No._____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re NEWPORT TRIAL GROUP, *et al.*,

NEWPORT TRIAL GROUP, *et al.*,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION,
Respondent,

NATURAL IMMUNOGENICS CORP.,
Respondent,

On Petition for Writ of Mandamus from the United States District Court,
Central District of California, Southern Division
(No. 8:15-cv-02034-JVS)

PETITION FOR WRIT OF MANDAMUS AND REQUEST FOR IMMEDIATE STAY

(PRIVILEGED DOCUMENTS ORDERED FOR PRODUCTION BY JULY 26, 2018)

Emergency Motion Under Circuit Rule 27-3

CALLAHAN & BLAINE, APLC
Edward Susolik (SBN 151081)
David J. Darnell (SBN 210166)
Stephanie A. Sperber (SBN 230006)
James M. Sabovich (SBN 218488)
3 Hutton Centre Drive, Ninth Floor
Santa Ana, CA 92707
Telephone: (714) 241-4444

Attorneys for Petitioners

FORD & DIULIO PC
Brendan Ford (SBN 224333)
Kristopher P. Diulio (SBN 229399)
Tyler E. Sanchez (SBN 299131)
605 Town Center Drive, Suite 760
Costa Mesa, CA 92626
Telephone: (714) 450-6830

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF CONTENTS
(Cont.)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

CIRCUIT RULE 27-3 CERTIFICATE

Counsel for Petitioners

Newport Trial Group ("NTG"), Scott J. Ferrell, Ryan M. Ferrell, Victoria C. Knowles, David Reid, and Andrew Lee Baslow

Edward Susolik (esusolik@callahan-law.com); (714) 241-4444

David J. Darnell (ddarnell@callahan-law.com); (714) 241-4444

Stephanie A. Sperber (ssperber@callahan-law.com); (714) 241-4444

James M. Sabovich (jsabovich@callahan-law.com); (714) 241-4444

Andrew Nilon, Sam Pfleg, Matthew Dronkers, Taylor Demulder, Sam Schoonover, Giovanni Sandoval

Brendan Ford (bford@FordDiulio.com); (714) 450-6830

Kris Diulio (kdiulio@FordDiulio.com); (714) 450-6830

Respondent Central District of California, Southern Division

Karla Tunis (Karla_Tunis@cacd.uscourts.gov); (714) 338-4750

Counsel for Respondent, Natural Immunogenics Corp.

Peter A. Arhangelsky (parhangelsky@emord.com); (602) 388-8899

Joshua S. Furman (jfurman@emord.com); (602) 388-8899

Facts showing the existence and nature of the claimed emergency:

On July 16, 2018 the district court entered an order denying Petitioners request for an *in camera* hearing regarding the application of the crime fraud exception to 26 privileged documents and ordered production of those privileged documents to an adverse party with ten days. As discussed in more detail below, the refusal to allow an *in camera* hearing effectively denied Petitioners an opportunity to address the content of those documents, which is central to the crime fraud inquiry. Absent a stay and mandamus relief, Petitioners will be compelled to produce privileged documents without being "given the opportunity to present evidence and argument in support of its claim of privilege" as required by Ninth Circuit precedent. *UMG Recording, Inc. v. Bertelsmann AG (In re Napster Copyright Litig.)*, 479 F.3d 1078, 1093 (9th Cir. 2007) (abrogated in part on other grounds by *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009)).

When and how counsel for the other parties were notified and whether they have been served with the motion; or, if not notified and served, why that was not done.

Counsel for NIC was notified of Petitioners' request by email on July 25, 2018 and oppose. NIC has also been served with a copy of this writ petition and request for a stay, as shown on the attached Certificate of Service.

If the relief sought in the motion was available in the district court, Bankruptcy Appellate Panel or agency, the motion shall state whether all grounds advanced in support thereof in this Court were submitted to the district court, panel or agency, and, if not, why the motion should not be remanded or denied.

Petitioners are concurrently seeking a stay in the district court.

Further, pursuant to Circuit Rule 27-3, the Clerk of the Court was notified telephonically of the filing on July 26, 2018 at 2:45 PM.

REQUEST FOR IMMEDIATE STAY

Pursuant to Fed. R. App. P. 8(a)(2), Petitioners Newport Trial Group ("NTG"), Scott J. Ferrell, Ryan M. Ferrell, Victoria C. Knowles, David Reid, and Andrew Lee Baslow (the "NTG Defendants"), along with Petitioners Andrew Nilon, Sam Schoonover, Sam Pfleg, Giovanni Sandoval, Taylor Demulder and Matthew Dronkers (the "Non-NTG Defendants"), respectfully seek an immediate stay of the discovery authorized by the district court's Orders of June 12, 2018 (EOR Vol. 1, Ex. 2) and July 16, 2018 (EOR Vol. 1, Ex. 1) pending resolution of this petition for writ of mandamus. Read together, the Orders require Petitioners to produce a vast amount of documents containing confidential and privileged attorney client communications and attorney work within product within 10 days (i.e., by June 26, 2018) without affording Petitioners the opportunity to present factual arguments concerning the privileged documents at issue in order to support of Petitioners' claim of privilege, which is in violation of settled law.

A stay is "'an exercise of judicial discretion,'" and "'[t]he propriety of its issue is dependent upon the circumstances of the particular case.'" *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (quoting *Nken v. Holder*, 556 U.S. 418, 434, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009)). Judicial discretion in exercising a stay is to be guided by the following legal principles: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the

stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id*. Of these, the first two "are the most critical." *Id.* "Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest." *Nken*, 556 U.S. at 435.

As discussed in *infra*.Part.VI.A, the district court's order is clear error and there is a strong showing of success on the merits. Second, Petitioners will be irreparably harmed absent a stay in a manner not correctable on appeal. *Infra*.Part.VI.C; *Hernandez v. Tanninen*, 604 F.3d 1095, 1099 (9th Cir. 2010) ("an appeal after disclosure of the privileged communication is an inadequate remedy" because of the "irreparable harm a party likely will suffer if erroneously required to disclose privileged materials or communications."). Third, there is no prejudice to NIC. The order at issue compels the disclosure of Petitioner's privileged litigation documents. NIC has not seen those documents, yet it has been able to litigate this case for more than 30 months without them. More importantly, the trial date in this case is not even scheduled. Accordingly, a brief stay to maintain the status quo while the writ is addressed will not harm NIC. Finally, public policy strongly favors the preservation of the attorney client privilege. It is "central to the legal system and the adversary process" and thus deserving of "unique protection in the courts." *UMG Recording, Inc. v. Bertelsmann AG (In re Napster Copyright Litig.)*, 479 F.3d 1078, 1093 (9th Cir. 2007) (abrogated in part on other grounds by

Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100 (2009)). For all of these reasons, a stay is in the public interest.

PETITION FOR WRIT OF MANDAMUS

I. STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this Petition for Writ of Mandate. *United States v. Ruiz*, 536 U.S. 622, 628 (2002); *Special Investments, Inc. v. Aero Air, Inc.*, 360 F.3d 989, 992 (9th Cir. 2004). When a disclosure order "amount[s] to a judicial usurpation of power or a clear abuse of discretion," or otherwise works a manifest injustice -- a party may petition the court of appeals for a writ of mandamus. *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 390 (2004).

II. INTRODUCTION

Plaintiff Natural Immunogenics Corp. ("Plaintiff" or "NIC") manufactures and sells "Sovereign Silver," which is colloidal silver that NIC markets and labels to consumers and the general public as providing "immune support" even though the United States Food and Drug Administration long ago determined there was not "any substantial scientific evidence which demonstrates that any OTC colloidal silver solution is useful to prevent or treat any serious disease" and that "the indiscriminate use of colloidal silver solutions . . . probably does more harm than good[.]" 61 Fed. Reg. 53685. NTG and certain of its clients sued NIC for its false

advertising of Sovereign Silver, but the case was ultimately dismissed due to class representative issues.

This Petition for Writ of Mandamus ("Writ") arises from the retaliatory lawsuit NIC filed against NTG, its attorneys, and its clients over that dismissed case. This lawsuit includes not only a malicious prosecution claim based on the underlying matter of *Nilon v. Natural-Immunogenics Corp.*, No. 3:12-cv-00930-LAB-BGS (C.D. Cal. 2012), but broad RICO claims involving seven other predicate lawsuits NTG brought against other defendants. NIC has explained in no uncertain terms that because it "has alleged RICO claims against a law firm (NTG) and its clients (Non-NTG Defendants)," its litigation strategy is to obtain wholesale access to privileged litigation files, principally through crime-fraud arguments. (EOR Vol. 3, Ex. 25 at 7:24-8:4.) Indeed, this Court currently has appeals pending before it from another erroneous crime fraud order by the district court. *See NIC v. Ferrell*, Appeal No. 17-55661 and *NIC v. NTG v. Weiss*, Appeal No. 17-55699.

Petitioners bring the instant Writ because the district court granted NIC's motion for an order compelling the production of privileged litigation files by applying the crime-fraud exception without affording the Petitioners a meaningful hearing on the documents at issue. NIC sought broad access to those litigation files via an "omnibus" motion to vitiate the attorney-client privilege and work product protection over 1,696 litigation documents. (EOR Vol. 1, Ex. 2 at 4.)

Various related Motions, Objections, and Orders of the Special Master were reviewed by the district court resulting in changes in the scope of production.

On June 6, 2018, only twenty (20) hours before the hearing on the subject Motion to Compel, the district court issued a 27-page "Tentative Order Regarding Objections to the Special Master Order" stating the Court's intent to compel NTG to produce twenty-four (24) privileged documents pursuant to the crime-fraud exception, and to compel the Non-NTG Defendants to produce two (2) privileged documents pursuant to the crime-fraud exception. Critically, nineteen (19) of the documents identified in the Tentative Order had never been previously identified by the Special Master or the Court as communications "in furtherance of" a crime or fraud (EOR Vol 1, Ex. 4.)

At the hearing before the Court, Defendants requested an *ex parte* or *in camera* hearing so they could discuss the specific privileged communications at issue outside of the presence of opposing counsel and thus avoid the possibility of waiving privilege through open disclosure. After the parties submitted briefing on the issue, the district court rejected Defendants' request for an *in camera* hearing to present arguments in support of the privileged status of documents and instead just ordered the production of documents within 10 days (i.e., by July 26, 2018). (EOR Vol. 1, Ex. 1.) Given the context of a sweeping motion to compel over 1,600 privileged documents *en mass*, and that the only opportunity to discuss the 26 privileged documents subject to the Court's tentative finding was ***in open court***

with opposing counsel present, this effectively denied Defendants a meaningful hearing.

The Ninth Circuit has made clear that "in a civil case the party resisting an order to disclose materials allegedly protected by the attorney-client privilege ***must be given the opportunity to present evidence and argument in support of its claim of privilege***." *In re Napster Copyright Litig.*, 479 F.3d 1078, 1093 (9th Cir. 2007) (emphasis added). Because the order is clearly erroneous, and because the other factors supporting Mandamus review are present, this Court should direct that the order be stayed and further direct the district court to provide Defendants with the requested hearing so that Defendants can present evidence and argument based on the documents themselves in support of privilege.

III. RELIEF SOUGHT

Petitioners request that the Court issue an immediate stay of the July 16, 2018 Order and further order the district court to set an *in camera* hearing to allow Petitioners the opportunity to present meaningful argument about the 26 documents at issue in support of their claim that the privilege should not be vitiated because there is nothing in those documents that would allow the district court to properly conclude that they are "sufficiently related to" and "in furtherance of" any crime or fraud.

IV. ISSUES PRESENTED

This matter concerns Petitioners' right to present factual arguments and

evidence in support of the attorney client privilege and the work product doctrine ***before*** a district court issues a ruling on the crime-fraud exception that requires the compelled production of privileged documents.

V. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. The Parties and the Underlying Action

Defendant NTG is a California consumer protection law firm that sues companies for violating consumer protection laws and related statutes, including the Consumers Legal Remedies Act (Cal. Civ. Code § 1750), the False Advertising Law (Cal. Bus. & Prof. Code § 17500), the Unfair Competition Law (Cal. Bus. & Prof. Code § 17200), the Wiretapping Statute (Cal. Penal Code § 632.7), and the Auto-Renewal Statute (Cal. Bus. & Prof. Code § 17600), among other things. (EOR Vol. 3, Ex. 28, ¶21.) Defendant Scott J. Ferrell is the founding member of NTG and a practicing attorney with the firm. (*Id.*, ¶3.) Defendants Ryan M. Ferrell, Victoria C. Knowles, and David Reid are also attorneys at NTG. Defendant Andrew Baslow works as an investigator for NTG. (*Id.*, ¶¶4-7.)

Plaintiff NIC is a Florida corporation that sells colloidal silver under the name "Sovereign Silver," which NIC markets and labels for its purported ability to provide "immune support." (*Id.*, ¶¶ 1, 107.) That claim is false. As the United States FDA found before outlawing the over-the-counter sale of colloidal silver for medical treatment, there is no "substantial scientific evidence which demonstrates that any OTC colloidal silver solution is useful to prevent or treat any serious

disease," and available science indicates that "the indiscriminate use of colloidal silver solutions . . . probably does more harm than good . . . ." 61 Fed. Reg. 53685. In March 2012, NTG brought a class action lawsuit against NIC in *Nilon v. Natural-Immunogenics Corp.*, Case No. 3:12-cv-00930-LAB-BGS (S.D. Cal. 2012) ("Nilon Action"). (EOR Vol. 3, Ex. 28, ¶13.) The class action included false advertising claims based on NIC's advertising and labeling of its Sovereign Silver product. (*Id.*, ¶¶ 57 and 61.) The class was certified during the course of the litigation, but in May 2015, the class was decertified and the case was dismissed, predominately due to issues with the class representative. (EOR Vol. 3, Ex. 26 at 5.)

Thereafter, NIC sued the NTG Defendants[1] and six of their clients[2] on claims for malicious prosecution, violation of the civil RICO Act, and conspiracy to violate RICO. (*Id.*)[3] While the complaint is extremely voluminous, the essence of NIC's allegations is that based on the Nilon Action and seven other lawsuits, "NTG has participated in a pattern of fabricated and fraudulent litigation, and

---

[1] NTG, Scott J. Ferrell, Ryan M. Ferrell, Victoria C. Knowles, David Reid and Andrew Lee Baslow are referred to collectively as the "NTG Defendants."

[2] The named clients are Defendants Andrew Nilon, Giovanni Sandoval, Sam Pfleg, Matthew Dronkers, Sam Schoonover and Taylor Demulder, who are collectively referred to as the "Non-NTG Defendants."

[3] The SAC also included a claim for unfair competition that sought injunctive relief, but that claim was dismissed on summary judgment. (EOR Vol 2, Ex. 17.)

threats of litigation, in an unlawful scheme to defraud defendants nationwide." (EOR Vol. 3, Ex. 28, ¶ 2.) NIC alleges that common litigation practices, such as filing legal documents, sending demand letters, making statements that NIC disagrees with in legal documents, and the rendering of a settlement payment to the corresponding plaintiff, constitute predicate acts of mail fraud, extortion, obstruction of justice, and bribery, respectively. (EOR Vol. 3, Ex. 27 at 23:9-13; 25:4-21; EOR Vol. 3, Ex. 28, ¶¶ 350, 57, 68, 76, 114; *id.* at ¶ 105 (NIC alleging a bribe in that "Ryan Ferrell or Andrew Baslow promised payment (out of settlement or judgment proceeds to be acquired) if Sandoval would agree to be named a substitute plaintiff in the contrived litigation . . .").)

B. The Litigation Over NIC's Omnibus Motion Leading Up to the Order at Issue

Having sued a law firm, its lawyers, and its clients, NIC's litigation strategy has been to obtain unbridled access to privileged litigation communications. As NIC explained, it "has alleged RICO claims against a law firm (NTG) and its clients (Non-NTG Defendants)" and thus "contemplated that documents necessary to its claims would be designated 'privileged' by Defendants, and that motions would be necessary to address privilege designations." (EOR Vol 3, Ex. 25 at 7:24-8:4).

In keeping with that strategy, on April 14, 2017, NIC filed an "omnibus" motion to compel the production of 1,696 documents designated by Defendants as

protected by the attorney-client privileged and/or the attorney work product doctrine. (EOR Vol. 1, Ex. 2 at 4.) On August 10, 2017, the Special Master issued a preliminary order requiring Defendants to produce for in camera review 231 randomly selected documents identified in Defendants' privilege logs. (EOR Vol. 3, Ex. 24.) On September 28, 2017, the Special Master issued a final order granting in part and denying in part NIC's "omnibus" motion. (EOR Vol. 3, Ex. 23.) In that order, the Special Master found that NIC had made a factual showing sufficient to support in camera review of documents related to the *Nilon, Nature's Way, Kiss My Face, Chromadex, Carter-Reed, Himalaya Drug*, and *Nutrisystem* cases, but not the *Magna* case. (*Id.*, at 31–35.) After reviewing the 231 documents that were randomly selected from every case but *Magna*, the Special Master then found that four (4) of the documents came within the crime-fraud exception to the attorney-client privilege and work-product doctrine.[4] (*Id.*, at 36.) The Special Master denied NIC's "omnibus" motion to compel on all other grounds. (*Id.* at 37.)

Multiple objections and related briefs were then filed before the district court. (EOR Vol 2, Exs. 19-20 and EOR Vol 3, Exs. 21-22.) On November 29, 2017, the district court issued an order remanding to the Special Master to consider new evidence submitted by NIC. (EOR Vol. 2, Ex. 18.) The Special Master found that certain of those documents were subject to the crime fraud exception. (EOR

[4] These documents are NTG000239–NTG000240; NTG005980–NTG005981; NTG005984–NTG005985; and NTG041929–NTG041930.

Vol. 2, Ex. 16 at 9–10.) The parties then filed cross-objections to that order before the district court. (EOR Vol. 2, Exs. 14-15.) On April 13, 2018, after taking in camera review of fourteen (14) "late-disclosed" documents, the Special Master issued the final order in Docket 625 finding that the majority of these documents came within the crime-fraud exception. (EOR Vol. 2, Ex. 13 at 9–10.) Schoonover filed an objection to the Special Master's order in Docket 625 (EOR Vol. 2, Ex. 12), NIC filed a response (EOR Vol. 2, Ex. 11) and Schoonover replied (EOR Vol. 2, Ex. 10).

C. The Tentative Ruling and Hearing on All Objections to the Special Master's Orders in Dockets 458, 597 and 625

All of these related objections came to a head on June 7, 2018, when the Court held a hearing on all five objections to the Special Master's orders in Dockets 458, 597 and 625: (1) Defendants' Objections to the Special Master's Order in Docket 458 (EOR Vol. 3, Ex. 22); (2) NIC's Objections to the Special Master's Order in Docket 458 (EOR Vol. 3, Ex. 21); (3) NIC's Objections to the Special Master's Order in Docket 597 (EOR Vol. 2, Ex. 15); (4) the NTG Defendants' Objections to the Special Master's Order in Docket 597 (EOR Vol. 2, Ex. 14); and (5) Schoonover's Objections to the Special Master's Order in Docket 625 (EOR Vol. 2, Ex. 12).

Shortly after 1:00 p.m. on June 6, 2018, which was approximately 20 hours before the 9:00 a.m. start of the hearing before the Court on June 7, 2018, the

district court issued a 27 page tentative ruling on all five objections to the Special Master's orders in Dockets 458, 597 and 625. (EOR Vol 1, Ex. 4.) In the tentative ruling, the district court found that the crime-fraud exception applied to twenty-six (26) different bates ranges of documents (hereinafter 26 documents).[5] Critically, only 7 of the 26 documents at issue in the tentative ruling had been identified and previously found by the Special Master to be subject to the crime-fraud exception. In other words, Defendants did not learn that 19 of the 26 documents at issue would be subject to a crime-fraud finding until less than 20 hours before the June 7 hearing.

Counsel for the parties appeared and presented legal arguments before the Court at the hearing on June 7, 2018. (*See generally* EOR Vol 1, Ex. 3.) In addition, counsel for the NTG Defendants and the Non-NTG Defendants expressly requested an opportunity to present factual arguments regarding the 26 documents that were subject to the crime-fraud findings in the Court's tentative order. More specifically, defense counsel noted:

[5] For ease of reference, the text messages reflected in SCHOONOVER00082-SCHOONOVER00092 (which span a period of six months and reflect numerous text messages on different dates and multiple topics) are being counted as just one of the "26 documents." However, when it comes to evaluating whether the crime-fraud exception applies to one or more of the text communications in SCHOONOVER00082-SCHOONOVER00092, the text messages should not be considered or accounted for in such a simplistic manner.

> MS. SPERBER: We noted that the tentative compels defendants to produce documents for which there had never previously been a crime-fraud finding, and we would like an opportunity to discuss some of those documents with the Court specifically and to address the reasons why this Court should change its crime-fraud finding as to some of those documents. However, we do not believe we can have a meaningful conversation that would not disclose privileged information contained in those documents. Accordingly, we are requesting an opportunity to discuss the documents specifically identified in the tentative order in an ex parte hearing.

(EOR Vol 1, Ex. 3 at 32:13-34:17.)[6]

In response to this request, the district court agreed it was "self-evident that discussion of those documents would have to get into the content of the documents," and also expressed the view that "defendants ought to have an opportunity to defend the specific documents . . . ." (*Id.* at 56:19-24.) The district court also expressed the view that Defendants should have the opportunity to defend the specific documents and to do so before the Special Master. (*Id.* at 56:19-24 "THE COURT: Well, let me tell you right now my sense is that defendants ought to have an opportunity to defend the specific documents, and I think in the first instance that discussion ought to be with the special master who is familiar with not only the documents she found fell within the crime-fraud exception but the context."). Nevertheless, given NIC's objections, the district

[6] The Non-NTG Defendants also joined in the request for an opportunity to discuss the content of the privileged documents at issue. (EOR Vol 1, Ex. 3 at 50:21-51:5.)

court ordered the parties to submit further briefing on Defendants' request to discuss the specific documents for which a crime-fraud finding was made. (EOR Vol. 2, Ex. 9.)

On June 12, 2018, the district court issued an order on all five objections to the Special Master's orders in Dockets 458, 597 and 625. (EOR Vol. 1, Ex. 2.) This order confirmed the crime-fraud findings on the same 26 documents that were identified in the Court's tentative ruling, but also noted that the date of actual production was deferred until the Court determines whether an *in camera* hearing is appropriate. (*Id.*, at 29-30.)

On June 14, 2018, the NTG Defendants and the Non-NTG Defendants jointly submitted a brief in support of their request for an in camera hearing to discuss the privileged documents identified in Docket 659. (EOR Vol. 2, Ex. 8.) On June 20, 2018, NIC filed its opposition to Defendants' request. (EOR Vol 2, Ex. 7.)

On July 16, 2018, the district court issued its order rejecting Defendants' request for an *in camera* hearing in order to present factual arguments and discuss the specific documents for which a crime-fraud finding was made. (EOR Vol. 1, Ex. 1.) This order also directed Defendants to produce the 26 documents at issue in Docket 659 within ten days. (*Id.*, at 2.) As a result of the orders in Docket 659 and 679, Defendants have been denied an opportunity to present factual arguments in support of the claim of privilege, requiring the filing of this Petition.

VI. THIS COURT SHOULD GRANT MANDAMUS

This Court has "authority to issue a writ of mandamus under the 'All Writs Act,' 28 U.S.C. § 1651." *Cohen v. U.S. Dist. Court*, 586 F.3d 703, 708 (9th Cir. 2009). A writ of "[m]andamus is appropriate to review discovery orders when particularly important interests are at stake." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1156-57 (9th Cir. 2010).

In the Ninth Circuit, consideration of "[w]hether a writ of mandamus should be granted is determined case-by-case, weighing the factors outlined in *Bauman v. United States Dist. Court*, 557 F.2d 650 (9th Cir. 1977)." *Cole v. U.S. Dist. Court*, 366 F.3d 813, 816-17 (9th Cir. 2004). Those factors are: "(1) whether the petitioner has no other means, such as a direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated error or manifests a persistent disregard of the federal rules; and (5) whether the district court's order raises new and important problems or issues of first impression." *Perry*, 591 F.3d at 1156 (citing *Bauman*, 557 F.2d at 654-55). "The factors serve as guidelines, a point of departure for . . . analysis of the propriety of mandamus relief." *Id*. (citing *Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1491 (9th Cir. 1989)). They "are not exhaustive . . . and need not all be met in order to grant mandamus relief." *Barnes v. Sea Haw. Rafting, LLC*, 889 F.3d 517, 535 (9th Cir.

2018) (internal citations omitted). While "rarely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is relevant or applicable," *Bauman*, 557 F.2d at 655, this is the unusual case where all factors weigh heavily in Petitioners favor.

A. The District Court's Refusal to Afford Defendants an Opportunity to Present Factual Arguments Concerning the Specific Documents at Issue Was Clearly Erroneous

Because it is dispositive, the Ninth Circuit will often "begin with the third factor, clear error . . . ." *Hernandez v. Tanninen*, 604 F.3d 1095, 1099 (9th Cir. 2010). In this case, the district court clearly erred. As shown below, the crime-fraud analysis is document specific and the privilege-holder is entitled to a meaningful hearing on that analysis. Petitioners were denied such a hearing because they could not discuss the specific documents at issue.

1. The Crime Fraud Analysis Is Document Centric

The attorney-client privilege is the oldest and arguably most fundamental of the common law privileges recognized under Federal Rule of Evidence 501. *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981); *see U.S. v. Zolin*, 491 U.S. 554, 562 (1989). The assurance of confidentiality promotes open attorney-client communications, which are "central to the legal system and the adversary process." *United States v. Hodge & Zweig*, 548 F.2d 1347, 1355 (9th Cir. 1977). The privilege protects fundamental liberty interests by allowing individuals to seek the

legal advice they need "to guide them through the thickets" of complex laws. *United States v. Chen*, 99 F.3d 1495, 1499 (9th Cir. 1996).

Exceptions to the attorney-client privilege are not to be found lightly since "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'" *United States v. Mett*, 178 F.3d 1058, 1065 (9th Cir. 1999). Consistent with this, the district court in *Laser Indus. v. Reliant Techs.*, 167 F.R.D. 417, 430-31 (N.D. Cal. 1996) explained that if "it would have been rational . . . for the trier of fact to draw either inference," then the crime-fraud exception does not apply. Moreover, "[a] moving party does not satisfy [its] threshold burden merely by alleging that a fraud occurred and asserting that disclosure of any privileged communications may help prove the fraud. There must be a *specific* showing that a *particular* document or communication was made *in furtherance* of the client's alleged crime or fraud." *In re BankAmerica Corp. Sec. Litig.*, 270 F.3d 639, 642 (8th Cir. 2001) (emphasis added).

In the Ninth Circuit, a party seeking to vitiate the attorney-client privilege under the crime-fraud exception must satisfy a two-part test. "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.'" *United States v. Doe (In re Grand Jury Investigation)*, 231 Fed. Appx. 692, 695 (9th Cir. 2007). Second, that party "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.* (quoting *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1097 (9th Cir. 2007). Importantly, before a court can compel the disclosure or privileged documents, there "must be a *specific* showing that a *particular* document or communication was made *in furtherance* of the client's alleged crime or fraud." *In re BankAmerica Corp. Sec. Litig.*, 270 F.3d 639, 642 (8th Cir. 2001). Consistent with this, the party seeking to invoke the crime fraud exception "cannot rest merely upon the movant's presentation of a 'theory' regarding widespread fraud." *Macnamara v. City of New York*, 2008 U.S. Dist. LEXIS 3937, *13 (S.D.N.Y. 2008). Mere allegations that a lawyer's services were used in furtherance of a crime and the relationship between the document in question and the service are also insufficient. *Id.* In fact, in *United States v. Doe (In re Grand Jury Investigation)*, 231 Fed. Appx. 692, 695 (9th Cir. 2007), the Ninth Circuit expressly rejected the proposition that the crime fraud exception applies whether a party shows the services of a lawyer were "used in furtherance of a crime or fraud" and that "there is a reasonable relationship between the communications and the illegality." *Id.* Instead, this Court explained "this analysis was improper because the crime-fraud exception applies only to documents and communications that were themselves in furtherance of illegal or fraudulent conduct." *Id.*

Given that the crime-fraud analysis turns on the content of the specific

document at issue – namely whether it was "sufficiently related" to and was "in furtherance" of a crime or fraud – it is simply not possible to meaningfully defend against a crime-fraud challenge without discussing and disclosing the content of the privileged documents at issue.

2. The District Court Erred in Denying an *In Camera* Hearing Because Without One the NTG Defendants Could Not Address the Specific Documents at Issue

The law is equally clear that privilege holders are entitled to a meaningful hearing before having privilege stripped. This Court explained in the crime-fraud context "that in a civil case the party resisting an order to disclose materials allegedly protected by the attorney-client privilege ***must be given the opportunity to present evidence and argument in support of its claim of privilege***." *In re Napster Copyright Litig.*, 479 F.3d at 1093 (emphasis added). In so holding, this Court relied on *Haines v. Liggett Group, Inc.*, 975 F.2d 81 (3d Cir. 1992), which held that "the importance of the privilege, as we have discussed, as well as fundamental concepts of due process require that the party defending the privilege be given the opportunity to be heard, by evidence and argument, at the hearing seeking an exception to the privilege." *Haines*, 975 F.2d at 96-97; *see also Laser Industries, Ltd. v. Reliant Technologies, Inc.*, 167 F.R.D. 417 (N.D. Cal. 1996) ("I conclude that I am required, given the civil character of this case and the specific basis for the claim that the fraud exception applies, to permit the holder of the

privilege to submit evidence and argument that tends to rebut an inference of any of the necessary elements of the crime/fraud exception.")

Here, the nature of the law and motion proceedings below rendered the opportunity to present evidence and argument illusory because the Petitioners had no ability to address the specific documents at issue. NIC's omnibus motion sought production of 1,696 documents based on general allegations of litigation misconduct. (*See generally*, EOR Vol. 3, Ex. 28.) Practically speaking, it was not possible for Petitioners to address every one of the 1,696 documents or even a substantial portion of them in briefing before the Court. But even if Petitioners had the time and space to address each of the 1,696 documents (they did not), Petitioners still could not assert factual arguments about the content of privileged documents without possibly waiving privilege. Moreover, it was only some 20 hours before the hearing before the district court that the universe of potential documents was narrowed down to 26 specific documents. Once the district court issued its tentative ruling, the focus turned to whether those specific documents were "sufficiently related to" and "in furtherance of illegal or fraudulent conduct." *United States v. Doe (In re Grand Jury Investigation),* 231 Fed. Appx. at 695.

But again, Petitioners obviously could not discuss the content of those 26 privileged documents in open court with opposing counsel present and thus requested an *in camera* hearing to allow them to do so. Courts across the country routinely respect such requests and conduct *in camera* hearings in similar

situations. For example, in *BSD, Inc. v. Equilon Enterprises*, 2013 U.S. Dist. LEXIS 33416, at *5 (N.D. Cal. March 11, 2013), counsel for the plaintiff filed a motion to withdraw as counsel, citing to the fact that counsel could not "take the necessary litigation strategies and steps to continue to diligently pursue and protect [plaintiff's] best interests." The district court in *BSD* denied the motion without prejudice because it lacked specificity. *Id.* Acknowledging that counsel may need to disclose attorney-client privileged information to provide the requisite factual basis, the district court allowed counsel to re-file the motion and also stated its intent to allow an *in camera* hearing if needed:

> In the event that [plaintiff's counsel] determines that it cannot adequately explain how [plaintiff's] conduct has rendered it unreasonably difficult for it to carry out the employment effectively without revealing attorney-client privileged matters, [plaintiff's counsel] may request to file its motion under seal or [request] an in camera hearing.

Id. at *8-9.

Consistent with the policy evidenced in *BSD*, the district court in *Verschoth v. Time Warner, Inc.*, 2001 U.S. Dist. LEXIS 6693, at *5 n.1 and *21 (S.D.N.Y. May 22, 2001) concluded that the Magistrate Judge's "convening of an *ex parte* hearing was appropriate" to hear testimony defendant claimed was protected by the attorney-client privilege. In addition to approving the decision to conduct an *ex parte* hearing to decide the validity of the privilege claim, the court also rejected plaintiff's argument that the *ex parte* hearing "resulted in the denial of plaintiff's

due process rights." *Id*. Like the court in *BSD*, the district court in *Verschoth* acknowledged its "authority to conduct an *in camera* review of allegedly privileged oral or written communications in order to determine whether a privilege applies." *Id*.

In a similar situation, the district court for the Northern District of California issued an order that it would "schedule an *in camera* hearing to resolve privilege issues with respect to certain questions" for which the privilege against self-incrimination was asserted. *Nursing Home Pension Fund v. Oracle Corp.*, 2007 U.S. Dist. LEXIS 49851, at *4 (N.D. Cal. June 29, 2007). In *Nursing Home Pension Fund*, plaintiff took the deposition of a non-party witness. *Id*. at *5-7. At the deposition, the witness asserted the Fifth Amendment privilege against self-incrimination. *Id*. at 9-11. In response to plaintiff's motion to compel, the witness "requested the opportunity to present evidence *in camera* to the extent that the Court requires additional information regarding the incriminating nature of the questions asked." *Id*. at *52. The district court thus granted the request for an *in camera* hearing to ensure the witness "a further opportunity to substantiate his claims of privilege." *Id*. In doing so, the district court relied on the Ninth Circuit's decision in *United States v. Drollinger*, 80 F.3d 389 (9th Cir. 1996). In *Drollinger*, the Ninth Circuit held that "the required inquiry [for whether the privilege against self-incrimination applies] is best made in an *in camera* proceeding." *Id*. at 393; *see also United States v. Argomaniz*, 925 F.2d 1349, 1355 (11th Cir. 1991)

(holding review of privilege assertions "will best be accomplished in an *in camera* proceeding . . ."); *First Tenn. Bank Nat'l Ass'n v. Serv. Foods. Inc.*, 2017 U.S. Dist. LEXIS 217170 at *7-8 (N.D. Ga. Sept. 29, 2017) (approving decision to hold an *in camera* hearing to allow privilege holder "to support his invocation of the privilege against self-incrimination").

Likewise, in *SEC v. Teo*, 2009 U.S. Dist. LEXIS 49537, at * 35-36 (D.N.J. June 12, 2009), the district court conducted an *ex parte* hearing in a civil enforcement action where the SEC argued the crime-fraud exception compelled disclosure of privileged communications. To address this claim, the district court allowed an *ex parte* hearing where "the SEC was excused from the courtroom, and Defendants were given an opportunity to rebut *ex parte* the SEC's evidence." *Id.* at *36. The court further noted that "[t]his phase . . . was sealed by the Court." *Id.*

Indeed, in *In re Richard Roe, Inc.*, 168 F.3d 69, 71 (2d Cir. 1999), which is a grand jury case, the Second Circuit allowed both sides to submit *in camera* filings in support of their positions regarding attorney-client privilege and the crime-fraud exception. In grand jury investigations, it is common for the government to have *ex parte* communications with the court to maintain the secrecy of the grand jury proceedings. However, as a result of the need to allow both sides to make *in camera* submissions, the Second Circuit noted that neither side knew the contents of filings and arguments being made to the Court. *Id.*

Accordingly, the district court clearly erred by rejecting Petitioners' request

for an *in camera* or *ex parte* hearing and then applying the crime-fraud exception to the very documents that Petitioners wanted to be heard on.

B. Petitioners Have No Remedy at Law

The first factor supporting mandamus review – whether Petitioners have no other means to obtain the desired relief – is met here because collateral order appeal is no longer available to Petitioners and "[a] discovery order . . . is interlocutory and non-appealable." *Hernandez*, 604 F.3d at 1101 (quoting *Perry*, 591 F.3d at 1157). In *Hernandez*, this Court held that mandamus review was the only means available to correct an erroneous finding of "blanket waiver" of privilege. *Id.*; *see also* A*dmiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1491 (9th Cir. 1989) ("mandamus is the only method available to Admiral to obtain review, prior to final judgment, of the district court's order compelling production of a statement Admiral contends is privileged.").

C. Petitioners Will be Prejudiced in a Manner Not Correctable on Appeal

The second factor supporting mandamus review – whether Petitioners will be damaged in any way not correctable on appeal – "is closely related to the first [factor]" and is likewise easily satisfied. *Barnes*, 889 F.3d at 536. In *Hernandez,* this Circuit reaffirmed that "an appeal after disclosure of the privileged communication is an inadequate remedy" because of the "irreparable harm a party likely will suffer if erroneously required to disclose privileged materials or

communications." *Hernandez*, 604 F.3d at 1101.

In assessing whether mandamus review of a ruling adverse to privilege is appropriate, this Court also considers whether the ruling is "particularly injurious or novel." *Id*. In this case, it is both. First, the order to produce privileged documents is particularly injurious because it lacks any limitations as to scope and does not allow Petitioners to redact portions of certain privileged documents. One of the issues that Petitioners wished to raise with the district court is that the 26 documents include privileged information for cases beyond those at issue in the underlying matter, including cases for which allegations of crime-fraud have never even been raised. But since Petitioners were denied a hearing to address the content of those documents, they could they could not discuss and explain the documents that raise this issue. This same concern was addressed in *Hernandez*. *Accord id.* ("Ferguson might be forced to testify about his evaluation of matters unrelated to Tanninen or the conspiracy claim. The breadth of the waiver finding, untethered to the subject-matter disclosed, constitutes a particularly injurious privilege ruling.") And in this case, the order compelling disclosure of privileged communications discussing other cases infringes upon the rights of other non-party clients whose cases are discussed in the documents.

Second, as discussed in more detail in connection with the fifth factor below, the underlying ruling is novel because the unique posture and circumstances of the proceedings below applied the crime-fraud without affording Petitioners a

meaningful opportunity to address the content of the documents actually at issue. *See also Infra.*Part.VI.C. After all, since NIC sought to compel the production of a massive number of documents based on general allegations, Petitioners could not know what documents were actually at issue until it received a tentative from the Special Master or the district court. And when it became clear less than one day before the hearing on June 7, 2018 that the focus was now on 26 specific documents, the district court denied Petitioners' request to address those documents *in camera*.

It should also be self-evident that when parties are allowed to actually present evidence and argument, courts have an opportunity correct mistaken facts or findings, which in turn decreases the likelihood of erroneous rulings. A prime example of this can be found in an earlier ruling from the Special Master in Docket 597, where the Special Master reversed her tentative findings on at least two documents based on factual arguments presented at the hearing. (*See* EOR Vol. 2, Ex. 16 at 8:6-12 ("At oral argument, Defendants objected to several of the documents the Special Master tentatively found met the step-two test. As to NTG007983, Defendants argue that the document on its face is innocuous. And as to NTG007987, Defendants argue that the document refers to other, prior Magna litigation . . . . [t]he Special Master agrees and has reconsidered her tentative rulings regarding the two documents.").) But here, since Defendants were denied the right to a hearing that allowed them to discuss the documents, many documents

were erroneously found to be subject to the crime-fraud exception.

D. This Is the District Court's Second Crime-Fraud Error

The fourth factor assesses whether the ruling is "an oft repeated error or manifests a persistent disregard of the federal rules." *Perry*, 591 F.3d at 1156. Respectfully, this is not the first time the district court has loosely applied the crime fraud exception to eviscerate attorney client privilege in the underlying matter. Indeed, this Court currently has before it two related appeals where the district court held that the crime fraud exception applied to a facially innocuous corporate formation email string. *See NIC v. Ferrell*, Appeal No. 17-55661 and *NIC v. NTG v. Weiss*, Appeal No. 17-55699.

In addition, the erroneous ruling in Docket 679 has had a "snowball" effect on other proceedings by causing the Special Master to issue two orders finding even more privileged documents are subject to the crime-fraud exception ***without*** providing Defendants with a tentative ruling or even a hearing to present arguments on the new documents that were identified for the first time in those orders. (*See* EOR Vol. 2, Ex. 6 (issued July 23, 2018 and identifying seventy-five (75) new documents that are subject to crime-fraud findings without providing a tentative ruling or even a hearing on those documents) and EOR Vol. 2, Ex. 5 (issued July 25, 2018 and identifying thirty-two (32) new documents that are subject to crime-fraud findings without providing a tentative ruling or even a hearing on those documents).)

For all of these reasons, the fourth factor supports mandamus.

E. This Writ Raises the New and Important Problem of an Adversary Seeking Application of the Crime-Fraud Doctrine *En Mass*, Coupled with the District Court's Refusal to Implement Procedures that Would Allow the Opposing Party to Respond and Present Arguments to the Court

In the fifth factor, this Court considers whether the ruling raises "new and important problems or issues of first impression." *Perry*, 591 F.3d at 1156. Here, the ruling and NIC's entire approach to crime-fraud law and motion presents a novel and significant threat to the attorney client privilege and attorney work product doctrine. As discussed *supra*, Part.VI.A, the crime-fraud analysis is highly dependent on analysis of the specific document in that it can only properly apply when the reviewing court finds that the specific document is "sufficiently related to" and "in furtherance" of a crime or fraud.

The approach taken in the district court is novel and turns this concept on its head. NIC's approach is to broadly contend that attorney files are subject to a crime-fraud finding, and then to press the district court to audit those privileged attorney files via *in camera* review. Consequently, the privilege holder does really not know what documents are truly at issue until the privilege holder learns the result of the *in camera* review. Here, NIC moved to compel 1,696 documents. 26 of those documents, or 1.5%, ended up being at issue. This is not to say that it is

improper for the district court to conduct *in camera* review – even of large groups of documents – when review is warranted. The problem, however, comes when the privilege holder is not afforded a meaningful opportunity to address the documents identified through that review. Absent a hearing on those specific documents, it is impossible for the privilege holder to discuss and rebut whether the content of those documents actually show they are "sufficiently related to" and "in furtherance of" a crime or fraud.

Counsel for Petitioners are unaware of any published instance in which a court has allowed a party to orchestrate a general crime-fraud fishing expedition of a litigation opponents files, much less where a court has done so and then denied the privilege holder a meaningful hearing. The issue is not only novel but deeply problematic. It obviously undermines due process and fundamental principles of fair play. At the same time, it creates uncertainty for privilege, while also incentivizing broad or loose crime-fraud allegations:

> Lawyers love to know the secret communications between opposing parties and their counsel. And some lawyers love to strike fear into the hearts of opponents by attempting to discover those communications. Motions to penetrate clearly applicable privileges can be tools for harassment -- and can chill the communications that the privileges are designed to encourage. The looser the standard for the crime/fraud exception, the greater the risk that it will be abused for such tactical purposes.

Laser Indus., 167 F.R.D. 417 at 424.

For these reasons, the fifth factor also supports mandamus.

VII. CONCLUSION

Petitioners respectfully submit that the district court erred in denying Defendants' request for an opportunity to discuss and present arguments on privileged documents ***before*** a crime-fraud finding is issued and before the compelled disclosure of those privileged materials. Accordingly, Petitioners respectfully request that the Court enter a stay, that it grant this Petition for Writ of Mandate, and that it direct the district court to set a date for an *in camera* hearing to allow Petitioners a meaningful opportunity to present factual arguments on the specific documents at issue, and for such other relief that the Court deems appropriate.

DATED: July 26, 2018

Respectfully submitted,

By: */s/ David J. Darnell*
Edward Susolik
David J. Darnell
Stephanie A. Sperber
James M. Sabovich
CALLAHAN & BLAINE, APLC
3 Hutton Centre Drive, Ninth Floor
Santa Ana, CA 92707
Telephone: (714) 241-4444

Attorneys for Petitioners

By: */s/ Brendan M. Ford*
Brendan M. Ford
Kristopher P. Diulio
Tyler E. Sanchez
FORD & DIULIO PC
605 Town Center Drive, Suite 760
Costa Mesa, CA 92626
Telephone: (714) 450-6830

Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This petition complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this petition contains 7,244 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This petition also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this petition has been prepared in a proportionately spaced typeface using MS Word Times New Roman 14-point font.

Dated: July 26, 2018

/s/ David J. Darnell
Attorney for Petitioners

NOTICE OF RELATED CASES

Petitioners, Newport Trial Group, PC, *et al.*, hereby give notice to this Court and the Court's Clerk of the following related cases pending in this Court, pursuant to Ninth Circuit Rule 28-2.6, which arise out of the same case in the district court:

1. *Natural-Immunogenics Corp., v. Newport Trial Group v. Joshua A. Weiss,* No. 17-55699 (9th Cir.)

2. *Natural-Immunogenics Corp., v. Scott Ferrell and David Reid*, No. 17-55661 (9th Cir.)

Dated: July 26, 2018

/s/ David J. Darnell
Attorney for Petitioners

CORPORATE DISCLOSURE STATEMENT

Petitioners hereby certify that Newport Trial Group is the only corporate petitioner. Further, petitioners certify that there is no parent corporation, and no corporation holds 10% or more of the stock of Newport Trial Group.

Dated: July 26, 2018

/s/ David J. Darnell
Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2018, I electronically filed the foregoing Excerpts of Record through the ECF system. I further certify that the following participants were also served via US Mail, in accordance with FRAP 25:

Peter A. Arhangelsky
Joshua S. Furman
EMORD & ASSOCIATES, P.C.
3210 S. Gilbert Road, Suite 4
Chandler, AZ 85286
Phone: (602) 388-8899
Fax: (602) 393-4361
parhangelsky@emord.com
jfurman@emord.com

Attorneys for Respondent
(Courtesy Copy via Email)

Hon. James V. Selna
Courtroom 10C
Ronald Reagan Federal Building
411 West 4th Street, Room 1053
Santa Ana, CA 92701-4516

District Court Judge

Dated: July 26, 2018

/s/ David J. Darnell
Attorney for Petitioners