CASE NO. 82448

IN THE SUPREME COURT OF NEVADA

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; 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 IN SUPPORT OF 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

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8984 SPANISH RIDGE AVENUE
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I. INTRODUCTION

Caesars' efforts to transform the legal issues addressed by the Petition into factual issues are unavailing. Although Caesars devotes nearly half of its Answer to its "Counterstatement of Facts,"[1] the substantive issues in the case have no bearing on resolution of the issues before this Court. Put simply, the Petition presents an opportunity for this Court to address a novel question of law that is of statewide importance: whether and to what extent a defendant may assert new or amended counterclaims, without leave of court, when pleading in direct response to an amended complaint that expands the scope of the case. The answer to that question is *not* driven by the underlying facts giving rise to the litigation. Instead, as explained in the Petition and discussed below, federal courts have resoundingly affirmed that defendants may assert new or amended counterclaims *as a matter of right* in direct response to an amended complaint that expands the scope of the case.

Caesars practically disregards the overwhelming federal authority to advocate for the "Rule 16" approach crafted by the district court in this case

[1] The Development Entities disagree with much of Caesars' counterstatement of facts. However, because those disagreements are not material to the Petition, the Development Entities will not address them unnecessarily.

and attempts to paint the Petition as concerning matters of discretion under Rules 15 and 16. But that misses the point. The question is not whether the district court correctly applied the relevant factors under Rules 15(a) and 16(b) (in fact, the district court did not specifically address the relevant factors)—the question is whether those rules apply *at all* in this context. Federal courts have rejected similar arguments that a defendant must comply with Rules 15(a) and 16(b) when pleading in direct response to an amended complaint that expands the scope of the case. Logically, Rules 15(a) and 16(b) are inapplicable when dealing with new or amended counterclaims because the defendant is pleading in direct response to an amended complaint, *not* seeking leave to amend.

Based on this same flawed logic—that the district court's decision to strike the Amended Counterclaims should somehow be viewed as a denial of leave to amend under Rules 15(a) and 16(b)—Caesars further argues that this Court's standard of review is an abuse of discretion and that writ relief is therefore inappropriate. These arguments are unpersuasive. First, this Court applies a de novo standard of review to a district court's interpretation of the Nevada Rules of Civil Procedure, which is the actual subject matter of the Petition. Second, writ relief is appropriate here because the Petition concerns a

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novel question of law (not fact), the resolution of which will provide important guidance to judges, litigants, and attorneys throughout Nevada.

Caesars also contends that the Amended Counterclaims are inappropriate under the moderate approach because the changes in the Amended Counterclaims do not relate to the changes in the First Amended Complaint. However, the moderate approach only requires that any changes in new or amended counterclaims be proportional (or less drastic) to changes in the amended complaint—the subject matter of the changes in the new or amended counterclaims need *not* relate to the subject matter of the changes in the amended complaint. Caesars is really advocating for this Court to adopt the narrow approach while labeling it the moderate approach. Federal courts have found that the narrow approach is no longer viable based on amendments to the Federal Rules of Civil Procedure (which this Court adopted in its 2019 amendments to the Nevada Rules of Civil Procedure).

If this Court adopts the moderate approach (which it should), the only question remaining is whether the changes in the Amended Counterclaims are proportional (or less drastic) to the changes in the First Amended Complaint, *regardless of subject matter*. The answer is yes: The changes in the Amended

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702.562.8820

Counterclaims are minimal when compared to the changes in the First Amended Complaint. Through the First Amended Complaint, Caesars asserted coercive claims for relief for the first time (specifically, five new claims), which were based on entirely new legal theories. Further, Caesars added a new party to the litigation. In comparison, the Amended Counterclaims concern the same subject matter the parties have been litigating for years—Caesars' purported termination of the Development Agreements—and the same legal theories. Applying the moderate approach, because the breadth of the changes in the Amended Counterclaims is minimal when compared to the breadth of the changes in the First Amended Complaint, the Development Entities were permitted to assert the Amended Counterclaims, without leave of court.

For the reasons set forth in the Petition and below, this Court should consider the Petition and grant the relief requested by the Development Entities.

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II. REASONS WHY A WRIT SHOULD ISSUE

A. Writ Relief is Warranted Under the Circumstances.

Caesars argues that writ relief is not warranted because the Development Entities have a remedy at law (*i.e.*, an appeal). (Ans. at 18-20.) This argument misses the mark.

Initially, 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). Caesars does not dispute that this Petition raises an important issue of first impression that is of statewide significance. Without guidance from this Court, judges, attorneys, and litigants will not know whether and to what extent a defendant may assert amended counterclaims as a matter of right in response to an amended complaint that expands the scope of the case.

Further, considerations of sound judicial economy and administration warrant writ relief in this case. That is, if this Court elects not to entertain the Petition, the parties will go through a costly and time-consuming trial and then, if the Development Entities are successful on appeal setting aside the Order

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granting the Motion to Strike, the parties will face a retrial based on the same facts and legal theories, calling the same witnesses and presenting virtually identical evidence. Instead, efficiency is best served by one trial on all claims and counterclaims.

As explained in the Petition, this Court—in *Lund v. Eighth Judicial Dist. Court*, 127 Nev. 358, 255 P.3d 280 (2011)—entertained a writ petition under very similar circumstances to those presented here. Specifically, this Court held that writ relief was appropriate because the district court had erroneously interpreted NRCP 13(h) and, as a result, erroneously dismissed a defendant's counterclaims. *Id.* at 364, 255 P.3d at 284. This Court found that the district court's dismissal "potentially affect[ed] the future course of [the] proceeding," and that "confusion as to the scope and application of NRCP 13(h) is of statewide significance …." *Id.*

Notably, Caesars does not address *Lund* in its Answer to the Petition. Here, just like in *Lund*, the district court's striking of the Amended Counterclaims is erroneous, and the decision will affect the future course of this case, as well as address confusion over whether and under what

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circumstances a defendant may assert an amended counterclaim as a matter of right in direct response to an amended complaint is of statewide significance.

Caesars' decision to ignore *Lund* in favor of *Walker v. Second Judicial District Court*, 136 Nev. Adv. Op. 80, 476 P.3d 1194 (2020), is misplaced. In *Walker*, the petitioners sought writ relief based on a district court's denial of motions to strike requests for a trial de novo following court-annexed arbitration. *Id.* at 1195-96. The petitioners argued in the district court that the real parties in interest had not arbitrated in good faith based on statistical evidence showing that their counsel had requested trials de novo at a disproportionate rate—which the petitioners argued showed the requests were for obstruction and delay purposes. *Id.* at 1195. The district court held an evidentiary hearing and found that the petitioners failed to demonstrate that the real parties in interest had arbitrated in bad faith and, as a result, denied the motions to strike. *Id.* This Court declined to consider the writ petition because it concerned "a ***factual question*** limited to the practice of one particular attorney … which will be appealable by the petitioners … at the conclusion of their respective matters." *Id.* (emphasis added).

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This Court declined to entertain the writ petition in *Walker* because: (i) the petitioners sought to address a dispute that was factual (as opposed to legal) in nature; (ii) the relief sought did not involve "a serious issue of substantial public policy or … precedential questions of statewide interest;" and (iii) resolution of the issue would not promote judicial economy. *Id.* at 1199. Those concerns are absent here—the Petition concerns a novel question of law (not fact), the resolution of which will provide guidance to judges, litigants, and attorneys throughout Nevada. This Court need not evaluate any factual disputes to resolve the issues here; it need only provide guidance concerning the Nevada Rules of Civil Procedure and perform a simple comparison of the pleadings themselves.

Moreover, Caesars' contention that this Court's consideration of the Petition will disrupt the district court's administration of justice falls flat. This Court's resolution of a novel question of law will not impede the proceedings below—to the contrary, it will enable the district court to proceed more efficiently by having all the claims and counterclaims resolved during one trial.

In sum, and for the same reasons that existed in *Lund*, this Court should exercise its discretion to consider this Petition. *See id.*, 127 Nev. at 363, 255

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P.3d at 284 ("[W]rit relief may lie when trial court fails to analyze or apply law correctly in entering an order that conflicts with the … Rules of Civil Procedure.").

B. The Standard of Review is De Novo Because the Writ Petition Concerns the District Court's Erroneous Interpretation of the Nevada Rules of Civil Procedure and Erroneous Application of the Moderate Approach.

Caesars argues that the standard of review to be employed by this Court is an abuse of discretion based on the contention that the Petition concerns discretionary, fact-bound rulings made by the district court under NRCP 15(a) and NRCP 16(b).[2] (Ans. at 20-21.) This argument misconstrues the issues.

The Petition concerns the district court's interpretation of the Nevada Rules of Civil Procedure and the legal question of whether and to what extent a defendant may assert new or amended counterclaims, as a matter of right, in direct response to an amended complaint that expands the scope of the case. The Development Entities do not argue before this Court that they demonstrated good cause to modify the scheduling order pursuant to NRCP

[2] Caesars suggests that the District Court was applying "well-settled law" in deciding the Motion to Strike. (Ans. at 21.) But there is an absence of Nevada law addressing whether and under what circumstances a defendant may plead new or amended counterclaims in direct response to an amended complaint.

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16(b) or that the district court should have granted leave to allow them to file the Amended Counterclaims under NRCP 15(a). The point of the Petition is that they did not have to make those arguments. Even assuming the district court conducted an analysis of the relevant factors under NRCP 15(a) or NRCP 16(b) in striking the Amended Counterclaims,[3] such an analysis would have no bearing on the Petition. The question is whether Petitioners had the right, without seeking leave of court, to file the Amended Counterclaims.

A de novo review is utilized by this Court in evaluating a district court's interpretation of the Nevada Rules of Civil Procedure, even where the district court's interpretation is challenged through a writ petition. *Lund*, 127 Nev. at 362, 255 P.3d at 284; *see also Moseley v. Eighth Jud. Dist. Ct.*, 124 Nev. 654, 662, 188 P.3d 1136, 1142 (2008) (applying de novo review to a writ petition concerning the "interplay and interpretation of NRCP 25 and NRCP 6").

[3] The Order granting the Motion to Strike does not contain an analysis of the relevant factors concerning whether good cause existed to modify the scheduling order under NRCP 16(b) or whether to grant leave to the Development Entities to amend under NRCP 15(a). (*See* 7 PA 84, at 1491.) Instead, the district court created its own "Rule 16 approach" to the issue presented and found that the Amended Counterclaims were "time-barred." (*See id.*)

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In *Lund*, this Court held that a district court's interpretation of NRCP 13(h) and NRCP 14 was subject to a de novo review. 127 Nev. at 362, 255 P.3d at 284. There, a defendant had filed counterclaims against the plaintiff and named additional counterclaim defendants—through NRCP 13(h)—to the litigation based on injuries the defendant suffered independent from the injuries suffered by the plaintiff. *Id.* at 362, 255 P.3d at 284. The district court held that the defendant could not name additional counterclaim defendants to a lawsuit through NRCP 13(h), finding that the defendant could only do so through a third-party complaint pursuant to NRCP 14. *Id.* at 362, 255 P.3d at 283. Applying a de novo standard of review, this Court held that additional counterclaim defendants may be named under NRCP 13(h) so long as the joinder requirements of NRCP 19 or 20 are met.[4] *Id.* at 362, 255 P.3d at 284.

[4] In *Lund*, this Court also found that the district court had manifestly abused its discretion under NRCP 13(h) based on its erroneous interpretation of NRCP 13(h). *Id.* at 363, 255 P.3d at 284. This Court applied an abuse of discretion standard as to that particular finding because the district court had discretion concerning whether to allow the defendant's amendment to name additional counterclaim defendants under NRCP 19 and 20. *Id.* Because the district court's decision whether to allow joinder under NRCP 19 and 20 involved an exercise of discretion, this Court remanded the action for further proceedings based on its holding. *Id.* at 364, 255 P.3d at 284-85.

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Like in *Lund*, the Development Entities are challenging the district court's interpretation of the Nevada Rules of Civil Procedure—specifically, whether and to what extent they allow a defendant to assert new or amended counterclaims, as a matter of right, in direct response to an amended complaint that expands the scope of the case. Thus, the district court's interpretation of the Nevada Rules of Civil Procedure is subject to a de novo standard of review.

Moreover, assuming this Court adopts the moderate approach, the district court's alternative application of the moderate approach (which is really an application of the narrow approach, incorrectly labeled as the moderate approach) is *not* a fact-intensive, discretionary act. As discussed further below, the moderate approach requires an objective analysis of whether the changes in the new or amended counterclaims are proportional in scope (or less drastic) to the changes in the amended complaint. *See, e.g.*, *Va. Innovation Scis. Inc. v. Samsung Elecs. Co.*, 11 F. Supp. 3d 622, 633 (E.D. Va. 2014). If the changes in the new or amended counterclaims are proportional, they must be allowed. *See, e.g.*, *Poly-Med, Inc. v. Novus Sci. Pte Ltd.*, No. 8:15-cv-01964-JMC, 2017 U.S. Dist. LEXIS 103991, at *6-7 (D.S.C. July 6, 2017); *see also Hydro Eng'g, Inc. v. Petter Invs., Inc.*, Case No. 2:11-cv-

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00139-RJS-EJF, 2013 U.S. Dist. LEXIS 40552, at *14 (D. Utah Mar. 22, 2013) (finding that because the amended complaint added new parties and new tort claims, the defendant could "raise new counterclaims as of right"); *Synermed Int'l, Inc. v. Lab. Corp. of Am. Holdings*, No. 1:97-CV-00966, 1999 WL 1939253, at *1 (M.D.N.C. Mar. 3, 1999) ("[B]ecause Synermed's second amended complaint expanded the theory or scope of its claims, the court finds that LabCorp had a right to assert its additional counterclaims without obtaining leave of the court."); *Brown v. E.F. Hutton & Co.*, 610 F. Supp. 76, 78 (S.D. Fla. 1985) ("[W]hen a plaintiff files an amended complaint which changes the theory or scope of the case, the Defendant is allowed to plead anew as though it were the original complaint filed by the Plaintiff."). Thus, the district court's decision of whether to allow the Amended Counterclaims is not an exercise of discretion.[5]

[5] Even if this Court were to find that applying the moderate approach involves an exercise of discretion, it should find that the district court manifestly abused its discretion in evaluating the proportionality of the changes in the Amended Counterclaims when compared to the changes in the First Amended Complaint. As detailed in the Writ Petition and further below, the changes in the Amended Counterclaims are minimal compared to the drastic changes in the First Amended Complaint.

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In sum, this Court should apply a de novo standard of review in analyzing both the district court's interpretation of the Nevada Rules of Civil Procedure and the district court's alternative analysis of the moderate approach.

C. The Development Entities were Entitled to File the Amended Counterclaims, Without Leave of Court, in Direct Response to the First Amended Complaint.

Caesars argues that the Amended Counterclaims were properly stricken because the Development Entities did not demonstrate good cause under Rule 16(b) to modify the district court's scheduling order and did not obtain leave to amend under NRCP 15(a). (Ans. at 21-25.) These arguments miss the point.

As explained in the Petition, federal courts have, with near unanimity, held that a defendant may assert new or amended counterclaims, ***as a matter of right***, in direct response to an amended complaint where the amended complaint changes the theory or scope of the case. *See, e.g.*, *Va. Innovation Scis. Inc.*, 11 F. Supp. 3d at 632-33. Those courts find that equity and fairness dictate that 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 a new or amended counterclaim pled in direct response to the amended

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complaint. *See id.* ("[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); *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 Complaint without permitting Cedarapids to completely plead anew. . . . Cedarapids did not act improperly in filing its new counterclaim without first seeking leave of the court to do so."); *Uniroyal Chem. Co. v. Syngenta Crop Prot., Inc.*, No. 3:02-CV-02253(AHN), 2005 U.S. Dist. LEXIS 4545, at *5 (D. Conn. Mar. 23, 2005) ("The underlying premise to this approach is 'what is good for the goose is good for the gander.'").

Logically, although ignored by Caesars, federal courts have held that other requirements that would ordinarily apply if a defendant were independently seeking leave to amend—such as Rules 15 and 16—***do not apply*** when a defendant asserts new or amended counterclaims in direct response to an amended complaint. *See, e.g.*, *Sierra Dev. Co. v. Chartwell Advisory Grp. Ltd.*, No. 13-cv-602-BEN-VPC, 2016 U.S. Dist. LEXIS 160308, at *10-12 (D. Nev. Nov. 18, 2016) (rejecting arguments that counterclaims

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were time-barred by Rule 16 and that Rule 15 required the defendants to first seek leave); *Poly-Med, Inc.*, No. 8:15-cv-01964-JMC, 2017 U.S. Dist. LEXIS 103991, at *3-7 (denying a motion to strike amended counterclaims that were "proportional to the changes in the amended complaint" even though the amended counterclaims were filed after the deadline to amend pleadings had passed); *Spellbound Dev. Grp., Inc. v. Pac. Handy Cutter, Inc.*, No. SACV-09-951-DOC-(Anx), 2011 U.S. Dist. LEXIS 54597, at *4 (C.D. Cal. May 12, 2011) (rejecting argument that amended counterclaims were untimely because the deadline to amend had passed).

Here, in filing the Amended Counterclaims, the Development Entities were not, in the first instance, seeking to modify the scheduling order pursuant to NRCP 16(b) or seeking leave to file amended counterclaims under NRCP 15(a). Rather, the Development Entities were pleading in direct response to Caesars' First Amended Complaint, which drastically increased the scope of the litigation. The distinction is crucial. Because the Development Entities were pleading in direct response to Caesars' First Amended Complaint, they were not required to seek leave of the district court or a modification of the scheduling order before filing their Amended Counterclaims. As a result,

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neither NRCP 15(a) nor NRCP 16(b) applies. *See, e.g.*, *Sierra Dev. Co.*, No. 13-cv-602-BEN-VPC, 2016 U.S. Dist. LEXIS 160308, at *10-12; *Poly-Med, Inc.*, No. 8:15-cv-01964-JMC, 2017 U.S. Dist. LEXIS 103991, at *3-7.

Because NRCP 15(a) and NRCP 16(b) do not apply, Caesars' reliance on these rules and related case law is inapposite. Similarly, Caesars' reliance on the district court's prior findings concerning certain of the Development Entities' previous efforts to seek leave to amend their initial counterclaims, and the district court's finding that Caesars had demonstrated good cause to file its First Amended Complaint, have no bearing on this Petition. Either the Development Entities did, or did not, have the right to assert their Amended Counterclaims in direct response to the First Amended Complaint without first seeking leave of court. Stated differently, once Caesars sought and obtained leave to amend, whether the Development Entities could have sought (or had previously sought) leave to file their Amended Counterclaims and to amend the scheduling order, is of no consequence—they were not required to do so.

Indeed, as noted in the Petition, Caesars previously argued (successfully) in an unrelated case in the United States District Court, District of Nevada, that Rules 15 and 16 do not apply to counterclaims that are asserted, without leave

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of court, in direct response to an amended complaint after the deadline to amend has expired. (*See* 6 PA 77, at 1301.) In fact, in that same case, *Sierra Development Co.*,[6] Caesars' current counsel argued (successfully) that their clients were entitled to assert new counterclaims in direct response to an amended complaint without first seeking leave of court—even though the deadline to amend had passed—noting that the plaintiff had "elected to amend its claims late in the process, which under the law opened the door for the Counterclaims." (*Id.* at 1317.)

Finally, Caesars' contention that the Development Entities could have asserted the Amended Counterclaims previously or filed them in a separate action is immaterial. (*See* Ans. at 9-11, 25.) The Development Entities elected to plead their initial counterclaims as they pled them. By the same token, Caesars also could have asserted the new claims in their First Amended Complaint earlier or through a separate action. Caesars did not. Instead, Caesars choose to plead their initial claims as they pled them, just like the Development Entities. Regardless, just because the Development Entities could have asserted the Amended Counterclaims previously or in a separate

[6] No. 13-cv-602-BEN-VPC, 2016 U.S. Dist. LEXIS 160308, at *10-12.

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action does not make their decision to file the Amended Counterclaims in direct response to the First Amended Complaint improper—they were well within their rights to do so.

In sum, Caesars' arguments concerning NRCP 15(a) and NRCP 16(b) are inapplicable because the Development Entities did not have to seek to modify the scheduling order or obtain leave to file their Amended Counterclaims when pleading in direct response to Caesars' First Amended Complaint.

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D. By Asserting Coercive Claims for Relief for the First Time, the Development Entities were Required to Assert Any Compulsory Counterclaims.

Caesars completely disregards a critical issue that demonstrates the necessity of allowing defendants to add or amend counterclaims as a matter of right in direct response to an amended complaint: The Development Entities, including the TPOV Parties and the Moti Parties (who did not initially assert counterclaims in the litigation), were arguably required to assert all compulsory counterclaims in direct response to the First Amended Complaint based on Caesars' assertion of coercive claims for relief for the first time.

As explained in the Petition, the Development Entities were not required to assert compulsory counterclaims in direct response Caesars' initial Complaint because it only sought declaratory relief. (Pet. at 35-36.) Once Caesars asserted coercive claims for relief against the Development Entities through the First Amended Complaint, the Development Entities were arguably required to assert the Amended Counterclaims as compulsory counterclaims pursuant to NRCP 13(a). *See, e.g.*, *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 600 F.3d 190, 197 (2d Cir. 2010). Accordingly, if the Development Entities are not allowed to assert their Amended Counterclaims as a matter of right, they risk claim preclusion in any future litigation based upon their omission of compulsory counterclaims in this litigation.

This potential outcome is not only prejudicial, but it also demonstrates why equity and fairness dictate that defendants should be allowed to assert new or amended counterclaims in direct response to an amended complaint. Accordingly, this Court should find that the Development Entities were permitted to file their Amended Counterclaims in direct response to Caesars' First Amended Complaint.

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E. The District Court's Alternative Analysis of the Moderate Approach was a De Facto Application of the Narrow Approach.

Caesars argues that even if this Court were to adopt the moderate approach (which it should), the district court has already concluded that the Amended Counterclaims are not appropriate under the moderate approach. (Ans. at 26-28.) This argument ignores that the district court (like Caesars) erroneously considered the Amended Counterclaims under the narrow approach, while incorrectly labeling it the moderate approach.

As explained in the Petition, courts following the moderate approach hold that a defendant may file amended counterclaims in direct response to an amended complaint as a matter of right "when the amended complaint changes the theory or scope of the case," so long as the "the breadth of the changes in the amended [counterclaims] … reflect the breadth of the changes in the amended complaint." *Elite Entm't, Inc. v. Khela Bros. Entm't*, 227 F.R.D. 444, 446 (E.D. Va. 2005). The "breadth requirement is one of proportionality" and does not require the subject matter of the new or amended counterclaims to be related to the same subject matter as the changes in the amended complaint. *See, e.g.*, *Va. Innovation Scis. Inc.*, 11 F. Supp. 3d at 633.

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For example, in *Virginia Sciences, Inc.*, the defendant added a new counterclaim, without seeking leave of court, in direct response to an amended complaint. *Id.* at 628. The plaintiff argued that the new counterclaim (involving inequitable conduct) was improper under the moderate approach because it was "not tied" to the claim that the plaintiff had added to its first amended complaint (involving willful infringement) and, thus, did "not reflect the breadth of changes" in the first amended complaint. *Id.* The court rejected the plaintiff's argument, holding that the "breadth requirement is one of proportionality and [] does not require the changes to the response to be directly tied to the changes in the amended complaint." *Id.* at 633. Because the new counterclaim was proportional to the changes in the amended complaint, the court found that the defendant had properly filed the additional counterclaim without first needing to seek leave of court. *Id.* at 634-35.

Similarly, in *Hydro Engineering, Inc. v. Petter Investments, Inc.*, the plaintiff filed an amended complaint (without leave of court) adding "two new defendants," "six additional claims for relief," and "requests for exemplary or punitive damages." *Id.*, No. 2:11-cv-00139-RJS-EJF, 2013 U.S. Dist. LEXIS 40552, at *4. Applying the moderate approach, the district court found that the

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defendant was not required to seek leave to file amended counterclaims in response to the amended complaint because the amended complaint "expanded the scope and theory of the case." *Id.* at *13-15. !

Here, applying the moderate approach, the question is whether the changes in the Amended Counterclaims are proportional in scope (or less drastic) when compared to the changes in the First Amended Complaint. That analysis does *not* involve analyzing whether the changes in the Amended Counterclaims relate to the same subject matter as the changes in the First Amended Complaint. *See, e.g.*, *Va. Innovation Scis. Inc.*, 11 F. Supp. 3d at 633; *UDAP Indus. v. Bushwacker Backpack & Supply Co.*, No. CV 16-27-BU-JCL, 2017 U.S. Dist. LEXIS 66803, at *6 (D. Mont. May 2, 2017).

Caesars does not contest, and the district court did not find, that the changes in the Amended Counterclaims were disproportionate in scope when compared to the drastic changes made by Caesars in its First Amended Complaint. Through its First Amended Complaint, Caesars vastly increased both the theory and scope of this case by asserting coercive claims for relief, for the first time—***five new claims*** in total—and by ***adding a new party***. In comparison, the Amended Counterclaims are based on the same facts and legal

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theories previously asserted by the Development Entities, whether in their defenses to Caesars' initial Complaint or in their initial counterclaims. In short, the breadth of the changes made by the Development Entities in their Amended Counterclaims is ***minimal*** when compared to the breadth of the changes made by Caesars in its First Amended Complaint. As a result, under the moderate approach, the Development Entities were allowed to assert the Amended Counterclaims as a matter of right, without obtaining leave of court. *See Va. Innovation Scis. Inc.*, 11 F. Supp. 3d at 633; *UDAP Indus.*, No. CV 16-27-BU-JCL, 2017 U.S. Dist. LEXIS 66803, at *6.

Instead of addressing the moderate approach, Caesars advocates for this Court to apply the narrow approach (without saying so directly). (Ans. at 27-28.) Specifically, Caesars argues that the subject matter of the newly asserted claims in its First Amended Complaint is distinct from the subject matter of the Amended Counterclaims. (*See id.*; *see also id.* at 15-16.) That is the narrow approach. *Uniroyal Chem. Co.*, 2005 U.S. Dist. LEXIS 4545, at *4 (indicating that the narrow approach requires the amended counterclaims to be "confined specifically to the amendments to the complaint"). The moderate approach contains no requirement "that a defendant specifically tailor its answer to the

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amended complaint." *UDAP Indus.*, No. CV 16-27-BU-JCL, 2017 U.S. Dist. LEXIS 66803, at *6. "Rather, the court considers whether the defendant's answer affects the scope of the litigation in a manner proportional with the amended complaint." *Id.* (internal quotation marks omitted).

At Caesars' urging, the district court conflated the moderate approach with the narrow approach, finding, in its Order granting the Motion to Strike, that the changes to the Amended Counterclaims "relate to Caesars' termination of the Development Agreements," while the changes to the First Amended Complaint involve "an alleged kick-back scheme." (7 PA 84, at 1490.) The district court (erroneously) believed that the subject matter of the changes in the Amended Counterclaims had to relate to the subject matter of the changes in the First Amended Complaint.[7] But again, that is the narrow approach, not the moderate approach; the moderate approach does not require the changes in the amended counterclaims to relate to the same subject matter as the changes

[7] The district court likewise considered the subject matter of the changes to the Amended Counterclaims relative to the subject matter of the changes to First Amended Complaint (*i.e.*, the narrow approach) when denying the Development Entities' motion to stay, stating: "[T]he amended counterclaims the Development Entities filed on or about June 19, 2020 bear no relation to the new claims brought by Caesars in its First Amended Complaint which pertained to an alleged kickback scheme." (*See* Doc. 2021-07200, Pets.' Mot. for a Partial Stay of District Court Proceedings, filed Mar. 11, 2021, at Ex. 3.)

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702.562.8820

in the amended complaint. *Va. Innovation Scis. Inc.*, 11 F. Supp. 3d at 633. As Caesars' current counsel aptly stated in *Sierra Development Co.* when facing a similar attempt by the plaintiff to conflate the narrow approach with the moderate approach: "[Plaintiff] claims that it is relying on the moderate approach, ***but it is plainly attempting to have this Court employ the narrow approach***, something which few courts do." (*Id.* (emphasis added).)

In sum, this Court should reject Caesars' efforts (which were successful below) to employ the narrow approach while calling it the moderate approach.

F. The Amended Counterclaims Require Only Minimal Additional Discovery.

Caesars argues that the Amended Counterclaims will require substantial additional discovery. (Ans. at 27-28.) Even if true, this is not a basis to deny the Development Entities their right to assert the Amended Counterclaims, without leave of court, in direct response to the First Amended Complaint under the moderate approach.

In reality, the Amended Counterclaims will require minimal additional discovery because they concern the same subject on which the parties have been conducting discovery for years: issues surrounding Caesars' termination

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of the Development Agreements. The only additional discovery necessary is basic and involves readily available financial data for the two additional restaurants addressed in the Amended Counterclaims.

Especially considering that the new claims asserted by Caesars in its First Amended Complaint required an arduous amount of new discovery, Caesars should not be heard to complain of the minimal additional discovery needed as a result of the Amended Counterclaims.

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III. CONCLUSION

For the reasons set forth in the Petition and above, the Development Entities respectfully request that this Court issue a writ of mandamus directing the district court (i) to vacate the Order and (ii) to enter an order denying the Motion to Strike in its entirety.

DATED this 11th day of May, 2021.

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

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8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

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 21(a)(5).

I hereby declare under penalty of perjury under the laws of the State of Nevada that the facts relevant to this Reply in Support of Petition for Extraordinary Writ Relief 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. PHWLV, LLC*, No. A-17-751759-B, consolidated with No. A-17-760537-B, pending in Department XVI of the Eighth Judicial District Court, Clark County, Nevada.

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

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8984 SPANISH RIDGE AVENUE
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702.562.8820

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

EXECUTED on this 11th day of May, 2021.

/s/ John R. Bailey
JOHN R. BAILEY

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

NRAP 28.2 CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply in Support of Petition for Extraordinary Writ Relief 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 Reply has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in Times New Roman font 14 and contains 5,664 words (excluding the Cover Page, Table of Contents, Table of Authorities, Verification, this Certificate of Compliance, and the Certificate of Service).

I further certify that I have read this Reply, 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 Reply complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Reply 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.

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

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 11th day of May, 2021.

/s/ John R. Bailey
JOHN R. BAILEY

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
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702.562.8820

CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 11th day of May, 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 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: DC16Inbox@clarkcountycourts.us Dept16lc@clarkcountycourts.us Dept16ea@clarkcountycourt.us *Respondents*

/s/ Sharon Murnane
Employee of BAILEY❖KENNEDY

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820