Case No. _____

In the Supreme Court of Nevada

JAMES J. COTTER, JR., individually and derivatively on behalf of READING INTERNATIONAL, INC.,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark, and THE HONORABLE ELIZABETH GONZALEZ, District Judge,

Respondent,

and

MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS MCEACHERN, WILLIAM GOULD, JUDY CODDING, and MICHAEL WROTNIAK,

Real Parties in Interest.

RULE 27(e) EMERGENCY MOTION FOR STAY
PENDING RESOLUTION OF WRIT PETITION
(Action Required Today, September 15, 2016)

Pursuant to NRAP 8 and 27(e), petitioner requests a stay of the district court's oral order of September 8, 2016, in Case No. A719860 (coordinated with No. P082942 and No. A735305) pending this Court's resolution of a petition for writ of prohibition or mandamus. Because the district court has ordered a disclosure of protected information on

September 15, 2016, a stay is necessary to avoid serious and imminent harm.

BACKGROUND

A whirlwind of activity in the district court brings us to this emergency stay motion and the accompanying petition for writ relief. Less than two weeks ago, real parties in interest moved on shortened time to compel production of all communications between petitioner's counsel and counsel for intervening plaintiffs. (Motion to Compel, filed Sept. 2, 2016, at 16.)[1] And less than a week ago, the district court orally granted the motion, ordering disclosure within one week, by September 15, 2016. (Tr. 9/8/16, at 14:10–17.) Petitioner had argued that defendants were his and intervening plaintiffs' common adversary, so written impressions of the case shared between their respective attorneys remained work product. The district court rejected that contention, holding that "[t]he mere fact that you and [intervening plaintiffs] are both plaintiffs is not sufficient for a common interest" to preserve work-product protection. (*Id.*)

[1] The motion also requested all communications between petitioner and intervening plaintiffs themselves. (Motion at 16.) The petition does not challenge that aspect of the court's ruling.

The district court has also denied even a temporary stay at the last possible moment, depriving petitioner of the chance to file this motion in the ordinary course. The day after the district court's disclosure order, petitioner told the district court that he intended to contest that order via this writ petition and moved for a stay pending the filing and resolution of the petition. (Mot. for Stay, filed 9/9/16.) The district court, however, set the hearing on that motion for September 15, the deadline for disclosure.

ARGUMENT

Granting a stay is the only way to preserve appellate review of the issue in the writ petition and the only way to prevent an irreversible disclosure of attorney work product to an adversary. This Court should grant the stay.

I.

THIS MOTION IS RIPE, AND RULE 27(e) RELIEF IS APPROPRIATE

This motion is properly brought under NRAP 27(e). Petitioner requested and was denied a stay pending resolution of the writ petition, as NRAP 8(a) and NRAP 27(e)(4) require. Petitioner raised in that motion the grounds now asserted here. *See* NRAP 27(e)(4). Without a stay

from this Court, petitioner will have to disclose the communications, making both the stay and the underlying petition moot. NRAP 27(e) is thus the appropriate vehicle for this Court to enter a stay in time to avoid disclosure.

II.

PETITIONER IS ENTITLED TO A STAY

This Court has recognized that writ relief may be "necessary to prevent discovery that would cause privileged information to irretrievably lose its confidential nature and thereby render a later appeal ineffective." *Aspen Fin. Services v. Eighth Judicial Dist. Court*, 128 Nev., Adv. Op. 57, 289 P.3d 201, 204 (2012). Consequently, when a district court overrules a claim of privilege or work-product protection, that order is often stayed pending resolution of a writ petition challenging that order. *Mitchell v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Op. 21, 359 P.3d 1096, 1099 n.2 (2015), *reh'g denied* (July 23, 2015); *Coyote Springs Inv., LLC v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Op. 18, 347 P.3d 267, 270 (2015); *L.V. Dev. Assocs. v. Eighth Judicial Dist. Court*, 130 Nev., Adv. Op. 37, 325 P.3d 1259, 1262 (2014); *Las Vegas Sands v. Eighth Judicial Dist. Court*, 130 Nev. Adv., Op. 13, 319 P.3d

618, 620 (2014). As all of the NRAP 8(c) factors favor a stay in this case, such a stay is especially necessary here.

A. Denying a Stay would Defeat the Object of the Petition to Determine the Propriety of Disclosure

This Court has held that whether denial of a stay defeats the object of the appeal or writ petition is a factor with "added significance," such that a stay is "generally warranted" when this factor is present. *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 252, 89 P.3d 36, 39 (2004) (citing NRAP 8(c)(1).

Here, the entire point of the petition is to *stop* the disclosure, which only a stay will do. If, because a stay is denied, the protected communications are disclosed, the petition asserting their protected status would become purely academic. No ruling in petitioner's favor would undo the disclosure.

B. Denying a Stay would Force Disclosure of Protected Communications, Causing Serious Harm

Similarly, denying a stay of the disclosure order would petitioner serious if not irreparable harm. *See* NRAP 8(c)(2). The documents covered by the district court's order reflect litigation strategy; once disclosed to the other side, that information is irretrievable.

This situation is even more serious than in *Mikhon Gaming*, where this Court ordered a stay of an order denying arbitration even though the only harm threatened was increased litigation costs and delay. *Cf. Mikohn Gaming*, 120 Nev. at 253, 89 P.3d at 39.

C. A Stay of the Disclosure Order will Not Harm Real Parties in Interest

By contrast, a stay of the disclosure order will cause no harm to real parties in interest. *See* NRAP 8(c)(3). If they are truly entitled to that information, defendants will get it upon denial of the writ. There has been no suggestion that the communications are time-sensitive or that a delayed disclosure will cause harm.

D. The Petition has Substantial Merit

In these circumstances, where a writ petition is the only way to prevent disclosure, only a showing that the petition is frivolous will defeat a stay. *See Mikohn Gaming*, 120 Nev. at 253, 89 P.3d at 40 (citing NRAP 8(c)(4)). It is enough that the appeal presents a "substantial case on the merits when a serious legal question is involved." *Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000) (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)); *ac-*

cord Simon Prop. Grp., Inc. v. Taubman Centers, Inc., 262 F. Supp. 2d 794, 798 (E.D. Mich. 2003). For example, in one case the D.C. Circuit hazarded the "tentative conclusion" that the appellant would not succeed, but given the difficulty of the legal issues, the "balance of the equities" favored granting a stay. *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844-45 (D.C. Cir. 1977). And this Court granted a stay of arbitration even where "the merits [were] unclear." *Mikohn Gaming*, 120 Nev. at 254, 89 P.3d at 40.

Here, petitioner has shown that the district court's order is likely to be reversed.

Although this Court has not addressed the issue presented, the D.C. Circuit has held under similar facts that the work-product protection was not waived—and granted a stay while it decided the issue. *United States v. AT&T Co.*, 642 F.2d 1285, 1288 & n.1 (D.C. Cir. 1980). In that case, the government sued AT&T, asserting claims similar to those MCI brought in another suit, and MCI shared its database of litigation documents and analysis with the government. *Id.* at 1289. The D.C. Circuit held that the work-product protection is MCI's database was not waived by the disclosure because MCI's common interest with

the government made it unlikely the government would share those documents with its adversary, AT&T. *Id.* at 1299–1300.

So, too, here. Intervening plaintiffs stated similar claims against real parties in interest, and the disclosure of materials by petitioner's counsel to counsel for intervening plaintiffs did not "substantially increase" the likelihood that intervening plaintiffs would share that information with real parties in interest. *Cf. id.* The district court's simplistic waiver ruling based on a finding that co-party status was insufficient ignores the proper standard for work-product protection. Regardless of whether this Court ultimate adopts the D.C. Circuit's approach, the issue is important enough to stay the disclosure order while this Court decides.

CONCLUSION

To avoid an irreversible disclosure and to allow this Court to set the appropriate standard for the protection of work-product communications among parties with a common adversary, this Court should grant the stay.

Dated this 15th day of September, 2016.

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NRAP 27(e) CERTIFICATE

E. Contact information

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F. Nature of emergency

On September 8, 2016, the district court orally ordered petitioner to produce communications containing attorney work product by September 15. Petitioner filed a petition for extraordinary relief from that order on September 15.

Given the rushed disclosure deadline, on September 9 petitioner moved the district court on shortened time to stay its order pending the filing and resolution of a writ petition. The district court, however, set

the hearing for that stay motion for September 15, the deadline for disclosure. Without an immediate stay from this Court, petitioner will be required, under threat of contempt, to disclose the protected communications without appellate review of that order.

G. Notice and service

Today, I, Matthew Park, personally called the offices of Maupin, Cox & LeGoy and spoke with Carolyn K. Renner, and the offices of Cohen-Johnson, LLC and spoke with Stan Johnson, notifying them of this motion for stay. I left a voicemail and sent an e-mail to Kara Hendricks at Greenberg Traurig LLP notifying her of the same. Upon filing, I will e-mail copies of the motion for stay and this certificate to each of the listed attorneys for real parties in interest.

Dated this 15th day of September, 2016.

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CERTIFICATE OF SERVICE

I certify that on September 15, 2016, I submitted the foregoing RULE 27(e) EMERGENCY MOTION FOR STAY PENDING RESOLUTION OF WRIT PETITION for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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