CASE NO.

IN THE SUPREME COURT OF NEVADA

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; PHWLV, 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 4th day of November, 2021.

BAILEY❖KENNEDY

By: /s/ Dennis L. Kennedy

Attorneys for Petitioners

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PETITION FOR EXTRAORDINARY WRIT RELIEF

Pursuant to NRS 34.160, NRS 34.330 and NRAP 21, the Development Parties[1] petition ("Petition") this Court to issue an extraordinary writ of prohibition or mandamus, as appropriate, 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 "Initial Order");

(ii) 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 October 28, 2021 (the "Supplemental Order");

[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").

(iii) To enter an order denying Caesars'[2] 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;

(iv) To vacate the Order Granting in Part, and Denying in Part, the Development Entities, Rowen Seibel, and Craig Green's Motion to Compel the Return, Destruction, or Sequestering of the Court's August 19, 2021, Minute Order Containing Privileged Attorney-Client Communications (the "Clawback Order"); and

(v) To enter an order granting the Development Parties' Motion to Compel the Return, Destruction, or Sequestering of the Court's August 19, 2021, Minute Order Containing Privileged Attorney-Client Communications (the "Clawback Motion") in its entirety.

Finally, for the reasons stated below, the Development Parties believe that random reassignment of this case upon remand is appropriate.

[2] "Caesars" refers to Real Parties in Interest PHWLV, 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").

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

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

II. INTRODUCTION

The district court has ordered Seibel to divulge his *privileged* attorney-client communications, finding that non-disclosure of immaterial information somehow constitutes a crime-fraud pursuant to NRS 49.115(1). The attorney-client privilege should not be set aside so lightly. This Court should accept this Petition and direct the district court to vacate its decision for the following reasons.

First, the district court abused its discretion by finding that Caesars had met its burden to invade Seibel's privilege. Caesars failed to show that Seibel (i) intended to perpetuate a fraud and (ii) used his attorneys in furtherance of a fraud. Caesars contends that Seibel created a family trust and prenuptial agreement to defraud Caesars into not terminating various contracts at issue in this matter. However, substantial evidence demonstrates that the trust and prenuptial agreement were developed for legitimate purposes and, in any event, had no impact whatsoever on Caesars—it *still* terminated the contracts.

Second, the district court abused its discretion by requiring disclosure of *all* the privileged communications without regard to whether each was sufficiently related to and made in furtherance of the supposed fraud. Indeed, the district court's decision was based on *three out of nearly 200 communications*.

Third, the district court abused its discretion by making numerous factual findings that were not supported by substantial evidence and, remarkably, were completely unnecessary to decide the Motion to Compel.

Fourth, the district court wrongfully disclosed privileged communications to opposing parties without providing the Development Parties with an opportunity to seek appellate review. When the Development Parties sought to remedy this error (to the extent it can be), the district court only agreed to partially claw back its disclosure.

Finally, alongside reversing the decision, this Court should direct random reassignment of this case upon remand. In deciding the Motion to Compel, the judge gratuitously expressed his opinions on the ultimate merits of the case (even before he conducted an *in camera* review of any communications)—opinions that will be virtually impossible to disregard going forward.

III. RELEVANT FACTS

A. Caesars Works with Seibel to Revamp its Restaurants.

Starting in the late 2000s, Seibel conceptualized numerous extremely profitable restaurants for Caesars. (9 PA 1614, 1838; 10 PA 1870-71, 1928-29.) Caesars entered into a series of agreements (the "Development Agreements") with certain Development Entities owned, directly or indirectly, by Seibel to develop, fund, and/or operate restaurants at various Caesars' properties (collectively, the "Restaurants"). (*See, e.g.*, 11 PA 2178-2210.) [redacted] (*Id.*)

B. Seibel's Relationship with Caesars Deteriorates.

Shortly after the Restaurants opened, Caesars started to question its obligation to pay the Development Entities and its top executives began to dislike Seibel personally. (*See, e.g.*, 12 PA 2401-17.) By 2014, Caesars was plotting to avoid continuing to pay the Development Entities. (*Id.* at 2404-09, 19-20; 13 PA 2425-28, 2554-80.) Seibel was aware of Caesars' hostility toward him. (10 PA 1974; 13 PA 2595-96.)

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 2601-04.) At the time, Seibel wanted "[redacted]" the Development Entities' interests in the Development Agreements. (14 PA 2618-19.) ***Caesars did not question the Amendment***. (10 PA 2013-17; 1987-90, 93-94, 97.)

As of 2014, Seibel had not been charged with any crime that would have required any disclosure to Caesars. (14 PA 2651.) Nevertheless, before executing the Amendment, Seibel told his main point of contact at Caesars that he was under investigation for tax issues. (10 PA 1890, 1947-48, 1953-55, 2008, 2044; 14 PA 2659, 2662.) Seibel was preparing for the unknown and considering selling or assigning his interests. (14 PA 2619-22.)

D. The Assignments and the Trust.

In 2016, Seibel formed The Seibel Family 2016 Trust, an irrevocable trust (the "Trust"). (14 PA 2689-752.) Seibel formed the Trust for several legitimate reasons, including (i) estate planning; (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. (10 PA 1973-74.) Thereafter, certain Development Entities assigned their rights and interests (the "Assignments") under their respective Development Agreements with Caesars to newly-formed Development Entities, which were owned, directly or indirectly, by the Trust. (*See, e.g.*, 14 PA 2754-55.)

The Trust contains provisions specially designed to ensure that neither its Trustees nor beneficiaries could be unsuitable persons as determined by Caesars. (*Id.* at 2733-34.) For example, the Trust provides that [redacted] (*Id.*)

These provisions reflect Seibel's intent in carrying out a valid assignment to dissociate from the Development Entities so they could remain under contract even if Seibel became unsuitable. (*Id.* at 2816-17, 2822-23.) Seibel reasonably believed that this arrangement was an appropriate way to dissociate based on past practices of another gaming licensee. (10 PA 1943-44.)

Seibel notified Caesars of the Trust's formation and the Assignments and gave Caesars all information required by the Amendment, including disclosing that he was no longer the Manager of any Development Entity and that the Trust's beneficiaries were his wife, Bryn Dorfman ("Bryn"), and grandmother. (*See, e.g.*, 14 PA 2754-55.) As Caesars admitted in discovery, it knew that the Trust was a family trust. (14 PA 2777.) ***Caesars did not question the Trust or the Assignments*** (10 PA 1987-88, 93, 97); ***instead, Caesars began making payments to the newly-formed Development Entities***. (14 PA 2763-64.)

E. The Prenuptial Agreement.

In 2016, Seibel and Bryn entered into a Prenuptial Agreement. (15 PA 2865.) The Prenuptial Agreement includes common provisions addressing topics [redacted]. (7 PA 1392-420.) Two provisions are at issue here.

First, Article II, Section 3, subpart (d)(i), which states [redacted] (*Id.* at 1397-98.) As confirmed by subpart (d)(ii) of that same section, 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 does not, ***as admitted by Caesars' gaming expert***, cause Seibel to secretly retain an ownership interest in the Development Entities. (15 PA 2880, 85.)

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

[redacted].[3] (7 PA 1398.) This provision had no impact on Caesars' decision to terminate—it knew that Seibel could still benefit from the Restaurants due to his relationship to the beneficiaries (his wife and grandmother). (15 PA 2897, 902.) Indeed, Caesars purportedly rejected the Assignments because of the relationships between Seibel and the Trust's beneficiaries. (15 PA 2908, 3006.)

Importantly, Seibel and Bryn never followed the Prenuptial Agreement and rescinded it a short time later. (9 PA 1605; 10 PA 1969-70; 14 PA 2857.) Funds that Bryn received from the Trust were ***never*** deposited into an account to which Seibel was a signatory or had access; in fact, no joint bank account was ever opened. (14 PA 2624, 2860-61; *see also* 15 PA 2910-29.)

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

In September 2016, upon learning that Seibel had been convicted of a felony having nothing to do with the Restaurants, Caesars declared Seibel unsuitable and terminated the Development Agreements—without working with the Development

[3] Another provision of the Prenuptial Agreement states that [redacted] 7 PA 1396.)

Entities to find a means to cure their alleged improper association with Seibel.[4] (15 PA 3007-10, 19-22.) The Development Entities immediately tried to provide Caesars with any information that it needed to evaluate the Assignments and be assured that Seibel was no longer affiliated with the Development Entities. (6 PA 1369-73; 15 PA 3037-42.) They also offered to work toward a different arrangement, such as a sale of the interests to a disinterested third party acceptable to Caesars; but Caesars did not respond. (*Id.*; 10 PA 2018.)

IV. RELEVANT PROCEDURAL HISTORY

A. The District Court's Initial Determination.

On January 6, 2021, Caesars moved to compel Seibel's privileged attorney-client communications based on the crime-fraud exception. (7 PA 1341-60.[5]) A hearing was held on February 24, 2021. (4 PA 786-838.)

On June 8, 2021, the district court entered the Initial Order granting the Motion to Compel. (5 PA 970-79.) The district court found that Seibel's "communications seeking legal advice for creation of the prenuptial agreement and the Seibel Family 2016 Trust are discoverable under the crime-fraud exception

[4] Within a day of learning of Seibel's conviction, [redacted] (15 PA 2931.)

[5] Notably, Caesars did not attach the Trust—one of the two principal documents it argues was part of the fraud—to its Motion to Compel.

(NRS § 49.115(1)) as they were made in furtherance of a scheme to defraud Caesars," and directed the Development Parties to submit nearly 200 privileged communications for *in camera* review. (*Id.* at 977-79.)

B. The Initial Writ Petition.

On June 16, 2021, the Development Parties sought writ relief from this Court challenging the Initial Order (the "Initial Writ Petition"). (17 PA 3433-80.) On June 18, 2021, this Court denied the Initial Writ Petition as premature because the district court had not yet conducted its *in camera* review. (5 PA 1094-96.) The ruling was "without prejudice to petitioner's ability to seek writ relief in the event [Seibel] is ordered to disclose the subject documents." (*Id.*)

C. The *In Camera* Review and the Minute Order.

On June 18, 2021, the Development Parties submitted the privileged communications for *in camera* review. (5 PA 1097-1100.) On August 19, 2021, the district court issued a minute order (the "Minute Order") setting forth its decision. (17 PA 3481-82.) The district court identified ***three*** of the nearly 200 communications as the basis for finding that ***all*** of the communications are discoverable. (*Id.*)

However, instead of simply referencing the documents that formed the basis of its decision, ***the district court quoted them, thereby disclosing their contents to the parties in this case***. (*Id.*)

On October 28, 2021, the district court entered its Supplemental Order, compelling the Development Parties to produce the privileged communications within 14 days. (6 PA 1262-73.)

D. The Development Parties Seek to Claw Back the Minute Order.

On August 30, 2021, the Development Parties moved to claw back the Minute Order. (5 PA 1103-18.) A hearing was held on September 22, 2021. (6 PA 1233-61.) The district court granted the Clawback Motion in part and denied it in part. (*Id.* at 1320-22.) The district court found that Caesars may utilize the Minute Order for purposes of this Petition. (*Id.*)

V. RELIEF REQUESTED

The Development Parties seek a writ of prohibition directing the district court to vacate the Initial and Supplemental Orders and deny the Motion to Compel in its entirety. NRS 34.330; *Las Vegas Dev. Assocs., LLC v. Eighth Jud. Dist. Ct.*, 130 Nev. 334, 338, 325 P.3d 1259, 1262 (2014). Further, the Development Parties seek a writ of mandamus directing the district court to grant the Clawback Motion in its entirety. NRS 34.160. Finally, the Development Parties request random reassignment of this case upon remand. *See FCH1, Ltd. Liab. Co. v. Rodriguez*, 130 Nev. 425, 435, 335 P.3d 183, 190 (2014).

VI. WHY EXTRAORDINARY WRIT RELIEF IS APPROPRIATE

A. Standard for Seeking Writ Relief.

This Court has original jurisdiction to issue writs of prohibition and mandamus. Nev. Const., art. 6, § 4(1); NRS 34.160; NRS 34.330. A writ is an extraordinary remedy available when the petitioner lacks a plain, speedy, and adequate legal remedy. NRS 34.170; 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). A writ of mandamus may issue to compel an act that the law requires a district court to perform "or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Jud. Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). 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 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 information 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 when it 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, this Court should intervene because, as shown below, the district court abused its discretion and misapplied the law in ordering the disclosure of privileged communications based on a statutory exception to a statutory privilege. 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 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)?

2. Did the district court misapply the law in finding that Seibel's privileged communications were substantially related to and made in furtherance of the alleged fraud, before reviewing those communications, *in camera*, as part of the second step of the crime-fraud analysis?

3. Did the district court abuse its discretion in finding that *all* the privileged communications were made in furtherance of the alleged fraud?

4. Did the district court abuse its discretion in disclosing Seibel's privileged communications to all parties without first affording the Development Parties an opportunity to seek appellate review?

5. Did the district court abuse its discretion in refusing to claw back Seibel's privileged communications?

6. Should this case be randomly reassigned upon remand?

VIII. REASONS WHY A WRIT SHOULD ISSUE

A. Standard of Review.

Discovery rulings 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.*

This Court will set aside and not give deference to any factual finding that is "clearly erroneous or not supported by substantial evidence." *Id.* This Court

should review, *de novo*, "whether an evidentiary showing is sufficient" to meet the burden required in proving applicability of the crime-fraud exception. *In re Napster Copyright Litig.*, 479 F.3d 1078, 1089-90 (9th Cir. 2007), *abrogated on other grounds by Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009).

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.

"[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. "[H]ard 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).

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). 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. *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*.

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 [fraud]." *In re Grand Jury Investigation*, 810 F.3d 1110, 1113 (9th Cir. 2016) (internal quotation marks omitted). If a court finds that the exception applies, an *in 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.* (internal quotation marks omitted). For advice to be used "in furtherance" of a fraud, it must "advance, or the client must intend the advice to advance, the client's … fraudulent purpose." *In re Grand Jury Subpoena*, 745 F.3d 681, 693 (3d Cir. 2014). The advice cannot "merely relate" to the fraud. *Id.*; *see also State ex rel. Nix v. City of Cleveland,* 700 N.E.2d 12, 16 (Ohio 1998).

Though showing common law fraud is not required in some jurisdictions,[6] a district court 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 field." *In re Omnicom Grp. Inc., Sec. Litig.*, 233 F.R.D. 400, 405-06 (S.D.N.Y. 2006). Indeed, while a showing "may justify a finding in favor of the offering

[6] Some courts require the elements of common-law fraud to be present. *See, e.g.*, *Laser Indus. v. Reliant Techs.*, 167 F.R.D. 417, 425 (N.D. Cal. 1996); *Rsch. Corp. v. Gourmet's Delight Mushroom Co.*, 560 F. Supp. 811, 820 (E.D. Pa. 1983).

party, it does not necessarily compel that finding." *Id.* at 407. This is important where the court's findings involve issues at the heart of the case. *In re Fundamental Long Term Care, Inc.*, 509 B.R. 956, 963 (Bankr. M.D. Fla. 2014).

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 Prenuptial Agreement. Each error is explained below.

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

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. (5 PA 971.) Nothing in the record supports this finding (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. (5 PA 972.) The evidence shows that Seibel informed Caesars of the investigation. (10 PA 1890, 1947-48, 1951, 1953-55, 2008, 2044; 14 PA 2659, 2662.)

- Seibel "perform[ed] [the Assignments] … because of his impending felony conviction," and "specifically to avoid, undermine, and circumvent Caesars' rights to terminate the Agreements." (5 PA 972.) Seibel testified that the Assignments were intended to offer him "more flexibility in selling, transferring, or assigning" the Development Entities' interests in the Development Agreements. (14 PA 2618-19.) Further, Caesars did not possess an absolute right to terminate the Development Agreements without affording an opportunity to cure, discussed *infra*.

- 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." (5 PA 973.) The Trust contains such measures (14 PA 2733-34), and the Development Entities asked Caesars for guidance on additional

provisions to be included in the Trust to allay any concerns. (6 PA 1369-73; 15 PA 3037-42.)

- 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." (5 PA 973.) The 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 2880, 85.)

- "Seibel falsely told Caesars that the sole beneficiaries of the Seibel Family 2016 Trust were Netty Wachtel Slushny, Dorfman, and potential descendants of Seibel." (5 PA 973.) The Trust shows that this representation was accurate. (14 PA 2689-2752; 2844-45.) That Seibel could benefit from distributions received by his wife—a fact known at the time by Caesars (15 PA 2897, 902)—does not make him 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").[7]

- "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,

[7] The Trust is governed by New York law. (14 PA 2722.)

powers or responsibilities regarding, or equity or financial interests in' the new entities." (5 PA 973.) This statement was true—Seibel no longer had power over the Development Entities and title in the Development Entities was transferred to the Trust, discussed *infra*.

- Seibel was "secretly negotiating" his Prenuptial Agreement with his wife. (5 PA 974.) 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 [Trust] with Seibel." (5 PA 974.) The Prenuptial Agreement required distributions—*from any origin*—to be placed into a joint bank account for payment of living expenses. (7 PA 1398.)

- The "Prenuptial Agreement has not been amended or nullified." (5 PA 974.) Seibel and Bryn testified that they rescinded the Prenuptial Agreement and never abided by it. (9 PA 1605; 10 PA 1969-70; 14 PA 2857.) Indeed, they never even opened a joint bank account. (14 PA 2624, 2860-61.)

- Seibel "used his lawyers to obtain advice about… [the Trust's] interplay with the prenuptial agreement." (5 PA 974; 6 PA 1268 (finding that the Prenuptial Agreement was not "legitimately prepared").) The evidence shows that Seibel had lawyers draft these documents for legitimate purposes. (*See, e.g.*, 10 PA 1973-74; 15 PA 2865.)

- Seibel "falsely represented to Caesars that Seibel was disconnected from receiving benefits from the [Trust] and the business interests with Caesars." (5 PA 974.) Those are Caesars' words, not Seibel's. (7 PA 1369-73, 1386-90, 2754-61.)

- "[T]he prenuptial agreement demonstrates that Seibel always had an interest in receiving distributions from the [Trust] – a direct contradiction to the false representations made to Caesars." (5 PA 974.) Each representation made to Caesars was true. More importantly, Seibel did not receive any proceeds from the Restaurants following the Assignments, and such actions speak louder than words. (14 PA 2624, 2860-61; 15 PA 2910-29.)

- That the "statements made to Caesars about Seibel's purported disassociation were false when made and designed exclusively for the purpose of defrauding Caesars." (5 PA 974.) 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. (10 PA 1943-44, 73-74; 14 PA 2619-22.)

Because the district court's findings are not supported by substantial evidence, the Initial and Supplemental Orders should be vacated. *See Shores*, 134 Nev. at 505, 422 P.3d at 1241.

2. Substantial Evidence Demonstrates that Seibel's Efforts to Dissociate were Legitimate.

The district court found (without substantial evidence) that Seibel's efforts to dissociate from the Development Entities were part of a "complex scheme" to defraud Caesars. (5 PA 973.) Not true. Importantly, the district court did not consider (and Caesars did not advocate for) *in camera* review during the first step of the crime-fraud analysis; the district court's erroneous conclusion was based solely on the record at that point. (*Id.* at 971.)

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. (10 PA 1943-44.) Importantly, the Development Agreements expressly contemplate a right for Seibel to dissociate from the Development Entities. (*See, e.g.*, 11 PA 2200.) That Seibel did not dissociate to Caesars' satisfaction does not make his intent to dissociate fraudulent. The Development Entities tried to work with Caesars to evaluate the Trust as a valid assignee of Seibel's interests and even offered to work toward a different arrangement with Caesars. (6 PA 1369-73; 15 PA 3037-42.) That Caesars refused to work with Seibel (10 PA 2018) 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 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. (5 PA 973-74.) The district court's interpretation of these documents, including the Trust—which is subject to *de novo* review by this Court, *see In re W.N. Connell & Marjorie T. Connell Living Tr.*, 133 Nev. 137, 139, 393 P.3d 1090, 1092 (2017)—is wrong.

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." (5 PA 977.) According to Caesars, Seibel maintained a secret ownership interest in the Development Entities through the Prenuptial Agreement despite the Trust. That is incorrect.

Any legal interest in the Development Entities 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 2880, 85.) 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 2733-34.) "[redacted]" the Trust provides that no unsuitable person (such as Seibel) could: [redacted] (*Id.* at 2733.) Nothing about the Prenuptial Agreement alters these terms. (7 PA 1392-420.)

That the Development Entities would remain as Seibel's separate property under the law only means that Bryn could not seek to extract any interest in the Development Entities from the Trust if a divorce occurred. In fact, the income that she received from the Trust remained her separate property under the Prenuptial Agreement. (*Id.* at 1396-98.)

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

b. <u>The Prenuptial Agreement's Provision Concerning Handling of Distributions Was Not a Part of a Fraudulent Scheme.</u>

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." (5 PA 974.) 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 a beneficiary of the Trust, and thus, she would receive any income derived from the Development Entities. (14 PA 2754-55.)

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 2897, 902)—*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 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—Caesars' understanding of how marriage works is precisely why it rejected the Trust as a valid assignee of Seibel's interests. (*Id.*; *see also* 14 PA 2777; 15 PA 2908.)

The Prenuptial Agreement does not show that Seibel intended to defraud Caesars or that Seibel sought advice from his attorneys to defraud Caesars. The district court erred in finding otherwise.

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 the first step (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." *In re Grand Jury Investigation*, 810 F.3d at 1114 (internal quotation marks omitted).

Preliminarily, the district court erred by concluding—without first conducting an *in camera* review—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." (5 PA 977.) The district court could not reach that conclusion until *after* it reviewed the communications in question—how else would it know? The *in camera* review was seemingly superfluous, because the district court had already made its decision.

Regardless, the district court abused its discretion in concluding that ***all*** communications pertaining to the Trust and Prenuptial Agreement were communications made *in furtherance* of an alleged fraud after its *in camera* review. (6 PA 1271.) Caesars' argument hinged on two provisions of the Prenuptial Agreement; yet, the district court found that each and every email

pertaining to the Trust and Prenuptial Agreement was in furtherance of a fraud, without making any distinction among the documents. (17 PA 3481-82.)

As noted above, the Prenuptial Agreement contains common provisions having nothing to do with Caesars, [redacted]. (7 PA 1392-420.) To the extent any of the communications relate to these subjects, they would not be "in furtherance of" any alleged fraud.

Ultimately, this Court need not review the communications to determine that the district court's order is overbroad. The district court did not make any findings as to 182 of the 185 documents. Instead, the district court found that ***three*** communications "[redacted]." (6 PA 1268; 17 PA 3481-82.) Based on three documents, the district court ordered the production of ***all*** privileged communications at issue. (*See id.*) This was a manifest abuse of discretion. The district court needed to determine whether each communication was "sufficiently related to" and made "in furtherance of" the alleged fraud. *See In re Grand Jury Investigation*, 810 F.3d at 1114. The district court failed to do so.

E. The District Court's Unilateral Disclosure of Privileged Communications was Inappropriate and Should be Cured to the Extent Possible.

The district court—without providing the Development Parties an opportunity to seek appellate review—unilaterally disclosed Seibel's privileged

communications to all parties through its Minute Order. (17 PA 3481-82.) This was plain error.

When a district court conducts an *in camera* review of privileged communications and determines that the crime-fraud exception applies, the court should give the aggrieved party an opportunity to seek appellate review ***before*** compelling the disclosure of the communications or revealing them to others. *See, e.g.*, *In re GMC*, 153 F.3d 714, 717 (8th Cir. 1998); *Haines v. Liggett Grp., Inc.*, 975 F.2d 81, 97 (3d Cir. 1992); *Walanpatrias Found. v. AMP Servs.*, 964 So. 2d 903, 905 (Fla. Dist. Ct. App. 2007); *accord In re Grand Jury Subpoena*, 190 F.3d 375, 388 (5th Cir. 1999).

Similarly, this Court has recognized that the compelled disclosure of privileged communications causes irreparable harm, thus warranting its intervention to review any such decision before it is effectuated. *See e.g.*, *Cotter*, 134 Nev. at 249, 416 P.3d at 231.

Here, the Minute Order quotes from several privileged communications. (17 PA 3481.) Such disclosure was inappropriate. *In re GMC*, 153 F.3d at 717; *Haines*, 975 F.2d at 97. Rather than disclosing the content of a privileged communication, the district court should have been "circumspect in its description of the various documents supporting its decision" "in order to avoid premature disclosure" until the Development Parties could seek writ relief. *See Transcon.*

Refrigerated Lines, Inc. v. New Prime, Inc., No. 1:13-CV-2163, 2014 U.S. Dist. LEXIS 75320, at *39-42 & n.18 (M.D. Pa. June 3, 2014).

Because the Initial and Supplemental Orders should be vacated, this Court should direct the district court to strike the Minute Order, vacate the Clawback Order, and enter a new order granting the Clawback Motion in its entirety. *See In re GMC*, 153 F.3d at 717.

F. Reassignment Upon Remand is Appropriate.

This Court will direct random reassignment on remand where a judge has inappropriately expressed an opinion on the ultimate merits of a case. *FCH1, Ltd. Liab. Co.*, 130 Nev. at 435, 335 P.3d at 190; *Leven v. Wheatherstone Condo. Corp.*, 106 Nev. 307, 310, 791 P.2d 450, 451 (1990).

The Ninth Circuit has identified various factors to consider in deciding when reassignment is appropriate, including where a "judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected." *United States v. Arnett*, 628 F.2d 1162, 1165 (9th Cir. 1979).

Here, the judge will have substantial difficultly disregarding the views expressed in his Orders that go to the ultimate merits of this case. Notably, the vast majority of the findings were made prior to the *in camera* review. Worse,

most of them were gratuitous. Essentially, the district court decided contested issues in pending summary judgment motions when resolving a discovery dispute.

For example, a key issue in this case is whether Caesars properly terminated the Development Agreements. (*Compare* 3 PA 548-51, *with* 17 PA 3361-74, 3411-19.) The district court's Initial Order concludes that "Caesars terminated the agreements—as it was expressly allowed to do—due to Seibel's unsuitability and failure to disclose." (5 PA 972; *see also id.* (concluding that Seibel "perform[ed] [the Assignments] … specifically to avoid, undermine, and circumvent Caesars' rights to terminate the [Development] Agreements.").) As argued below, to determine whether Caesars properly terminated the Development Agreements, the jury must decide, *inter alia*, whether Seibel remained affiliated with the Development Entities and, regardless, whether Caesars acted in good faith in denying a right to cure before terminating the Development Agreements. (*See* 17 PA 3361-74, 3411-19.) Yet, the district court found—unnecessarily and without substantial evidence—that Seibel remained affiliated with the Development Entities and that Caesars properly terminated the Development Agreements. (5 PA 973-74.)

Further, another critical question of fact is whether Seibel properly informed Caesars of the criminal investigation. (*Compare* 3 PA 538-39, *with* 17 PA 3362-64, 3424-26.) The district court found—unnecessarily and without substantial

evidence—that Seibel did not inform Caesars that he was being investigated. (5 PA 972.)

Finally, Caesars has claims against Seibel and Green for civil conspiracy and fraud. (3 PA 553, 56.) The district court found—unnecessarily and without substantial evidence—that "Seibel … worked with … Green to create new entities" as part of a "complex scheme" to defraud Caesars. (5 PA 973.)

Based on these erroneous (and gratuitous) findings, random reassignment is warranted. *See FCH1, Ltd. Liab. Co.*, 130 Nev. at 435, 335 P.3d at 190.

IX. CONCLUSION

For the reasons set forth above, this Court should (i) vacate the Initial and Supplemental Orders and the Clawback Order, (ii) direct the district court to deny the Motion to Compel in its entirety and grant the Clawback Motion in its entirety, and (iii) order random reassignment upon remand.

DATED this 4th day of November, 2021.

BAILEY❖KENNEDY

By: /s/ Dennis L. Kennedy

Attorneys for Petitioners

VERIFICATION

I, Dennis L. Kennedy, am a 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 34.330, 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. PHWLV, 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 4th day of November, 2021.

/s/ Dennis L. Kennedy
DENNIS L. KENNEDY

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 6,995 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 4th day of November, 2021.

/s/ Dennis L. Kennedy
DENNIS L. KENNEDY

CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 4th day of November, 2021, service of the Petition for Extraordinary Writ Relief and Petitioners' Appendix to Petition for Extraordinary Writ Relief, Volumes 1 through 6, and Volumes 7 through 17 (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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HON. TIMOTHY C. WILLIAMS DISTRICT JUDGE EIGHTH JUDICIAL DISTRICT COURT Regional Justice Center 200 Lewis Avenue Las Vegas, NV 89155	Email: dept16lc@clarkcountycourts.us; berkheimerl@clarkcountycourts.us *Respondent*

/s/ Susan Russo
Employee of BAILEY❖KENNEDY