CASE NO. 83723

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

REPLY TO PETITION FOR EXTRAORDINARY WRIT RELIEF

REDACTED

JOHN R. BAILEY
Nevada Bar No. 0137
DENNIS L. KENNEDY
Nevada Bar No. 1462
JOSHUA P. GILMORE
Nevada Bar No. 11576
PAUL C. WILLIAMS
Nevada Bar No. 12524
BAILEY❖KENNEDY
8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148-1302
Telephone: (702) 562-8820
Facsimile: (702) 562-8821
jbailey@baileykennedy.com
dkennedy@baileykennedy.com
jgilmore@baileykennedy.com
pwilliams@baileykennedy.com

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

In an effort to distort the full picture, Caesars[1] tells only half of the story. This Court should reject Caesars' efforts to pick and choose only certain facts when deciding whether Caesars meets its burden to pierce the attorney-client privilege.

Upon review of the entire record, it is clear that Caesars does not meet its burden to show that Seibel intended to commit a fraud (and enlisted his counsel in alleged furtherance of such fraud) when dissociating from the Development Entities. The lynchpin of Caesars' fraud argument is the alleged undisclosed fact that Seibel would indirectly benefit from the Restaurants following the Assignments. ***But that fact was made known to Caesars***. Indeed, Caesars' Deputy Compliance Officer testified [redacted] because Caesars knew that Seibel would still benefit from the Restaurants, having previously been told—by Seibel—that he was married to one of the Trust's beneficiaries.

Fraud, in its most basic form, involves concealing a material fact in order to induce a party to act differently than it otherwise would have under the circumstances. How can a party attempt to commit a fraud by allegedly concealing

---

[1] Capitalized terms used but not defined herein shall have the meanings set forth in the Petition.

a fact that is already known by the opposing party? The answer: It is impossible. And because it is impossible, the district court erred by finding that Seibel was engaged in a fraud through non-disclosure of facts *known* by Caesars.

Again, Seibel told Caesars that he was married to a beneficiary of the Trust and that, going forward, the Trust would receive a share of the net profits of the Restaurants. Caesars cries foul over not also receiving a copy of the Prenuptial Agreement; however, Caesars already had all the material facts that it needed for purposes of evaluating Seibel's relationship with the Trust. Caesars did not need the Prenuptial Agreement because it already knew that Seibel would benefit from his wife's receipt of income generated by the Restaurants—precisely why Caesars did not consent to the Assignments. As a result, Caesars cannot credibly argue that it was operating in the blind and somehow defrauded by Seibel.

Further, Caesars was told, in writing, that the Trust was drafted [redacted]. If Seibel were intending to defraud Caesars, he would not have created an *irrevocable* trust that afforded such control to Caesars.

Through its Response to this Petition, Caesars seeks to lessen its burden of proof, arguing that it only needed to make a *prima facie* showing of fraud in order

to invade Seibel's privilege (rather than prove a fraud through assistance of Seibel's counsel by a preponderance of the evidence). Setting aside that Caesars does not meet this lesser standard, Caesars cannot change its approach before this Court in order to make up for its shortcomings before the district court. Caesars argued below that sufficient non-privileged evidence warranted an outright disclosure of Seibel's privileged communications under NRS 49.115(1). Because the district court did not conduct an *in camera* review before finding that Seibel's privileged communications were discoverable under the crime-fraud exception, this Court should find that Caesars had to show, by a preponderance of the evidence, that Seibel attempted to commit a fraud using his lawyers. And, here, Caesars did not make that showing.

Even if Caesars meets its initial burden (it does not), this Court should nonetheless find that the district court abused its discretion by not deciding, in general terms and without disclosing any specifics, why the privilege was lost for each and every document. The district court clearly erred because it allowed three emails to guide its decision to compel the disclosure of 185 emails.[2]

---

[2] The Development Parties are filing a motion to permit them to submit the privileged emails to this Court for an *in camera* review. The Development Parties did not argue the substance of those emails before the district court or in their Petition in order to preserve the privilege and avoid a possible finding of waiver. Nor do they do so in this Reply. However, the emails will be made available to this Court, should it reach the second step of the crime-fraud analysis.

For these reasons, this Court should intervene in the proceedings below, vacate the district court's rulings at issue in the Petition, and direct entry of orders denying the Motion to Compel and granting the Clawback Motion (together with ordering random reassignment of this case).[3]

II. ARGUMENT

A. This Court Should Consider This Petition.

Caesars urges this Court to decline to consider this Petition, claiming that the Development Parties have an adequate remedy at law through an appeal from the Initial and Supplemental Orders and Clawback Order following entry of a final judgment. (*See* Ans. to Pet. for Extraordinary Writ Relief, filed Jan. 5, 2022 ("Ans."), at 16, 29-30.) Nevada law says otherwise. *See Wardleigh v. Second Jud. Dist. Ct.*, 111 Nev. 345, 350-51, 891 P.2d 1180, 1183-84 (1995) (finding writ relief appropriate because, if "improper discovery were allowed, the assertedly privileged information would irretrievably lose its confidential and privileged quality and petitioners would have no effective remedy, even by a later appeal"); *see also Valley Health Sys., LLC v. Eighth Jud. Dist. Ct.*, 127 Nev. 167, 172, 252

---

[3] Contrary to Caesars' self-serving contention, Seibel will be prejudiced if this Court declines to consider the issues raised by this Petition until the time for an appeal from a final judgment entered in this case. Nevada law is clear that compelled disclosure of privileged information results in irreparable harm that cannot be remedied by a subsequent appeal.

P.3d 676, 679 (2011). Intervention is especially warranted given that this Petition involves a statutory exception to a statutory privilege that has not previously been addressed by this Court. *See, e.g.*, *Diaz v. Eighth Jud. Dist. Ct.*, 116 Nev. 88, 93, 993 P.2d 50, 54 (2000).

Further, the Development Parties do not seek an "advisory" writ, such that the authority cited by Caesars is inapplicable.[4] (*See* Ans. at 17.) Absent this Court's intervention, the Development Parties will be compelled to disclose privileged communications to Caesars. The threat is real, not hypothetical.

In sum, this Court should exercise its discretion to consider this Petition.

B. This Court Should Review—*De Novo*—Whether Caesars Met its Initial Burden of Proof.

Caesars wants it both ways. Caesars wants this Court to follow the two-step process to a crime-fraud analysis adopted by the United States Court of Appeals for the Ninth Circuit. (*See* Ans. at 18-20.) At the same time, Caesars does not want this Court to review a district court's crime-fraud ruling through the same

---

[4] In *Archon Corp. v. Eighth Judicial District Court*, the petitioner sought writ relief arising from an order denying a motion to dismiss without prejudice. *Id.*, 133 Nev. 816, 817, 407 P.3d 702, 704 (2017). The petitioner conceded that the district court "was not required to dismiss" the complaint "and that an appeal [wa]s an adequate remedy at law." *Id.* at 820-21, 407 P.3d at 707. Further, the petitioner had not properly presented one of its arguments to the district court so as to allow proper review by this Court. *Id.* at 822, 407 P.3d at 708. Finally, granting writ relief would not have affected the outcome, as this Court was not also asked to consider an alternative basis for denial of the motion. *Id.* at 824, 407 P.3d at 709.

appellate lens as the Ninth Circuit. (*See id.*) Just as the Ninth Circuit reviews "de novo whether an evidentiary showing is sufficient" to invoke the crime-fraud exception, *see 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), so should this Court. *See also In re Grand Jury Investigation*, 231 F. App'x 692, 694 n.4 (9th Cir. 2007) (noting a de novo review of application of the crime-fraud exception).

Regardless, as argued in the Petition and further below, assuming (*arguendo*) an abuse of discretion standard is applicable to all or parts of the analysis, the evidence does not support the district court's rulings.

C. Caesars Concedes That it Did Not Meet Its Burden Below By Advocating for a Lesser Burden Before this Court.

Caesars argues that it only needed to "show a *prima facie* case" of fraud in order to sustain its initial burden of proof under the crime-fraud analysis. (Ans. at 21-23.) Caesars' attempt to lessen its burden is a tacit admission that it failed to meet its initial burden.

Through its Motion to Compel, Caesars asked the district court to "[redacted]" (7 PA1358; *see also* 15 PA3066.) Caesars did not ask the district court to conduct an *in camera* review for purposes of deciding application

of the crime-fraud exception on the basis that Caesars had made a *prima facie* showing of fraud. Indeed, the phrase "*prima facie*" does not appear anywhere in the Motion to Compel or Reply. (*See generally* 7 PA1341-59; 17 PA3055-66.)

Caesars convinced the district court that the evidence presented was sufficient to make Seibel's privileged communications "discoverable under the crime-fraud exception." (5 PA977.) The district court's *in camera* review then occurred for purposes of determining whether the communications related to the Trust and Prenuptial Agreement were "sufficiently related to and were made in furtherance" of the alleged fraud. (*See id.* at 977-78.)

Where, as here, an "outright disclosure of attorney-client communications is sought under the crime-fraud exception," the moving party must prove "by a preponderance of the evidence that the exception applies." *In re: Napster Copyright Litig.*, 479 F.3d at 1098. As Caesars' own authority makes clear, a "lower threshold showing applies where the party asserting the crime-fraud exception initially requests only that the court conduct an in camera review of the allegedly privileged communications to determine if the crime-fraud exception applies." *Lewis v. Delta Air Lines, Inc.*, No. 2:14-CV-01683-RFB-GWF, 2015 WL 9460124, at *2 (D. Nev. Dec. 23, 2015); *see also United Studios of Self Def., Inc. v. Rinehart*, No. SACV181048DOCDFM, 2019 WL 6973521, at *4 (C.D. Cal. Sept. 13, 2019) ("A lower threshold showing … applies when the moving party

requests only that the court conduct an in camera review … to determine if the crime-fraud exception applies.").

There is a distinction between a moving party requesting an *in camera* review to help meet its burden and demanding outright disclosure of privileged communications based on evidence already in the moving party's possession. *See Est. of Curtis v. Costco Wholesale Corp.*, No. 2:13-CV-00074-REB, 2016 WL 11558227, at *2 (D. Idaho Apr. 14, 2016). Here, Caesars proceeded as if the fraud was a foregone conclusion, such that it did not need the district court to review any privileged emails *in camera* for purposes of determining whether Seibel enlisted his counsel to assist him in committing a fraud. *In re Grand Jury Investigation*, 974 F.2d 1068, 1073 (9th Cir. 1992) ("There is an important difference between showing how documents may supply evidence that the crime-fraud exception applies and showing directly that the exception applies.").

Because Caesars requested an outright disclosure rather than an *in camera* review, and because the district court found that the exception applied before conducting an *in camera* review, this Court should find that Caesars needed to show—by a preponderance of the evidence—that the crime-fraud exception applied to Seibel's privileged communications during the first step of the crime-fraud analysis. *Fleming v. Escort, Inc.*, No. 1:12-CV-066-BLW, 2015 WL 136091,

at *2 (D. Idaho Jan. 9, 2015) ("Fleming is seeking outright disclosure rather than in camera review, and so the preponderance standard governs here.").

Ultimately, as shown further below, regardless of which evidentiary hurdle Caesars needs to overcome, it does not meet its burden.

D. Caesars Fails to Substantiate the District Court's Findings.

1. *Caesars' Fraud Theory Is Not Supported By the Facts*.

According to Caesars, Seibel attempted to commit a fraud by assigning his interests in the Development Entities to the Trust while concealing the fact that he continued to hold an ownership interest in the Development Entities through the Prenuptial Agreement, together with a secret right to continue benefitting from the Restaurants.[5] (Ans. at 23-27.) Caesars' fraud theory is not supported by the facts because (i) Seibel did not retain a secret ownership interest in the Development Entities and (ii) Caesars knew that Seibel would benefit from the Restaurants through his relationship with the Trust's beneficiaries.

Starting with the first leg of Caesars' fraud theory, Caesars' Nevada gaming expert, Scott Scherer ("Scherer"), admitted that the Prenuptial Agreement did not cause Seibel to secretly retain an ownership interest in the Development Entities:

---

[5] The Prenuptial Agreement was nullified by Seibel and Bryn as discussed further below.

[redacted]

(15 PA2880.)

Incredibly, Caesars attempts to impeach Scherer (its own Nevada expert) by arguing that its Florida expert said [redacted]. (Ans. at 25.) Caesars cannot shy away from Scherer's unequivocal testimony:

[redacted]

(15 PA2880-81; *see also id.* at 2885 ("[redacted]").)

Scherer's testimony is consistent with Ziegler's. As trustee of the Trust, which is governed by New York law (*see* 14 PA2722), Ziegler testified [redacted].[6] (*See* 14 PA2834, 2840-41.) Based on his testimony and Scherer's, together with the plain language of the Trust, Caesars did not show that the Prenuptial Agreement caused Seibel to secretly retain an ownership interest in the Development Entities.

Turning to the second leg of Caesars' fraud theory, Seibel told Caesars, in writing, that his wife was a beneficiary of the Trust. (*See, e.g.*, 14 PA2754-55.) Caesars thus knew that Seibel would still benefit from the Restaurants; it did not need the Prenuptial Agreement to confirm that obvious fact.

---

[6] Caesars makes a point of referring to Caesars' counsel as "New York lawyers." (Ans. at 2, 10, 26.) Caesars fails to explain why its Florida lawyer is more qualified to opine as to New York law than Ziegler, a New York lawyer. Caesars also questions why the Development Parties did not retain an expert to rebut their Florida lawyer's "opinions." (*Id.* at 25.) The Development Parties did not need to do so; as Trustee of the Trust, Ziegler is competent to interpret the Trust's provisions. Indeed, Ziegler testified [redacted]. (14 PA2815-18, 2822-24.) Ziegler also testified [redacted]. (*Id.* at PA2844-45.)

During Caesars' NRCP 30(b)(6) deposition, its designee, Susan Carletta ("Carletta"), admitted [redacted]:

> [redacted]

(14 PA2777.) Carletta, who served as Caesars' Vice President and Deputy Chief Regulatory and Compliance Officer responsible for making suitability determinations for gaming purposes, expanded upon that explanation in her individual deposition:

> [redacted]

(15 PA2902.) As the person who assessed the Trust's suitability (*see* 10 PA2022; 14 PA2795), Carletta confirmed Caesars' knowledge that Seibel would still benefit from the Restaurants because he was related to the Trust's beneficiaries:

---

[7] As discussed in the Petition, in April 2016, Seibel caused his interests in the Development Entities to be assigned to the Trust—the Assignments. (*See, e.g.*, 14 PA2754-55.)

[redacted]

(15 PA2897.) She said it herself: "[redacted]." (*Id.* at 2902 (emphasis added).)

The evidence is undisputed: Caesars knew that Mr. Seibel would still benefit from the Restaurants because he told Caesars that his wife would receive income from the Restaurants as a beneficiary of the Trust.[8] If Seibel were intending to defraud Caesars, he would have concealed from Caesars the identities of the beneficiaries or he would have formed a non-descriptive trust and then named shell entities as its beneficiaries, without disclosing to Caesars the identities of the members of such entities; he would not have created a family trust to whom he

[8] As discussed in the Petition, Seibel formed the Trust in part so that his valuable interests in the Development Entities would not be forfeited if he were to plead guilty to a felony—a reasonable concern given his undeniably acrimonious relationship with Caesars. (10 PA1973-74.) He understood that another gaming licensee had modified a contractual relationship with a vendor whose principal had pled guilty to a felony under similar circumstances. (*Id.* at 1943-44.) The fact that Caesars rejected the Trust as an assignee of Seibel's interests does not mean that Seibel was engaged in a fraud by proposing the Assignments in the first place.

would assign his interests in the Development Entities and then told Caesars that his wife was a beneficiary of the trust (alongside his grandmother).[9]

Based on his written disclosure to Caesars, there was no need for Seibel to also provide Caesars with a copy of the Prenuptial Agreement in order to confirm for Caesars what it already knew—Caesars had what it needed in order to evaluate the Trust. (*See* 15 PA2908 (informing Ziegler that Caesars had determined [redacted]).) As a result, Caesars did not show that Seibel concealed his ability to continue benefiting from the Restaurants as part of an alleged scheme to defraud Caesars.[10]

Significantly, Scherer testified [redacted]. According to Scherer, [redacted] (15 PA2882.) In other words, it was enough

---

[9] Caesars' in-house counsel, Amie Sabo ("Sabo"), testified [redacted]. (10 PA1988-90, 1993.)

[10] Caesars claims that whether it knew of Seibel's relationship with the Trust's beneficiaries is irrelevant. (*See* Ans. at 26.) The authority cited by Caesars, *In re: Napster Copyright Litigation*, says no such thing. In fact, the *In re: Napster Copyright Litigation* decision supports the relief sought by the Development Parties. There, the Ninth Circuit held that "a lawyerly attempt to make inconspicuous" a fact did not constitute a fraud warranting invasion of the privilege. *Id.* at 1097. The same logic applies here: Caesars should not be allowed to invade Seibel's privilege by arguing that he did not do enough to inform Caesars that he would benefit from the Trust given his marriage to one of its beneficiaries.

for Caesars to know the identities of the Trustees of the Trust—information that was also provided to Caesars by Seibel in writing (*see* 14 PA2754-55)—in assessing the Trust's suitability.

Scherer's testimony proves that Caesars' fraud argument is based on an entirely *immaterial* fact. Caesars received all *material* facts that it needed in order to analyze the Assignments and did not need to confirm that Seibel's marriage operated like most marriages, *e.g.*, that each spouse contributes his or her income toward their joint living expenses.[11]

If Caesars was truly concerned with Bryn's relationship with Seibel, Caesars could have prevented the Trustees from distributing to Bryn any income that was received by the Trust from the Restaurants. Ziegler informed Caesars, in writing, that [redacted] (15 PA3037.) His representation was accurate—the Trust states [redacted]

---

[11] Caesars proudly boasts how it confirmed in discovery that Seibel's wife helps pay for the family's living expenses. (*See* Ans. at 9.) It is as if Caesars just discovered that the sun rises in the east and sets in the west.

[12] The Trust [redacted]. (14 PA2733.)

[redacted] (*See* 14 PA2733-34.)

The fact that Seibel, upon creating the Trust, afforded control to Caesars with respect to distributions of income received by the Trust from the Restaurants that could be made by the Trustees to the beneficiaries negates any notion that Seibel was intending to defraud Caesars. To the contrary, it shows that Seibel was intending to effectuate a valid assignment so that Caesars could remain under contract with the Development Entities.

Because Caesars' fraud theory is defunct, this Court should intervene to set aside the Initial and Supplemental Orders.

2. *Caesars Failed to Address Myriad Evidentiary Deficiencies Underlying the Initial and Supplemental Orders*.

Caesars wants to control the narrative. To that end, Caesars claims that it need not respond to the numerous points raised by the Development Parties in their Petition. (*See* Ans. at 23, 26-27.) Caesars' unwillingness (or rather, inability) to defend the district court's myriad factual errors is grounds for vacating the Initial and Supplemental Orders.

Preliminarily, this Court will find that Caesars plays fast and loose with the facts in its Answer. Indeed, despite NRAP 28(e)'s requirement for a party to cite

the record when making a factual assertion, Caesars' Answer is replete with factual assertions that are *not* supported by citations to the record. Further, in several instances, Caesars cites its supplemental appendix, which consists of exhibits that were attached to its summary judgment motions and not its Motion to Compel or Reply. The fact that Caesars quietly supplemented the record with evidence that it did not present to the district court when filing its Motion to Compel is proof that the district court lacked evidence supporting its decision.

Turning to the factual errors identified in the Petition, Caesars has no answer for the following:

- ***First***, that the district court lacked evidence regarding Seibel's felony conviction and, in any event, incorrectly found that Seibel defrauded the IRS, which is not what happened. (*See* 7 SA1097-1102.)
- ***Second***, Seibel showed, through direct and circumstantial evidence, that he disclosed the criminal investigation to Caesars. (*See* 10 PA1890, 1947-48, 1951, 1953-55, 2008, 2044; 14 PA2659, 2662.) While Caesars refutes Seibel's testimony (Ans. at 24), Caesars has no answer for the additional evidence showing that Seibel *did* tell Caesars about the investigation.
- ***Third***, the Trust—on its face—prohibits the Trustees from making distributions to unsuitable persons. (*See* 14 PA2733-34.) Unable to refute

the plain language of the Trust, Caesars inexplicably omitted the Trust as an exhibit from its Motion to Compel. (*See generally* 7 PA1361-63.)

- ***Fourth***, the Trust owns the Development Entities, not Seibel (*see* 7 PA1386-87)—a fact conceded by Caesars' Nevada expert, as shown above.
- ***Fifth***, Seibel is not a beneficiary of the Trust. (*See* 14 PA2689.) The district court chose to ignore the plain language of the Trust by finding otherwise.
- ***Sixth***, Seibel did not conceal the Prenuptial Agreement from Caesars. Again, he told Caesars that his wife was a beneficiary of the Trust and also, offered to make himself available to provide any additional information requested by Caesars related to the Trust. (*See* 15 PA3037-38, 3040-42.)
- ***Seventh***, Seibel and Bryn did not follow the Prenuptial Agreement. (*See* 10 PA1968-69; 14 PA 2624; 15 PA 2857.) Bryn did not siphon to Seibel any distributions that she received from the Trust. (*See* 15 PA2861-62; *see also id.* at 2910-29.)

In short, Caesars has no answer for, and cannot defend, these and other factual errors underlying the Initial and Supplemental Orders.

Moreover, the evidence does not reflect that Seibel was engaged in a scheme to defraud Caesars. Seibel told Caesars what he was doing. (*See, e.g.*, 14 PA2754-55.) He reasonably understood that assigning his interests in the Development Entities to a family trust was a permissible way to dissociate from Caesars without

disrupting the Development Parties' contractual relationship with Caesars. (10 PA1943-44.) Caesars did not care because it had no interest in remaining under contract with the Development Entities—as the Development Parties' Nevada gaming expert, Randall Sayre ("Sayre"), explained in his expert reports, [redacted] (*See* 15 PA2961-64, 2966, 2970, 2997-98, 3003.) According to Sayre, "[redacted]." (15 PA2977-78.)

It is undisputed that the Restaurants have grossed [redacted]. (*See* 9 PA1614; *see also id*. at PA1804-34 (reproducing the financials of the Restaurants); 14 PA2637-44 (describing the financial performance of the Restaurants).) It is also undisputed that Caesars executives were hostile toward having to continue to share in the net profits of the Restaurants with the Development Entities. (*See* 10 PA1892-94, 2029-31; 12 PA2401-03, 2405, 2407-09, 2415-17; 13 PA2426-28.) Caesars has tens of millions of reasons to paint itself as the victim of a fraud so that it may try to avoid its contractual

obligations owed to the Development Entities. (*See* 9 PA1835.) Caesars' fraud theory must be seen for what it really is: An attempt to shift the focus away from its own misconduct and cast blame on Seibel for not merely forfeiting his interests in the Development Entities so that Caesars could make even more money. (*See* 13 PA2595 (testifying that Seibel was "[redacted]").)

Because there is not substantial evidence in the record supporting the Initial and Supplemental Orders, the district court erred by finding that Caesars met its burden under the first prong of the crime-fraud analysis.

E. This Court May Review the Privileged Documents, *In Camera*, If It Finds that Caesars Met Its Burden Under the First Step.

This Court should find that Caesars does not meet its initial burden under the first step of the crime-fraud analysis, such that the district court did not need to proceed with the second step, which involved conducting an *in camera* review of Seibel's privileged communications. Assuming (*arguendo*) this Court finds that Caesars met its burden (it did not), reversal is still required.

Caesars makes no effort to explain why the district court did not have to address each of the emails at issue in finding that the crime-fraud exception applied to Seibel's privileged communications with his counsel related to the Trust and Prenuptial Agreement. Needless to say, the mere fact that Seibel communicated with his counsel about those documents does not, without more, mean that they

were communications sufficiently related to and made in furtherance of a fraud.[13] *In re: Napster, Inc. Copyright Litig.*, 479 F.3d at 1098 ("The fact that a party has taken steps to structure a business transaction to limit its liability does not suffice, without more, to establish that the crime-fraud exception applies.").

Instead, the district court needed to determine which of the emails, if any, were "sufficiently related to" and were made "in furtherance of" the alleged fraud. *In re Grand Jury Investigation*, 810 F.3d 1110, 1114 (9th Cir. 2016). The record is clear that the district court did not do so.

Caesars faults the Development Parties for not including the emails in their Appendix. (*See* Ans. at 28.) The Development Parties are concurrently filing a motion seeking an order from this Court permitting them to submit the privileged emails to this Court, under seal, for an *in camera* review. *Las Vegas Police Protective Ass'n Metro, Inc. v. Eighth Jud. Dist. Ct.*, 122 Nev. 230, 235 n.5, 130 P.3d 182, 187 n.5 (2006) (noting that in deciding a petition for extraordinary writ relief, this Court may consider documents that were reviewed, *in camera*, by the

---

[13] Caesars highlights the fact that Seibel consulted with counsel about the Trust and Prenuptial Agreement. (*See* Ans. at 12, 26.) Caesars' assumption that Seibel was engaged in a fraud because he was speaking to counsel runs contrary to "a primary purpose of the attorney-client privilege, which is to encourage individuals to seek legal counsel to guide them through [the] thickets of complex laws." *In re: Napster, Inc. Copyright Litig.*, 479 F.3d at 1097 (quotation marks and citation omitted).

district court). As a result, this Court will be able to assess (i) whether Caesars meets its burden under the second step of the crime-fraud analysis and (ii) if the district court erred in requiring a blanket production of all 185 emails.

F. The District Court Erroneously Disclosed Seibel's Privileged Communications to Caesars.

Caesars has no answer for the district court's premature disclosure of Seibel's privileged communications. Instead, Caesars claims that the district court was obligated to quote certain privileged emails in its Minute Order so that the parties could understand the basis for its decision. (*See* Ans. at 29-30.)

Caesars' refusal to address the cases cited by the Development Parties in their Petition is telling. It is axiomatic that the Development Parties had the right to seek this Court's review of the district court's crime-fraud rulings *before* being forced to disclose their privileged communications to Caesars. Indeed, this Court has recognized the need to entertain writ petitions where, "without writ relief, compelled disclosure of petitioner's assertedly privileged communication will occur." *Cotter v. Eighth Jud. Dist. Ct.*, 134 Nev. 235, 249, 416 P.3d 228, 231 (2018); *see also Las Vegas Sands Corp. v. Eighth Jud. Dist. Ct.*, 130 Nev. 118, 122, 319 P.3d 618, 621 (2014).

Further, the district court knew that the Development Parties would ask this Court to intervene, given their filing of a petition for extraordinary writ relief following entry of the Initial Order, together with a stay motion. (5 PA1007-40,

1078-93; 17 PA3433-80.) Yet, respectfully, the district court hampered the Development Parties' appellate rights by revealing to Caesars the contents of Seibel's privileged communications—*before* the Development Parties could renew their request for writ relief. The district court clearly erred in doing so. *See In re GMC*, 153 F.3d 714, 717 (8th Cir. 1998) ("We stress that if the district court ultimately determines that the crime/fraud exception applies, it should keep the privileged communications under seal to prevent their further disclosure until all avenues of appeal have been exhausted."); *Haines v. Liggett Grp., Inc.*, 975 F.2d 81, 97 (3d Cir. 1992) ("Because of the sensitivity surrounding the attorney-client privilege, care must be taken that, following any determination that an exception applies, the matters covered by the exception be kept under seal or appropriate court-imposed privacy procedures until all avenues of appeal are exhausted.").

In the end, Caesars does not dispute that if this Court vacates the Initial and Supplemental Orders, it should also vacate the Clawback Order. Because the district court erred in finding that Caesars met its burden in seeking to compel the disclosure of Seibel's privileged communications under NRS 49.115(1), this Court should find that the district court erred by denying in part the Clawback Motion.

G. Reassignment Should Occur Upon Granting the Relief Sought.

Caesars attempts to reframe the Development Parties' request for reassignment as an untimely motion to disqualify. (Ans. at 30-31.) Caesars' argument misses the mark.

This Court has previously held that random reassignment may be warranted upon remand where a district court has expressed opinions regarding the ultimate merits of the case. *See FCH1, Ltd. Liab. Co. v. Rodriguez*, 130 Nev. 425, 435, 335 P.3d 183, 190 (2014) ("As the Palms notes, the district court judge in this case has heard the evidence that should have been excluded and formed and expressed an opinion on the ultimate merits. We therefore grant the Palms' request to have this case reassigned if remanded."); *Leven v. Wheatherstone Condo. Corp.*, 106 Nev. 307, 310, 791 P.2d 450, 451 (1990) ("Finally, because the district court judge has expressed herself in the premises, we direct the Chief Judge of the Eighth Judicial District Court to assign a different judge to hear the trial of this matter."). Respectfully, the district court did just that upon entering the Initial and Supplemental Orders—e.g., the district court found, in deciding a discovery motion, that Seibel allegedly withheld information about the criminal investigation from Caesars and that Caesars had the right and properly terminated the Development Agreements (both contested issues of material fact). (*See* 5 PA972.)

Upon finding that insufficient evidence supports the district court's decisions to compel the Development Parties to disclose Seibel's privileged communications to Caesars, this Court should direct random reassignment of this case.

III. CONCLUSION

Caesars does not meet its burden to compel the disclosure of Seibel's privileged communications with his counsel. Accordingly, this Court should:

- Vacate the Initial and Supplemental Orders and the Clawback Order,
- Direct the district court to enter orders (i) denying the Motion to Compel in its entirety and (ii) granting the Clawback Motion in its entirety, and
- Order random reassignment of this case.

DATED this 16th day of February, 2022.

BAILEY❖KENNEDY

By: /s/ Dennis L. Kennedy

Attorneys for Petitioners

NRAP 28.2 CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply 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 5,926 words (excluding the Cover Page, Table of Contents, Table of Authorities, 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.

/ / /

/ / /

/ / /

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

EXECUTED on this 16th day of February, 2022.

/s/ Dennis L. Kennedy
DENNIS L. KENNEDY

CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 16th day of February, 2022, service of the service of the foregoing was made by electronic service through the Nevada Supreme Court's electronic filing system, electronic service through the Eighth Judicial District Court's electronic filing system, hand delivery, and/or depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

JAMES J. PISANELLI DEBRA L. SPINELLI JORDAN T. SMITH M. MAGALI MERCERA PISANELLI BICE PLLC 400 South 7th Street, Suite 300 Las Vegas, NV 89101	Email: JJP@pisanellibice.com DLS@pisanellibice.com JTS@pisanellibice.com MMM@pisanellibice.com *Attorneys for Real Parties in Interest Desert Palace, Inc.; Paris Las Vegas Operating Company, LLC; PHWLV, LLC; and Boardwalk Regency Corporation*
HON. TIMOTHY C. WILLIAMS DISTRICT JUDGE EIGHTH JUDICIAL DISTRICT COURT Regional Justice Center 200 Lewis Avenue Las Vegas, NV 89155	Email: Dept16lc@clarkcountycourts.us; Dept16ea@clarkcountycourt.us *Respondent*

/s/ Susan Russo
Employee of BAILEY❖KENNEDY