

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

PETITION FOR EXTRAORDINARY WRIT RELIEF

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NRAP 26.1 DISCLOSURE

Pursuant to Nevada Rule of Appellate Procedure 26.1, Petitioners 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 (collectively, the “Petitioners”) submit this Disclosure:

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

1. Moti is a New York limited liability company with no parent corporations. No publicly held companies own ten (10) percent or more of its stock.

2. Moti 16 is a Delaware limited liability company with no parent corporations. No publicly held companies own ten (10) percent or more of its stock.

3. LLTQ is a Delaware limited liability company and its parent corporations are: GR Pub/Steak Holdings, LLC; Elite Acquisition Team, LLC; CNV Acquisition Group IV, LLC; and CPGR Acquisition, LLC. No publicly held companies own ten (10) percent or more of its stock.

4. LLTQ 16 is a Delaware limited liability company and its parent corporations are: GR Pub/Steak Holdings, LLC; Elite Acquisition Team, LLC; CNV Acquisition Group IV, LLC; and CPGR Acquisition, LLC. No publicly held companies own ten (10) percent or more of its stock.

5. TPOV is a New York limited liability company and its parent corporations are: GR Pub/Steak Holdings, LLC; Elite Acquisition Team, LLC; CNV Acquisition Group IV, LLC; and CPGR Acquisition, LLC. No publicly held companies own ten (10) percent or more of its stock.

6. TPOV 16 is a New York limited liability company and its parent corporations are: GR Pub/Steak Holdings, LLC; Elite Acquisition Team, LLC; CNV Acquisition Group IV, LLC; and CPGR Acquisition, LLC. No publicly held companies own ten (10) percent or more of its stock.

7. FERG is a Delaware limited liability company with no parent corporations. No publicly held companies own ten (10) percent or more of its stock.

8. FERG 16 is a Delaware limited liability company with no parent corporations. No publicly held companies own ten (10) percent or more of its stock.

9. R Squared is a Nevada limited liability company with no parent corporations. No publicly held companies own ten (10) percent or more of its stock.

10. DNT is a Delaware limited liability company and its parent corporations are: R Squared and the Original Homestead Restaurant, Inc. No publicly held companies own ten (10) percent or more of its stock.

11. GRB is a dissolved Delaware limited liability company and previously had one parent corporation: GR US Licensing, LP.

12. Seibel and Green are individuals.

13. The Petitioners have been represented by the law firms of Carbajal & McNutt; McNutt Law Firm, P.C.; Adelman & Gettleman, Ltd.; Certilman Balin; Rice Reuther Sullivan & Carroll, LLP; Scarola Zubatov Schaffzin PLLC; and Bailey❖Kennedy in the underlying action. GRB was previously represented by Newmeyer & Dillion LLP. Bailey❖Kennedy currently represents the Petitioners in the underlying action and for the purposes of this Petition.

14. None of the Petitioners are using a pseudonym for the purpose of this Petition.

DATED this 16th day of June, 2021.

BAILEY ❖ KENNEDY

By: /s/ John R. Bailey

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PETITION FOR EXTRAORDINARY WRIT RELIEF

Pursuant to NRS 34.330 and NRAP 21, the Development Parties¹ petition (“Petition”) this Court to issue an extraordinary writ of prohibition directing the Honorable Timothy C. Williams in Department XVI of the Eighth Judicial District Court:

(i) To vacate the Findings of Fact, Conclusions of Law, and Order Granting Caesars’ Motion to Compel Documents Withheld on the Basis of the Attorney-Client Privilege Pursuant to the Crime-Fraud Exception entered on June 8, 2021 (the “Order”); and

(ii) To enter an order denying Caesars’ Motion to Compel Documents Withheld on the Basis of the Attorney-Client Privilege Pursuant to the Crime-Fraud Exception (“Motion to Compel”) in its entirety.

As explained below, the district court abused its discretion and misapplied the law in finding that various communications were discoverable based on the crime-fraud exception to the attorney-client privilege, NRS 49.115(1). Because

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”).

neither this Court nor the Nevada Court of Appeals has published an opinion addressing the crime-fraud exception, this Court should consider this Petition to decide how and when the exception applies. In doing so, this Court should find that Caesars² failed to meet its burden to pierce the oldest and most sacred privilege recognized at law by screaming foul over non-disclosure of immaterial information of which Caesars was already aware.

I. NRAP 21(A)(3)(A) ROUTING STATEMENT

This Petition is presumptively assigned to the Supreme Court because: (i) it raises a question of first impression that is of statewide public importance (application of the crime-fraud exception to the attorney-client privilege); and (ii) the case originated in business court. NRAP 17(a)(9), (12).

II. INTRODUCTION

Should non-disclosure of immaterial information that had absolutely no bearing on a party's decision to terminate a contract be grounds for invading the non-disclosing party's attorney-client privilege pursuant to NRS 49.115(1) in an action between the parties arising from the contract's termination? This Court should answer that question in the negative.

² "Caesars" refers to Real Parties in Interest 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").

Starting in 2009, certain Development Entities entered into various contracts with Caesars to develop and operate numerous successful restaurants (the “Development Agreements”). For many years, Caesars shared net profits with and/or paid license fees to those Development Entities.

In 2016, Caesars terminated the Development Agreements (without closing the restaurants) upon determining that Seibel, a former principal of certain Development Entities, was unsuitable following his guilty plea to a tax crime. Caesars did not care that Seibel had dissociated from those Development Entities by assigning his interests to an irrevocable trust (the “Trust”). To Caesars, Seibel’s relationship with the Trust’s beneficiaries (his wife and his grandmother)—a fact made known to Caesars—meant that Seibel remained affiliated with the Development Entities. Litigation ensued, with Caesars seeking a judicial declaration that it properly terminated the Development Agreements and the Development Entities seeking damages for lost profits.

In discovery, Seibel produced a copy of his prenuptial agreement with his wife, Bryn Dorfman. Two provisions of this 30-page document address Bryn’s handling of distributions from the Trust. Shortly after entering into the Prenuptial Agreement, Seibel and Bryn rescinded it and did not follow it.

Caesars moved to compel the disclosure of Seibel’s attorney-client privileged communications, arguing that his Prenuptial Agreement demonstrated

that statements made to Caesars that he was no longer affiliated with the Development Entities and would not benefit from them were fraudulent because the Prenuptial Agreement stated [REDACTED]

[REDACTED] Even though Bryn never did that, and even though Caesars terminated the Development Agreements based on Seibel's ability to indirectly benefit from the Restaurants due to his marriage to Bryn, the district court agreed with Caesars, finding—without substantial evidence—that because of the Prenuptial Agreement, the representations to Caesars were “false,” made “with the intent to deceive,” and “designed exclusively for the purposes of defrauding Caesars.” (4 PA 871-73.) As a result, the district court found that Seibel's privileged communications relating to the Trust and Prenuptial Agreement are discoverable under NRS 49.115(1). (*Id.* at 876.)

As shown below, the district court abused its discretion in finding that Caesars met its burden to invade Seibel's privilege. Caesars failed to show that Seibel (i) intended to perpetuate a fraud on Caesars and (ii) used his attorneys in furtherance of a fraud. Seibel told Caesars that his wife was a beneficiary of the Trust and offered to provide Caesars with any information that it needed about the Trust. Caesars rejected Seibel's efforts to dissociate, and did not ask for further information, because Caesars had no interest in listening to, let alone speaking

with, Seibel. Under these circumstances, it was error for the district court to interpret the Prenuptial Agreement (a document that proves nothing and that was rescinded by the parties) and the Trust as somehow contradicting what was said about Seibel's relationship with the Development Entities.

The district court also misapplied the law by determining that emails between Seibel and his counsel were made in furtherance of a scheme to defraud Caesars before seeing the emails. Stated simply, the law requires an *in camera* review of the emails before such a determination can be made.

The bar to compel the production of attorney-client privileged communications is higher than the showing made by Caesars in this case. For these reasons, this Court should accept this Petition and grant the relief requested.

III. RELEVANT FACTS

A. Caesars Works with Seibel to Revamp its Restaurants.

Starting in the late 2000s, Seibel conceptualized a fleet of extremely profitable restaurants for Caesars that have performed [REDACTED] than the restaurants that they replaced. (8 PA 1474; 9 PA 1506-07.) Caesars entered into a series of agreements (the Development Agreements) with certain Development Entities owned, directly or indirectly, by Seibel to develop and operate several restaurants at various Caesars' properties (collectively, the "Restaurants"). (9 PA 1695-719; 10 PA 1752-97, 1814-49; 11 PA 1851-85, 1934-

77; 12 PA 1997-2035.) [REDACTED]

[REDACTED]

[REDACTED]

(*Id.*)

B. Seibel’s Relationship with Caesars Deteriorates.

Shortly after the Restaurants were opened, Caesars started to question its obligations to pay the Development Entities. (*See, e.g.*, 12 PA 2037, 2039, 2041, 2043-44, 2051-53.) Further, top executives at Caesars began to dislike Seibel personally. (*Id.* at 2043, 2047, 2051.)

By 2014, Caesars was trying to figure out how to lessen the share of profits being remitted to the Development Entities. (*Id.* at 2041, 2043-44.) And the Development Parties knew it. (9 PA 1610; 13 PA 2231-32.)

C. The Amendment.

In 2014, certain Development Entities negotiated an amendment to their respective Development Agreements with Caesars (the “Amendment”), allowing them to [REDACTED]

[REDACTED] (13 PA 2237-40.) At the time, Seibel wanted [REDACTED]
[REDACTED] the Development Entities’ interests in the Development Agreements. (14 PA 2255.) *Caesars did not object to the*

Amendment or question Seibel's motivation for it. (9 PA 1651-52; *see also id.* at 1623-1626, 1629-30, 1633.)

At that time, Seibel had not been charged with any crime that would have required any disclosure by the Development Entities to Caesars. (*See* 14 PA 2287.) Still, before executing the Amendment, Seibel told his main point of contact at Caesars, J. Jeffrey Frederick (Caesars' Regional Vice President of Food and Beverage), that he was under investigation for tax issues. (9 PA 1526, 1583-84, 1587, 1589-91, 1644, 1680; *see also* 14 PA 2295, 2298.) Seibel was preparing for the unknown and considering selling or assigning his interests. (14 PA 2255, 2257-58.)

D. The Assignments and the Trust.

In 2016, Seibel formed The Seibel Family 2016 Trust, an irrevocable trust. (14 PA 2325-88.) Seibel formed the Trust for several legitimate reasons, including (i) to protect his assets in the event of his death; (ii) to protect his assets from unscrupulous creditors; and (iii) to address the distinct possibility that if he were charged with and found guilty of a crime, Caesars would seek to terminate the Development Agreements. (9 PA 1609-10.) After that, several Development Entities assigned their rights and interests ("the Assignments") under their respective Development Agreements to newly formed Development Entities,

which were owned, directly or indirectly, by the Trust. (6 PA 1022-23, 1025-26; 14 PA 2390-91, 2393-94, 2396-97.)

Seibel notified Caesars of these events and gave Caesars all information required by the Amendment, including disclosing that the Trust's beneficiaries were his wife and grandmother. (*Id.*) As Caesars would later admit in discovery, it knew that the Trust was a family trust. (14 PA 2413, 2430-31.) ***No one at Caesars questioned the Trust or Seibel's motivation for entering into the Assignments***; Caesars simply began making payments to the newly formed Development Entities. (*Id.* at 2399-400.)

The Trust contains provisions specially designed to ensure that neither the Trustees nor the beneficiaries could be unsuitable persons as determined by Caesars. (*Id.* at 2369-70.) For example, the Trust provides that [REDACTED] [REDACTED] (*Id.* at 2369.) The Trust also provides that [REDACTED] [REDACTED] [REDACTED] (*Id.*)

These provisions restrict how the Trustees may disburse funds and show Seibel's intent in carrying out a valid assignment that would effectuate his disassociation from the Development Entities for purposes of the gaming regulators. (*Id.* at 2452-53, 2459.) Because of the Assignments, Caesars could

remain under contract with the Development Entities even if Seibel later became unsuitable, because the Trust could never be managed or owned by an unsuitable person. (*Id.*) Seibel understood that this arrangement was a valid way to dissociate from the Development Entities, as he learned that another gaming company had accepted a similar trust arrangement in the past when dealing with a vendor whose owner pled guilty to a felony. (9 PA 1579-80.)

E. The Prenuptial Agreement.

In 2016, Seibel entered into the Prenuptial Agreement with Bryn. (14 PA 2501.) At Caesars' urging, the district court found that the Prenuptial Agreement caused Seibel to end-run the Trust. (*See* 4 PA 872-83.) In fact, the district court found that Seibel entered into the Prenuptial Agreement as part of a "complex scheme" to "deceive Caesars," disregarding its legitimate use of addressing, among other things, what would happen upon a divorce. (*Id.*; *see also* 14 PA 2260.)

The Prenuptial Agreement includes several provisions relating to topics like

[REDACTED]

[REDACTED] (6 PA 1037, 1041-44.) The

district court ignored these (and other) provisions in favor of two provisions within the 30-page document, as follows.

First, Article III, subpart 6, which states [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.* at 1036.) This provision means that Bryn could not claim an interest in the Development Entities to be divided between her and Seibel if a divorce occurred. (*Id.*) This provision did not, as admitted by Caesars’ gaming expert in his deposition, cause Seibel to secretly retain an ownership interest in the Development Entities—title to the Development Entities was lawfully transferred to and remains with the Trust. (15 PA 2516.)

Second, Article II, Section 3, subsection (d)(iii), which discusses what happens if [REDACTED]

[REDACTED]³ (6 PA 1034.) This provision did nothing that Caesars did not already know; that is, Caesars was aware—and Seibel knew that Caesars was aware—that Seibel could still benefit from the income stream flowing from the Restaurants because of his marriage to Bryn (and his close relationship with his grandmother). (15 PA 1201; *see also* 14 PA 2430-31.) Indeed, Caesars rejected the Trust as an owner of the Development Entities because of the relationship between Seibel and the Trust’s beneficiaries. (15 PA 2538; *see also* 15 PA 2544.)

³ Another provision of the Prenuptial Agreement states that [REDACTED]

[REDACTED] (*See id.* at 1032.)

These provisions in the Prenuptial Agreement did not cause Seibel to end-run the Trust. As further proof that he did not intend to defraud Caesars, Seibel and Bryn never followed the Prenuptial Agreement and rescinded it a short time after signing it. (9 PA 1605-06; 14 PA 2493.) It is undisputed that funds that Bryn received from the Trust (including distributions by the Development Entities to the Trust) were *never* deposited into an account to which Seibel was a signatory or had access. (14 PA 2260, 2496-97; *see also* 15 PA 2546-65.) In fact, Bryn and Seibel never even opened a joint bank account. (14 PA 2498.)

F. Caesars Declares Seibel Unsuitable and Terminates the Development Agreements.

Within a day of learning of Seibel's conviction, Caesars' in-house counsel began looking [REDACTED] [REDACTED] (15 PA 2567; *see also* 2 PA 1657-58.) Caesars was ready to terminate the Development Agreements, without making any effort to work in good faith with them to allow them to dissociate from Seibel to Caesars' satisfaction while remaining under contract with Caesars and continuing to participate in the net profits of the Restaurants. (15 PA 2578-79.)

In September 2016, Caesars declared Seibel unsuitable and terminated the Development Agreements—without working with the Development Entities to find a means to cure. (15 PA 2643-46, 2655-58, 2668-71.) The Development Entities immediately tried to provide Caesars with any information that it needed

to evaluate the Assignments and assure itself that Seibel was no longer affiliated with the Development Entities. (6 PA 1005-09.) They also offered to work toward a different arrangement involving a sale or transfer of the interests previously held by Seibel to a disinterested third party acceptable to Caesars. (15 PA 2673.) They contacted Caesars, several times, to address Caesars' concerns, without so much as a returned email or phone call. (*See id.*; *see also id.* at 2676-78.) Any questions that Caesars had about the Trust could have—and would have—been answered by the Development Entities. (6 PA 1005-7, 1011-12.) Caesars did not care because it was intent to rid itself of its payment obligations to the Development Entities.

IV. RELEVANT PROCEDURAL HISTORY

On January 6, 2021, Caesars moved to compel documents based on the crime-fraud exception (the Motion to Compel). (6 PA 977.)⁴ The district court held a hearing on February 24, 2021. (4 PA 803-04; 7 PA 1213; 16 PA 2691.) On April 12, 2021, the district court issued a Minute Order granting the Motion to Compel. (4 PA 803-04.) In its Minute Order, the district court determined that “Caesars ha[d] met its initial burden of proof by establishing that Plaintiff Seibel’s representations as to the independence of the Seibel Family 2016 Trust were unfounded, and Plaintiff Seibel could continue to benefit from the agreements

⁴ Notably, Caesars did not attach the Trust—one of the two documents it argues was part of a fraudulent scheme—to its Motion to Compel. (*See generally id.*)

despite unsuitability to conduct business with a gaming licensee.” (*Id.* at 803.)

The district court further determined that “an issue exists as to the effect of Plaintiff Seibel’s prenuptial agreement with his wife and the interplay with the trust.” (*Id.*)

The district court directed Caesars to prepare an order and to circulate it to the Development Parties’ counsel for review and comment. (*Id.* at 804.) The parties could not agree on language for the order and submitted competing versions. (5 PA 921-27.) The Development Parties disputed multiple portions of Caesars’ proposed order, including factual findings and legal conclusions that were inconsistent with the district court’s Minute Order, factual findings that were not supported by substantial evidence, and inaccurate characterizations of the evidence. (*Id.*)

On June 8, 2021, the district court adopted Caesars’ version of the Order. (*See* 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 directs the Development Parties to submit privileged communications for *in camera* review within 10 days: by June 18, 2021. (*Id.* at 876, 886.)

V. RELIEF REQUESTED

The Development Parties seek a writ of prohibition directing the district court to vacate the Order and deny the Motion to Compel in its entirety. *Las Vegas Dev. Assocs., LLC v. Eighth Jud. Dist. Ct.*, 130 Nev. 334, 338, 325 P.3d 1259, 1262 (2014) (holding that a writ of prohibition is the “appropriate remedy to correct an order that compels disclosure of privileged information”).

VI. WHY EXTRAORDINARY WRIT RELIEF IS APPROPRIATE

A. Standard for Seeking Writ Relief.

This Court has original jurisdiction to issue a writ of prohibition. Nev. Const., art. 6, § 4(1); NRS 34.330. A writ of prohibition is an extraordinary remedy available when the petitioner lacks a plain, speedy, and adequate legal remedy. NRS 34.340.

A writ of prohibition may issue when a district court acts without or in excess of its jurisdiction. *Toll v. Wilson*, 135 Nev. 430, 432, 453 P.3d 1215, 1217 (2019). The petitioner has the burden to demonstrate why extraordinary writ relief is warranted. *Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

B. Reasons Why This Court Should Consider this Writ.

This Court “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. The “resulting prejudice” from disclosure of privileged communications before appellate review is “not only ... irreparable, but of a magnitude that could require ... drastic remedies,” because there is “no adequate remedy at law that could restore the privileged nature of the information.” *Cotter v. Eighth Jud. Dist. Ct.*, 134 Nev. 235, 249, 416 P.3d 228, 231 (2018).

This Court will also intervene on discovery issues when the Court has “a unique opportunity to define the precise parameters of [a] privilege conferred by a statute that this court has never interpreted.” *Diaz v. Eighth Jud. Dist. Ct.*, 116 Nev. 88, 93, 993 P.2d 50, 54 (2000) (alteration in original) (internal quotation marks omitted).

Here, writ relief is appropriate because, as shown further below, the district court abused its discretion and misapplied the law in ordering the disclosure of privileged communications based on its interpretation of a statutory exception to a statutory privilege, which this Court has never interpreted through a published opinion. *See Toll*, 135 Nev. at 432, 453 P.3d at 1217; *Diaz*, 116 Nev. at 93, 993 P.2d at 54. Because this Petition presents this Court with the opportunity to define when and how 49.115(1) excepts attorney-client communications from NRS 49.095, and because Seibel’s privileged communications would “irretrievably lose” their “confidential and privileged quality” if disclosed to the district court and Caesars, *see Wardleigh v. Second Jud. Dist. Ct.*, 111 Nev. 345, 350-51, 891

P.2d 1180, 1183-84 (1995), this Court should exercise its discretion to consider this Petition.

VII. ISSUES PRESENTED

This Petition presents the following issues:

1. Did the district court abuse its discretion in concluding that Caesars met its burden of proof in seeking to compel the disclosure of Seibel's privileged communications pursuant to NRS 49.115(1); and
2. Did the district court misapply the law in finding that Seibel's privileged communications were made in furtherance of a scheme to defraud Caesars before reviewing those communications, *in camera*, as part of the second step of the crime-fraud analysis?

VIII. REASONS WHY A WRIT SHOULD ISSUE

A. Standard of Review.

Discovery matters are generally subject to an abuse of discretion review. *Canarelli v. Eighth Jud. Dist. Ct.*, 136 Nev. 247, 252, 464 P.3d 114, 119 (2020). However, conclusions of law, including the meaning and scope of statutes, are reviewed de novo. *Id.* at 252, 464 P.3d at 119; *see also UMG Recording, Inc. v. Bertelsmann AG (In re Napster Copyright Litig.)*, 479 F.3d 1078, 1089 (9th Cir. 2007) (holding that "rulings on the scope of the privilege," including the crime-fraud exception, "involve mixed questions of law and fact and are reviewable de

novo, unless the scope of the privilege is clear and the decision made by the district court is essentially factual.”). Any finding of fact that is “clearly erroneous or not supported by substantial evidence” must be set aside and is not given deference by this Court. *Canarelli*, 136 Nev. at 252, 464 P.3d at 119.

B. Legal Framework for Analyzing the Crime-Fraud Exception.

1. The Attorney-Client Privilege.

In general, confidential communications between a client and lawyer are privileged and protected from disclosure to third parties. NRS 49.095. The attorney-client privilege “is the oldest and arguably most fundamental of the common law privileges....” *Napster*, 479 F.3d at 1090. Its purpose “is to encourage clients to make full disclosures to their attorneys in order to promote the broader public interests of recognizing the importance of fully informed advocacy in the administration of justice.” *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 133 Nev. 369, 374, 399 P.3d 334, 341 (2017) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

“[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected.” *Canarelli*, 136 Nev. at 252, 464 P.3d at 120. With that in mind, “***hard cases should be resolved in favor of the privilege, not in favor of disclosure*** [because] an 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) (internal quotation marks omitted) (emphasis added).

2. *The Crime-Fraud Exception.*

An exception to the attorney-client privilege arises “if 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). Although not previously addressed by this Court, the Ninth Circuit, following federal common law, has adopted a two-step framework for a party seeking to apply the crime-fraud exception to the attorney-client privilege. *See, e.g., Napster*, 479 F.3d at 1094-95.

Under the first step, the party seeking to invade the privilege must show, by a preponderance of the evidence, that the party asserting the privilege was engaging in or planning to commit a crime or fraud when it sought the advice of counsel. *Id.* at 1090. “[I]t is the client’s knowledge and intentions that are of paramount concern to the application of the crime-fraud exception.” *In re Grand Jury Proceedings (Corp.)*, 87 F.3d 377, 381 (9th Cir. 1996). If the evidence shows that the client sought the advice of counsel for a legitimate purpose (such as permissible dissociation from a gaming licensee), rather than for “what the client knew or reasonably should have known to be a crime or fraud,” then the exception

does not apply. *See id.* If, and only if, the party seeking to invade the privilege meets its burden under the first step, then the analysis proceeds to the second step.

Under the second step, the party seeking to invade the privilege must show, by a preponderance of the evidence, “that the specific attorney-client communications for which production is sought are sufficiently related to and were made in furtherance of the intended, or present, continuing illegality.” *United States v. Doe (In re Grand Jury Invest.)*, 810 F.3d 1110, 1114 (9th Cir. 2016) (internal quotations omitted). “[I]n camera review is **mandated** to determine the scope of the order, *i.e.* ... whether [the documents] reflect communications ... made in furtherance of a contemplated or ongoing crime-fraud (step two).” *Id.* (emphasis added).

Though showing common law fraud is not required in some jurisdictions,⁵ courts must take special care “in setting the height of the bar,” because “any findings by the court that would suggest a strong enough basis to infer the perpetration of a fraud when such fraud is an essential element of the ... underlying claims in th[e] case would, at the very least, potentially tilt the playing

⁵ Some courts require the elements of common-law fraud to be met. *See, e.g., Laser Indus. v. Reliant Techs.*, 167 F.R.D. 417, 425 (N.D. Cal. 1996) (“[W]e agree that courts should use the more demanding common-law fraud standard...”); *Rsch. Corp. v. Gourmet’s Delight Mushroom Co.*, 560 F. Supp. 811, 820 (E.D. Pa. 1983) (“...for the privilege to take flight, unlawful conduct, not mere inequity, must be demonstrated.”).

field.” *In re Omnicom Grp. Inc., Sec. Litig.*, 233 F.R.D. 400, 405-06 (S.D.N.Y. 2006). Indeed, while a showing by a preponderance of the evidence “*may* justify a finding in favor of the offering party, it does *not necessarily compel* that finding.” *Id.* at 407 (emphasis added). This is especially important here, where the district court’s findings involve issues at the heart of this case. (3 PA 464-509.)

C. Step One: The District Court Erred in Concluding that Caesars Met its Burden to Demonstrate That Seibel Intended to Defraud Caesars.

In determining that Caesars “met its initial burden of proof,” the district court made findings that are not supported by substantial evidence and contradict the evidence presented. Further, the district court misinterpreted the Trust and the Prenuptial Agreement. Each error is explained below.

1. The District Court’s Findings are Not Supported by Substantial Evidence.

It has long been recognized that a “mere charge of illegality, not supported by any evidence,” is not enough to compel disclosure of privileged communications. *Clark v. United States*, 289 U.S. 1, 15 (1933). As this Court has explained, a “decision that lacks support in the form of substantial evidence is arbitrary or capricious and, therefore, an abuse of discretion.” *Shores v. Glob. Experience Specialists, Inc.*, 134 Nev. 503, 505, 422 P.3d 1238, 1241 (2018) (internal citations omitted).

Here, Caesars had the burden to show, by a preponderance of the evidence, that Seibel sought his lawyer's services to enable what he knew to be a fraud. Caesars did not do so and, as a result, the district court's findings are not supported by substantial evidence. For example:

- Seibel began using foreign bank accounts to defraud the IRS in 2004. (4 PA 870.) Nothing in the record supports this finding (other than argument of counsel, which is not evidence), and it is an inaccurate description of the circumstances surrounding Seibel's guilty plea.
- Seibel did not inform Caesars that he was being investigated for criminal activity. (4 PA 871.) The record shows that Seibel informed Caesars of the investigation. (9 PA 1526, 1583-84, 1587, 1589-91, 1644, 1680; *see also* 14 PA 2295, 2298.)
- Seibel "perform[ed] [the Assignments] ... because of his impending felony conviction," and "specifically to avoid, undermine, and circumvent Caesars' rights to terminate the Agreements." (4 PA 871.) Seibel testified that the Assignments were intended to offer him [REDACTED] [REDACTED] the Development Entities' interests in the Development Agreements. (14 PA 2255.) Further, as discussed below, Caesars did not possess an absolute right to terminate the Development Agreements without first affording an opportunity to cure.

- The statement that “great care was taken to ensure that the trust would never have an unpermitted association with an Unsuitable Person and ... the trust is to be guided by [Caesars’] determination” was “false and ... made with the intent to deceive Caesars.” (4 PA 872.) The Trust contains such measures (*see* 14 PA 2369-70), and the Development Entities asked Caesars for guidance on additional provisions to be included within the Trust—to no avail. (6 PA 1005-09; 15 PA 2673, 2676-78.)

- The statement “the agreement would be assigned to a new entity whose membership interests were ultimately mostly owned by the Seibel Family 2016 Trust” was “false and ... made with the intent to deceive Caesars.” (4 PA 872.) This statement was an accurate representation of the ownership of the Development Entities after the Assignments, as Caesars’ own expert admitted in his deposition. (15 PA 2516.)

- “Seibel falsely told Caesars that the sole beneficiaries of the Seibel Family 2016 Trust were Netty Wachtel Slushny, Dorfman, and potential descendants of Seibel.” (4 PA 872.) The Trust shows that this representation was accurate. (14 PA 2325-88.) That Seibel could benefit from distributions received by his wife as a beneficiary of the Trust does not make Seibel, by definition, a beneficiary of the Trust. *See Cashman v. Petrie*, 201 N.E.2d 24, 26 (N.Y. 1964)

(noting a distinction between a beneficiary and a person “who might incidentally benefit from the performance of a trust”).⁶

- “Seibel falsely represented 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.” (4 PA 872.) The evidence shows that this statement was true—Seibel no longer had power over the Development Entities (having resigned as Manager of the Development Entities), and title in the Development Entities was transferred to the Trust. *Infra*, Section IV(F)(2)(a).

- Seibel was “secretly negotiating” his Prenuptial Agreement with his wife. (4 PA 873.) There is nothing in the record showing that Seibel hid the negotiations from Caesars.

- The Prenuptial Agreement required Bryn to “share the distributions she received from the Seibel Family 2016 Trust with Seibel.” (4 PA 873.) The Prenuptial Agreement required [REDACTED]

[REDACTED] (6 PA 1034.)

- The “Prenuptial Agreement has not been amended or nullified.” (4 PA 873.) Seibel and Bryn testified that they rescinded the agreement and never

⁶ The Trust is governed by New York law. (14 PA 2358.)

abided by it. (9 PA 1605-06; 14 PA 2493.) Indeed, they never opened a joint bank account. (14 PA 2260, 2496-97; *see also* 15 PA 2546-65.)

- Seibel “used his lawyers to obtain advice about... [the Trust’s] interplay with the prenuptial agreement.” (4 PA 873.) No evidence shows that Seibel obtained advice from his lawyers pertaining to an “interplay” between these two documents—the evidence only shows that Seibel had lawyers draft these documents for legitimate purposes. (*See, e.g.*, 6 PA 1037, 1041-44; 9 PA 1609-10; 14 PA 2325-88.)

- Seibel “falsely represented to Caesars that Seibel was disconnected from receiving benefits from the Seibel Family 2016 Trust and the business interests with Caesars.” (4 PA 873.) Those were not Seibel’s words but rather, Caesars’ mischaracterization of Seibel’s words. (6 PA 1005-09, 1022-23, 1025-26; 14 PA 2325-88, 2390-91, 2393-94.)

- “[T]he prenuptial agreement demonstrates that Seibel always had an interest in receiving distributions from the Seibel Family 2016 Trust – a direct contradiction to the false representations made to Caesars.” (4 PA 873.) The record reflects that each representation made to Caesars was true. More importantly, Seibel did not receive any proceeds from the Restaurants following the Assignments. (14 PA 2260, 2496-97; *see also* 15 PA 2546-65.)

- That the “statements made to Caesars about Seibel’s purported disassociation were false when made and designed exclusively for the purpose of defrauding Caesars.” (4 PA 873.) Again, each statement made to Caesars was true. Seibel created the Trust, and assigned his interests in the Development Entities to the Trust, for legitimate purposes. (9 PA 1609-10.)

Because the district court’s findings—which the district court relied on in compelling the Development Parties to divulge privileged communications—are not supported by substantial evidence, the Order should be vacated. *See, e.g., Shores*, 134 Nev. at 505, 422 P.3d at 1241.

2. Substantial Evidence Demonstrates that Seibel’s Efforts to Dissociate were Legitimate—Not Part of a Scheme to Defraud Caesars.

The district court found (without substantial evidence) that Seibel’s efforts to dissociate from the Development Entities were part of a “complex scheme” to deprive Caesars of its contractual rights. (4 PA 872.) Not true.

Here, the evidence establishes that Seibel understood that creating a trust and assigning his interests in the Development Entities to that trust was a permissible way for him to dissociate from Caesars. (9 PA 1579-80.) While Caesars claimed that Seibel’s actions are evidence of a fraudulent intent, the Development Agreements expressly contemplate a right to dissociate if Seibel becomes unsuitable. (9 PA 1708, 10 PA 1778, 1836; 11 PA 1873-74; 1962-63; 12

PA 2018-20.) That Seibel did not dissociate to Caesars' satisfaction does not make his intent fraudulent. The Development Entities tried to work with Caesars to provide it with any information it may have needed to evaluate the Trust as a valid assignee of Seibel's interests and even offered to work toward a different arrangement involving a sale of the Development Entities' interests to a disinterested third party acceptable to Caesars. (6 PA 1005-09; 15 PA 2673, 2676-78.) That Caesars refused to have any discussion with the Development Entities about Seibel's efforts to dissociate does not mean that Seibel hid anything from Caesars.

The Assignments were a legitimate attempt by Seibel to dissociate from the Development Entities—an act that was expressly contemplated by the Development Agreements. It was error for the district court to equate preparation and estate planning with an attempted fraud.

3. *The District Court Erred in its Interpretation of the Trust and Prenuptial Agreement.*

The district court found (without substantial evidence) that the “interplay” between the Trust and the Prenuptial Agreement demonstrated a “complex scheme” to defraud Caesars. (4 PA 872-73.) The district court's interpretation of the Trust—which is subject to a *de novo* review—is wrong. *In re W.N. Connell & Marjorie T. Connell Living Tr.*, 133 Nev. 137, 139, 393 P.3d 1090, 1092 (2017).

There are two provisions of the (rescinded) Prenuptial Agreement that theoretically implicate the Trust: the first references interests in business entities that Seibel irrevocably assigned to the Trust; and the second references a tangential benefit by Seibel from income that Bryn would receive from the Trust, no matter how the Trust derived that income. Neither provision end-runs the Trust to support the finding that Seibel made material misrepresentations to Caesars in furtherance of an attempted fraud.

a. Seibel Irrevocably Assigned His Interests in the Development Entities to the Trust.

The district court found that an “issue exists as to the effect of Seibel’s prenuptial agreement with his wife and its interplay with the Seibel Family 2016 Trust.” (4 PA 876.) Although the meaning of this finding is unclear, Caesars argued below that Seibel somehow maintained a secret ownership interest in the Development Entities despite the Assignments. That is incorrect.

Any legal interest in the Development Entities (including rights to distributions of income received from the Restaurants) lies with the Trustees of the Trust, and the Prenuptial Agreement did not change that—as Caesars’ own expert admitted in his deposition. (15 PA 2516.) This is further evident when looking to the language of the Trust itself alongside the Prenuptial Agreement.

The Trust contains an entire Article restricting ownership of its interests in the Development Entities. (14 PA 2369-70.) It contains mandatory language that

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.* at 2369.) Nothing about the Prenuptial Agreement alters these terms. (14 PA 2325-88; *see also* 14 PA 1151-52.)

That the Development Entities would remain as Seibel’s separate property under the law (as the grantor of the Trust) only means that Bryn could not seek to extract any interest in the Development Entities from the Trust if a divorce occurred. In fact, [REDACTED]

[REDACTED] under the Prenuptial Agreement. (6 PA 1032.)

Because Seibel did not secretly retain an ownership interest in the Development Entities through the Prenuptial Agreement, he did not conceal anything about the Development Entities from Caesars.

b. The Prenuptial Agreement’s Provision Concerning Handling of Distributions Was Not a Part of a Fraudulent Scheme.

The district court found that “the prenuptial agreement demonstrates that Seibel always had an interest in receiving distributions from the Seibel Family 2016 Trust – a direct contradiction to the false representations made to Caesars and

this Court.” (4 PA 873.) The district court’s interpretation of the Prenuptial Agreement without regard for the parties’ actions was clearly erroneous.

Preliminarily, that Seibel could benefit from income received by Bryn as a beneficiary of the Trust was obvious. Seibel told Caesars that his wife was named as a beneficiary of the Trust, and thus, she would receive any income derived from the Development Entities from the Restaurants. (6 PA 1022-23, 1025-26; 14 PA 2390-91, 2393-94.)

According to Caesars, it knew that Seibel would benefit from income that his wife received through the Trust because of their marriage (*see* 15 PA 1201)—*the same way* that Seibel would have benefitted from the income under the Prenuptial Agreement had it not been rescinded. In other words, the ***Prenuptial Agreement offered only what Caesars already knew.***

Caesars succeeded below in making a distinction between representing that income would inure to Seibel’s wife and representing that Seibel’s wife would use that income to pay their living expenses. The distinction is immaterial and is surely not evidence of an attempted fraud. Caesars’ understanding of how marriage works is precisely why it rejected Seibel’s effort to dissociate from the Development Entities through assigning his interests to the Trust. (14 PA 2413; 15 PA 2533, 2538; *see also* 15 PA 2544.)

In sum, the Prenuptial Agreement does not show that Seibel intended to defraud Caesars or that Seibel sought advice from his attorneys to defraud Caesars. Seibel told Caesars that the income would go to his wife; and it went to his wife (at least, until Caesars stopped making payments to the Development Entities and began keeping the profits for itself).

D. Step Two: The District Court Erred by Concluding that All Privileged Communications Concerning the Trust and the Prenuptial Agreement Were Made in Furtherance of a Fraud.

Assuming Caesars met its initial burden under step one (which it did not), the analysis proceeds to the second step, which involves determining whether the communications sought were made “in furtherance of the intended, or present, continuing illegality.” *United States v. Doe (In re Grand Jury Inves.)*, 810 F.3d at 1114 (quoting *In re Napster*, 479 F.3d at 1090). As noted above, “in camera review is mandated to determine ... whether [the documents] reflect communications ... made in furtherance of a contemplated or ongoing crime-fraud (step two).” *Id.* (internal quotation marks omitted).

Here, the district court concluded—without first conducting an *in camera* review of the documents—that “communications seeking legal advice for creation of the prenuptial agreement and the Seibel Family 2016 Trust ... were made in furtherance of a scheme to defraud Caesars.” (4 PA 876.) The district court

misapplied the law by making that determination before conducting an *in camera* review of the documents.

Although the Order compels Seibel's privileged communications to be produced for an *in camera* review before they will be turned over to Caesars,⁷ the *in camera* review process is superfluous given that the district court already pre-determined in its Order that these same communications were "made in furtherance" of the alleged fraud. (4 PA 876.) In effect, the district court conflated step one with step two by determining that the privileged communications were part of an alleged crime-fraud, without actually looking at the communications.

The district court's determination that all communications concerning the Trust and Prenuptial Agreement were "made in furtherance" of the alleged crime-fraud was, at a minimum, premature, as the district court had not conducted an *in camera* review of the documents before making that determination. This alone warrants reversal. *See, e.g., Doe*, 810 F.3d at 1114.

⁷ Importantly, the Order does not provide a mechanism of how or when any privileged communications will be provided to Caesars. For example, if the district court intends to provide the privileged communications directly to Caesars immediately after reviewing them, the Development Parties will be unable to challenge the district court's evaluation of the documents under the second step.

IX. CONCLUSION

For these reasons, this Court should vacate the district court's Order and direct the district court to deny Caesars' Motion to Compel in its entirety.

DATED this 16th day of June, 2021.

BAILEY ❖ KENNEDY

By: /s/ John R. Bailey

JOHN R. BAILEY

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VERIFICATION

I, John R. Bailey, am the managing partner of the law firm of Bailey❖Kennedy, counsel of record for the Development Parties, and the attorney primarily responsible for handling this matter for and on behalf of the Development Parties. I make this Verification pursuant to NRS 34.170, NRS 53.045, and NRAP 17(a)(5).

I hereby declare under penalty of perjury under the laws of the State of Nevada that the facts relevant to this Petition are within my knowledge as an attorney for the Development Parties and are based on the proceedings, documents, and papers filed in the underlying action, *Rowen Seibel v. PHWL V, LLC*, No. A-17-751759-B, consolidated with No. A-17-760537-B, pending in Department XVI of the Eighth Judicial District Court, Clark County, Nevada.

I know the contents of this Petition, and the facts stated therein are true of my own knowledge except as to those matters stated on information and belief. As to any matters identified as being stated on information and belief, I believe them to be true.

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True and correct copies of the orders and papers served and filed by the parties in the underlying action that may be essential to an understanding of the matters set forth in this Petition are contained in the Appendix to this Petition.

EXECUTED on this 16th day of June, 2021.

/s/ John R. Bailey
JOHN R. BAILEY

NRAP 28.2 CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition complies with the formatting requirements of NRAP 21(d), NRAP 32(a)(4), and NRAP 32(c)(2), as well as the reproduction requirements of NRAP 32(a)(1), the binding requirements of NRAP 32(a)(3), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6), because this Petition has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in Times New Roman font 14 and contains 6,955 words (excluding the Cover Page, Table of Contents, Table of Authorities, Verification, this Certificate of Compliance, and the Certificate of Service).

I further certify that I have read this Petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Petition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

EXECUTED on this 16th day of June, 2021.

/s/ John R. Bailey
JOHN R. BAILEY

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 Petition for Extraordinary Writ Relief and Petitioners' Appendix to Petition for Extraordinary Writ Relief, Volumes 1 through 5, and Volumes 6 through 16 (filed under seal) 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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