

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 83723

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,

v.

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 d/b/a/ CAESARS ATLANTIC CITY,
Real Parties in Interest.

**ANSWER TO PETITION
FOR EXTRAORDINARY WRIT RELIEF**

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RULE 26.1 DISCLOSURE

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

Real Parties in Interest are Desert Palace, Inc., Paris Las Vegas Operating Company, LLC, PHWLTV, LLC, and Boardwalk Regency, LLC d/b/ Caesars Atlantic City.

- A. Desert Palace, Inc. is a former Nevada corporation that was converted to Desert Palace LLC, a Nevada Limited Liability Company. Its ownership structure is as follows:
 - a. Desert Palace LLC is wholly owned by Caesars Palace LLC – a Delaware Limited Liability Company, which is wholly owned by:
 - i. Caesars World LLC – a Florida Limited Liability Company, which is wholly owned by:
 - 1. CEOC, LLC – a Delaware Limited Liability Company, which is wholly owned by:
 - a. Caesars Resort Collection LLC – a Delaware Limited Liability Company which is wholly owned by:
 - i. Caesars Growth Partners, LLC– a Delaware Limited Liability Company which is wholly owned by:
 - 1. Caesars Holdings, Inc. – a Delaware corporation which is wholly owned by:

- a. Caesars Entertainment, Inc., a publicly traded corporation.
 - B. Paris Las Vegas Operating Company, LLC is a Nevada Limited Liability Company. Its ownership structure is as follows:
 - a. Paris Las Vegas Operating Company, LLC is wholly owned by Caesars Nevada Newco, LLC – a Nevada Limited Liability Company, which is owned by:
 - i. Caesars Palace LLC – a Delaware Limited Liability Company, which is wholly owned by:
 - 1. Caesars World LLC – a Florida Limited Liability Company, which is wholly owned by:
 - a. CEOC, LLC – a Delaware Limited Liability Company, which is wholly owned by:
 - i. Caesars Resort Collection LLC – a Delaware Limited Liability Company which is wholly owned by:
 - ii. Caesars Growth Partners, LLC– a Delaware Limited Liability Company which is wholly owned by:
 - 1. Caesars Holdings, Inc. – a Delaware corporation which is wholly owned by:
 - a. Caesars Entertainment, Inc., a publicly traded corporation.
- C. PHWLTV, LLC is a Nevada Limited Liability Company. Its ownership structure is as follows:
 - a. PHWLTV, LLC is wholly owned by Caesars Growth PH, LLC – a Delaware Limited Liability Company, which is wholly owned by:
 - i. Caesars Nevada Newco, LLC – a Nevada Limited Liability Company, which is owned by:

1. Caesars Palace LLC – a Delaware Limited Liability Company, which is wholly owned by:

a. Caesars World LLC – a Florida Limited Liability Company, which is wholly owned by:

i. CEOC, LLC – a Delaware Limited Liability Company, which is wholly owned by:

1. Caesars Resort Collection LLC – a Delaware Limited Liability Company which is wholly owned by:

a. Caesars Growth Partners, LLC– a Delaware Limited Liability Company which is wholly owned by:

i. Caesars Holdings, Inc. – a Delaware corporation which is wholly owned by:

ii. Caesars Entertainment, Inc., a publicly traded corporation.

D. Boardwalk Regency, LLC is a Nevada Limited Liability Company. Its ownership structure is as follows:

a. Boardwalk Regency, LLC is wholly owned by Caesars New Jersey, LLC – a New Jersey Limited Liability Company, which is wholly owned by:

i. Caesars World LLC– a Florida Limited Liability Company, which is wholly owned by:

a. CEOC, LLC – a Delaware Limited Liability Company, which is wholly owned by:

i. Caesars Resort Collection LLC – a Delaware Limited Liability Company which is wholly owned by:

1. Caesars Growth Partners, LLC– a Delaware Limited Liability Company which is wholly owned by:

a. Caesars Holdings, Inc. – a Delaware corporation which is wholly owned by:

i. Caesars Entertainment, Inc., a publicly traded corporation.

Pisanelli Bice PLLC is the only law firm whose attorneys are expected to appear for Real Parties in Interest. Previously, attorneys from Kirkland and Ellis also appeared for Real Parties in Interest.

DATED this 5th day of January 2022.

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ROUTING STATEMENT

Even though this case originates in business court, NRAP 17(a)(9), this matter involves a pretrial writ proceeding challenging a discovery order and, therefore, is presumptively assigned to the Court of Appeals. NRAP 17(b)(13). Contrary to Petitioners' characterization, this matter does not "raise[] a question of first impression that is of statewide public importance." (Pet. 3.) The parties largely agree on the applicable standard for the statutory crime-fraud exception to the attorney-client privilege. Thus, this matter involves a dispute over the application of facts to law after an *in camera* review utilizing an abuse of discretion standard of review.

ISSUES PRESENTED FOR REVIEW

1. Is there substantial evidence in the record showing that Caesars presented the *prima facie* case necessary to invoke the crime-fraud exception to the attorney-client privilege?

2. Even though the disputed documents are not in the record on appeal, did the District Court abuse its discretion when, after an *in camera* review, it found that Petitioners' withheld communications were "sufficiently related to" and were made "in furtherance of" intended, present, or continuing fraud?

I. INTRODUCTION

Caesars¹ and Petitioners² contracted to develop restaurants at Caesars' properties. Because Caesars is a gaming licensee in Nevada and across the country, the agreements contained extensive suitability and disclosure obligations in compliance with regulatory requirements. However, unbeknownst to Caesars, Petitioners' principle – Rowen Seibel – was engaged in a long-running tax evasion scheme and was unsuitable from the beginning. Eventually, Seibel fell under investigation, pled guilty to federal crimes, and served prison time.

Seibel told Caesars none of this. Instead, Seibel and his lawyers engaged in a plot to defraud Caesars and jeopardize its gaming licenses. With assistance of

¹ "Caesars" means Real Parties in Interest.

² "Seibel" or "Petitioners" mean Petitioners.

counsel, Seibel built a corporate shell structure to continue reaping the financial benefits of his relationship with Caesars despite his unsuitability under the agreements and Nevada gaming laws. Days before pleading guilty and without explanation, Seibel informed Caesars that he was creating new entities, assigning the agreements to them, and transferring his membership interests [REDACTED]

[REDACTED]

[REDACTED]

Once news of Seibel's conviction surfaced, Caesars immediately terminated the agreements for unsuitability and this litigation ensued. In discovery, Caesars learned that Seibel's efforts to divest himself were a ruse and the Trust only superficially obtained Seibel's business interests on paper. Seibel and New York counsel orchestrated a side-deal in the form of a "Prenuptial Agreement" where his

[REDACTED]

[REDACTED] Contrary to Seibel's representations to Caesars, the Prenuptial Agreement also stated [REDACTED]

[REDACTED]

[REDACTED] Through the Trust and Prenuptial Agreement, and directly contrary to Seibel's representations to Caesars that he had divested his interests in the companies, [REDACTED]

[REDACTED]

When Caesars learned of Seibel's attempt to defraud it and violate gaming regulations through legal services, Caesars moved to compel certain allegedly attorney-client privileged documents under NRS 49.115(1)'s crime-fraud exception. This Court has not addressed this exception. Accordingly, the parties and the District Court applied Ninth Circuit precedent requiring a two-step framework. First, the movant must make a *prima facie* case that the client was engaged in or planning what he reasonably should have known was a crime or fraud when he sought the advice. If this first step is satisfied, the district court must conduct an *in camera* review to assess whether the documents are sufficiently related to and were made in furtherance of the illegality. Before ordering production, the District Court must be satisfied by a preponderance of the evidence.

The District Court properly applied this framework. Indeed, Seibel does not contend otherwise. Rather, Seibel asserts that there is not substantial evidence to support the District Court's decisions to conduct an *in camera* review and order production of the contested documents. But there is overwhelming evidence of Seibel's attempt to defraud Caesars and his lawyers' role in the fraudulent enterprise. The District Court observed Seibel's crime-fraud with its own eyes in a thorough *in camera* review and then compelled production. Viewing the truth about Seibel's conduct is not grounds to reassign the case to a different judge. Seibel does not want this Court to see what the District Court saw and does not provide the documents to

this Court for review. Thus, there is no basis to issue the requested writs and the Petition should be denied.

II. STATEMENT OF FACTS

A. The Law and Seibel Agreements Contain Suitability Requirements.

Caesars and its affiliates are the largest gaming company in the United States. Together, they hold privileged gaming licenses in Nevada and across the country. Like all gaming jurisdictions, Nevada demands operators – and those with whom they conduct business – maintain the highest standards of good character and suitability. NRS 463.170; NRS 463.167. A gaming licensee cannot enter any contract or pay remuneration to unsuitable persons. NRS 463.166; NRS 463.165.

To comply with its regulatory obligations, Caesars has implemented a rigorous ethics and compliance program. The Caesars Compliance Plan emphasizes that the company must avoid associating with unsuitable persons. (16PA3165.) And these compliance requirements extend to [REDACTED]

[REDACTED]

[REDACTED] (*Id.*)

That's why, when Seibel and his entities contracted to develop restaurants at certain properties, Caesars imposed stringent suitability and disclosure requirements. In all, Caesars entered six agreements with Petitioners between 2009 and 2014. Under the Agreements, Seibel and his entities generally shared in the profits or

revenues from restaurants at Caesars properties. Each Seibel Agreement made clear

[REDACTED] For

example, one agreement provided [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (11PA2142.)

The other Agreements contained nearly identical provisions [REDACTED]

[REDACTED]

[REDACTED] (11PA2200; 12PA2237-38; 12PA2326-27; 12PA2383-84; 13PA2455-56; 13PA2494.)

B. Seibel Conceals his Unsuitability Before Caesars Terminates him.

Unbeknownst to Caesars, Seibel and his affiliated entities were unsuitable from the start. Caesars later learned that, [REDACTED]

[REDACTED]

[REDACTED] (6SA988-1002.) Eventually, the United States government prosecuted Seibel and he pled guilty to one count of corrupt endeavor to obstruct and impede the due administration of the Internal Revenue Laws. (7SA1097-1100.) Seibel served prison time, followed by home confinement, and community service. (*Id.*)

Despite Caesars' regulatory duties and the suitability obligations in the Seibel Agreements, Seibel never informed Caesars about any of this. Seibel did not mention his investigation or his guilty plea. Instead, behind the scenes, Seibel was working furiously with attorneys to form a [REDACTED]

[REDACTED]

[REDACTED] (7PA1381-84; 7PA1397-1420; 14PA2689-2752.)³

Omitting his criminal problems, Seibel wrote Caesars ten days before pleading guilty and stated he was [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (14PA2754-61.) Seibel represented to Caesars that the new entities would be owned by the Seibel Family 2016 Trust. (*Id.*) The Trust theoretically contains [REDACTED]

[REDACTED] (14PA2733.) The Trust defines [REDACTED]

[REDACTED]

[REDACTED]. (14PA2734.)

³ The 2014 letter amendment [REDACTED]. (Pet. 5-6; 13PA2601.)

Seibel expressly told Caesars that the *sole beneficiaries* of the Trust were his grandmother, his wife (Bryn Dorfman), and descendants. (*See, e.g.*, 14PA2754.)

Seibel stated: [REDACTED]

[REDACTED]

[REDACTED] (*Id.*) Seibel led Caesars to believe he would no longer be involved or benefit from the entities.

During discovery, Seibel testified [REDACTED]

[REDACTED] (7PA1510-

11.) [REDACTED]

[REDACTED]. (10PA1973-74; 16PA3081.)

Brian Ziegler – the Trust's trustee and Seibel's long-time lawyer (more about him below) – testified [REDACTED]

[REDACTED]. (14PA2822.) Simply put, Seibel and his

lawyers knew when presenting the new corporate arrangement to Caesars that he was unsuitable and that Caesars could not be associated with him.

Seibel and his counsel were correct about Caesars' reaction. Once Caesars learned about his conviction, Caesars immediately terminated its relationships with Seibel. (15PA3007-35.) [REDACTED]

(7PA1367.) [REDACTED].

(7SA1175.)

C. In Discovery, Caesars Learns about the Prenuptial Agreement.

Caesars' termination of Seibel and his companies led to this litigation. In discovery, Caesars uncovered the depths of Seibel's efforts to skirt his suitability obligations under the Agreements and Nevada gaming laws. After initially denying its existence, Seibel produced a prenuptial agreement with Bryn. The Prenuptial Agreement [REDACTED]

[REDACTED]

[REDACTED]. The prenuptial agreement states:

[REDACTED]

[REDACTED]

[REDACTED]

(7PA1392-1420 (emphasis added)). The Prenuptial Agreement defines marital property, in part, as [REDACTED]

[REDACTED] (7PA1400.)

A plain reading of the Prenuptial Agreement shows that it was designed to conceal Seibel's involvement with the new entities and his continued receipt of financial benefits despite representations to Caesars that he was disassociated and would have no [REDACTED]

[REDACTED] (14PA2754.) Through the Prenuptial Agreement, the business interests Seibel purportedly transferred to the Trust [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (7PA1398.)

That's precisely what happened. Seibel testified [REDACTED]

[REDACTED]

(16PA3078:13-20.) [REDACTED]

[REDACTED] (16PA3080:14-22.) [REDACTED]

[REDACTED] (16PA3079:1-23; 15PA2861-63.)

Bryn testified [REDACTED]. (15PA2858.)

Caesars' trust expert opined that the Prenuptial Agreement [REDACTED]

[REDACTED]

(16PA3211-13.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (16PA3211-13.)

D. Seibel Enlisted Attorneys to Defraud Caesars.

Seibel did not manufacture this convoluted corporate structure on his own. He sought and received the advice of multiple attorneys. [REDACTED]

[REDACTED] (7PA1426-31.) Zeigler testified he provided [REDACTED]

[REDACTED] (7PA1427-29.) But Zeigler admitted [REDACTED]

[REDACTED] (7PA1429.) [REDACTED]

[REDACTED]. (*Id.*)

Seibel and his attorneys directly misrepresented to Caesars that he was completely disconnected from receiving benefits from the Trust and the business interests with Caesars. Ziegler represented to Caesars that [REDACTED]

[REDACTED]

[REDACTED]

(7PA1370.) Ziegler went further to claim that [REDACTED]

[REDACTED] (7PA1375.) Neither Seibel,

Zeigler, nor any of his attorneys [REDACTED]

[REDACTED] (7PA1430.).

Had Seibel or his representatives disclosed the Prenuptial Agreement to Caesars, the proposed arrangement would have been rejected – as Seibel and his lawyers should have known. For instance, Susan Carletta testified for Caesars' Compliance Committee that [REDACTED]

[REDACTED] (14PA2777.) She described that [REDACTED]

[REDACTED]

[REDACTED] (15PA2897.) Ms. Carletta [REDACTED]

[REDACTED]

[REDACTED] (15PA2899-2902.)

Caesars' gaming regulatory expert, Scott Scherer, confirmed [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (15PA2879-82.)

The Trust was the [REDACTED].

(15PA2880.) [REDACTED]

[REDACTED] Sherer explained, [REDACTED]

[REDACTED] (15PA2885-86.)

E. Caesars Moves to Compel Based on the Crime-Fraud Exception.

Even though Seibel hid the Prenuptial Agreement from Caesars when the Trust and entities were formed, Seibel produced an extensive privilege log in discovery showing the exhaustive role of his lawyers in creating the structure to keep Caesars in the dark. More than 100 entries appeared related to the creation of the Prenuptial Agreement or the Trust. (7PA1434-1503.) After finally receiving the Prenuptial Agreement, and reviewing the privilege log, Caesars pieced together Seibel's and his lawyers' attempt to defraud a gaming company into paying compensation to an unsuitable convicted felon.

In January 2021, Caesars moved to compel certain documents listed on the privilege log that appeared to be related to, and in furtherance of, Seibel's efforts to defraud Caesars with the Trust and Prenuptial Agreement in violation of gaming laws and the Agreements. (7PA1341-59.) Because this Court has yet to enunciate the standard applicable to the crime-fraud exception, Caesars advanced the Ninth Circuit's two-step framework outlined in *Napster*. (7PA1354-56.) Caesars asked the District Court to conduct an *in camera* review and then, if appropriate, order production. (7PA1355-56.) Seibel also applied *Napster* and opposed Caesars' motion. (8PA1596-98.)

After briefing, the District Court held a hearing. (4PA786-827.) The District Court recognized "[t]here is a two-part analysis that the Court has to conduct as it

relates to this." (4PA822-23.) The District Court explained it planned to carefully review the trust document and Prenuptial Agreement, especially the opinions of Caesars' trust expert. (4PA824-826.) "I'm going to go look at the [trust] and focus on what the trust expert says as it pertains to retention of ownership interest by Mr. Seibel." (4PA825.) The District Court highlighted that Seibel did not offer a competing trust expert. (4PA824.)

The District Court's comments show that it appropriately weighed the gravity of Caesars' motion and seriously considered Petitioners' attorney-client privilege. The District Court stated, "at the end of the day, and this is one of the reasons why I want to be very careful as far as how I handle this issue, because, you, the attorney-client privilege is nothing we should set aside cavalierly, right?" (4PA826.) The District Court continued, "if I feel there's appropriate basis to do so, I have to be very careful as to how I handle that. So I don't mind telling everybody that." (*Id.*)

The District Court then issued a minute order stating "[t]he Court has determined that Caesars has 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 despite unsuitability to conduct business with a gaming licensee." (4PA904.) The District Court granted Caesars' motion to compel and stated it would conduct the second step *in camera* review "to determine the attorney-client

communications for which production is sought are sufficiently related to and were made in furtherance of intended or continued illegality." (4PA904-05.)

The District Court directed Caesars to prepare findings of fact and conclusions of law "based not only on the court's minute order but the pleadings on file herein, argument of counsel, and the entire record." (4PA905.) The formal order was entered June 8, 2021. (5PA970-79.)

F. Seibel Files a Writ Petition to Prevent *In Camera* Review.

Seibel's efforts to hide his attempt to defraud Caesars did not stop with the District Court's order. This time, Seibel sought to conceal his efforts from the District Court's eyes. On June 16, 2021, he filed a writ petition seeking to prevent the *in camera* review. (17PA3433-80.) This Court swiftly denied the petition, finding that "the district court has not completed its review of the matter, determining merely that real parties in interest have demonstrated that its *in camera* review is warranted." (5PA1095.) "Only after that review is completed may the district court compel petitioner to disclose the documents to real parties in interest." (*Id.*)

G. The District Court Conducts the *In Camera* Review and Orders Production.

Following its *in camera* review, the District Court issued another minute order on August 18, 2021. The District Court stated [REDACTED]
[REDACTED]
[REDACTED] (17PA3481.) To

explain its reasoning and the factual basis for its decision, the District Court provided illustrations – it did not endeavor to be exhaustive. The District Court noted [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.*)

The District Court recognized that this document directly discussed the problematic Prenuptial Agreement provision [REDACTED]

[REDACTED]

[REDACTED] The document indicates the author hoped the provision was subtle enough to escape Caesars' attention. Otherwise, it [REDACTED] (*Id.*) The District Court found another document contained [REDACTED] (*Id.*) A third example contained [REDACTED] showing efforts to use the Prenuptial Agreement to evade Caesars' notice: [REDACTED]

[REDACTED]

[REDACTED]

Based on its *in camera* review of all the documents – not just the three quoted communications – the District Court granted Caesars' motion to compel. (*Id.*) Again,

the District Court directed Caesars to prepare a formal written order based on the minute order and "also on the record on file herein." (*Id.*) Later, the District Court granted, in part, Seibel's motion to "clawback" the minute order. (6PA1320-22.) The formal order was entered on October 28, 2021. (6PA1262.)

H. Petitioners File this Petition.

Petitioners filed the Petition on November 5, 2021. Again, they tried to sweep the crime-fraud evidence under the rug. While arguing the District Court's ruling was not supported by substantial evidence, Petitioners filed a motion seeking to prevent Caesars and the Court from using the evidence *cited in the District Court's Minute Order* "for any purpose, including in responding to the writ petition." This Court denied the motion, ruling "real parties in interest may use the August minutes for purposes of responding to this petition, as petitioners placed the minutes at issue in the petition." (Order, Dec. 28, 2021, on file.)

III. THE REASONS WHY THE WRIT SHOULD NOT ISSUE

A. The Court Should Not Entertain the Petition.

Petitioners invoke this Court's original jurisdiction to issue writs of mandamus or prohibition. A writ may issue when "there is not a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.160; NRS 34.330. Most discovery rulings are unreviewable by writ, but the Court has entertained petitions involving privilege issues. *Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 130 Nev. 118, 122, 319

P.3d 618, 621 (2014). This Court's review, however, remains purely discretionary even when privileges are raised. *Smith v. Eighth Jud. Dist. Ct.*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

The Court is not automatically obligated to exercise its original jurisdiction every time a party raises a privilege question. *See, e.g., Vistana Condo. Owners Ass'n, Inc. v. Eighth Jud. Dist. Ct.*, 2018 WL 6818987, at *1, 134 Nev. 1025, 432 P.3d 218 (2018) (unpublished disposition). Moreover, the United States Supreme Court has indicated that an appeal after final judgment may be an adequate legal remedy. *Infra* § III(D).

Because its privilege assertion alone is insufficient, Petitioners urge the Court to accept the Petition "to define the precise parameters" of the crime-fraud exception. (Pet. at 14.) But this type of "advisory" writ should only be considered in rare circumstances. *Archon Corp. v. Eighth Jud. Dist. Ct.*, 133 Nev. 816, 822, 407 P.3d 702, 708 (2017). To warrant an advisory writ, the parties must have fully developed competing arguments and legal theories in the lower court. *Id.* at 823, 407 P.3d at 708. An advisory writ without developing different novel or important legal issues does not promote judicial economy or administration. *Id.* at 823, 407 P.3d at 708-09.

Here, the parties agreed on the same Ninth Circuit legal standard to evaluate the crime-fraud exception. The parties did not present competing tests or dueling

factors. As a result, this is not an appropriate case for an advisory writ even though this Court has not pronounced the crime-fraud exception's contours.

B. Standard of Review.

The Court reviews privilege rulings for an abuse of discretion. *Canarelli v. Eighth Jud. Dist.*, 136 Nev. 247, 251, 464 P.3d 114, 119 (2020). Legal conclusions, like the scope of statutes, are reviewed *de novo*. *Id.* Factual findings receive deference and will not be set aside unless clearly erroneous or not supported by substantial evidence. *Id.*

Perhaps because both parties applied Ninth Circuit caselaw, Petitioners assert the Court should review *de novo* whether Caesars established the crime-fraud exception. (Pet. 15-16.) But the Court need not alter its customary practice for privilege determinations. Other states with similar crime-fraud exceptions apply an abuse of discretion standard. *Bd. of Overseers of Bar v. Warren*, 34 A.3d 1103, 1109 (Me. 2011).

C. The District Court Properly Compelled Production.

Petitioners do not contend the District Court applied an incorrect legal standard. Rather, Petitioners argue that there is insubstantial evidence to satisfy the applicable test. (Pet. 19-29.) The Legislature codified the attorney-client privilege in NRS 49.095. It states, "[a] client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications [b]etween the

client...and the client's lawyer...[m]ade for the purpose of facilitating the rendition of professional legal services to the client."

The privilege is not absolute. *Haynes v. State*, 103 Nev. 309, 317, 739 P.2d 497, 502 (1987). In contrast to Petitioners' claim that "hard cases should be resolved in favor of the privilege," (Pet. 16), privileges are narrowly construed because they are "exceptions to the demand for every man's evidence [and] in derogation of the search for the truth." *Ashokan v. State, Dep't of Ins.*, 109 Nev. 662, 668, 856 P.2d 244, 247 (1993).

Just as it has codified the attorney-client privilege, the Legislature has enacted exceptions to it. NRS 49.115(1) codifies the crime-fraud exception. It provides that no privilege exists "[i]f 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 import of this rule...is to prevent a client from being able to assert an attorney-client privilege for communications made to his attorney for purposes of using the attorney to commit a fraud on a third person." *Sloan v. State Bar of Nevada*, 102 Nev. 436, 442, 726 P.2d 330, 334 (1986).

This Court has not yet considered NRS 49.115(1)'s scope so both parties largely applied – and the District Court adopted – the Ninth Circuit's standard described in *In re Napster, Inc. Copyright Litigation*, 479 F.3d 1078 (9th Cir. 2007).

Under *Napster*, "[a] party seeking to vitiate the attorney-client privilege under the crime-fraud exception must satisfy a two-part test." 479 F.3d at 1090.

At step one, "the party must show that the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme." *Id.* Even so, "the crime-fraud exception is not strictly limited to cases alleging criminal violations or common law fraud." *Lewis v. Delta Air Lines, Inc.*, 2015 WL 9460124, at *3 (D. Nev. Dec. 23, 2015). The majority view does not require the actual elements of a crime or common law fraud. *Id.* "The term 'crime/fraud exception,'...is a bit of a misnomer, as many courts have applied the exception to situations falling well outside of the definitions of crime or fraud." *Rambus, Inc. v. Infineon Techs. AG*, 222 F.R.D. 280, 288 (E.D. Va. 2004).

At step two, the party must show that "the attorney-client communications for which production is sought are 'sufficiently related to' and were made 'in furtherance of [the] intended, or present, continuing illegality.'" *Napster*, 479 F.3d at 1090. Step-two requires an *in camera* review of the individual documents. *In re Grand Jury Investigation*, 810 F.3d 1110, 1114 (9th Cir. 2016).

Before a court orders outright disclosure of the purportedly privileged documents, the court must find by a preponderance of the evidence that the crime-fraud exception applies. *Napster*, 479 F.3d at 1098.⁴

1. Seibel Applies an Incorrect Step-One Burden of Proof.

Petitioners attack the District Court's initial decision to conduct an *in camera* review. They dispute that Caesars satisfied its step-one burden to demonstrate Seibel and Petitioners sought or obtained legal services to enable or aid them in committing or planning what they knew or reasonably shown have known to be a crime or fraud. (Pet. 19-27.) But Petitioners fundamentally misunderstand the requisite burdens of proof.

Petitioners' assert, at step-one, "Caesars has 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." (Pet. 19 (emphasis added).) This is wrong. Under *Napster*, "the threshold for *in camera* review is 'considerably lower' than that 'for fully disclosing documents.'" 479 F.3d at 1092. "A lower threshold showing applies where the party asserting the crime-fraud exception initially requests only that the

⁴ Other states with similar crime-fraud exceptions apply a two-step *prima facie* standard. *In re Park Cities Bank*, 409 S.W.3d 859, 869 (Tex. App. 2013) (Tex. R. Evid. 503(d)(1) applies: (1) a *prima facie* showing a crime or fraud was ongoing or about to be committed; (2) there is a relationship between the document and the *prima facie* proof).

court conduct an *in camera* review of the allegedly privileged communications to determine if the crime-fraud exception applies." *Lewis*, 2015 WL 9460124, at *2.

To obtain *in camera* review, the movant must establish "the existence of a *prima facie* case." *In re Grand Jury Investigation*, 810 F.3d at 1113. This requires "'a factual basis adequate to support a good faith belief by a reasonable person that in camera review of the materials may reveal evidence to establish the claim that the crime fraud exception applies.'" *Planned Parenthood v. Ctr. Med. Progress*, 2019 WL 1950377, at *2 (N.D. Cal. May 1, 2019). The bar is not high. *In re Outlaw Lab'ys, LP Litig.*, 2020 WL 3268581, at *5 (S.D. Cal. June 17, 2020). The threshold is low enough to discourage the abuse of privilege and to account for the disparity of evidence between the parties. *Id.* at **5-6. Still, the bar is high enough to halt groundless forays into the privilege. *Id.* at *5.

"Only if the threshold has been met and the court exercises its discretion to engage in *in camera* review does the court review the documents to determine if the crime-fraud exception applies. At this point, the preponderance of the evidence standard *Napster* set for terminating the privilege in a civil case applies." *Id.* at *6.

Thus, Caesars only needed to show a *prima facie* case from which a reasonable person could conclude an *in camera* review may expose evidence that Seibel sought legal services to pursue a crime or fraud. And to sustain the District

Court's *in camera* review order, this Court need only find substantial evidence supports Caesars' *prima facie* showing.

2. Substantial Evidence Supports the Step One Analysis.

Applying either standard, Caesars established Petitioners were engaged in a crime-fraud warranting an *in camera* review, and the District Court's decision is supported by substantial evidence. "Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion." *J.D. Constr. v. IBEX Int'l Grp.*, 126 Nev. 366, 380, 240 P.3d 1033, 1043 (2010).

Petitioners' laundry list of supposed factual errors ignores the relevant considerations and mischaracterizes the record. When evaluating the underlying conduct at step one, only the client's knowledge and intent are relevant; the attorney need not know the client's purpose. *Napster*, 479 F.3d at 1090. "The planned crime or fraud need not have succeeded for the exception to apply. The client's abuse of the attorney-client relationship, not his or her successful criminal or fraudulent act, vitiates the privilege." *Id.*

Here, there is substantial evidence supporting Caesars' step-one burden and the District Court's findings. Based on the record, there was ample proof from which the District Court could conclude [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Seibel was aware that Caesars is a gaming licensee subject to suitability requirements – the same requirements imposed in the Agreements. (*Supra* p. 4-5.) For these reasons, Seibel never disclosed his criminal conduct. Petitioners claim Seibel informed a Caesars executive, Jeffrey Fredrick, in 2014 that Seibel was under investigation. (Pet. 20.) But Frederick testified that [REDACTED] [REDACTED]. (16PA3137-3138.)⁵

The documents themselves are *prima facie* and preponderance evidence of the fraud and Seibel's efforts with counsel to funnel income despite being unsuitable. The Trust purportedly [REDACTED]

[REDACTED]

(14PA2732-34.)

But the Prenuptial Agreement effectuates an end-run around these paper restrictions. It states that, notwithstanding Seibel's [REDACTED]

[REDACTED]

[REDACTED] (7PA1397-98.) It also provides that [REDACTED]

[REDACTED]

⁵ Seibel's guilty plea was in the record in a motion for summary judgment (the one in Petitioners' Appendix) before both minute and written orders. (7SA1101.)

[REDACTED]

(7PA1397-98.) This was done. (15PA2861-63.) Bryn's [REDACTED]

[REDACTED] (7PA1400.) Bryn confessed [REDACTED]

[REDACTED] (15PA2858.)

The assignments, Trust, and Prenuptial Agreement were devised to conceal Seibel's continued ownership and allow him to profit from the businesses unlawfully. Caesars' gaming expert relayed how the Prenuptial Agreement permitted Seibel to continue [REDACTED]

[REDACTED] (15PA2879-86.)⁶ And Caesars' unrebutted trust expert detailed [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (16PA3211-13.) At the hearing, the District Court stated it was going to focus on the uncontroverted opinions of the trust expert. (4PA824-826.)

Seibel admitted one reason he created the Trust was that he anticipated [REDACTED]. (7PA1510-11; 10PA1973-74; 16PA3081.) Ziegler, the assisting lawyer and sham trustee, [REDACTED] [REDACTED]. (14PA2822.)

⁶ Scherer never admitted Seibel did not "secretly retain an ownership interest in the Development Entities." (Pet. 25.)

Other New York lawyers participated in setting up this shell game. (7PA1426-31.)

The lengthy privilege log is illustrative. (7PA1434-1503.)

With knowledge of the Trust and Prenuptial Agreement, Seibel and his counsel made many explicit and implicit misrepresentations to Caesars about Seibel's feigned divestitures. For instance, Seibel's letters to Caesars before pleading guilty deceptively stated that only [REDACTED]

[REDACTED] (14PA2754-61.) Ziegler fibbed that the Trust

[REDACTED]

[REDACTED]

[REDACTED] (7PA1370; 7PA1375.) [REDACTED]

[REDACTED] (7PA1430.)

Seibel is not absolved of his crime or fraud even if he claims Caesars was told isolated facts comprising the deceitful web (it was not). (Pet. 27.) The intended crime or fraud need not succeed. *Napster*, 479 F.3d at 1090. Thus, awareness that may defeat a common law fraud claim does not insulate an abuse of the attorney-client privilege. *Id.* On this record, substantial evidence supports each challenged finding no matter the applicable standard.

Petitioners hunt through the record and protest that other out-of-context snippets support them or contradict the findings. (Pet. 19-23.) They also repeatedly argue the District Court – and this Court – must blindly accept the Trust's restrictions

at face value, naively construe the Prenuptial Agreement in Seibel's favor,⁷ or credit the other possible legitimate reasons for Seibel's skullduggery. (Pet. 24-27.) But the District Court need not evaluate the evidence with an uncritical eye. Its evidentiary interpretation is afforded deference. If there is substantial evidence, this Court does not reweigh the record or substitute its judgment. *Matter of T.M.R.*, 137 Nev. Adv. Op. 23, 487 P.3d 783, 789 (2021).

3. The District Court Properly Conducted an *In Camera* Review.

Because Caesars met its step-one burden, the District Court correctly conducted an *in camera* review to determine whether the challenged communications were "sufficiently related to" and made "in furtherance of" the illegality. Oddly, Petitioners criticize the District Court for proceeding to step-two without conducting an *in camera* review at step-one. (Pet. 28, 24.) They accuse the District Court of prejudging the outcome. (*Id.* at 28.)

But the step-one "threshold decision must be made without consideration of the privilege documents....[C]onsidering the allegedly privileged documents in determining whether to conduct an *in camera* review to decide whether the crime

⁷ Petitioners conceded [REDACTED]

(8PA1592(n.13).)

fraud exception applies would be error." *In re Outlaw Lab'ys*, 2020 WL 3268581, at *6. Petitioners' view collapses both steps into one.

No matter when the *in camera* review occurred, Petitioners argue the District Court wrongfully found the compelled documents were sufficiently related to, and in furtherance of, Seibel's attempt to defraud Caesars. Yet Seibel does not provide the documents to this Court to doublecheck the District Court's work. Petitioners contend "this Court need not review the communications to determine that the District Court's order is overbroad." (Pet. 29.) This is incorrect.

The party asserting insubstantial evidence must provide an adequate record. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007). The Court presumes any missing material supports the District Court and, therefore, generally affirms. *Id.* This rule applies to *in camera* reviews of protected materials. *Bray v. Swisher*, 2017 WL 1650131, at **3-4 (N.C. App. 2017).

In *Canarelli*, this Court reviewed the district court's privilege rulings after examining the *in camera* documents. 136 Nev. at 253, 257 464 P.3d at 120, 123. By contrast, Seibel does not provide the communications as part of the record. As a result, this Court cannot determine whether the District Court abused its discretion, and the Court must presume the omitted documents bolster the District Court's findings. The Court should affirm for this alone.

But there's more. The District Court's August 2021 Minute order quotes three illustrations that were related to, or in furtherance of, Siebel's fraud. (17PA3481.)

The documents show Siebel and his lawyers [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.*) Siebel and his counsel expressed a desire

[REDACTED] (*Id.*) They

knew it [REDACTED] (*Id.*) As the only court that has viewed the documents, the District Court is in the best position to decide if they satisfy step-two. This Court should not disturb its ruling.

D. The Court Should Unseal the "Clawback Order," If Anything.

Ironically, Petitioners bemoan that "the District Court did not make any findings as to 182 of the 185 documents" while arguing the District Court should not have made *any* public findings. (Pet. 29-30.) Petitioners suggest that they are automatically entitled to appeal before the contents are revealed. (*Id.* at 30.)

Privilege disputes are not automatically entitled to appellate review. *Supra* §III(A). The United States Supreme Court has held that "postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 109 (2009). It reasoned that appellate courts can remedy the improper disclosure by

vacating an adverse judgment and remanding for a new trial without the protected material. *Id.* at 109. The Court also noted that parties have another available legal remedy: refuse court-ordered production, incur sanctions, and appeal without revealing the allegedly privileged information. *Id.* at 111.

"Whether or not immediate...appeals are available, clients and counsel must account for the possibility that they will later be required by law to disclose their communications for a variety of reasons—for example, because they misjudged the scope of the privilege, because they waived the privilege, or *because their communications fell within the privilege's crime-fraud exception.*" *Id.* at 110.

Thus, the District Court did not err by stating necessary findings in a public minute order. There is a presumption of access to prevent "secret judicial proceedings." *Jones v. Nev. Comm'n on Jud. Discipline*, 130 Nev. 99, 109, 318 P.3d 1078, 1085 (2014). Courts are allowed to quote sealed, confidential, or even privileged materials so interested readers can "discern what the Court has done." *News+Media Cap. Grp. LLC v. Las Vegas Sun, Inc.*, 137 Nev. Adv. Op. 45, 495 P.3d 108, 114 (2021). If this Court modifies the Clawback Order at all, it should unseal it entirely.

E. Seibel's Reassignment Request is Improper.

Petitioners request reassignment now that the District Court has conducted an *in camera* review and seen Siebel's (and counsel's) deceit firsthand. But this request

is procedurally and substantively improper. First, Petitioners did not make this request below. Petitioner did not file a party affidavit or certificate of counsel under NRS 1.235, and they made no motion under NCJC Canon 2, Rule 2.11.

Second, the District Court has not remotely exhibited the "extreme" bias needed for reassignment. *Millen v. Eighth Jud. Dist. Ct.*, 122 Nev. 1245, 1255, 148 P.3d 694, 701 (2006). The party seeking reassignment must show impermissible bias stemming from extrajudicial sources. *Matter of Dunleavy*, 104 Nev. 784, 788, 769 P.2d 1271, 1274 (1988). Rulings and actions during the case are not grounds for reassignment or disqualification. *Id.* at 789, 769 P.2d at 1275.

Petitioners complain the District Court "decided contested issues in pending summary judgment motions when resolving a discovery dispute." (Pet. 32.) Not so. *Napster* requires the District Court to make the necessary findings by a preponderance of the evidence – the same burden of proof Petitioners advocate for. Petitioners' authorities do not suggest overlapping merits findings should not be made. Instead, those cases caution that findings should be made on complete records. (Pet. 18-19.) There was a fulsome record here and the District Court's comments demonstrate that it was gravely circumspect when assessing Petitioners' privilege claims. (4PA826.)

The findings are not necessarily conclusive on the merits in any event. All interlocutory findings or orders may be revised at any time before final judgment.

NRCP 54(b). The District Court's findings are not gratuitous and do not show "extreme bias." There is no legitimate indication that the District Court's mind is closed to the merits going forward. The case should not be reassigned.

IV. CONCLUSION

The Petition for Extraordinary Writ Relief should be denied.

DATED this 5th day of January 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2016 in size 14 font in double-spaced Times New Roman.

I further certify that I have read this brief and that it complies with the page or type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and 6,979 words.

Finally, I hereby certify that, to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on

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

DATED this 5th day of January 2022.

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I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC and that, on this 5th day of January 2022, I electronically filed and served a true and correct copy of the above and foregoing **ANSWER TO PETITION FOR EXTRAORDINARY WRIT RELIEF** properly addressed to the following:

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