IN THE SUPREME COURT OF NEVADA

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

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

APPELLANT'S REPLY BRIEF TO RDI'S "ANSWERING BRIEF" CASE NO. 76981

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RULE 26.1 DISCLOSURE

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

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

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I. INTRODUCTION

The separate answering brief filed by nominal defendant RDI is just one more example of its extraordinary partisanship in this derivative case that was brought on its behalf and against the directors with whom RDI has aligned itself. RDI should have remained wholly neutral. *Patrick v. Alacer Corp.*, 167 Cal. App. 4th 995, 1005-09, 84 Cal.Rptr.3d 642, 652 (2008).

Nominal defendant RDI has no cognizable legitimate standing and interest in asking the Court to affirm the order dismissing the three interested and nonindependent directors. RDI did not join in the motion for summary judgment filed below by Ellen Cotter, Margaret Cotter and Guy Adams. And the order dismissing these interested directors that is the subject of this appeal did not grant or deny RDI any relief. Because "nominal defendant[] [RDI] do[es] not have the right to take litigation positions regarding the order entered below, [it] lack[s] standing to advance the arguments [it] seek[s] to assert on appeal." *Kennedy v. Kennedy*, 2019 WL 3369742, at *10 (Cal. Ct. App. 2nd. App. Div. July 26, 2019) (unpublished disposition).

In addition to filing what amounts to an unauthorized *amicus* brief in an appeal that does not concern it, RDI raises new argument in its rogue brief that neither RDI nor the interested directors raised below. The interested directors seek to adopt this new argument (and all other arguments made by RDI) by filing a "joinder" to RDI's rogue brief in what is unmistakably an effort to bypass the page and word limitations imposed by NRAP 32. *See* Respondents' November 27, 2019 Joinder to RDI's Briefs in Case Nos. 76981, 77648, and 77733, on file.

These coordinated briefs are clear and persuasive evidence that illustrate a pattern of wrongful coordinated efforts between RDI and the two controlling shareholders to help them avoid liability for their actions to get their brother out of RDI so they can take over the company. This is precisely why RDI's counsel is and was hopelessly conflicted when they were simultaneously preparing the interested Cotter sisters for trial and, at the same time, advising RDI's special independent committee ("SIC") and RDI's board on "ratification" of the Termination and Share Option Decisions in 2017 that would ensure their exclusive control of the company. Counsel's conflict raised substantial genuine questions about the

independence of the SIC and the Board that should have prevented summary judgment below.

For these reasons of disabling conflict, the Court should strike RDI's answering brief and the directors' joinder thereto. If the Court is inclined to disregard the conflict and consider RDI's arguments, the arguments should be rejected for lack of merit for the reasons stated below.[1]

II. ARGUMENT

A. RDI had no right to take an adversarial position below.

In a derivative case, the corporation named as a nominal defendant is actually the "real party in interest" on whose *behalf* the derivative plaintiff is acting when the corporation fails to act. *Ross v. Bernhard*, 396 U.S. 531, 538–39 (1970); *Patrick v. Alacer Corp.*, 167 Cal. App. 4th 995, 1005-09, 84 Cal.Rptr.3d 642, 652 (2008). "The only reason the corporation is named a nominal defendant is its refusal to join the action as a plaintiff." *Patrick*, 167 Cal.App.4th at 1004.

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[1] Cotter Jr. objects to each unsupported and irrelevant fact raised in RDI's statement of facts and will only address those contentions relevant to this appeal.

As a general rule, a nominal defendant must " 'take and maintain a wholly neutral position taking sides neither with the complainant nor with the defending director.' " *Swenson v. Thibaut*, 250 S.E. 2d 279, 293-94 (N.C. App. 1978) (quoting *Solimine v. Hollander*, 129 N.J.Eq. 264, 19 A.2d 344 (1941)). "One of the practical and ethical reasons for this rule is that in a typical derivative action, the alleged wrongdoers (as is the case here) are in control of the corporation." *Kennedy,* 2019 WL 3369742, at * 10 (citing *Patrick*, 167 Cal.App.4th at 1006).

Some courts have recognized a limited exception to the rule that a nominal defendant must remain neutral in cases where the derivative action threatens the corporate interests, such as actions to: (1) interfere with a corporate reorganization; (2) interfere with internal management in the absence of an allegation of bad faith or fraud; (3) enjoin performance of contracts; or (4) appoint a receiver. *See Nat'l Bankers Life Ins. Co. v. Adler*, 324 S.W.2d 35, 37 (Tex. Civ. App. 1959) (citing cases); *see also Patrick*, 167 Cal. App. 4th. at 1010 (citing cases).

Contrary to RDI's suggestion on page 30 of its answering brief, it was RDI's burden—*not* Cotter Jr.'s—to show that an exception applied

that justified RDI abandoning its neutral position throughout this litigation, which began in 2015. RDI failed to meet that burden.

1. Cotter Jr.'s complaints in this lawsuit posed no threat to RDI.

Cotter Jr.'s derivative complaint posed no threat to RDI's corporate interests that would have justified RDI's aggressive adversarial position in the district court or in this appeal. Certainly, if Cotter Jr.'s actions threatened RDI's corporate interests or existence, the company's conflicted counsel failed to identify those actions and explain how they imperiled the company. Counsel merely asserts an unsupported contention—"the relief sought [by Cotter Jr.] endangered the Company's own rights and interests." RAB at 34. This statement is merely a conclusion that does not have a factual predicate.

Not one of the four exceptions cited in the case law above applies. Cotter Jr. did not seek to undo a merger or seek the appointment of a receiver. He did not seek to enjoin the performance of a contract. Although RDI argues that Cotter seeks to interfere with "RDI's contractual relationships," RAB at 10, RDI did not identify a single contract Cotter Jr. is supposedly seeking to interfere with.

RDI's remaining arguments are equally conclusory and lack factual support in the record. For example, RDI argues that Cotter Jr. asked to be reinstated, RAB at 10, but he did not ask for this relief—the *T2 plaintiffs* did. I JA124 (T2 plaintiffs' prayer for relief seeking "an order reinstating James J. Cotter, Jr. as the President and CEO of RDI"). The T2 plaintiffs—not Cotter Jr.—asked for the appointment of a temporary receiver and asked the district court to "disband[]" the executive committee. *Id*. Cotter Jr. merely asked for an order declaring the vote to terminate him invalid due to the individual directors' lack of independence and disinterestedness when they voted him out. III JA571 (¶ 3(a)). Cotter Jr.'s concern is, and has been, RDI's continued success: Before he was terminated, Cotter Jr. *and* RDI were about to hire an outside executive with real estate development experience to manage RDI's New York real estate, after a long executive search. III JA543 (¶ 92). After Cotter Jr. was terminated, the Board—eschewing any outside advice—appointed his sisters, Margaret Cotter and Ellen Cotter, *both* of whom lacked real estate development experience. III JA544; XXI JA5146 (at 45:2-4).

But even assuming RDI correctly characterized the relief sought by Cotter Jr. when he alleged in his derivative complaint that the directors

acted in bad faith and in violation of their fiduciary duties to the corporation, RDI had no business in taking an adversarial position to Cotter Jr. to affirm the directors. *Nat'l Bankers Life Ins. Co. v. Adler*, 324 S.W.2d 35, 37 (Tex. Civ. App. 1959).

RDI cites no legal support whatsoever for its empty argument that it is justified taking an adversarial position in this case because financial recovery appears minimal and it is unlikely that the derivative plaintiff can meet his burden under NRS 78.138(7)(b)(2). RAB at 30. The likelihood of damages and the likelihood that a derivative plaintiff will prevail are also not criteria by which courts determine whether a corporation may abandon its neutral position and become an advocate for directors who are accused of breach of fiduciary duty.[2] Thus, RDI's self-serving analysis of the evidence to support claims not made against it, RAB at 30, is an exercise in futility that this Court should not countenance.

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[2] Moreover, damages are not the only benefit RDI could obtain. Cotter Jr. sought to improve RDI's corporate governance, sought measures to improve the qualifications of those serving on the board, and sought the appointment of a qualified executive who could manage RDI's New York real estate development. III JA571-572. RDI's argument that it could not "achieve any benefit from this litigation," RAB at 40, is thus baseless.

RDI's effort to distinguish the facts of this case from those in *Patrick* and *Swenson*, where the court held that the corporation was required to remain neutral, is equally inappropriate and wasted. The question whether a nominal defendant may abandon its neutral position is not determined by the absence of allegations "of significant misappropriation of corporate assets," self-dealing, or board stacking, as RDI oddly appears to argue. RAB at 32. In fact, the court in *Messing v. FDI, Inc.*, 439 F. Supp. 776 (D. N.J. 1977)—cited by the directors on page 56 of their answering brief—warned against "relying upon the nature of the charges against the directors" and explained that the interests of the corporation and the director defendants "will almost always be diverse." *Id.*

In the *absence* of a threat to the company, which RDI has not shown, the company should have remained neutral, as RDI's own legal authority confirms. *See Otis & Co. v. Pennsylvania R. Co.*, 57 F. Supp. 680, 684 (E.D. Pa. 1944) ("when the cause of action is such as to endanger rather than advance corporate interests, an answer setting forth affirmative defenses seems proper").[3]

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[3] Some of the same allegations as those in *Patrick* present are here: The Cotter sisters engaged in similar self-dealing by getting themselves appointed to corporate positions at inflated salaries (as the case with

2. RDI's litigation positions went far beyond contesting Cotter Jr.'s standing as a derivative plaintiff.

While RDI could contest Cotter Jr.'s right to bring suit through a motion to dismiss for failure to make a demand, *Patrick*, 167 Cal.App.4th at 1005, and did so here, RDI went far beyond challenging Cotter Jr.'s standing.

RDI joined in each of the six motions for partial summary judgment ("Partial MSJs") filed by the directors. XV JA3704-XVI JA3814. Each of the six Partial MSJs raised one or more issues or aspects of Cotter Jr.'s complaint. Partial MSJ No. 6, alone, raised four issues. XII JA2861-XIV JA3336. Taken together, the six Partial MSJs covered nearly every issue raised in Cotter Jr.'s complaint. VI JA1486-XIV JA3336. RDI also joined in Gould's separate motion for summary judgment and in the directors' opposition to Cotter Jr.'s motion for summary judgment. XVI JA3921-JA4014; XIX JA4604-JA4609; XX JA5025-5027. Thus, by joining in each Partial MSJ, and Gould's separate MSJ, and opposing Cotter Jr.'s motion for summary judgment brought on its behalf, RDI joined in each of the

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Margaret Cotter), III JA560, 564 (¶¶ 148-153, 167), getting two family friends (Codding and Wrotniak) appointed to the Board, III JA552-554 (¶¶121-133), wasting corporate assets, III JA560, 564, and ousting a unanimously-appointed CEO, Cotter Jr. III JA531.

directors' defenses on nearly every allegation of Cotter Jr.'s complaint. RDI also joined in other motions, such as the interested directors' motion for evidentiary hearing regarding Cotter Jr.'s adequacy as a derivative plaintiff, XX JA4978-JA4980, and their motion *in limine* to exclude expert testimony. XV JA3704-JA3706.

None of RDI's joinders added anything of substance that the directors had not already briefed. All were purely partisan filings to support and perpetuate the Cotter sisters-directors who controlled RDI.

It's not as if the directors needed more lawyers. Each director was represented by capable litigation counsel. Director Gould, alone, was represented by *seven* attorneys. XXXVI JA9060-9068. The remaining directors were represented by a group of Quinn Emanuel attorneys, three of whom are Harvard graduates who command rates between $661.50 and $1,147.50 per hour. XXXVI JA9048-9050. RDI argues that it was not required to rely on the defense of the directors. RAB at 32. But to defend against what? No claims or threats were made against RDI. Nor does RDI argue that the directors' squadron of attorneys were unqualified to defend them or failed to make arguments unique to RDI because there were not unique arguments to make.

The directors' separate representation and RDI's obligation to indemnify the directors' legal fees only make RDI's neutrality more warranted—not less, as RDI argues on page 31 of its brief. Yet RDI *chose* to incur millions of dollars in *additional* defense costs and fees merely to join in and parrot what the directors were arguing in their briefs. XXXVI JA9020; XXXIV JA8430-8431. Thus, RDI only added to the "bleed" and "drain of company resources" of which RDI now complains, like one would complain of the pain from a self-inflicted wound. RDI and the directors needlessly multiplied the proceedings with seven separate motions for summary judgment in which RDI joined, multiple motions to dismiss for failure to make a demand, several contentious evidentiary motions that went nowhere, and by retaining five experts costing more than $1 million, which it now wants this court to bless despite not using any of their opinions in the case. III JA576-XV JA3336; XV JA3707-XVI JA 4014; XX JA4932-5047; XXV JA6162-6170; XXXIV JA8430.

What RDI's litigation conduct shows is a deliberate effort to join in and advance the defense of the directors that control RDI for the benefit of the Cotter sisters who are directors and control shareholders. This is precisely why RDI's counsel was hopelessly conflicted when they were

simultaneously preparing the interested, nonindependent Cotter sisters and Adams for trial and advising RDI's "special independent committee" and RDI's Board on "ratification" of the Termination and Share Option Decisions. This unmistakable conflict, remarked but not acted on by the district court, raised significant questions of the independence of the SIC and the Board that should have prevented summary judgment below. *See* XXXIV JA8389 (lines 5-9), JA8408-8409.

B. RDI lacks standing to support the dismissal of interested directors on appeal.

When "nominal defendants do not have the right to take litigation positions regarding the order entered below, they lack standing to advance the arguments they seek to assert on appeal." *Kennedy*, 2019 WL 3369742, at *10. Stated another way, a corporate party does not have standing on appeal to urge an error that did not affect its own rights. NRAP 3A(a) ("party who is *aggrieved* by an appealable judgment or order may appeal. . . .") (emphasis added).

Here, RDI filed a separate "Answering Brief" in an appeal that pertains to the order granting summary judgment in favor of directors Ellen Cotter, Margaret Cotter and Guy Adams. RDI did not join in the summary judgment motion on ratification filed by these three interested

directors. And the order granting summary judgment in favor of these interested directors did not grant or deny RDI any relief. XXXIV JA8401-8411.

Nominal defendant RDI therefore has no real interest in asking the Court to affirm the order dismissing the three interested directors, let alone the right to file a separate answering brief. RDI's separately filed "Answering Brief" is therefore analogous to an *amicus curiae* brief filed without leave of Court and should be stricken. NRAP 29(c); *cf. NAIW v. Nev. Self-Insurers Ass'n*, 126 Nev. 74, 77 n.1, 225 P.3d 1265, 1266 n.1 (2010) (ordering clerk to strike a supplemental reply brief that NAIW filed without seeking leave of court).

C. The Court should disregard RDI's new argument the directors failed to make below.

An "argument . . . not presented to the district court for consideration . . . is considered waived on appeal." *Wolff v. Wolff*, 112 Nev. 1355, 1363-64, 929 P.2d 916, 921 (1996) (citing *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981)); *see also In re AMERCO Deriv. Litig.*, 127 Nev. 196, 217-218 n.6, 252 P.3d 681, 697 n.6 (2011) (declining to address the ratification issue that was "raised for the first time on appeal").

RDI not only failed to join in the Ratification MSJ and thus made *no* argument in support of dismissal of the three directors. This nominal defendant raises an altogether new argument on appeal that not even the directors raised below: RDI summarily argues that the 2017 amendments to NRS 78.138 abrogate this Court's holding in *In re DISH Network Deriv. Litig.*, 133 Nev. 438, 401 P.3d 1081 (2017) that a special litigation committee (SLC) moving to dismiss a derivative case is not entitled to a presumption of independence but bears the burden to prove its independence. RAB at 24. The interested directors joined in this new argument. *See* Respondents' Nov. 27, 2019 Joinder to Reading International, Inc.'s Briefs in Case Nos. 76981, 77648, and 77733, on file. The Court should not entertain this new argument or any other argument raised by RDI.

D. RDI's arguments should be rejected, if the Court is inclined to consider them at all.

Strictly in the alternative, should the Court be inclined to consider any of RDI's arguments, including its new argument, the Court should summarily reject them for the following reasons.

1. NRS 78.138 does not abrogate *In re DISH Network*.

The amendments to NRS 78.138 did not change the law that only independent directors can invoke the business judgment rule. Moreover, NRS 78.138(3) by its terms only applies to decisions on "matters of business"; it does not address, let alone change, the burden of proof for decisions on matters of litigation, such as the SLC's decision in *In Re DISH Network* to terminate the derivative case. The amendments to NRS 78.138 also add nothing new to the application of the business judgment rule. This Court has already held that the business judgment rule applies **IF** the SLC is independent and conducts good faith investigation. *In re DISH Network*, 133 Nev. at 443, 401 P.3d at 1088.

2. The conflicted role of RDI's counsel is unmistakable evidence of a lack of director independence.

In arguing that Cotter Jr. provided "no evidence" that directors failed to exercise independent judgment in ratifying the Termination and Share Option Decisions, RDI ignores Cotter Jr.'s indisputable evidence of the triple-conflicted role played by RDI's counsel throughout this case, in particular in December 2017, when conflicted counsel was advising the special independent committee (SIC) that recommended the ratification,

preparing the Cotter sisters for trial, and advising the Board on ratification—all at the same time.

To downplay the conflict of its counsel and the role played by the SIC, RDI makes a series of diversionary arguments, none of which has merit.

First, RDI makes the breathtakingly dishonest argument that the SIC was devoted to "nothing more than remaining informed of events in the various litigation," RAB at 20, when in fact: (1) the SIC was created to consider, investigate and evaluate matters related to the various litigation matters; (2) the SIC was allowed to take all actions deemed necessary, including by making recommendations to the Board; (3) the SIC was allowed to obtain its own legal counsel to fulfill its functions; and (4) the SIC meeting with RDI's conflicted counsel on December 21, 2017 is what led to the ratification vote on December 29, 2017. XXXI JA7663-7765; XXX JA7505 (at 528:10-18).

Next, RDI argues that its counsel could not be conflicted because RDI and directors had separate counsel. RAB at 27. But the point, of course, is that RDI's "separate" counsel, Greenberg Traurig, not only advised RDI, but was concurrently advising the SIC to recommend

ratification so that the interested directors—the Cotter sisters, who were *also* advised by Greenberg Traurig—could avoid trial against claims that were ***brought on RDI's behalf***. These conflicts were not "the same bases" for challenging the directors' lack of independence that Cotter Jr. raised before, as RDI argues, RAB at 26; these were *new* bases raised by Cotter in response to the belated ratification in December 2017, once RDI came around to producing relevant documents its counsel had withheld for months. XXXI JA7608-7797.

Cotter Jr. is not only relying on December 2017 emails to and from Ellen Cotter and a conversation with Margaret Cotter to argue that the Cotter sisters blessed the ratification. RAB at 27. Cotter Jr. provided uncontroverted evidence that RDI's counsel was in fact preparing the Cotter sisters for trial in December, right before and during the same time that it was also advising the SIC and the Board on ratification. XXXI JA7608-7797; XXXVII JA9206; XL JA9854-9856, 9863. This was further evidence of a debilitating conflict that called the entire ratification process and vote into question and should have precluded summary judgment in the Cotter sisters' and Adams' favor.

Finally, Cotter Jr. did not "baldly mischaracterize" any testimony about what occurred before the ratification vote. RAB at 28. Cotter Jr.'s point, which RDI failed to read and grasp, is that none of the five "independent" directors asked for a ratification vote until *after* Greenberg Traurig discussed it with the Cotter sisters, when trial against them and Adams was imminent. The point is not that the directors ultimately made that request in an email that was written for them—which Cotter Jr. does not dispute—the point is that at no time during the entire litigation before the December 21, 2017 SIC meeting did a single director independently ask the Board to take up ratification of the Share Option and Termination Decisions. The notion that ratification was an independent, as opposed to an orchestrated, request by five independent directors is belied by these facts. If they truly believed that the Termination and Share Option Decisions were in the best interests of RDI, they could and should have requested ratification or formed an SLC years earlier.[4]

[4] The December 27, 2017 request that RDI's counsel drafted for the five directors is included in the joint appendix as XXVI JA 6350-A (filed under seal), as RDI's counsel has since acknowledged. *See* RDI's December 6, 2019 Erratum to Answering Brief for Case No. 76981, on file.

3. Boards cannot ratify away the damage self-dealing directors have caused.

Zealously promoting the interests of the interested directors, RDI makes the cart-before-the-horse argument on page 35 of its brief that the Cotter sisters' and Adams' original votes on the Termination and Share Option Decisions are no longer relevant, because "a majority of disinterested directors" ratified their Decisions in 2017. This argument assumes NRS 78.140 applies to the Decisions, assumes the disinterested directors who ratified the Decisions were not influenced by conflicted counsel and the directors "doing the controlling," *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 645, 137 P.3d 1171, 1187 (2006), assumes that they ratified the Decisions in good faith, and assumes that ratification protects *interested* directors against liability for a breach of their fiduciary duties of care and loyalty. Even the directors who joined in RDI's brief acknowledge that compliance with the ratification statute—if it applies at all—is not the end of the inquiry. At best, a "valid interested director action" is entitled to the business judgment rule's presumption, which is rebuttable. *Shoen*, 122 Nev. at 636-37, 137 P.3d at 1181.

In a further attempt to assure that the interested controlling directors have no chance of losing their appeal, RDI makes the incoherent

argument that because the Cotter sisters' and Adams' votes in 2015 are no longer relevant, "Cotter Jr. cannot show that any action by the [unidentified] remaining defendants was the cause of purported injury to RDI." RAB at 35-36. Putting aside the irony that RDI is openly arguing against its interests here—(Cotter Jr. sought damages on RDI's behalf)—this argument is akin to saying that despite the Cotter sisters' and Adams' self-dealing in 2015, RDI could not have suffered any injury because the remaining directors approved it in 2017. It's pure nonsense.

4. The Montana law on which RDI relies to interpret NRS 78.140 does not help the directors.

After accusing Cotter Jr. of relying on what RDI mischaracterizes as "patently inconsistent" Delaware case law interpreting a safe harbor clause nearlyidentical to NRS 78.140, RAB at 23, RDI asks the Court to follow a Montana case involving a Montana safe harbor statute that does not come close to resembling NRS 78.140 and Black's Law Dictionary to interpret NRS 78.140. RDI and the directors did not rely on these authorities in the district court, and should not have on appeal, because these authorities only support *Cotter Jr.'s arguments*.[5]

[5] It's ironic that the directors joined in a brief by RDI that criticizes Cotter

First, RDI leaves out key facts and discussion of *Warren v. Campbell Farming Corp.*, 271 P.3d 36 (Mont. 2011). *Warren* involved a closely held corporation and a proposal by a shareholder-director, Stephanie, who controlled the voting rights of the majority to award a $1.2 million-dollar bonus to her son Robert, the president of the company, to compensate him for past services and induce him to not leave the company. *Id.* at 38-39. At the request of one of the other two directors-shareholders, the *shareholders* voted on the proposal; there was *no ratification* by members of the board. *Id.* at 39, 44 and n. 4.

Unlike NRS 78.140, the Montana safe harbor statute in *Warren* speaks only to "transactions," providing, in relevant part:

> (2) A director's conflicting interest transaction may not be enjoined, set aside, or give rise to an award of damages or other sanctions in a proceeding by a shareholder or by or in the right of the corporation because the director or any person with whom the director has a personal, economic, or other association has an interest in the transaction if:
>
> (a) directors' action respecting the transaction was at any time taken in compliance with 35-1-463;

Jr.'s reliance on Delaware case law, because the directors rely on some of the same Delaware cases that RDI calls "patently inconsistent" with Nevada law. In fact, the directors' Answering Brief is larded with citations to published and unpublished Delaware cases. *See* Respondents' Answering Brief at 29, 33, 35-37, 40, 46, 59-62; *see generally id.* at v-vii (Table of Cases).

(b) shareholders' action respecting the transaction was at any time taken in compliance with 35-1-464; or

(c) the transaction, judged according to the circumstances at the time of commitment, is established to have been fair to the corporation.

§ 35-1-462(2), MCA (2003) (cited in *Warren*, 271 P.3d at 40).

Relying in part on a prior version of the Montana safe harbor statute that included the term "contract" and Black's Law Dictionary, the Montana Supreme Court defined "transactions" as those involving "the conducting of *business* by *more than one party*—an *'activity involving two or more persons*,' *'negotiations*,' 'a *deal*,' or 'a *consensual bilateral arrangement'* respecting *'differing economic rights or interests*.' " *Warren*, 271 P.3d at 42 (emphasis added).

This definition is not substantively different than the one suggested by Cotter Jr. based on the plain terms of NRS 78.140, which addresses transactions between a director and a corporation or between corporations in which a director has an interest. *See* Cotter Jr.'s Opening Brief at 32-33.[6] Crucial in this definition are the bilateral, economic,

[6] Cotter never argued that the term transaction in NRS 78.140 can only apply to "a *contract* between a company on the one hand, and the interested director or an affiliate. . . on the other," as RDI misleadingly contends. RAB at 37. Cotter Jr. repeatedly and specifically mentioned *transactions* or deals between one corporation and a director or another

business aspects of "transactions." Indeed, what swayed the Montana Supreme Court were the facts that "the bonus, as constituted, was the result of *negotiations* between Stephanie and Robert," and that "[e]ven without regard to past compensation, Campbell sought Robert's continued service and Robert stayed on as President because of the bonus he received." *Warren*, 271 P.3d at 42 (emphasis added). While lacking the consideration necessary for a contract, "it was, at the least, a 'consensual *bilateral arrangement*' involving 'differing *economic rights* or interests,' or a 'business exchange' or *'negotiation'* that can be reviewed under the safe harbor provision." *Id.* at 43 (emphasis added).

The Termination and Share Option Decisions here, by contrast, were not the result of a deal or negotiations, let alone a "consensual bilateral arrangement" between a director and RDI. RDI's argument on this point improperly conflates the result of the decision and collateral aspects of the Decisions and the decision itself. The fact that Cotter Jr. had an employment agreement does not turn the Decision to terminate him into a transaction, let alone a negotiated one.

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corporation in which the director had an interest. OB at 29-33.

Warren is also unhelpful to the directors in another aspect: it confirms that the business judgment rule "does not protect corporate fiduciaries who engage in self-dealing or make decisions affected by inherent conflict of interest." *Warren*, 271 P.3d at 44. While the *Warren* court did "not address whether a conflicted transaction, which has been ratified by a majority of disinterested directors, could still be challenged as a breach of the duty of care and defended by the business judgment rule, " the court pointed to the "predicate condition" that "the board's action must comply with the care, best interests and good faith criteria prescribed in section 8.30(a) for all directors' actions." *Warren*, 271 P.3d at 44 n. 4. The Montana Supreme Court warned that "[i]f the directors who voted for the conflicting interest transaction . . . approved the transaction merely as an accommodation to the director with the conflicting interest, going through the motions of board action without complying with the requirements of section 8.30(a) [care, good faith, best interests of the company], the action of the board would not be given effect for purposes of section 8.61(b)(1) [§ 35-1-462(2)(a), MCA."]. *Warren*, 271 P.3d at 44 n. 4 (internal citation omitted).

But "going through the motions of board action" at a special board meeting as an "accommodation" to the Cotter sisters and Adams to

help them avoid trial is precisely what occurred here and what *Warren* condemns. Days after the ratification and shortly before trial, the Cotter sisters and Adams used the ratification to file a Motion for Judgment as a Matter of Law, XXV JA6192-6624, which smacks of bad faith. RDI has already admitted below and again on appeal that the ratification was a litigation strategy but wrongfully argues that it is one "sanctioned by Nevada law." RAB at 40-41.

5. RDI's argument on burden of proof contradicts NRS 78.140 and *Shoen*.

Finally, to deflect attention from its counsel's conflict of interest, RDI makes the nonsensical argument that Cotter Jr. has the burden to prove a negative—*i.e.*, that "NRS 78.140 did *not* apply." RAB at 39 (emphasis added). But as RDI knows, not one of the three cases it cites on page 39 of its brief for this proposition talks about the parties' respective burdens of proof, let alone holds that a derivative plaintiff has the burden of proof under NRS 78.140. The cases only discuss whether there was enough evidence to show ratification—as even RDI's parentheticals to the cases make clear. RAB at 39 (citing *Pederson v. Owen*, 92 Nev. 648, 556

P.2d 542 (1976) and other cases for the proposition that there was a "lack of evidence of unfairness").

Ratification is not an element of Cotter Jr.'s fiduciary duty claims; it is a defense on which the directors carry the burden of proof. *See In re AMERCO Deriv. Litig.*, 127 Nev. 196, 217 n.6, 252 P.3d 681, 697 n.6 (2011) ("The district court did not again consider this *ratification defense*") (emphasis added). The directors know this, because they asserted "ratification" as one of their affirmative defenses in their answer. XXI JA5073 ("Eighth Defense-Ratification and Consent").

Thus, *the directors*, not Cotter Jr., had the burden of persuasion on their Ratification MSJ, which is also clear from the language of NRS 78.140. **It is up to the interested directors to prove that the Termination and Share Option Decisions qualified as "transactions" and were validated by a majority of disinterested directors**. NRS 78.140.

III. CONCLUSION

RDI has filed a rogue answering brief in an appeal that does not concern it, making new and other inappropriate arguments the directors did not make in the district court. The Court should strike RDI's brief or, in

the alternative, reject each of its baseless arguments for the reasons set out above.

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CERTIFICATE OF COMPLIANCE

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

2. I also certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Palatino 14 point font and contains 5394 words.

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

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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:

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