

IN THE SUPREME COURT OF THE STATE OF NEVADA

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*Supreme Court Case No. 83723*

ROWEN SEIBEL; MOTI PARTNERS, LLC; MOTI PARTNERS ENTERPRISES, LLC; LLTQ ENTERPRISES 16, LLC; TPOV ENTERPRISES, LLC; TPOV ENTERPRISES 16, LLC; FERG, LLC; FERG LLC SQUARED GLOBAL SOLUTIONS, LLC, DERIVATIVELY ON BEHALF OF DNT ACQUISITION LLC; GR BURGR, LLC; AND CRAIG GREEN,

*Petitioners,*

v.

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

*Respondents,*

and

DESERT PALACE, INC.; PARIS LAS VEGAS OPERATING COMPANY, LLC;  
PHWLTV, LLC; and BOARDWALK REGENCY CORPORATION d/b/a/  
CAESARS ATLANTIC CITY,

*Real Parties in Interest.*

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**REAL PARTIES IN INTEREST'S RESPONSE TO PETITIONERS'  
MOTION TO SUBMIT PRIVILEGED DOCUMENTS UNDER SEAL FOR  
AN *IN CAMERA* REVIEW BY THIS COURT**

**AND COUNTERMOTION TO STRIKE FOOTNOTE 2 AND PAGES 20  
TO 22 OF PETITIONERS' REPLY BRIEF**

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## I. INTRODUCTION

Petitioners seek extraordinary writ relief to halt the court-ordered production of non-privileged documents the district court found – after conducting an *in camera* review – were related to or in furtherance of a crime or fraud. Petitioners, however, did not include the *in camera* review materials in their appendix or move to include the documents under seal in the record on appeal. Petitioners' omission of the *in camera* review documents was not accidental or thoughtless – it was intentional and calculated. The Petition openly proclaims, "this Court need not review the communications to determine that the district court's order is overbroad." (Pet. 29.) By intentionally refusing to provide the documents, Petitioners sought to hide from this Court's eyes the same evidence of their crime-fraud that the district court observed first-hand.

In its Answer to the Petition, Caesars highlighted Petitioners' failure to provide a complete appellate record and argued their failure should result in affirmance.<sup>1</sup> Petitioners' belated Motion to Submit Privileged Documents under Seal for an *in camera* Review is a confession that Caesars is correct: Petitioners failed to provide this Court with an adequate appellate record. As a result, Petitioners implicitly admit the Court should grant Caesars' request to affirm.

Parties must provide this Court with *in camera* review materials when they contend the district court erred, particularly in cases like this where no one

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<sup>1</sup> (Ans. 3-4, 27-28.) All Real Parties in Interest are referred to as "Caesars."

accuses the lower court of applying the wrong legal standard. Now, Petitioners concede "[t]he Privileged Documents are relevant to this Court's determination of the issues presented in the Petition...." (Mot. 7.) But Petitioners must live with their strategic decision to exclude the documents from the appellate record.

Petitioners' Motion also violates another fundamental tenant of appellate practice. Petitioners seek to raise new arguments in their Reply Brief. Petitioners reverse their prior position and assert for the first time that this Court should review the purportedly privileged documents *in camera*. Petitioners cannot advance new reasons for writ relief in reply. Therefore, the Court should deny the Motion, strike footnote 2 and pages 20 to 22 of the Reply, and ultimately affirm the district court's orders without reassigning the case.<sup>2</sup>

## **II. STATEMENT OF FACTS**

As gaming licensees, Caesars and its affiliates must avoid relationships with unsuitable individuals. Unbeknownst to Caesars, Petitioner Rowen Seibel and his affiliated entities were unsuitable when they entered contracts to develop certain restaurants at Caesars' properties. Caesars eventually learned that Seibel was cheating on his taxes through a foreign bank account and a sham Panamanian company. (6SA988-1002.) The United States government prosecuted Seibel and he served prison time for one count of a corrupt endeavor to obstruct and impede

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<sup>2</sup> Subject to its prior positions, Caesars does not oppose Petitioners' Motion to Redact Reply in Support of Petition. (*See* Ans. 29-30.)

the due administration of the Internal Revenue Laws, a felony. (7SA1097-1100.)

Seibel never told Caesars about his criminal problems. Instead, Seibel and his lawyers worked behind the scenes to create a shell structure to allow Seibel to profit from his relationship with Caesars despite his unsuitability. (7PA1426-31; 7PA1370; 7PA1375.) Ten days before pleading guilty, Seibel suddenly informed Caesars that he was (i) transferring his membership interests under the contracts to a new trust; (ii) naming other individuals as the managers of his entities; (iii) assigning the contracts to new entities; and (iv) delegating his duties under the contracts to someone else. (14PA2754-61.) Seibel deliberately mislead Caesars into believing he would no longer financially benefit or participate.

On paper, the trust superficially contains restrictions on distributions or transfers to "Unsuitable Persons." (14PA2733.) Seibel told Caesars [REDACTED]

[REDACTED]

[REDACTED] (14PA2754.) He stated: [REDACTED]

[REDACTED]

[REDACTED] (*Id.*)

In discovery, Caesars unraveled the scheme when Seibel finally produced a prenuptial agreement with Dorfman. Contrary to Seibel's statements to Caesars,

[REDACTED]

[REDACTED]

[REDACTED] (7PA1392-1420.) Dorfman had an obligation to

[REDACTED] (7PA1398.) By [REDACTED]

[REDACTED], Seibel used the prenuptial agreement to avoid the trust's transfer restrictions and conceal his ongoing interests. (16PA3211-13.)

Seibel produced an extensive privilege log showing his lawyers' involvement with the shell structure. More than 100 entries appeared related to the prenuptial agreement or the trust. (7PA1434-1503.) In January 2021, Caesars moved to compel certain documents on the privilege log that appeared related to, and in furtherance of, Seibel's efforts to use the trust and prenuptial agreement to defraud Caesars in violation of gaming laws and the contracts. (7PA1341-59.)

In its motion, Caesars advocated the Ninth Circuit's two-step framework outlined in *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078 (9th Cir. 2007). (7PA1354-56.) Caesars first asked the district court to conduct an *in camera* review and then, if appropriate, order production. (7PA1355-56.) Seibel's opposition also applied *Napster*. (8PA1596-98.) The district court adopted the Ninth Circuit's framework. (4PA822-26.) The district court then issued a minute order stating "[t]he Court has determined that Caesars has met its initial burden of proof by establishing that Plaintiff Seibel's representations as to the independence

of the Seibel Family 2016 Trust were unfounded, and Plaintiff Seibel could continue to benefit from the agreements despite unsuitability to conduct business with a gaming licensee." (4PA904.) The district court stated it would conduct the second step *in camera* review "to determine the attorney-client communications for which production is sought are sufficiently related to and were made in furtherance of intended or continued illegality." (4PA904-05.) After its *in camera* review, the district court granted Caesars' motion to compel and this writ proceeding ensued. (17PA3481.)

Petitioners did not move this Court to include the *in camera* review materials under seal in the original record on appeal. In fact, Petitioners affirmatively asserted that they had no obligation to provide the documents for this Court's review. On page 29 of the Petition, Petitioners argued that "this Court need not review the communications to determine that the district court's order is overbroad." (Pet. 29.)

Caesars' Answer to the Petition demonstrated that Petitioners were required to provide the documents to this Court so it can evaluate whether the district court abused its discretion. (Ans. 27-28.) In their Reply, Petitioners do not dispute Caesars' authority and have now belatedly acquiesced. (Reply to Pet. 20-22.) They seek to finally include the allegedly privileged documents in the record and urge the Court to conduct an appellate *in camera* review. But Petitioners cannot request

an appellate *in camera* review for the first time in reply.

### III. ARGUMENT

#### A. Petitioners' Record is Inadequate and the Court Should Affirm.

Nevada Rule of Appellate Procedure 21(a)(4) demands that the appendix include "any other original document that may be essential to understand the matters set forth in the petition." "[T]his court has made it clear that [petitioners] are responsible for making an adequate appellate record." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007). The Court will not consider matters not properly provided in the record and will presume missing material supports the district court's ruling. *Id.*, 172 P.3d at 135.

These general appellate practice principles apply when lower courts conduct an *in camera* review. For instance, in *Cascade Builders Corp. v. Rugar*, -- N.E.3d ---, 2021 IL App (1st) 192410 (Ill. App. Ct. Feb. 5, 2021), the court affirmed because the appellant failed to provide an adequate record of the trial court's *in camera* review. A party moved to quash a subpoena based on, in part, the attorney-client privilege and work product. *Id.* at \*2. The district court reviewed the documents *in camera* and the aggrieved party appealed. *Id.* The appellant did not include the undisclosed documents in the appellate record and the court affirmed. *Id.* at \*6. The court explained that the appellant had a duty to provide a sufficient record and, without a complete record, the court presumes that the lower court ruling conformed to the law with a sufficient factual basis. *Id.* at

\*6. "Where such privileged documents are not provided to the appellate court for review, we must affirm...." *Id.*

Other courts have held similarly. *See, e.g., United States v. Dweck*, 913 F.2d 365, 372 (7th Cir. 1990) (party "lacks any basis in the record to support such a claim [because he] chose not to include the material examined by the district judge *in camera* as part of the record on appeal."); *Bray v. Swisher*, 2017 WL 1650131, at \*\*3798 S.E.2d 816 (N.C. App. 2017) ("the appellate record does not contain a copy of the unredacted notes that the trial court reviewed *in camera* ... which prevents us from reviewing the trial court's finding.").

As Caesars pointed out in its Answer to the Petition, (Ans. 28), and Petitioners now acknowledge, this Court will conduct an *in camera* review of privileged material. (Mot. 5 (citing *Las Vegas Police Protective Ass'n Metro, Inc. v. Eighth Jud. Dist. Ct.*, 122 Nev. 230, 235 n.5, 130 P.3d 182, 187 n.5 (2006); *Canarelli v. Eighth Jud. Dist. Ct.*, 136 Nev. 247, 253, 464 P.3d 114, 120 (2020))).

Yet despite this Court's practice, Petitioners consciously chose not to include the *in camera* review materials in the record and made no effort to defend the individual documents in their briefing. Petitioners asserted that "this Court need not review the communications to determine that the district court's order is overbroad." (Pet. 29.) But "[c]onsideration of those issues requires examination of the documents reviewed *in camera* by the court ... Therefore, plaintiff must suffer



the consequences of submitting an incomplete record to this Court." *Andolina-Stovcsik v. Conesus Lake Nursing Home, LLC*, 105 A.D.3d 1377, 1378, 963 N.Y.S.2d 889 (2013) (quotations omitted).

**B. Petitioners Cannot Supplement the Record or Raise New Arguments in Reply.**

Petitioners' Reply and Motion improperly present new arguments. "[T]he Nevada Rules of Appellate Procedure do not allow litigants to raise new issues for the first time in a reply brief." *LaChance v. State*, 130 Nev. 263, 277 n.7, 321 P.3d 919, 929 n.7 (2014). This Court will not consider arguments that could – and should – have been presented in an initial brief. *See id.*

After initially avoiding this Court's *in camera* review, Petitioners' Reply and Motion attempt an about-face. Footnote 2 and pages 20 to 22 of the Reply argue for the first time that "[t]his Court may review the privileged documents, *in camera*" (Reply 20), "to assess (i) whether Caesars meets its burden under the second step of the crime-fraud analysis and (ii) if the district court erred in requiring a blanket production of all 185 emails." (*Id.* at 22.) The Motion finally agrees with Caesars that "[t]he Privileged Documents are relevant to this Court's determination of the issues presented in the Petition" (Mot. 7) and "[b]ecause the district court reviewed the Privileged Documents *in camera*..., this Court should have the ability to do so as well." (*Id.* at 1.)

But Petitioners cannot argue for an appellate *in camera* review in their

Reply after expressly disclaiming the need for such review in their Petition. Petitioners' late flip-flop raises an impermissible new argument for the requested writ, and allowing it at this stage is prejudicial to Caesars. The North Carolina Court of Appeals decision in *Friday Investments, LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, 788 S.E.2d 170, 173 (N.C. App. 2016) is an example. There, after an *in camera* review, the trial court ordered the production of allegedly privileged documents. Defendants appealed but did not include the material in the record. Instead, like Petitioners, "Defendants submitted a 'Motion to Submit Documents Under Seal' to this Court to examine the documents reviewed *in camera*" several days after the Plaintiff filed its brief. *Id.* at 175.

The appellate court denied the motion as "improper, untimely, and unfairly prejudicial." *Id.* It reasoned that "[t]o allow these documents to enter the record after briefing would be unfairly prejudicial to Plaintiff because such a significant amendment of the record would likely require both parties to re-brief the case to address legal issues not previously raised." *Id.* The court would have to consider anew "whether the trial court erred in its *in camera* review and whether the documents, based on this Court's *in camera* review, were subject to attorney-client privilege" under the relevant factors. *Id.*

Caesars will suffer the same prejudice here. Permitting the untimely documents and the new arguments will likely require additional briefing and delay

these proceedings. Petitioners try to minimize the disruption by noting they "do not address the substance of the Privileged Documents in their Petition or Reply ... in order to preserve the privilege and avoid a potential waiver." (Mot. 4) But Petitioners should have and, indeed, were required to address each document at a high level of generality to defend their privilege assertions while protecting the specific contents. *See Canarelli*, 136 Nev. at 252, 464 P.3d at 120 ("The party asserting the privilege has the burden to prove that the material is in fact privileged."). Afterall, Petitioners fault the district court for failing to "address *each of the emails at issue* in finding the crime-fraud exception applied..." (Reply 20; *see also id.* at 21.) In any event, Petitioners cannot argue for this Court's *in camera* review for the first time in reply or belatedly include the allegedly privileged documents in the record.

#### IV. CONCLUSION

For these reasons, Caesars respectfully requests that the Court deny Petitioners' Motion and strike footnote 2 and pages 20 to 22 of the Reply.

DATED this 9th day of March 2021.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC and, pursuant to NRAP 25(b) and NEFR 9, that on this 9th day of March 2022, I electronically filed and served the foregoing **REAL PARTIES IN INTEREST'S RESPONSE TO PETITIONERS' MOTION TO SUBMIT PRIVILEGED DOCUMENTS UNDER SEAL FOR AN *IN CAMERA* REVIEW BY THIS COURT AND COUNTERMOTION TO STRIKE FOOTNOTE 2 AND PAGES 20 TO 22 OF PETITIONERS' REPLY BRIEF** properly addressed to the following:

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