

**CASE NO. 83723**

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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.*

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

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**PETITIONERS' REPLY IN SUPPORT OF THEIR MOTION REGARDING THE  
DISTRICT COURT'S AUGUST 19, 2021, MINUTE ORDER**

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

Caesars argues that the Development Parties' Motion should be denied because: (i) the Development Parties seek to conceal the district court's ruling; (ii) the Development Parties fail to cite Ninth Circuit authority supporting their position; and (iii) the Development Parties waived their right to seek to claw back the Minute Order.<sup>1</sup> (*See generally* Opp.) Each argument fails, as shown below.

### **A. The District Court Should Have Refrained From Revealing Seibel's Privileged Communications to Caesars.**

Caesars argues that the Development Parties seek to keep the district court's ruling "in the shadows" by asking this Court to claw back the Minute Order. (*See* Opp. at 1, 7.) Not quite.

The Development Parties seek to prevent Caesars from relying on Seibel's privileged communications in responding to the Petition, given that such communications should not have been disclosed to Caesars by the district court in the first instance. As set forth in the Motion, the district court should have been cautious in handling Seibel's privileged communications following its *in camera* review. To that end, the district court should have refrained from revealing any of the communications; instead, the district court should have simply cited, by Bates number, those particular communications that it believed supported application of

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<sup>1</sup> Capitalized terms used throughout this Reply are defined in the Motion.

the crime-fraud exception. The Development Parties would then have had full and fair opportunity to seek review by this Court—*before* the bell of privilege was rung. *See Valley Health Sys., LLC v. Eighth Jud. Dist. Ct.*, 127 Nev. 167, 172, 252 P.3d 676, 679 (2011) (“[O]nce such information is disclosed, it is irretrievable.”).

Caesars may rely on the Initial and Supplemental Orders in responding to the Petition. Those Orders contain the district court’s (clearly erroneous) reasoning for compelling the disclosure of Seibel’s privileged communications—not the Minute Order. *See Mortimer v. Pac. States Saus. & Loan Co.*, 62 Nev. 142, 153, 145 P.2d 733, 735-36 (1944) (“The formal written order signed by the court, must, we think, supersede the minute order entered by the clerk. It must be taken as the best evidence of the court’s decision.”) (internal citations omitted)).

In sum, Caesars is wrong to argue that clawing back the Minute Order will somehow conceal the district court’s reasoning for granting the Motion to Compel.

**B. *In re Napster* Relies on Authority from Other Circuits, Including the *In re GMC* and *Haines v. Liggett Group* Decisions.**

Caesars argues that the district court was free to reveal Seibel’s privileged communications in deciding the Motion to Compel. (*See* Opp. at 8-9.) Without citing any authority supporting the district court’s disclosure, Caesars faults the Development Parties for citing “cases from other circuits,” saying, “The Ninth Circuit does not require any additional steps before requiring disclosure of [privileged] communications.” (*See id.*) Caesars’ argument misses the mark.

As a preliminary matter, this Court is not limited to Ninth Circuit authority in deciding this Motion. This is because case law from the Ninth Circuit does not carry any more or less weight than case law from any other Circuit. *See, e.g., Kindred v. Second Jud. Dist. Ct.*, 116 Nev. 405, 413, 996 P.2d 903, 908 (2000).

That aside, the authority cited by the Development Parties in their Motion has been favorably cited by the Ninth Circuit. Specifically, in *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078 (9th Cir. 2007)<sup>2</sup>—the case cited by Caesars—the Ninth Circuit cited with approval, *inter alia*, the Third Circuit’s decision in *Haines v. Liggett Grp., Inc.*, 975 F.2d 81 (3d Cir. 1992), saying that it is a “well-reasoned decision,” and the Eighth Circuit’s decision in *In re GMC*, 153 F.3d 714 (8th Cir. 1998). *See In re Napster*, 479 F.3d at 1090, 1092-93. Both of those decisions were cited in the Motion for the proposition that when a district court determines that the crime-fraud exception applies to privileged communications (after conducting an *in camera* review), the district court must give the aggrieved party an opportunity to seek appellate review *before* it reveals the communications to the opposing parties. *See In re GMC*, 153 F.3d at 717; *Haines*, 975 F.2d at 97.

It is telling that Caesars fails to cite a single case—from the Ninth Circuit or elsewhere—holding that a district court should reveal a party’s privileged

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<sup>2</sup> *Abrogated on other grounds by Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009).

communications in deciding that the crime-fraud exception applies; particularly where, as here, the aggrieved party has made it abundantly clear that he will promptly seek appellate review of the decision. Given this Court's long-standing history of reviewing discovery rulings that effectuate a disclosure of privileged communications, *see, e.g., Cotter v. Eighth Jud. Dist. Ct.*, 134 Nev. 235, 249, 416 P.3d 228, 231 (2018), it stands to reason that it was inappropriate for the district court to unilaterally disclose Seibel's privileged communications to Caesars *before* he had a reasonable opportunity to seek appellate review.<sup>3</sup>

In sum, Caesars is wrong to argue that the Ninth Circuit would condone a premature disclosure of a party's privileged communications by a district court.

**C. The Development Parties Did Not Waive their Right to Seek to Claw Back the Minute Order.**

As a way to avoid the merits of this Motion, Caesars argues that the Development Parties waived their right to seek to claw back the Minute Order. (Opp. at 9-10.) The argument is belied by the Development Parties' actions.

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<sup>3</sup> Contrary to Caesars' assertion, the Development Parties do not seek to create new law requiring this Court to review all discovery rulings involving the attorney-client privilege. (*See* Opp. at 8-9.) Whether this Court elects to entertain a writ petition arising from a discovery ruling addressing the attorney-client privilege is separate and apart from whether a district court should reveal the contents of privileged communications in an order compelling the disclosure of privileged communications.

As shown in the Motion, the Development Parties diligently moved to claw back the Minute Order promptly after it was entered. (5 PA 1103-18.) Then, promptly after this Court directed an answer to the Petition and stayed compliance with the Supplemental Order, the Development Parties filed their Motion. Such actions are antithetical to “conduct which evidences an intention to waive a right or ... conduct which is inconsistent with any other intention than to waive a right.” *McKellar v. McKellar*, 110 Nev. 200, 202, 871 P.2d 296, 297 (1994).

In sum, Caesars is wrong to argue that the Development Parties have acted in a manner that somehow constitutes a waiver of the privilege.

## **II. CONCLUSION**

The district court clearly erred by disclosing the Development Parties’ privileged communications to Caesars *before* the Development Parties could file their Petition. As a result, Caesars should not be permitted to rely on the privileged communications quoted in the Minute Order when responding to the Petition. Anything less would unfairly disadvantage the Development Parties.

For these reasons, the Motion should be granted in its entirety.

DATED this 21<sup>st</sup> day of December, 2021.

BAILEY ❖ KENNEDY

By: /s/ Dennis L. Kennedy

*Attorneys for Petitioners*

## **CERTIFICATE OF SERVICE**

I certify that I am an employee of BAILEY ❖ KENNEDY and that on the 21<sup>st</sup> day of December, 2021, service of the foregoing was made by electronic service through Nevada Supreme Court's electronic filing system, the Eighth Judicial District Court's electronic filing system, and/or by 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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