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 No. 72356 District Court Case No. A-13-719860-B, jointly administered with Case No. P-14-082942-E and Case No. A-16-735305-B **MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS MCEACHERN, JUDY CODDING, AND MICHAEL WROTNIAK'S JOINDER TO THE PETITION UNDER NRAP 21 FOR WRIT OF PROHIBITION, OR IN THE ALTERNATIVE, MANDAMUS**

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NRAP 26.1 DISCLOSURE

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

Margaret Cotter, Ellen Cotter, Douglas McEachern, Guy Adams, Edward Kane, Judy Codding, and Michael Wrotniak are individuals.

Margaret Cotter, Ellen Cotter, Douglas McEachern, Guy Adams, Edward Kane, Judy Codding, and Michael Wrotniak have been represented in this litigation by H. Stan Johnson of COHEN|JOHNSON|PARKER|EDWARDS; and Christopher Tayback and Marshall M. Searcy of Quinn Emanuel Urquhart & Sullivan, LLP.

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Margaret Cotter, Ellen Cotter, Douglas McEachern, Guy Adams, Edward Kane, Judy Codding, and Michael Wrotniak (together, the "Joining Directors"), who are members of the Board of Directors (the "Board") of Petitioner Reading International, Inc. ("Reading" or the "Company"), respectfully join in the Petition Under NRAP 21 for Writ of Prohibition, or in the Alternative, Mandamus filed by Petitioner Reading on February 13, 2017 (the "Petition").

I. INTRODUCTION

On February 13, 2017, Reading petitioned this Court for a writ of prohibition or, alternatively, mandamus against the District Court's Orders dated October 3, 2016, December 1, 2016, and January 20, 2017 (the "Orders"), which compel production and/or *in camera* review of attorney-client privileged legal advice. The District Court's Orders require Joining Directors to disclose legal advice given to Reading's Compensation and Stock Options Committee (the "Committee") in connection with approval of an exercise of an option to acquire shares of Reading voting stock.

In issuing its Orders, the District Court concluded that, when two directors on the Committee testified that they obtained legal advice to assist in exercising their business judgment concerning the option exercise, they waived the attorney-client privilege over that advice. The two directors did not disclose any of the substance of the advice provided to them, nor did they assert an advice of counsel

defense in any pleading in the case. Nonetheless, the District Court reasoned that, by claiming the protections of the business judgment rule, the two directors made the advice "fair game." If the District Court's reasoning were to be accepted, directors of Nevada corporations who obtain legal advice when making a business decision would automatically waive the attorney-client privilege by defending their decision in litigation—even in situations where the directors were not relying upon an advice of counsel defense and expressly did not intend to waive the privilege.

There is no basis for such a rule in the Nevada statutes or Nevada case law. To the contrary, Nevada's business judgment statute explicitly provides that, "[i]n performing their respective duties, directors . . . are entitled to rely on information, opinions, [and] reports . . . that are prepared or presented by" counsel. NRS 78.138(2). Nowhere does the business judgment statute—or the Nevada statute that enumerates the limited exceptions to the attorney-client privilege—suggest that directors who obtain legal advice when exercising their business judgment will automatically be forced to disclose the attorney-client privileged communications upon which they relied.

Nor is there a basis in Nevada public policy for limiting the attorney-client privilege when advice is received by corporate directors. As the legislative history makes clear, Nevada's corporations law embodies the legislative purpose of making Nevada an attractive jurisdiction for incorporation. No other American

jurisdiction conditions the presumptive benefit of the business judgement rule on a waiver of the corporation's attorney-client privilege. If the District Court's rulings stand, Nevada will not be "the 'domicile of choice' for corporations around the world" as envisioned by the Legislature. The exact opposite will be true—Nevada will be isolated as the least attractive jurisdiction for incorporation. Directors who receive legal advice would be forced to either (1) waive the personal protections of the business judgment rule, which is codified as a presumption in NRS 78.138(3), or (2) waive the benefits of the attorney-client privilege, which could be detrimental to the corporation and its stockholders. Stockholders of Nevada corporations would have to accept, as a cost of doing business in Nevada, the risk that a plaintiff, with interests that are not aligned with the best interests of the corporation and its stockholders, could use derivative litigation to gain access to privileged and confidential legal advice obtained by the corporation.

Moreover, if accepted as the law of this state, the District Court's rulings would contravene Nevada's public policy of encouraging corporate directors to make decisions on an informed basis. Because directors would not be able to consult with company counsel without the distinct possibility that such communications will be immediately discoverable in the event of litigation, directors may be discouraged from seeking information from corporate counsel. Such a rule would thus corner directors into a no-win situation. If directors do not

seek legal advice from corporate counsel, they will be criticized; if they do seek legal advice from corporate counsel, they would lose the attorney-client privilege with respect to such legal advice. Such a rule would spur an exodus of directors from Nevada corporations, as directors weigh the risk that plaintiffs may sue them for failing to seek legal advice against the risk that plaintiffs may force disclosure if directors seek legal advice. The lack of consistently robust protection of both directors' business judgment and the corporation's attorney-client privilege would scare directors away from Nevada, and chill communications between the corporation and its counsel.

For these reasons, as discussed further below, the Petition should be granted.

II. ISSUE PRESENTED

Does a corporate director, who is sued for breach of fiduciary duty, automatically waive the corporate attorney-client privilege if the director obtains legal advice to assist in the exercise of his or her business judgment, even if the director does not disclose the substance of the advice or assert an advice of counsel defense?

III. FACTS RELEVANT TO UNDERSTANDING THE PETITION

A. James Cotter, Jr. Files a Derivative Suit After Being Fired in June 2015

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.[1] Its voting shares have long been owned primarily by members of the Cotter family, including, until his death in 2014, James J. Cotter, Sr. ("Cotter, Sr.").[2] The shares controlled by Cotter, Sr., which consisted of more than 70 percent of the voting shares,[3] are presently property of his estate (the "Cotter Estate") or of a trust formed by Cotter, Sr. (the "Cotter Trust").[4] The executors of the Estate are Cotter, Sr.'s daughters,

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[1] *See* Vol. 4 APP 638 (James Cotter, Jr.'s Second Am. Compl. ¶ 26 ("Nominal defendant Reading International, Inc. (RDI) is a Nevada corporation and is, according to its public filings with the United States Securities and Exchange Commission (the 'SEC'), an internationally diversified company principally focused on the development, ownership and operation of entertainment and real estate assets in the United States, Australia and New Zealand.")).

[2] *See id.* at 639 (James Cotter, Jr.'s Second Am. Compl. ¶ 28 ("Since approximately 2000, and until he resigned as Chairman and CEO of [Reading] on or about August 7, 2014, James J. Cotter, Sr. (JJC, Sr.) was the CEO and Chairman of the Board of Directors of [Reading]. Additionally, JJC, Sr. (according to [Reading's] filings with the SEC, among other things) through the Trust controlled approximately seventy percent (70%) of the Class B voting stock of [Reading].")); *id.* at 640 (James Cotter, Jr.'s Second Am. Compl. ¶ 32 ("On or about September 13, 2014, JJC, Sr. passed.")).

[3] *Id.* at 639 (James Cotter, Jr.'s Second Am. Compl. ¶ 28 ("Additionally, JJC, Sr. (according to [Reading's] filings with the SEC, among other things) through the Trust controlled approximately seventy percent (70%) of the Class B voting stock of [Reading].")).

[4] Vol. 2 Joining Directors' Appendix ("JDAPP") 243 (Reading's DEF 14A filed on May 18, 2016 stating that "the Cotter Estate . . . is the record owner of 427,808 shares of [Reading's] Class B Stock (representing 25.5% of such Class B Stock)" and that "the Cotter Trust . . . is the record owner of 696,080 shares of Class B Stock (representing an additional 41.4% of such Class B Stock).").

Joining Directors Ellen Cotter and Margaret Cotter, who are members of Reading's Board of Directors.[5]

On June 12, 2015, Reading's Board terminated the employment of James Cotter, Jr. ("Cotter, Jr.") as the Company's President and Chief Executive Officer.[6] That same day, making good on his prior threats,[7] Cotter, Jr., who is also a member of Reading's Board,[8] filed a lawsuit against the Company and each of Reading's other directors asserting derivative claims based on his termination and seeking reinstatement as Reading's Chief Executive Officer and President.[9] For his derivative claims, Cotter, Jr. asserted that both the directors who voted in favor of his termination and the directors who voted against his termination had breached their fiduciary duties to the Company.[10]

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[5] *Id.* at 236 (Reading's DEF 14A filed on May 18, 2016 stating: "Ellen M. Cotter and Margaret Cotter are the Co-Executors of their father's (James J. Cotter, Sr.) estate . . . ."); *id.* at 243 (Reading's DEF 14A filed on May 18, 2016 stating: "Ellen M. Cotter has been a member of our Board since March 13, 2013 . . . ."); *id.* at 245 (Reading's DEF 14A filed on May 18, 2016 stating: "Margaret Cotter has been a Director of our Company since September 27, 2002 . . . .").

[6] Vol. 1 JDAPP 81 (Reading's DEF 14A filed on October 20, 2015 stating that, "[o]n June 12, 2015, the Board terminated the employment of James J. Cotter, Jr. as our President and Chief Executive Officer . . . .").

[7] *See* Vol. 1 JDAPP 54; Vol. 1 JDAPP 56.

[8] Vol. 4 APP 635 (Cotter, Jr.'s Second Am. Compl. ¶ 17 (stating that Cotter, Jr. "has been a director of [Reading] since on or about March 21, 2002.")).

[9] *See generally* Vol. 1 APP 1-31 (Cotter, Jr.'s Compl.).

[10] *See id.* at 4-6 (Cotter, Jr.'s Compl. ¶¶ 8-14 (reflecting that directors Margaret Cotter, Ellen Cotter, Edward Kane, Guy Adams, Douglas McEachern,

On July 14, 2015, the Company filed an arbitration demand with the American Arbitration Association against Cotter, Jr.[11] The demand seeks, among other things, declaratory relief that Cotter, Jr.'s employment and employment agreement with the Company have been validly terminated and that the Board validly removed him from his positions as President and Chief Executive Officer of the Company and positions with the Company's subsidiaries.[12] Cotter, Jr. filed a counter-complaint in the arbitration, asserting claims for breach of his employment contract, declaratory relief, and contractual indemnification.[13]

In addition, in trust litigation pending in California state court, Cotter, Jr. has asserted many of the claims alleged in his derivative suit. There, Cotter, Jr. alleges

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Timothy Storey, and William Gould were named as defendants in this Action)); *id. at* 23 (Cotter, Jr.'s Compl. ¶ 105 ("[Ellen Cotter], [Margaret Cotter], [Guy] Adams, [Edward] Kane and [Douglas] McEachern each voted to terminate [Cotter, Jr.]. . . . [Timothy] Storey and [William] Gould voted against terminating [Cotter, Jr.] as President and CEO.")).

[11] Vol. 2 JDAPP 241 (Reading's DEF 14A filed on May 18, 2016).

[12] *Id.*

[13] *Id.*

that his termination[14] and other alleged breaches of duties[15] are bases for removing his sisters Ellen and Margaret Cotter as trustees of the Cotter Trust,[16] which controls approximately 41% of the Class B voting stock of Reading.[17]

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[14] *See, e.g.*, Vol. 1 JDAPP 120 (Petition by Cotter, Jr. for Immediate Suspension of Powers of Ann Margaret Cotter and Ellen Cotter as Co-Trustees and for Appointment of Temporary Trustee; Petition for Permanent Removal (the "Petition for Removal") ¶ 4 ("Enraged, Margaret and Ellen [Cotter] exploited their fiduciary powers to stage a boardroom coup and fire [Cotter,] Jr.")); Vol. 4 APP 675 (Cotter, Jr.'s Second Am. Compl. ¶ 177 ("They failed to engage in any process to assess the skills and performance of [Cotter, Jr.] as President or as CEO in connection with the decision to threaten to terminate and to terminate him, and instead pre-empted an ongoing process[.]")).

[15] *See, e.g.*, Vol. 1 JDAPP 119 (Petition for Removal ¶ 2 ("Abusing their power over the stock as co-trustees of the Trust and executors of [Cotter,] Sr.'s will, Margaret [Cotter] and Ellen [Cotter] orchestrated promotions and massive compensation increases for themselves. . . . Ellen [Cotter] deliberately interfered with and corrupted a search process set in motion by the [Reading] Board so that she could take the CEO job for herself.")); *id.* at 121 (Petition for Removal ¶ 6 ("Ellen [Cotter] then promoted Margaret [Cotter] to a position to which she is also wholly unqualified.")); Vol. 4 APP 631 (Cotter, Jr.'s Second Am. Compl. ¶ 6 ("[Ellen Cotter and Margaret Cotter] regularly sought, and often received, money, benefits, titles, positions and/or promotions they would not have received but for their status as potential controlling shareholders, including [Ellen Cotter] being appointed and compensated as CEO in January 2016 and [Margaret Cotter] being appointed and compensated as Executive Vice President-Real Estate Management and Development-NYC ('EVP-RED-NYC') in March 2016.")).

[16] *See* Vol. 1 JDAPP 137 (Petition for Removal, Prayer for Relief ("WHEREFORE, [Cotter, Jr.] prays for an order granting the Petition as follows: . . . 3. Permanently removing Margaret [Cotter] and Ellen [Cotter] and appointing Michael J. Seibert as successor trustee of the [Cotter] Trust in their place . . . .")).

[17] Vol. 2 JDAPP 250 (Reading's DEF 14A filed on May 18, 2016 reflecting beneficial ownership by the Cotter Trust of 696,080 shares, or 41.4%, of Class B stock).

B. Other Stockholders Intervene in the Action

On August 19, 2015, the District Court granted a motion allowing T2 Partners Management, L.P., T2 Accredited Fund, L.P., T2 Qualified Fund, L.P., Tilson Offshore Fund, Ltd., T2 Partners Management I, LLC, T2 Partners Management Group, LLC, JMG Capital Management, LLC, and Pacific Capital Management, LLC, (the "Intervenors") to intervene in the case.[18] At the time they filed their suit, the Intervenors owned approximately 4.8% of Reading's outstanding Class A non-voting common stock.[19]

[18] Vol. 1 JDAPP 58 (Order Granting Mot. to Intervene). Subsequently, the Intervenors amended their complaint to add two newly-appointed Reading directors as defendants, as well as the Company's in-house legal counsel. *See generally* Vol. 1 APP 124-162 (Intervenors' First Am. Compl.).

[19] *See* Vol. 1 APP 126 (Intervenors' First Am. Compl. ¶ 2 (reflecting ownership by Intervenor T2 Accredited Fund, L.P. of 174,019 shares of Class A common stock)); *id.* (Intervenors' First Am. Compl. ¶ 3 (reflecting ownership by Intervenor T2 Qualified Fund, L.P. of 53,817 shares of Class A common stock)); *id.* at 127 (Intervenors' First Am. Compl. ¶ 4 (reflecting ownership by Intervenor Tilson Offshore Fund, Ltd. of 291,406 shares of Class A common stock)); *id.* (Intervenors' First Am. Compl. ¶ 7 (reflecting ownership by Intervenor JMG Capital Management, LLC of 10,000 shares of Class A common stock)); *id.* (Intervenors' First Am. Compl. ¶ 8 (reflecting ownership by Intervenor Pacific Capital Management, LLC of 515,934 shares of Class A common stock)); *id.* at 128 (Intervenors' First Am. Compl. ¶ 11 ("As of May 6, 2015, there were 21,745,484 shares of Class A non-voting common stock (NASDAQ: RDI).")).

C. The Cotter Estate Exercises the Cotter Estate Option in September 2015

In or about September 2015—after Cotter, Jr. filed this Action—Ellen and Margaret Cotter, as the Co-Executors of the Cotter Estate,[20] sought to exercise an option owned by the Estate to acquire 100,000 shares of Class B stock ("the Cotter Estate Option").[21] They sought to exercise the Cotter Estate Option using Reading Class A non-voting stock rather than cash.[22] Pursuant to Reading's Stock Option Plan, the use of any consideration other than cash to pay an option exercise price requires the approval of the Committee.[23] Reading's Stock Option Plan also expressly provides that "delivery by the optionee of shares of Common Stock

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[20] Vol. 2 JDAPP 251 (Reading's DEF 14A filed on May 18, 2016 ("On December 22, 2014, the District Court of Clark County, Nevada, appointed Ellen M. Cotter and Margaret Cotter as co-executors of the Cotter Estate.")).

[21] Vol. 1 JDAPP 61 (Minutes from September 21, 2015 Meeting of Reading's Committee).

[22] *Id.*

[23] *See* Vol. 1 JDAPP 48 (1999 Stock Option Plan of Reading as amended December 31, 2001 ("Except as provided below, payment in full, in cash, shall be made for all stock purchased at the time written notice of exercise of an Option is given to the Company, and proceeds of any payment shall constitute general funds of the Company. The Administrator, in the exercise of its absolute discretion after considering any tax, accounting and financial consequences, may authorize any one or more of the following additional methods of payment: . . . (b) Subject to the discretion of the Administrator and the terms of the stock option agreement granting the Option, delivery by the optionee of shares of Common Stock already owned by the optionee for all or part of the Option price, provided the fair market value (determined as set forth in Section 6.1.9) of such shares of Common Stock is equal on the date of exercise to the Option price, or such portion thereof as the optionee is authorized to pay by delivery of such stock . . . .")).

already owned by the optionee for all or part of the Option price" may be used, in lieu of cash, as a method of payment.[24]

In connection with the Committee's determination of whether to permit the use of Class A shares to pay the exercise price of the Cotter Estate Option, the Committee—of which Joining Directors Edward Kane ("Kane") and Guy Adams ("Adams") were members during the relevant time period[25]—sought legal advice.[26] The Committee sought this advice because, among other things, Cotter, Jr. had taken two contradictory positions: (1) Cotter, Jr. asserted to the District Court that the Cotter Estate Option is an asset *of the Cotter Estate and not the Cotter Trust*;[27]

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[24] *Id.*

[25] *See* Vol. 1 JDAPP 61 (Minutes from September 21, 2015 Meeting of Reading's Committee).

[26] *See, e.g.*, Vol. 1 JDAPP 199 (April 28, 2016 Adams Dep. Tr. 216:5-9 ("I conferred with legal counsel. . . . [In-house Company counsel] Craig Tompkins, [outside counsel] Greenberg Traurig and [in-house Company counsel] Bill Ellis.")).

[27] In addition to the derivative suit, the District Court is also presiding over a probate action brought by Cotter, Jr. In that action, Cotter, Jr. filed a Renewed Petition for Partial Distribution of Assets, which states: "Co-Executors acquired an additional 100,000 shares of [Reading] Class B stock by exercising the Estate's option." Vol. 1 JDAPP 143 (Email from Cotter, Jr.'s counsel attaching Cotter, Jr.'s Renewed Petition for Partial Distribution of Assets filed on April 22, 2016). Moreover, in an email objecting to the use of Class A shares to pay for the Option Exercise, Cotter, Jr. did not dispute that the Cotter Estate Option was owned by the Cotter Estate, and he did not claim that the Committee could and should block the option exercise in the event that the Cotter Estate paid cash to exercise the Cotter Estate Option. *See* Vol. 1 JDAPP 69 (Ex. 406 (September 21, 2015 Email from Cotter, Jr.)).

but (2) Cotter, Jr. also asserted to the Committee that the Co-Executors of the Cotter Estate could not exercise the Cotter Estate Option *because the Cotter Estate Option belonged to the Cotter Trust and not the Cotter Estate*.[28] In addition, Cotter, Jr. had already filed his derivative action, which individually named the three members of the Committee, including Kane and Adams, as defendants.[29] The Committee ultimately approved the use of Class A shares in connection with the option exercise (the "Option Exercise").[30]

In October 2015, Cotter, Jr. amended his complaint to add allegations regarding the Option Exercise, and Kane and Adams' conduct specifically, in support of his claims for breach of fiduciary duty.[31] Cotter, Jr. alleged that the

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[28] Vol. 1 JDAPP 222 (May 2, 2016 Kane Dep. Tr. 102:13-21 ("Mr. Cotter, Jr., was saying those options belong to the trust, that they had been transferred to the living trust, and that they could not exercise that option on behalf of the estate.")).

[29] *See* Vol. 1 APP 4-5 (Cotter, Jr.'s Compl. ¶ 10 (reflecting that Cotter, Jr. sued Kane)); *id.* at 5 (Cotter, Jr.'s Compl. ¶ 11 (reflecting that Cotter, Jr. sued Adams)); *id.* (Cotter, Jr.'s Compl. ¶ 13 (reflecting that Cotter, Jr. sued Timothy Storey)); Vol. 1 APP 105 (Cotter, Jr.'s First Am. Compl. ¶ 132 (reflecting Kane, Adams, and Timothy Storey were members of the Committee)).

[30] Vol. 1 JDAPP 63 (Minutes from September 21, 2015 Meeting of Reading's Committee).

[31] *Compare* Vol. 1 APP 1-31 (Cotter, Jr.'s Compl. (containing no allegations about the Option Exercise)) *with* Vol. 1 APP 77 (Cotter, Jr.'s First Am. Compl. ¶ 10 ("Plaintiff is informed and believes that on or about September 21, 2015, Kane and Adams, purporting to act as directors and as members of the Compensation Committee, authorized the request of [Ellen Cotter] and [Margaret Cotter] that the Estate be allowed to use liquid class A [Reading] stock to exercise the option to acquire the 100,000 shares. Kane and Adams did so in derogation of

Cotter Estate should not have been allowed to exercise the Cotter Estate Option using Reading Class A non-voting stock rather than cash.[32] Cotter, Jr. further alleged that, through their actions, Kane and Adams had assisted Ellen and Margaret Cotter in taking additional control of Reading,[33] giving Ellen and

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the interests of [Reading], which received no benefit from receiving class A stock (rather than cash), which merely reduced the float of such stock.")), *id.* at 105 (Cotter, Jr.'s First Am. Compl. ¶ 132 (similar)), *id.* at 108 (Cotter, Jr.'s First Am. Compl. ¶ 145 ("Kane and Adams acted to facilitate this scheme, acting as directors and members of the Compensation Committee to effectuate the acquisition by the Estate of 100,000 shares of class B voting stock, including as alleged herein.")).

[32] *See* Vol. 1 APP 77 (Cotter, Jr.'s First Am. Compl. ¶ 10 ("Plaintiff is informed and believes that on or about September 21, 2015, Kane and Adams, purporting to act as directors and as members of the Compensation Committee, authorized the request of [Ellen Cotter] and [Margaret Cotter] that the Estate be allowed to use liquid class A [Reading] stock to exercise the option to acquire the 100,000 shares. Kane and Adams did so in derogation of the interests of [Reading], which received no benefit from receiving class A stock (rather than cash), which merely reduced the float of such stock.")).

[33] *See id.* (Cotter, Jr.'s First Am. Compl. ¶ 10 ("Plaintiff is informed and believes that [Ellen Cotter] and [Margaret Cotter] took such actions because it is their understanding that, absent the exercise of the option for the Estate to acquire 100,000 shares of [Reading] class B voting stock which [Ellen Cotter] and [Margaret Cotter] will purport to vote as executors of the Estate, [Ellen Cotter] and [Margaret Cotter] lacked sufficient votes to control the 2015 [Annual Stockholders Meeting] and, in effect, unilaterally elect as [Reading] directors whomever they choose.")); *id.* at 108 (Cotter, Jr.'s First Am. Compl. ¶ 145 ("Kane and Adams acted to facilitate this scheme, acting as directors and members of the Compensation Committee to effectuate the acquisition by the Estate of 100,000 shares of class B voting stock, including as alleged herein.")); *id.* at 104 (Cotter, Jr.'s First Am. Compl. ¶ 127 ("Plaintiff is informed and believes that [Ellen Cotter] and [Margaret Cotter] agreed to act and have taken actions to increase the number of [Reading] class B shares they can vote at [Reading's] 2015 [Annual Stockholders Meeting] in order to attempt to control that vote without including the class B voting stock held in the name of the [Cotter] Trust.")).

Margaret Cotter additional voting power in the event that they were somehow prevented from voting the other 596,080 shares of Reading Class B stock that they controlled through the Cotter Estate, or the 427,808 shares of Reading Class B stock that they controlled through the Cotter Trust.[34]

Joining Directors Kane, Adams, Margaret Cotter, Ellen Cotter, and Douglas McEachern filed an Answer to the First Amended Complaint asserting numerous affirmative defenses.[35] They did not assert an "advice of counsel" defense.[36]

[34] *See* Vol. 1 JDAPP 84 (Reading's DEF 14A filed on October 20, 2015 ("Ms. Cotter is the Co-Executor of her father's estate, which is the record owner of 427,808 shares of our Class B Stock (representing 25.5% of such Class B Stock). Ms. Cotter is also a Co-Trustee of the James J. Cotter, Sr. Trust, which is the record owner of 696,080 shares of Class B Stock (representing an additional 44.0% of such Class B Stock).")). All three iterations of Cotter, Jr.'s complaints in this Action fail to acknowledge that (1) the Option Exercise was only before the Committee because the Co-Executors of the Cotter Estate sought to use Class A common stock to pay the exercise price; and (2) no approval by the Committee would have been necessary had the Co-Executors used cash (which they could have raised by selling the Class A shares in the market) to pay the exercise price for the Option Exercise. *See generally* Vol. 1 APP 1-31 (Cotter, Jr.'s Compl.); Vol. 1 APP 74-123 (Cotter, Jr.'s First Am. Compl.); Vol. 4 APP 628-684 (Cotter, Jr.'s Second Am. Compl.).

[35] *See* Vol. 1 APP 178-182 (Answer to First Am. Compl. ¶¶ 195-220).

[36] *See id.*

D. Joining Directors Kane and Adams Give Deposition Testimony about the Option Exercise

Cotter, Jr. deposed Guy Adams on April 28, 2016 and Edward Kane on May 2, 2016.[37] At the depositions of each of Kane and Adams, Cotter, Jr.'s counsel asked various questions about the Option Exercise.[38] Specifically, Cotter, Jr.'s counsel asked Kane and Adams whether they relied on legal advice in connection with the Committee's decision to authorize the Option Exercise.[39] Adams and Kane acknowledged seeking legal advice to determine whether the Cotter Estate Option was an asset of the Cotter Estate (as opposed to the Cotter Trust or some other person or entity). Upon questioning, Joining Director Adams testified:

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[37] *See* Vol. 1 JDAPP 189 (April 28, 2016 Adams Dep. Tr.); Vol. 1 JDAPP 213 (May 2, 2016 Kane Dep. Tr.).

[38] *See, e.g.*, Vol. 1 JDAPP 203 (April 28, 2016 Adams Dep. Tr. 220:9-20 ("Q. Okay. But you relied on this particular Greenberg Traurig memo in connection with making the decision to vote as a member of the compensation committee to allow Ellen and Margaret Cotter, as executors, to exercise the supposed option to acquire 100,000 shares of Class B voting stock; is that right?")); Vol. 1 JDAPP 224 (May 2, 2016 Kane Dep. Tr. 104:13-18 ("Q. Well, as to you personally, Mr. Kane, what did you do to reach a conclusion with respect to the question of whether Ellen and Margaret Cotter as executors of the estate of Jim Cotter, Sr., had the right to exercise the 100,000 share option?")).

[39] *See* Vol. 1 JDAPP 203 (April 28, 2016 Adams Dep. Tr. 220:9-20 ("Q. Okay. But you relied on this particular Greenberg Traurig memo in connection with making the decision to vote as a member of the compensation committee to allow Ellen and Margaret Cotter, as executors, to exercise the supposed option to acquire 100,000 shares of Class B voting stock; is that right?")); Vol. 1 JDAPP 218 (May 2, 2016 Kane Dep. Tr. 98:7-19 ("Q. Mr. Kane, directing your attention to the Greenberg Traurig memo or opinion, to what use, if any, did you put that? . . . Just tell me, did you rely on it for any purpose?")) .

Q. Did you ask [Ellen Cotter] -- well, what did you do to ascertain [the 100,000 share option] was [the Cotter Estate's] asset?

A. I informed myself through legal counsel.

MR. TAYBACK: Don't -- don't disclose the communications with legal counsel. You can simply say you conferred with legal counsel.

THE WITNESS: **I conferred with legal counsel.**

BY MR. KRUM:

Q. Who?

A. **Craig Tompkins, Greenberg Traurig and Bill Ellis.**

Q. When did you confer with each of them?

A. There were emails about this particular thing, and Tim Storey wanted -- if I -- as I recall, he wanted a legal written opinion or something like that. And I didn't think there was a question that the shares were within the estate, and anyway, Ed Kane agreed, we should -- we should make sure we're on a firm basis that they have it and can do -- can exercise this. So I inquired, and to my knowledge, Ed Kane inquired, and we both became of the opinion **that it was an asset of the estate** and they could exercise this transaction.[40]

[40] Vol. 1 JDAPP 198-199 (April 28, 2016 Adams Dep. Tr. 215:24-216:22) (emphasis added). *See also* Vol. 2 JDAPP 303-304 (June 9, 2016 Kane Dep. Tr. 401:19-402:12 ("Q. Mr. Kane, when you say you looked at whether the B options . . . meaning the 100,000-share option . . . rested with the Estate, what exactly does that mean? A. It means that the Estate through the executor was exercising those options. So they had -- the options had to lie with the Estate. Q. When you say rest with or lie with the Estate, do you mean to -- does that include or mean that they were at the time legally held by the Estate as distinct from some other person or entity? A. I believe that's a fair question, yes. Q. What steps, if any, did you take personally to answer that question? A. I consulted with counsel on that question.")).

The only written piece of legal advice Adams and Kane testified they relied on in connection with the Committee's determination was a single memorandum from the law firm Greenberg Traurig, though Adams testified that he relied on the memorandum from Greenberg Traurig, in addition to Reading in-house counsel Craig Tompkins and Bill Ellis:

> Q. Okay. But you relied on this particular Greenberg Traurig memo in connection with making the decision to vote as a member of the compensation committee to allow Ellen and Margaret Cotter, as executors, to exercise the supposed option to acquire 100,000 shares of Class B voting stock; is that right?
>
> MR. TAYBACK: Objection to the extent that misstates his prior testimony. You can answer.
>
> THE WITNESS: Yes, in addition to Craig Tompkins and Bill Ellis.[41]

Neither Kane nor Adams disclosed the substance of any attorney-client communications at their deposition,[42] and both were specifically instructed by

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[41] Vol. 1 JDAPP 203 (April 28, 2016 Adams Dep. Tr. 220:9-20). *See also* Vol. 1 JDAPP 224 (May 2, 2016 Kane Dep. Tr. 104:13-23 ("Q. Well, as to you personally, Mr. Kane, what did you do to reach a conclusion with respect to the question of whether Ellen and Margaret Cotter as executors of the estate of Jim Cotter, Sr., had the right to exercise the 100,000 share option? A. I asked for a legal opinion. Q. And I don't want to repeat everything you've already told me. You're referring to the Greenberg Traurig opinion you discussed earlier? A. I believe that's correct, yes.")).

[42] *See, e.g.*, Vol. 1 JDAPP 191-211 (April 28, 2016 Adams Dep. Tr. 208:10-228:21 (reflecting no disclosure by Adams of the substance of any attorney-client communications)); Vol. 1 JDAPP 215-225 (May 2, 2016 Kane Dep.

counsel not to disclose or describe the substance of any legal advice received regarding the Option Exercise.[43] Neither Kane nor Adams claimed at their depositions that they intended to assert an "advice of counsel" affirmative defense or that they would seek to introduce the substance of any attorney-client communications at trial.[44] Neither Kane nor Adams testified that he relied solely on any legal advice in deciding to allow the use of Class A shares to pay the exercise price for the Cotter Estate Option.[45]

Tr. 95:5-105:5 (reflecting no disclosure by Kane of the substance of any attorney-client communications)).

[43] *See, e.g.*, Vol. 1 JDAPP 198-199 (April 28, 2016 Adams Dep. Tr. 215:24-216:5 ("[D]on't disclose the communications with legal counsel. You can simply say you conferred with legal counsel.")); Vol. 1 JDAPP 215-216 (May 2, 2016 Kane Dep. Tr. 95:24-96:5 ("Don't get into the substance of any legal advice.")).

[44] *See, e.g.*, Vol. 1 JDAPP 191-211 (April 28, 2016 Adams Dep. Tr. 208:10-228:21 (reflecting no claim by Adams that he intended to assert an "advice of counsel" affirmative defense or that he would seek to introduce the substance of any attorney-client communications at trial)); Vol. 1 JDAPP 215-225 (May 2, 2016 Kane Dep. Tr. 95:5-105:5 (reflecting no claim by Kane that he intended to assert an "advice of counsel" affirmative defense or that he would seek to introduce the substance of any attorney-client communications at trial)).

[45] *See, e.g.*, Vol. 1 JDAPP 191-211 (April 28, 2016 Adams Dep. Tr. 208:10-228:21 (reflecting no testimony by Adams that he relied solely on any legal advice in deciding to allow the use of Class A shares to pay the exercise price for the Cotter Estate Option)); Vol. 1 JDAPP 215-225 (May 2, 2016 Kane Dep. Tr. 95:5-105:5 (reflecting no testimony by Kane that he relied solely on any legal advice in deciding to allow the use of Class A shares to pay the exercise price for the Cotter Estate Option)).

E. The Intervenors Conduct Extensive Discovery and Decide to Dismiss Their Claims

The Intervenors conducted extensive discovery, which included (1) depositions of Adams, Kane, Margaret Cotter, Ellen Cotter, William Gould, Douglas McEachern, Timothy Storey, and Cotter, Jr.; (2) production by Reading of over 13,900 documents; and (3) production by the Individual Defendants of over 7,900 documents.[46]

After taking extensive discovery from the Joining Directors, the Intervenors decided to dismiss their claims against the Joining Directors, and, on July 12, 2016, the Intervenors, the Company, the Joining Directors, and other defendants in the Intervenors' suit jointly moved for preliminary approval of a settlement agreement between them.[47] Pursuant to the settlement agreement, none of the Intervenor's costs, which totaled approximately $450,000 through May 2016,[48] were

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[46] *See* Vol. 2 APP 291 (Joint Mot. for Preliminary Approval of Settlement stating: "In connection with the litigation, James Cotter, Jr. and the [Intervenors] conducted extensive discovery on these matters, which included depositions of Guy Adams, Margaret Cotter, Ellen Cotter, William Gould, Edward Kane, Douglas McEachern, Timothy Storey, and James Cotter, Jr. In response to discovery requests, Reading produced over 13,900 documents, and the Individual Defendants produced over 7,900 documents.").

[47] *See generally id.* at 285-377 (Joint Mot. for Preliminary Approval of Settlement).

[48] *See* Vol. 2 JDAPP 285-286 (June 1, 2016 Jonathan Glaser Dep. Tr. 138:17-139:15 ("I believe our fees are -- I believe 450, approximately.")).

reimbursed,[49] and no payment was otherwise made to them.[50] In a press release included with the settlement agreement, the Intervenors stated:

> We are pleased with the conclusions reached by our investigations as Plaintiff Stockholders and now firmly believe that the Reading Board of Directors has and will continue to protect stockholder interests and will continue to work to maximize shareholder value over the long term. We appreciate the Company's willingness to engage in open dialogue and are excited about the Company's prospects. Our questions about the termination of James Cotter, Jr., and various transactions between Reading and members of the Cotter family-or entities they control-have been definitively addressed and put to rest. We are impressed by measures the Reading Board has made over the past year to further strengthen corporate governance. We fully support the Reading Board and management team and their strategy to create stockholder value.[51]

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[49] Vol. 2 JDAPP 330 (July 13, 2016 Press Release stating: "In connection with the dismissal of the Derivative Claims, the parties have agreed to mutual general releases with each party bearing his, her or its own legal fees and expenses."); Vol. 7 APP 1436-1437 (October 20, 2016 Order Granting Settlement with [Intervenors] and Final Judgment ("Based on such findings, the Court, HEREBY ORDERS THE FOLLOWING: . . . . 3. The [Intervenors], the [Joining Directors and other defendants], and [Reading] shall each be responsible for their own attorneys' fees and costs.")).

[50] *See generally* Vol. 7 APP 1435-1449 (October 20, 2016 Order Granting Settlement with [Intervenors] and Final Judgment (reflecting no payment to Intervenors)).

[51] Vol. 2 JDAPP 330 (July 13, 2016 Press Release).

F. Cotter, Jr. Moves to Compel Production of Privileged Communications

On August 12, 2016, Cotter, Jr. filed a Motion to Compel Production of Documents and Communications Related to Advice of Counsel Defense.[52] Through this Motion, Cotter, Jr. sought production by Adams, Kane, Ellen Cotter, Margaret Cotter, Douglas McEachern, and the Company of "all documents and communications pertaining to attorney advice and opinions defendants Adams and Kane testified they relied on as members of the [Reading] Board of Directors Compensation Committee in deciding to authorize [Ellen Cotter's] and [Margaret Cotter's] exercise of James Cotter, Sr.'s supposed option to purchase 100,000 shares of Class B voting stock."[53] Among the purported bases for Cotter, Jr.'s Motion was that Kane and Adams had put attorney advice and opinions at issue in this Action through their deposition testimony, and therefore were no longer entitled to claim such communications were privileged.[54] Joining Directors

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[52] *See generally* Vol. 3 APP 378-512 (Cotter, Jr.'s Mot. to Compel Production of Documents and Communications Related to Advice of Counsel Defense).

[53] *Id.* at 378.

[54] *Id.* at 378-379 ("First, the [Joining Directors] have prevented discovery into the advice and opinions, even though they waived any privilege by their testimony placing the advice and opinions directly at issue in this litigation."); *id.* at 389 ("Both Adams and Kane testified that they relied upon advice from Tompkins, Ellis, and Greenberg Traurig when they authorized the exercise of the 100,000 share option. Having thereby indicated their intention of relying upon that

opposed Cotter, Jr.'s Motion on the basis that they had neither asserted an advice of counsel defense nor put the substance of attorney-client communications at issue in the litigation.[55] In addition, on its own behalf, Reading opposed the motion on the grounds that the corporation had not waived the attorney-client privilege, and that Cotter, Jr. had conceded in his pleadings that the Cotter Estate could properly exercise the Cotter Estate Option.[56]

G. The District Court Orders Production of Privileged Communications

Cotter, Jr.'s Motion was heard by the District Court on August 30, 2016. At the hearing, the District Court stated that, "[t]o 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

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advice, they have placed the advice and communications at issue and waived any privilege concerning the advice and communications.").

[55] *See* Vol. 3 APP 521-523 (Joining Directors' Opp'n. to Cotter, Jr.'s Mot. to Compel Production of Documents and Communications Related to Advice of Counsel). *See also* Vol. 1 APP 178-182 (Answer to Cotter, Jr.'s First Am. Compl. ¶¶195-220 (asserting numerous affirmative defenses but not an "advice of counsel" defense)); Vol. 1 APP 231-235 (Reading's Answer to Cotter, Jr.'s First Am. Compl. (asserting numerous affirmative defenses but not an "advice of counsel" defense)); Vol. 8 APP 1723-1726 (Reading's Answer to Cotter, Jr.'s Second Am. Compl. (asserting numerous affirmative defenses but not an "advice of counsel" defense)).

[56] *See* Vol. 3 APP 543, 545-549, 555 (Reading's Opp'n. to Cotter, Jr.'s Mot. to Compel Production of Documents and Communications Related to Advice of Counsel Defense).

communication even though it's the company's privilege."[57] The Court further stated:

> If [Joining Directors] 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 [NRS 78.138(2)] is written. You can't take advantage of that advice and then not tell anybody what it was.[58]

The District Court then granted Cotter, Jr.'s Motion in part, issuing its order on October 3, 2016 (the "October 3 Order").[59] The District Court ordered that Joining Directors produce "the legal opinion referenced by Messrs. Kane and Adams in their deposition testimony as having been relied upon relating to the 100,000 share option[,]" including:

> 1. Any and all documents or communications to or from [Company counsel] Tompkins concerning the 100,000 share option, and [Ellen Cotter's] and [Margaret Cotter's] right or ability as executors of the Estate to exercise the option;
>
> 2. Any and all communications to or from . . . [Company counsel] Ellis concerning the 100,000 share option, and [Ellen Cotter's] and [Margaret Cotter's] right or ability as executors of the Estate to exercise the option;
>
> 3. Any and all communications to or from any attorney or employee of [outside Company counsel] Greenberg Traurig concerning the 100,000 share option, and [Ellen Cotter's] and [Margaret Cotter's] right or ability as executors of the Estate to exercise the option;

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[57] Vol. 3 APP 618 (August 30, 2016 H'rg Tr. 15:8-21).
[58] *Id.* at 620 (August 30, 2016 H'rg Tr. 17:7-14).
[59] Vol. 7 APP 1372-1374 (October 3 Order).

4. Any and all documents, communications, materials, or information relied upon or referred to in any advice, opinion, or communication from [Company counsel] Tompkins concerning the 100,000 share option, and [Ellen Cotter's] and [Margaret Cotter's] right or ability as executors of the Estate to exercise the option;

5. Any and all documents, communications, materials, or information relied upon or referred to in any advice, opinion, or communication from [Company counsel] Ellis concerning the 100,000 share option, and [Ellen Cotter's] and [Margaret Cotter's] right or ability as executors of the Estate to exercise the option; and

6. Any and all documents, communications, materials, or information relied upon or referred to in any advice, opinion, or communication from any attorney or employee of [outside Company counsel] Greenberg Traurig concerning the 100,000 share option, and [Ellen Cotter's] and [Margaret Cotter's] right or ability as executors of the Estate to exercise the option.[60]

H. The Company and Joining Directors Move For Reconsideration or, in the Alternative, Clarification

Four days later, on October 7, 2016, the Company filed a Motion to Reconsider or Clarify Order Granting James J. Cotter, Jr.'s Motion to Compel Production of Documents and Communications Related to Advice of Counsel Defense on Order Shortening Time (the "Motion to Reconsider").[61] Joining Directors joined in the motion.[62] The Motion to Reconsider pointed out that:

> [The District Court] did not apply the test adopted by the Nevada Supreme Court, but instead, made a ruling requiring the production of certain attorney-client communications based on a theory neither

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[60] *Id.* at 1373-1374 (October 3 Order).

[61] *See generally* Vol. 7 APP 1375-1418 (October 7, 2016 Mot. to Reconsider).

[62] *See generally* Vol. 7 APP 1419-1422 (October 11, 2016 Joining Directors' Joinder to Mot. to Reconsider).

> raised nor briefed by the parties with respect to the Motion to Compel. Specifically, [the District Court] appears to have adopted a rule, as an interpretation of NRS 78.138(2) that whenever directors or officers "invoke" the business judgment rule as a defense to claims for breaches of their fiduciary duties, they necessarily waive any attorney-client privilege with respect to communications or advise considered or relied upon by such officers and directors in the performance of their duties so that plaintiffs may second guess the substantive advice given.[63]

On December 1, 2016, the District Court partially granted the Motion to Reconsider,[64] but still ruled that Joining Directors Kane and Adams were required to produce the legal advice provided to them:

> [T]o the extent Messrs. Kane and Adams testified that they relied solely upon the advice of counsel in making their decision relating to the approval of a request by Cotter, Sr.'s Estate to exercise a 100,000 share stock option, Defendants are to produce the written legal opinion, relating to such exercise, that was **provided to** Messrs. Kane and Adams. To the extent information identified in this Court's order dated October 3, 2016, was not provided to or relied upon by Messrs. Kane and Adams, it is not subject to production.[65]

I. Cotter, Jr. Moves for Reconsideration or, in the Alternative, Clarification

Eight days later, on December 9, 2016, Cotter, Jr. filed a "Motion to Reconsider and/or Clarify Order Granting in Part [the Company's] Motion to Reconsider or Clarify Order Granting [Cotter, Jr.'s] Motion to Compel Production

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63 *See* Vol. 7 APP 1379 (October 7, 2016 Mot. to Reconsider).
64 *See* Vol. 8 APP 1637-1638 (December 1 Order).
65 *Id.* at 1638 (emphasis in original).

of Documents and Communications Related to the Advice of Counsel on Order Shortening Time" ("Cotter, Jr.'s Motion to Reconsider").[66] With his motion, Cotter, Jr. sought "an order that compels production of all information identified in the [District] Court's October 3, 2016 Order, with the exception of such information not provided to Kane and Adams."[67] Cotter, Jr. also sought *in camera* review by the District Court to "determine if the documents referenced by the entries on Defendants' privilege logs that refer to communications providing legal advice pertaining to the supposed 100,000 share option for some reason are not responsive."[68]

At the Court's invitation,[69] on January 12, 2017, Cotter, Jr.'s counsel sent the District Court "a list of privilege log entries for documents [Cotter, Jr.] believes should be reviewed in camera by the Court."[70] Subsequently, after a telephonic

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[66] *See generally* Vol. 8 APP 1639-1654 (Cotter, Jr.'s Mot. to Reconsider).

[67] *Id.* at 1653 (Cotter, Jr.'s Mot. to Reconsider).

[68] *Id.* at 1645 (Cotter, Jr.'s Mot. to Reconsider).

[69] *See* Vol. 9 APP 1766-1767 (December 22, 2016 H'rg Tr. 14:10-15:16).

[70] *See* Vol. 2 JDAPP 332 (Letter from Cotter, Jr.'s Counsel to District Court Listing Privilege Log Entries for *In Camera* Review). Notably, Cotter, Jr.'s counsel incorrectly represented to the District Court that "[Joining Directors] acknowledge the following 73 documents are subject to the Court's Order[.]" *See id.* at 333 (Letter from Cotter, Jr.'s Counsel to District Court Listing Privilege Log Entries for *In Camera* Review). On the contrary, Joining Directors' counsel expressly stated: "[O]nly 73 documents (identified below) even arguably fall within the scope of the Court's Order, even applying the interpretation of the Order that Plaintiff has urged. To be clear, [Joining Directors] do not agree with [Cotter, Jr.'s] interpretation of the Court's Order or the scope of any purported privilege

conference, on January 20, 2017, the District Court ordered the *in camera* review of certain documents from the privilege logs of Kane and Adams.[71] The District Court also stayed enforcement of its Orders until February 17, 2017 in anticipation of the filing of a petition to the Supreme Court for a writ of prohibition or, alternatively, mandamus.[72]

IV. REASONS WHY THE REQUESTED WRIT SHOULD ISSUE

A. Compelled Production of Attorney-Client Privileged Information Warrants Extraordinary Writ Relief

"Writ relief is an available remedy, where, as here, petitioners have no plain, speedy and adequate remedy at law other than to petition this court." *Wardleigh v.*

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waiver. Rather, in an effort to resolve this discovery dispute, [Joining Directors] have identified the documents they believe would be covered by the Court's order if [Cotter, Jr.'s] argued interpretation were to be accepted. If the Court intends to review documents *in camera*, these are the documents that should be reviewed." Vol. 2 JDAPP 351-352 (January 3, 2017 Email from Joining Directors' Counsel to Cotter, Jr.'s Counsel Attached to Letter from Cotter, Jr.'s Counsel to District Court Listing Privilege Log Entries for *In Camera* Review).

[71] On January 20, 2017, the District Court issued its written Order granting Cotter, Jr.'s Motion to Reconsider in part. *See* Vol. 9 APP 1894-1896 (January 20 Order). The District Court's Order stated: "The Court will perform an *in camera* review of certain documents listed on the privilege logs of defendants Adams and Kane for the purpose of determining whether those documents are subject to the Court's orders of October 3, 2016 and December 1, 2016. The documents the Court will review *in camera* are the documents numbered 1-115 on the Court's Exhibit 1 ([Cotter, Jr.'s] counsels' January 12, 2017 correspondence to the Court and all counsel of record). [Joining Directors] shall provide the Court with copies of those documents for *in camera* review." *Id.* at 1895 (January 20 Order).

[72] *See* Vol. 9 APP 1903-1905 (Order Staying [District] Court's October 3, 2016, December 1, 2016, and January 20, 2017 Orders Regarding Privilege Issues).

Second Jud. Dist. Ct. In & For County of Washoe, 111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995). As this Court has held, "a writ of prohibition will issue to prevent discovery required by court order" where, like here, "[i]f improper discovery were allowed, the assertedly privileged information would irretrievably lose its confidential and privileged quality and petitioners would have no effective remedy, even by a later appeal." *Wardleigh*, 111 Nev. at 350-51, 891 P.2d at 1183-84. In the absence of writ relief, Joining Directors face an unacceptable dilemma; they must choose between (1) revealing privileged information and suffering irreparable prejudice or (2) refusing to comply and facing "the imposition of such drastic remedies as dismissal with prejudice or other similar sanctions." *Wardleigh*, 111 Nev. at 351, 891 P.2d at 1184. Because neither alternative is acceptable, relief by writ petition is warranted to challenge the disclosure of privileged information ordered by the District Court.

Writ relief is also justified where, as here, an important question of state law needs clarification. As this Court has held, "consideration of extraordinary writ relief is often justified 'where an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction.'" *MountainView Hosp. v. Nev. Dist. Ct.*, 128 Nev. Adv. Op. 17, 273 P.3d 861, 864 (2012) (quoting *Mineral County v. State, Dep't of Conserv.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001)).

NRS 78.138(2) expressly provides that, "[i]n performing their respective duties, directors . . . are entitled to rely on information, opinions, [and] reports, . . . that are prepared or presented by" counsel. Nonetheless, the District Court's Orders suggest that, if directors testify that they relied on legal advice when exercising their business judgment, the attorney-client privilege is automatically waived for that advice. If upheld, the District Court's Orders mean that corporate directors in Nevada can no longer obtain legal advice with the assurance that Nevada courts will protect the attorney-client privilege otherwise applicable to them. To the contrary, under the District Court's Orders, directors who obtain legal advice for the purpose of exercising their business judgment run the risk that their communications with attorneys will not be protected from discovery. The District Court's Orders would create a catch-22 in which directors must choose between forgoing legal advice, at the risk of breaching their fiduciary duties, or obtaining legal advice that would be vulnerable to forced disclosure to litigants and even the public.

If it is indeed the case that, under Nevada law, directors who rely on the legal advice in exercising their business judgment may not enjoy the protections of the attorney-client privilege, they must be made aware of this pitfall. Corporations that are incorporated in Nevada, and corporations considering incorporation in Nevada, need to know whether the price of doing business includes the risk that

Nevada courts, unlike the courts of other jurisdictions, will not protect the legal advice received by directors for purposes of exercising business judgment. The need for clarification on whether such a rule exists for Nevada corporations and their directors makes this issue of corporate law both significant and worthy of a definitive ruling by the state's highest court.

The Supreme Court has already determined that this is an issue requiring its attention. In March 2016, Wynn Resorts, Limited petitioned this Court for a writ of prohibition or, alternatively, mandamus against an order by a district court requiring Wynn Resorts, Limited to turn over attorney-client privileged information. *See generally* Supreme Court Case No. 70050. This Petition arises from a similar order arising from the same District Court, and the issues presented—including the possibility that the attorney-client privilege is waived if and when a corporate director seeks the protection of the business judgment rule—raise similar legal and policy issues.[73]

B. The Standard of Review Favors Writ Relief, as the Issue is One of Law

De novo review by this Court is appropriate because the Petition arises from the District Court's interpretation and application of Nevada's statutory business presumption, NRS 78.138(3), and certain related provisions. "Statutory

[73] Joining Directors have extensively relied on the briefing in the *Wynn* action in connection with the preparation of this Joinder to the Petition.

interpretation and application is a question of law subject to [the Supreme Court's] de novo review, even when arising in a writ proceeding." *Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 13, 319 P.3d 618, 621 (2014). When the statutory meaning is clear, courts will apply the statute's plain language; "[b]ut when a statute is susceptible to more than one reasonable interpretation, it is ambiguous," and courts will "resolve that ambiguity by looking to legislative history and 'construing the statute in a manner that conforms to reason and public policy.'" *Id.* (quoting *Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010)). Because the District Court's ruling involves statutory interpretation and a significant issue of Nevada corporate law, writ review by this Court is appropriate.

C. The District Court's Ruling Finds No Support in Nevada Law

The District Court concluded that the attorney-client privilege is waived in cases where a director indicates a reliance on legal advice in the exercise of the director's business judgment. According to the District Court, "[t]o 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."[74] The District Court further stated:

[74] Vol. 3 APP 618 (August 30, 2016 H'rg Tr. 15:8-21).

> If [Joining Directors] 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.[75]

The District Court's ruling is unsupported by the plain language of the applicable Nevada statutes. Neither NRS 78.138(3), which establishes the business judgment presumption, nor NRS 78.138(2), which permits directors to rely on third parties, including counsel, creates an exception to the attorney-client privilege.[76] Indeed, neither NRS 78.138(3) nor NRS 78.138(2) says anything at all about privilege, let alone that directors who rely on legal advice—solely or partially—in their exercise of business judgment lose the protections of attorney-client privilege with respect to such advice.

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[75] *Id.* at 620 (August 30, 2016 H'rg Tr. 17:7-14).

[76] The District Court appears to have based its ruling on NRS 78.138(2), which provides, in relevant part: "In performing their respective duties, **directors and officers are entitled to rely on information, opinions**, reports, books of account or statements, including financial statements and other financial data, **that are prepared or presented by**: . . . (b) **Counsel**, public accountants, financial advisers, valuation advisers, investment bankers or other persons as to matters reasonably believed to be within the preparer's or presenter's professional or expert competence; . . . but a director or officer is not entitled to rely on such information, opinions, reports, books of account or statements if the director or officer has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted." NRS 78.138(2) (emphasis added).

Instead, other Nevada statutes address the scope of attorney-client privilege. *See* NRS 49.035 *et seq*. Establishing a "[g]eneral rule of privilege," NRS 49.095 permits a client to "refuse to disclose, and to prevent any other person from disclosing, confidential communications: (1) Between the client or the client's representative and the client's lawyer . . . ." Five exceptions to this general rule are enumerated by NRS 49.115. None of the five exceptions refer to communications between directors and their counsel related to an exercise of the directors' business judgment. *See* NRS 49.115.

D. The District Court's Rulings Find No Support in Nevada's Legislative History

Because the statutory text does not expressly create an exception to the attorney-client privilege in the context of an exercise of business judgment, in order to affirm the District Court's rulings, this Court would have to conclude that the Nevada legislature implicitly created an additional exception to the attorney-client privilege when it adopted NRS 78.138(2). Moreover, adopting the District Court's rulings would ignore the relevant legislative history of NRS 78.138, which makes clear that Nevada corporate law is designed to make Nevada an attractive place to incorporate.

The provisions in the Nevada corporations statute were enacted in an effort to attract corporations and directors to Nevada. NRS 78.138(2) and (4)-(5) were enacted in 1991 in order "to make Nevada a more favorable place to conduct

business and to attract new business into the state."[77] In 2001, Nevada adopted the exculpatory provision now codified at NRS 78.138(7). The legislature's discussions made clear that the exculpatory provision was intended "to ensure that Nevada's corporate laws were the best, the most inviting for business, the fairest, and the most equitable in the country" and to "guarantee that Nevada was the 'domicile of choice' for corporations around the country."[78]

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[77] *See* Vol. 1 JDAPP 2 (Minutes of the May 7, 1991 Session of the Senate Committee on Judiciary and Assembly Committee on Judiciary stating: "Cheryl Lau, Nevada Secretary of State, explained the Secretary of State's office had proposed this bill in an effort to streamline the corporate law in the state of Nevada, to make Nevada a more favorable place to conduct business and to attract new business into the state.").

[78] *See* Vol. 1 JDAPP 30 (Minutes of the May 30, 2001 Meeting of the Assembly Committee on Judiciary stating: "Senator James said legislation had been processed each session updating and upgrading to ensure that Nevada's corporate laws were the best, the most inviting for business, the fairest, and the most equitable in the country. . . . The intent was to guarantee that Nevada was the 'domicile of choice' for corporations around the country.").

See also Vol. 1 JDAPP 13 (Minutes of the May 22, 2001 Session of the Senate Committee on Judiciary stating: "Senator Mark A. James . . . stated BDR 7-1547 is a measure that will **take Nevada in a new and positive direction as a state that is business-friendly**. He surmised Nevada will **be the number one state in the country for a business to incorporate and operate in, or to have as its corporate domicile**.") (emphasis added); *id.* at 16 ("Senator Washington asked whether the protection placed around corporate officers and stockholders will be inducement enough for corporations to come into Nevada, if the filing fees are raised. Senator James answered it is an added incentive. He explained there are two separate issues. One is the protection for a director, he said, so a director is not held liable and his or her personal assets cannot be attached. Directors are the ones who decide where to incorporate, he said, and this will be a **major incentive**.") (emphasis added); *id.* at 19-20 ("Michael J. Bonner, . . . Attorney, stated Senator James had asked him to look into a provision to include in BDR 7-

The legislative history reflects the legislature's desire to make Nevada an attractive and favorable state in which to incorporate. It is implausible that the same legislature that enacted these unmistakably pro-corporation and pro-director provisions intended to deprive directors, who might otherwise rely on the legal advice in exercising their business judgment, of their right to engage in privileged communications with counsel. Such a rule, if adopted as the law of Nevada, would undermine the legislature's intent and make Nevada among the most challenging states for corporations and their directors.

E. No Other Courts Have Interpreted a Similar Statutory Provision to Require a Waiver of the Attorney-Client Privilege

Joining Directors have not located any case in which any other court in a state with a statutory provision similar to NRS 78.138(2) has interpreted the provision to require a waiver of the attorney-client privilege as the price for the protections of the business judgment rule.

1547 to make Nevada a more attractive place in which to domicile a business entity, and he suggested a provision for liability limitation. . . . Mr. Bonner stated, in looking at those issues, a corporation wants predictability, and if Nevada can enhance the liability protection for them and strike the proper balance to not protect those who have participated in a criminal activity or fraud, the State will **go a long way to making Nevada an attractive place in which to incorporate**.") (emphasis added).

The text of NRS 78.138(2) is similar to that of Sections 8.30(e) and 8.30(f) of the Model Business Corporation Act ("MBCA"). NRS 78.138(2) provides, in relevant part:

> In performing their respective duties, **directors and officers are entitled to rely on information, opinions, reports**, books of account or statements, including financial statements and other financial data, **that are prepared or presented by**: . . . (b) **Counsel** . . . or other persons as to matters reasonably believed to be within the preparer's or presenter's professional or expert competence; . . . but a director or officer is not entitled to rely on such information, opinions, reports, books of account or statements if the director or officer has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted.

NRS 78.138(2) (emphasis added). Section 8.30(e) of the MBCA provides:

> In discharging board or committee duties **a director** who does not have knowledge that makes reliance unwarranted **is entitled to rely on information, opinions, reports** or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (f).

2 Model Bus. Corp. Act Ann. § 8.30(e) (4th ed. 2013) (emphasis added). Section 8.30(f) of the MBCA provides:

> **A director is entitled to rely**, in accordance with subsection (d) or (e), on: . . . (2) **legal counsel**, public accountants, or other persons retained by the corporation as to matters involving skills or expertise the director reasonably believes are matters (i) within the particular person's professional or expert competence or (ii) as to which the particular person merits confidence; . . .

2 Model Bus. Corp. Act Ann. § 8.30(f) (emphasis added).

According to the MBCA's official comments, Nevada is one of forty-four jurisdictions with statutory provisions that "provide that [directors] may rely on information prepared by . . . outside professionals (usually legal counsel and public accountants) whom the director reasonably believes to be reliable and competent." *Id.* at 8-214. The official comments make clear that, in determining whether a director's reliance on information prepared by an outside professional was reasonable, the professional's access to pertinent information—and not the substance of the advice provided—is what matters:

> [I]t would be entirely appropriate for a director to rely on advice concerning highly technical aspects of environmental compliance from a corporate lawyer in the corporation's outside law firm, without due inquiry concerning the particular lawyer's technical competence, where the director reasonably believes the lawyer giving the advice is appropriately informed (by reason of resources known to be available from that adviser's legal organization or through other means) and therefore merits confidence.

Id. at 8-208.

Joining Directors have not found any case involving statutory provisions similar to Sections 8.30(e) and 8.30(f) of the MBCA in which any other court has held that directors must reveal attorney-client privileged communications to permit adverse parties to test the reasonableness of the directors' reliance on legal advice. Research has yielded only three decisions from other courts involving statutory provisions similar to Sections 8.30(e) and 8.30(f) of the MBCA and similar issues. All three decisions involved Virginia's business judgment statute, Va. Code Ann. §

13.1-690. *See WLR Foods, Inc. v. Tyson Foods, Inc.*, 65 F.3d 1172, 1186-87 (4th Cir. 1995); *WLR Foods, Inc. v. Tyson Foods, Inc.*, 857 F. Supp. 492, 494-95 (W.D. Va. 1994), *aff'd*, *WLR Foods, Inc.*, 65 F.3d 1172; *Willard v. Moneta Bldg. Supply, Inc.*, 515 S.E. 2d 277, 286 n.12 (Va. 1999).

Like NRS 78.138(2), Virginia's statute provides that "a director is entitled to rely" on "[l]egal counsel," "[u]nless he has knowledge or information concerning the matter in question that makes reliance unwarranted." Va. Code Ann. § 13.1-690(B). Because "[k]nowledge of the substantive advice" provided to directors is "not reasonably calculated to lead to a determination regarding good faith as defined in § 690," the substance of legal advice is not discoverable under Virginia's business judgment statute. *See, e.g.*, *WLR Foods*, 65 F.3d at 1187. A litigant is "not entitled to discover the substance of legal and financial advice that the defendants received" under Virginia's business judgment statute "[b]ecause the objective reasonableness of a director's decision or conduct is not a relevant inquiry." *Willard*, 515 S.E. 2d at 286 n.12.

Likewise, under Delaware law, directors who receive legal advice in connection with a business decision do not waive the attorney-client privilege. And Joining Directors have located no case in which a Delaware court has held that directors who rely on the legal advice in exercising their business judgment are stripped of attorney-client privilege with respect to such communications with their

counsel. Though not modeled on the MBCA, Delaware's corporation statute does "fully protect" directors who "rely[] in good faith" upon advice "as to matters the [director] reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care . . . ." Del. Code Ann. tit. 8, § 141(e). Directors of Delaware corporations may invoke the attorney-client privilege to "prevent[] the plaintiffs and the court from testing the reasonableness and propriety of their reliance" when they "are not trying to use advice of counsel offensively[.]" *In re Toys "R" Us, Inc. S'holder Litig.*, 2005 WL 5756357, at *18 n.23 (Del. Ch. June 24, 2005). Thus, Delaware law recognizes that "the examination of privileged communications is not required for the truthful resolution" of the case when directors "seek to rely on the fact that they sought and obtained legal advice rather than that they relied on the substance of privileged communications to prove that the board was fully informed." *In re Comverge, Inc. S'holders Litig.*, 2013 WL 1455827, at *3 (Del. Ch. Apr. 10, 2013).

Adopting the District Court's rulings would make Nevada law substantially less favorable to directors than the law of any other jurisdiction. It would essentially require directors who rely on legal advice in the exercise of their business judgment to disclose the substance of privileged communications.[79]

[79] In cases where directors received legal advice, prohibiting litigants from inquiring into the substance of legal advice provided to directors would not read

Under the rule suggested by the District Court's Orders, corporate directors and the corporations they serve would be vulnerable to the risk that a plaintiff, with interests that are not aligned with the best interests of the corporation and its stockholders, could use derivative litigation to gain access to privileged and confidential legal advice received by the corporation. In fact, here, Cotter, Jr. has sought to do just that. Cotter, Jr.'s interests as a plaintiff are not aligned with the best interests of Reading stockholders. Indeed, disinterested institutional stockholders of Reading have intervened in this Action,[80] conducted extensive discovery,[81] and decided to dismiss their claims without any payment for the

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out the provision in NRS 78.138(2) that "a director . . . is not entitled to rely on such information, opinions, reports, books of account or statements if the director or officer has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted." Litigants challenging an exercise of business judgment by directors can inquire into "identity and qualifications" of counsel, "the circumstances surrounding [counsel's] selection," "the general topics (but not the substance) of the information sought or imparted[.]" *WLR Foods*, 857 F. Supp. at 494; *accord WLR Foods*, 65 F.3d at 1186. Because the directors who received legal advice would rarely be qualified to know that the legal advice they received was incorrect, the substance of the legal advice would generally be irrelevant to whether the directors who received that legal advice had "knowledge concerning the matter in question that would cause reliance thereon to be unwarranted." NRS 78.138(2). And even where a particular director was qualified to know that the legal advice he or she received was incorrect, an opposing party could inquire whether that director received any legal advice that was contrary to his or her preexisting understanding of the law.

[80] *See* Vol. 1 JDAPP 57-58 (Order Granting Mot. to Intervene).

[81] *See* Vol. 2 APP 291 (Joint Mot. for Preliminary Approval of Settlement stating: "In connection with the litigation, James Cotter, Jr. and the [Intervenors] conducted extensive discovery on these matters, which included depositions of

significant legal expenses they incurred.[82] Cotter, Jr., on the other hand, continues to doggedly pursue this litigation as a part of a personal vendetta. Cotter, Jr. seeks to invade the Company's attorney-client privilege to obtain discovery, perhaps in the hopes of using that privileged information to advance a faulty argument that the Cotter Estate Option belongs to the Cotter Trust, rather than the Cotter Estate, and thereby advance his personal interests at the expense of the interests of the corporation and its stockholders.

For all of these reasons, this Court should reverse the District Court's Orders. Otherwise, Nevada will be the first and only state to deny directors the right to engage in privileged communications with counsel if they rely on legal advice when exercising their business judgment.

V. CONCLUSION

The District Court's rulings find no support in Nevada case law or the statutory text of NRS 78.138, which expressly entitles directors to consider and rely upon legal advice in exercising their business judgment. The District Court's

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Guy Adams, Margaret Cotter, Ellen Cotter, William Gould, Edward Kane, Douglas McEachern, Timothy Storey, and James Cotter, Jr. In response to discovery requests, Reading produced over 13,900 documents, and the Individual Defendants produced over 7,900 documents.").

[82] *See generally id.* at 285-377 (Joint Mot. for Preliminary Approval of Settlement); *see also* Vol. 2 JDAPP 330 (July 13, 2016 Press Release stating: "In connection with the dismissal of the Derivative Claims, the parties have agreed to mutual general releases with each party bearing his, her or its own legal fees and expenses.").

rulings would also frustrate the public policy objectives reflected in the relevant legislative history, which repeatedly emphasizes that Nevada corporate law is designed to make Nevada an attractive place in which to incorporate. Requiring directors to surrender applicable privileges whenever they rely on legal advice in exercising their business judgment, as the District Court would have Joining Directors do, would make Nevada law substantially less favorable and attractive to businesses than the law of any other jurisdiction. For these reasons, the District Court's Orders should be reversed.

DATED this 21st day of February, 2017.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), 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 Microsoft Word with 14 point, double-spaced Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 11,760 words.

3. Finally, I hereby certify that I have read this appellate brief, 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 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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VERIFICATION

I, H. Stan Johnson, declare:

1. I am an attorney with COHEN|JOHNSON|PARKER|EDWARDS, associated counsel of record for Joining Directors Margaret Cotter, Ellen Cotter, Douglas McEachern, Guy Adams, Edward Kane, Judy Codding, and Michael Wrotniak.

2. I verify that I have read the foregoing **MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS MCEACHERN, JUDY CODDING, AND MICHAEL WROTNIAK'S JOINDER TO THE PETITION UNDER NRAP 21 FOR WRIT OF PROHIBITION, OR IN THE ALTERNATIVE, MANDAMUS**; that the same is true to my own knowledge, except for matters therein stated on information and belief, and as to those matters, I believe them to be true.

3. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 21st day of February, 2017, in Clark County, Nevada.

/s/ H. Stan Johnson
H. Stan Johnson

CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25, I certify that I am an employee of COHEN|JOHNSON|PARKER|EDWARDS, that in accordance therewith, I caused a copy of **MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS MCEACHERN, JUDY CODDING, AND MICHAEL WROTNIAK'S JOINDER TO THE PETITION UNDER NRAP 21 FOR WRIT OF PROHIBITION, OR IN THE ALTERNATIVE, MANDAMUS** to be served as indicated below, on the date and to the addressee(s) shown below:

VIA EMAIL and U.S. MAIL ON February 21,2017

Judge Elizabeth Gonzalez
Eighth Judicial District Court of Clark County, Nevada
Regional Justice Center
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VIA the Supreme Court of Nevada's EFLEX system on February 21, 2017

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