

**CASE NO. 83723**

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IN THE SUPREME COURT OF NEVADA

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

*Petitioners,*

vs.

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

*Respondents,*

-and-

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

*Real Parties in Interest.*

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District Court Case No. A-17-751759-B, consolidated with A-17-760537-B

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**PETITIONERS' REPLY IN SUPPORT OF THEIR MOTION TO SUBMIT PRIVILEGED  
DOCUMENTS UNDER SEAL FOR AN *IN CAMERA* REVIEW BY THIS COURT;**

**AND**

**OPPOSITION TO REAL PARTIES IN INTEREST'S COUNTERMOTION TO STRIKE  
FOOTNOTE 2 AND PAGES 20 TO 22 OF PETITIONERS' REPLY BRIEF**

JOHN R. BAILEY  
Nevada Bar No. 0137

DENNIS L. KENNEDY  
Nevada Bar No. 1462

JOSHUA P. GILMORE  
Nevada Bar No. 11576

PAUL C. WILLIAMS  
Nevada Bar No. 12524

**BAILEY ♦ KENNEDY**  
8984 Spanish Ridge Avenue  
Las Vegas, Nevada 89148-1302  
Telephone: (702) 562-8820  
Facsimile: (702) 562-8821  
jbailey@baileykennedy.com  
dkennedy@baileykennedy.com  
jgilmore@baileykennedy.com  
pwilliams@baileykennedy.com

*Attorneys for Petitioners*

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

Caesars<sup>1</sup> seeks to prevent this Court from having a complete record related to the Motion to Compel so that it may argue that this Court should affirm the district court's order granting the Motion to Compel on the basis of an incomplete record. Caesars' argument is both self-serving and misleading, because the Privileged Documents are only relevant to the second step of the crime-fraud analysis. As set forth in the Petition, the district court erred by finding that Caesars met its initial burden of proof under the first step of the crime-fraud analysis—a decision that this Court reviews without regard for the Privileged Documents.

Initially, Caesars claims that it is too late for the Development Parties to submit the Privileged Documents for an *in camera* review by this Court. The Nevada Rules of Appellate Procedure do not set a date certain by which documents must be submitted for an *in camera* review in connection with a writ petition challenging a discovery order compelling the disclosure of such documents. In fact, NRAP 30(b)(5) states that additional documents may be included for the first time in an appendix filed with a reply in support of a writ petition.

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<sup>1</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion to Submit Privileged Documents Under Seal for an *In Camera* Review By this Court, filed February 16, 2022 (the "Motion").

Next, Caesars claims that it will be prejudiced if the Privileged Documents are made a part of the record for the Petition. Not true. Caesars would not have had the opportunity to review the Privileged Documents in preparing its Answer to the Petition, had this Motion been filed earlier. In other words, when the Privileged Documents are provided to this Court for an *in camera* review is irrelevant from Caesars' perspective—Caesars does not get to see them regardless of when they are submitted.

Finally, Caesars claims that the Development Parties have raised a new argument for the first time in the Reply to their Petition. That is false. The Development Parties argued in their Petition that the district court abused its discretion by finding that *all* of the Privileged Documents are discoverable under the crime-fraud exception to the attorney-client privilege. Submitting the Privileged Documents for an *in camera* review will allow this Court to confirm that the district court abused its discretion and clearly erred by compelling the Development Parties to disclose the Privileged Documents to Caesars.

For these reasons, as discussed further below, this Court should grant the Motion and deny the Countermotion.<sup>2</sup>

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<sup>2</sup> Although a reply to a response to a motion “shall not exceed 5 pages,” a “response to a motion shall not exceed 10 pages.” NRAP 27(d)(2). Because this brief is both a reply and a response, it is 10 pages in length.

## II. ARGUMENT

### A. The Nevada Rules of Appellate Procedure Expressly Permit the Filing of Additional Documents with a Reply Brief.

Caesars argues that the Development Parties had to file this Motion when they filed their Petition. (Opp.<sup>3</sup> at 1-2, 6-8.) Caesars fails to cite Nevada law indicating *when* a party has to move to include in the record with a writ petition any privileged documents that were reviewed, *in camera*, by the district court. The Nevada Rules of Appellate Procedure do not provide that the record is closed once the writ petition is filed or as soon as the real party in interest files its answer. To the contrary, the rules expressly contemplate that additional documents may be added to the record when the petitioner files a reply in support of its writ petition.

NRAP 21(a)(4) states that a petition for a writ of mandamus or prohibition shall be accompanied by “an appendix that complies with Rule 30.” *NRAP 30(b)(5) states—in no uncertain terms—that an appellant “may file an appendix to the reply brief which shall include only those documents necessary to reply to respondent’s position on appeal.”* (Emphasis added.) Caesars’ argument, if accepted as true, would nullify NRAP 30(b)(5)—likely why Caesars did not cite or attempt to distinguish NRAP 30(b)(5) in its Opposition.

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<sup>3</sup> “Opp.” refers to Caesars’ Response to the Motion & Countermotion to Strike, filed March 9, 2022.

In *Cuzze v. University & Community College System of Nevada*, 123 Nev. 598, 172 P.3d 131 (2007), this Court noted that the appellant had omitted from the record on appeal its opposition to the respondent's summary judgment motion. *Id.* at 603-04, 172 P.3d at 135. This Court stated that appellants "failed to take any steps to supplement their appendix with the missing documents" after the issue was raised by the respondents in their answering brief. *Id.* As a result, this Court presumed that the missing opposition failed to raise genuine issues of fact warranting reversal of the summary judgment order.<sup>4</sup> *Id.*

Here, the Development Parties filed this Motion with the Reply to their Petition. Nothing says that the Development Parties could not do so or had to file their Motion sooner.

Unable to find Nevada law to support its argument, Caesars cites cases from other jurisdictions, which are notably subject to different rules. (*See Opp.* at 6-8.) Regardless, none of those cases provides that the record on appeal is closed once a petitioner files a writ petition or after the real party in interest files its answer.

Caesars likewise finds no support for its argument in *In Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, 788 S.E.2d 170 (N.C. Ct. App. 2016).

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<sup>4</sup> The same material distinction occurred in *Andolina-Stovcsik v. Conesus Lake Nursing Home, LLC*, 963 N.Y.S.2d 889 (N.Y. App. Div. 2013), a case cited favorably by Caesars. *See id.* at 889 (noting that "plaintiff did not otherwise seek to submit [privileged documents] to this Court for in camera review").

(*See* Opp. at 9.) There, the appellate court noted that under the North Carolina Rules of Appellate Procedure, the record may be amended “at any time *prior* to the filing of the opposing party’s responsive brief.” *Id.* at 175 (emphasis added).

Unlike North Carolina’s rules, the Nevada Rules of Appellate Procedure contain no such restriction. Instead, NRAP 30(b)(5) *expressly* permits the filing of an appendix with additional documents *after* the filing of a respondent’s answering brief.

In sum, Caesars’ timing argument is contrary to Nevada law. Because the Development Parties timely moved to include the Privileged Documents in the record, this Motion should be granted in its entirety. *See* NRAP 30(b)(5).

**B. The Privileged Documents Only Matter During the Second Step of the Crime-Fraud Analysis.**

Caesars argues that if this Court denies this Motion, it should automatically affirm the district court’s order compelling the Development Parties to disclose the Privileged Documents to Caesars, without review of the merits of the Petition. (Opp. at 1-2.) Caesars’ argument is legally unsound and based on a gross misrepresentation of the argument made by Caesars in its Motion to Compel.

According to Caesars, when moving to compel the Development Parties to produce the Privileged Documents, it “first asked the district court to conduct an *in camera* review and then, if appropriate, order production.” (*Id.* at 4.) That is untrue and Caesars knows that it is untrue.

As discussed in the Reply to the Petition, Caesars did not argue below that it only needed to make a *prima facie* showing of fraud in order to meet its initial burden of proof under the first step of the crime-fraud analysis.<sup>5</sup> (Reply to Pet. at 6-7; *see generally* 7 PA 1341-59.) Rather, Caesars argued that the evidence was sufficient to compel an outright disclosure of the Privileged Documents. (7 PA 1356-58.) In ruling on the Motion to Compel, the district court found that the Privileged Documents were discoverable under the crime-fraud exception before conducting an *in camera* review. (*See* 5 PA 977.)

Through their Petition, the Development Parties argued that the district court erred under the first step of the crime-fraud analysis. (Pet. at 3, 19-27.) This Court will not reach the second step if it finds that Caesars did not meet its initial burden under the first step. *See, e.g., Rock River Commc'ns, Inc. v. Universal Music Grp., Inc.*, 745 F.3d 343, 353 (9th Cir. 2014) (finding that the district court did not need to conduct an *in camera* review of privileged documents where the moving party did not meet its initial burden under the crime-fraud exception). Indeed, Caesars does not dispute that an *in camera* review is only relevant during the second step. (Ans. to Pet. at 20; *see* 7 PA 1355-56.)

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<sup>5</sup> Caesars changed its tune in response to the Petition, once it realized that it did not meet its burden of proof under the first step of the crime-fraud analysis.



In effect, Caesars seeks to conflate the first and second steps of the crime-fraud analysis, arguing that if this Court does not review the Privileged Documents as part of the second step, it must affirm the district court's findings under the first step. Because the first step is separate from the second step, this Court should reject Caesars' attempt to end-run this Court's review of the Petition on the merits. *See, e.g., In re Grand Jury Investigation*, 810 F.3d 1110, 1113 (9th Cir. 2016) (distinguishing between the first and second steps of the crime-fraud analysis).

**C. No Prejudice Arises from Granting this Motion.**

Caesars argues that it will suffer prejudice if this Motion is granted, because it will “likely require additional briefing and delay these proceedings.” (Opp. at 9-10.) Not true.

Through their Motion, the Development Parties seek an Order from this Court permitting them to submit the Privileged Documents, under seal, for an *in camera* review, should this Court reach the second step of the crime-fraud analysis. (Mot. at 2, 4.) The Development Parties do not also seek leave to file an additional brief. Thus, Caesars will not need to file another brief. Stated differently, had this Motion been filed earlier, Caesars would not have been in any different position when filing its Answer to the Petition, because the Development Parties did not argue—either in the Petition or in the Reply to their Petition—the contents of the Privileged Documents.

In sum, no prejudice will befall Caesars if this Motion is granted—the Privileged Documents will simply be made available to this Court for an *in camera* review, should it reach the second step of the crime-fraud analysis.

**D. The Development Parties Are Not Presenting a New Argument Related to the Privileged Documents.**

Caesars argues that by seeking to submit the Privileged Documents for an *in camera* review, the Development Parties are making a new argument for the first time in the Reply to their Petition. (Opp. at 1, 8-10.) Nonsense.

The Development Parties argued in their Petition that the district court erred in its handling of the second step of the crime-fraud analysis. (Pet. at 4, 28-29.) They explained how the district court abused its discretion by finding that *all* of the Privileged Documents were supposedly made in furtherance of an alleged fraud, both before and after conducting an *in camera* review of the Privileged Documents. (*Id.* at 28; *see also id.* at 29 (“To the extent any of the communications relate to [child and spousal support], they would not be ‘in furtherance of’ any alleged fraud.”).) The Development Parties’ request for an *in camera* review of the Privileged Documents is in furtherance of that argument.

Moreover, the Development Parties had the right to respond to Caesars’ argument in its Answer to the Petition that this Court needs to review the Privileged Documents as part of analyzing the second step of the crime-fraud analysis, by indicating that the Privileged Documents would be made available to

this Court for an *in camera* review. (Reply to Pet. at 21-22.) The precise purpose of a reply brief is to respond to arguments raised in an answering brief. NRAP 28(c). The Development Parties did just that.

For these reasons, this Court should find that the Development Parties appropriately filed this Motion in response to Caesars' Answer to the Petition.

**E. This Court Should Deny the Countermotion.**

Along with its Opposition to the Motion, Caesars filed a Countermotion<sup>6</sup> to Strike those portions of the Reply to the Petition that reference the filing of this Motion. (Opp. at 8-10.) The Countermotion serves no purpose other than to permit Caesars to have the last word. As noted above, the Development Parties did not argue the substance of the Privileged Documents in their initial Petition or in the Reply to their Petition in order to preserve the attorney-client privilege and avoid a possible waiver. If this Motion is denied, this Court will decide the issues presented by the Petition, including whether Caesars met its initial burden of proof under the first step of the crime-fraud analysis, without also conducting an *in camera* review of the Privileged Documents.

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<sup>6</sup> The Nevada Rules of Appellate Procedure do not address the filing of a countermotion in response to a motion. *See generally* NRAP 27.

Regardless, because this Motion should be granted (for the reasons stated above), there is no basis to strike any portion of the Reply to the Petition.<sup>7</sup>

## II. CONCLUSION

The Development Parties are not too late in filing this Motion. The Nevada Rules of Appellate Procedure permit submitting additional documents with a reply in support of a writ petition, NRAP 30(b)(5), and Caesars will not be prejudiced by the Privileged Documents being made a part of the record before this Court.<sup>8</sup>

For these reasons, this Motion should be granted and the Countermotion should be denied.

DATED this 30<sup>th</sup> day of March, 2022.

BAILEY ♦ KENNEDY

By: /s/ Dennis L. Kennedy

JOHN R. BAILEY

DENNIS L. KENNEDY

JOSHUA P. GILMORE

PAUL C. WILLIAMS

*Attorneys for Petitioners*

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<sup>7</sup> Assuming (*arguendo*) this Motion is denied and the Countermotion is granted, this Court should only strike the following portions of the Reply to the Petition: (i) the first sentence of footnote 2 on page 3; and (ii) the last full paragraph that starts on page 21 and ends on the top of page 22.

<sup>8</sup> If Caesars believes otherwise, then the appropriate outcome is to permit Caesars to file a supplemental Answer to the Petition—not deny the Development Parties an opportunity to show this Court that the district court erred in compelling the disclosure of Seibel’s privileged communications with his counsel.

## **CERTIFICATE OF SERVICE**

I certify that I am an employee of BAILEY ❖ KENNEDY and that on the 30<sup>th</sup> day of March, 2022, service of the foregoing was made by electronic service through the Nevada Supreme Court's electronic filing system, electronic service through the Eighth Judicial District Court's electronic filing system, hand delivery, and/or depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

JAMES J. PISANELLI  
DEBRA L. SPINELLI  
JORDAN T. SMITH  
M. MAGALI MERCERA  
PISANELLI BICE PLLC  
400 South 7<sup>th</sup> Street, Suite 300  
Las Vegas, NV 89101

Email: JJP@pisanellibice.com  
DLS@pisanellibice.com  
JTS@pisanellibice.com  
MMM@pisanellibice.com  
*Attorneys for Real Parties in Interest  
Desert Palace, Inc.; Paris Las Vegas  
Operating Company, LLC; PHWLV,  
LLC; and Boardwalk Regency  
Corporation*

---

HON. TIMOTHY C. WILLIAMS  
DISTRICT JUDGE  
EIGHTH JUDICIAL DISTRICT COURT  
Regional Justice Center  
200 Lewis Avenue  
Las Vegas, NV 89155

Email:  
Dept16lc@clarkcountycourts.us;  
Dept16ea@clarkcountycourt.us

*Respondent*

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/s/ Susan Russo  
Employee of BAILEY ❖ KENNEDY