IN THE SUPREME COURT OF THE STATE OF NEVADA

READING INTERNATIONAL, INC.,

Petitioner,

v.

EIGHTH JUDICIAL DISTRICT COURT, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE ELIZABETH GONZALEZ, DISTRICT JUDGE, DEPT. 11,

Respondents,

JAMES J. COTTER, JR, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF READING INTERNATIONAL, INC.

And concerning,

MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE; DOUGLAS MCEACHERN, JUDY, CODDING, AND MICHAEL WROTNIAK,

Defendants Below.

Supreme Court Case No.:

District Court Case No. Case No. A-15-719860-B, jointly administered with Case No. P 14-082942-E and Case No. A-16-735305-B

PETITION UNDER NRAP 21 FOR WRIT OF PROHIBITION, OR IN THE ALTERNATIVE, MANDAMUS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, Petitioner, through its undersigned counsel, states that:

Petitioner Reading International, Inc. is a publicly traded Nevada corporation. No publicly held corporation owns 10% or more of the aggregate outstanding common stock of Reading International, Inc.

Petitioner Reading International, Inc. has been represented by the following law firm in the proceedings below:

GREENBERG TRAURIG, LLP.

DATED this 13th day of February, 2017.

GREENBERG TRAURIG, LLP

/s/ Tami D. Cowden

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VERIFICATION

The undersigned declares under the penalty of perjury that she is counsel for Petitioner Reading International, Inc., and has read the attached Petition for Writ of Mandamus or for Prohibition, and that the factual assertions therein are true of her own knowledge, except as to those matters stated on information and belief, and that as to such matters she believes them to be true. This verification is made pursuant to NRS 15.010.

DATED this 13th day of FEBRUARY, 2017.

TAMI D. COWDEN

Subscribed and sworn to before me this
13th day of February, 2017.

JOYCE HEILICH
NOTARY PUBLIC
STATE OF NEVADA
Appt No. 15-2880-1
Exp. August 19, 2019

TABLE OF CONTENTS

NRAP 26.1 DISCLOSURE……...……. ii

NRAP 21(a)(5) VERIFICATION …….....…….....……. iii

TABLE OF AUTHORITIES…….....…… vi

STATEMENT OF RELIEF SOUGHT .....…….....……. 1

ROUTING STATEMENT..... 2

STATEMENT OF THE ISSUES……. 3

STATEMENT OF THE FACTS…….. 3

STANDARD OF REVIEW…….. 13

REASONS THE WRIT SHOULD ISSUE..... 13

I. THIS COURT SHOULD ISSUE A WRIT DIRECTING THE DISTRICT COURT TO VACATE THE ORDER COMPELLING DISCLOSURE OF THE ADVICE OF COUNSEL. 13

A. Writ Relief is Appropriate to Prevent the Disclosure of Privileged Information..... 13

B. The District Court's Ruling is Inconsistent with this Court's rulings on the Attorney Client Privilege..... 15

C. Nevada Has No Exception to the Attorney-Client Privilege for Derivative Actions, Even Though It Has an Exception for Other Privileges for Derivative Actions..... 20

D. The Business Judgment Rule Governs Regardless of Specific Invocation..... 21

E. No Other Jurisdiction Has Adopted the District Court's Interpretation of the Effect of the Business Judgment Rule..... 23

CONCLUSION……..……..... 27

CERTIFICATE OF COMPLIANCE……..... 29

TABLE OF AUTHORITIES

NEVADA CASELAW	
Abbott v. State, 122 Nev. 715, 138 P.3d 462 (2006).....	14
Ashokan v. State, Dept. of Ins., 109 Nev. 662, 670, 856 P.2d 244, 249 (1993).....	20, 21
Sands v. Eighth Jud. Dist. Ct., 130 Nev. Adv. Op. 69, 331 P.3d 905, 913 (2014).....	*passim*
Mitchell v. Eighth Judicial Dist. Court, 131 Nev., Adv. Op. 21, 359 P.3d 1096, 1099 (2015).....	13
Shoen v. SAC Holding Corp., 122 Nev. 621, 636, 137 P.3d 1171, 1181 (2006).....	22
State v. Eighth Judicial Dist. Court (Romano), 120 Nev. 613, 618, 97 P.3d 594, 597 (2004).....	14
State v. Lucero, 127 Nev. Adv. Op. 7, 249 P.3d 1226, 1228 (2011).....	13
Wardleigh v. Second Judicial District Court, 111 Nev. 345, 891 P.2d 1180 (1995).....	*passim*
Yeager v. Harrah's Club, Inc., 111 Nev. 830, 834, 897 P.2d 1093, 1095 (1995).....	21
OTHER CASELAW	
Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas, 04 CIV 10014 PKL, 2009 WL 3111766 (S.D. N.Y. 2009).....	25
Chesapeake Corp. v. Shore, 771 A.2d 293, 301 (Del. Ch. 2000).....	26

Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985).....	19
In re County of Erie, 546 F.3d 222, 229 (2d Cir. 2008).....	25, 26
Frontier Ref., Inc. v. Gorman-Rupp Co., Inc., 136 F.3d 695, 699–700 (10th Cir. 1998)	15
Hearn v. Rhay, 68 F.R.D. 574, 576, 581 (E.D.Wash.1975).....	*passim*
Garner v. Wolfinbarger, 430 F.2d 1093, 1103 (5th Cir. 1970).....	9, 26
Milroy v. Hanson, 875 F.Supp. 646, 648 (D.Neb.1995).....	19
Nelson v. Alliance Hospitality Management, LLC, 2013 WL 9554167 (N.C. Super. March 19, 2013).....	25
Rhone–Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851, 863–64 (3d Cir.1994).....	16
In re Subpoena Issued to Dennis Friedman, Esq., 286 B.R. 505, 509 n. 4 (S.D.N.Y.2002).....	26
WLR Foods, Inc. v. Tyson Foods, Inc., CIV. A. 94-012-H, 1994 WL 377257 (W.D. Va. 1994), *Suppl'd,* CIV. A. 94-012-H, 1994 WL 702788 (W.D. Va. 1994), *aff'd,* 65 F.3d 1172 (4th Cir. 1995), *aff'd,* 65 F.3d 1172 (4th Cir. 1995).....	*26*
Zirn v. VLI Corp, 621 A. 2d 773 (Del. 1993).....	26
NEVADA RULES AND STATUTES	
NRS 49.095	20

NRS 49.105.....	20
NRS 48.180.....	21
NRS 49.205.....	20
NRS 78.138.....	*passim*
NRAP 17.....	2
OTHER AUTHORITIES	
3A Fletcher Cyc. Corp. § 1083.....	25
Harvard Law Review Association, "Developments in the Law —Privileged Communications 98 Harv. L. Rev. 1450.....	16
Vargas & Bartlett, *Study of Nevada Corporate Law* http://www.leg.state.nv.us/Division/Research/Library/ LegHistory/LHs/LHSupp/StudyNV.....	23, 24
Minutes of the Senate Committee on Judiciary and the Assembly Committee on the Judiciary, May 7, 1991.....	23
Model Business Corporation Act § 8-213-14.....	24

Petitioner, Reading International, Inc. ("RDI" or "Company"), presents its Petition for Writ of Prohibition or in the Alternative, for Mandamus.

STATEMENT OF RELIEF SOUGHT

This writ petition seeks Supreme Court intervention due to significant issues of first impression involving this state's corporate law and the attorney-client privilege. Specifically, this petition seeks clarification regarding how Nevada's corporate laws relating to the responsibilities of officers and directors intersect with the attorney-client privilege and who does and does not have the power to waive that privilege. Petitioner seeks a writ of mandamus from this Court directing Judge Elizabeth Gonzales to vacate her orders: 1) requiring disclosure of an opinion of counsel; and 2) requiring certain documents identified in privilege logs to be produced for *in camera* review, which review is intended to determine whether such privileged documents should also be produced.

In rulings in the case below, wherein there is no dispute that Nevada, not Delaware law applies, Respondent Honorable Elizabeth Gonzales has held that Nevada's codification of the business judgment rule requires the disclosure of otherwise attorney-client privileged advice, if a director considered such advice in determining how to proceed. The District Court appeared to narrow that ruling to apply only when the director in question testifies that he or she relied "solely" on the attorney advice; however, the District Court ordered the advice disclosed here,

even though there was no testimony by either director that such advice was the sole basis of his decision. The District Court subsequently ordered that certain other documents should be presented for *in camera* review to determine whether such privileged documents should also be produced.

The District Court's rulings on this issue appear to be the product of a skewed view of Nevada's corporate law. Moreover, such rulings in this case, brought in the Eighth Judicial District Court's specialty Business Court, threaten Nevada's position as the state that offers the widest protection to those who choose to serve as directors in publicly traded companies. Accordingly, this Court's invocation of its original jurisdiction to grant writ relief is appropriate to preserve an the attorney client privilege, to serve public policy, to clarify important issues of law, and to serve judicial economy.

ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding because it stems from a case "originating in the Business Court." NRAP 17(a)(1); NRAP 17(e). In addition, this case presents issues of first impression on matters of statewide importance and involves a fundamental policy of Nevada Law – the preservation of the confidentiality of attorney-client communications and attorney work product. NRAP 17(a)(13)-(14). Additionally, this Court should retain this

matter because two other writs involving the same case below are presently pending before it, Case No. 71267 and Case No. 72261.

STATEMENT OF ISSUE PRESENTED

I. WHETHER A DIRECTOR'S RECEIPT OF ADVICE FROM THE CORPORATION'S COUNSEL AS TO AN ISSUE ON WHICH THE DIRECTOR VOTES REQUIRES DISCLOSURE OF SUCH ADVICE IN A SUIT CLAIMING THE DIRECTOR'S VOTE CONSTITUTED A BREACH OF FIDUCIARY DUTY.

STATEMENT OF RELEVANT FACTS

The litigation below was commenced by Cotter, Jr. immediately following his termination as CEO of the Company, and seeks, as relief, among other things, his reinstatement. **III APP 536, ¶ 3.a.** In service of that goal, Cotter, Jr., wearing the cloak of a derivative class representative,[1] has formulated a fantasy plot in which every action taken by the defendant board members since his termination was purportedly undertaken for the sole purpose of "entrenching" his sisters' position as employees of RDI and the Board members in their positions as members of the RDI Board.[2] Cotter, Jr.'s entire case is based upon the motivations

[1] The propriety of Cotter, Jr.'s proceeding as the representative plaintiff in a derivative action is the topic of a Petition for Writ of Prohibition or in the Alternative, Writ of Mandamus filed by the individual defendants in this matter, in Supreme Court Case No. 72261, to which Petitioner RDI joined.

[2] It is uncontested that all of the directors who voted for the termination of Cotter, Jr. were appointed to the Board with the approval of Cotter, Jr.'s father, James J. Cotter, Sr., that a majority of the current directors were appointed to the Board with the approval of James J. Cotter, Sr., and that voting control of RDI remains in the hands of the Cotter Family. Accordingly, it cannot be reasonably asserted that

he imputes to his sisters, whom he deems unqualified for their positions, despite the fact that each had considerably more operations experience in the Company than did he. Additionally, Cotter, Jr.'s claims of damage to the Company are based entirely on theories of how the Company hypothetically and as a matter of conjecture ought to have performed since his termination, if he had continued as CEO.

Background Information

Reading International, Inc. is a publicly traded company, whose operations involve development, ownership, and operation of entertainment and real estate assets in Australia, New Zealand, and the United States. **IV APP 638, ¶ 26**. Its voting shares have long been owned primarily by members of the Cotter family, including, until his death in 2014, James J. Cotter, Sr. ***Id*. at 639, ¶ 28.**

In August of 2014, shortly before his death, Cotter, Sr., who had long served as RDI's CEO, and Chairman of the Board of Directors, suddenly resigned for health reasons. **I APP 128, ¶ 12; II APP ¶ 236, ¶ 17.** Each of Cotter, Sr.'s children, Ellen Cotter, Margaret Cotter and Cotter, Jr., (collectively, the "Cotter Siblings") were members of RDI's Board of Directors at that time, while the other members of the Board of Directors were Edward Kane, Douglas McEarchern, Guy

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there has been any change of control or RDI or that any current director has taken any action to entrench him or herself.

Adams. William Gould, and Timothy Story. ***Id.* at ¶¶ 3, 17 -23**. In accordance with what the Board was advised were Cotter, Sr.'s wishes (as controlling stockholder), RDI's Board of Directors appointed Cotter, Jr. as CEO. ***Id.***

The shares of RDI stock controlled by Cotter, Sr., which consisted of more than 66 percent of the voting shares, are presently property of his estate (the "Estate") or of a trust formed by James J. Cotter, Sr. (the "Trust").[3] ***Id.* at 639, ¶ 28.** The executors of the Estate are Ellen Cotter and Margaret Cotter . **IV APP 646**. Ellen Cotter and Margaret Cotter are, indisputably, trustees of the Trust, while Margaret Cotter is trustee of a Voting Trust created in the Trust. However, Cotter, Jr., claims also to be a trustee of that Trust, based on an amendment to the Trust signed while Cotter, Sr. was in the hospital. **I APP 130, ¶ 20**. That purported amendment also granted alternative yearly control over a Voting Trust to Margaret Cotter and Cotter, Jr.; whereas, such control would, prior to the purported amendment, have been solely Margaret Cotter's. **I APP 129, ¶ 19, 130, ¶ 20**. The validity of the amendment to the Trust is currently the object of litigation being conducted in California.[4] **I APP 128, ¶ 11, 130, ¶ 23.**

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[3] With these shares, and other voting shares owned by Cotter family members, approximately 70 percent of the voting shares are in the control of the Cotter family.

[4] In addition to the proceeding below, and the trust litigation in California, Cotter, Jr. is also engaged in litigation with his sisters in Nevada, in a probate proceeding, and against RDI in an employment arbitration proceeding. **I APP 131, ¶ 25.**

Of the Cotter Siblings, Cotter, Jr. had been the one least involved in the day to day operations of the Company. **IV APP 818-819.** In contrast, Ellen and Margaret Cotter had been actively involved in the operations of the Company for years, with Ellen in charge of the Company's domestic cinema operations since 2002, and Margaret the owner of the theater management company providing services to theaters indirectly owned by RDI. **IV APP 635:17-19, 636:2-4.**

Cotter, Jr.'s tenure as CEO was fraught with conflict, including disputes among the Cotter Siblings, and claims of hostile work environment brought against Cotter, Jr. and the Company by an employee. **IV APP 698-701; 773-788, 791-800; V APP 899-900.** Several non-Cotter board members expressed dissatisfaction with Cotter, Jr.'s performance. ***Id.*** In February, one board member was assigned to act as a mentor to Cotter, Jr. and to mediate his disputes with his sisters. **IV APP 701-702; V APP 896-898.** Cotter, Jr., apparently recognizing his own weaknesses, retained at company expense a consultant to advise him on how to do his job without disclosing such action to the Board. **IX APP 1807-1810 (filed under seal)**. After several months in which a majority of the board saw no improvement, a series of board meetings were held, which meetings culminated in the termination of Cotter, Jr. as CEO. **IV APP 702-705; VII APP 1278-1282; 1295-1297**.

Immediately upon his termination, Cotter, Jr. filed suit against the Company and all of the then siting directors asserting both individual claims for wrongful termination, and purported to state a derivative claim for purported breaches of fiduciary duty related to the termination and other decisions of the Board of Directors, and, seeking his own reinstatement. **I APP 1-32**. After such suit was filed, several shareholders sought to intervene in the action, asserting the necessity to protect their own interests. Following the grant of the intervention, the complaint by the intervening plaintiffs was filed, and later amended. **I APP 32-49; 124-162.** After extensive discovery, which included production of thousands of pages of documents, and depositions of most of the individual defendants, the intervening plaintiffs sought a voluntary dismissal and approval of settlement, which motion, after notice to the Shareholders, was ultimately granted.[5] **II APP 285; VII SUPP 1423-1430.**

Thereafter, Cotter, Jr. was permitted to amend his complaint a second time, in order to add as defendants, two board members who had joined the board

[5] No payments or concessions were made by the Company or any individual defendants. The plaintiffs of the other derivative action essentially acknowledged that discovery had not yielded evidence of wrongdoing. **II APP 291: 26-291:2.** ("The T2 Plaintiffs have reviewed a number of transactions and engaged in discussions with management in addition to participating in the litigation and have determined that Defendants have acted, and will continue to act in good faith to use best practices with regard to board governance, protection of stockholder rights, and maximizing value for all its stockholders.").

subsequent to the original filing, Judy Codding and Michael Wrotniak, and to add allegations relating to corporate decisions made since the original filing. **IV APP 628-644.** Essentially, Cotter, Jr. has challenged every significant (and many routine) decisions made by the Board of Directors, claiming the actions were the product of a board unduly influenced by Ellen Cotter and Margaret Cotter. *Id.*

The Court's Order Compelling Disclosure of Attorney Advice

Among Cotter, Jr.'s claims was the allegation the Estate should not have been permitted to exercise an option to purchase certain shares of RDI stock by exchanging shares of RDI stock owned by the Estate to pay the exercise price, which payment was approved by the Compensation Committee, on which Defendants Kane and Adams served. Neither Kane nor Adams asserted that they may not be held liable for their decision with respect to the exercise of the option because they relied on the advice of counsel. Indeed, "reliance on counsel" has not been raised as an affirmative defense in this case by any defendant. **I APP 163-208.** Accordingly, no defendant will be required to present the contents of any attorney-client privileged communication in order to prove such a defense.

Similarly, no defendant has revealed the content of any legal opinion. While during their depositions, Adams and Kane were each asked what they had done to inform themselves regarding the stock option issue and stated they had considered an opinion of counsel when making their decision, the attorney-client privilege was

timely asserted when questions were posed as to the contents of that opinion. ***Id.*** Cotter, Jr. filed a Motion to Compel, claiming that because these individual defendants had purportedly testified to having relied on the opinion, these defendants had placed that legal advice at issue. **III APP 378**. Cotter, Jr. included as exhibits the deposition excerpts in which such testimony purportedly occurred. **III APP 492-505**. Both the individual defendants and RDI opposed this Motion to Compel. **III APP 513-603**. Briefing by all parties primarily focused on the anticipatory waiver test set forth by this Court in *Wardleigh v. Second Judicial District Court,* 111 Nev. 345, 891 P.2d 1180 (1995), which test is used to determine whether a party has waived the attorney-client privilege by placing the contents of the communications at issue.[6] *Id.*

The District Court granted Cotter, Jr.'s Motion, but *not* on either of the grounds raised therein or briefed by the parties. Instead, the Court stated:

> THE COURT: To the extent any of the directors relied upon advice of counsel in performing their duties which are subject of the breach of fiduciary duty claim, which includes this, they can't also protect the communication even though it's the company's privilege. So you all have to make a decision.
>
> So your motion's granted, Mr. Krum.
>
> MR. KRUM: Thank you, Your Honor.

[6] Cotter, Jr. also argued that because the action was derivative, the attorney-client privilege should not apply, citing *Garner v. Wolfinbarger*, 430 F.2d 1093, 1103 (5th Cir. 1970).

MS. HENDRICKS: Your Honor, if I can just seek clarification. The request was very broad in nature and also seeks work product information from counsel.

THE COURT: It's only the information that was provided to the board members in the course of their making their decision. That's all it is.

III APP 613: 8-21. Counsel for the Independent Defendants sought further clarification, and the District Court further stated:

> I do not know at this stage if the actions your clients have taken related to the exercise of the option was information directly related to the communications from counsel. So it may be appropriate for a motion in limine to not permit that to go to the jury, because it is not information for which you will be seeking protection under the business judgment rule. ***Because that's where all this comes from, is the business judgment rule.***

***Id*., at 614:14-21 (emphasis added).** Further explanation was sought:

> MR. SEARCY: Well, I understand. I just want to understand the parameters as this goes forward. You're saying that, because—if the directors testify at trial they received advice from counsel, not that they disclosed the substance of the communications, but saying that they received it, that would be enough so that he's allowed to inquire into the substance of the communications?
>
> THE COURT: ***If your clients are relying upon the business judgment rule to defend their decision and as part of their activities under the business judgment rule relied upon the advice of certain professionals in conducting themselves, that advice is fair game.*** And I understand that that's a frustrating process for you***, but that's the way the Nevada statute is written.*** You can't take advantage of that advice and then not tell anybody what it was.

***Id*., at 614:25- 615:14 (emphasis added)**. The District Court did not further explain its reasoning.[7] The written ruling was issued on October 3, 2016. **VII APP 1372.**

Despite the fact that the ruling had been expressly limited to the legal opinion provided to Messrs. Kane and Adams upon which they had relied, Cotter, Jr. thereafter insisted that he was entitled to *all* materials related to the provision of *any* attorney opinions or advice considered by any board member in any of the decisions challenged by him. **VII APP 1373:5-7.** RDI sought reconsideration of the Court's ruling, pointing out that the District Court's reasoning contradicted this Court's rulings on privilege. **VII APP 1375.** The District Court partially granted

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[7] The District Court's views on the interplay of the business judgment rule and the attorney-client privilege were explained in somewhat greater detail in another matter, District Court Case No. A-12-656710-B, *Wynn Resorts, Ltd. v. Okada, et al.* Specifically, in that other case, this Court issued an order granting discovery of attorney-client communications, stating:

> The motion is granted in part. To the extent that information was provided to the members of the board of directors for their consideration in the decision-making process and their defense related to the business judgment rule[,] the Okada parties are entitled to test whether the director or officer had knowledge concerning the matter in question that would cause reliance thereon to be unwarranted. The only way they can get to that part of the statute is by having the information that was provided to the board.

VII APP 1404. This order was issued in District Court Case No. A-12-656710-B, *Wynn Resorts, Ltd. v. Okada, et al.* A writ petition relating to that order is currently pending in Supreme Court Case No. 70050.

the motion to reconsider, limiting the required production to opinions of counsel actually provided to Messrs. Kane and Adams, and on which they had solely relied in making their decision.[8] **VIII APP 1633**.

Thereafter, Cotter, Jr. brought a motion to reconsider the Court's order on the reconsideration. **VIII APP 1685**. Cotter, Jr. requested that the Court require the communications between counsel and two other witnesses to be produced, regardless of reliance thereon, or in the alternative, to review the communications *in camera*, to determine whether they should be produced. *Id.* In two separate orders, the District Court granted the latter requested relief, requiring certain documents contained on the privilege logs of Messrs. Kane and Adams to be produced in camera, even though neither witness had actually testified that he had solely relied on the legal opinion. **IX APP 1891 and 1897 .** The District Court issued a stay of that order pending the filing of these writ proceedings. **IX APP 1900.**

[8] During the hearing, the District Court inaccurately asserted that Messrs. Kane and Storey had testified that they had relied solely on the advice of counsel in making their decision. **VIII APP 1488:8-9.** No such testimony occurred, as the transcripts included with Cotter, Jr.'s Motion to Compel demonstrated. **III APP 491-505**.

STANDARD OF REVIEW

A District Court's interpretation of a rule or statute is reviewed de novo, without deference to the conclusions of the lower court. *State v. Lucero*, 127 Nev. Adv. Op. 7, 249 P.3d 1226, 1228 (2011).

REASONS THE WRIT SHOULD ISSUE

This Court should entertain this writ petition, and resolve the issues herein, as such issues relate to the appropriate interpretation of Nevada's corporate law.

I. THIS COURT SHOULD ISSUE A WRIT DIRECTING THE DISTRICT COURT TO VACATE THE ORDER COMPELLING DISCLOSURE OF THE ADVICE OF COUNSEL.

This Court should grant the Petition, and direct the District Court to vacate the order that compels RDI to disclose privileged information. The District Court's determination that Nevada's statutory adoption of the business judgment rule resulted in a means by which the attorney-client privilege belonging to a corporation can be waived by testimony that a director relied on attorney advice is contrary to this Court's pronouncements on the attorney-client privilege.

A. Writ Relief is Appropriate to Prevent the Disclosure of Privileged Information.

This Court should elect to exercise its original jurisdiction to prevent the disclosure of privileged material. RDI does not have any plain, speedy, and adequate remedy in the ordinary course of law to correct this issue, as waiting until a post trial appeal could prejudice RDI's ability to defend against Cotter, Jr.'s

claims. *See Mitchell v. Eighth Judicial Dist. Court,* 131 Nev., Adv. Op. 21, 359 P.3d 1096, 1099 (2015) (noting that this court has granted "extraordinary writ relief from orders allowing pretrial discovery of privileged information, especially when the petition presents an unsettled and important issue of statutory privilege law"); *State v. Eighth Judicial Dist. Court (Romano*), 120 Nev. 613, 618, 97 P.3d 594, 597 (2004) (noting that this court has entertained extraordinary writs to prevent improper discovery), *overruled on other grounds by Abbott v. State,* 122 Nev. 715, 138 P.3d 462 (2006). Plaintiff continues to amend his complaint to add actions taken by the Board following the filing of the First Amended Complaint and the closing of discovery. Consequently, the Company and its counsel find it impossible to determine what current and future advice will or will not be protected. At the present time, RDI (and every other Nevada corporation) must assume that there is no corporate attorney-client privilege in Nevada in any matter where the business judgment rule is applicable. This, in essence, eliminates any practical reliance on the business judgment rule in this State.

Here, the District Court's ruling is a unique interpretation of Nevada's business judgment rule. A failure to clarify these issues endangers the ability of corporate attorneys to advise Nevada corporations with the appropriate assurance of confidentiality.

B. The District Court's Ruling is Inconsistent with this Court's rulings on the Attorney Client Privilege.

The District Court's basis for its ruling appears to be simply that if a director has in the exercise of his duty of due care consulted with company counsel, then the plaintiff in a derivative lawsuit can get access to any advice that such counsel may have been given, or else that defendant may not rely on the business judgment rule as adopted by Nevada. The District Court's ruling contradicts the test for waiver of privileged communications set forth by this Court in *Wardleigh v. Second Judicial District Court,* 111 Nev. 345, 891 P.2d 1180 (1995). In *Wardleigh,* this Court stated that a waiver of the attorney client privilege occurs when:

> a privilege holder pleads a claim or defense in such a way that eventually he or she will be forced to draw upon the privileged communication at trial in order to prevail.

Wardleigh, 891 P.2d at 1186. It is to be noted that, in so holding, this Court adopted the most restrictive of the various approaches to implied waiver of the attorney-client privilege rejecting the so-called "automatic waiver" rule,[9] citing to

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[9] See *Frontier Ref., Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 699–700 (10th Cir. 1998), describing the three approaches to implied waiver used by courts:

> The first of these general approaches is the "automatic waiver" rule, which provides that a litigant automatically waives the privilege upon assertion of a claim, counterclaim, or affirmative defense that raises as an issue a matter to which otherwise privileged material is relevant. The second set of generalized approaches provides that the privilege is

"Developments in the Law-Privileged Communications," 98 Harv. L. Rev. 1450 (1985). In that law review article, it was explained that:

> When the party asserting the privilege bears the burden of proof on an issue and can meet that burden only by introducing evidence of a privileged nature, waiver is clearly warranted at the discovery stage.

98 Harv. L. Rev. at 1639 (1985). It follows, then, that if the party holding the privilege would *not* need to introduce the privileged information in order to satisfy an evidentiary burden, no waiver has occurred. Here, neither RDI nor any of the defendant directors bears the burden of proof on any issue, and accordingly, RDI has not waived its privilege, and should not be forced to do so to allow its directors the benefit of the business judgment rule.

1. The District Court Failed to Apply the Wardleigh Test.

In ruling on Cotter, Jr.'s Motion to Compel, however, the District Court Court applied an implied waiver or privilege that is commonly known as the *Hearn*

> waived only when the material to be discovered is both relevant to the issues raised in the case and either vital or necessary to the opposing party's defense of the case. Finally, several courts have recently concluded that a litigant waives the attorney-client privilege if, and only if, the litigant directly puts the attorney's advice at issue in the litigation.

The last of these tests has been described as the most restrictive of the three approaches. *See, e.g., Rhone–Poulenc Rorer Inc. v. Home Indem. Co,* 32 F.3d 851, 863–64 (3d Cir.1994) (adopting restrictive test and criticizing more liberal views of waiver). As shown *infra*, the Nevada Supreme Court adopted this most restrictive test.

test, under which "the repository of the privilege (1) makes an assertion through some affirmative act that (2) renders relevant to the action (3) privileged matter vital to the opposing party's defense." *Hearn v. Rhay,* 68 F.R.D. 574, 576, 581 (E.D.Wash.1975). However, this Court expressly *rejected* the *Hearn* test. *Wardleigh* 111 Nev. at 355–56, 891 P.2d at 1187. Moreover, this Court noted that this "more liberal view" of implied waiver was improper precisely *because* of its dependence on a balancing test. This Court stated:

> Fairness should not simply dictate that because pleadings raise issues implicating a privileged communication, the privilege regarding those issues is waived. Rather, fairness should dictate that where litigants raise issues ***that will compel the litigants to necessarily rely upon privileged information at trial to defend those issues, the privilege as it relates only to those issues should be waived***. Allocations of burdens of pleading and proof should not be the basis for depriving privilege-holders of their privilege.

Wardleigh, 111 Nev. at 356, 891 P.2d at 1187 (emphasis added).

Because the privilege in Nevada is waived *only* where the party possessing the privilege relies on the *content* of the communication to prevail, there is no basis for finding a waiver here. Indeed, neither RDI nor any individual defendant has expressed any intent to introduce the content of privileged communications into evidence. Moreover, as indicated during the hearing of the Motion to Compel, there would be no testimony proffered regarding even the directors' consideration of attorney advice by Messrs. Adams and Kane – *unless required to truthfully answer questions posed by Cotter, Jr.*

The anticipatory waiver test is the *only* appropriate test to be applied to determine whether a waiver of the attorney-client privilege has been waived. Because the District Court's ruling was was not based on this test, and application of this test establishes that no waiver occurred, a writ should issue requiring the ruling to be reconsidered, and the Motion to Compel denied.

Moreover, even if the *Hearn* test were the law of Nevada, the District Court made no findings as to the essential components of that test.

2. The District Court Failed to Recognize the True Holder of the Privilege.

The District Court's ruling is also inconsistent with this Court's determination that a corporation controls its attorney-client privilege. The District Court's determination that a director could, by "invoking" the business judgment rule, waive the attorney-client privilege indicates a belief that directors and corporations are *collective* clients of the corporation's counsel. However, this Court expressly rejected this "collective corporate client" concept in *Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 69, 331 P.3d 905, 913 (2014). This Court noted that the collective corporate client approach would "have a perverse chilling effect on candid communications between corporate managers and counsel." And, indeed, the District Court's ruling in this matter could have a chilling effect on candid communications. The ruling makes it impossible for counsel to advise its corporate clients with any assurance of confidentiality.

While *Sands* notes that a corporation's current board of directors has the ability to control the privilege, this is in the context of their *collective* management of the company. Nothing in *Sands* indicates that individual defendants may unilaterally decide to waive the privilege without a vote of the entire board. To the contrary, this Court cited with approval *Milroy v. Hanson,* 875 F.Supp. 646, 648 (D.Neb.1995), which noted that the directors must vote on the waiver of a privilege as a board and that individual directors cannot control it. Moreover, such a vote must be made for the purpose of the management of the corporation. As the U.S. Supreme Court stated:

> [T]he power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors. The managers, of course, must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals.

Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985).

The District Court's ruling, when considered in conjunction with the U.S. Supreme Court's holding in *Weintraub*, would require board members to vote on whether to maintain the corporation's privilege, or to waive the corporation's privilege so that the individual directors may receive the benefit of the statutory presumption created in NRS 78.138. The District Court's ruling, therefore, sets up a trap with a manufactured conflict of interest for the board here, given that each member of the Board of Directors is also a defendant in this action.

C. Nevada Has No Exception to the Attorney-Client Privilege for Derivative Actions, Even Though It Has an Exception for Other Privileges for Derivative Actions.

As noted above, the District Court apparently acted under its interpretation of NRS 78.138(2) in creating an exception to Nevada's attorney-client privilege. The District Court's finding of an *implied* waiver through NRS 78.138(2) failed to take into account the *explicit* exceptions that the Nevada legislature adopted with respect to attorney-client privilege. The privilege, which existed under the common law, was codified in NRS 49.095. The Nevada legislature did create several exceptions to the attorney-client privilege in NRS 49.105, however, none are applicable here. Most significantly, the Nevada legislature did *not* create an exception to the privilege applicable to derivative actions in general, or to where the business judgment rule applies to a case.

Nevertheless, the legislature's demonstrated ability to draft precise privilege parameters is relevant to this inquiry. *Ashokan v. State, Dept. of Ins.*, 109 Nev. 662, 670, 856 P.2d 244, 249 (1993) (legislature's demonstrated ability in drafting privilege laws considered in determining whether plain language of privilege law should govern). Significantly, the Nevada legislature has created an *explicit* exception to the accountant-client privilege, when such privilege information is relevant to issue in a derivative action. NRS 49.205(6). The fact that the legislature created such an exception for the accountant-client privilege, but failed

to do so for the attorney-client privilege, indicates that the legislature did not intend for any such exception to the attorney-client privilege.

A court should not create exceptions to privileges not adopted by the legislature. "It is for the Legislature to determine how far to go in promoting its various goals [regarding privileged communications]. There is no justification for courts to strike a different balance." *Ashokan,* 109 Nev. at 669, 856 P.2d at 248 (internal quotations omitted).

D. The Business Judgment Rule Presumption Governs Regardless of Specific Invocation.

The District Court's indication that the business judgment rule is something that defendants affirmatively assert demonstrates the District Court's misinterpretation of the business judgment rule in Nevada, and its differences with the law of Delaware. The business judgment rule, codified at NRS 78.138(3), states:

> (3) Directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation.

NRS 78.138(3). A statutory presumption results in the presumed fact being considered true, ***unless it is rebutted with direct evidence***. Both the burden of production *and* the burden of proof to show that the presumed fact is untrue lies with the party challenging the presumption. NRS 48.180; *Yeager v. Harrah's Club, Inc.*, 111 Nev. 830, 834, 897 P.2d 1093, 1095 (1995). Accordingly, here, ***as***

a matter of law, unless and *until* Cotter, Jr. presents direct evidence sufficient to persuade a fact finder that the decisions made by the directors were not made in good faith, on an informed basis, and with a view to the interests of the corporation, ***and the fact finder actually makes such a finding***, the decisions made by the individual defendants here must be deemed to have been made in good faith, on an informed basis, and with a view to the best interests of RDI. The individual defendants have no obligation to prove that this is so, and no obligation to "invoke" the business judgment rule. It applies regardless of any affirmative invocation by them.

Similarly, a director defendant does not need to "invoke" the limitations on liability imposed by NRS 78.138 (7), which here requires Cotter, Jr. to prove both a breach of fiduciary duty, and that such breach involved intentional misconduct, fraud, or a knowing violation of law. Thus, in Nevada, the determination that a director or officer was acting in good faith is based on a *subjective*, rather than objective standard. *See Shoen v. SAC Holding Corp.*, 122 Nev. 621, 636, 137 P.3d 1171, 1181 (2006) (noting that business judgment rule creates a presumption that directors' actions were undertaken with "***an honest belief*** that the action would serve the corporation's interests") (emphasis added).

Because a corporate officer or director does not need to "invoke" the business judgment rule, reliance on the rule cannot not constitute the placement of

legal advice into issue in a case as required under the anticipatory waiver test adopted by *Wardleigh*. This interpretation of the business judgment rule presumption and the relationship between this presumption and the attorney-client privilege is in accordance with the Court's ruling in *Sands*. Any other interpretation would be inconsistent with that ruling and establish a need for an exception to the *Sands* rule to be created. Accordingly, this Court should issue a writ of mandamus directing the District Court to vacate the order.

E. No Other Jurisdiction Has Adopted the District Court's Interpretation of the Effect of the Business Judgment Rule.

As noted above, nothing in the text of NRS 78.138(2) references the attorney-client privilege, or otherwise suggests that a waiver of the privilege would result from application of the business judgment rule to a director defendant. Accordingly, the text of the statute itself does not give rise to a waiver. Nor is there any indication in the legislative history that, in adopting the provision, the Nevada legislature believed that an implicit waiver was created.

Nevada adopted the language now codified in NRS 78.138(2) in 1991. The wording was proposed in a "Study of Nevada Corporate Law" prepared by the firm of Vargas and Bartlett at the behest of the Nevada Secretary of State and included in the exhibits to legislative minutes. **Minutes of the Senate Committee on Judiciary and the Assembly Committee on the Judiciary, May 7, 1991.** That

report containing the proposed legislation stated the following with respect to the provisions relating to the business judgment rule:

> We suggest the legislature add a new section to the Nevada Revised Statutes with respect to the standards of conduct applicable to the board of directors and officers. . . . The language is derived from a review of similar provisions which have recently been enacted in several jurisdictions, including Indiana, Ohio, Arizona and Virginia.

Study of Nevada Corporate Law, Vargas and Bartlett, (available at http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/LHSupp/StudyNVCorpLaw.pdf, p. 32-b, last viewed, February 9, 2017). Thus, an indication of an intent to create an implied waiver of the business judgment rule is wholly absent from this report. Furthermore, there is nothing in this language to suggest that the language was adopted by reference to Delaware law, and thus, there is no basis on which to find Delaware law is persuasive for purposes of interpreting this language.

Moreover, as indicated by the report, the language of NRS 78.138(2) – wherein directors are permitted to rely on opinions of counsel, provided such directors do not have knowledge that would render such reliance unwarranted – was not unique to Nevada, even at the time of its adoption. In fact, similar language was *later* adopted by the Model Business Corporation Act ("MBCA"), § 8-213-14, and the same or similar language is now found in 42 states and the

District of Columbia.[10] Specifically, in the MBCA and in each of these 41 other jurisdictions, in the discharge of their duties, directors are expressly permitted to rely on, *inter alia*, the opinions of counsel, unless said directors have knowledge that would make such reliance "unwarranted."

Despite the widespread adoption of this provision, which was, in fact, essentially a ***codification of the common law***, *see* 3A Fletcher Cyc. Corp. § 1083, research has not revealed a single appellate case holding that this language required a waiver of the attorney-client privilege where the business judgment rule is applicable as a defense.[11] To the contrary, claims that merely reference consultation on attorney advice, without a claim that such reliance on the content of advice shields the party from liability, have been expressly rejected. *See e,g*,, *Nelson v. Alliance Hospitality Management,* LLC, 2013 WL 9554167 (N.C. Super. March 19, 2013) (rejecting claim that "the privilege was waived by Defendants' assertion of the business judgment rule as an affirmative defense."); *Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas*, 04 CIV 10014 PKL, 2009 WL 3111766, at *16 (S.D.N.Y. Sept. 28, 2009) (waiver does not occur merely because parties disclose that they consulted legal counsel on challenged action); *In re*

[10] The relevant language from the Model Act and each of these 43 jurisdictions may be found in Appendix 1.

[11] Moreover, the *only* trial court decision located which adopts this theory is that mentioned above, in *Wynn Resorts, Ltd. v. Okada.*

County of Erie, 546 F.3d 222, 229 (2d Cir. 2008) (claim of qualified immunity does not place advice of counsel at issue).

Indeed, in applying Virginia's business judgment rule, ***i.e., one of the sources of NRS 78.138(2)***, courts have even precluded discovery of *nonprivileged* materials consulted by directors in making their decisions, as the *content* of such documents is irrelevant; all that is relevant is that the directors did take measures to inform themselves. *See WLR Foods, Inc. v. Tyson Foods, Inc.*, CIV. A. 94-012-H, 1994 WL 377257 (W.D. Va. 1994), *supplemented,* CIV. A. 94-012-H, 1994 WL 702788 (W.D. Va. 1994), and *aff'd,* 65 F.3d 1172 (4th Cir. 1995), and *aff'd,* 65 F.3d 1172 (4th Cir. 1995).

In contrast to the cases cited above, case law that holds that materials that directors considered in making their decisions, including privileged communications, must be disclosed, have relied on 1) the fact that portions of the privileged content had been disclosed by the party claiming privilege, warranting disclosure of the remainder, see *Zirn v. VLI Corp*, 621 A. 2d 773 (Del. 1993); 2) the fiduciary exception created in *Garner v. Wolfinbarger,* 430 F. 2d 1093 (5th Cir. 1970); or 3) the *Hearn* rule. *See. e.g*., Shorewood *Chesapeake Corp. v. Shore*, 771 A.2d 293, 301, n. 8 (Del. Ch. 200; *In re Subpoena Issued to Dennis Friedman, Esq.,* 286 B.R. 505, 509 n. 4 (S.D.N.Y.2002) (stating that directors who proposed to use advice of counsel to substantiate their due care "created the situation where

their attorney's advice is both relevant and possibly crucial to the plaintiff's preparation of its case"). Not only are the facts of this case distinct, but none of these justifications fit within Nevada law. Accordingly, the District Court's ruling was contrary to Nevada law.

CONCLUSION

The District Court's order requiring production of privileged documents failed to consider the appropriate test for the waiver of the attorney-client privilege, ignores the *Sands* rule and the *Wardleigh* test, and instead imposes a brand new automatic waiver rule not countenanced or acknowledged by any other court. To the extent that the District Court's ruling may be shoehorned into the *Hearn* test, it both imposed a rule expressly rejected by this Court and failed to make the specific findings necessary for the imposition of that rule. An appeal of such decision following a final judgment would not offer RDI relief, because the privileged communications would have been revealed. Furthermore, the decision creates uncertainty as to the extent that ongoing advice received by RDI and its directors from corporate counsel will be protected by the attorney-client privilege, in both this and other litigation. Accordingly, this Court should entertain this Petition, and should grant Petitioner the requested relief, by prohibiting the the District Court from enforcing its orders requiring production of privileged

communications, or in the alternative, grant a writ of mandamus directing that such order be vacated.

Respectfully submitted this 13th day of February, 2017.

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CERTIFICATE OF COMPLIANCE WITH NRAP 28 AND 32

I hereby certify that this Petition complies with the formatting requirements of NRAP 32(c)(2), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word 2010 in Times New Roman 14, with double spacing. The brief contains approximately 5924 words.

Finally, I hereby certify that I have read this Petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 21(a)(3). I understand that I may be subject to sanctions in the event that the accompanying Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 13th day of February, 2017.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of GREENBERG TRAURIG, LLP, that in accordance therewith, I caused a copy of ***Petition Under NRAP 21 for Writ of Prohibition, or in the Alternative, Mandamus*** to be served to the Real Parties in Interest via electronic mean through the District Court's Wiznet E-Mail filing system on February 13, 2017, and upon

Judge Elizabeth Gonzalez
Eighth Judicial District Court of
Clark County, Nevada
Regional Justice Center
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Respondent
via hand-delivery on February 14, 2017

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