

CASE NO.

IN THE SUPREME COURT OF NEVADA

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ROWEN SEIBEL; MOTI PARTNERS, LLC; MOTI PARTNERS 16, LLC; LLTQ ENTERPRISES, LLC; LLTQ ENTERPRISES 16, LLC; TPOV ENTERPRISES, LLC; TPOV ENTERPRISES 16, LLC; FERG, LLC; FERG 16, LLC; R SQUARED GLOBAL SOLUTIONS, LLC, DERIVATIVELY ON BEHALF OF DNT ACQUISITION LLC; GR BURGR, LLC; AND CRAIG GREEN

Petitioners,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN
AND FOR THE COUNTY OF CLARK, AND THE HONORABLE TIMOTHY
C. WILLIAMS, DISTRICT JUDGE,

Respondents,

-and-

DESERT PALACE, INC.; PARIS LAS VEGAS OPERATING COMPANY, LLC;
PHWLTV, LLC, AND BOARDWALK REGENCY CORPORATION,

Real Parties in Interest.

District Court Case No. A-17-751759-B, consolidated with A-17-760537-B

**PETITIONERS' EMERGENCY MOTION FOR A STAY OF COMPLIANCE WITH THE
DISTRICT COURT'S ORDER COMPELLING PRODUCTION OF ATTORNEY-CLIENT
PRIVILEGED DOCUMENTS**

EMERGENCY MOTION UNDER NRAP 27(e)

RELIEF REQUESTED BY JUNE 18, 2021

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EMERGENCY MOTION UNDER NRAP 27(e)

Pursuant to NRAP 8 and NRAP 27, Rowen Seibel (“Seibel”); Moti Partners, LLC (“Moti”); Moti Partners 16, LLC (“Moti 16”); LLTQ Enterprises, LLC (“LLTQ”); LLTQ Enterprises 16, LLC (“LLTQ 16”); TPOV Enterprises, LLC (“TPOV”); TPOV Enterprises 16, LLC (“TPOV 16”); FERG, LLC (“FERG”); FERG 16, LLC (“FERG 16”); R Squared Global Solutions, LLC (“R Squared”), derivatively on behalf of DNT Acquisition LLC (“DNT”); GR Burgr, LLC (“GRB”); and Craig Green (“Green”) (collectively, “Petitioners” or “Development Parties”) respectfully move (the “Motion”) this Court, on an emergency basis, for an Order staying their compliance with the district court’s Findings of Fact, Conclusions of Law, and Order Granting Caesars’ Motion to Compel Documents Withheld on the Basis of Attorney-Client Privilege Pursuant to the Crime-Fraud Exception, entered on June 8, 2021 (the “Order”), which is the subject of their Petition for Extraordinary Writ Relief filed contemporaneously herewith (the “Writ Petition”). Emergency relief is warranted because the Order mandates the Petitioners to divulge attorney-client privileged documents on June 18, 2021.

Absent a stay being entered on or before June 18, 2021, the object of their Writ Petition will be defeated. Such relief was initially requested from the district court; however, the district court declined to consider the stay request until after the deadline for compliance with its Order.

This Motion is made and based on the papers and pleadings on file, the exhibits hereto, and the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Court should stay the Petitioners' compliance with the district court's Order—which mandates the Petitioners to divulge attorney-client privileged documents by June 18, 2021—pending this Court's resolution of the Writ Petition.

As detailed below, this Court analyzes four factors in determining whether to issue a stay. All four factors support the issuance of a stay. *First*, and most importantly, the object of the Writ Petition will be defeated if a stay is not entered by June 18, 2021, because the Petitioners will be forced to divulge the privileged documents that are the subject of their Writ Petition. *Second*, the Petitioners will suffer irreparable injury if a stay is not entered because the bell of compelled disclosure of privileged communications cannot be unrung. *Third*, Caesars will suffer little to no harm if the Petitioners' compliance with the Order is stayed—all non-discovery proceedings in this matter are already stayed pursuant to this Court's order in another matter. *Finally*, the Petitioners are likely to prevail on the merits of their Writ Petition because (i) Caesars did not meet its burden to set aside the attorney-client privilege between Seibel and his counsel pursuant to NRS

49.115(1); (ii) the Order contains findings that are not supported by the record; and (iii) the district court misapplied the law.

In sum, this Court should stay the Petitioners' compliance with the Order until it rules on their Writ Petition.

II. RELEVANT PROCEDURAL HISTORY¹

A. The District Court Grants Caesars' Motion to Compel Production of the Petitioners' Communications with Their Attorneys Based on the Crime-Fraud Exception.

On January 6, 2021, Caesars² moved to compel attorney-client privileged documents based on the crime-fraud exception (the "Motion to Compel"). (6 PA 977-96.) After full briefing, the district court held a hearing on February 24, 2021, and then issued a Minute Order granting the Motion to Compel on April 12, 2021. (4 PA 803-04.) The district court directed Caesars to prepare an order and to provide it to the Development Parties for review and comment. (*Id.*) The district court directed the parties to submit competing orders if they were unable to agree on the form and content of the order. (*Id.*)

¹ A recitation of the facts relevant to these proceedings is contained in the Writ Petition and, in the interests of brevity, is incorporated herein by reference.

² "Caesars" refers to PHWLTV, LLC ("Planet Hollywood"); Desert Palace, Inc. ("Caesars Palace"); Paris Las Vegas Operating Company, LLC ("Paris"); and Boardwalk Regency Corporation d/b/a Caesars Atlantic City ("CAC").

B. The Parties Submit Competing Orders; the Court Adopts Caesars' Order.

The parties could not agree on language for the order and submitted competing versions. (5 PA 921-27.) One point of dispute between the parties was the time for compliance with the Order, given that the Development Parties had expressed their intent to seek writ relief from this Court related to the decision. (*Id.* at 927.) They explained (in an explanatory letter to the district court) that absent a reasonable amount of time, the district court would have to decide a motion to stay within a matter of days; or the Development Parties would be forced to seek emergency relief from this Court. (*Id.*)

On June 8, 2021, the district court adopted Caesars' version of the order, without making any revisions, and entered it. (4 PA 869-78.) The Order concludes that “communications seeking legal advice for creation of the prenuptial agreement and the Seibel Family 2016 Trust are discoverable under the crime-fraud exception (NRS § 49.115(1)) as they were made in furtherance of a scheme to defraud Caesars” and requires the Development Parties to submit privileged communications for *in camera* review by the district court within ten (10) days of notice of entry of the Order. (*Id.* at 876.)

Notice of entry of the Order was filed on June 8, 2021. (4 PA 886-98.) Accordingly, in the absence of a stay, the Development Parties must divulge attorney-client privileged documents on or before June 18, 2021.

C. The District Court Effectively Denies the Development Parties’ Motion to Stay by Setting the Hearing Nearly One Week After the Deadline to Divulge Privileged Communications.

Two (2) days after entry of the Order, the Development Parties moved for a stay pending disposition of their Writ Petition. (5 PA 906-39.) Given that the Order required them to divulge privileged communications by June 18, 2021, the Development Parties asked the district court to hear and decide their motion for stay by June 15, 2021, and to stay compliance with the Order pending its resolution of the motion to stay. (*Id.* at 908-910.)

The district court denied the Development Parties’ request to temporarily stay compliance with the Order and set the motion to stay for hearing on June 24, 2021—*nearly one full week after the deadline for compliance with the Order.* (5 PA 911.) The district court’s setting of the hearing on the motion to stay after the compliance deadline is a *de facto* denial of the motion to stay, necessitating the request for emergency relief from this Court.

III. ARGUMENT

A. Standard of Decision.

In deciding whether to issue a stay pending review of a writ petition, this Court evaluates: “(1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied; (3) whether

respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.” NRAP 8(c); *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004). “[I]f one or two factors are especially strong, they may counterbalance other weak factors.” *Mikohn Gaming Corp.*, 120 Nev. at 251, 89 P.3d at 38.

B. This Court Should Stay Compliance with the Order Pending the Outcome of the Writ Petition.

1. The Object of the Writ Petition Will Be Defeated Unless an Emergency Stay of the Order Is Entered.

Where the object of a writ petition will be defeated unless a stay is entered, “a stay is generally warranted.” *Mikohn Gaming Corp.*, 120 Nev. at 253, 89 P.3d at 40.

Here, without a stay, the Development Parties will be forced to divulge privileged communications to the district court and the opposing parties without a ruling from this Court on the Writ Petition. While the Order requires communications to be initially produced for an *in camera* review before they will be turned over to Caesars,³ the *in camera* review process is arguably superfluous

³ Importantly, the Order also fails to state how or when any privileged documents will be provided to Caesars. For example, if the district court intends to provide the privileged documents directly to Caesars immediately after

because the district court has already determined that the documents were “made in furtherance” of the alleged crime fraud. (4 PA 876.)

Requiring disclosure of the privileged communications would defeat the object of the Writ Petition. As this Court has explained, “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 v. Second Jud. Dist. Ct.*, 111 Nev. 345, 350-51, 891 P.2d 1180, 1183-84 (1995); *accord Cotter v. Eighth Jud. Dist. Ct.*, 134 Nev. 235, 249, 416 P.3d 228, 231 (2018); *Las Vegas Sands Corp. v. Eighth Jud. Dist. Ct.*, 130 Nev. 118, 122, 319 P.3d 618, 621 (2014); *Valley Health Sys., LLC v. Eighth Jud. Dist. Ct.*, 127 Nev. 167, 171-72, 252 P.3d 676, 679 (2011).

Accordingly, the first factor weighs *heavily* in favor of a stay.

2. *The Development Parties Will Suffer Irreparable Injury if a Stay Is Not Entered Pending the Outcome of Their Writ Petition; Conversely, the Opposing Parties Will Suffer No Harm.*

“[I]n certain cases, a party may face actual irreparable harm, and in such cases the likelihood of irreparable harm should be considered in the stay analysis.” *Mikohn Gaming Corp.*, 120 Nev. at 253, 89 P.3d at 39.

reviewing them, the Development Parties would have no ability to challenge the district court’s evaluation of the documents before they are turned over to Caesars.

As this Court has held, the “resulting prejudice” from disclosure of privileged communications prior to appellate review would “not only be irreparable, but of a magnitude that could require the imposition of such drastic remedies as dismissal with prejudice or other similar sanctions.” *Cotter*, 134 Nev. 235, 249, 416 P.3d at 231. Conversely, when “the only cognizant harm threatened to the parties is increased litigation costs and delay,” they do not face any irreparable harm. *Mikohn Gaming Corp.*, 120 Nev. at 253, 89 P.3d at 39.

Here, the Development Parties will suffer irreparable injury if a stay is not entered, whereas Caesars (and the other parties) will not. Specifically, compelled disclosure of privileged communications results in a prejudice that is irreparable and cannot be restored. If a stay is not entered and the Development Parties ultimately prevail before this Court, their victory will be hollow—the opposing parties will already have possession of their privileged documents.

Conversely, Caesars (and the other parties) will not suffer irreparable or serious harm if this Court grants a stay of compliance with the Order. A stay of all non-discovery proceedings in this matter is already in effect pursuant to this Court’s order in another matter.⁴ Thus, although mere delay does not constitute irreparable harm, any delay that would allegedly be suffered by Caesars from a

⁴ Order Granting Stay, *Moti Partners, LLC v. Eighth Jud. Dist. Ct.*, Case No. 82448 (Apr. 16, 2021).

stay would be minimal, if any, as all non-discovery proceedings in this matter are already stayed.

Accordingly, the second and third factors weigh in favor of a stay.

3. The Development Parties Are Likely to Prevail on the Merits of Their Writ Petition.

Under the fourth factor, the party opposing the stay “can defeat the motion by making a strong showing that [writ] relief is unattainable” or by showing that the writ petition is frivolous or was filed for dilatory purposes. *Mikohn Gaming Corp.*, 120 Nev. at 253, 89 P.3d at 40.

Here, it is likely that this Court will consider the Writ Petition and grant the relief requested by the Development Parties. As detailed in the Writ Petition, the district court abused its discretion by compelling the production of privileged documents. This Court has said that it “will intervene [on discovery issues] when the district court issues an order requiring disclosure of privileged information.” *Toll*, 135 Nev. at 432, 453 P.3d at 1217. Further, this Court has not yet defined the parameters of NRS 49.115(1). *See Diaz*, 116 Nev. at 93, 993 P.2d at 54 (noting writ relief may be appropriate where a “writ petition offers this court a unique opportunity to define the precise parameters of [a] privilege conferred by a statute that this court has never interpreted.”) (alteration in original) (internal quotation marks omitted).

Aside from abusing its discretion in compelling privileged documents, the district court made factual findings without substantial evidence from the record, and it misapplied the law related to the crime-fraud exception to the attorney-client privilege. The district court also erred in its interpretation of Seibel's Prenuptial Agreement and The Seibel Family 2016 Trust.

Because it is likely that this Court will issue a writ, the fourth factor weighs in favor of a stay.

IV. CONCLUSION

For the reasons set forth above, this Court should stay compliance with (and enforcement of) the Order until it rules on the Development Parties' Writ Petition. Absent a stay, the object of the Writ Petition will be defeated and, unlike Caesars (and the other parties), the Development Parties will suffer serious injury for which they would have no remedy. Their Writ Petition is meritorious, and this Court should enter a stay until it decides the matter.

DATED this 16th day of June, 2021.

BAILEY ❖ KENNEDY

By: /s/ John R. Bailey

JOHN R. BAILEY

DENNIS L. KENNEDY

JOSHUA P. GILMORE

PAUL C. WILLIAMS

STEPHANIE J. GLANTZ

Attorneys for Petitioners

NRAP 27(e) CERTIFICATE

I, Paul C. Williams, declare as follows:

1. I am a partner of Bailey❖Kennedy, LLP, counsel for the Development Parties in the above-captioned proceeding.
2. I make this Certificate in support of Petitioners' Emergency Motion for a Stay of Compliance with the District Court's Order Compelling Production of Attorney-Client Privileged Documents. I am competent to testify to the facts stated herein, which are based on personal knowledge unless otherwise indicated, and would do so if requested.
3. The telephone numbers and office addresses for the district court and the attorneys for the Real Parties in Interest are as follows:

The Honorable Timothy C. Williams
District Court Judge
Eighth Judicial District Court
Regional Justice Center
200 Lewis Avenue
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Attorneys for Real Parties in Interest Desert Palace, Inc.; Paris Las Vegas Operating Company, LLC; PHWLTV, LLC; and Boardwalk Regency Corporation

4. Emergency relief is needed with regard to this Motion. As explained above, the district court ordered production of privileged communications within ten (10) days of entry of the Order and then set a hearing on the Development Parties' motion for stay (filed with the district court) nearly one week after the deadline to comply with the Order. (5 PA 911.) Accordingly, the Development Parties need emergency relief through a stay of compliance with the Order—which compels the Development Parties to divulge privileged communications by June 18, 2021—while this Court decides the Writ Petition filed concurrently herewith.

5. All grounds for a stay being advanced in this Motion were previously submitted to the district court on a motion for stay. (5 PA 906-39.)

6. On June 15, 2021, I notified the Nevada Supreme Court Clerk, via telephone, of the Development Parties' intent to file this Motion and seek relief on an emergency basis. I called the Clerk again on June 16, 2021, to indicate that the Motion was being filed.

7. On June 15, 2021, I notified M. Magali Mercera, Esq., counsel for Caesars, of the Development Parties' intent to file this Motion and seek relief on an emergency basis. I emailed Ms. Mercera an unfiled copy of the Motion on June 16, 2021.

8. On June 16, 2021, I notified the district court, via telephone, of the Development Parties' filing of this Motion and request for relief on an emergency basis.

9. As noted in the Certificate of Service, a file-stamped copy of this Motion is being served via U.S. Mail, first class postage prepaid, *and* through the Eighth Judicial District Court's electronic filing system. The district court will also be served with a copy of this Motion via hand delivery.

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

EXECUTED this 16th day of June, 2021.

/s/ Paul C. Williams
PAUL C. WILLIAMS

CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY ❖ KENNEDY and that on the 16th day of June, 2021, service of the foregoing was made by electronic service through the Nevada Supreme Court's electronic filing system, electronic service through the Eighth Judicial District Court's electronic filing system, hand delivery, and/or depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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Respondent

/s/ Susan Russo
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