IN THE SUPREME COURT OF THE STATE OF NEVADA

ROWEN SEIBEL; LLTQ ENTERPRISES, LLC; LLTQ ENTERPRISES 16, LLC; FERG, LLC; FERG 16, LLC; MOTI PARTNERS, LLC; MOTI PARTNERS 16, LLC; TPOV ENTERPRISES, LLC; TPOV 16 ENTERPRISES, LLC; DNT ACQUISITION, LLC, appearing derivatively by one of its two members, R Squared Global Solutions, LLC Petitioners, vs. CLARK COUNTY DISTRICT COURT, THE HONORABLE JOSEPH HARDY, DEPARTMENT 15, Respondent, DESERT PALACE, INC.; PARIS LAS VEGAS OPERATING COMPANY, LLC; PHWLV, LLC; and BOARDWALK REGENCY CORPORATION d/b/a CAESARS ATLANTIC CITY, Real Parties in Interest.	Case Number: Eighth Judicial District Court Case No. A-17-760537-B Dept. 15, Honorable Joseph Hardy **PETITION FOR WRIT OF MANDAMUS OR PROHIBITION**

MCNUTT LAW FIRM
DANIEL R. MCNUTT (SBN 7815)
MATTHEW C. WOLF (SBN 10801)
625 South Eighth Street
Las Vegas, Nevada 89101

CERTILMAN BALIN ADLER & HYMAN
PAUL SWEENEY
Admitted Pro Hac Vice
90 Merrick Avenue
East Meadow, New York 11554

ADELMAN & GETTLEMAN
STEVEN B. CHAIKEN
Admitted Pro Hac Vice
53 West Jackson Boulevard, Suite 1050
Chicago, IL 60604

BARACK FERRAZZANO KIRSCHBAUM & NAGELBERG
NATHAN Q. RUGG
Admitted Pro Hac Vice
200 W. Madison Street, Suite 3900
Chicago, IL 60606

ROUTING STATEMENT

This petition should be retained by the Nevada Supreme Court under NEV. R. APP. P. 17(a)(10) because it raises an issue of first impression under Nevada law – *i.e.*, under what factors and circumstances, if any, may a district court refuse to enforce a valid, mandatory forum selection clause?

DATED June 18, 2018.

MCNUTT LAW FIRM, P.C.

/s/ Dan McNutt
DANIEL R. MCNUTT (SBN 7815)
MATTHEW C. WOLF (SBN 10801)
625 South Eighth Street
Las Vegas, Nevada 89101
Attorneys for Petitioners

RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NEV. R. APP. P. 26.1(a) and must be disclosed. These representations are made so the judges of this court may evaluate possible disqualification or recusal. The Petitioners are (1) FERG 16, LLC and FERG, LLC (collectively, "FERG"); (2) LLTQ ENTERPRISES 16, LLC and LLTQ ENTERPRISES, LLC (collectively, "LLTQ"); (3) MOTI PARTNERS 16, LLC and MOTI PARTNERS, LLC (collectively, "MOTI"); (4) TPOV ENTERPRISES, LLC ("TPOV") and TPOV 16 ENTERPRISES, LLC ("TPOV 16"); (5) DNT ACQUISITION, LLC ("DNT"), appearing derivatively by one of its two members,

R Squared Global Solutions, LLC ("RSG"); and (6) ROWEN SEIBEL, an individual. There are no publicly held companies owning 10% or more of the stock of any Petitioner. TPOV, TPOV 16, LLT Q, and LLTQ 16's parent company is GR Pub/Steak Holdings, a Delaware limited liability company. FERG, FERG 16, MOTI, and MOTI 16 do not have a parent company.

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/s/ Dan McNutt
DANIEL R. MCNUTT (SBN 7815)
MATTHEW C. WOLF (SBN 10801)
625 South Eighth Street
Las Vegas, Nevada 89101
Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this writ petition and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure. I also certify that this brief complies with the formatting requirements of NEV. R. APP. P. 32(a)(4), the typeface requirements of NEV. R. APP. P. 32(a)(5) and the typestyle requirements of NEV. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14-point font. Finally, I certify that this brief complies with all applicable

procedural rules, in particular NEV. R. APP. P. 28(e), which requires every section of the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied is to be found.

DATED June 18, 2018.

MCNUTT LAW FIRM, P.C.

/s/Dan McNutt
DANIEL R. MCNUTT (SBN 7815)
MATTHEW C. WOLF (SBN 10801)
625 South Eighth Street
Las Vegas, Nevada 89101
Attorneys for Petitioners

VERIFICATION

I, Dan McNutt, declare under penalty of perjury of the laws of Nevada that I am one of the attorneys for Petitioners. I have read the foregoing writ petition, and it is true to the best of my personal knowledge, except for those matters stated on information and belief, and as to those matters, I believe them to be true.

DATED June 18, 2018.

MCNUTT LAW FIRM, P.C.

/s/ Dan McNutt
DANIEL R. MCNUTT (SBN 7815)
MATTHEW C. WOLF (SBN 10801)
625 South Eighth Street
Las Vegas, Nevada 89101
Attorneys for Petitioners

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I. INTRODUCTION.

Nevada law requires a district court to dismiss a lawsuit when the parties entered a valid, mandatory forum selection clause granting exclusive jurisdiction to another forum. Nevada law also does not allow a plaintiff to maintain a duplicative lawsuit involving the same parties, facts, and claims as an earlier-filed lawsuit. It also certainly does not allow the plaintiff to pursue the duplicative lawsuit to evade unfavorable rulings in the earlier-filed lawsuit. Here, some of the parties entered a valid, mandatory forum selection clause granting exclusive jurisdiction to New Jersey courts, the parties have been litigating the issues at hand for several years in two different federal courts (*i.e.*, the United States Bankruptcy Court for the Northern District of Illinois in Chicago and the United States District Court for Nevada), and Real Parties in Interest ("Real Parties") instituted this action to evade unfavorable rulings from the federal courts. Despite those facts, the district court denied Petitioners' motions to dismiss. That ruling was clearly erroneous and a manifest abuse of discretion, and Petitioners respectfully request a writ directing the district court to dismiss Real Parties' claims against Petitioners.

II. ISSUES PRESENTED.

1. Whether the district court should have dismissed Real Parties' claims against FERG due to a mandatory forum selection clause requiring the claims to be filed in New Jersey. *See, e.g., LV Car Serv., LLC v. AWG Ambassador, LLC*, 416

P.3d 206, *1 (Nev. 2018) (citing *Am. First Fed. Credit Union v. Soro*, 131 Nev. Adv. Op. 73, 359 P.3d 105, 106 (2015)) ("Whether a forum selection clause applies is a question this court reviews de novo.")

2. Whether the district court abused its discretion in refusing to dismiss the case because the same claims and issues are already being litigated in federal courts and Real Parties are forum shopping. *See, e.g., Alltrade, Inc. v. Uniweld Prod., Inc*., 946 F.2d 622, 625 (9th Cir. 1991) (the first-to-file rule is reviewed for abuse of discretion); *see also Vivendi SA v. T-Mobile USA Inc*., 586 F.3d 689, 695 (9th Cir. 2009) (rulings on forum shopping are reviewed for abuse of discretion).

III. STATEMENT OF FACTS.

A. The Parties Entered Numerous Restaurant Agreements.

This case concerns multiple restaurants Petitioners opened and operated across the United States with entities affiliated with Caesars Entertainment Corporation after entering separate contracts for each restaurant. Many but not all of the restaurants used the name and likeness of celebrity chef Gordon Ramsay, with whom entities affiliated with Caesars Entertainment Corporation entered contracts for the restaurants. The following restaurant-related contracts between Petitioners and Caesars-affiliates are relevant: (1) Desert Palace, Inc. ("Desert Palace") entered an agreement with MOTI for a restaurant called Serendipity (Ex. A to MOTI's Mot. to Dismiss, App. 797-820, the "MOTI Agreement"); (2) Desert Palace entered an

agreement with LLTQ for a restaurant called Gordon Ramsay Pub (Ex. C to LLTQ's Mot. to Dismiss, App. 1454-1489, the "LLTQ Agreement"); (3) Desert Palace entered an agreement with DNT for a restaurant called Old Homestead (Ex. N to DNT's Reply, App. 3256-3302, the "DNT Agreement"); (4) Caesars Atlantic City ("CAC") entered a consulting agreement with FERG (Ex. H to LLTQ's Mot. to Dismiss, App. 1962-2001, the "FERG Agreement"); *and* (5) Paris Las Vegas Operating Company, LLC ("Paris") entered an agreement with TPOV for a restaurant called Gordon Ramsay Steak (Ex. B to TPOV 16's Mot. to Dismiss, App. 706-739, the "TPOV Agreement").[1] Petitioner Rowen Seibel was not a party to the agreements, although he was a direct or indirect principal of the entities that entered the agreements.

B. Caesars Filed Bankruptcy in Illinois in 2015.

In January 2015, Caesars Entertainment Operating Company, Inc. ("CEOC") and a number of its subsidiaries and affiliates filed bankruptcy in Illinois (hereinafter, the "Caesars Bankruptcy"). The restaurant agreements are subject to extensive, ongoing litigation in the Caesars Bankruptcy.

1. *The LLTQ Agreement and the FERG Agreement*.

In June 2015, the debtors filed a motion for an order authorizing them to reject

[1] Of these five restaurant concepts, the Serendipity and Old Homestead restaurants (Nos. 1 and 3) did not involve Mr. Ramsay.

the LLTQ Agreement and the FERG Agreement. (Ex. A to LLTQ's Mot. to Dismiss, App. 1417-1444.) Under section 365 of the Bankruptcy Code, damages from a debtor's breach of contract caused by rejection may be treated as prepetition claims. *See* 11 U.S.C. § 365(g). LLTQ and FERG objected to the debtors' request and argued, *inter alia*, that: (i) the restaurant agreements are integrated with other contracts the debtors entered with Gordon Ramsay and his affiliates; and (ii) the LLTQ Agreement precludes the debtors and Ramsay from operating the restaurants together without LLTQ and FERG. (Ex. B to LLTQ's Mot. to Dismiss, App. 1445-1453.)

In November 2015, LLTQ and FERG asked the bankruptcy court to compel the debtors to pay them under the LLTQ Agreement and the FERG Agreement. (Ex. D to LLTQ's Mot. to Dismiss, App. 1490-1845.) The request was premised on the debtors' ongoing operation of the restaurants. The debtors objected to the request and asked the bankruptcy court to decide it along with their rejection motion. (Ex. E to LLTQ's Mot. to Dismiss, App. 1846-1851.) In January 2016, the debtors moved for an order allowing them to reject their restaurant agreements with Ramsay (which are integrated with the LLTQ Agreement and FERG Agreement) and enter new ones solely with Ramsay. (Ex. F to LLTQ's Mot. to Dismiss, App. 1852-1952.) LLTQ and FERG objected on February 10, 2016. (Ex. G to LLTQ's Mot. to Dismiss, App. 1953-1961.) All of these matters are contested under Bankruptcy

Rule 9014. Discovery for the contested matters remains ongoing.

On August 3, 2016, LLTQ and FERG filed a motion to compel discovery from the debtors concerning the restrictive covenants in the restaurant agreements. (Ex. I to LTTQ's Mot. to Dismiss, App. 2002-2037.) In their opposition, the debtors argued, *inter alia*, that the restrictive covenant in the LLTQ Agreement is unenforceable under Nevada law. (Ex. J to LLTQ's Mot. to Dismiss, App. 2038-2074.) On August 17, 2016, the bankruptcy court held a hearing at which it granted the motion to compel in part and said:

> I don't know that the [debtors'] assertions about the validity of the restrictive covenant under Nevada law are accurate. The cases they cite would not support the proposition that this is invalid. They don't have a case that I saw, at least based on the information in the memorandum, that would support that.

(Ex. K to LLTQ's Mot. to Dismiss, App. 2075-2119, 8:24 – 9:5.)

On October 5, 2016, LLTQ and FERG moved for partial summary judgment before the bankruptcy court on the issues of (a) whether the various restaurant contracts the debtors entered with Petitioners and Ramsay are integrated, and (b) whether the debtors are obligated to make payments to LLTQ and FERG under the LLTQ Agreement and FERG Agreement. (Ex. L to LLTQ's Mot. to Dismiss, App. 2120-2149.) In their opposition, the debtors raised the affirmative defense of fraudulent inducement. (Ex. M to LLTQ's Mot. to Dismiss, App. 2150-2156.) They

claimed that they were fraudulently induced to enter both agreements because Rowen Seibel, LLTQ, and FERG allegedly failed to disclose Seibel's purported unsuitability. (*Id.*)[2] They requested and were granted additional time to conduct discovery concerning suitability, which resulted in the partial summary judgment motion being denied without prejudice. (Ex. M to LLTQ's Mot. to Dismiss, App. 2150-2156, ¶ 9.) The debtors then served discovery on Seibel, LLTQ, and FERG concerning suitability and termination of the underlying agreements, and LLTQ and FERG in turn served their own discovery.

In response to the debtors' suitability discovery, LLTQ and FERG filed a motion for a protective order on April 7, 2017. (Ex. N to LLTQ's Mot. to Dismiss, App. 2160-2183.) In their opposition, the debtors renewed their fraudulent inducement and rescissions defenses and argued that LLTQ and FERG breached the relevant agreements by failing to disclose that they and their affiliates were unsuitable. (Ex. O to LLTQ's Mot. to Dismiss, App. 2184-2204.) They claimed this purported breach excuses them from any further performance under the LLTQ Agreement. (*Id.*)

At the hearing on LLTQ and FERG's protective order motion, the bankruptcy

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[2] In 2016, Seibel pled guilty to one count of obstructing or impeding the due administration of the internal revenue laws under 26 U.S.C. § 7212(a). However, prior to that plea, LLTQ and FERG had assigned their respective Agreements to LLTQ 16 and FERG 16, entities with which Seibel was not associated.

court referred to the debtors' fraud in the inducement and rescission theories as "thin" and "dubious" and said rescission "did not look like a possibility here." (Ex. Q to LLTQ's Mot. to Dismiss, Tr., May 31, 2017, App. 2222-2233, 7:7; 6:23-24 ("I agree that the debtors' legal theories look thin."); 10:3 (calling the debtors' legal theories "dubious").) It denied the motion for protective order simply because it was not prepared at that time to make a dispositive ruling on the debtors' theories in connection with a discovery dispute. (*Id.* 10:3-6 ("Dubious though the debtors' legal theories seem to be – at least based on what I have been given to date – that is not a determination I am comfortable making on a discovery motion.").)

The debtors' reorganization plan was confirmed in January 2017 and became effective in October 2017. (Ex. R to LLTQ's Mot. to Dismiss, App. 2234-2382.) It expressly contemplates that the bankruptcy court will hear and determine all contested matters and related disputes, such as the parties' rejection motions and motion to compel payment. (*Id.*) Article XI of the plan expressly provides that the bankruptcy court "shall retain such jurisdiction over the Chapter 11 Cases and all matters arising out of, or related to, the Chapter 11 Cases and the Plan . . . ." (*Id.*) As will be shown, the claims and legal theories Real Parties are attempting to litigate in the Eighth Judicial District Court are already before the bankruptcy court and are subject to its jurisdiction.

2. *The MOTI Agreement.*

MOTI filed a proof of claim on May 22, 2015, seeking over $700,000 under the MOTI Agreement. (Ex. B to MOTI's Mot. to Dismiss, App. 821-832.) It also filed a request in November 2016 for payment under the MOTI Agreement based on Caesars' ongoing operation of the Serendipity restaurant and use of the materials licensed in the MOTI Agreement after Caesars filed bankruptcy and terminated the agreement. (Ex. C to MOTI's Mot. to Dismiss, App. 833-888.)

Caesars filed a preliminary objection to MOTI's request in December 2016 (Ex. D to MOTI's Mot. to Dismiss, App. 889-936) and a supplemental objection in January 2017 (Ex. E to MOTI's Mot. to Dismiss, App. 937-1086). Therein, Caesars asserted that (a) no payments were due under the MOTI Agreement, and (b) that if it can establish it was fraudulently induced to enter the MOTI Agreement by Seibel, a former principal of MOTI, then it can rescind the agreement and avoid any contractual obligation to pay MOTI. (Ex. D to MOTI's Mot. to Dismiss, App. 889-936 at p. 2, ¶ 5.) At a hearing on June 21, 2017, the bankruptcy court concluded that a genuine issue of material fact exists as to the terms under which the parties conducted business and said an evidentiary hearing would be necessary. (Ex. J to MOTI's Mot. to Dismiss, App. 1189-1221.) Extensive discovery remains on-going in anticipation of an evidentiary hearing.

As set forth above, the debtor's plan of reorganization expressly preserves the

bankruptcy court's jurisdiction to determine the claim and motion filed by MOTI in the bankruptcy case.

3. *The DNT Agreement*.

In spring 2015, three proofs of claims were filed in the Caesars Bankruptcy in relation to the DNT Agreement. Specifically, on April 30, 2015, the Original Homestead Restaurant, Inc. ("OHS"), one of the members of DNT, filed a proof of claim seeking more than $204,964.75 under the DNT Agreement. (Ex. A to DNT's Mot. to Dismiss, App. 276-280.) On May 22, 2015, DNT and R Squared Global Solutions, LLC ("RSG"), the other member of DNT, each filed their own claims. (Ex. B to DNT's Mot. to Dismiss, App. 281-284; *see also* Ex. C to DNT's Mot. to Dismiss, App. 285-288.)

In September 2016, Caesars sent a letter accusing Seibel of being unsuitable and threatening to terminate the DNT Agreement unless DNT and OHS were to disassociate from Seibel. (Ex. G to DNT's Mot. to Dismiss, App. 417-419.) DNT responded and reminded Caesars that following an assignment of his interests in April 2016, Seibel has not had an interest in DNT or OHS. (Ex. H to DNT's Mot. to Dismiss, App. 420-421.)[3] Determined to manufacture a false pretense for

[3] Effective April 13, 2016, Seibel assigned all of his ownership interests in RSG to The Seibel Family 2016 Trust, as permitted under DNT's operating agreement.

terminating the DNT Agreement, Caesars responded by claiming the April 2016 assignment was invalid and declaring the DNT Agreement terminated. (Ex. I to DNT's Mot. to Dismiss, App. 422-424.) In response, RSG, acting on behalf of itself and derivatively on behalf of DNT, filed an administrative claim challenging Caesars' alleged termination of the DNT Agreement. (Ex. D to DNT's Mot. to Dismiss, App. 289-304.)

On January 17, 2017, the bankruptcy court entered an order confirming Caesars' third amended joint plan of reorganization. (Ex. J to DNT's Mot. to Dismiss, App. 425-590.) In relevant part, it defines "Claim" as meaning:

> any claim against the Debtors or the Estates, as defined in section 101(5) of the Bankruptcy Code, including: (a) any right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (b) any right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

(Third Amended Plan at Art. I(A)(75).) It further provides that administrative claims asserted under section 503(b) of the Bankruptcy Code are considered "Claims." (*Id.* Art. I(A)(16).) With regard to objecting to Claims, the plan provides that:

> Subject to Article XII.G hereof, the Reorganized Debtors shall have the authority to: (a) *File objections to Claims*, settle, compromise, withdraw, or litigate to judgment objections to any and all Claims, regardless of whether such claims are in a

> Class or otherwise; (b) settle or compromise any Disputed Claim without any further notice to or action, order, or approval by the Bankruptcy Court; and (c) administer and adjust the Claims Register to reflect any such settlements or compromises without any further notice to or action, order, or approval by the Bankruptcy Court.

(*Id.* Art. VII(A)(2) (emphasis added).) Moreover, it states that "'File,' 'Filed,' or 'Filing'" means "file, filed, or filing with the Bankruptcy Court (including the clerk thereof) in the Chapter 11 Cases . . . ." (*Id.* Art. I(A)(131).) Thus, the plan requires the debtors' objections to claims and administrative expense requests to be filed before the bankruptcy court. It certainly does not contemplate or allow a separate action in Nevada state court.

In addition to the claims resolution process contained in the plan, the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure also set forth procedures for objecting to proofs of claim and administrative expense requests. *See, e.g.*, 11 U.S.C. § 502(b); FED. R. BANKR. P. 3007 ("An objection to the allowance of a claim and a notice of objection that substantially conforms to the appropriate Official Form shall be filed and served at least 30 days before any scheduled hearing on the objection or any deadline for the claimant to request a hearing"); FED. R. BANKR. P. 5005 (The lists, schedules, statements, proofs of claim or interest, complaints, motions, applications, *objections and other papers* required to be filed by these rules . . . shall be filed with the clerk in the district where the

case under the Code is pending") (emphasis added). Accordingly, it is clear that under the plan, all challenges to RSG's administrative claim must be brought before the bankruptcy court.

C. In February 2017, TPOV 16 Sued Paris in Nevada Federal Court.

On February 3, 2017, TPOV 16 sued Paris in Nevada federal court. (Ex. A to TPOV 16's Mot. to Dismiss, App. 682-705, Compl. from Case No. 2:17-cv-00346-JCM-VCF (the "Federal Action" and "Federal Complaint").) The following is a brief summary of the key allegations in the Federal Complaint:

1. TPOV and Paris entered the TPOV Agreement in November 2011. (Federal Compl., ¶ 8.) Simultaneously, Paris entered another agreement with Ramsay for the restaurant. (*Id.* ¶ 9.) TPOV invested $1,000,000 to open the restaurant. (*Id.* ¶¶ 10, 26-27.) The TPOV Agreement contains clear and precise terms dictating how Paris must compensate TPOV. (*Id.* ¶¶ 28-31.)

2. In April 2016, TPOV assigned the TPOV Agreement to TPOV 16, an entity in which Seibel had no equity interest or management rights. (*Id.* ¶¶ 32-38.) Paris acknowledged and ratified the assignment and even made payments to TPOV 16. (*Id.* ¶ 39.)

3. After making payments to TPOV 16, Paris terminated the TPOV Agreement on the incorrect grounds that Seibel allegedly is associated with TPOV 16 and purportedly is an unsuitable person. (*Id.* ¶¶ 14, 40-45.)

4. When it terminated the TPOV Agreement, Paris did not terminate its agreement with Ramsay, as it was obligated to do. (*Id.* ¶¶ 46-50.)

5. In violation of the TPOV Agreement, Paris continues to operate the restaurant with Ramsay. (*Id.* ¶¶ 69-82.)

TPOV 16 is pursuing the following claims and theories against Paris:

1. The assignment from TPOV to TPOV 16 was valid (Federal Compl., ¶¶ 84-88);

2. Paris breached the TPOV Agreement by failing to pay money to TPOV 16 (*Id.* ¶¶ 89(a)-(b));

3. Paris breached the TPOV Agreement by purportedly terminating it based on the alleged unsuitability of Seibel (*Id.* ¶¶ 89(c), (g));

4. Paris breached the TPOV Agreement by continuing to operate the restaurant and do business with Ramsay (*Id.* ¶ 89(d)-(f)); *and*

5. TPOV 16 seeks a judicial declaration that (a) the assignment from TPOV to TPOV 16 was valid, (b) Paris must pay money to TPOV 16, and (c) Paris cannot operate the restaurant without TPOV 16 (*Id.* ¶ 111(a)-(c)).

Paris filed a motion to dismiss TPOV 16's claims, which the Nevada federal court (Hon. James C. Mahan) mostly denied. (Ex. C to TPOV 16's Mot. to Dismiss, July 3, 2017 Order, App. 740-751.) The Nevada federal court refused to dismiss TPOV 16's claims for breach of contract (*Id.* 7:2 – 8:3), breach of the implied

covenant (*Id.* 8:4 – 9:5), and accounting (*Id.* 10:1-18). It concluded the allegations concerning the TPOV-to-TPOV 16 assignment were cognizable. (*Id.* 8:10 – 9:3.) Importantly, it also recognized that if the assignment is valid, then Paris's suitability argument is irrelevant because TPOV 16 is not associated with Seibel. Specifically, it said that "[a]lthough Paris argues its 'determination that Seibel is unsuitable is undisputable as a matter of law', . . . TPOV 16 alleges a valid assignment to TPOV that cured any affiliation with an unsuitable person . . . ." (*Id.* 8:26 – 9:2.)

D. Real Parties Sue Petitioners in Nevada.

Shortly after the bankruptcy court called their theories "thin" and "dubious" and Judge Mahan found TPOV 16's claims cognizable and recognized the lack of relevance to Paris's suitability argument, Real Parties ran to the state courthouse and sued Petitioners (hereinafter, the "State Action" and "State Complaint"). (State Compl., Aug. 24, 2017, App. 1-40.)[4] The State Complaint simply repackages the claims and defenses in the Caesars Bankruptcy and the Federal Action. Therein, Real Parties (1) allege that they are entitled to terminate the restaurant agreements due to the alleged unsuitability of Seibel (State Compl., ¶¶ 1-5, 131-135); (2) seek a judicial declaration that they have no further obligation to pay any money to

[4] In February 2018, the State Action was consolidated with Eighth Judicial District Court case no. A-17-751759-B. (Stip. and Order to Consolidate, App. 250-253.)

Petitioners under the restaurant agreements (*Id.* ¶¶ 7, 136-146); and (3) seek a judicial declaration that they and Ramsay can continue to operate the existing restaurants together without Petitioners (*Id.* ¶¶ 147-156). As previously shown herein, these issues are already being litigated in the federal cases.

In fact, in the Federal Action, Paris asserted the very same claims against TPOV and TPOV 16 that it is now pursuing in the State Action. Specifically, on July 21, 2017 (*i.e.*, one month before it filed the State Complaint), Paris counterclaimed against TPOV and TPOV 16 and requested "a judicial declaration that Paris properly terminated the TPOV Development Agreement." (App. 642-666, ¶ 47.) This is the very same relief Paris seeks in the State Complaint. (State Compl. ¶ 134 ("Caesars therefore seeks a declaration that the Seibel Agreements were properly terminated.").)

In September 2017, MOTI removed the State Action to the Nevada bankruptcy court and then moved to transfer the case to the Illinois bankruptcy court presiding over the Caesars Bankruptcy. (Pet. for Removal, App. 41-119.) The Nevada bankruptcy court denied MOTI's venue motion and remanded the State Action. (ECF No. 68-70 in the Nev. Bankr. Action, App. 201-224.) MOTI has appealed this ruling.

After the State Action was remanded, Petitioners filed five separate motions to dismiss seeking dismissal under the first-to-file rule and due to forum shopping.

(*See, e.g.*, [1] DNT's Mot. to Dismiss, App. 254-272, 11:1 – 17:6; *see also* [2] LLTQ's Mot. to Dismiss, App. 1386-1413, 19:2 – 26:18; [3] MOTI's Mot. to Dismiss, App. 777-793, 13:24 – 16:18; [4] Seibel's Mot. to Dismiss, App. 610-666, 5:1 – 7:16; and [5] TPOV and TPOV 16's Mot. to Dismiss, App. 667-776, 9:14 – 13:27.) FERG also requested dismissal under the forum selection clause in the FERG Agreement. (LLTQ's Mot. to Dismiss, App. 1386-1413, 17:4 – 18:1.) On March 12, 2018, Real Parties filed an omnibus opposition. (Caesars' Opp'n, App. 2383-2405.) Petitioners replied on March 28, 2018. (App. 3247-3481.)

The district court heard oral arguments on May 1, 2018. (Tr., May 1, 2018, App. 3482-3533.) It denied Petitioners' motions without prejudice. (*Id.* 46:8 – 51:14.) It entered an order on June 1, 2018 (the "Denial Order"), and notice of entry was filed on June 4, 2018. (App. 3574-3617.) In the Denial Order, the district court said it was exercising its discretion "not [to] defer to the first-to-file doctrine[.]" (Denial Order 3:1-3.) It said "that comity supports denial of the Motions." (*Id.* 3:23.)

The district court further said it believes that rather than the federal courts, it should decide the issue of suitability-based termination, which is subsumed within count I of the State Complaint. (*Id.* 3:20-22 ("[I]t would be most efficient to resolve the suitability issues in one forum. This is the most comprehensive action in which to make a determination on this key issue.").) The district court did not, however, comment on counts II and III of the State Complaint, which are unrelated to the

issue of unsuitability and are identical to claims already before the federal courts. It also said "that issues related to discovery taken in other actions can be addressed, as appropriate, in the future by this Court." (*Id.* 4:5-6.) With respect to the forum selection clause, it denied FERG's motion because "the parties are already involved in litigation in a forum other than New Jersey, namely the United States Bankruptcy Court in Illinois . . . ." (*Id.* 4:9-11.)

IV. WHY THE PETITION SHOULD BE CONSIDERED.

A writ of mandamus "*shall* be issued" if "there is not a plain, speedy and adequate remedy in the ordinary course of law" and "*may* be issued" to mandate "the performance of an act which the law especially enjoins as a duty" of law. NEV. REV. STAT. §§ 34.170, 34.160 (emphasis added); *see also Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas* ("*Atlantic Marine*"), 571 U.S. 49 (2013) (in *Atlantic Marine*, the federal courts entertained a mandamus writ petition concerning a forum selection clause). A writ of prohibition "arrests the proceedings of any tribunal, corporation, board or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person" and "may be issued" if "there is not a plain, speedy and adequate remedy in the ordinary course of law." NEV. REV. STAT. §§ 34.320, 34.330.

This Court has said a writ of mandamus "is appropriate when the district court manifestly abuses its discretion by improperly refusing to dismiss an action" and a

writ of prohibition "is available when a district court acts without or in excess of its jurisdiction." *Int'l Game Tech., Inc. v. Dist. Ct.*, 122 Nev. 132, 142, 127 P.3d 1088, 1096 (2006). It also has considered a writ petition when (a) the petition raised "important legal issues that are likely to be the subject of extensive litigation" in the district court, (b) there was a risk of "inconsistent rulings" in the district court, and (c) the "avoidance of multiple actions" would conserve resources. *Borger v. Dist. Ct.*, 120 Nev. 1021, 1025–26, 102 P.3d 600, 603 (2004).

This Court should entertain this petition for at least four reasons. ***First***, the district court was absolutely required by the law to dismiss the claims against FERG under the mandatory forum selection clause. ***Second***, it appears the Denial Order raises an issue of first impression. *Int'l Game Tech., Inc*., 122 Nev. at 142, 127 P.3d at 1096 (although "[g]enerally, this court declines to consider writ petitions that challenge district court orders denying motions to dismiss[,]" it "may exercise its discretion to consider" such a petition "when an important issue of law needs clarification and this court's review would serve considerations of public policy or sound judicial economy and administration.") Even though it concluded the forum selection clause applies to Real Parties' claims against FERG, the district court refused to enforce the clause because "the parties are already involved in litigation in" the Caesars Bankruptcy. (Denial Order 4:9-11.) Petitioners are unaware of any Nevada law allowing a district court to disregard a valid, mandatory forum selection

clause because one of the parties (and the party against whom enforcement is sought) filed bankruptcy outside the selected forum.[5]

Furthermore, the district court also refused to enforce the forum selection clause based on the totality of circumstances (and also never expressly identified the circumstances it considered). (Tr., May 1, 2018, 50:20-22 ("[T]he unique and the totality of the circumstances here support denial of the Motion without prejudice as to FERG.").) It appears this Court has not yet addressed what circumstances and factors, if any, a district court may consider in determining whether to dismiss an action under a valid, mandatory forum selection clause.[6] Nevada law is well-settled, however, that an unambiguous contract must be enforced as written. Additionally, in 2013, the United States Supreme Court unanimously held that in determining whether to transfer venue under a valid forum selection clause, the district court cannot consider such circumstances as convenience and "may consider arguments about public-interest factors only." *Atlantic Marine*, 571 U.S. at 64. For these

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[5] In addition to the fact this Court has never addressed whether a forum selection clause is waived when a party files bankruptcy outside the selected forum, there are not any citable Nevada cases addressing the first-to-file rule. For that reason, Petitioners rely herein on Ninth Circuit precedent concerning that rule.

[6] Petitioners are aware of only one case in which this Court has addressed mandatory forum selection clauses, but in that case, it concluded the clause was permissive and therefore did not address what circumstances, if any, a district court may consider in relation to a valid, mandatory forum selection clause. *See Am. First Fed. Credit Union v. Soro*, 131 Nev. Adv. Op. 73, 359 P.3d 105 (2015).

reasons, this Court should hold that a district court cannot refuse to enforce a valid, mandatory forum selection clause based on the totality of circumstances.

Third, under NEV. R. APP. P. 3A(b), Petitioners do not have the right to appeal the Denial Order at this time. Although Petitioners could appeal following entrance of final judgment, that remedy would not be "speedy" because the State Action likely will take years to litigate. Indeed, the Federal Court Action already has been pending for almost 1.5 years, and discovery is still ongoing. The first of the four contested matters in the bankruptcy court were filed over three years ago.

Such an appeal also would be an inadequate remedy because the state and federal courts likely will make conflicting and inconsistent rulings before the district court enters final judgment. Given that the Federal Action was filed before the State Action, TPOV 16 likely will obtain a judgment against Paris in the Federal Action before the district court decides whether it believes Paris owes money to TPOV 16. The bankruptcy court also likely will order the debtors to pay Petitioners before the district court decides whether it believes the restaurant agreements are valid and enforceable. Motions to stay both the Federal Action and the bankruptcy matters have been respectively contested by the applicable Petitioners and remain pending.

Fourth, the district court manifestly abused its discretion by (a) refusing to dismiss the claims against Petitioners under the first-to-file rule and due to forum shopping; and (b) deciding that it will determine suitability and discovery issues

already pending before the federal courts (Denial Order 3:20-22 ("[I]t would be most efficient to resolve the suitability issues in one forum. This is the most comprehensive action in which to make a determination on this key issue."); *see also id.* 4:5-6 ("[I]ssues related to discovery taken in other actions can be addressed, as appropriate, in the future by this Court.")). Moreover, the district court's decision focused solely on suitability-based termination of the agreements, which is at issue only in count I of the State Complaint, whereas Petitioners also sought to dismiss or stay counts II and III. For these four reasons, this Court should entertain this petition and issue a writ compelling the district court to vacate the Denial Order and dismiss the claims against Petitioners.

V. WHY A WRIT SHOULD ISSUE.

A. The District Court Lacks Jurisdiction to Hear the Claims Against FERG.

The FERG Agreement contains a plain, clear, and unambiguous forum selection clause under which the parties agreed to the "exclusive jurisdiction" of any state or federal court in Atlantic County, New Jersey. (Ex. H to LLTQ's Mot. to Dismiss, § 14.10(c); *see also* LLTQ's Mot. to Dismiss at 17:22 – 19:1, ¶¶ 52-57 (explaining why the clause is applicable to Real Parties' declaratory relief claims); LLTQ's Reply at 17:1-14 (same).)[7] On account of the phrase "exclusive

[7] Specifically, per § 14.10(c) of the FERG Agreement, the forum selection clause applies to "any court action" and "any action or proceeding contemplated by

jurisdiction," the clause is mandatory, not permissive. *Am. First Fed. Credit Union v. Soro*, 131 Nev. Adv. Op. 73, 359 P.3d 105, 107 (2015) (agreeing with foreign cases defining a mandatory forum selection clause as one that, as here, "requires 'a particular forum be the exclusive jurisdiction for litigation'" and contains "language demonstrating the parties' intent to make jurisdiction exclusive[.]") Because the parties agreed to the exclusive jurisdiction of the New Jersey courts, the district court lacks subject matter jurisdiction over the claims against FERG.

At the hearing on Petitioners' motions to dismiss, Real Parties claimed the district court was free to disregard the forum selection clause based on "the totality of the circumstances" and due to the Caesars Bankruptcy. (Tr., May 1, 2018, 36:18-21 ("Forum selection clause[s] don't strip Your Honor of jurisdiction, subject matter jurisdiction, for sure. And it becomes a factor to be weighed against the totality of the circumstances."); *see also id.* 38:10-15 (wherein Real Parties argued that even when there are several contracts with forum selection clauses involving different forums, the parties are not required to have "different trials on the same exact issue between the same exact parties."); 39:9-10 ("So, we have a problem there already because we're in Illinois.").) Real Parties notably did not present these arguments

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Section 14.10(b)." Section 14.10(b) of the FERG Agreement references any proceeding "brought in equity to enforce the provisions of this Agreement[.]"

in their omnibus opposition. (*See* Caesars' Opp'n, March 12, 2018, 17:5-27.)[8]

In response to these new arguments by Real Parties, Petitioners explained to the district court that after Caesars filed bankruptcy and then moved to have the FERG Agreement rejected under the Bankruptcy Code, "the only remedy that FERG had was to object to the Motion. We were precluded by the automatic stay, Section 362, of bringing an action somewhere else. The proceeding was brought in the Bankruptcy Court as it was required to and we responded." (Tr., May 1, 2018, 43:19-23; *see also id.* 44:3-13 (after the district court asked why FERG did not seek to lift the automatic stay to litigate in Atlantic County, New Jersey, FERG explained that "the nature of the relief [*i.e.*, the debtors' request for the bankruptcy court to reject the FERG Agreement under the Bankruptcy Code] is unique to bankruptcy. It's that ability to reject a contract under 365 of the bankruptcy code. It's a great power for debtors.").) Moreover, the bankruptcy court combined the rejection motions with FERG's motion to compel payments related to the debtors' post-bankruptcy operation of the restaurants, and FERG's motion for payment can only be brought in the bankruptcy court under 11 U.S.C. § 503.

The district court concluded that by appearing in the Caesars Bankruptcy to protect its interests, FERG waived its otherwise enforceable rights under the forum

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[8] Because Real Parties first raised these arguments at the hearing, Petitioners were deprived of the opportunity to brief them.

selection clause:

> Ordinarily, I would defer to that clause and you would litigate over in New Jersey. I think in a normal case, that's clear. This is not a normal case. You're already litigating in a forum that's not New Jersey. Whether you're doing that voluntarily or involuntarily, I think is of little import. But when I'm considering whether to say, okay, yeah, I see the parties agreed to litigate in New Jersey, but you're not litigating in New Jersey, supports denial under the unique circumstances of this case and the other pending bankruptcy case -- well, not pending. Other ongoing bankruptcy case in Illinois. The fact that you're not in the forum agreed upon by the parties supports denial of the Motion on that grounds.

(Tr., May 1, 2018, 49:22 – 50:9; *see also id.* 50:20-22 ("[T]he unique and the totality of the circumstances here support denial of the Motion without prejudice as to FERG.").) The district court also said that even though it believes the forum selection clause applies to Real Parties' claims, "considering the totality of the circumstances, there are far stronger reasons to keep the case in front of me." (*Id.* 50:22 – 51:4; *see also* Denial Order 4:8-9 (wherein the district court said the FERG Agreement "would ordinarily require that actions, not just arbitration matters, be litigated in New Jersey.").)

The district court's ruling is clearly erroneous. Petitioners are unaware of any law - let alone Nevada law - allowing a district court to disregard a valid, mandatory forum selection clause because the parties are involved in a bankruptcy proceeding outside the selected forum (especially when, as here, the bankruptcy was filed by

the party against whom enforcement is sought.) To the contrary, a clear and unambiguous "contract must be enforced as written . . . ." *Ringle v. Bruton*, 120 Nev. 82, 93, 86 P.3d 1032, 1039 (2004); *see also Ellison v. California State Auto. Ass'n*, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990). The forum selection clause clearly and unambiguously applies to Real Parties' claims against FERG (as the district court correctly concluded), and the clause should have been enforced as written. A district court cannot decline to enforce a clear and unambiguous mandatory forum selection clause based on the totality of circumstances.

In fact, as the United States Supreme Court explained in 2013, "[w]hen the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause. Only under extraordinary circumstances unrelated to the convenience of the parties should a [motion to transfer venue] be denied." *Atlantic Marine*, 571 U.S. at 62.[9] The only circumstance under which a district court may refuse to enforce a valid forum-selection clause is if it violates public policy. *Id.* at 64 ("[A] district court may consider arguments about public-interest factors only[,]" and "those factors will rarely defeat a transfer motion . . . ."); *see also Dolin v. Facebook, Inc.*, 289 F. Supp.

[9] Although the analysis in *Atlantic Marine* pertains to a motion to change venue under 28 U.S.C. § 1404(a), there is no reason why it should not also apply to a motion to dismiss under NEV. R. CIV. P. 12(b) that seeks to enforce a valid, mandatory forum selection clause.

3d 1153, 1158 (D. Haw. 2018) (quoting *Atl. Marine Const. Co.*, 571 U.S. at 67) ("[T]o defeat transfer, Plaintiff must show that the forum-selection clause is not valid and enforceable or does not apply to his claims, or that [venue-related] 'public-interest factors overwhelmingly disfavor a transfer.'"); *Ponomarenko v. Shapiro*, 287 F. Supp. 3d 816, 839 (N.D. Cal. 2018) (a plaintiff's "arguments that the convenience of the parties and witnesses and the interests of justice weigh in favor of venue in [the forum in which the plaintiff filed suit] are simply irrelevant under *Atlantic Marine*.")

Under *Ringle*, *Ellison*, and *Atlantic Marine*, the district court should not have considered Real Parties' "totality of the circumstances" argument. It instead was required to enforce the mandatory forum selection clause as it is written and dismiss the claims against FERG. There also is no legal support for the district court's conclusion that FERG waived the forum selection clause by protecting its interests in the Caesars Bankruptcy. This is especially true given that Caesars, not FERG, filed bankruptcy, and the motions filed by both the debtors and FERG could only be brought in a bankruptcy court. This Court therefore should compel the district court to vacate the Denial Order and dismiss the claims against FERG.

B. The District Court Abused Its Discretion by Refusing to Dismiss the Claims Against Petitioners Under the First-to-File Rule and Due to Forum Shopping.

Under the first-to-file rule, "when cases involving the same parties and issues

have been filed in two different districts, the second district court has discretion to transfer, stay, or dismiss the second case in the interest of efficiency and judicial economy." *Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 769 (9th Cir. 1997); *see also Alltrade, Inc. v. Uniweld Prod., Inc*., 946 F.2d 622, 623 (9th Cir. 1991).[10] In determining whether to apply the rule, "a court analyzes three factors: chronology of the lawsuits, similarity of the parties, and similarity of the issues." *Kohn Law Grp., Inc. v. Auto Parts Mfg. Mississippi, Inc*., 787 F.3d 1237, 1240 (9th Cir. 2015). The two actions need not be identical, only similar. *Id.* at 1239 ("The first-to-file rule allows a district court to stay proceedings if *a similar case* with *substantially similar issues and parties* was previously filed in another district court.") (emphasis added); *see also Inherent.com v. Martindale-Hubbell*, 420 F. Supp. 2d 1093, 1097 (N.D. Cal. 2006) ("The 'sameness' requirement does not mandate that the two actions be identical, but is satisfied if they are 'substantially similar.'")

In Nevada, "[i]t is well-settled that courts will not entertain a declaratory judgment action if . . . another action or proceeding [is already pending] to which the same persons are parties and in which the same issues may be adjudicated." *Pub. Serv. Comm'n of Nevada v. Dist. Ct.*, 107 Nev. 680, 684, 818 P.2d 396, 399 (1991)

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[10] As aforementioned, it appears neither this Court nor the Nevada Court of Appeals has ever addressed the first-to-file rule in a citable opinion. For that reason, Petitioners rely on Ninth Circuit precedent.

(quoting *Haas & Haynie Corp. v. Pacific Millwork Supply*, 627 P.2d 291, 293 (Haw. 1981)); *see also Smith v. Hutchins*, 93 Nev. 431, 432, 566 P.2d 1136, 1137 (1977) ("Policy demands that all forms of injury or damage sustained by the plaintiff as a consequence of the defendant's wrongful act be recovered in one action rather than in multiple actions."); *Knittle v. Progressive Cas. Ins. Co.*, 112 Nev. 8, 11, 908 P.2d 724, 726 (1996) (where a prior action is pending, a plaintiff "can assert no legally protectible interest creating a justiciable controversy ripe for declaratory relief.")

Moreover, a "separate action for declaratory judgment is not an appropriate method of testing defenses in a pending action." *Pub. Serv. Comm'n of Nevada*, 107 Nev. at 685 (citing *Ratley v. Sheriff's Civil Service Bd. of Sedgwick County*, 646 P.2d 1133 (Kan. App. Ct. 1982)). When two pending actions involve similar parties and facts, the later-filed action may be dismissed. *Fitzharris v. Phillips*, 74 Nev. 371, 376-77, 333 P.2d 721, 724 (1958). It "would be contrary to fundamental judicial procedure to permit two actions to remain pending between the same parties upon the identical cause." *Id.* at 376; *see also Goldfield Consol. Milling & Transp. Co. v. Old Sandstrom Annex Gold Mining Co.*, 38 Nev. 426, 435, 150 P. 313, 315 (1915); *State v. Cal. Mining Co.*, 13 Nev. 289, 294 (1878).

In addition to the first-to-file rule, a duplicative action may also warrant dismissal due to forum shopping. Forum shopping is "[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard." *Forum-*

Shopping, Black's Law Dictionary (10th ed. 2014); *see also Knapp v. Depuy Synthes Sales Inc*., 983 F. Supp. 2d 1171, 1178 (E.D. Cal. 2013) (dismissing a complaint seeking declaratory relief because another lawsuit was pending in Pennsylvania based on the same facts and "the manner in which Plaintiff filed this action smacked of forum shopping."); *Lane v. Allstate Ins. Co*., 114 Nev. 1176, 1181, 969 P.2d 938, 941 (1998) ("Courts have inherent equitable powers to dismiss actions for abusive litigation practices.")

The district court manifestly abused its discretion when it refused to dismiss the State Action under the first-to-file rule and due to forum shopping. The federal cases were filed well before the State Action. Though not identical, the parties in the federal and state cases are substantially similar. The State Action involves sixteen parties (*i.e.*, four plaintiffs and twelve defendants). And as Real Parties acknowledge, twelve of these parties are involved in one or both of the federal cases. (Caesars' Opp'n, March 12, 2018, 11:12-13.) Petitioner is unaware of any precedent, and the Real Parties did not cite any such authority to the district court, in which a court refused to apply the first to file rule when the first filed case had been filed years in advance of the second action and involved the same claims, as is true with the bankruptcy matters, or even seven months in advance, as is the case with TPOV's federal court action.

Furthermore, the issues in the federal and state cases are identical. In their

first claim in the State Action, Real Parties request a judicial declaration that they properly terminated the restaurant agreements based on suitability grounds. (State Compl. ¶¶ 131-135.) That issue already is being litigated in the federal cases and was explicitly raised in the Federal Action. In their second claim, Real Parties request a judicial declaration that they do not have any current or future obligations to Petitioners under the restaurant agreements. (State Compl. ¶¶ 136-146.) Again, that issue already is being litigated in the federal cases. In their third and final claim, Real Parties request a judicial declaration that the restaurant agreements do not preclude them from doing business with Ramsay. (State Compl. ¶¶ 147-156.) Once more, that issue already is being litigated in the federal cases.

The district court also concluded that "it would be most efficient to resolve the suitability issues in one forum. This is the most comprehensive action in which to make a determination on this key issue." (Denial Order 3:20-22.) To the contrary, the federal courts are in a better position to determine that issue because their cases are further along, and those courts already have preliminarily examined Real Parties' "suitability" argument. Judge Mahan has already recognized that if the TPOV-to-TPOV 16 assignment was valid, then unsuitability is irrelevant. (Order, July 3, 2017, 8:26 – 9:2 ("Although Paris argues its 'determination that Seibel is unsuitable is undisputable as a matter of law', . . . TPOV 16 alleges a valid assignment to TPOV that cured any affiliation with an unsuitable person . . . .").)

Moreover, suitability is only directly at issue in one of the three claims in the State Action. By focusing solely on the issue of suitability, the district court ignored the other two claims in the State Action (which are the subject of the Federal Action and have been squarely before the bankruptcy court for years), and the federal courts are in a better position to determine the issues involved in those two claims.

The district court also manifestly abused its discretion by refusing to dismiss due to forum shopping. It is telling that Real Parties raced to the state courthouse shortly after (a) the bankruptcy court used the terms "thin" and "dubious" to describe their theories of rescission and fraud in the inducement (which Real Parties repackaged as counts II and III in the State Action); (b) the bankruptcy court said it did not agree with Real Parties' legal argument concerning the restrictive covenant in the LLTQ Agreement; and (c) Judge Mahan found TPOV 16's claims to be cognizable and recognized the lack of relevance to Paris's suitability argument amid the TPOV-to-TPOV 16 assignment. Real Parties clearly filed the State Complaint to evade the federal courts' unfavorable views of their thin and dubious theories. Real Parties' forum shopping is an abusive litigation tactic to which the district court should have put an immediate end by dismissing their claims.

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VI. CONCLUSION.

For the foregoing reasons, Petitioners respectfully request a writ compelling the district court to vacate the Denial Order and dismiss the claims against them.

DATED June 18, 2018.

MCNUTT LAW FIRM, P.C.

/s/ Dan McNutt
DANIEL R. MCNUTT (SBN 7815)
MATTHEW C. WOLF (SBN 10801)
625 South Eighth Street
Las Vegas, Nevada 89101
Attorneys for Petitioners

CERTIFICATE OF SERVICE

Pursuant to NEV. R. APP. P. 25, I certify that I am an employee of MCNUTT LAW FIRM. On June 18, 2018, I caused a copy of the **PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** to be hand delivered, in a sealed envelope, on the date and to the addressee(s) shown below:

Honorable Joseph Hardy
District Court Judge, Dept. 15
Regional Justice Center
200 Lewis Ave., Las Vegas, NV 89155
Respondent

James J. Pisanelli, Esq.
Pisanelli Bice, PLLC
400 S. 7th Street, Suite 300
Las Vegas, NV 89101
Attorney for Real Parties in Interest

/s/ Lisa Heller
An Employee of McNutt Law Firm, P.C.