IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES J. COTTER, JR., derivatively on behalf of Reading International, Inc., Petitioners, *vs.* THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, IN AND FOR THE COUNTY OF CLARK; and THE HONORABLE ELIZABETH GONZALEZ, District Judge, Department 11, Respondents, and DOUGLAS MCEACHERN, EDWARD KANE, JUDY CODDING, WILLIAM GOULD, AND MICHAEL WROTNIAK, Real Parties in Interest.	Electronically Filed Jan 04 2018 10:51 a.m. Elizabeth A. Brown Clerk of Supreme Court Supreme Court Case No.: 74759 District Court No. A-15-719860-B

DOUGLAS MCEACHERN, EDWARD KANE, JUDY CODDING, AND MICHAEL WROTNIAK'S OPPOSITION TO PETITIONER'S EMERGENCY MOTION UNDER NRAP 27(e)

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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.

Real Parties in Interest DOUGLAS MCEACHERN, EDWARD KANE, JUDY CODDING, and MICHAEL WROTNIAK are individuals.

These Real Parties in Interest have been represented in this litigation by the attorneys and law firms listed in the signature block below.

DATED this 4th day of January 2018.

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Real Parties in Interest Douglas McEachern, Edward Kane, Judy Codding, and Michael Wrotniak (collectively, the "Former Director Defendants"), each of whom are currently members of the Board of Directors of Reading International, Inc. ("RDI") and former Defendants in the underlying litigation before the District Court, hereby oppose Petitioner James J. Cotter, Jr.'s Emergency Motion Under NRAP 27(e) and oppose Petitioner's request for a stay on the eve of trial for the reasons set forth in that brief.

Rather than prematurely address the many legal errors and factually unsupportable claims made in Petitioner's emergency motion and related writ, which are plainly contradicted by the record and contrary to well-settled precedent, the Former Director Defendants write to correct certain substantive inaccuracies in Petitioner's emergency stay request.

First, contrary to his assertions, the object of Petitioner's appeal will not be defeated if a stay is denied. The purpose of Petitioner's appeal is to seek the view of another court as to whether the Former Director Defendants are disinterested and independent as a matter of law with respect to a series of RDI Board decisions with which he disagrees. Petitioner has not waived his claims against the Former Director Defendants, nor will he do so if the underlying case either proceeds to trial in the near future or if it is disposed of by the District Court in light of the

outcome-dispositive motions filed by the remaining defendants and RDI that are still pending (which are discussed in RDI's opposition filing).

After trial or disposition, Petitioner will be able to combine his appeal as to the District Court's independence ruling with any other issues that he may seek to contest. Absent the "waiver" of an entire issue or defense, courts in Nevada do not consider the object of an appeal to be defeated. *See Hansen v. Eighth Judicial Dist. Ct. In and For the Cnty. of Clark*, 116 Nev. 650, 657-58, 6 P.3d 982, 986 (2000) (because party's jurisdictional challenge, rejected by the district court, was preserved and could eventually be heard on appeal, no waiver existed and thus the object of appeal was not defeated); *cf. Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89 P.3d 36, 39 (2004) (granting stay because allowing case to proceed in district court rather than in an arbitration would defeat the object of appeal). Indeed, ***this Court*** denied the Director Defendants' Petition for Writ of Prohibition or Mandamus relating to Petitioner's termination claims in this litigation for this exact reason—the requested relief "would not appear to dispose of all the claims" and an "adequate remedy" absent an appeal remained. *See Cotter v. Eighth Judicial Dist. Ct.*, No. 72261 (4/14/17 Order) at 1-2 (denying petition). The result should be no different here.

Second, Petitioner will not suffer "severe harm" without an emergency stay, as he incredibly asserts. Petitioner's substantive objections to proceeding to trial or

continuing before the District Court are no different from any plaintiff who has lost on a partial summary judgment motion. That the Former Director Defendants may take advantage of a favorable summary judgment ruling to make arguments plainly available based on the record and under governing law is a fact of litigation, not irreparable or serious injury to Petitioner. *See Hansen*, 116 Nev. at 658, 6 P.3d at 987 (noting that "irreparable harm is harm for which compensatory damages would be inadequate, such as the sale of a home at trustee's sale, because real property is unique").

Petitioner's related contention that a second trial will be avoided is mere "speculation," and courts have rejected the possibility that a "do over" may result following an appeal as a valid basis to stay a case. *See Busey v. Richland Sch. Dist.*, No. 2:13-CV-5022-TOR, 2016 WL 8938423, at *4 (E.D. Wash. Apr. 13, 2016) (denying certification and stay pending appeal because plaintiff's argument that a second trial would be avoided was "speculative"); *Hansen*, 116 Nev. at 658, 6 P.3d at 986-87 (noting that appellant's argument that, absent a stay, it would be "required to participate 'needlessly' in the expense of . . . trial" is "neither irreparable nor serious" injury). Indeed, ***every appeal***, whether before or after trial, raises the specter of a potential second trial.

Third, the Former Director Defendants will suffer serious injury if the District Court proceedings are stayed. Since June 2015, the Former Director

Defendants have been repeatedly smeared in the press by a serious of wild, unsupportable accusations made entirely out of vindictiveness by Petitioner, a divisive, poorly-performing CEO, who threatened to "ruin them financially" when they exercised their business judgment to terminate him after all other options failed. Not only have Petitioner's baseless allegations threatened the professional reputations and livelihood of the Former Director Defendants, they have seriously affected the business operations of RDI as it seeks to move beyond the turmoil fostered by Petitioner. It makes sense to avoid further injury and continue the proceedings before the District Court because there are dispositive issues—other than directorial independence—to be resolved and/or tried before a jury that may moot any appeal by Petitioner. For example, if Petitioner cannot prove at trial that he would be a suitable CEO, then the injunctive relief he seeks is moot; if Petitioner cannot establish damages to RDI, then his entire case fails. There is no valid reason to delay resolution of these issues just to allow Petitioner yet another chance to revisit the District Court's independence determination, which may be mooted by what happens at trial.

Fourth, Petitioner cannot show a likelihood of success on the merits. The District Court has twice rejected his arguments, and its independence ruling was not a hasty, ill-considered decision. Rather, the District Court made its determination after affording Petitioner over two years of extensive discovery,

carefully reviewing the "2 feet" of summary judgment materials submitted by the parties, and holding multiple oral arguments on Petitioner's ever-evolving breach of fiduciary duty claims. At the final summary judgment hearing, the District Court specifically asked Petitioner whether there were any additional facts that he wanted it to consider in determining the disinterestedness/independence issue. None were forthcoming.

Instead, Petitioner's entire argument with respect to the Former Director Defendants boiled down to an assertion that, because they often voted in a manner in which he disagreed, they must be guilty of intentional misconduct and could not be independent. Petitioner's theory reverses Nevada's strong business judgment presumption. Absent any evidence of interest, Petitioner's attack on the Former Director Defendants' independence is not nearly enough to avoid summary judgment under settled law. *See Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993) (to show lack of independence, plaintiff must establish that challenged directors are so "beholden" to a controlling stockholder "or so under their influence that their discretion would be sterilized"); *see also Shoen v. SAC Holding Corp.*, 122 Nev. 621, 639, 137 P.3d 1171, 11783 (2006) (same); *In re AMERCO Deriv. Litig.*, 127 Nev. 196, 219, 252 P.3d 681, 698 (2011) (same).[1]

[1] The Nevada Supreme Court has yet to make clear whether the "beholden" standard for independence applies outside of the demand futility context. Nevada

Nor was the District Court's decision in any way "surprising," as Petitioner falsely asserts. Petitioner conspicuously avoids that (i) the Director Defendants' Motion for Partial Summary Judgment (No. 2) on the Issue of Director Independence covered ***all claims***, and (ii) Petitioner admittedly used the ***same evidence*** to question the disinterestedness and independence of Directors Wrotniak, Codding, McEachern, and Kane in every transaction or cause of action at issue. The Director Defendants' separate summary judgment motions—addressing particular issues—also covered all RDI Board decisions that Petitioner has identified as independent breaches.

Petitioner cannot satisfy any of the factors required to support a stay under NRAP 8(c). Accordingly, Petitioner's Emergency Motion Under NRAP 27(e) should be denied.

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statute evaluates independence solely on whether a director stands on both sides of a transaction. *See* NRS 78.140(1)(a).

DATED this 4th day of January 2018.

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CERTIFICATE OF SERVICE

I certify that I am an employee of COHEN|JOHNSON|PARKER|EDWARDS, and that I have served the foregoing OPPOSITION TO PETITIONER'S EMERGENCY MOTION UNDER NRAP 27(**e**), by uploading the same to the EFlex System of the Nevada Supreme Court, to be filed and served upon all parties registered to receive notice of documents filed in the above-captioned case.

Dated this 4th day of January, 2018.

/s/ Sarah Gondek
COHEN|JOHNSON|PARKER|EDWARDS