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.

Real Party In Interest,

And concerning,

MARGARET COTTER, ET AL,

Defendants Below.

Supreme Court Case No.: 72356

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

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MOTION TO RECONSIDER ORDER DENYING RDI'S REQUEST FOR STAY PENDING RESOLUTION OF WRIT PETITION
(Action Required before July 12, 2017)

EMERGENCY MOTION UNDER NRAP 27(3)
(Action Required before July 12, 2017)

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Docket 72356 Document 2017-22471

Petitioner Reading International, Inc., ("Petitioner" or "RDI") respectfully requests the Court reconsider its order denying RDI's requested stay, which order was issued prior to the expiration of the deadline for RDI to submit a Reply to the Opposition filed by Real Party in Interest James J. Cotter, Jr. ("Cotter, Jr."). Indeed, RDI was finalizing its Reply at the time this Court issued its ruling. Accordingly, RDI requests the Court to reconsider its ruling in light of the additional argument that would have been included in that Reply, set forth below.

Cotter, Jr., has opposed the stay. Cotter, Jr. contends that the stay should not be granted as the District Court has not yet made a determination as to whether *all* of the subject documents must be produced. However, contrary to Cotter, Jr.'s assertion, the District Court has determined that the memorandum prepared by the law firm of Greenberg Traurig to RDI's Compensation Committee in September of 2015 (the "GT Memo"), should be produced. Accordingly, RDI does face immediate and irreparable harm.

Cotter, Jr.'s contention that the directors are using the attorney-client privilege as both sword and shield is also inaccurate, as the privilege in question belongs to RDI, not the directors, and no individual director has the authority to determine whether it should be asserted. Furthermore, no director has pleaded an affirmative defense of "reliance on the advice of counsel." Accordingly, there is no basis for asserting that RDI's privilege has been wielded as either sword *or* shield.

Cotter, Jr. has also claimed that his ability to prepare for trial would be impeded if the stay were granted. However, Cotter, Jr. ignores the fact that this Court has already imposed a stay with respect to an order for Cotter, Jr. to produce certain communications with third parties he contends are privileged. Thus, any harm that purportedly arises from a stay of an order to produce certain documents already exists in this case – although Cotter, Jr. *denied* that any such harm would arise from a stay of an order directed at *him*. Furthermore, Cotter, Jr. fails to acknowledge that the stay here would apply only to a very narrow number of documents involving only a single director decision out of the multitude challenged by him.

Because RDI has demonstrated that, in the absence of a stay, the purpose of the writ proceedings would be thwarted and RDI would be irreparably harmed; that it stands a significant likelihood of success on the merits, as the business judgment rule does not impair the attorney-client privilege; and that no prejudice would result to any other party, the requested stay should be granted.

I. RDI FACES SERIOUS AND IRREPARABLE HARM AS A PRIVILEGED DOCUMENAT WAS ORDERED PRODUCED.

Significantly, Cotter, Jr. asserts, in a rather highhanded fashion, that the District Court's *actual* orders be ignored, and instead, the Parties pretend that the District Court has not completed an analysis as to one of the privileged documents at risk. Specifically, Cotter, Jr. suggests that RDI should not comply with the

District Court's December 1, 2016 order to produce to him the GT Memo. Instead, Cotter, Jr. suggests that RDI "could" include the GT Memo with documents that were the subject of the District Court's January 24, 2017 order for an *in camera* review. However, this proposed amendment of the District Court's order offers nothing by delay.

The District Court determined that the attorney-client privilege cannot be asserted as to documents "relied upon" by directors in performing their corporate duties. Specifically, as noted in the Petition, the District Court ruled:

> 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.

Petition, p. 9, citing III APP 613:8-21. The District Court further explained:

> 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.***
>
> * * *
>
> 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 P. 10, citing III APP 614:14-21, 614:25-615:14 (emphasis added).** Thus, the District Court ruled that the business judgment rule's presumption that directors perform their duties in good faith creates a waiver of the attorney-client privilege as to otherwise privileged communications relied upon by corporate directors. With respect to the GT Memo, the District Court found that the directors in question had solely relied upon it, and has ordered it produced to Cotter, Jr. by July 12, 2017.[1] **Motion, Exhibit B, 2:12-16, Exhibit G, 2:7-9.** Accordingly, Cotter, Jr.'s highhanded suggestion that the GT Memo be, instead produced to the Court for inclusion in its ordered review of the *additional* privileged documents at risk for disclosure [2] results in nothing more than requiring that the District Court repeat an analysis it has already completed.

Thus, Cotter, Jr.'s proposed modification of the ruling is revealed as nothing more than a transparent bid for delay. Cotter, Jr. clearly recognizes that the stay is warranted by virtue of the District Court's order to produce the GT Memo. By

[1] In addition to objecting to the analysis employed by the District Court, RDI also disputes the District Court's factual finding, as no director testified to having relied *solely* on the GT memo. However, that factual dispute is irrelevant to the determination of whether Nevada's business judgment rule impairs the attorney-client privilege.

[2] See **Motion, Exhibit C.**

suggesting that the District Court's order for production of the GT Memo be ignored, Cotter, Jr. clearly hopes that this Court will then be inclined to dismiss the Petition as premature because the other privileged documents at risk have not *yet* been ordered to be produced to him. However, the District Court has made a final determination as to the GT Memo – it ordered the GT Memo produced to Cotter, Jr. The fact that *additional* privileged documents might also be ordered produced if the District Court determines that the directors in question relied on such privileged communications does *not* dictate against the grant of the stay. To the contrary, a stay is appropriate so that the issue presented in the Petition – *i.e.*, whether the business judgment rule vitiates the attorney-client privilege possessed by a corporation – can be resolved in a single proceeding, rather than in a succession of writ petitions. The fact that the same erroneous analysis will be employed as to additional documents is not reason to delay the determination of the important issue presented in the Petition.

II. COTTER, JR. IS NOT PREJUDICED BY AN ADDITIONAL STAY OF VERY SPECIFIC DISCOVERY.

Cotter, Jr. coyly contends that he will be prejudiced by the imposition of a stay because discovery cannot be completed if a stay is imposed. In making such a claim, Cotter, Jr. fails to acknowledge that the stay here would be limited solely to the GT Memo and to the certain documents listed on a privilege log which relate to:

> 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 . . .

Motion, Exhibit A, 2:5-7, Exhibit B, 2:12-16; Exhibit C, 2:22-25. Moreover, the decision rendered by Messrs. Kane and Adams relating to the 100,000 share option, *i.e.,* that the Estate of James J. Cotter, Sr. could pay for the exercise of option to purchase voting stock with nonvoting stock, is only one of a multitude of decisions that Cotter, Jr. has cited in his claims against RDI's directors. **See Appendix to Petition for Writ, IV APP 628-644** (showing that Cotter, Jr. has challenged virtually all significant (and numerous routine) decisions made by the RDI Board of Directors since June 2015). Nothing precludes ongoing discovery with respect to the other challenged decisions.

Furthermore, Cotter, Jr. failed to remind the Court that a stay as to an isolated issue of discovery has already been granted with respect to the proceedings below. Specifically, in Case No. 71267, Cotter, Jr. stated that no prejudice to the RDI or the directors could result from his requested stay, asserting:

> By contrast, a stay of the disclosure order will cause no harm to real parties in interest. *See* NRAP 8(c)(3). If they are truly entitled to that information, defendants will get it upon denial of the writ. . . .

See Cotter, Jr.'s Rule 27 Emergency Motion for Stay Pending resolution of Writ Petition, p. 6. filed September 15, 2016 in Case No. 71267. Here, of course,

Cotter, Jr. has claimed that delayed disclosure of RDI's Privileged documents, *will* cause harm; however, he does not explain how this would be true with respect to the documents he seeks, yet was not true as to those he resists producing.

CONCLUSION

To avoid the irreversible disclosure of information protected by the attorney-client privilege, this Court should reconsider its denial of RDI's requested stay, and stay of the enforcement of the RDI Privilege Orders.

Respectfully submitted this 6th day of July, 2017.

GREENBERG TRAURIG, LLP

/s/ Tami D. Cowden

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NRAP 27(e) CERTIFICATE

A. Contact information

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B. Nature of emergency

On June 22, 2017, the District Court ordered Petitioner to produce a privileged document, the GT Memo, to Real Party in Interest James, J. Cotter, Jr. by July 12, 2017, and denied a stay of that order. Petitioner moved this Court for a stay, and Cotter, Jr. filed an opposition that contained some inaccurate information, and failed to disclose other relevant information. On July 6, 2017, prior to receiving Petitioner's planned Reply, this Court denied the Motion for Stay. The present Motion to Reconsider is filed to provide the Court with corrections of the misstatements contained in the Opposition field by Cotter, Jr. Without a stay from this Court issued on or before July 12, 2017, Petitioner will be required, under threat of contempt, to disclose the protected communications without appellate review of that order.

C. Notice and service

Today, I, Tami D. Cowden personally called the offices of Mark G. Krum, Erik Foley, Marshall Searcy, and Stan Johnson. I advised Mr. Krum and

Mr. Foley of the intent to file this motion to reconsider, and left message regarding such intent with the offices of Messrs. Searcy and Johnson. Upon filing, I will e-mail copies of the motion to reconsider and this certificate to all counsel.

Respectfully submitted this 6th day of July, 2017.

GREENBERG TRAURIG, LLP

/s/ Tami D. Cowden

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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, on 6th day of July 2017, I caused a copy of ***Motion to Reconsider Order Denying RDI's Request for Stay Pending Resolution of Writ Petition*** to be served to the Real Parties in Interest via electronic mean through the Court's eFlex filing system. Electronic notification will be sent to the following:

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and

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I further certify that on July 7, 2017, a copy of the same will be duly served by hand delivery upon the below:

Judge Elizabeth Gonzalez
Eighth Judicial District Court of
Clark County, Nevada
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155

Respondent

/s/ Andrea Lee Rosehill
An Employee of Greenberg Traurig LLP