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**In the Supreme Court of Nevada**

JAMES J. COTTER, JR., individually and  
derivatively on behalf of READING IN-  
TERNATIONAL, 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, MICHAEL WROTONIAK, and  
READING INTERNATIONAL, INC.,

Real Parties in Interest.

Electronically Filed  
Dec 02 2016 09:28 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

District Court No.  
A719860, coordinated  
with No. P082942 and  
No. A735305

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**REPLY IN SUPPORT OF PETITION FOR  
WRIT OF PROHIBITION OR, IN THE  
ALTERNATIVE, MANDAMUS**  
*With Supporting Points and Authorities*

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## INTRODUCTION

James J. Cotter, Jr.'s ("Plaintiff") Petition sought a writ prohibiting the District Court from enforcing a discovery order that required Plaintiff to produce—to the adverse parties—communications containing his attorney's mental impressions concerning the pending litigation, which were shared only with co-Plaintiffs' counsel. This work product did not become discoverable when shared with the intervening RDI shareholders ("Intervening Plaintiffs"), because, among other things, Plaintiff had a reasonable basis to believe the information would be kept from Defendants, their common adversary. The District Court, though, applied the wrong standard, appearing instead to base its decision on the absence of a confidential relationship, a standard applicable only to a claim of attorney-client privilege.

The answer of the Real Parties in Interest ("Defendants") confuses the issues and, whether by design or oversight, misleads the Court. Plaintiff's petition presents one question: Does attorney work product become discoverable when it is disclosed to counsel for another party without a formal confidentiality agreement, even if those parties have a common adversary? Yet, rather than address this issue, Defendants

repeatedly confuse the standards for attorney-client privilege with the standards for work product protection. Their arguments pertaining to joint prosecution agreements and waiver by partial disclosure both apply to attorney-client privilege—not the work product doctrine. Here, the disputed communications contain the mental impressions of Plaintiff’s attorney. This is work product, which does not lose its protection when disclosed so long as Plaintiff had a reasonable basis to believe it would be kept from the opposition. Defendants’ mischaracterization of the record and baseless arguments for sanctions—an issue not properly before this Court—do not alter the calculus. The District Court should be prohibited from ordering the disclosure of this work product or, failing that, be required to first conduct an *in camera* review of the communications to determine their nature and the applicability of the protections of the work product doctrine.

## ARGUMENT

### I.

#### **THE ABUSE OF DISCRETION STANDARD IS NOT APPLICABLE HERE, NEVERTHELESS, THE DISTRICT COURT ABUSED ITS DISCRETION**

##### **A. A Question as to Which Legal Standard Applies Is Reviewed De Novo**

Where a party raises a question as to which legal standard applies, the Court reviews the issue de novo. *Staccato v. Valley Hosp.*, 123 Nev. 526, 531, 170 P.3d 503, 506 (2007) (“[A]n argument that the district court applied the wrong legal standard raises a purely legal question, subject to de novo review.”); *see also United States v. Deloitte L.L.P.*, 610 F.3d 129, 134 (D.C. Cir. 2010) (“If the district court applied an incorrect legal standard, however, we review de novo.”).

Here, the District Court appeared to base its analysis on whether there was a confidential relationship between Plaintiff and Intervening Plaintiffs, stating that “[t]he mere fact that you and Mr. Robertson’s clients are both plaintiffs is not sufficient for a common interest,” and then ordering all work product communications between counsel for Plaintiff and Intervening Plaintiffs released. [3 App. 539.] As discussed below, this all-or-nothing approach to waiver, while appropriate

to protections rooted in a confidential relationship (that is, attorney-client privilege), is not the correct approach for the common interest doctrine, which is rooted in the strategic litigation considerations protected by the work product doctrine. The correct inquiry, therefore, is whether the attorney work product was released to an adversary. *United States v. AT&T Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980) (“The purpose of the work product doctrine is to protect information against opposing parties . . . .”); *Goff v. Harrah's Operating Co.*, 240 F.R.D. 659, 661 (D. Nev. 2007) (“The work product rule is not based on the confidentiality of the attorney-client relationship, and it does not disappear when the balloon wall of confidentiality is breached unless the breach has substantially increased the opportunities for potential adversaries to obtain the information.” (citation and internal quotation marks omitted)); *In re Visa Check/MasterMoney Antitrust Litig.*, 190 F.R.D. 309, 315 (E.D.N.Y. 2000) (finding no waiver where “the transferee was ‘not at all likely’ to provide the disclosed material to the common adversary”). Thus, both because the question before this Court concerns which legal standard applies, and because the District Court applied the incorrect legal standard, de novo review is appropriate.

## **B. The District Court Abused Its Discretion**

Notwithstanding that the District Court's decision must be reviewed de novo, the District Court's decision also would be reversible as an abuse of discretion. "[A] tribunal abuses its discretion when, among other things, it applies an incorrect legal standard." *In re Halverson*, 123 Nev. 493, 510, 169 P.3d 1161, 1173 (2007). As discussed above,<sup>1</sup> the District Court applied the incorrect legal standard.

Furthermore, the District Court abused its discretion when it summarily ordered the disclosure of all of the work product designated emails without even performing an *in camera* review of the materials to determine if the interests of Plaintiff and Intervening Plaintiffs were adverse as pertaining to each communication. *See Goff*, 240 F.R.D. at 662 ("The only way to resolve this dispute appears to be for the Magistrate Judge to conduct an *in camera* review of the unredacted evidence and resolve both the relevance issue and the factual dispute regarding the scope of any waiver that occurred.").

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<sup>1</sup> *See supra* Part II.A.

## II.

### **DEFENDANTS CONFUSE ATTORNEY-CLIENT PRIVILEGE WITH THE WORK PRODUCT DOCTRINE**

Though Plaintiff consistently and explicitly has asserted the protections of the work product doctrine independent of the attorney-client privilege, both before the District Court and in this Court, Defendants' Answer argues the law of attorney client privilege. In fact, the word "privilege" appears seventy-six times in Defendants' answer to the Writ Petition. *See* Real Parties' [Answer to Pet. for Writ of Prohibition or, in the Alternative, Mandamus (hereinafter "Answer").] Defendants even go so far as to cite inapplicable rules of attorney-client privilege. [*See, e.g.,* Answer 33–34 (quoting *Wardleigh v. Second Jud. Dist. Ct.*, for the proposition that "the attorney-client privilege is waived when a litigant places information protected by it in issue" 111 Nev. 345, 354-55 (1995)).]

The distinction between the work product doctrine and the attorney-client privilege is substantive and material. The two "are grounded in different policies [such that] waiver of the attorney-client privilege will not result in automatic disclosure of a communication that still en-

joys work-product immunity.” *In re Pfohl Bros. Landfill Litig.*, 175 F.R.D. 13, 21 (W.D.N.Y. 1997).

The distinction is rooted in the differing policies underlying the attorney-client and work product privileges.

The policy of the attorney-client privilege is based upon the protection of a *relationship*. *AT&T*, 642 F.2d at 1299. “The attorney-client privilege exists to protect confidential communications, to assure the client that any statements he makes in seeking legal advice will be kept strictly confidential between him and his attorney; in effect, to protect the attorney-client relationship.” *Id.* (emphasis added).

On the other hand, “the work product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent.” *Id.* The work product doctrine seeks to aid in effective preparation for trial by preventing opposing parties from accessing the attorney’s *plans, strategy, and mental impressions*. *Id.* The existence or lack of a confidential relationship is irrelevant. *Id.*

Defendants' repeated reference to privilege-related waiver doctrines in relation to the work product materials at issue here therefore is fundamentally incorrect and should be summarily rejected.

Furthermore, not only is Defendants' analysis conceptually erroneous, they have not and cannot point to any law contradicting *AT&T* or supporting the use of privilege waiver analysis for work product protection. On the contrary, multiple courts have adopted the rule set forth in the *AT&T* case. *See, e.g., United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 687 (1st Cir. 1997); *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1428–29 (3d Cir. 1991); *In re Steinhart Partners*, 9 F.3d 230, 234–35 (2d Cir. 1993); *In re Martin Marietta Corp.*, 856 F.2d 619, 625 (4th Cir. 1988); *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844, 846–47 (8th Cir.1988); *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1371–75 (D.C.Cir.1984). As a result, Defendants' argument should be rejected in view of the analysis of *AT&T* and its progeny, which require protection of the attorney work product at issue in this case, for the reasons stated below.

**A. The Existence of a Joint Prosecution Agreement Is Not a Requirement of the Work Product Doctrine.**

The existence of a joint prosecution agreement is not a requirement for maintaining work product protection. Although defendants refer to the lack of a joint prosecution agreement here no less than thirteen times, they cite no authority holding that such an agreement is a prerequisite to asserting and preserving protection under the work product doctrine. [See Answer 2–3, 12, 18–19, 21, 21 n.76, 21 n.77, 22 n.80, 25 n. 92, 27, 30, 30 n. 99, 30 n.100, 39 n.123.] This is because no such authority exists.

What joint prosecution agreements do protect is the *attorney-client privilege*. *U.S. ex rel. Pogue v. Diabetes Treatment Ctrs. of Am.*, No. 01-MS-50(MDL)(RCL), 2004 WL 2009413, at \*3 (D.D.C. May 17, 2004) (citing *In re sealed Case*, 29 F.3d 793, 719 n. 5 (D.C. Cir. 1982)) (holding that the existence of a joint prosecution agreement protects communications between the parties to the agreement and their attorneys). “The joint defense privilege preserves the confidentiality of communications and information exchanged between two or more parties and their counsel who are engaged in a joint defense effort.” *Metro Wastewater Reclamation Dist. v. Cont’l Cas. Co.*, 142 F.R.D. 471, 478 (D. Colo.

1992). However, and as explained herein, the standards governing the attorney-client privilege are inapposite here, because the policies and rationale for protecting attorney-client privilege are different than those for protecting attorney work product.

In fact, courts have rejected Defendants' interpretation of the common interest doctrine. *E.g.*, *AT&T*, 642 F.2d at 1299. That doctrine protects co-parties, with or without a joint prosecution agreement. *See id.* (holding that the doctrine extends *even beyond* co-parties). Because the presence of a joint prosecution agreement is not a requirement to maintain work product protection when attorney mental impressions are shared between parties with a common litigation interest, Defendants' reliance on this principle is unfounded.

**B. The Protections of the Work Product Doctrine Were Not Waived Here; Defendants Again Mistakenly Apply the Rule of Attorney-Client Privilege.**

Defendants devote nearly five pages of their Answer to the proposition that Plaintiff waived the protections of the work product doctrine by producing ("partially disclosing") some communications between Plaintiff and Intervening Plaintiffs. [See Answer 31–35.] In fact, Plaintiff has not disclosed, partially or otherwise, *any* protected documents to

Defendants. The produced communications contain no attorney mental impressions, while the withheld communications do.<sup>2</sup> Defendants, without any record support, accuse Plaintiff of “selectively producing communications.” [Answer 35.] On the contrary, as Defendants have conceded, Plaintiff produced hundreds of emails between counsel for Plaintiff and Intervening Plaintiffs that did not contain attorney mental impressions; hardly a “selective” production. Though Defendants imply Plaintiff acted with nefarious motives, Plaintiff has been selective in only one regard: Plaintiff has withheld only those communications protected by the work product doctrine and has produced everything else.

Furthermore, the sole rule cited by Defendants in support of this incorrect theory concerns attorney-client privilege, not work product.<sup>3</sup> The correct rule, however, holds that waiver of attorney work product occurs “only if the disclosure ‘substantially increases’ the possibility of

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<sup>2</sup> As discussed above, even if the District Court was uncertain whether the content of particular communications was not protected by work product doctrine, it should have conducted an *in camera* review rather than simply summarily releasing them.

<sup>3</sup> [See Answer 33–34 (quoting *Wardleigh v. Second Jud. Dist. Ct.*, for the proposition that “the attorney-client privilege is waived when a litigant places information protected by it in issue” 111 Nev. 345, 354-55 (1995) (emphasis added)).]

an opposing party obtaining the information.” *AT&T*, 642 F.2d at 1299 (quoting 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2024 (3d ed. updated Apr. 2016)).

As such, “[t]here is no reason to conclude that waiver in the context of work product is all or nothing.” *Goff*, 240 F.R.D. at 661 . Thus, Defendants’ “all or nothing” rationale that production of some communications between counsel for Plaintiffs and Intervening Plaintiffs automatically waives work product asserted as to other communications is legally and logically erroneous. Because the protection of attorney work product is not based on the confidentiality of the relationship between the communicating parties, the protection of the attorney work product here is not waived simply because other communications not containing those mental impressions have been released. *Goff*, 240 F.R.D. at 661.

### III.

**THESE MATERIALS CONTAIN THE MENTAL IMPRESSIONS  
OF THE PLAINTIFFS’ ATTORNEYS, AND THUS ARE  
PROTECTED BY THE WORK PRODUCT DOCTRINE**

Plaintiff’s privilege log properly describes the nature of the documents not produced and the basis for withholding: attorney mental impressions. [1 App. 194 – 2 App. 343.] Such mental impressions are sub-

ject to the highest presumptive work product protection. As such, they are “virtually undiscoverable.” *Dir., Office of Thrift Supervision v. Vinson & Elkins, L.L.P.*, 124 F.3d 1304, 1307 (D.C. Cir. 1997).

**A. Plaintiffs Made a Proper and Sufficient Showing that the Documents Are Attorney Work Product.<sup>4</sup>**

A party asserting the protections of the work product doctrine “shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.” Nev. R. Civ. P. 26(b)(5) (emphasis added). A privilege log satisfies Rule 26, so long as “it sets forth specific facts that, if credited, would suffice to establish each element of the privilege or immunity that is claimed.” *Golden Trade, S.r.L. v. Lee Apparel Co.*, No. 90 CIV. 6291 (JMC), 1992 WL 367070, at \*5 (S.D.N.Y. Nov. 20, 1992). Therefore, for a privilege log to properly label a communication as work prod-

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<sup>4</sup> In fact, notwithstanding several motions directed at Plaintiff’s privilege log, the only deficiency the trial court found was a failure to number the documents on the log. *See infra*, Part V.A.2. Thus, Defendants’ arguments to this Court asserting a deficient privilege log are contrary to the District Court’s findings.

uct, it must indicate the elements of the doctrine—that it was prepared in anticipation of litigation. *See Nev. R. Civ. P. 26(b)(3); Lisle v. State*, 113 Nev. 679, 696, 941 P.2d 459, 470 (1997).

Where the privilege log is “sufficiently specific to allow [the opposing party] to determine the basis for the privilege asserted,” the log complies with the Rule. *Spilker v. Medtronic, Inc.*, No. 4:13-CV-76-H, 2015 WL 1643258, at \*6 (E.D.N.C. Apr. 13, 2015). In *Spilker*, for example, the court held a privilege log to sufficiently notify the opposition of the basis for the asserted privilege where the log contained the “date, author, recipient (including any recipient copied or blind copied), description, and the privilege asserted.” *Id.* One such description deemed adequate simply read, “Email requesting advice of counsel regarding FDA request.” *Id.*

Here, the privilege log was sufficiently specific to allow Defendants to determine the basis for the privilege asserted. As in *Spilker*, every entry lists the date and time of the communication, the sender, all recipients, a description of the subject matter of the communication, and the privilege asserted. [*E.g.*, 2 App. 337.] One description, for example, reads, “Communication regarding mental impressions of litiga-

tion matters.” [*Id.*] As this expressly indicates the discussion involved pending litigation, it “establish[es] each element of the privilege or immunity that is claimed.” Any greater detail would result in the release of the very work product Plaintiff seeks to protect. Plaintiff has complied with the requirements of Rule 26.

Most notably, Defendants do not claim they are unable to “determine the basis for the privilege asserted.” In fact, they concede the opposite in their Answer: “[T]he Real Parties understand Petitioner’s counsel to be asserting that such documents are being withheld as purported ‘mental impressions.’” [Answer 15 n.56.] Thus, Plaintiff’s privilege log was “sufficiently specific to allow [the opposing party] to determine the basis for the privilege asserted.” *Spilker*, 2015 WL 1643258, at \*6.

**B. An Attorney’s Mental Impression of the Litigation Is Subject to the Highest Level of Work Product Protection.**

Plaintiff seeks to protect the mental impressions of his attorney, which must be afforded presumptive protection by the Court in order to promote trial preparation in an adversarial system. Nev. R. Civ. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495, 510 (1947) (“Not even the

most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.”). This presumption is embodied in Rule 26: Though the rule allows a party to obtain otherwise protected documents upon a showing of substantial need and undue hardship, an attorney’s mental impressions are exempt from this provision. Nev. R. Civ. P. 26(b)(3);<sup>5</sup> Fed. R. Civ. P. 26(b)(3)(B) advisory committee’s note to 1970 amendment (“The courts have steadfastly safeguarded against disclosure of lawyers’ mental impressions and legal theories, as well as mental impressions . . .”).

Protection of an attorney’s mental impressions serves to protect the adversarial system of justice by preventing parties from accessing the analytical and strategic thoughts of the opposing attorney. *Hickman*, 329 U.S. at 510. Work product of this type “is virtually undiscoverable.” *Office of Thrift Supervision*, 124 F.3d at 1307.

Here, Defendants must not be permitted to circumvent the adversarial system of justice by gaining access to the mental impressions of

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<sup>5</sup> “In ordering discovery of such materials when the required showing has been made, **the court shall protect against disclosure of the mental impressions**, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” Nev. R. Civ. P. 26 (emphasis added).

the attorneys for Plaintiff and Intervening Plaintiffs.<sup>6</sup> Notably, throughout the entirety of their Answer, Defendants have not articulated a single legitimate need for the mental impression communications; thus, the only ostensible basis for their continued insistence on obtaining those communications is an open attempt to capitalize on their opponents preparatory efforts. Under well-established work product doctrine, that cannot be permitted. *Hickman*, 329 U.S. at 510. The District Court's order must be reversed.

#### IV.

#### **APPLYING THE CORRECT RULE, THESE COMMUNICATIONS REMAIN PROTECTED ATTORNEY WORK PRODUCT**

The voluntary disclosure of attorney work product does not waive protection under the work product doctrine, so long as the disclosure is not “inconsistent with the maintenance of secrecy from the disclosing party's adversary.” *AT&T*, 642 F.2d at 1299. Thus, work product protection is lost only when the material is either communicated to an adversary or communicated to a third party without “a reasonable basis

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<sup>6</sup> Again, if necessary, an *in camera* review of the communications can ensure that Defendants receive all documents to which they are entitled.

for believing that the recipient would keep the disclosed material confidential” from the adversary. *Deloitte*, 610 F.3d at 140–41.

**A. The Question Is Not Whether Plaintiffs Could Be Potential Adversaries, but Whether They Could Be Adversaries in Litigation Involving the Protected Communications.**

The mere “possibility of a future dispute” does not create an adversary to whom disclosure would waive the protections of the work product doctrine. *Id.* at 140. Instead, to determine whether there was waiver of the protection, the Court must consider whether the recipient of work product “could be [an] adversary in the sort of litigation the [documents] address.” *Id.* In other words, the transferor must anticipate litigation against the transferee over the subject matter in the disclosed materials. *Id.*

Though Defendants concoct various theories of possible litigation between Plaintiff and Intervening Plaintiffs,<sup>7</sup> such speculation is insufficient to establish the adversarial relationship required to constitute a waiver of the work product doctrine. Plaintiff was not a Defendant in

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<sup>7</sup> [See Answer 22–24.]

the Intervening Plaintiffs' claims, [1 App. 33], nor were Intervening Plaintiffs the subject of Plaintiff's claims, [1 App. 1].

Additionally, even if a potential exists for an adversarial relationship between Plaintiff and Intervening Plaintiffs, the relevant inquiry is whether the communications pertain to the subject of that potential adversarial litigation. The District Court made no such inquiry, much less a finding to that effect. The District Court was simply and improperly focused on the confidentiality of the relationship between the parties. As noted above, even if this were in doubt, an *in camera* review should be conducted to ascertain the nature of the withheld communications, rather than a summary and wholesale disclosure of Plaintiff attorney's mental impressions. *See Goff*, 240 F.R.D. at 662 ("The only way to resolve this dispute appears to be for the Magistrate Judge to conduct an *in camera* review of the unredacted evidence and resolve both the relevance issue and the factual dispute regarding the scope of any waiver that occurred.").

**B. Work Product Remains Protected When Disclosed to a Third Party, So Long as There Is a Reasonable Basis to Believe It Will Remain Confidential from the Common Adversaries.**

“[T]he work-product doctrine allows disclosures, as long as they do not undercut the adversary process.” *Deloitte*, 610 F.3d at 140. Disclosure of work product does not weaken the adversary process, providing the transferor has “a reasonable basis for believing that the recipient would keep the disclosed material confidential.” *Deloitte*, 610 F.3d at 140–41.

**1. Defendants Mischaracterize the Rule from Deloitte; No Confidentiality Agreement Is Required, A Common Interest Is Sufficient.**

Defendants imply that the absence of a confidentiality agreement defeats Plaintiff’s reasonable basis for believing the information would remain confidential. [See Answer 24–25.]<sup>8</sup> Plaintiff cites *United States v. Deloitte, L.L.P.* to support this proposition. *Id.* *Deloitte* says no such thing.

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<sup>8</sup> Defendants’ Answer states that, though a “reasonable expectation of confidentiality may derive from common litigation interests . . . in the absence of a confidentiality agreement, [Plaintiff] had no reasonable expectation that the [Intervening Plaintiffs] would maintain the secrecy of the purported mental impressions.” [Answer 24–25 (internal quotation marks and citations omitted).]

Instead, *Deloitte* describes two means by which a party may demonstrate a reasonable basis to believe disclosed materials will remain confidential so as to maintain protection under the work product doctrine. *Deloitte*, 610 F.3d at 141. First, “[a] reasonable expectation of confidentiality may derive from common litigation interests between the disclosing party and the recipient.” *Id.* (citing *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1372 (D.C. Cir. 1984)). The court continues: “Alternately, a reasonable expectation of confidentiality may be rooted in a confidentiality agreement . . . .” *Id.* (emphasis added). Thus the reasonable expectation of privacy may be satisfied either by demonstrating a common interest between the disclosing party and the recipient or by establishing a confidentiality agreement. *Id.*

This case involves the first alternative: Because Plaintiff and the Intervening Plaintiffs shared common adversaries, they shared common litigation interests in the materials disclosed, as discussed below.<sup>9</sup> As recognized in *AT&T*, this serves as a functional guarantee against disclosure, because it would be contrary to both Plaintiff’s interest and Intervening Plaintiffs’ interest to provide their attorneys’ mental impres-

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<sup>9</sup> See *infra* Part IV.B.2.

sions on issues concerning their common adversaries to those very common adversaries. *See AT&T*, 642 F.2d at 1299–300 (“Moreover, with common interests on a particular issue against a common adversary, the transferee is not at all likely to disclose the work product material to the adversary.”). Thus, Plaintiff need not also satisfy the second alternative with a confidentiality agreement.

**2. *The Communications Remain Protected Work Product, Because Plaintiff and Intervening Plaintiffs Shared Common Litigation Interests.***

Disclosure of work product to a party with common litigation interests does not waive the doctrine’s protections. *AT&T*, 642 F.2d at 1299.

The existence of common interests between transferor and transferee is relevant to deciding whether the disclosure is consistent with the nature of the work product privilege. But “common interests” should not be construed as narrowly limited to co-parties. So long as transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts. Moreover, with common interests on a particular issue against a common adversary, the transferee is not at all likely to disclose the work product material to the adversary.

*Id.* at 1299–300.

In this case, Plaintiff and intervening Plaintiffs clearly share common litigation interests. Both were asserting derivative claims against Defendants for breaches of fiduciary duties.

Moreover, contrary to Defendant's suggestion, Plaintiff's decision not to engage in a joint prosecution agreement with Intervening Plaintiffs does not negate the clear common interests they shared.<sup>10</sup> Plaintiff chose not to join Intervening Plaintiffs in joint prosecution in view of his continuing fiduciary obligations as a director of RDI. [3 App. 535–36.] He did not want to be party to an agreement that Defendants might (erroneously) claim created an obligation on his part to share information he might wish to maintain as confidential in his capacity as a director. Indeed, it was a claimed (and nonexistent) conspiring with Intervening Plaintiffs that precipitated the discovery Defendants sought in the first place.

Accordingly, because Plaintiff and Intervening Plaintiffs were pursuing claims of the same type, against the same defendants, they

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<sup>10</sup> *See also supra* Part II.A (explaining that, while the existence of a joint prosecution agreement may be a requirement of attorney-client privilege, it is not a requirement of the work product doctrine).

shared a strong common interest in the litigation.<sup>11</sup> *AT&T*, 642 F.2d at 1299–300.

**C. The Broad, Unequivocal Language of *AT&T* Belies Defendants’ Attempt to Distinguish the Case**

Defendants argue that *AT&T* should not apply here by attempting to distinguish two facts from the case. First, they note that, in *AT&T*, the work product was conveyed to a third party pursuant to a court order, whereas here no similar order exists. [Answer 29–30.] The *AT&T* court’s holding directly belies Defendants’ argument: “We conclude, then, that while the mere showing of a voluntary disclosure to a third person will generally suffice to show waiver of the attorney-client privilege, it should not suffice in itself for waiver of the work product privilege.” *AT&T*, 642 F.2d at 1299.

Second, Defendants note that the work product was transferred under a court order to maintain the confidentiality of the documents. [Answer 29.] Defendants’ assertion that this confidentiality was a “key element” of the *AT&T* court’s decision, [Answer 30.], again misstates

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<sup>11</sup> Again, any concern that the identified communications did not involve areas in which Plaintiff and Intervening Plaintiffs shared a common interest can be easily alleviated with an *in camera* review of the communications at the District Court.

the holding. The court *first* found that a transfer to a party “with common interests on a particular issue against a common adversary . . . is not at all likely to [result in disclosure of] the work product material to the adversary.” *AT&T*, 642 F.2d at 1299. The court *then* noted that the added confidentiality simply strengthen the case against waiver. *Id.* Thus, as discussed above, a guarantee of confidentiality is not required.<sup>12</sup>

Most importantly, the *AT&T* decision employs broad, sweeping language. “A disclosure made in the pursuit of such trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege.”<sup>13</sup> *Id.* The existence of such common interests alone is sufficient to establish a reasonable expectation of confidentiality. *See id.* at 1299–300. Therefore, this Court should reverse the District Court’s order.

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<sup>12</sup> *See supra* Part IV.B.1.

<sup>13</sup> Indeed, Plaintiff’s privilege log shows the communications to be “made in the pursuit of such trial preparation.” For example, one entry reads, “Communication regarding mental impressions of litigation matters.” [*E.g.*, 2 App. 337.]

## V.

### **DEFENDANTS' PLEA FOR DISCOVERY SANCTIONS IS ANOTHER ATTEMPT AT MISDIRECTION**

Defendants dedicate nearly half their answer to an argument in support of a request for sanctions. As a threshold matter, their recitation of purported facts is simply inaccurate. Second, such a request is not appropriate for writ relief, nor is it properly before this court. Defendant makes this argument well aware that any alleged untimely production<sup>14</sup> by Plaintiff is irrelevant to the work product question properly before this Court.

#### **A. A Chronological (and Accurate) Description of the Facts Demonstrates Plaintiff's Compliance with the District Court's Orders**

##### ***1. Defendants Blend and Confuse Two Distinct Motions***

In late 2015, Defendants served requests for production on Plaintiff, seeking, *inter alia*, communications between Plaintiff and the Intervening Plaintiffs. [Answer 9; 1 R. App. 140.] Consistent with Rules 26(f) and 34(b)(2), Plaintiff promptly objected to the request, including “to the extent it seeks documents or information which is protected by

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<sup>14</sup> Nevertheless, Plaintiff was neither untimely nor evasive in his response to discovery orders. *See infra* Part V.A.

. . . the attorney work product doctrine and/or otherwise is privileged or protected from disclosure, including in particular communications of counsel of record for Plaintiff in this action, which communications will not be produced or logged.” [1 R. App. 157-8.] Nevertheless, Plaintiff produced all relevant documents predating the commencement of the lawsuit. On February 23, 2016, Defendants filed a motion to compel plaintiff to produce a privilege log related to these communications. [1 R. App. 82.] On March 2, 2016, Defendant filed a separate motion seeking the production of additional documents requested in a second set of requests for production. [1 R. App. 114.] Specifically, Defendants’ March 2, 2016 motion requested communications between Plaintiff and Intervening Plaintiffs which post-dated commencement of the lawsuit. [*Id.* at 122.] The motion did not specifically raise communications between counsel for plaintiffs.

On March 3, 2016, the District Court verbally directed Plaintiff to produce a privilege log, and Plaintiff verbally anticipated it could be produced by March 17, 2016. [2 App. 360–61.] No written order was ever entered on this motion. Nevertheless, Plaintiffs produced the privilege log on March 18, 2016, merely one day after the anticipated pro-

duction date. [3 R. App. 569–644.] Notably, Defendants have never articulated any prejudice arising from the fact that the privilege log came one day later than anticipated, including in their Answer to this writ petition.

This is where Defendants, either purposefully or inadvertently, mislead the Court. Defendant muddles the distinctions between the February and March motions.

Defendants state that the March 18 privilege log “did not include a single document dated after June 12, 2015” (or after the filing of this lawsuit). [Answer 11.] However, the March 18 log was submitted to comply with the District Court’s order (which was never entered) on the February 23 motion.

Indeed, the District Court did not even rule on the March 2 motion until March 17, 2016, [2 App. 364, 373–90.], the day before Plaintiff submitted the privilege log. On that day, for the first time, the District Court directed Plaintiff to produce the additional documents specified in the March 2 motion. [*Id.*]

Defendants blur these facts to make it appear Plaintiff repeatedly ignored the District Court’s orders. However, Plaintiff has complied

with the District Court's orders, but was a day late with respect to the date Plaintiff picked for production of a privilege log.

**2. *Defendants Continue to Pile On Motions, Notwithstanding Plaintiff's Compliance***

On April 8, 2016, before Plaintiff had the full opportunity to review and produce communications responsive to the March 17 order (on the March 2 motion), Defendants filed an additional motion to compel. [1 R. App. 203.] On June 21, the District Court heard this motion. [1 App. 140.] Though the court did reiterate that its March 17 order on the March 2 motion still stood, it only granted new relief to Defendants in one regard: Plaintiff was directed to number the entries on the previously submitted privilege log for easier readability. [1 App. 162.]

On August 1, 2016, consistent with the District Court's orders, Plaintiff produced 350 additional responsive communications. [Answer 13; 1 App. 194 – 2 App. 343.] The only documents withheld were work product—the subject of this writ petition. [1 App. 194 – 2 App. 343.] Plaintiff appropriately supplemented its privilege log a week later. [*Id.*] Again, Defendants have not, and cannot articulate any prejudice associated with the timing of the supplemental privilege log. This is especially so considering that Defendants did not file a motion to compel the

mental impression communications until weeks after the revised privilege log was produced and discussed between the parties.

Moreover, Defendants twice filed their redundant motions without a proper meet and confer, prompting the Court to order them to do so. [See 4 App. 552.] Thus, the Defendants created the convoluted record they mischaracterize in their Answer by proceeding in derogation of local rules.

On September 2, 2016, several weeks after the parties could not resolve the work product issue, Defendants filed a motion to compel production of these withheld communications. [1 App. 171.] The District Court granted the motion and this writ petition followed.

### ***3. Plaintiff Has Consistently Claimed These Communications to Be Work Product***

Defendants also assert that Plaintiff “shifted the basis for withholding” the communications to “common interest.” [Answer 16.] This is inaccurate. The only two privilege logs which detail these communications accurately reflect Plaintiff’s assertion of work product protec-

tion. [3 R. App. 569–644; 1 App. 194 – 2 App. 343.]<sup>15</sup> “Common interest” does not appear on the privilege logs.<sup>16</sup>

**B. The Forfeiture of an Attorney’s Mental Impressions for an Alleged Discovery Violation Is Like Forcing a Coach to Hand Over the Playbook for a Delay of Game Penalty—Absurd**

For what amounts to, at most, a barely untimely production, of less than twenty-four hours, Defendants’ proposed sanctions are outrageously harsh. Even accepting Defendants’ muddled timeline of events and erroneous conclusions, compelling a party to produce its attorney’s mental impressions—containing strategies for trial, strengths and weaknesses of the case, and other various opinions—is an affront to the very adversarial system the work product doctrine seeks to protect.

Plaintiff has neither willfully delayed, nor acted in bad faith. A review of the transcripts from the hearings on the various motions demonstrates that each subsequent motion sought, in some way, to alter, clarify, or amend the understanding of Defendants’ requests for

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<sup>15</sup> Through inadvertent error, the communications withheld on the basis of work product were erroneously designated attorney-client privilege in addition to work product. This error was subsequently acknowledged and corrected.

<sup>16</sup> See *supra* Part IV.B.2.

production.<sup>17</sup> No order resulting from these motions simply directed Plaintiff to comply with a previous order.<sup>18</sup> Likewise, at no point was Plaintiff admonished for disregarding an order.<sup>19</sup> This is because Plaintiff never disregarded the District Court's orders.

Even if delay had occurred, Defendant cannot claim any resulting prejudice. On the contrary, on October 27, the trial date was delayed due to *Defendants'* failure to produce discovery which repeatedly has been ordered produced by the District Court, dating back to August 30, 2016. [4 App. 582–617.] This irony—Defendants' engaging in the very delay and evasion of which they accuse Plaintiff—is telling.<sup>20</sup> To date, Plaintiff still awaits production of these documents.

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<sup>17</sup> [See 2 App. 359–62 (Mar. 3 hearing); 2 App. 373–90 (Mar. 17 hearing); 1 App. 140–64 (June 21 hearing); 3 App. 526–40 (Sept. 8 hearing).]

<sup>18</sup> [See 2 App. 361 (Mar. 3 hearing); 2 App. 373–90 (Mar. 17 hearing); 1 App. 140–64 (June 21 hearing); 3 App. 526–40 (Sept. 8 hearing).]

<sup>19</sup> [See 2 App. 361 (Mar. 3 hearing); 2 App. 373–90 (Mar. 17 hearing); 1 App. 140–64 (June 21 hearing); 3 App. 526–40 (Sept. 8 hearing).]

<sup>20</sup> Defendants have yet to comply with an August 30, 2016 order directing them to produce communications from counsel on which they claim to have relied in making decisions relevant to Plaintiff's claims. Because of Defendants' continued noncompliance with the District Court's order, fact discovery cannot be completed and trial cannot reliably be scheduled, much less commenced.

Additionally, Defendants even admit they can proceed to trial without Plaintiff's attorney's mental impressions:

THE COURT: Mr. Krum [counsel for Plaintiff] took a writ, and there's a stay related to some documents that he has. Are you worried about those documents being available prior to you starting trial?

MR. FERRARIO [counsel for Defendants]: We've talked amongst ourselves, and if we can get the trial date, we're prepared to proceed with that writ pending and the stay in place.

THE COURT: Okay. So you're not really worried about those documents anymore.

MR. FERRARIO: No. I mean, we're worried about them, but it's not worth forgoing the trial and having this linger.

[4 App. 606.] Defendants have suffered no prejudice from the supposed delay. Thus, where Plaintiff has acted in good faith and only caused a one-day delay, a sanction requiring the production of attorney mental impressions is entirely unjustified.

**C. The Issue of Discovery Sanctions Is Not Properly Before This Court, and Is Irrelevant to the Issue Presented**

This Court should summarily disregard Defendants' argument that Rule 37 discovery sanctions should have issued against Plaintiff. While improper release of work product is an appropriate subject of writ relief, *see Wardleigh v. Second Judicial Dist. Court ex rel. Cty. of Washoe*, 111 Nev. 345, 359, 891 P.2d 1180, 1189 (1995), other discovery

orders, such as a denial of sanctions, are not proper for this Court to review on a writ petition. *Clark Cty. Liquor & Gaming Licensing Bd. v. Clark*, 102 Nev. 654, 659, 730 P.2d 443, 447 (1986) (citing *State ex rel. Department of Transportation v. Thompson*, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983)). This is especially so considering that Defendants have not even filed a petition for writ relief from the District Court’s decision not to consider Rule 37 sanctions.

Furthermore, this Court is without a record to address possible discovery sanctions. Questions of fact must be addressed by the trial court in the first instance. *Dogra v. Liles*, 129 Nev. Adv. Op. 100, 314 P.3d 952, 958 (2013). The District Court did not consider sanctions,<sup>21</sup> and as a result, has not been briefed on issues pertaining to possible sanctions, including (1) whether the party seeking sanctions made “a good faith effort to obtain the disclosure or discovery without court action”; (2) whether the opposing party’s nondisclosure was “substantially justified”; and (3) whether any “other circumstances make an award of expenses unjust.” Nev. R. Civ. P. 37(a)(4)(A). Consequently, the record is devoid of the facts necessary for this Court to pass on the issue.

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<sup>21</sup> And this is likely because Plaintiff has acted in good faith with regard to the discovery orders at issue.

Most importantly, the question of Plaintiff's compliance with discovery requests is not relevant to the issue properly before this court: Whether attorney work product becomes discoverable anytime it is disclosed to counsel for another party where those parties share a common adversary. Defendants' sanction argument is yet another distraction.

Thus, sanctions are not reviewable via writ relief, the question is not yet ripe, and the entire issue is irrelevant to the work product question. The District Court's order must be reversed.

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## CONCLUSION

For these reasons and the reasons in Plaintiff's Petition for Writ of Prohibition or, in the Alternative, Mandamus, this Court should issue a writ of prohibition to prevent the District Court from enforcing its order requiring the wholesale release of communications between Plaintiffs and Intervening Plaintiffs containing attorney mental impressions to Defendants, their mutual adversaries.

Dated this 1st day of December, 2016.

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## CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 6,626 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 1st day of December, 2016.

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**CERTIFICATE OF SERVICE**

I certify that on December 1, 2016, I served a copy of the foregoing PETITION FOR WRIT OF PROHIBITION OR, IN THE ALTERNATIVE, MAN-DAMUS by mailing a true and correct copy thereof, postage prepaid, at Las Vegas, Nevada, addressed as follows:

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