

CASE NO.

**IN THE
SUPREME COURT OF NEVADA**

Electronically Filed
Feb 05 2021 03:20 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**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; AND R SQUARED GLOBAL SOLUTIONS, LLC,
DERIVATIVELY ON BEHALF OF DNT ACQUISITION LLC,**

Petitioners,

vs.

**EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE
TIMOTHY C. WILLIAMS, DISTRICT JUDGE,**

Respondents,

-and-

**DESERT PALACE, INC.; PARIS LAS VEGAS OPERATING
COMPANY, LLC; PHWLTV, LLC, AND BOARDWALK REGENCY
CORPORATION,**

Real Parties in Interest.

**DISTRICT COURT CASE NO. A-17-751759-B
CONSOLIDATED WITH A-17-760537-B**

PETITION FOR EXTRAORDINARY WRIT RELIEF

JOHN R. BAILEY

NEV. BAR NO. 0137

DENNIS L. KENNEDY

NEV. BAR NO. 1462

JOSHUA P. GILMORE

NEV. BAR. NO. 11576

PAUL C. WILLIAMS

NEV. BAR. NO. 12524

STEPHANIE J. GLANTZ

NEV. BAR. NO. 14878

BAILEY ♦ KENNEDY

8984 SPANISH RIDGE AVENUE

LAS VEGAS, NEVADA 89148

TELEPHONE: (702) 562-8820

FACSIMILE: (702) 562-8821

jbailey@baileykennedy.com

dkennedy@baileykennedy.com

jgilmore@baileykennedy.com

pwilliams@baileykennedy.com

sglantz@baileykennedy.com

Attorneys for Petitioners

1 JOHN R. BAILEY
Nevada Bar No. 0137

2 DENNIS L. KENNEDY
Nevada Bar No. 1462

3 JOSHUA P. GILMORE
Nevada Bar No. 11576

4 PAUL C. WILLIAMS
Nevada Bar No. 12524

5 STEPHANIE J. GLANTZ
Nevada Bar No. 14878

BAILEY ♦ KENNEDY

6 8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148-1302

7 Telephone: 702.562.8820

Facsimile: 702.562.8821

8 JBailey@BaileyKennedy.com

DKennedy@BaileyKennedy.com

JGilmore@BaileyKennedy.com

9 PWilliams@BaileyKennedy.com

SGlantz@BaileyKennedy.com

10 *Attorneys for Petitioners Moti Partners, LLC; Moti Partners*
11 *16, LLC; LLTQ Enterprises, LLC; LLTQ Enterprises 16, LLC;*
12 *TPOV Enterprises, LLC; TPOV Enterprises 16, LLC; FERG,*
LLC; FERG 16, LLC; and R Squared Global Solutions, LLC,
derivatively on behalf of DNT Acquisition LLC

13 IN THE SUPREME COURT OF THE STATE OF NEVADA

14 MOTI PARTNERS, LLC; MOTI
PARTNERS 16, LLC; LLTQ
15 ENTERPRISES, LLC; LLTQ
ENTERPRISES 16, LLC; TPOV
16 ENTERPRISES, LLC; TPOV
ENTERPRISES 16, LLC; FERG, LLC;
FERG 16, LLC; and R SQUARED
17 GLOBAL SOLUTIONS, LLC,
derivatively on behalf of DNT
18 ACQUISITION LLC,

Supreme Court No.

District Court No. A-17-751759-B
Consolidated with A-17-760537-B

**PETITION FOR
EXTRAORDINARY
WRIT RELIEF**

Petitioners,

vs.

EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA, IN AND FOR THE
COUNTY OF CLARK, and THE
HONORABLE TIMOTHY C.
WILLIAMS, DISTRICT JUDGE,

Respondents,

And

DESERT PALACE, INC.; PARIS LAS
VEGAS OPERATING COMPANY,
LLC; PHWLTV, LLC, and
BOARDWALK REGENCY
CORPORATION,

Real Parties in Interest.

NRAP 26.1 DISCLOSURE

Pursuant to Nevada Rule of Appellate Procedure 26.1, Petitioners 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”), (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 judges 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.

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

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

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

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

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

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

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

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

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

1 12. None of the Petitioners are using a pseudonym for the purpose of
2 this appeal.

3 DATED this 5th day of February, 2021.

4 BAILEY ♦ KENNEDY

By: /s/ John R. Bailey

JOHN R. BAILEY

DENNIS L. KENNEDY

JOSHUA P. GILMORE

PAUL C. WILLIAMS

STEPHANIE J. GLANTZ

Attorneys for Petitioners 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;
and R Squared Global Solutions, LLC, Derivatively
On Behalf of DNT Acquisition, LLC

TABLE OF CONTENTS

I.	NRAP 21(A)(3)(A) ROUTING STATEMENT.....	3
II.	INTRODUCTION	4
III.	STATEMENT OF FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED	7
A.	The Development Agreements.....	8
B.	Seibel Divests his Interests in the Development Entities.	8
C.	Seibel Pleads Guilty to a Tax Offense; Caesars Wrongfully Terminates the Development Agreements While Continuing to Operate and Reap Profits from the Restaurants.....	9
IV.	RELEVANT PROCEDURAL HISTORY	10
A.	Siebel Files a Derivative Action on Behalf of GRB Against PHWLV and Gordon Ramsay (the “GRB Action”).	10
B.	Caesars Files a Complaint for Declaratory Relief Related to the Development Agreements (the “Declaratory Relief Action”).	10
C.	The Development Entities’ Answers/Initial Counterclaims.	11
D.	The District Court Denies the LLTQ/FERG Parties Leave to Amend their Counterclaims.	12
E.	The District Court, After the Deadline to Amend Had Expired, Grants Caesars Leave to Amend its Complaint to Assert Five New Coercive Claims for Relief and to Add a New Party.....	13
F.	The Development Entities, Seibel, and Green Move to Dismiss the New Claims Asserted by Caesars.	14

1	G. The Development Entities File their Amended Counterclaims Against Caesars.	15
2		
3	H. Caesars Moves to Strike the Amended Counterclaims.	16
4	I. The District Court Strikes the Amended Counterclaims.	16
5	V. RELIEF REQUESTED	18
6	VI. SUMMARY OF REASONS WHY EXTRAORDINARY WRIT RELIEF IS PROPER.....	18
7	A. Standard of Decision for Seeking Writ Relief.	18
8	B. Writ Relief Is Appropriate Here.....	19
9	VII. TIMING OF THIS PETITION.....	22
10	VIII. ISSUES PRESENTED FOR REVIEW.....	22
11	IX. REASONS WHY A WRIT SHOULD ISSUE.....	23
12	A. Standard of Review.	23
13	B. This Court Should Adopt the Moderate Approach to Evaluate the Scope of Amended Counterclaims a Defendant May Assert as a Matter of Right in Response to an Amended Complaint.	23
14		
15	1. The Narrow Approach.	25
16	2. The Permissive Approach.....	26
17	3. The Moderate Approach.	27
18	C. The District Court Erred in Striking the Amended Counterclaims.	30

1	1. This Court Should Reject the District Court’s NRCP 16 Approach.....	30
2		
3	2. The District Court Erred in Its Alternative Analysis of the Moderate Approach.	32
4	X. CONCLUSION	36
5	VERIFICATION	38
6	NRAP 28.2 CERTIFICATE OF COMPLIANCE.....	40
7	CERTIFICATE OF SERVICE.....	42
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		

TABLE OF AUTHORITIES

Federal Cases

<i>Bern Unlimited, Inc. v. Burton Corp.</i> , 25 F. Supp. 3d 170 (D. Mass. 2014)	25
<i>Deutsch v. Health Ins. Plan</i> , 573 F. Supp. 1443 (S.D.N.Y. 1983)	25
<i>Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.</i> , 600 F.3d 190 (2d Cir. 2010)	35, 36
<i>E.E.O.C. v. Morgan Stanley & Co.</i> , 211 F.R.D. 225 (S.D.N.Y. 2002)	25
<i>Elite Entm't, Inc. v. Khela Bros. Entm't</i> , 227 F.R.D. 444 (E.D. Va. 2005)	24, 27
<i>Hydro Eng'g, Inc. v. Petter Invs., Inc.</i> , No. 2:11-cv-00139-RJS-EJF, 2013 U.S. Dist. LEXIS 40552 (D. Utah Mar. 22, 2013)	24, 27, 31
<i>Joseph Bancroft & Sons Co. v. M. Lowenstein & Sons, Inc.</i> , 50 F.R.D. 415 (D. Del. 1970)	26
<i>Poly-Med, Inc. v. Novus Sci. Pte Ltd.</i> , Civil Action No. 8:15-cv-01964-JMC, 2017 U.S. Dist. LEXIS 103991 (D.S.C. July 6, 2017)	23, 28
<i>Ramsay-Nobles v. Keyser</i> , 2018 U.S. Dist. LEXIS 214472 (S.D.N.Y. Dec. 18, 2018)	25
<i>Sierra Dev. Co. v. Chartwell Advisory Grp. Ltd.</i> , No. 13-cv-602-BEN-VPC, 2016 U.S. Dist. LEXIS 160308 (D. Nev. Nov. 18, 2016)	26, 27, 31

1	<i>Spellbound Dev. Grp., Inc. v. Pac. Handy Cutter, Inc.,</i>	
2	No. SACV-09-951-DOC-(Anx), 2011 U.S. Dist. LEXIS 54597	27, 31
3	<i>Tralon Corp. v. Cedarapids, Inc.,</i>	
4	966 F. Supp. 812 (N.D. Iowa 1997)	24
5	<i>UDAP Indus. v. Bushwacker Backpack & Supply Co.,</i>	
6	No. CV-16-27-BU-JCL, 2017 U.S. Dist. LEXIS 66803 (D. Mont. May 2,	
7	2017)	24, 25, 28, 33
8	<i>Uniroyal Chem. Co. v. Syngenta Crop Prot., Inc.,</i>	
9	No. 3:02-CV-02253-AHN, 2005 WL 677806 (D. Conn. Mar. 23, 2005)	
10	4, 24, 31
11	<i>Va. Innovation Scis. Inc. v. Samsung Elecs. Co.,</i>	
12	11 F. Supp. 3d 622 (E.D. Va. 2014)	<i>passim</i>
13	State Cases	
14	<i>Boca Park Marketplace Syndications Group, LLC v. Higo, Inc.,</i>	
15	133 Nev. 923, 407 P.3d 761 (2017)	35, 36
16	<i>Exec. Mgmt. Ltd. v. Ticor Title Ins. Co.,</i>	
17	118 Nev. 46, 38 P.3d 872 (2002)	23
18	<i>Leibowitz v. Eighth Jud. Dist. Ct.,</i>	
19	119 Nev. 523, 78 P.3d 515 (2003)	18
20	<i>Lund v. Eighth Judicial Dist. Court,</i>	
21	127 Nev. 358, 255 P.3d 280 (2011)	20, 21, 23
22	<i>Nev. Yellow Cab Corp. v. Eighth Jud. Dist. Ct.,</i>	
23	123 Nev. 44, 152 P.3d 737 (2007)	19
24	<i>Nutton v. Sunset Station, Inc.,</i>	
25	131 Nev. 279, 357 P.3d 966 (2015)	5, 17, 30

1	<i>Pan v. Eighth Jud. Dist. Ct.,</i>	
	120 Nev. 222, 88 P.3d 840 (2004)	19
2		
	<i>Scarbo v. Eighth Jud. Dist. Ct.,</i>	
3	125 Nev. 118, 206 P.3d 975 (2009)	18
4	<i>Widdis v. Second Jud. Dist. Ct.,</i>	
	114 Nev. 1224, 968 P.2d 1165 (1998)	22
5		
	Nevada Constitution/Statutes	
6		
	Nev. Const., art. 6, § 4	18
7		
	NRS 34.160	1, 18
8		
	NRS 34.170	38
9		
	NRS 34.330	1
10		
	NRS 53.045	38
11		
	Nevada Rules	
12		
	Nev. R. App. P. 17	3, 38
13		
	Nev. R. App. P. 21	1, 40
14		
	Nev. R. App. P. 28	40
15		
	Nev. R. App. P. 32	40
16		
	NRCP 13	21, 26, 35, 36
17		
	NRCP 15	29, 30, 31
18		
	NRCP 16	passim

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18

Federal Rules

Fed. R. Civ. P. 13..... 25, 26

Fed. R. Civ. P. 15..... 27, 29, 31

Fed. R. Civ. P. 16..... 27, 31

PETITION FOR EXTRAORDINARY WRIT RELIEF

Pursuant to NRS 34.160, NRS 34.330, and NRAP 21, 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”); and R Squared Global Solutions, LLC (“R Squared”), derivatively on behalf of DNT Acquisition LLC (“DNT”) (collectively, the “Development Entities”) petition (the “Petition”) this Court to issue an extraordinary writ of mandamus 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 Strike the Seibel-Affiliated Entities’ Counterclaims, and/or in the Alternative, Motion to Dismiss (the “Order”), entered on February 3, 2021; and
- (ii) To enter an order denying Caesars’ Motion to Strike the Seibel-Affiliated Entities’ Counterclaims, and/or in the Alternative, Motion to Dismiss (the “Motion to Strike”), in its entirety.

1 In its Order, the district court struck amended counterclaims (the
2 “Amended Counterclaims”) filed by the Development Entities in response to a
3 First Amended Complaint filed by real parties in interest PHWLTV, LLC
4 (“Planet Hollywood”), Desert Palace, Inc. (“Caesars Palace”), Paris Las Vegas
5 Operating Company, LLC (“Paris”), and Boardwalk Regency Corporation
6 d/b/a Caesars Atlantic City (“CAC”) (collectively, “Caesars”).

7 *Neither this Court nor the Nevada Court of Appeals has addressed*
8 *whether and under what circumstances a defendant may file amended*
9 *counterclaims, without leave of court, in direct response to an amended*
10 *complaint.* Virtually every federal court to address the issue has held a
11 defendant may do so as a matter of right—*even if the deadline to amend has*
12 *passed.* Federal courts have further developed various approaches to evaluate
13 the permissible scope of such amended counterclaims.

14 Here, the district court elected not to apply any of the various federal
15 approaches. Instead, it struck the Amended Counterclaims based on NRCP
16 16—finding that good cause did not exist for the Development Entities to file
17 their Amended Counterclaims after the deadline to amend had passed.

18

1 This Court should entertain this Petition to clarify whether and under
2 what circumstances a defendant may assert amended counterclaims as a matter
3 of right in response to an amended complaint. Such guidance is needed for
4 jurists, parties, and lawyers in Nevada since this issue commonly arises in
5 litigation. Further, this Court should find that the district court’s decision was,
6 respectfully, erroneous—the Amended Counterclaims were properly filed
7 based on the “moderate” approach applied by an overwhelming majority of
8 federal courts. Accordingly, this Court should issue an extraordinary writ
9 directing the district court to (i) vacate the Order and (ii) enter an order
10 denying the Motion to Strike in its entirety.

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

12 The Supreme Court should consider this Petition for two reasons: (i) it
13 concerns a case that originated in business court; and (ii) it raises issues of first
14 impression that are of statewide public importance. *See* NRAP 17(a)(9),
15 NRAP 17(a)(12).

II. INTRODUCTION

This Petition raises important issues of first impression. First, may a defendant assert amended counterclaims, as a matter of right, in responding to an amended complaint? Second, if so, what is the permissible scope of such amended counterclaims?

Federal courts have resoundingly found that a defendant may do so in answer to the first question. As one court explained it: “Simply put, principles of fairness compel the court to conclude that if a plaintiff is permitted to expand the scope of the case by amending her complaint to add new theories of recovery, a defendant should be permitted to do the same by adding new counterclaims that also expand the scope of the case.”¹

Federal courts have developed three approaches to answer the second question; they are: the “moderate” approach; the “permissive” approach; and, the “narrow” approach. The moderate approach is the overwhelmingly predominant approach applied by federal courts. It requires that any changes in an amended counterclaim be proportional (or less drastic) to the changes in the amended complaint. Because this approach balances equity and fairness

¹ *Uniroyal Chem. Co. v. Syngenta Crop Prot., Inc.*, No. 3:02-CV-02253-AHN, 2005 WL 677806, at *3 (D. Conn. Mar. 23, 2005).

1 with courts' interests in managing their cases, the Development Entities
2 respectfully submit that this Court should adopt the moderate approach.

3 Here, the district court gave Caesars leave to file its First Amended
4 Complaint—which drastically expanded the scope of this matter—well after
5 the deadline to amend had expired. Soon after, the Development Entities filed
6 their Amended Counterclaims, which included changes to their prior
7 counterclaims that were undeniably proportional to those in Caesars' First
8 Amended Complaint. Caesars moved to strike the Amended Counterclaims.
9 Rather than applying any of the federal approaches, the district court struck the
10 Amended Counterclaims pursuant to NRCP 16, relying on the Court of
11 Appeals' decision in *Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 357 P.3d
12 966 (2015). Specifically, the district court found that the Amended
13 Counterclaims were time-barred by the scheduling order and the Development
14 Entities had not shown good cause to amend their counterclaims after the
15 deadline to amend had expired. In essence, the district court rejected the
16 Amended Counterclaims as untimely *even though they were pled in response*
17 *to a First Amended Complaint that itself was filed long after the deadline to*
18 *amend had expired.*

1 The district court’s Rule 16 approach is unfair and should be rejected.
2 Indeed, the Order demonstrates the inequity of not allowing amended
3 counterclaims to be pled as a matter of right in response to an amended
4 complaint. The district court enabled Caesars to drastically expand the scope
5 of this case by asserting—for the first time—coercive claims for relief (five
6 new claims in total) involving new facts and legal theories and by also adding
7 a new party. In contrast, the Amended Counterclaims are based on the same
8 facts and legal theories underlying the initial counterclaims and/or affirmative
9 defenses filed by the Development Entities and required virtually no new
10 discovery. Once the district court gave Caesars leave to amend its pleading, it
11 was inequitable for it to deny the same privilege to the Development Entities.

12 In considering this Petition, this Court should decide the issues as
13 follows. **First**, this Court should hold that a defendant may assert amended
14 counterclaims as a matter of right in response to an amended complaint.
15 **Second**, this Court should adopt the “moderate” approach to determine the
16 proper scope of such amended counterclaims, which involves applying a
17 proportionality test—that is, amended counterclaims are permissible so long as
18 the changes made are proportional to the changes made in the amended

1 complaint, regardless of whether they concern the same or different subject
2 matters. ***Finally***, applying the moderate approach, this Court should find that
3 the district court erred in striking the Amended Counterclaims.

4 By accepting this Petition, this Court will not only provide much needed
5 guidance to jurists, lawyers, and parties on issues of first impression, but also
6 avoid the likelihood of a retrial in this case (a substantial waste of court
7 resources) by not requiring the Development Entities to wait until the time for
8 an appeal to demonstrate why they should have been allowed to file their
9 Amended Counterclaims in response to Caesars' First Amended Complaint.

10 For these reasons, this Court should accept this Petition and grant the
11 relief requested by the Development Entities.

12 **III. STATEMENT OF FACTS NECESSARY TO UNDERSTAND**
13 **THE ISSUES PRESENTED**

14 The material facts relevant to the issues raised by this Petition are
15 undisputed.² They are as follows.

16 _____
17 ² For citations to Petitioners' Appendix, the number preceding "PA" refers to
18 the applicable Volume and the number succeeding PA refers to the applicable
Tab, which is then followed by a pin-cite to the appendix page number(s) (if
applicable). Additionally, where there is a redacted and a sealed version of the
same filing, the citation to the sealed version will be cited.

A. The Development Agreements.

Beginning in 2009, Caesars entered into various agreements (the “Development Agreements”) with Moti, LLTQ, TPOV, FERG, and DNT—each of which was owned, in whole or in part, directly or indirectly, by Rowen Seibel (“Seibel”)—to develop various restaurants at Caesars’ properties (the “Restaurants”). (5 PA 58, at 943.) Under the terms of the Development Agreements, the Development Entities agreed to provide capital funding and/or to assist in the design, development, construction, and/or operation of the Restaurants. (*Id.* at 947-49.) In exchange, the Development Entities would receive a return of their capital and/or a percentage of the Restaurants’ net profits. (6 PA 74, at 1225-29.)

B. Seibel Divests his Interests in the Development Entities.

In April 2016, Seibel divested his interests in the original Development Entities (MOTI, LLTQ, TPOV, and FERG) by, among other acts: (a) assigning his interests to a family trust (the “Trust”); and (b) causing the original Development Entities to assign (the “Assignments”) their interests in the Development Agreements to new Development Entities (Moti 16, LLTQ 16, TPOV 16, and FERG 16) in which Seibel had no rights or responsibilities. (5

1 PA 58, at 969.) Seibel likewise assigned his interests in DNT (held through R
2 Squared) to the Trust. (2 PA 27, at 297.)

3 **C. Seibel Pleads Guilty to a Tax Offense; Caesars Wrongfully**
4 **Terminates the Development Agreements While Continuing to**
Operate and Reap Profits from the Restaurants.

5 After the Assignments, Seibel pled guilty to a tax offense. (5 PA 58, at
6 968.) A few months later, in September 2016, Caesars terminated the
7 Development Agreements, contending that it had determined that Seibel—who
8 had no continuing interest in the Development Entities—would be considered
9 an “Unsuitable Person” by gaming authorities. (*Id.* at 969-73.) Caesars further
10 rejected the Assignments on the grounds that it (Caesars) believed that the
11 Development Entities remained affiliated with Seibel through his relationship
12 to the Trust. (*Id.*) Finally, Caesars refused to work in good faith with the
13 Development Entities to find a means to permit them to dissociate from Seibel
14 to Caesars’ satisfaction while remaining in business with Caesars and profiting
15 from the Restaurants. (6 PA 74, at 1232.) Rather than closing the Restaurants,
16 Caesars continued (and continues) to operate them. (*Id.*)

IV. RELEVANT PROCEDURAL HISTORY

A. Siebel Files a Derivative Action on Behalf of GRB Against PHWLTV and Gordon Ramsay (the “GRB Action”).

On February 28, 2017, Seibel filed a Complaint on behalf of GR Burger, LLC (“GRB”), an entity in which Seibel was a fifty percent member, against PHWLTV and Gordon Ramsay (“Ramsay”), a former indirect member of GRB. (1 PA 1.) Among the allegations, GRB alleged that PHWLTV and Ramsay conspired to terminate an agreement between GRB and PHWLTV involving BurGR, a restaurant at Planet Hollywood, and open an identical restaurant in the same space without sharing profits with GRB. (1 PA 2, at 42, 47.)

B. Caesars Files a Complaint for Declaratory Relief Related to the Development Agreements (the “Declaratory Relief Action”).

On August 25, 2017, Caesars filed a Complaint against Seibel, the Development Entities, GRB, and J. Jeffrey Frederick (“Frederick”). (1 PA 7.) Caesars’ Complaint contained three claims for declaratory judgment involving the Development Agreements; Caesars did not assert any claims for coercive relief (e.g., breach of contract, civil conspiracy, etc.). (*Id.* at 164-69.)

1 Upon stipulation of the parties, the district court consolidated the GRB
2 Action and the Declaratory Relief Action on February 9, 2018. (1 PA 22.)

3 **C. The Development Entities’ Answers/Initial Counterclaims.**

4 On July 6, 2018, the Development Entities answered Caesars’ Complaint
5 and certain of them counterclaimed against Caesars, as follows:

- 6 • LLTQ and LLTQ 16 (the “LLTQ Parties”), together with FERG and
7 FERG 16 (the “FERG Parties,” and together with the LLTQ Parties,
8 the “LLTQ/FERG Parties”), filed an Answer and Counterclaims
9 against Caesars Palace and CAC, asserting contract claims (2 PA 28);
- 10 • R Squared, derivatively on behalf of DNT, filed an Answer and
11 Counterclaims against Caesars Palace, asserting contract claims (2 PA
12 27);
- 13 • Moti and Moti 16 (the “Moti Parties”) filed an Answer (2 PA 25);³ and
- 14 • TPOV and TPOV 16 (the “TPOV Parties”) filed an Answer (2 PA
15 26).⁴

16 _____
17 ³ At the time of filing their Answer, the Moti Parties had asserted claims
against Caesars in its bankruptcy action. (5 PA 58, at 974.)

18 ⁴ At the time of filing its Answer, TPOV 16 had asserted contract claims
against Caesars in a related federal action. (5 PA 58, at 976.)

1 **D. The District Court Denies the LLTQ/FERG Parties Leave to**
2 **Amend their Counterclaims.**

3 In their initial counterclaims, the LLTQ/FERG Parties cited specific
4 provisions of their Development Agreements restricting Caesars from pursuing
5 certain restaurant ventures with Ramsay absent involving the LLTQ/FERG
6 Parties, the TPOV Parties, or their affiliates. (2 PA 28, at 323.) Their
7 counterclaims described, as examples, two such restaurant ventures—Gordon
8 Ramsay Fish & Chips, in Las Vegas, and Gordon Ramsay Steak, in Baltimore
9 (“GR Steak Baltimore”)—from which the LLTQ Parties and the TPOV Parties
10 had been wrongfully excluded. (*Id.* at 328-29.) The LLTQ/FERG Parties
11 thereafter sought discovery concerning another restaurant venture from which
12 the TPOV Parties had been wrongfully excluded: Gordon Ramsay Steak, in
13 Atlantic City (“GR Steak AC”). (3 PA 41, at 478.) Caesars resisted the
14 discovery, asserting that there were no specific allegations pled by the
15 LLTQ/FERG Parties concerning GR Steak AC. (*Id.*)

16 On October 2, 2019—approximately eight months after the deadline to
17 amend had expired—the LLTQ/FERG Parties sought leave to amend their
18 counterclaims. (3 PA 41.) Specifically, the LLTQ/FERG Parties sought leave

1 to add specific allegations to their counterclaims concerning GR Steak AC.
2 (*Id.* at 554.) Caesars opposed the motion, contending that the LLTQ/FERG
3 Parties were previously aware of GR Steak AC and had not acted diligently in
4 seeking leave to amend. (3 PA 42.)

5 On November 6, 2019, the district court denied the LLTQ/FERG Parties
6 leave to file their proposed amended counterclaims. (3 PA 45.)

7 **E. The District Court, After the Deadline to Amend had Expired,**
8 **Grants Caesars Leave to Amend its Complaint to Assert Five**
9 **New Coercive Claims for Relief and to Add a New Party.**

10 On December 12, 2019—over ten months after the deadline to amend
11 had expired—Caesars sought leave to amend its Complaint. (8 PA 4.)
12 Specifically, Caesars sought leave to add a new party, Craig Green (“Green”),
13 and to assert, for the first time, coercive claims for relief against the
14 Development Entities, GRB, Seibel, and Green. (*Id.* at 1515.) Caesars’
15 proposed changes were based on new facts and legal theories unrelated to its
16 initial Complaint. (5 PA 58, at 977-78.)

17 The Development Entities and Seibel opposed Caesars’ motion, arguing
18 that Caesars had been aware of the facts forming the basis of its new claims for

1 at least one year—noting the incongruence with Caesars’ prior opposition to
2 the LLTQ/FERG Parties’ motion to amend. (8 PA 88.)

3 On February 12, 2020, the district court granted Caesars leave to file its
4 First Amended Complaint. (4 PA 56.)

5 On March 11, 2020, Caesars filed its First Amended Complaint. (5 PA
6 58.) Caesars asserted the following new claims for coercive relief: civil
7 conspiracy, breach of the implied covenant of good faith and fair dealing,
8 unjust enrichment, intentional interference with contractual relations, and
9 fraudulent concealment. (*Id.* at 983-86.) Caesars also named Green as an
10 additional defendant. (*Id.* at 946.)

11 **F. The Development Entities, Seibel, and Green Move to Dismiss**
12 **the New Claims Asserted by Caesars.**

13 On April 8, 2020, the Development Entities, Seibel, and Green filed a
14 motion to dismiss the new claims in Caesars’ First Amended Complaint. (5
15 PA 61.) On May 20, 2020, the district court denied the motion. (5 PA 69.)

G. The Development Entities File their Amended Counterclaims Against Caesars.

On June 19, 2020, the Development Entities, Seibel, and Green filed a consolidated Answer to Caesars’ First Amended Complaint and the Development Entities filed their Amended Counterclaims against Caesars. (6 PA 74.) In their Amended Counterclaims, the Development Entities asserted two causes of action: Breach of Contract; and Breach of the Implied Covenant of Good Faith and Fair Dealing. (*Id.* at 1233-34.) The Amended Counterclaims did not significantly expand the scope of this case—they involve the same facts and legal theories that the Development Entities had previously asserted in this case, whether in defense to Caesars’ initial declaratory relief claims and/or as counterclaims. (*Compare* 2 PA 25-28 with 6 PA 74.) The material changes from the initial counterclaims are two-fold: (i) the TPOV Parties and the Moti Parties asserted counterclaims against Caesars for the first time; and (ii) the LLTQ/FERG Parties added allegations concerning GR Steak AC and another restaurant venture from which the TPOV Parties were wrongfully excluded: Gordon Ramsay Steak, in Kansas City (“GR Steak KC”). (6 PA 74, at 1230, 1233-34.)

H. Caesars Moves to Strike the Amended Counterclaims.

On July 15, 2020, Caesars moved to strike the Amended Counterclaims, advocating for the district court to apply the “narrow” approach applied by a small minority of federal courts. (6 PA 76.) Caesars argued that the Amended Counterclaims should be stricken because they did not relate to the changes in Caesars’ First Amended Complaint—i.e., the subject matter of the new counterclaims was different from the subject matter of the new claims. (*Id.*) The Development Entities opposed Caesars’ motion, pointing out that the “narrow” approach was no longer good law and advocating for the district court to adopt the “moderate” approach applied by the majority of federal courts. (6 PA 77.)

I. The District Court Strikes the Amended Counterclaims.

On September 23, 2020, the district court heard argument on the Motion to Strike. (6 PA 79.) On February 3, 2021, the district court entered the Order granting the Motion to Strike. (7 PA 84.)

The district court noted that there “is no Nevada case law directly addressing whether a defendant may file amended counterclaims in response to an amended complaint without leave of court.” (*Id.* at 1489.) The district

1 court correctly concluded that the abrogation of NRCP 13(f) in 2019 “would
2 supersede [federal] cases following the narrow approach.” (*Id.*) The district
3 court further predicted that the Nevada Supreme Court would reject the
4 permissive approach. (*Id.* at 1489-90.) In analyzing the moderate approach,
5 the district court stated that the Amended Counterclaims would be
6 impermissible because they did not relate to the same subject matter as the new
7 claims (as explained below, this is really the narrow approach). (*Id.* at 1490.)

8 Ultimately, the district court declined to apply any of the federal
9 approaches and created an NRCP 16 approach—relying on *Nutton v. Sunset*
10 *Station, Inc.*, 131 Nev. 279, 357 P.3d 966 (2015). (*Id.*; *see also* 6 PA 79, at
11 1385-87, 1390, 1402, and 1410.) The district court found that the Amended
12 Counterclaims were “time-barred by [the District] Court’s prior scheduling
13 order and the previous denial of the LTTQ/FERG Defendants’ Motion to
14 Amend,” and that “Caesars’ First Amended Complaint did not open the door
15 for the Development Entities to expand the scope of the litigation beyond its
16 current parameters.” (7 PA 84, at 1491.)

V. RELIEF REQUESTED

The Development Entities seek a writ of mandamus directing the district court to vacate the Order and to enter an order denying the Motion to Strike in its entirety.

VI. SUMMARY OF REASONS WHY EXTRAORDINARY WRIT RELIEF IS PROPER

A. Standard of Decision for Seeking Writ Relief.

This Court has original jurisdiction to issue writs of mandamus. Nev. Const., art. 6, § 4(1); NRS 34.160. “A writ of mandamus is an extraordinary remedy that will not issue if the petitioner has a plain, speedy, and adequate remedy at law.” *Leibowitz v. Eighth Jud. Dist. Ct.*, 119 Nev. 523, 529, 78 P.3d 515, 519 (2003).

This Court has broad discretion to consider a mandamus petition. *Id.* This Court may entertain a mandamus petition “when judicial economy and sound judicial administration militate in favor of writ review” or when “an important issue of law requires clarification.” *Scarbo v. Eighth Jud. Dist. Ct.*, 125 Nev. 118, 121, 206 P.3d 975, 977 (2009) (internal quotation marks omitted).

1 A writ of mandamus is “available to compel the performance of an act
2 that the law requires or to control an arbitrary or capricious exercise of
3 discretion.” *Nev. Yellow Cab Corp. v. Eighth Jud. Dist. Ct.*, 123 Nev. 44, 49,
4 152 P.3d 737, 740 (2007). The petitioner has the burden to demonstrate why
5 extraordinary writ relief is warranted. *Pan v. Eighth Jud. Dist. Ct.*, 120 Nev.
6 222, 228, 88 P.3d 840, 844 (2004).

7 **B. Writ Relief Is Appropriate Here.**

8 This Court should exercise its discretion to consider this Petition for the
9 following reasons.

10 First, this Petition raises important issues of first impression: whether
11 and under what circumstances a defendant may assert amended counterclaims
12 as a matter of right in response to an amended complaint. Plaintiffs often
13 obtain leave to amend their complaints to expand the scope of the case. Absent
14 guidance from this Court, defendants are left to guess whether they may file
15 amended counterclaims as a matter of right in response to the amended
16 complaint.

17 Second, judicial economy and administration support considering this
18 Petition. If this Court declines to consider this Petition, the parties will go

1 through a costly and time-consuming trial, during which neither the TPOV
2 Parties nor the MOTI Parties will be allowed to present evidence on any claims
3 for relief; and the LLTQ/FERG Parties will be unable to seek damages with
4 regard to GR Steak AC and GR Steak KC (even though they will seek
5 damages for Fish and Chips and GR Steak Baltimore). If the Development
6 Entities later prevail on appeal addressing the issues presented by this Petition,
7 the parties will be forced to go through a retrial on the same facts and legal
8 theories, calling the same witnesses and presenting virtually identical evidence.
9 Plainly, it would be much more efficient to hold one trial on all of the claims
10 and counterclaims.

11 In a similar set of circumstances, this Court considered a writ petition
12 where the pretrial dismissal of certain claims was erroneous, affected the
13 course of the proceeding, and the issue involved a matter of statewide
14 significance. *See Lund v. Eighth Judicial Dist. Court*, 127 Nev. 358, 255 P.3d
15 280 (2011). In *Lund*, the district court had granted a motion to dismiss a
16 defendant's counterclaim against a third party (who previously had not been a
17 party in the case), finding that NRCP 13(h) did not authorize a defendant to
18 assert counterclaims against non-parties. *Id.* at 362, 255 P.3d at 283. The

1 defendant filed a writ of mandamus, seeking to vacate the district court’s order.
2 *Id.* at 363-64, 255 P.3d at 284-85. This Court held that writ relief was
3 appropriate because the district court had erroneously interpreted NRCP
4 13(h), the dismissal “potentially affect[ed] the future course of [the]
5 proceeding,” and the “confusion as to the scope and application of NRCP 13(h)
6 is of statewide significance” *Id.* at 364, 255 P.3d at 284.

7 Just like the district court’s dismissal of the counterclaims in *Lund*, here
8 the district court’s striking of the Amended Counterclaims is erroneous, it will
9 affect the future course of this case, and the confusion over whether and under
10 what circumstances a defendant may assert an amended counterclaim as a
11 matter of right in response to an amended complaint is of statewide
12 significance. *See id.* (“[W]rit relief may lie when trial court fails to analyze or
13 apply law correctly in entering an order that conflicts with the ... Rules of
14 Civil Procedure.”).

15 In sum, this Court should exercise its discretion to consider this Petition.
16 *See Lund*, 127 Nev. at 365, 255 P.3d at 285 (considering writ petition on order
17 dismissing counterclaims where the “district court manifestly abused its
18 discretion by failing to apply the proper NRCP 13(h) analysis”).

VII. TIMING OF THIS PETITION

While there is no specific time limit for the filing of a writ petition, such relief should be timely sought. *Widdis v. Second Jud. Dist. Ct.*, 114 Nev. 1224, 1227-28, 968 P.2d 1165, 1167 (1998). The Order was entered on February 3, 2021. (7 PA 84.) The Development Entities filed this Petition on February 5, 2021, two days after the Order was filed. Thus, this Petition is timely.

VIII. ISSUES PRESENTED FOR REVIEW

This Petition presents the following issues:

1. May a defendant assert amended counterclaims, as a matter of right, in response to an amended complaint that expands the scope of the litigation?
2. What is the permissible scope of amended counterclaims pled, as a matter of right, in response to an amended complaint that expands the scope of the litigation?
3. Did the district court err in striking the Amended Counterclaims as the changes made were proportional to the changes made in the First Amended Complaint?

1 **IX. REASONS WHY A WRIT SHOULD ISSUE**

2 **A. Standard of Review.**

3 This Court “reviews the district court’s interpretation of the Nevada
4 Rules of Civil Procedure *de novo*, even when that interpretation is challenged
5 through a petition for extraordinary relief.” *Lund*, 127 Nev. at 362, 255 P.3d at
6 283 (emphasis added).

7 **B. This Court Should Adopt the Moderate Approach to Evaluate**
8 **the Scope of Amended Counterclaims a Defendant May Assert**
9 **as a Matter of Right in Response to an Amended Complaint.**

10 Because neither this Court nor the Court of Appeals has addressed
11 whether and under what circumstances a defendant may assert amended
12 counterclaims as a matter of right in response to an amended complaint, federal
13 case law is “strong persuasive authority” on the issue. *See Exec. Mgmt. Ltd. v.*
Ticor Title Ins. Co., 118 Nev. 46, 53, 38 P.3d 872, 876 (2002).

14 Federal courts have, with near unanimity, held that a defendant may
15 assert amended counterclaims, as a matter of right, in response to an amended
16 complaint where the amended complaint changes the theory or scope of the
17 case. *See, e.g., Va. Innovation Scis. Inc. v. Samsung Elecs. Co.*, 11 F. Supp. 3d
18 622, 632-33 (E.D. Va. 2014); *see also Poly-Med, Inc. v. Novus Sci. Pte Ltd.*,

Civil Action No. 8:15-cv-01964-JMC, 2017 U.S. Dist. LEXIS 103991, at *7 (D.S.C. July 6, 2017); *UDAP Indus. v. Bushwacker Backpack & Supply Co.*, No. CV 16-27-BU-JCL, 2017 U.S. Dist. LEXIS 66803, at *7-8 (D. Mont. May 2, 2017); *Hydro Eng’g, Inc. v. Petter Invs., Inc.*, No. 2:11-cv-00139-RJS-EJF, 2013 U.S. Dist. LEXIS 40552, at *13 (D. Utah Mar. 22, 2013); *Elite Entm’t, Inc. v. Khela Bros. Entm’t*, 227 F.R.D. 444, 446 (E.D. Va. 2005); *Uniroyal Chem. Co. v. Syngenta Crop Prot., Inc.*, No. 3:02-CV-02253-AHN, 2005 WL 677806, at *1-3 (D. Conn. Mar. 23, 2005).

The rationale of these decisions is based on equity and fairness—if a plaintiff is given leave to expand the scope of the case through an amended complaint, a defendant should be afforded the same privilege through an amended counterclaim. *See Va. Innovation Scis. Inc.*, 11 F. Supp. 3d at 632-33 (“[W]hen a plaintiff’s amended complaint changes the theory of the case, it would be inequitable to require leave of the court before the defendant could respond with appropriate counterclaims.”) (internal quotation marks omitted); *Uniroyal Chem. Co.*, No. 3:02-CV-02253-AHN, 2005 WL 677806, at *1-3; *Tralon Corp. v. Cedarapids, Inc.*, 966 F. Supp. 812, 832 (N.D. Iowa 1997) (“[I]t would be inequitable to entertain the Plaintiffs’ Second Amended

1 Complaint without permitting Cedarapids to completely plead anew.”);
2 *Deutsch v. Health Ins. Plan*, 573 F. Supp. 1443, 1445 (S.D.N.Y. 1983) (“An
3 amended complaint represents a plaintiff’s second bite at the apple, and a
4 defendant should be accorded the same privilege.”).

5 Federal courts have developed three approaches to evaluate the
6 permissible scope of amended counterclaims pled, without leave of court, in
7 response to amended complaints.⁵ They are addressed in turn.

8 ***1. The Narrow Approach.***

9 The “narrow” approach has previously been applied by a minority of
10 federal courts based upon their reading of former Rule 13(f) and required any
11 new counterclaims to relate to the same subject matter as the new claims. *See*,
12 *e.g.*, *E.E.O.C. v. Morgan Stanley & Co.*, 211 F.R.D. 225, 226-27 (S.D.N.Y.
13 2002). Courts have found that the 2009 amendments to the Federal Rules of
14 Civil Procedure, which deleted Rule 13(f), superseded the narrow approach.

15 ⁵ One court—the District of Massachusetts—created its own approach,
16 requiring a defendant to seek leave before amending counterclaims pled in
17 response to an amended complaint. *See Bern Unlimited, Inc. v. Burton Corp.*,
18 25 F. Supp. 3d 170, 179 (D. Mass. 2014). Courts have rejected this approach in
favor of the moderate approach. *See, e.g., Ramsay-Nobles v. Keyser*, 2018
U.S. Dist. LEXIS 214472, at *14-15 (S.D.N.Y. Dec. 18, 2018); *UDAP Indus.*,
No. CV 16-27-BU-JCL, 2017 U.S. Dist. LEXIS 66803, at *7.

1 *See, e.g., Va. Innovation Scis. Inc.*, 11 F. Supp. 3d at 631. “This leaves the
2 permissive approach and the moderate approach as the remaining valid lines of
3 case law on this issue.” *Id.* Notably, this Court similarly deleted the analog of
4 Rule 13(f) in its 2019 amendments to the Nevada Rules of Civil Procedure,
5 making the narrow approach untenable under Nevada law.

6 **2. The Permissive Approach.**

7 Another approach used by federal courts—labeled the “permissive”
8 approach—allows a defendant to file new or amended counterclaims without
9 leave of court in response to amended claims irrespective of proportionality.
10 *See Joseph Bancroft & Sons Co. v. M. Lowenstein & Sons, Inc.*, 50 F.R.D. 415,
11 419 (D. Del. 1970). Although still employed by some courts, the permissive
12 approach has been criticized for depriving courts of the “ability to effectively
13 manage the litigation.” *Va. Innovation Scis. Inc.*, 11 F. Supp. 3d at 632
14 (internal quotation marks omitted).⁶

15 ⁶ Notably, Caesars advocated for the permissive approach and (correctly)
16 argued that Rule 16 was inapplicable to a court’s analysis when it suited its
17 interests in a case before the United States District Court, District of Nevada.
18 (6 PA 77, at 1300-02.) Ultimately, the court there adopted the moderate
approach and allowed Caesars to assert counterclaims, as a matter of right, in
response to an amended complaint that had expanded the scope of the case
even though the deadline to amend had passed. Sierra Dev. Co. v. Chartwell

1 3. *The Moderate Approach.*

2 The overwhelmingly “predominant [approach] in the case law”—labeled
3 the “moderate” approach—holds that a defendant may file amended
4 counterclaims in response to an amended complaint as a matter of right “when
5 the amended complaint changes the theory or scope of the case” so long as the
6 “the breadth of the changes in the amended [counterclaims] ... reflect the
7 breadth of the changes in the amended complaint.” *Elite Entm’t, Inc.*, 227
8 F.R.D. at 446. “[I]f major changes are made to the complaint, then major
9 changes may be made to the [counterclaims].” *Id.*

10 If the amended counterclaims are proportional (or less drastic),
11 *defendants may file them as a matter of right*—other requirements (e.g.,
12 Rules 15 and 16) are inapplicable. *See Hydro Eng’g, Inc.*, No. 2:11-cv-00139-
13 RJS-EJF, 2013 U.S. Dist. LEXIS 40552, at *15; *see also Sierra Dev. Co.*, No.
14 13-cv-602-BEN-VPC, 2016 U.S. Dist. LEXIS 160308, at *10-12 (denying a
15 motion to strike counterclaims pled by Caesars and other defendants, without
16 leave of court, in response to an amended complaint *after the Rule 16 deadline*
17 *to amend had passed*); *Spellbound Dev. Grp., Inc. v. Pac. Handy Cutter, Inc.*,
18 *Advisory Grp. Ltd.*, No. 13-cv-602-BEN-VPC, 2016 U.S. Dist. LEXIS 160308,
at *10-12 (D. Nev. Nov. 18, 2016).

1 No. SACV-09-951-DOC-(Anx), 2011 U.S. Dist. LEXIS 54597, at *4 (C.D.
2 Cal. May 12, 2011) (rejecting argument that a counterclaim filed in response to
3 an amended complaint was “untimely” because the defendant had “failed to
4 comply with the Court’s past scheduling order dictating the deadline by which
5 to amend claims and failed to seek leave of the Court to amend”).

6 What distinguishes the moderate approach from the narrow approach is
7 this: while “the breadth of the changes in the amended [counterclaims] must
8 reflect the breadth of the changes in the amended complaint” under the
9 moderate approach, the “breadth requirement is one of proportionality and,”
10 unlike the narrow approach, “*it does not require the changes to the response*
11 *to be directly tied to the changes in the amended complaint.*” *Va. Innovation*
12 *Scis. Inc.*, 11 F. Supp. 3d at 633 (emphasis added); *accord Poly-Med, Inc.*,
13 Civil Action No. 8:15-cv-01964-JMC, 2017 U.S. Dist. LEXIS 103991, at *6
14 (same); *UDAP Indus.*, No. CV 16-27-BU-JCL, 2017 U.S. Dist. LEXIS 66803,
15 at *6 (same).

16 This Court should adopt the moderate approach as it appropriately
17 balances equity and fairness with the interests of courts managing litigation.
18 The moderate approach limits changes in amended counterclaims to only those

1 that are proportional in scope (or less drastic) to changes in the amended
2 complaint. In other words, any amended counterclaims are necessarily limited
3 to the scope of changes a district court has already approved in giving a
4 plaintiff leave to file an amended complaint.

5 Moreover, the moderate approach best reflects the intent of Rule 15(a).
6 As one court explained: “Not only is this moderate approach predominant in
7 the caselaw, the requirement that an amended response reflect the change in
8 theory or scope of the amended complaint is consistent with Rule 15’s [pre-
9 2009 Amendments] requirement that an amended pleading must ‘plead in
10 response’ to the amended pleading.” *Va. Innovation Scis. Inc.*, 11 F. Supp. 3d
11 at 632 (internal quotation marks omitted).⁷

17 ⁷ “As the purpose behind the 2009 Amendments to Rule 15 appears to have
18 been only to make ‘changes in the time allowed to make one amendment as a
matter of course,’ the ‘plead in response’ language is arguably still pertinent to
the allowable scope of a response to an amended pleading.” *Id.*

C. The District Court Erred in Striking the Amended Counterclaims.

1. This Court Should Reject the District Court's NRCP 16 Approach.

As detailed above, the district court required the Development Entities to demonstrate good cause under NRCP 16 (as the deadline to amend had passed) to file their Amended Counterclaims. This Court should reject the NRCP 16 approach because it is inequitable and unfair.

Initially, the district court's reliance on *Nutton* was misplaced. In *Nutton*, the Court of Appeals analyzed the interplay between NRCP 15(a), which governs amendments of pleadings, and NRCP 16(b), which governs scheduling orders. *See id.*, 131 Nev. at 285-86, 357 P.3d at 971. The *Nutton* Court held that where a party is seeking leave to amend its pleading after the deadline to amend has passed, it must demonstrate good cause, under NRCP 16(b), for the failure to seek amendment before the deadline expired, in addition to meeting the requirements under NRCP 15(a). *Id.*

Here, unlike in *Nutton*, the district court had already determined that the pleadings could be amended when it granted Caesars' Motion to Amend and allowed Caesars to increase the scope of the case drastically—well after the

1 deadline to amend had passed. Once the district court elected to give Caesars
2 leave to amend, it could not equitably deny the Development Entities the same
3 privilege. *See Va. Innovation Scis. Inc.*, 11 F. Supp. 3d at 632-33; *Uniroyal*
4 *Chem. Co.*, No. 3:02-CV-02253-AHN, 2005 WL 677806, at *1-3.

5 As noted above, courts have held that where a defendant files an
6 amended counterclaim as a matter of right in response to an amended
7 complaint, the requirements of Rules 15 and 16 are inapplicable. *See Hydro*
8 *Eng'g, Inc.*, No. 2:11-cv-00139-RJS-EJF, 2013 U.S. Dist. LEXIS 40552, at
9 *15 (holding futility analysis under Rule 15(a) was inapplicable); *Sierra Dev.*
10 *Co.*, No. 13-cv-602-BEN-VPC, 2016 U.S. Dist. LEXIS 160308, at *6-7
11 (rejecting arguments that counterclaims were time-barred by Rule 16 and that
12 Rule 15 required defendants to first seek leave); *Spellbound Dev. Grp., Inc.*,
13 No. SACV 09-951 DOC-(Anx), 2011 U.S. Dist. LEXIS 54597, at *4 (rejecting
14 argument that amended counterclaims were untimely because the deadline to
15 amend had passed).

16 Using Caesars' own words from another matter where it successfully
17 argued that Rules 15 and 16 did not apply to counterclaims it asserted, without
18

1 leave of court, in response to an amended complaint after the deadline to
2 amend had expired:

3 [Caesars] made the decision to file the [First Amended
4 Complaint], and, by law, the [First Amended
5 Complaint] became the operative pleading in this
6 matter. By choosing to redo its original work,
[Caesars] can hardly be heard to complain that the
[Development Entities] have now filed [amended]
counterclaims in response to the operative pleading.

7 (6 PA 77, at 1301.)

8 In sum, this Court should find that neither NRCP 16(b) nor *Nutton*
9 applies because the Development Entities were allowed to file their Amended
10 Counterclaims, as a matter of right, in response to Caesars' First Amended
11 Complaint.

12 **2. *The District Court Erred in Its Analysis of the Moderate***
13 ***Approach.***

14 The district court stated that even if it were to have applied the moderate
15 approach, "the Development Entities' counterclaims would not be permitted
16 because the breadth of the changes in their Amended Counterclaims do not
17 reflect the breadth of the changes in Caesars' First Amended Complaint (*i.e.*,
18

1 the alleged kick-back scheme).” (7 PA 84, at 1490.) Respectfully, the district
2 court erred in its analysis of the moderate approach.

3 The district court conflated the narrow approach with the moderate
4 approach. The district court found that the Amended Counterclaims were
5 improper under the moderate approach because the changes did not relate to
6 the same subject matter as the changes in the First Amended Complaint. (*Id.*)
7 ***But, as explained above, that distinction is precisely what separates the***
8 ***moderate approach from the narrow approach.*** The moderate approach does
9 not require the changes in the amended counterclaims to relate to the same
10 subject matter as the changes in the amended complaint. *See Va. Innovation*
11 *Scis. Inc.*, 11 F. Supp. 3d at 633. Accordingly, the changes in the Development
12 Entities’ Amended Counterclaims do not need to relate to the same subject
13 matter as the changes in Caesars’ First Amended Complaint. Instead, the
14 Amended Counterclaims are proper so long as they do not disproportionately
15 impact the scope of this case. *See UDAP Indus.*, No. CV 16-27-BU-JCL, 2017
16 U.S. Dist. LEXIS 66803, at *6 (“There is no requirement under this approach
17 that a defendant specifically tailor its answer to the amended complaint, rather
18 the court considers whether the defendant’s answer affects the scope of the

1 litigation in a manner proportional with the amended complaint.”) (internal
2 quotation marks omitted).

3 Under the moderate approach, the Development Entities were allowed to
4 file their Amended Counterclaims as a matter of right because the breadth of
5 their changes is *minor* when compared with the breadth of the changes in
6 Caesars’ First Amended Complaint. Through its amendments to its Complaint,
7 Caesars substantially increased both the theory and scope of this case by
8 asserting coercive claims for relief for the first time (five new claims in total)
9 and adding a new party (Green). In contrast, the Amended Counterclaims are
10 based on the same facts and legal theories previously asserted by the
11 Development Entities, whether in their defenses to Caesars’ initial declaratory
12 relief claims and/or their initial counterclaims.

13 Unlike Caesars’ First Amended Complaint—which requires
14 substantially new and different discovery—the Amended Counterclaims
15 require virtually no additional discovery. The parties have been conducting
16 discovery on matters surrounding Caesars’ termination of the Development
17 Agreements for years (the subject of the Amended Counterclaims). The only
18

1 additional discovery needed is basic and readily available financial data for the
2 two additional restaurants (GR Steak AC and GR Steak KC).

3 Further, the Development Entities—including the TPOV Parties and the
4 Moti Parties (who did not previously assert counterclaims)—are arguably
5 required to assert all compulsory counterclaims based on Caesars’ assertion of
6 coercive claims for relief. Under the “declaratory judgment exception” to the
7 doctrine of claim preclusion—which this Court has adopted—a party
8 responding to a claim solely for declaratory relief is not required to assert
9 compulsory counterclaims under NRCP 13(a) and may instead assert such
10 claims in a subsequent action (subject to any issue-preclusive effects of the
11 declaratory judgment). *See Boca Park Marketplace Syndications Group, LLC*
12 *v. Higco, Inc.*, 133 Nev. 923, 927, 407 P.3d 761, 765 (2017). However, where
13 a party asserts a coercive claim for relief in addition or in response to a claim
14 for declaratory relief, the exception no longer applies—the party responding to
15 the coercive claim for relief must assert all compulsory counterclaims under
16 NRCP 13(a). *See, e.g., Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*,
17 600 F.3d 190, 197 (2d Cir. 2010).

1 When Caesars filed its initial Complaint only seeking declaratory relief,
2 none of the Development Entities had to assert counterclaims under NRCP
3 13(a). *See Marketplace Syndications Group, LLC*, 133 Nev. at 927, 407 P.3d
4 at 765. However, because Caesars has asserted coercive claims for relief, the
5 Development Entities are arguably required to assert all compulsory
6 counterclaims under NRCP 13(a). *See Duane Reade, Inc.*, 600 F.3d at 197.

7 In sum, because the Amended Counterclaims are, *minimally*,
8 proportional to the breadth of changes in the First Amended Complaint, the
9 Development Entities were entitled to assert them as a matter of right. This
10 Court should find that the district court erred in striking them. *See Va.*
11 *Innovation Scis. Inc.*, 11 F. Supp. 3d at 632-33.

12 X. CONCLUSION

13 Just as this Court looks to federal case law for guidance when addressing
14 procedural issues, so this Court should adopt the moderate approach used by an
15 overwhelming majority of federal courts when deciding whether and under
16 what circumstances a defendant may assert amended counterclaims as a matter
17 of right in response to an amended complaint. Then, this Court should find
18

1 that the Amended Counterclaims were properly filed as the changes were not
2 disproportional to those in the First Amended Complaint.

3 For the foregoing reasons, the Development Entities respectfully request
4 that this Court issue a writ of mandamus directing the district court to vacate
5 the Order and enter an order denying the Motion to Strike in its entirety.

6 DATED this 5th day of February, 2021.

7 BAILEY ♦ KENNEDY

8 By: /s/ John R. Bailey

9 JOHN R. BAILEY

DENNIS L. KENNEDY

JOSHUA P. GILMORE

10 PAUL C. WILLIAMS

11 STEPHANIE J. GLANTZ

12 *Attorneys for Petitioners Moti Partners, LLC; Moti*
13 *Partners 16, LLC; LLTQ Enterprises, LLC; LLTQ*
14 *Enterprises 16, LLC; TPOV Enterprises, LLC; TPOV*
15 *Enterprises 16, LLC; FERG, LLC; FERG 16, LLC;*
16 *and R Squared Global Solutions, LLC, Derivatively*
17 *On Behalf of DNT Acquisition, LLC*
18

VERIFICATION

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

I hereby declare under penalty of perjury under the laws of the State of Nevada that the facts relevant to this Petition are within my knowledge as an attorney for the Development Entities and are based on the proceedings, documents, and papers filed in the underlying action, *Rowen Seibel v. PHWLIV, 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.

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

4 EXECUTED on this 5th day of February, 2021.

5 /s/ John R. Bailey

6 JOHN R. BAILEY
7
8
9
10
11
12
13
14
15
16
17
18

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 6,989 words (excluding the Cover Page, NRAP 26.1 Disclosure, 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.

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

4 EXECUTED on this 5th day of February, 2021.

5 /s/ John R. Bailey

6 JOHN R. BAILEY
7
8
9
10
11
12
13
14
15
16
17
18

CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 5th day of February, 2021, service of the foregoing was made by electronic service through Nevada Supreme Court's electronic filing system and/or by 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	Email: JJP@pisanellibice.com
DEBRA L. SPINELLI	DLS@pisanellibice.com
M. MAGALI MERCERA	MMM@pisanellibice.com
BRITTNIE T. WATKINS	BTW@pisanellibice.com
PISANELLI BICE PLLC	<i>Attorneys for Real Parties in Interest</i>
400 South 7 th Street, Suite 300	<i>Desert Palace, Inc.; Paris Las Vegas</i>
Las Vegas, NV 89101	<i>Operating Company, LLC; PHWLV, LLC; and Boardwalk Regency Corporation</i>

HON. TIMOTHY C. WILLIAMS	Email:
DISTRICT JUDGE	DC16Inbox@ClarkCountyCourts.us;
EIGHTH JUDICIAL DISTRICT COURT	Dept16lc@clarkcountycourts.us;
Regional Justice Center	Dept16ea@clarkcountycourt.us
200 Lewis Avenue	
Las Vegas, NV 89155	<i>Respondent</i>

/s/ Sharon Murnane
Employee of BAILEY❖KENNEDY