

CASE NO. 83723

IN THE SUPREME COURT OF NEVADA

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Elizabeth A. Brown
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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' MOTION TO SUBMIT PRIVILEGED DOCUMENTS UNDER SEAL FOR
AN *IN CAMERA* REVIEW BY THIS COURT**

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Pursuant to NRAP 27, the Development Parties¹ move (the “Motion”) this Court for an Order permitting them to submit attorney-client privileged communications (the “Privileged Documents”) for an *in camera* review by this Court. The Privileged Documents are the subject of the Development Parties’ Petition for Extraordinary Writ Relief (the “Petition”), which remains pending. Because the district court reviewed the Privileged Documents *in camera* in rendering the decisions at issue in the Petition, this Court should have the ability to do so as well. *See Las Vegas Police Protective Ass’n Metro, Inc. v. Eighth Jud. Dist. Ct.*, 122 Nev. 230, 235 n.5, 130 P.3d 182, 187 n.5 (2006). Further, pursuant to SRCR 4(h) and 7, the Privileged Documents should be maintained under seal and not disclosed to Caesars.²

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

¹ “Development Parties” or “Petitioners” “refers to Rowen Seibel (“Seibel”), Craig Green (“Green”), and the “Development Entities,” *i.e.*, 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”); and GR Burgr, LLC (“GRB”).

² “Caesars” or “Real Parties in Interest” 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”).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Development Parties have sought this Court's intervention with respect to orders (erroneously) entered by the district court compelling the Development Parties to disclose the Privileged Documents to Caesars pursuant to NRS 49.115(1). The district court reviewed the Privileged Documents, *in camera*, as part of finding that the crime-fraud exception applies to Seibel's privileged communications with his counsel related to his family trust and nullified prenuptial agreement. Although the district court erred in finding that Caesars met its initial burden under the first step of the crime-fraud analysis,³ the Development Parties seek an order from this Court permitting them to submit the Privileged Documents, under seal, for an *in camera* review, should this Court reach the second step.

For these reasons, as explained below, this Court should grant this Motion in its entirety.

³ The district court followed the two-step approach adopted by the 9th Circuit U.S. Court of Appeals in addressing the crime-fraud exception. The first step involves determining whether the party was engaged in or planning to engage in a fraud when it sought the advice of counsel "to further the scheme." *In re Napster 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). The second step involves determining whether the communications with counsel were "sufficiently related to and ... made in furtherance of" the alleged fraud. *Id.* (quotation marks and citation omitted).

II. BACKGROUND⁴

On January 6, 2021, Caesars moved to compel an outright disclosure of the Privileged Documents under Nevada’s crime-fraud exception to the attorney-client privilege (the “Motion to Compel”). (7 PA1341-60.) On June 8, 2021, the district court entered an order granting the Motion to Compel, finding that Seibel’s “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.” (5 PA977.) Although, as stated, the district court found that the crime-fraud exception applied *before* even seeing the Privileged Documents, the district court directed the Development Parties to submit the Privileged Documents for an *in camera* review within 10 days of notice of entry of the Order. (*Id.*)

On June 18, 2021, the Development Parties submitted the Privileged Documents to the district court for an *in camera* review.⁵ (5 PA1097-1100.) On August 19, 2021, the district court entered the Minute Order related to its *in*

⁴ In the interests of brevity, the Development Parties incorporate by reference the facts set forth in their Petition.

⁵ Before doing so, the Development Parties filed a petition for extraordinary writ relief with this Court, which was dismissed as premature pending the outcome of the district court’s *in camera* review. *See* Ord. Denying Pet. for Writ of Prohibition, *Seibel v. Eighth Jud. Dist. Ct.*, No. 83071 (June 18, 2021), *available at* 5 PA1094-96.

camera review, through which the district court quoted certain privileged communications prior to affording a reasonable opportunity to the Development Parties to seek this Court’s intervention. (17 PA3481-82.) On October 28, 2021, the district court entered an order compelling the Development Parties to disclose the Privileged Documents to Caesars. (6 PA1262-78.)

On November 4, 2021, the Development Parties filed their Petition. The Development Parties argue, *inter alia*, that the district court erred in finding (i) that Caesars met its initial burden under the first step of the crime-fraud analysis; and (ii) that all the Privileged Documents are discoverable under the second step of the crime-fraud analysis. The Development Parties do not address the substance of the Privileged Documents in their Petition or Reply (nor did they do so before the district court in response to the Motion to Compel) in order to preserve the privilege and avoid a potential waiver. *In re Zetia (Ezetimibe) Antitrust Litig.*, No. MDL No. 2:18-md-2836, 2019 WL 6122012, at *11 (E.D. Va. July 16, 2019) (“A party cannot be expected to defend a privilege assertion by revealing the contents of what it hopes to keep secret.”). Nevertheless, the Development Parties move for an order permitting them to submit the Privileged Documents, under seal, for an *in camera* review by this Court, should it reach the second step of the crime-fraud analysis.

III. ARGUMENT

NRAP 10(b)(1) provides that “[f]or purposes of appeal, the parties shall submit to the Supreme Court copies of the portions of the trial court record to be used on appeal” “The trial court record consists of the papers and exhibits filed in the district court, the transcript of the proceedings, if any, the district court minutes, and the docket entries made by the district court clerk.” NRAP 10(a).

The trial court record may also include, if applicable, documents that are subject to a claim of privilege that were reviewed, *in camera*, by the district court. *Las Vegas Police Protective Ass’n Metro, Inc.*, 122 Nev. at 235 n.5, 130 P.3d at 187 n.5 (noting that the Supreme Court may consider documents that were reviewed, *in camera*, by the district court); *see also Canarelli v. Eighth Jud. Dist. Ct.*, 136 Nev. 247, 253, 256, 464 P.3d 114, 120, 123 (2020) (reviewing documents that were allegedly subject to the attorney-client privilege and attorney work product privilege as part of analyzing a district court order compelling the production of such documents).

The primary issue raised by the Petition is whether Caesars met its burden to invade Seibel’s attorney-client privilege under NRS 49.115(1). The district court found that Caesars met its initial burden, under the first step of the crime-fraud analysis, and then reviewed the Privileged Documents, *in camera*, during the second step. (6 PA1270-71.) Following its *in camera* review, the district court

affirmed its initial finding that the Privileged Documents are “subject to production under the crime-fraud exception.” (*Id.*; *see also* 5PA 977.)

The Development Parties argue in their Petition that the district court erred in finding that Caesars met its initial burden to show that Seibel was supposedly engaged in a fraud and utilized his counsel in furtherance of such fraud—the first step of the crime-fraud analysis. If this Court agrees, the analysis will conclude without the need for this Court to proceed with the second step.

Alternatively, the Development Parties argue that the district court erred in finding that all the Privileged Documents are discoverable under the second step of the crime-fraud analysis. So that this Court may review that finding in deciding the Petition, the Development Parties should be permitted to submit the Privileged Documents for an *in camera* review by this Court.⁶ *Las Vegas Police Protective Ass’n Metro, Inc.*, 122 Nev. at 235 n.5, 130 P.3d at 187 n.5; *see also* SRCR 7 (noting that records sealed in the trial court “shall be made available to the Nevada Supreme Court in the event of an appeal”).

⁶ Because the Privileged Documents were not publicly filed (or filed under seal) with the district court, the Development Parties were unable to include them in the Appendix that accompanied their Petition. The Privileged Documents that were provided to the district court are currently in the custody of a vendor, in response to the district court’s request to pick up the documents for safekeeping. The Privileged Documents were transferred directly from the district court to the vendor and are being maintained in a secure location. Upon this Court’s direction, the vendor will transmit the Privileged Documents to this Court.

Further, this Court should permit the Development Parties to submit the Privileged Documents under seal. SRCR 3(4)(h) states that sealing may be permitted by an “identified compelling circumstance.” Here, sealing the Privileged Documents will ensure that the privilege is not lost and that the Development Parties are given a full and fair opportunity to have this Court consider the propriety of the district court’s order compelling the Development Parties to disclose the Privileged Documents to Caesars.

IV. CONCLUSION

The Privileged Documents are relevant to this Court’s determination of the issues presented in the Petition and were reviewed, *in camera*, by the district court. So that this Court may also review the Privileged Documents, this Court should enter an order permitting the Development Parties to submit the Privileged Documents, under seal, for an *in camera* review by this Court.

This Motion should be granted in its entirety.

DATED this 16th day of February, 2022.

BAILEY ❖ KENNEDY

By: /s/ Dennis L. Kennedy

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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY ❖ KENNEDY and that on the 16th day of February, 2022, 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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