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.

v.

MARGARET COTTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS McEACHERN, JUDY CODDING, and MICHAEL WROTNIAK,

Real parties in interest.

Supreme Court No. 72356

District Court No. A-15-719860-B

JAMES J. COTTER JR.'S OPPOSITION TO PETITIONER'S MOTION FOR RECONSIDERATION

I. INTRODUCTION

Petitioner and nominal defendant Reading International, Inc. ("RDI" or the "Company") on June 23, 2017 filed a motion with this Court seeking a stay of certain of the District Court's orders (the "Stay Motion"). Plaintiff and Real Party in Interest James J. Cotter, Jr. ("Plaintiff") on June 28, 2017 filed an opposition to the Stay Motion. On July 6, 2017, this Court denied the Stay Motion, finding that the factors identified in NRAP 8(c) "do not militate in favor of a stay." Later on July 6, 2017, RDI filed a "Motion to Reconsider Order Denying RDI's Request for Stay Pending Resolution of Writ Petition" (the "Motion to Reconsider"). The Motion to Reconsider raises no new matter that warrants reconsideration, much less granting the Motion to Reconsider, including for the reasons discussed below.

II. ARGUMENT

A. The "GT Memo"

In the Motion to reconsider, as in the Stay Motion, RDI argues that the object of its writ petition will be defeated absent a stay because RDI will produce the GT Memo to Plaintiff. What RDI does not say about the GT Memo undermines its argument. First, RDI provides no explanation why the GT Memo, which was provided to certain RDI directors (at least Adams, Kane and possibly Tim Storey) and which addresses who owns and/or who can vote certain RDI stock, is privileged as to Plaintiff, who at all relevant times was and today remains a

member of the RDI board of directors. Second, the Motion to Reconsider ignores a decision of this Court that provides that a director can waive a privilege claimed by a company of which he is a director. Adams and Kane were and are directors of RDI, and therefore have authority to waive the privilege on behalf of RDI as holders of the privilege. *See Las Vegas Sands Corp. v. Eight Judicial Dist. of Nev.*, 331 P.d3d 905, 912-13 (Nev. 2014) (power to waive attorney-client privilege rests with corporation's officers and directors). Plaintiff's request for the documents is distinguishable from that in *Sands* because he is not a former officer or director adverse to the company relying solely on his status as a former officer of the company; rather, Plaintiff was at the time and today remains a director of the company, and is suing derivatively on behalf of the Company. Third, the Motion to Reconsider dutifully ignores the fact that it was defendants themselves who and which effectively offered to produce the GT memo in an effort to avoid the possible production of other documents withheld based on claims of privilege, certain of which now are to be reviewed *in camera* by the District Court to determine if they are subject to that Court's orders.

B. Mischaracterizations of the Record Below and "Red Herrings"

In what appears to be an effort at obfuscation and/or misdirection, RDI offers a series of observations that mischaracterize the record below, are irrelevant or both.

For example, RDI argues what it and the individual defendants argued to the District Court, namely, that the individual defendants had not pleaded advice of counsel as an affirmative defense. That argument is a "red herring." In this case, director defendants Adams and Kane affirmatively testified that the sole basis upon which they made the challenged decision to authorize the exercise of the 100,000 Share Option was the substance of privileged communications with lawyers. That was the basis of the District Court's ruling:

> THE COURT: Mr. Ferrario, I'm not going to talk to you about a hypothetical case. I am talking about the facts in this case where I have two witnesses who testified that their sole basis was they relied upon representation or the opinion of counsel in making a determination. That's this case. That's the one I'm deciding.

[Transcript of District Court Proceedings, October 27, 2016, at 13:10-15] (Ex. B to Opposition filed June 28, 2017).

Where, as here, it is the substance of privileged communications rather than the fact of it that is invoked by a director defendant, the privileged communications must be disclosed in order for there to be a truthful resolution of the case. *In re Comverge, Inc. S'holders Litig.,* 2013 WL 1455827, at *3 (Del. Ch. Apr. 10, 2013).

Likewise, the Motion to Reconsider quotes from portions of hearing transcripts below in which the District Court made statements about the business judgment rule. That is an effort at misdirection. The District Court made clear that

the basis of its decision was that two director defendants testified that the sole basis for their challenged decision was the substance of advice of counsel. See above. The writ petition therefore can and should be decided on the same basis.

The Motion to Reconsider also suggests that director defendants Adams and Kane are not using privilege as a sword and shield because the privilege technically belongs to the Company. That dutifully ignores the fact that it is Adams, Kane and other directors who are the ultimate decision-makers at the Company who volunteered in their deposition testimony that the sole basis for their challenged decision was reliance on the substance of advice of counsel, but contemporaneously claimed privilege as to that advice. That is exactly what using the advice as a sword and shield entails. "[T]he attorney client privilege was intended as a shield, not a sword." *Wardleigh v. Second Judicial District Court in and for the County of Washoe*, 111 Nev. 345, 354, 891 P. 2d 1180, 1186 (1995) (quotation and citation omitted). Thus, "the attorney-client privilege is waived when a litigant places information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against the disclosure of such information would be manifestly unfair to the opposing party." *Id.* at 354-55, 891 P.3d at 1186. *See also Aspex Eyewear, Inc. v. E'Lite Optik, Inc.*, 276 F.Supp. 2d 1084, 1092 (D. Nev. 2003) ("Fundamental fairness compels the conclusion that a litigant may not use reliance on advice of counsel to support a

claim or defense as a sword in litigation, and also deprive the opposing party the opportunity to test the legitimacy of that claim by asserting the attorney-client privilege... as a shield").

In what perhaps is the most egregious effort at misdirection, the Motion to Reconsider references a different writ petition brought by Plaintiff. However, the subject of that writ petition is attorney work product communications between Plaintiff's counsel and counsel for the then intervening plaintiffs, not communications between the parties, which were produced. There, the issue is not waiver of privilege by asserting reliance on the attorneys' advice as the basis for the challenged conduct, it is discoverablity by defendants of the mental impressions of lawyers for co-plaintiffs. Simply put, that writ petition is legally and logically irrelevant to the issues raised by RDI's writ petition.

Finally, the Motion to Reconsider argues, as the Stay Motion did, that Plaintiff will not be prejudiced by a stay. As Plaintiff demonstrated previously, a stay will delay resolution of issues raised by defendants in their still pending motions for summary judgment, which motions await supplemental briefing, which is in part dependent upon the District Court conducting an *in camera* review of documents and determining which if any of them are subject to its prior orders. Thus, although the Motion to Reconsider imputes to Plaintiff "a transparent bid for delay," that is exactly what the Motion to Reconsider entails.

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Motion to Reconsider be denied or, if it is granted, be granted only as to production of the so-called "GT Memo" to Plaintiff, but not as to the delivery of documents to the district court for *in camera* review.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25 I hereby certify that I caused a copy of *James J. Cotter Jr.'s Opposition To Petitioner's Motion for Reconsideration* to be served on the Petitioner, Reading International, Inc. and the Real Parties in Interest via electronic means through the Nevada Supreme Court's eFlex filing system.

Electronic notification will be sent to the following:

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I further certify that a copy of *James J. Cotter Jr.'s Opposition To Petitioner's Motion for Reconsideration* will be served on July 7, 2017 by Federal Express overnight delivery upon:

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