

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 83723

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, LLC; FERG, LLC; SQUARED GLOBAL SOLUTIONS, LLC, DERIVATIVELY ON BEHALF OF DNT ACQUISITION LLC; GR BURGR, LLC; AND CRAIG GREEN,

Petitioners,

v.

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 d/b/a/
CAESARS ATLANTIC CITY,

Real Parties in Interest.

**REAL PARTIES IN INTEREST'S RESPONSE TO
PETITIONERS' MOTION REGARDING THE DISTRICT COURT'S
AUGUST 19, 2021 MINUTE ORDER**

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I. INTRODUCTION

Petitioners' Motion is an attempt to keep public judicial proceedings in the shadows. But the law does not condone secret judicial orders. The district court's August 19, 2021 minute order (the "Minute Order") sets forth the district court's reasons for granting Caesars' Motion to Compel Documents Withheld on the Basis of Attorney-Client Privilege Pursuant to the Crime-Fraud Exception (the "Motion to Compel"). Having complied with the two-part test set forth by the Ninth Circuit before ordering production of the challenged records, including performing an *in camera* review, the district court is not required to conceal the records any further. Petitioners' Motion is appropriately denied.

II. RELEVANT FACTUAL BACKGROUND

Caesars is a gaming licensee in Nevada and other jurisdictions. (6 PA001263.) Beginning in 2009, Caesars and certain Rowen Seibel ("Seibel") affiliated entities entered into various contracts "governing the development, creation, and operation of various restaurants in Las Vegas and Atlantic City." (*Id.*) In order to comply with Caesars' gaming licensee obligations, each of the agreements set forth the suitability obligations required of parties doing business with a gaming licensee. (*Id.*) However, as Caesars would later learn, Seibel pleaded guilty to one count of corrupt endeavor to obstruct and impede the due administration of the Internal Revenue Laws, 26 U.S.C. § 7212, a Class E Felony.

(*Id.* at PA001264.) Seibel's felony guilty plea followed "years of investigations, numerous tolling agreements, and plea negotiations with the U.S." (*Id.*) Importantly, Petitioners failed to notify Caesars of Seibel's felony criminal plea, conviction, or sentencing. (*Id.*) Instead, Petitioners engaged in a fraudulent scheme to conceal these important facts from Caesars. (*Id.* at 1264-65.) Through discovery, Caesars learned that Seibel used his attorneys to perpetrate this scheme. (*Id.* at 1264-66.) While representing to Caesars that he was no longer involved and had purportedly separated himself from his affiliated entities, in reality Seibel used his attorneys to actively hide his continuing involvement. (*Id.*) Specifically, Seibel and his attorneys (1) created new entities to which Seibel purportedly assigned the interests in certain of his affiliated entities; (2) created a trust – the Seibel Family 2016 Trust – to receive the income from those new entities; and (3) prepared a prenuptial agreement between Seibel and his soon to be wife to, in part, continue benefitting from the agreements with Caesars. (*Id.* at 001265.) "[A]fter the new entities were created, Seibel sent letters to Caesars purporting to assign the Seibel Agreements." (*Id.*) "In each of those letters, Seibel told Caesars that the agreements would be assigned to a new entity whose membership interests were ultimately mostly owned by the Seibel Family 2016 Trust." (*Id.*) Importantly, Seibel told Caesars that the sole beneficiaries of the Seibel Family 2016 Trust were his grandmother, his wife, and any potential descendants of Seibel and "that, '[o]ther

than the parties described in th[e] letter[s], there [were] no other parties that have any management rights, powers or responsibilities regarding, or equity or financial interests in' the new entities." (*Id.*) This was false. (*Id.* at 001265-66.)

As Caesars would later learn after Seibel finally produced his prenuptial agreement, Seibel's wife was required "to share the distributions she received from the Seibel Family 2016 Trust with Seibel." (*Id.* at 001266.) Thus, despite representing to Caesars that Seibel was no longer affiliated and no other beneficiaries to the Seibel Family Trust 2016 existed, the truth revealed that Seibel required one of the alleged "sole beneficiaries" of the trust to share the distributions with him. (*Id.*) As a result, "all of the statements made to Caesars about Seibel's purported disassociation were false when made and designed exclusively for the purpose of defrauding Caesars." (*Id.*)

Once Caesars uncovered the fraudulent scheme in discovery, it moved to compel disclosure of any communications between Seibel and his attorneys regarding the same. (7 PA 001341-60.) Following full briefing and oral argument, the district court issued a minute order finding that "Caesars has met its initial burden of proof[.]" (4 PA 000904.)

Following entry of detailed findings of fact and conclusions of law, the district court ordered Petitioners to produce the documents for *in camera* review. (6 PA 001266-67.) After an unsuccessful petition for extraordinary relief with this

Court (*see* Case No. 83071), Petitioners produced the documents to the district court for *in camera* review. (6 PA 001268.) Thereafter, the Court issued the Minute Order finding that "the Seibel prenuptial agreement was not legitimately prepared for estate purposes" and that "an issue exists as to the effect of the prenuptial agreement with Seibel's wife and its interplay with the Seibel Family 2016 Trust." (*Id.*) To explain its findings and provide the parties with an understanding of how it reached its conclusion, the district court quoted some of the documents at issue which unequivocally supported Caesars' suspicions. (17 PA003481.) In explaining the basis for its decision to disclose the contents of the documents, the district court stated that, among other things, Caesars would have to know the content of the documents in order to meaningfully address any subsequent appellate challenge. (6 PA 001249.)

Once the Court issued its Minute Order, Petitioners did not notify Caesars that they intended to request the return of the Minute Order. (*Id.* at 001133.) Instead, a few weeks later, Petitioners filed a Motion to Compel the Return, Destruction, or Sequestering of the Court's August 19, 2021, Minute Order (the "Motion to Return"). (5 PA 001103-118.) While the district court granted the Motion to Return, in part, it did not order Caesars to return, sequester, or destroy the Minute Order. (6 PA 001322.) Instead, the district court ordered that Caesars could utilize the Minute Order "for appellate purposes and/or in responding to the

Development Parties' anticipated petition for writ relief concerning this Court's orders on Caesars' Motion to Compel." (*Id.* at 001321.)

Petitioners thereafter filed their Petition for Extraordinary Writ Relief (the "Petition"). Notably, at that time, Petitioners did not request that this Court order the return or destruction of the Minute Order and Petitioners included the Minute Order in their Appendix in Support of their Petition. (17 PA 003481-82.) Petitioners also refer to the Minute Order in their Petition. The present Motion followed approximately two weeks after this Court directed an answer to the Petition. But, there is no authority to keep an order of the district court hidden from public view.

III. ARGUMENT

A. The Law Does Not Condone Secret Orders.

As this Court has recently recognized, when parties "call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials." *News+Media Cap. Grp. LLC v. Las Vegas Sun, Inc.*, 137 Nev. Adv. Op. 45, 495 P.3d 108, 114 n.4 (2021) (internal quotations omitted). Indeed, "[o]penness and transparency are the cornerstones of an effective, functioning judicial system." *Howard v. State*, 128 Nev. 736, 740, 291 P.3d 137, 139 (2012) (citations omitted). "Safeguarding those cornerstones requires public access not only to judicial proceedings but also to an equally important aspect of

the judicial process—judicial records and documents." *Id.*, 291 P.3d at 139 (citations omitted). Thus, generally, "any item that is filed with the court as part of the permanent record of a case and relied on in the course of judicial decision-making will be a public judicial record or document." *Id.*, 291 P.3d at 139 (internal quotations omitted).

Here, the district court quoted certain documents in the Minute Order to allow the parties to understand the reasoning behind the district court's conclusion that the documents were discoverable under the crime-fraud exception. In other words, the Minute Order is part of the judicial record and offers key insight into the district court's decision-making process. By seeking to claw back the Minute Order, Petitioners are seeking to cast the district court's decision-making process into the shadows, an outcome that the law disavows.

B. The Crime-Fraud Exception Vitiates Any Claim of Privilege.

As codified, Nevada law protects communications between a client (or their representative) and their attorney (or representative) "[m]ade for the purpose of facilitating the rendition of professional legal services to the client[.]" NRS 49.095. However, "this court has consistently held that statutory privileges should be construed narrowly." *Rogers v. State*, 127 Nev. 323, 328, 255 P.3d 1264, 1267 (2011) (listing cases). Indeed, "[b]ecause both the work product and the attorney-client privileges . . . obstruct[] the search for truth and because [their] benefits are,

at best, indirect and speculative, [they] must be strictly confined within the narrowest possible limits consistent with the logic of [their] principles." *Whitehead v. Nev. Comm'n on Jud. Discipline*, 110 Nev. 380, 414–15, 873 P.2d 946, 968 (1994) (internal quotations omitted). To be clear, "[t]here is no privilege under NRS 49.095 . . . [i]f the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." NRS 49.115(1); *see also In re Grand Jury Investigation*, 810 F.3d 1110, 1113 (9th Cir. 2016).

"A party seeking to vitiate the attorney-client privilege under the crime-fraud exception must satisfy a two-part test." *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1090 (9th Cir. 2007), *abrogated on other grounds by Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009). "First, the party must show that the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme." *Id.* (internal quotations omitted) "Second, it must demonstrate that the attorney-client communications for which production is sought are sufficiently related to and were made in furtherance of the intended, or present, continuing illegality." *Id.* (internal quotations omitted). The second step is accomplished through an *in-camera* review of the documents. *In re Grand Jury Investigation*, 810 F.3d at 1114.

Here, after fully briefed motion practice, the district court determined that

Caesars had met its initial burden of proof under the first step. (5 PA 000977.) Thereafter, as required under the two-step analysis in *In re Napster*, the district court reviewed the challenged records *in camera*. (6 PA 001267-68.) Only after it reviewed the challenged records *in camera* did the district court determine that the crime-fraud exception applied and, as a result, no privilege attached to the communications at issue. (*Id.*)

The Ninth Circuit does not require any additional steps before requiring disclosure of such communications. Aware of this fact, Petitioners turn to cases from other circuits for the proposition that a district court may not reveal the contents of challenged documents until all avenues of appeal are exhausted. However, this argument fails to consider that Nevada does not grant automatic appellate review of district court discovery orders.¹ Indeed, under the framework proposed by Petitioners, the district courts in this state would merely serve as advisory courts on discovery matters, with this Court serving as a Super-Discovery Commissioner over all privilege or other discovery disputes. Such a position runs contrary to this Court's policy that it "rarely entertains writ petitions challenging

¹ The Seibel Parties cite *Cotter*, *Las Vegas Sands*, *Valley Health Systems*, and *Wardleigh* to imply that this Court automatically intervenes whenever disclosure of a privileged issue is raised. Not so. This Court has made clear that it *may exercise its discretion* to intervene when a district court issues an order compelling production of privileged matters, not that it always exercises its discretion to intervene in all instances. See, e.g., *Cotter v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, 134 Nev. 247, 249, 416 P.3d 228, 231 (2018).

pretrial discovery." *See Cotter*, 134 Nev. at 249, 416 P.3d at 231.

Indeed, "[w]rit relief is an extraordinary remedy, available when the petitioner has 'no plain, speedy and adequate remedy at law other than to petition this court.'" *Id.*, 416 P.3d at 231 (quoting *Wardleigh v. Second Jud. Dist. Ct.*, 111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995))). Unlike in *Cotter*, the district court here performed an *in camera* review before finding that the challenged documents were subject to discovery under the crime-fraud exception. Indeed, the district court issued not one but two detailed sets of Findings of Fact and Conclusions of Law setting forth both the facts and reasoning behind its decision. (5 PA 000970-79; 6 PA 001262-73.) The district court's ruling is reviewed for abuse of discretion. *Cotter*, 134 Nev. at 249, 416 P.3d at 231–32. Nothing more is required before disclosure.

C. Petitioners Waived Any Claw-Back Argument.

"Waiver occurs where a party knows of an existing right and either actually intends to relinquish the right or exhibits conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that the right has been relinquished." *Hudson v. Horseshoe Club Operating Co.*, 112 Nev. 446, 457, 916 P.2d 786, 792 (1996); *see also Nev. Yellow Cab Corp. v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007). Petitioners have been aware of the content of the Minute Order since August 19, 2021. Yet,

Petitioners never asked Caesars to sequester the Minute Order containing the purportedly privileged information. Moreover, even after failing to receive the relief they wanted from the district court, Petitioners did not seek immediate relief from this Court. Instead, as discussed above, Petitioners included the Minute Order in their Appendix and refer to it in Petition. If granted the relief they seek, Petitioners would be allowed to rely on one record and expect real parties in interest to rely on another, lesser record that lacks the district court's reasoning behind its decision to grant Caesars' Motion to Compel. This Court, Caesars, and the public would be deprived of a full and accurate record. Not only would such a result be unjust, but it would be contrary to the law as Petitioners have waived any claims of privilege by not immediately seeking to claw back the Minute Order and, instead, placed the Minute Order at issue in their record before the Court.

IV. CONCLUSION

Based upon the foregoing, Petitioners' Motion should be denied.

DATED this 14th day of December 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC and, pursuant to NRAP 25(b) and NEFR 9, that on this 14th day of December 2021, I electronically filed and served the foregoing **REAL PARTIES IN INTEREST'S RESPONSE TO PETITIONERS' MOTION REGARDING THE DISTRICT COURT'S AUGUST 19, 2021 MINUTE ORDER** properly addressed to the following:

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