facts were analogous to Wynn and it
21 needed to make a decision, and that was shortly after you did
22 make the decision when we were back before you on it.

23 THE COURT: Yeah. We had a hearing.

24 MS. HENDRICKS: And we had the supplemental
25 briefing.

1 THE COURT: Yep. Okay. So anything else on this
2 one?

3 MS. LEVIN: Only -- the only thing is that the
4 partially disclosed privileged emails themselves show that the
5 board had information that would cause reliance on advice to
6 be improper. So that would --

7 THE COURT: Okay. So your motion's denied. Come up
8 here. I'm going to give you these. These are your I believe
9 documents you actually want sealed. Since I granted your
10 motion, it was on the calendar today, hopefully you can work
11 out with the Clerk's Office so they will actually take the
12 sealed documents and put them so they're part of the record in
13 some way.

14 MS. LEVIN: And I brought them with me, too.

15 THE COURT: Yeah. Good luck. You've got to do it
16 at the counter.

17 MS. LEVIN: Okay. Thank you.

18 THE COURT: Okay. So I am declining to hear again
19 the motion in limine on Chief Justice Steel. I've previously
20 made a ruling on that. I've reviewed your brief, and there's
21 nothing in it that causes me to change my mind.

22 I have already granted your motions to seal and
23 redact. It was on calendar for today.

24 And now we need to set our final pretrial
25 conference. I usually do it the week before.