IN THE SUPREME COURT OF NEVADA

JAMES J. COTTER, JR., derivatively on behalf of Reading International, Inc.,

Petitioner,

v.

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

Respondents,

and

DOUGLAS MCEACHERN, EDWARD KANE, JUDY CODDING, WILLIAM GOULD, AND MICHAEL WROTNIAK,

Real Parties in Interest.

CASE NO.:

District Court Case No. A-15-719860-B

EMERGENCY MOTION UNDER NRAP 27(e)

RELIEF REQUESTED BY THURSDAY, JANUARY 4, 2018

Steve Morris, Esq. (NSB #1543)
Akke Levin, Esq. (NSB #9102)
Morris Law Group
411 E. Bonneville Ave., Ste. 360
Las Vegas, NV 89101
Telephone: (702) 474-9400

Mark G. Krum (NSB # 10913)
Yurko, Salvesen & Remz, P.C.
1 Washington Mall, 11th Floor
Boston, MA 02108
Telephone: (617) 723-6900

Attorneys for Petitioner
James J. Cotter, Jr.

I. INTRODUCTION

This is a derivative case by James Cotter, Jr., a shareholder and former officer of Reading International, Inc., against eight directors for breach of their fiduciary duties owed to the corporation. On December 11, 2017, the district court heard motions for ***partial*** summary judgment on specific matters brought by seven of the eight directors and, without notice that she would do so, granted summary judgment on ***all*** fiduciary duty ***claims*** against five of the directors and dismissed them from the case.[1] The court based its surprise decision on its belief that these directors had not been shown to have breached their duties as a consequence of their "interestedness" in the decisions that plaintiff James Cotter challenged.

Thus, without proper notice and an opportunity to be heard on dismissal of all claims against these defendants because the district court did not think they were "interested" when they knowingly acted against the interests of plaintiff and Reading International and its shareholders, the court has deprived plaintiff of his statutory right under NRS 78.138(7) to introduce evidence at trial to rebut application of the business judgment rule and prove that the dismissed defendants' intentional "act[s] or

---

[1] Director William Gould separately moved for summary judgment that was ***not*** scheduled for hearing on December 11; his motion (which on December 11 was not fully briefed) was scheduled for hearing on January 8, 2018. Nevertheless, the district court granted his motion and dismissed all claims against him on December 11.

failure[s] to act constituted a breach of his or her fiduciary duties as a director or officer."

Plaintiff moved the district court to stay trial pending disposition of the concurrently-filed writ petition, which the court denied. PA3622–3630; PA3650 (at 20:20).[2] Plaintiff also moved the court to certify its decision to dismiss these five directors under NRCP 54(b) to facilitate direct appeal of that erroneous decision and request a stay from this Court pending disposition of the appeal. PA3671–3685. The district court, however, has scheduled a hearing on the motion for Rule 54(b) certification for January 4, ***one business day*** before trial starts. PA3671, PA3675, PA3283. Trial will be to jury and is expected to take three to four weeks.

As we substantiate below, a stay of trial is warranted because the object of the writ petition would be defeated without a stay (as would review under Rule 54(b)). The petition presents substantial meritorious legal issues that should be resolved before this case goes to trial to avoid having two lengthy jury trials if, as the law suggests, the district court erred in dismissing five of the eight director defendants without a proper basis to do so on the eve of trial. And no party will be prejudiced by a stay while the Court considers the merits of the petition—or the merits of a direct appeal under NRAP 54(b).

---

[2] A written order denying the stay has not been entered.

II. ARGUMENT

A. The Applicable Legal Standard for a Stay.

Factors relevant to a deciding whether a stay is warranted include:

> (1) whether the object of the appeal or writ petition will be defeated if the stay . . . is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay . . . is denied; (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay . . . is granted; and (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.

NRAP 8(c).

Not all factors have to weigh equally in the moving party's favor: some factors may be particularly strong and "counterbalance other weak factors." *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004).

1. The Object of the Writ Petition Would be Defeated if the Stay is Denied.

Absent a stay of proceedings and resolution of the issues raised by the writ petition, at least one meritorious object of the petition—proper application of Nevada's business judgment rule to the five dismissed individual director defendants and the three remaining defendants will be defeated. Recent actions by the five dismissed individual defendants on December 29 to create evidence that the remaining three defendants intend to use at trial to take advantage of the legal errors in the district court that

are the subject of the writ petition will be facilitated without review of those errors before trial.

In granting Partial MSJ No. 4 with respect to the repopulation and revitalization of Reading International's executive committee but not with respect to the use of it, and in granting Partial MSJ No. 3, the district court eliminated certain independent bases for plaintiff's claims of breaches of fiduciary duty, but did not eliminate those matters as additional evidence of an ongoing course of entrenchment and self-dealing by the dismissed directors. In denying Partial MSJ Nos. 1–6 with respect to defendants Ellen Cotter, Margaret Cotter, and Edward Kane, the district court left for trial matters that are evidence of ongoing breaches of the duty of loyalty. Thus, the district court's rulings effectively leave intact plaintiff's ability to introduce evidence with respect to all thirteen matters pleaded in the Second Amended Complaint and identified in the Joint Pretrial Memorandum and the accompanying writ petition. For this reason, plaintiff will put on substantially the same evidence to show unlawful entrenchment and self-dealing by the five dismissed defendants and the remaining three. So if plaintiff prevails on the writ petition, he will try the same case twice as the result of the district court's erroneous grant of summary judgment on all claims against five directors.

According to the remaining defendants, the dismissal of the five individual director defendants virtually guts plaintiff's case against the remaining defendants. As the individual defendants argued in their

opposition to plaintiff's motion for reconsideration, "the Court's decision . . . leaves only one challenged action—the RDI Board's June 12, 2015 termination of plaintiff as CEO and President—without a majority of disinterested, independent directors voting in its favor." PA3465 (at 1:19–22). Therefore, according to the defendants, the parties are about to embark upon a lengthy trial that will be a meaningless exercise if the district court's error is not corrected now.

Plaintiff should be permitted to raise all matters and pursue *all* claims he has made against all defendants. But if the remaining defendants are correct about the consequences of the district court's surprise dismissal of the five individual director defendants, plaintiff will be unable to do so unless the relief sought by this writ petition is obtained prior to the trial against the remaining defendants.

The remaining defendants take the position that the business judgment rule applies in any circumstance in which a majority of the directors who made or approved the challenged decision (to terminate plaintiff as President and CEO or any other challenged decision or action) have not been shown to have been "interested." *Id.* Court exhibit number 1 to the December 28, 2017 hearing shows that the five dismissed director defendants have taken action to formally ratify certain prior decisions or actions not made or approved by a "disinterested" majority (including the termination of Plaintiff). PA3656 (Court Ex. 1), PA3638 (Dec. 28, 2017 Hearing Tr.). They are taking this action to create evidence the remaining

defendants—the Cotter sisters and their wholly-dependent co-defendant Guy Adams—will seek to introduce at trial to contend that a majority of the directors who made or approved the decision were disinterested and independent. PA3656. For example, with respect to the 3-to-2 vote to terminate plaintiff, the five dismissed director defendants (including two of them who were not directors at the time) are acting to ratify that vote, thereby enabling the remaining defendants to say to the jury that Guy Adams' lack of independence does not matter because the vote to terminate cannot serve as a basis for liability on his part. *Id.* They will also argue same is true with respect to the ratification of exercise of an option to acquire 100,000 shares of the corporation's voting stock, which was approved by defendant Adams and dismissed defendant Kane as two of three members of the RDI Board of Directors compensation committee. Ratification, as court's Exhibit 1 shows, is an effort to create evidence to mislead the jury and favor the remaining three defendants by taking advantage of the district court's erroneous rulings which are the subject of plaintiff's writ petition.

If the remaining defendants are allowed to introduce evidence presently being created by the five dismissed director defendants, what will follow starting on January 8, 2018 will be a trial that could turn on evidence plaintiff could use *against* the five improperly dismissed defendants to show their lack of independence, not to "ratify" their sisters-serving-votes protected by NRS 78.138(7).

The foregoing makes clear that resolution of the issues raised in plaintiff's writ petition prior to trial proceeding below will have the laudatory effect of avoiding the all but certain waste of party and Nevada judicial resources, including multiple appellate proceedings and two trials—one before the district court's erroneous dismissal of five director defendants is corrected and another trial after the dismissal is reversed. *Cf. McCrea*, 120 Nev. at 251, 89 P.3d at 39 (finding that the benefits of arbitration, including its purpose to avoid "longer time periods associated with litigation," would "likely be lost" if the appellant "had to simultaneously or sequentially proceed in both judicial and arbitral forums").

Thus, the first factor of NRAP 8(c) weighs decisively in favor of staying proceedings below.

2. Plaintiff Would Suffer Serious Harm Without a Stay.

Harm to plaintiff is not just a wasteful expenditure of party and judicial resources in a premature trial. Allowing this case to go to trial against the three remaining director defendants without the five defendants who are working to "ratify" their breaches of fiduciary duty to benefit the remaining defendants by creating evidence they can use to manipulate the burden of proof and outcome at the trial will ensure an unfair proceeding.

3. Defendants Would Not Suffer Prejudice, Much Less Irreparable Harm, if a Stay is Granted.

It would be in all the parties' interest—including defendants' interest— to stay the case and avoid a costly and time-consuming "do over" of the trial that is about to start if the Court reverses and vacates the district court's dismissal of the five directors. This factor therefore also weighs in plaintiff's favor.

4. Plaintiff is Likely to Succeed on the Merits.

The accompanying writ petition seeks an order vacating the December 28, 2017 order on partial motions for summary judgment Nos. 1 and 2, William Gould's motion for summary judgment, and the district court's decision to dismiss five of the director defendants on the grounds that: (1) Plaintiff did not have proper notice and an opportunity to be heard before all claims were dismissed against these five defendants, as *Renown Regional Medical Center. v. Second Judicial District Court.*, 130 Nev. ___, ___, 335 P.3d 199, ___ (2014)("*Renown*") required; (2) briefing on defendant Gould's motion was still open; and (3) the district court's surprise ruling deprived plaintiff of his statutory right under NRS 78.138(7) to present evidence at trial to rebut the presumption that the acts and omissions of the five dismissed directors were protected by the business judgment rule.

In *Renown*, the Court granted the hospital's writ petition in circumstances similar to those before the Court in this petition. There, the district court found in favor of the plaintiff "on his breach of contract and

intentional interference with contract claims, even though the full merits of these claims were not specifically argued in the cross-motions for summary judgment or at the hearing." 130 Nev. at ___, 335 P. 3d at 202. The Court granted the writ petition because these claims were not mentioned anywhere "in the six summary judgment briefs" and Renown did not receive ten days notice and an opportunity to defend itself on those claims. *Id.* Similarly here, the director defendants other than Gould filed only motions for partial summary judgment on certain *issues* (not on claims), and plaintiff did not receive notice and an opportunity to defend himself before summary judgment was granted on all *claims* against five defendants.

Plaintiff also raises a compelling and meritorious legal issue: the district court granted summary judgment in favor of five individual director defendants with respect to claims for breach of the duty of care (first claim), breach of the duty of loyalty (second claim) and breach of the duty of candor (third claim) based solely on its determination that there were no disputed issues of material fact regarding the disinterestedness or independence of those director defendants. PA3618 (Dec. 28, 2017 Order at 4); PA3327 (Dec. 11, 2017 Hearing Tr. at 60:6–8) ("the directors that I found there was not evidence of a lack of disinterestedness have the protection the statute provides to them"). In doing so, the district court treated evidence of intentional breaches of fiduciary duty as legally irrelevant to rebutting the business judgment rule presumptions. As demonstrated in

the accompanying writ petition, the analysis employed by the district court is inconsistent with the plain terms of NRS 78.138, directly contrary to the holding and rationale of *Shoen v. the SAC holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (2006), and nothing less than an unprecedented determination that the business judgment rule, if properly invoked because a director is disinterested and independent, is irrebuttable. That is not now—nor should it be—the law in Nevada.

III. CONCLUSION

For the foregoing reasons, the Court should stay the proceedings below.

MORRIS LAW GROUP

By: _____

Steve Morris, Esq. (NSB #1543)
Akke Levin, Esq. (NSB #9102)
411 E. Bonneville Ave., Ste. 360
Las Vegas, NV 89101

Mark G. Krum (NSB #10913)
Yurko, Salvesen & Remz, P.C.
1 Washington Mall, 11th Floor
Boston, MA 02108

Attorneys for Petitioner
James J. Cotter, Jr.

NRAP 27(e) CERTIFICATE

I Steve Morris, declare as follows:

1. I am one of the attorneys representing plaintiff James Cotter Jr. in his Petition for Writ of Mandamus (the "Petition") concurrently filed with the Court.

2. I make this certification in support of Plaintiff's Emergency Motion Under NRAP 27(e), which seeks a stay of the proceedings below pending resolution of the legal issues presented by the Petition (*i.e.*, the proper application of the business judgment rule) that affect the scope of trial, the number of defendants, and plaintiff's burden of proof at trial.

3. This Motion presents an emergency because trial starts on January 8, 2018. Plaintiff filed a motion to stay proceedings in the district court in which he made the same arguments he raises in this Emergency Motion. The district court denied the Motion to Stay. Although plaintiff repeated his request for a stay in his Motion for Rule 54(b) Certification, pending in the district court, that Motion will not be heard until January 4, 2018, one business day before trial starts. A stay is unlikely to be granted in connection with the Rule 54(b) motion in light of the district court's prior denial of plaintiff's motion to stay the proceedings while this writ or direct appeal under Rule 54(b) certification is being considered by this Court.

4. Relief in response to this emergency motion is needed in less than 14 days—as soon as possible or by January 4, 2018—because trial is set to begin one business day later on January 8, 2018.

5. The telephone numbers and office address of the attorneys for the parties are:

H. Stan Johnson (SBN 00265)
Cohen Johnson Parker Edwards
375 East Warm Springs Rd, Suite 104
Las Vegas, NV 89119
Telephone No.: (702) 823-3500

Christopher Tayback (*pro hac vice*)
Marshall Searcy (*pro hac vice*)
Quinn Emanuel Urquhart & Sullivan LLP
865 South Figueroa Street, 10th Floor
Los Angeles, CA 90017
Telephone No.: (213) 443-3000

Attorneys for Real Parties in Interest Margaret Cotter, Ellen Cotter, Douglas McEachern, Guy Adams, Edward Kane, Judy

Donald A. Lattin (NV SBN 693)
Carolyn K. Renner (NV SBN 9164)
Maupin, Cox & Legoy
4785 Caughlin Parkway
Reno, Nevada 89519
Telephone No. (775) 827-2000

Ekwan E. Rhow (*admitted pro hac vice*)
Shoshana E. Bannett (*admitted pro hac vice*)
Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg & Rhow, P.C.
1875 Century Park East, 23rd Floor
Los Angeles, California 90067-2561
Telephone No: (310) 201-2100

Attorneys for Real Party In Interest William Gould

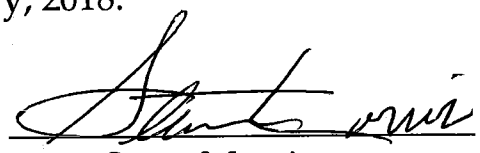
Mark Ferrario (SBN 1625)
Kara Hendricks (SBN 7743)
Tami Cowden (SBN 8994)
Greenberg Traurig, LLP
3773 Howard Hughes Pkwy.
Suite 400 North
Las Vegas, NV 89169
Telephone: (702) 792-3773

Attorneys for Nominal Defendant Reading International, Inc.

6. My partner, Rosa Solis-Rainey, called the Court's clerk on Friday December 29, 2017 and notified the clerk of this Emergency Motion

and Writ Petition and the need for relief by January 4. In the motion to stay filed below, we advised the district court and opposing counsel that we were preparing this writ Petition. Earlier today, January 2, we advised opposing counsel of this emergency motion and electronically served a copy of it on them.

Dated this 2nd day of January, 2018.



Steve Morris

CERTIFICATE OF SERVICE

I certify that I am an employee of MORRIS LAW GROUP; I am familiar with the firm's practice of collection and processing documents for mailing; that, in accordance therewith, I caused the **EMERGENCY MOTION UNDER NRAP 27(e)** to be served electronically through the Eighth Judicial District Court Portal E-Serve System and a copy to be deposited with the U.S. Postal Service at Las Vegas, Nevada, in a sealed envelope, with first class postage prepaid, on the date and to the addressee(s) shown below:

Stan Johnson
Cohen Johnson Parker Edwards
375 East Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119

Christopher Tayback
Marshall Searcy
Quinn Emanuel Urquhart & Sullivan LLP
865 South Figueroa Street, 10th Floor
Los Angeles, CA

Attorneys for Real Parties in Interest Edward Kane, Douglas McEachern, Judy Codding, and Michael Wrotniak

Mark Ferrario
Kara Hendricks
Tami Cowden
Greenberg Traurig, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, NV 89169

Attorneys for Nominal Defendant Reading International, Inc.

Donald A. Lattin
Carolyn K. Renner
Maupin, Cox & LeGoy
4785 Caughlin Parkway
Reno, Nevada 89519

Ekwan E. Rhow
Shoshana E. Bannett
Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg & Rhow, P.C.
1875 Century Park East, 23rd Fl.
Los Angeles, CA 90067-2561

Attorneys for Real Parties in Interest William Gould

Courtesy Copy
Hand Delivered

To:

Judge Elizabeth Gonzalez
Eighth Judicial District
Court of Clark County,
Nevada
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101

Dated: January 2, 2018

By: