IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 76118

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 ENTERPRISES 16, LLC; DNT ACQUISITION, LLC, APPEARING DERIVATIVELY BY ONE OF ITS TWO MEMBERS R SQUARED GLOBAL SOLUTIONS, LLC,

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE JOSEPH HARDY, DISTRICT JUDGE, DEPT. XV,

Respondent,

and

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.

ANSWER TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the foregoing are persons or entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Real Parties in Interest are Desert Palace, Inc., Paris Las Vegas Operating Company, LLC, PHWLV, LLC, and Boardwalk Regency, LLC.

A. Desert Palace, Inc. is a former Nevada corporation that was recently converted to Desert Palace LLC, a Nevada Limited Liability Company. Its ownership structure is as follows:

    a. Desert Palace LLC is wholly owned by Caesars Palace LLC – a Delaware Limited Liability Company, which is wholly owned by:

        i. Caesars World LLC – a Florida Limited Liability Company, which is wholly owned by:

            1. CEOC, LLC – a Delaware Limited Liability Company, which is wholly owned by:

                a. Caesars Entertainment Corporation, a publicly traded corporation.

B. Paris Las Vegas Operating Company, LLC is a Nevada Limited Liability Company. Its ownership structure is as follows:

    a. Paris Las Vegas Operating Company, LLC is wholly owned by Caesars Resort Collection, LLC – a Delaware Limited Liability Company, which is owned by:

        i. Caesars Entertainment Resort Properties Holdco, LLC – a Delaware Limited Liability Company, which is wholly owned by:

1. Caesars Entertainment Corporation, a publicly traded corporation.

ii. Caesars Growth Properties Parent, LLC – a Delaware Limited Liability Company, which is wholly owned by:

1. Caesars Growth Partners, LLC – a Delaware Limited Liability Company, which is wholly owned by:

a. Caesars Entertainment Corporation, a publicly traded corporation.

C. PHWLV, LLC is a Nevada Limited Liability Company. Its ownership structure is as follows:

a. PHWLV, LLC is wholly owned by Caesars Growth PH, LLC – a Delaware Limited Liability Company, which is wholly owned by:

i. Caesars Resort Collection, LLC – a Delaware Limited Liability Company, which is owned by:

1. Caesars Entertainment Resort Properties Holdco, LLC – a Delaware Limited Liability Company, which is wholly owned by:

a. Caesars Entertainment Corporation, a publicly traded corporation.

2. Caesars Growth Properties Parent, LLC – a Delaware Limited Liability Company, which is wholly owned by:

a. Caesars Growth Partners, LLC – a Delaware Limited Liability Company, which is wholly owned by:

i. Caesars Entertainment Corporation, a publicly traded corporation.

D. Boardwalk Regency, LLC is a Nevada Limited Liability Company. Its ownership structure is as follows:

a. Boardwalk Regency, LLC is wholly owned by Caesars New Jersey, LLC – a New Jersey Limited Liability Company, which is wholly owned by:

i. Caesars World, LLC– a Florida Limited Liability Company, which is wholly owned by:

1. CEOC, LLC – a Delaware Limited Liability Company, which is wholly owned by:

a. Caesars Entertainment Corporation, a publicly traded corporation.

Pisanelli Bice PLLC and Kirkland & Ellis LLP are the only law firms whose partners or associates have or are expected to appear for Real Parties in Interest.

DATED this 20th day of August 2018.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Page(s)

Statutes

Page(s)

Regulations

Other Authorities

Real Parties in Interest Desert Palace Inc. ("Caesars Palace"), Paris Las Vegas Operating Company, LLC ("Paris"), PHWLV, LLC ("Planet Hollywood"), and Boardwalk Regency Corporation d/b/a Caesars Atlantic City ("CAC," and collectively with Caesars Palace, Paris, and Planet Hollywood, "Caesars") file this answer to the Petition for Writ of Mandamus or Prohibition (the "Petition") by Rowen Seibel, LLTQ Enterprises, LLC, LLTQ Enterprises 16, LLC (together with LLTQ Enterprises, LLC, "LLTQ"), FERG, LLC, FERG 16, LLC (together with FERG, LLC, "FERG"), Moti Partners, LLC, Moti Partners 16, LLC (together with Moti Partners, LLC, "MOTI"), TPOV Enterprises, LLC ("TPOV Enterprises"), TPOV 16 Enterprises, LLC ("TPOV 16," and together with TPOV Enterprises, "TPOV"), and DNT Acquisition, LLC, appearing derivatively through one of its two members R Squared Global Solutions, LLC (collectively with Mr. Seibel, LLTQ, FERG, MOTI, and TPOV, the "Petitioners").

I. INTRODUCTION

This dispute arises out of six contracts Caesars entered into with affiliates of Rowen Seibel. In August 2016, Caesars learned from press reports that Mr. Seibel had pleaded guilty to a felony for federal tax fraud. As a result, Caesars determined that Mr. Seibel was "unsuitable" and terminated each of its contracts with Mr. Seibel's affiliates as it was entitled to do in its sole discretion under the agreements. This termination, however, has triggered widespread litigation in

federal and state courts in New York, Delaware, Illinois, and Nevada regarding the implications of Mr. Seibel's criminal conduct and his failure to disclose that conduct to Caesars. Recognizing the need for one comprehensive forum in which to litigate overlapping issues against Mr. Seibel and his corporate affiliates and obtain consistent determinations relating to similar facts and nearly identical contract provisions, Caesars commenced the underlying declaratory judgment action in the Eighth Judicial District Court, Clark County, Nevada (the "Nevada District Court").

Since then, Petitioners steadfastly have attempted to avoid litigating these Nevada-centric disputes in one consolidated action in Nevada. Petitioners have filed notices of removal, motions to transfer, motions to dismiss, and oppositions to Caesars' motions to stay the proceedings in the Illinois Bankruptcy Court and the Nevada Federal Court in favor of the underlying action. But ***every court*** to consider the issue has concluded that the claims in Caesars' declaratory judgment action (the "Nevada State Court Action") should proceed in the Nevada District Court.

This Petition is Petitioners' latest procedural maneuver to avoid litigating before the Nevada District Court. Petitioners now ask this Court to issue an extraordinary writ of mandamus or prohibition compelling the Nevada District Court to vacate its Order denying their motions to dismiss without prejudice and dismiss the claims against Petitioners. 6/1/18 Order (App. at 3534–77). Following extensive briefing and argument, the Nevada District Court found the Nevada State Court

Action was the most comprehensive lawsuit in terms of issues and parties. Accordingly, it declined to dismiss or stay the underlying lawsuit based on a New Jersey forum selection clause in one of the six agreements at issue, the first-filed rule or Petitioners' argument that Caesars is forum shopping. 6/1/18 Order (App. at 3534–77); 5/1/18 Hr'g Tr. at 46:17–51:4 (App. at 3527–32).

Under these circumstances, the extraordinary remedy of writ relief is simply not available. As an initial matter, this Court should not even consider the Petition. This Court reaches the merits of very few of the petitions filed and exercises its discretion to review decisions denying motions to dismiss even more sparingly. It typically only reviews decisions denying motions to dismiss where "(1) no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule, or (2) an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct. ex rel. Cnty. of Washoe*, 124 Nev. 193, 197–98, 179 P.3d 556, 558–59 (2008). Petitioners do not cite this standard or attempt to satisfy their burden to meet it. The Court need not go any further and should reject Petitioners' request for extraordinary relief.

Even if it decides to reach the merits of the Petition, this Court should not issue the writ because Petitioners have failed to meet their burden of showing that the Nevada District Court committed clear legal error or abused its discretion in

denying Petitioners' motions to dismiss. *Archon Corp. v. Eighth Jud. Dist. Ct. In & For Cnty. of Clark*, 133 Nev., Adv. Op. 101, 407 P.3d 702, 706 (2017).

First, the Nevada District Court did not commit clear legal error in refusing to dismiss the claims against FERG based on a New Jersey forum selection clause in the FERG agreement—the only one of the six Seibel agreements that did not require a Nevada forum. Contrary to Petitioners' arguments, forum selection clauses do not divest a court of subject matter jurisdiction and courts can choose not to enforce them based on public policy grounds. Here, the Nevada District Court did just that in deciding based on the "totality of the circumstances" that the claims against FERG should proceed in Nevada instead of New Jersey. It correctly concluded the Nevada State Court Action allows for the "most efficient determination" of the Seibel litigation and avoids the "great potential for inconsistent rulings amongst all the various different actions," including on the "key issue" of suitability. 5/1/18 Hr'g. Tr. at 45:12–16, 47:24–25, 48:9–16 (App. at 3526, 3528–29). This approach furthers the public interest of judicial economy and avoiding inconsistent rulings by different courts on key overlapping issues. Further, as the Nevada District Court recognized and Petitioners have since admitted, Petitioners do not intend to seek to have the claims against FERG litigated in New Jersey even if the Petition seeking to enforce the New Jersey forum selection clause is successful. 5/1/18 Hr'g Tr. at 49:22–50:9 (App. at 3530–31); 8/7/18 Hr'g Tr. at 43:13–44:15

(Resp. App. at 0177). This too counsels in favor of proceeding in the most comprehensive forum: the Nevada District Court.

Second, the Nevada District Court did not abuse its discretion when it declined to dismiss or stay the Nevada State Court Action based on the first-filed rule. The Nevada District Court properly recognized the first-filed rule is a "doctrine of discretion with the courts" to which it decided not to defer here based on the "totality of the circumstances." 5/1/18 Hr'g Tr. at 46:18–19, 49:8–11 (App. at 3527, 3530); *see also Amlin Corporate Member Ltd v. Leeward*, No. 3:12–cv–0360–LRH–VPC, 2012 WL 6020107, at *1 (D. Nev. Nov. 27, 2012) (under the first-filed rule, courts should "yield to the forum in which all interests are best served"). Those circumstances included "avoiding potential inconsistencies," creating a forum for the "most efficient determination on those [common] issues" across the Seibel litigation, and having Nevada courts decide questions of Nevada law. 5/1/18 Hr'g Tr. at 47:24–25, 49:6–8 (App. at 3528, 3530); 6/1/18 Order at 3–4 (App. at 3536–37). The Nevada District Court did not abuse its discretion in thoughtfully assessing the applicability of this discretionary doctrine.

Third, the Nevada District Court also did not abuse its discretion when it declined to dismiss or stay the Nevada State Court Action as a sanction for Caesars' alleged forum shopping. 5/1/18 Hr'g Tr. at 50:10–17 (App. at 3531); 6/1/18 Order at 4 (App. at 3537). It is simply not forum shopping to try to create a comprehensive

forum for the determination of related disputes. Indeed, each court to assess Petitioners' forum shopping argument has agreed that Caesars is not engaged in forum shopping. While Petitioners continue to trumpet comments made by certain courts overseeing portions of the Seibel litigation, the Nevada District Court correctly concluded "those courts have made clear that such comments are not determinations on the merits of any matter and, in fact, determinations on the merits have not been reached in the other actions." 6/1/18 Order at 4 (App. 3537). There is no forum shopping.

For each of these reasons, the Court should decline to consider the Petition or, if it reaches the merits, deny Petitioners' extraordinary request to issue a writ of mandamus or prohibition compelling the Nevada District Court to vacate its Order denying their motions to dismiss and dismiss the claims against Petitioners.

II. COUNTERSTATEMENT OF FACTS

Caesars takes issue with the accuracy and completeness of Petitioners' statement of facts. A more complete recitation of the facts follows.

A. Caesars Exercises Its Contractual Rights to Terminate the Seibel Agreements Following Rowen Seibel's Felony Conviction.

Beginning in 2009, Caesars entered into six agreements (the "Seibel Agreements") with entities owned by, managed by, and/or affiliated with purported New York restaurateur Rowen Seibel (the "Seibel-Affiliated Entities") relating to the operation of restaurants at Caesars' casinos. Compl. ¶ 1 (App. at 0002). Because

of the highly-regulated nature of Caesars' businesses, each agreement contains provisions designed to ensure Mr. Seibel and the Seibel-Affiliated Entities were "suitable," and Caesars was not entering into a business relationship that would jeopardize its good standing with gaming regulators. *Id*. ¶¶ 1, 27–34, 58–64, 80–86 (App. at 0002, 0009–10, 0016–18, 0021–23). Specifically, each agreement contains representations, warranties, and conditions that required Mr. Seibel and/or the Seibel-Affiliated Entities to disclose any information relating to whether he or his affiliated entities were or became "Unsuitable Persons." *Id*. ¶ 1 (App. at 0002). Each agreement also contains provisions that allow Caesars to terminate its relationship with Mr. Seibel and the Seibel-Affiliated Entities in its sole discretion if they are or become "Unsuitable Persons." *Id*. ¶¶ 1, 5, 32, 42, 51, 61, 73, 83 (App. at 0002–03, 0010, 0012, 0014, 0016–17, 0019–20, 0022).

Unbeknownst to Caesars, when the parties entered into each of the Seibel Agreements, Mr. Seibel was engaged in criminal conduct that rendered him "Unsuitable" under the terms of each agreement. *Id*. ¶ 2 (App. at 0002–03). As a result of these activities (which began in 2004), Mr. Seibel was charged in April 2016 with defrauding the IRS. *Id*. ¶¶ 2–3, 106 (App. at 0002–03, 0027). Rather than contesting the charges, Mr. Seibel pleaded guilty to one count of a corrupt endeavor to obstruct and impede the due administration of the Internal Revenue Laws, 26 U.S.C. § 7212, a Class E Felony, and subsequently was

imprisoned in a federal penitentiary for his crime. *Id*. ¶¶ 2, 106–07 (App. at 0002–03, 0027).

All of the Seibel Agreements required Mr. Seibel and the Seibel-Affiliated Entities to update their suitability disclosures to the extent they subsequently became inaccurate. *Id*. ¶¶ 30–31, 41, 50, 60, 72, 82 (App. at 0009, 0012, 0014, 0016, 0019, 0022). But they never informed Caesars that Mr. Seibel was engaged in criminal activities, was under investigation by the federal government, had lied to the government in connection with his application to obtain amnesty for his original crimes, had pleaded guilty to a felony, or had been sentenced to prison. *Id*. ¶ 4 (App. at 0003). Instead, Caesars only learned about Mr. Seibel's felony conviction from press reports in August 2016, four months after he pleaded guilty. *Id*. ¶¶ 5, 109 (App. at 0003, 0028). Upon learning of Mr. Seibel's felony conviction, Caesars promptly terminated all of its agreements with the Seibel-Affiliated Entities in September 2016, as it could do in its "sole and exclusive judgment" under each of the Seibel Agreements. *Id*. ¶ 5 (App. at 0003).

Had Mr. Seibel complied with his obligations to truthfully disclose under oath that he had been "party to . . . any felony" within the last ten years or that such criminal conduct "would prevent [him] from being licensed by a gaming authority," Caesars never would have entered into the Seibel Agreements. *Id*. ¶¶ 1–2, 7 (App. at 0002–04). Caesars likewise never would have agreed to any contractual terms

that Mr. Seibel now claims limit Caesars' ability to enter into new ventures with celebrity chef Gordon Ramsay or operate its existing restaurants without partnering with a convicted felon. *Id*. ¶ 7 (App. at 0003–04).

B. Caesars Palace, CAC and Seven of the Petitioners Litigate Certain Issues in the Chapter 11 Cases.

In January 2015, Caesars Palace, CAC, and certain Caesars affiliates filed for chapter 11 in the Illinois Bankruptcy Court. *Id*. ¶ 120 (App. at 0032). Caesars Palace, CAC, FERG, LLTQ, and MOTI are involved in several contested matters (collectively, the "Contested Matters") before the Illinois Bankruptcy Court. *Id*. ¶¶ 120–23 (App. at 0032–33).

On June 8, 2015, Caesars Palace and CAC filed a motion to reject their agreements with LLTQ and FERG under 11 U.S.C. § 365(a). *Id*. ¶ 121 (App. at 0032). On November 4, 2015, LLTQ and FERG filed a motion for payment of administrative expenses under 11 U.S.C. § 503 relating to the operation of restaurants in Las Vegas and Atlantic City. *Id*. ¶ 122 (App. at 0032–33). On November 30, 2016, MOTI filed a motion for payment of administrative expenses relating to Caesars Palace's use of MOTI's intellectual property during the wind-down period following the termination of the MOTI agreement and an early termination payment. *Id*. ¶ 123 (App. at 0033).

In each of these Contested Matters, Caesars Palace and CAC asserted that the Seibel-Affiliated Entities' failure to disclose Mr. Seibel's criminal activity

constitutes fraudulent inducement and is a material breach of the LLTQ, FERG, and MOTI agreements that excuses Caesars' future performance under the agreements. *Id*. ¶ 124 (App. at 0033); *see also Havas v. Alger*, 85 Nev. 627, 631, 461 P.2d 857, 859–60 (1969) (finding defrauded party may "refuse to perform and raise the defense of fraud when sued"); *Bradley v. Nev.-Cal.-Oregon R.R.*, 42 Nev. 411, 178 P. 906, 908–09 (1919) ("the party who commits the first breach of contract cannot maintain an action against the other for subsequent failure to perform").

In response, LLTQ and FERG moved for a protective order seeking to foreclose discovery into Mr. Seibel's criminal activity or other issues regarding his suitability. *See* App. at 0262. LLTQ and FERG argued that issues of termination, fraudulent inducement, and suitability should not be litigated before the Illinois Bankruptcy Court:

> [Caesars'] fraudulent inducement claim, like the issue of whether the Termination [of the agreements with LLTQ and FERG] was proper in the first instance, is not presently before [the Illinois Bankruptcy Court] and should be resolved in separate proceedings (likely in state or federal district court).
>
> Termination and the related issue of suitability should remain separate from the Contested Matters.

Compl. ¶ 125 (App. at 0033) (quoting filings from LLTQ and FERG to the Illinois Bankruptcy Court). The Illinois Bankruptcy Court denied LLTQ's and FERG's motion for a protective order because it was unwilling to effectively grant summary

judgment to LLTQ and FERG under the guise of a discovery motion. 5/31/17 Hr'g Tr. at 9:17–10:8 (App. at 0600–01).

Petitioners repeatedly cite comments the Illinois Bankruptcy Court made in its May 31, 2017 ruling on the motion for protective order to suggest it has predetermined the merits of Caesars' claims. Pet. at 6–7, 14, 31. Of course, the merits of Caesars' claims were not at issue on a discovery motion as the Illinois Bankruptcy Court pointed out. 5/31/17 Hr'g Tr. at 4:9–15, 9:17–10:6 (App. at 0595, 0600–01) (limiting comments to "what I have been given to date" and refusing to draw a "conclusion" about the merits of Caesars' suitability arguments "on a discovery motion"). Petitioners also fail to acknowledge the Illinois Bankruptcy Court provided something for each side to consider before embarking on further litigation:

> The facts adduced thus far suggest that Seibel may have made a false disclosure to the debtors in 2009, a disclosure the debtors insist they relied on in connection with the LLTQ and FERG agreements. The facts also suggest that the LLTQ and FERG agreements required their affiliates (Seibel was an affiliate) to behave with honesty and integrity. Seibel's conviction, another fact, tends to show he did neither.

5/31/17 Hr'g Tr. at 8:21–9:4 (App. at 0599–600).

On January 17, 2017, the Illinois Bankruptcy Court confirmed the plan of reorganization for Caesars Palace, CAC and the other Caesars debtors (the "Confirmed Plan"). LLTQ and FERG Opinion ¶ 7 (App. at 0228); MOTI Opinion

¶ 5 (App. at 0203). They emerged from bankruptcy on October 6, 2017. LLTQ and FERG Opinion ¶ 15 (App. at 0229); MOTI Opinion ¶ 13 (App. at 0204).

C. Rowen Seibel's Criminal Activities Result in Wide-Ranging Litigation.

The parties' respective rights and obligations under the Seibel Agreements have become the subject of litigation in courts across the country:

- An action in Delaware Chancery Court seeking to dissolve GRB, a joint venture between Mr. Seibel and an affiliate of Mr. Ramsay that relates to the former BurGR Gordon Ramsay restaurant (*In re GR Burger, LLC*, Case No. 12825);

- An action for breach of contract, fraud, and declaratory relief in New York state court asserted by The Old Homestead Restaurant, Inc. ("OHR") against Mr. Seibel and others based on the DNT joint venture between OHR and an entity affiliated with Mr. Seibel (*The Original Homestead Rest., Inc. v. Seibel*, Index No. 650145/2018);

- An action in Nevada federal court initiated by Mr. Seibel against Caesars and Mr. Ramsay relating to a Ramsay steak restaurant at Paris (one of Caesars' affiliates) (*TPOV Enters. 16, LLC v. Paris Las Vegas Operating Co., LLC*, Case No. 17-346) (the "Nevada Federal Court Action");

- An action in the Eighth Judicial District Court, Clark County, Nevada, initiated by Mr. Seibel against Caesars and Mr. Ramsay relating to the BurGR Gordon Ramsay restaurant, which has now been consolidated with the underlying lawsuit from which this Petition arises;

- The underlying lawsuit, which was initiated by Caesars and includes all of Caesars' relevant debtor and non-debtor affiliates, Mr. Seibel, and all of the Seibel-Affiliated Entities (the "Nevada State Court Action"); and

- The Contested Matters in the Illinois Bankruptcy Court involving Petitioners LLTQ, FERG, MOTI, and DNT (*In re Caesars Entm't Operating Co., Inc.*, Case No. 15-1145).

As they do with the Illinois Bankruptcy Court, Petitioners cite comments from the Nevada Federal Court Action to suggest that court also has predetermined the merits of Paris's claims and defenses. Specifically, Petitioners argue "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." Pet. at 31. The Nevada Federal Court made the comments, however, in the context of Paris' motion to dismiss. In that motion, Paris argued the Nevada Federal Court should dismiss TPOV 16's claim for breach of contract based on Paris' termination of the agreement because Paris rejected TPOV Enterprises' assignment to TPOV 16 and thus no valid contract currently existed. 7/3/17 Order at 8:16–17 (App. at 0748). Contrary to Petitioners' suggestion, the Nevada Federal Court determined only that TPOV alleged sufficient facts regarding the validity of the assignment to survive a motion to dismiss. It did not make any findings as the validity of that assignment or the ultimate merits of TPOV's breach of contract claim. In fact, it found "[w]hether Paris could or did reject the assignment [wa]s a factual dispute between the parties, which the court [did] not consider on a motion to dismiss." 7/3/17 Order at 8:24–26 (App. at 0748).

To bring control over and efficiency to the Contested Matters, the Nevada Federal Court Action, and the other wide-ranging litigation resulting from Mr. Seibel's termination due to his dishonesty and criminal activity, Caesars filed

the underlying Nevada State Court Action on August 25, 2017. App. at 0001. Two reorganized debtors (Caesars Palace and CAC) and two entities that never filed for chapter 11 (Planet Hollywood and Paris) filed the lawsuit against Mr. Seibel and all of his related entities. Compl. ¶¶ 9–12 (App. at 0004–05). The Nevada State Court Action asserts three state law declaratory judgment counts and does not seek any monetary relief. *Id*. ¶¶ 131–156. (App. at 0035–40).

Count I requests a declaration that Caesars properly terminated the Seibel Agreements based on its determination, pursuant to the underlying contracts, that Mr. Seibel and the Seibel-Affiliated Entities were unsuitable due to Mr. Seibel's felony conviction and criminal activities, and their failure to disclose either the conviction or the underlying activities. *Id*. ¶¶ 131–135 (App. at 0035–36). Count II seeks a declaration that Caesars does not have any financial obligations or commitments to Mr. Seibel or the Seibel-Affiliated Entities because (i) the Seibel Agreements provide that no such obligations or commitments exist when termination is based on suitability grounds; (ii) the Seibel-Affiliated Entities fraudulently induced Caesars to enter into the agreements by failing to disclose Mr. Seibel's criminal activities; and (iii) the Seibel-Affiliated Entities materially breached the agreements by failing to disclose Mr. Seibel's criminal activities. *Id*. ¶¶ 136–146 (App. at 0036–38). Count III asserts that certain restrictive covenants are unenforceable under state law and thus would not prohibit or limit existing or

future restaurant ventures between Caesars and Mr. Ramsay. *Id*. ¶¶ 147–156 (App. at 0038–40).

D. Petitioners' Ongoing Efforts to Frustrate Caesars' Efforts to Bring Efficiency and Control Over the Wide-Ranging Seibel Litigation.

Despite Caesars' efforts to create a consolidated, streamlined forum in the Nevada District Court, Petitioners have spent the past year engaged in procedural maneuvers designed to wrest control of this litigation away from the Nevada District Court. Each court faced with this issue, however, has determined the Nevada District Court should decide the declaratory relief claims asserted in the Nevada State Court Action.

In September 2017, LLTQ, FERG, and MOTI removed some, but not all, of the claims asserted against them in the Nevada State Court Action to the Nevada Bankruptcy Court and subsequently filed motions to transfer those claims to the Illinois Bankruptcy Court. *Desert Palace, Inc. v. MOTI Partners, LLC*, Case No. 17-01237 (Bankr. D. Nev.); *Desert Palace, Inc. v. LLTQ Enters., LLC*, Case No. 17-01238 (Bankr. D. Nev.). Contrary to the forum selection clause that it now purports to embrace, FERG never argued in its motion to transfer that the claims against it should be litigated in New Jersey.

On December 14, 2017, the Nevada Bankruptcy Court granted Caesars' motions to remand and denied as moot the motions to transfer from LLTQ, FERG, and MOTI. App. at 217–24, 0242–49. The Nevada Bankruptcy Court found

"comity dictates that Nevada courts should have the right to adjudicate the exclusively state-law claims involving Nevada-centric plaintiffs and Nevada-centric transactions," and absent a single forum to decide the issues presented by the removed claims, Caesars and Petitioners would be subject to the risk of inconsistent decisions by different courts. MOTI Opinion ¶¶ Y–Z (App. at 0213–14); LLTQ and FERG Opinion ¶¶ Y–Z (App. at 0238–39). The Nevada Bankruptcy Court also rejected Petitioners' argument that Caesars was forum shopping. It found that "the evidence does not indicate that any party chose its respective forum in an attempt to abuse or manipulate the judicial process." LLTQ and FERG Opinion ¶ V (App. at 0237) (internal ellipses omitted); MOTI Opinion ¶ V (App. at 0212) (internal ellipses omitted).

LLTQ, FERG, and MOTI appealed the Nevada Bankruptcy Court's remand and transfer orders. App. at 2853–60, 2887–93; *see Moti Partners, LLC v. Desert Palace, Inc.*, Case No. NV-17-1386 (9th Cir. B.A.P.); *LLTQ Enters., LLC v. Desert Palace, Inc.*, Case No. NV-17-1388 (9th Cir. B.A.P.). On August 20, 2018, the Ninth Circuit Bankruptcy Appellate Panel dismissed the appeals because remand orders based on lack of subject matter jurisdiction are not reviewable. Resp. App. at 0209-24. The Panel noted that if it were able to reach the merits of the appeals, it would find the Nevada Bankruptcy Court did not abuse its discretion in remanding the claims to the Nevada District Court on equitable grounds. *Id.* at 0224. It

reasoned that the Nevada Bankruptcy Court had found nearly all of the 14 equitable remand factors favored remand, including "the removed claims are all state law contract issues; comity weighs in favor of remand; … and there are several nondebtor parties involved in the Nevada Action who could be impacted by potentially inconsistent decisions." *Id.*

After appealing the Nevada Bankruptcy Court's remand order, Petitioners filed five sets of motions to dismiss, or in the alternative, stay all of the claims in the underlying action. App. at 0254–72, 0610–17, 0667–81, 0777–93, 1386–413. Petitioners argued, *inter alia*, that the Nevada District Court should exercise its equitable powers and dismiss the Nevada State Court Action as a sanction for Caesars' purported forum shopping or, in the alternative, stay the litigation in favor of the Contested Matters pursuant to the first-filed rule. LLTQ and FERG Mot. to Dismiss ¶¶ 83–89 (App. at 1410–11). For the first time in more than two years of litigation in various courts, FERG sought to invoke the New Jersey forum selection clause in the FERG agreement. *Id.* ¶¶ 50–57 (App. at 1402–04).

On May 1, 2018, the Nevada District Court heard oral argument and denied all of the motions to dismiss without prejudice. It found the various Seibel actions "involve issues of suitability, vis a vi[s] Mr. Seibel, prior to the contracts and after the contracts." 5/1/18 Hr'g Tr. at 47:9–12 (App. at 3528). Because the "contracts do have nearly identical suitability provisions," the Nevada District Court

determined there is a "great potential for inconsistent rulings amongst all the various different actions." *Id*. at 47:12–21 (App. at 3528). It reasoned that "keeping what's in front of me here will help, if not resolve, help alleviate that potential" of inconsistent determinations. *Id*. at 47:12–16 (App. at 3528). The Nevada District Court concluded it "makes sense to try, at least, to resolve the suitability issues in one forum," which is a "determination that's common throughout the contracts." *Id*. at 47:22–23, 48:9–10 (App. at 3528–29). While making clear it was not telling other courts what to do, the Nevada District Court also found the Nevada State Court Action is the "most comprehensive action" on suitability issues because "this is the case where everybody's at" and provides for "the most efficient determination on those issues." *Id*. at 47:17–25 (App. at 3528).

On June 1, 2018, the Nevada District Court issued its written order memorializing its oral ruling. 6/1/18 Order (App. at 3534–77). The Petition arises from that order. In its written order, the Nevada District Court found that "the subject contracts have nearly identical suitability provisions," "there exists a great potential for inconsistent rulings amongst the various actions," "[d]enying the Motions will help alleviate if not resolve the potential of inconsistent rulings on suitability among all of the various actions," "it would be most efficient to resolve the suitability issues in one forum," and "[t]his is the most comprehensive action in which to make a determination on this key issue." *Id*. at 3 (App. at 3536). The

Nevada District Court likewise concluded that "comity supports denial of the Motions" for the same reasons found by the Nevada Bankruptcy Court in remanding the claims that LLTQ, FERG and MOTI had removed back to the Nevada District Court. *Id*. at 3–4 (App. at 3536–37). Finally, the Nevada District Court rejected Petitioners' rhetoric and found that, "while other courts have made comments regarding aspects of the litigation, those courts have made clear that such comments are not determinations on the merits of any matter and, in fact, determination on the merits have not been reached in the other actions." *Id*. at 4 (App. at 3537).

While the parties were briefing the motions to dismiss in Nevada, Caesars moved to stay the Contested Matters in Illinois and the Nevada Federal Court Action. App. at 2939–55; Resp. App. at 0001, 0063. Petitioners opposed both motions. Resp. App. at 0020, 0080, 0104. Briefing is now complete on each of the motions, and the parties are awaiting decisions.

At the April 2018 hearing on Caesars' motion to stay, the Illinois Bankruptcy Court signaled its willingness to entertain a stay of the Contested Matters if there was significant overlap with the Nevada State Court Action. The Illinois Bankruptcy Court asked the "fundamental question" of "whether given the litigation pending in other courts, if there is any claim that [it] can decide that won't duplicate another court's efforts or potentially contradict what another court is doing." *See*, *e.g.*, 4/18/18 Hr'g Tr. at 4:19–23 (Resp. App. at 0040). The Illinois Bankruptcy Court

also questioned whether there is anything "left over" that would be "productive" for it to address now. 4/18/18 Hr'g Tr. at 5:22–25 (Resp. App. at 0041-42).

Upon filing this Petition, Petitioners also moved to stay the Nevada State Court Action pending this Court's decision. On August 7, 2018, the Nevada District Court denied Petitioners' motion because Petitioners had shown no likelihood of success on the merits of the Petition. 8/7/18 Hr'g Tr. at 54:14–56:2 (Resp. App. at 0188-89). The Nevada District Court found it "can't say that there's a likelihood of [Petitioners] prevailing on the merits of the writ petition," "taking into consideration . . . [the] unique issues of Nevada law, and it's a Nevada centric case." 8/7/18 Hr'g Tr. at 55:5–13 (Resp. App. at 0189). At the hearing on their stay motion, Petitioners conceded that despite their purported concern with enforcing the New Jersey forum selection clause, they would not seek to have the claims against FERG litigated in New Jersey even if they prevail on the Petition:

> THE [NEVADA DISTRICT] COURT: Here's my follow-up question. And this was raised too. I guess at the end of the day this case wouldn't go to New Jersey anyway; is that true or not?
>
> MR. McNUTT [COUNSEL FOR FERG]: Correct. Because it's a unique-to-bankruptcy issue. They're trying to reject the contract under one federal statute of the bankruptcy code.
>
> . . . .
>
> THE COURT: But, I mean, the bottom line is though, assuming this case is decided by the Nevada Supreme Court and they enforce the forum selection clause, this case wouldn't go back to New Jersey; would it?

> MR. McNUTT: This case?
>
> THE COURT: Yes.
>
> MR. McNUTT: If just FERG is enforced, correct. This case is not going to New Jersey. FERG will—obviously, they're going to end up in the bankruptcy court because you can't open a second bankruptcy case. It's impossible.

8/7/18 Hr'g Tr. at 43:13–44:15 (Resp. App. at 0177-78).

Thus, each court to have ruled on the issue to date has concluded Caesars' declaratory judgment claims should proceed in the Nevada District Court.

III. THE WRIT SHOULD NOT ISSUE

Petitioners are seeking extraordinary relief in requesting a writ of mandamus or prohibition compelling the Nevada District Court to vacate its Order denying their motions to dismiss and dismiss the claims against them either because the Nevada District Court committed legal error, abused its discretion or exceeded its jurisdiction. Pet. at 1-2, 17-21, 31. But the Petition does not present the extraordinary circumstances required before the Court will consider writ relief from the denial of motions to dismiss. Even if the Court considers the merits of the Petition, Petitioners have not met their burden to show the Nevada District Court misapplied the law or its discretion in attempting to bring efficiency and control to the wide-ranging Seibel litigation.

A. This Court Should Not Consider the Petition.

This Court reaches the merits of very few of the petitions filed. *See generally Archon Corp. v. Eighth Jud. Dist. Ct. In & For Cnty. of Clark*, 133 Nev., Adv. Op. 101, 407 P.3d 702, 706–07, 709 (2017) (discussing the limited availability of such "extraordinary" and "drastic" relief, and concluding that it be used "cautiously and sparingly"). And this Court exercises its discretion to review decisions denying motions to dismiss even more sparingly.

While this Court has acknowledged its "power to entertain" petitions stemming from motions to dismiss, it also has stated that "judicial economy and sound judicial administration militate against the utilization of mandamus to review orders denying motions to dismiss," and implemented a policy declining to exercise its discretion in this regard. *State ex rel. Dept. of Transp. v. Thompson*, 99 Nev. 358, 362, 662 P.2d 1338, 1340 (1983). The Court reaffirmed this policy in *Smith v. Eighth Judicial District Court In and For County of Clark*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997), noting the "very few exceptions" where it will exercise its discretion with respect to petitions based on orders on motions to dismiss. *See also Int'l Game Tech., Inc. v. Second Jud. Dist. Ct. ex rel. Cnty. of Washoe*, 124 Nev. 193, 197–98, 179 P.3d 556, 558–59 (2008).

Thus, "[e]ven when writ relief is available because an appeal from the final judgment is not an adequate and speedy remedy" under NRS 34.170, this Court

nonetheless will only exercise its discretion to review decisions denying motions to dismiss in those rare situations where "(1) no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule, or (2) an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *Int'l Game Tech.*, 124 Nev. at 197–98, 179 P.3d at 558–59.

Petitioners cite the wrong standard in their Petition. Pet. at 17. Thus, they do not even attempt to meet their burden of showing one of these two narrow exceptions for this Court to consider the Petition. *Pan v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). And each of the four reasons Petitioners do cite as to why this Court should consider the Petition lacks merits on its face. Pet. at 17–21.

First, the Nevada District Court was not required to dismiss the claims against FERG under the forum selection clause. Pet. at 18. Petitioners' argument is based on the premise that forum selection clauses divest courts of subject matter jurisdiction. *Id.* at 18–19, 21–22. That is wrong as a matter of black letter law. *See, e.g.*, *Walters v. FSP Stallion 1, LLC*, No. A564089-B, 2010 WL 8034117, at *1 (Nev. Dist. Ct. Apr. 13, 2010) (forum selection clauses do not present issues of subject matter jurisdiction).

Second, the denial of FERG's motion to dismiss with respect to the forum selection clause does not raise issues of first impression. Pet. at 18–20. As discussed below, the Nevada District Court relied on well-established principles of Nevada contract law and self-evident risks and inefficiencies of litigating in multiple forums to properly deny the motion. Nor could the so-called issues of first impression—which only relate to the claims against FERG—be dispositive of the entire Nevada State Court Action as is typically required before obtaining extraordinary relief on that basis. *Humboldt Gen. Hosp. v. Sixth Jud. Dist. Ct.*, 132 Nev., Adv. Op. 53, 376 P.3d 167, 170 (2016).

Third, Petitioners' argument that their right to appeal is not sufficiently "speedy" is irrelevant. Pet. at 20. Of course, Petitioners' procedural games are to blame for any delays in the Nevada State Court Action. Regardless, because they are seeking extraordinary relief based on order denying a motion to dismiss, it is not enough that Petitioners claim to lack a "speedy" appeal. Instead, they must satisfy one of the two narrow exceptions set forth in *International Game Technology* before the Court should consider providing any relief. 124 Nev. at 197–98, 179 P.3d at 558–59.

Fourth, undisputed facts regarding the Nevada State Court Action make clear that the Nevada District Court could not have "manifestly abuse[] its discretion" in refusing to dismiss based on the first-filed rule and alleged forum shopping. Pet. at

20–21. As the Nevada District Court correctly concluded, the Nevada State Court Action is the most comprehensive in terms of parties and issues and mitigates the risk of inconsistent rulings across courts on common issues. Based on these undisputed facts, the Nevada District Court did not abuse its discretion in allowing the Nevada State Court Action to proceed.

Because Petitioners fail to apply the correct legal standard and none of the reasons Petitioners do identify has merit, this Court does not need to consider the Petition any further.

B. The Court Should Not Issue the Writ.

Even if it reaches the merits of the Petition, the Court should not grant writ relief unless there was a "clear and indisputable legal error" or an "arbitrary and capricious abuse of discretion." *Archon Corp.*, 407 P.3d at 706. Here, Petitioners have not shown the Nevada District Court committed any clear legal errors or abused its discretion in attempting to bring control and efficiency to the wide-ranging Seibel litigation.

1. The Nevada District Court Did Not Commit Clear Legal Error In Denying FERG's Motion to Dismiss Based on the New Jersey Forum Selection Clause.

The Court should not issue the requested writ because the Nevada District Court did not commit clear legal error in refusing to dismiss the claims against FERG based on a New Jersey forum selection clause. Though recognizing forum selection

clauses should be enforced in the "normal case," the Nevada District Court declined to do so here based on the "totality of the circumstances" with respect to the wide-ranging Seibel litigation. 5/1/18 Hr'g Tr. at 49:16–51:4 (App. at 3530–32). The Nevada District Court correctly found the Nevada State Court Action allows for the "most efficient determination" of the Seibel litigation and avoids the "great potential for inconsistent rulings amongst all the various different actions," including on the "key issue" of suitability. *Id*. at 47:12–16, 47:24–25, 48:9–16 (App. at 3528–29).

Petitioners argue this Court should issue a writ of mandamus or prohibition compelling the Nevada District Court to vacate its Order denying their motion to dismiss and dismiss the claims against FERG because the forum selection clause divests it of subject matter jurisdiction. Pet. at 21 ("The District Court Lacks Jurisdiction to Hear the Claims Against FERG."); *id.* at 22 ("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."). But that is not the law. Forum selection clauses do not deprive a court of subject matter jurisdiction. *See Walters*, No. A564089-B, 2010 WL 8034117, at *1 (forum selection clauses do not present issues of subject matter jurisdiction); *see also Silva v. Encyclopedia Britannica, Inc.*, 239 F.3d 385, 388 n.6 (1st Cir. 2001) ("[E]ven a mandatory forum-selection clause does not in fact divest a court of jurisdiction that it otherwise

retains."); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) ("No one seriously contends in this case that the forum selection clause 'ousted' the District Court of jurisdiction over Zapata's action."). The Nevada District Court did not commit legal error by following black letter law.

Petitioners also argue the Nevada District Court committed clear error when it declined to enforce the New Jersey forum selection clause based on the "totality of the circumstances." Pet. at 22–26. Not so. Under well-established Nevada law, Nevada's public interests can render private contractual bargains unenforceable. *Miller v. A & R Joint Venture*, 97 Nev. 580, 582, 636 P.2d 277, 278 (1981); *see also Rivero v. Rivero*, 125 Nev. 410, 429, 216 P.3d 213, 226–27 (2009) (citing *Miller* as "discussing public policy as a limitation on enforceability of a contract"); Restatement (Second) of Contracts § 178(1) ("A promise or other term of an agreement is unenforceable on grounds of public policy if . . . the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.").

No Nevada state court has addressed the public policy exception as it relates to enforcement of "mandatory" forum selection clauses. But both the Supreme Court and federal courts have found that public interest factors can override forum

selection clauses under federal law.[1] *Atl. Marine Constr. Co., Inc. v. U.S. Dis. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 62–68 (2013); *see also Rand v. InfoNow Corp.*, No. 2:15–cv–00976–RCJ–VCF, 2015 WL 3948840, at *1–2 (D. Nev. June 29, 2015) (applying the *Atlantic Marine* test); *Aquila v. Fleetwood, R.V., Inc.*, No. 12-CV-3281 LDW GRB, 2014 WL 1379648, at *1, 4–5 (E.D.N.Y. Mar. 27, 2014) (denying motion to transfer based on a forum selection clause by a single defendant in a "case involving overlapping claims against multiple defendants" because of "the public interests in avoiding duplicative proceedings and potentially inconsistent results"). Though noting that courts should typically enforce forum selection clauses, in *Atlantic Marine*, the Supreme Court noted that courts may consider public interest factors such as "the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; and the interest in having the trial of a diversity case in a forum that is at home with the law. The Court must also give some weight to the plaintiffs' choice of forum." *Atl. Marine Constr. Co., Inc.*, 571 U.S. at 62 n.6 (internal quotations, citations, and

[1] This Court has found federal decisions instructive when construing forum selection clauses. *E.g.*, *Am. First Fed. Credit Union v. Soro*, 131 Nev., Adv. Op. 73, 359 P.3d 105, 107–08 (2015) (looking to federal guidance to determine if a forum selection clause is mandatory or permissive); *Tuxedo Int'l Inc. v. Rosenberg*, 127 Nev. 11, 16–20, 24–25, 251 P.3d 690, 693–96, 698–99 (2011) (looking to federal guidance to determine if a forum selection clause applies to tort claims related to the contract). Petitioners likewise assert federal law is instructive. Pet. at 17, 25-26..

brackets omitted). Interpreting *Atlantic Marine*, other courts have noted that public interests include "a broad[] set of concerns, ranging from the interest in having a case involving local disputes and local law resolved by a local court, to facilitating judicial economy and avoiding duplicitous litigation." *See, e.g.*, *In re Rolls Royce Corp.*, 775 F.3d 671, 678 (5th Cir. 2014).

Because forum selection clauses must yield to Nevada public policy, it was not clear error for the Nevada District Court to refuse to enforce the FERG forum selection clause under the "totality of the circumstances" here. The public interests of judicial economy and avoiding inconsistent rulings by different courts on key overlapping issues warrant proceeding with the most comprehensive lawsuit among all of the Seibel litigation: the Nevada State Court Action. No other existing proceeding can guarantee consistent decisions across the six related agreements with similar, and often identical, provisions. This includes making an "initial determination on a key issue" (suitability) that will affect Caesars' various defenses, including fraud in the inducement and the first breach doctrine. 5/1/18 Hr'g Tr. at 48:9–16 (App. at 3529).

A New Jersey court would not offer the same efficiencies and certainty in ruling on key issues. Among the six Seibel Agreements, the FERG agreement is the only one with a New Jersey forum selection clause. The other five agreements require a Nevada forum. *See*, *e.g.*, App. at 0733, 0812, 3063. Under similar

circumstances, courts have declined to enforce mandatory forum selection clauses where they only apply to some of the parties due to judicial inefficiencies and the risk of inconsistent rulings. *See, e.g.*, *Artech Info. Sys., LLC v. ProTek Consulting*, No. PX-17-3468, 2018 WL 3575054, at *2–5 (D. Md. July 25, 2018) (denying motion to transfer because enforcing forum selection clause, which did not cover two defendants, would "needlessly fracture this litigation"); *Ashley Furniture Indus., Inc. v. Packaging Corp. of Am.*, 275 F. Supp. 3d 957, 964–66 (W.D. Wis. 2017) (denying motion to transfer based on forum selection clause "[g]iven the commonality (if not nearly identical nature) of the facts and the law applicable to plaintiff's claims against [the movant] and the other alleged co-conspirators"); *Bronstein v. U.S. Customs & Border Prot.*, No 15-CV-02399-JST, 2016 WL 861102, at *1, 5–7 (N.D. Cal. Mar. 7, 2016) (denying motion to transfer because "substantively similar claims" were brought against a co-defendant not subject to the forum selection clause); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, Nos. M 07–1827 SI, C 13-3349 SI, MDL No. 1827, 2014 WL 1477748, at *1–2 (N.D. Cal. Apr. 14, 2014) (denying motion to transfer because the forum selection clause did not cover the state law claims against the moving defendant and did not apply to two of the plaintiffs with "substantially similar claims against the other defendants").

In assessing the public policy implications from enforcing the New Jersey forum selection clause, it is also relevant that Petitioners do not intend to seek to have these claims litigated in New Jersey. *See, e.g.*, 8/7/18 Hr'g Tr. at 43:13–44:15 (Resp. App. at 0177-78). While FERG argues it had no choice but to litigate before the Illinois Bankruptcy Court, that is simply not true. In April 2017, FERG argued to the Illinois Bankruptcy Court that issues relating to termination, fraudulent inducement and suitability should proceed in state court. Compl. ¶ 125 (App. at 0033) (quoting filings from LLTQ and FERG to the Illinois Bankruptcy Court) But it did not file suit in New Jersey then or later seek to transfer the claims against it in the Nevada State Court Action to New Jersey. FERG likewise never sought relief from the automatic stay to allow it to pursue litigation in New Jersey based on the forum selection clause.[2] Given these facts, the Nevada District Court correctly

[2] In contrast to FERG, the Illinois Bankruptcy Court granted requests of other claimants to proceed in state court, including to allow claimants to obtain judgments to liquidate claims pending in the bankruptcy court. *E.g.*, *In re Caesars Entm't Operating Co., Inc.*, Case No. 15-1145 (Bankr. N.D. Ill.) (Dkt. 585, order allowing *Harvey v. Caesars Entm't Operating Co., Inc.*, Case No. 11-cv-194 (N.D. Miss.), to proceed in Mississippi federal court); (Dkt. 7784, order allowing *Popovich v. Horseshoe Hammond, LLC*, Case No. 45D01-1106-PL-36 (Ind. Super. Ct.), to proceed in Indiana state court, including so the claimant could "establish liability against Caesars" for purposes of "liquidating proof of claim numbers 2567, 3131, and 3151"); (Dkt. 8056, order allowing *Caesars Entm't Operating Co., Inc. v. Monster, Inc.*, Case No. 14-707431-B (Nev. Dist. Ct.), to proceed in Nevada state court, including so the claimant could "establish liability against Caesars" for purposes of "liquidating proofs of claim numbers 3940, 4232, 4262, and 4285").

concluded that FERG "not litigating in New Jersey, supports denial under the unique circumstances of this case." 5/1/18 Hr'g Tr. at 49:22–50:9 (App. at 3530–31).

Finally, Petitioners claim FERG did not have an opportunity to brief in front of the Nevada District Court whether the New Jersey forum selection clause should be enforced given that the parties are not going to proceed in New Jersey. Pet. at 22. Petitioners argue Caesars first raised this "new argument[]"during the May 2018 oral argument with the Nevada District Court. *Id.* But this was not a "new argument" at all and instead simply a response to a question from the Nevada District Court to which each side had an opportunity to—and did—respond. 5/1/18 Hr'g Tr. at 38:22–39:10, 43:6–44:22 (App. at 3519–20, 3524–25). There is nothing prejudicial about that.

For these reasons, the Nevada District Court did not commit clear error in declining to enforce the New Jersey forum selection clause in the FERG agreement.

2. The Nevada District Court Did Not Abuse Its Discretion In Declining to Dismiss or Stay the Nevada State Court Action Based on the First-Filed Rule.

The Court likewise should not issue the writ because the Nevada District Court did not abuse its discretion when it declined to apply the first-filed doctrine. The Nevada District Court found the first-filed rule is a "doctrine of discretion with the courts," and, "under the totality of the circumstances, I'm not deferring to that." 5/1/18 Hr'g Tr. at 46:18–19, 49:8–11 (App. at 3527, 3530). As discussed above,

those circumstances included "avoiding potential inconsistencies [which] is a very much a factor in denying without prejudice the Motions to Dismiss," creating a forum for the "most efficient determination on those [common] issues," and having a Nevada state court decide questions of Nevada law. 5/1/18 Hr'g Tr. at 47:24–25; 49:6–8 (App. at 3528, 3530); 6/1/18 Order at 3–4 (App. at 3536–37).

Petitioners do not dispute that application of the first-filed rule is discretionary. Pet. at 26–27, 29; *see also Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 628 (9th Cir. 1991) ("The most basic aspect of the first-to-file rule is that it is discretionary[.]"); *Amlin Corporate*, 2012 WL 6020107, at *1. The Nevada District Court properly exercised its discretion in allowing the Nevada State Court action to proceed. It is not even a close call. As discussed above, the Nevada State Court Action is the most comprehensive lawsuit of the pending Seibel litigation. To the extent it does not resolve all issues in the Contested Matters, the Nevada Bankruptcy Court recognized that "any findings made by the [Nevada] State Court . . . may, to the extent applicable, be utilized by the Illinois Bankruptcy Court with respect to the matters pending before it." MOTI Opinion ¶ T (App. at 0211); LLTQ and FERG Opinion ¶ T (App. at 0236).

Under similar circumstances, courts have dismissed the first-filed lawsuit and let the second suit proceed. For example, in *Continental Insurance Company v. Hexcel Corporation*, four insurers commenced a declaratory judgment action against

their insured in California federal court. No. 12–cv–05352–YGR, 2013 WL 1501565, at *1–2 (N.D. Cal. Apr. 10, 2013). The insured later filed a competing declaratory judgment action in New Jersey state court against the same four insurers that brought the original action and 14 other insurers. *Id.* at *2. The federal court dismissed the first-filed lawsuit on the grounds that the state court proceeding would allow the insured to "comprehensively resolve . . . all insurers' coverage responsibilities stemming from the same underlying incidents." *Id.* at *4. By comparison, the first-filed federal suit would result in duplicative efforts for an incomplete resolution of the dispute. *Id.* at *4–5.

Likewise, in the cases cited by Petitioners (*see* Pet. at 27, 29), the courts deferred to the more comprehensive lawsuit. *Kohn Law Grp., Inc. v. Auto Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1238, 1240 (9th Cir. 2015) (affirming the district court's stay of second-filed lawsuit and noting the first-filed action had more parties); *Knapp v. Depuy Synthes Sales Inc.*, 983 F. Supp. 2d 1171, 1173, 1177–78 (E.D. Cal. 2013) (dismissing the first-filed lawsuit in favor of the broader second-filed lawsuit pending in Pennsylvania federal court, which included additional claims and "would more efficiently resolve all the issues presented by the present conflict").

Courts also consider each state's public policies when deciding whether to apply the first-filed rule. *See*, *e.g.*, *Cont'l Ins.*, 2013 WL 1501565, at *3, 5–6

(finding New Jersey's "intense and unambiguous interest in maintaining jurisdiction over insurance disputes involving environmental sites within its borders" outweighed the first-filed rule). Nevada has a strong public policy with respect to the issues presented in the Nevada State Court Action. The Nevada legislature has found that, as a "public policy of [Nevada]," the "gaming industry is vitally important to the economy of the State and the general welfare of the inhabitants," and "[t]he continued growth and success of gaming is dependent upon public confidence and trust that . . . gaming is free from criminal and corruptive elements." NRS 463.0129(1)(a)–(b); *see also* Nevada Gaming Regulation 5.011.

The Nevada State Court Action raises legal and factual issues at the intersection of Nevada contract and gaming law. Based on pleadings filed here and elsewhere, the Nevada District Court likely will need to decide issues such as the circumstances under which a party is entitled to attempt to cure its affiliation with an unsuitable person and the enforceability of restrictive covenants when they would require association with unsuitable persons. These suitability issues are best decided by a Nevada state court.

As the Nevada Bankruptcy Court found in opinions the Nevada District Court adopted, 6/1/18 Order at 3–4 (App. at 3536–37), a Nevada state court also should interpret agreements governed by Nevada law. MOTI Opinion ¶ Y (App. at 0213) ("Comity dictates that Nevada courts should have the right to adjudicate the

exclusively state law claims involving Nevada-centric plaintiffs and Nevada-centric transactions."); LLTQ and FERG Opinion ¶ Y (App. at 0238) (same). The parties' intentional selection of Nevada law in nearly all of the Seibel Agreements thus overrides the initial presumption of the first-filed rule. Compl. ¶¶ 14, 16–17, 19, 21 (App. at 0005–07); *Amlin Corporate*, 2012 WL 6020107, at *2 (determining that, although a lawsuit was filed second, it was better to have a Nevada court resolve a dispute governed by Nevada law because it "deals with Nevada law regularly"); *see also Editorial Planeta Mexicana, S.A. de C. V v. Argov*, No. 2:11–CV–01375–GMN–CWH, 2012 WL 3027456, at *4 (D. Nev. July 23, 2012) (although a lawsuit was first-filed in Nevada, the second-in-time Massachusetts court should resolve a contractual dispute because it would be more efficient, the actions were not identical, and Massachusetts law applied). Federal courts sitting in Nevada similarly defer to Nevada state courts to determine issues of Nevada law. *See*, *e.g.*, *Comm'l Cas. Ins. Co. v. Swarts, Manning & Assos., Inc.*, 616 F. Supp. 2d 1027, 1036 (D. Nev. 2007).

Petitioners argue Nevada law requires dismissing declaratory judgment actions if another legal proceeding is pending where "the same persons are parties and . . . the same issues may be adjudicated." Pet. at 27-28 (quoting *Pub. Serv. Comm'n of Nev. v. Eighth Jud. Dist. Ct. of State of Nev.*, 107 Nev. 680, 684–85, 818 P.2d 396, 399 (1991)). But the rule from *Public Service Commission* only applies when the declaratory judgment action involves the same parties and same issues as

the existing litigation. *Pub. Serv. Comm'n of Nev.*, 107 Nev. at 684–85, 818 P.2d at 399. As the Nevada District Court properly found, the underlying declaratory judgment action is broader than the Contested Matters or the Nevada Federal Action. It includes three defendants and one plaintiff that are not parties to either of those other actions. The Nevada District Court will also decide all issues presented by the declaratory judgment complaint, which may not occur in other actions. For example, the Illinois Bankruptcy Court may determine that LLTQ, FERG, MOTI, and DNT are not entitled to an administrative claim for specific reasons under the Bankruptcy Code (such as because they have not provided the estate with a post-petition benefit), and thus not determine the enforceability of the restrictive covenants or Caesars' prospective obligations as set forth in Counts II and III. Under similar circumstances, courts have favored declaratory judgment actions that are broader than the first-filed litigation. *E.g.*, *Cont'l Ins.*, 2013 WL 1501565, at *4–5, 7 (dismissing the first-filed declaratory judgment action because the second-filed declaratory judgment action included additional related parties and "substantially more of the controversy" could be resolved there).

There is simply no basis to conclude that the Nevada District Court abused its discretion in declining to dismiss or stay the Nevada State Court Action based on the first-filed rule.

3. The Nevada District Court Did Not Abuse Its Discretion In Declining to Dismiss or Stay The Nevada State Court Action As A Sanction for Alleged Forum Shopping.

The Court likewise should not issue the writ because the Nevada District Court did not abuse its discretion when it declined to dismiss or stay the Nevada State Court Action as a sanction for Caesars' alleged forum shopping. 5/1/18 Hr'g Tr. at 50:10–17 (App. at 3531); 6/1/18 Order at 4 (App. at 3537). The Nevada District Court found that "while other courts have made comments regarding aspects of the litigation, those courts have made clear that such comments are not determinations on the merits of any matter and, in fact, determinations on the merits have not been reached in the other actions." 6/1/18 Order at 4 (App. at 3537).

The Nevada State Court was correct and certainly did not abuse its discretion. The law is clear. It is not forum shopping to create a "*comprehensive* forum, not merely a favorable one." *R.R. St. & Co. Inc. v. Transp. Ins. Co.*, 656 F.3d 966, 981 (9th Cir. 2011) (emphasis in original). Caesars initiated the underlying lawsuit to obtain efficient and uniform determinations regarding all rights and obligations with respect to six related agreements involving all of the Seibel-Affiliated Entities. There is likewise nothing to indicate that the Nevada District Court is more favorable to any party than the Illinois Bankruptcy Court or the Nevada Federal District Court.

Consistent with the conclusion reached by the Nevada District Court, the Nevada Bankruptcy Court also rejected Petitioners' forum shopping argument in

remanding claims by LLTQ, FERG and MOTI back to the Nevada District Court. It noted Petitioners argued Caesars "engaged in forum shopping by filing the State Court Case after receiving unfavorable comments from [the Illinois Bankruptcy Court]," but then "determine[d] that the evidence does not indicate that any party chose its respective forum in an attempt to abuse or manipulate the judicial process." LLTQ and FERG Opinion ¶ V (App. at 0237) (internal ellipses omitted).

Petitioners' arguments fare no better here. They again trumpet comments the Illinois Bankruptcy Court and Nevada Federal Court made about certain positions taken by Caesars. Pet. at 6-7, 14, 30-31. But the Bankruptcy Court's comments were made in the context of discovery disputes and are not decisions on the merits. 5/31/17 Hr'g Tr. at 4:9–15, 9:17–10:6 (App. at 0595, 0600–01). The Nevada Federal Court likewise merely analyzed the sufficiency of pleading certain allegations on a motion to dismiss and did not determine the merits of Caesars' defenses. 7/3/17 Order at 8:21–9:2 (App. at 0748–49). In fact, it made clear that "[w]hether Paris could or did reject the assignment [wa]s a factual dispute between the parties, which the court [did] not consider on a motion to dismiss." 7/3/17 Order at 8:24–26 (App. at 0748).

Caesars has no doubt that both the Illinois Bankruptcy Court and the Nevada Federal District Court would assess these issues fairly. Indeed, Caesars did not object to transferring the claims removed by LLTQ, FERG and MOTI to the Illinois

Bankruptcy Court if jurisdiction had been proper. App. at 3224–25, 3231. This is not about forum shopping. The parties can simply get more comprehensive and consistent relief in the Nevada District Court than in the Illinois Bankruptcy Court or the Nevada Federal Court. The Nevada District Court did not abuse its discretion in reaching the same decision.

IV. CONCLUSION

For the foregoing reasons, Caesars respectfully requests that the Court either decline to consider or deny Petitioners' Petition for Writ of Mandamus or Prohibition.

DATED this 20th day of August 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2016 in size 14 font in double-spaced Times New Roman.

I further certify that I have read this brief and that it complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and 9,901 words.

Finally, I hereby certify that, to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on

/ / /

appeal. 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.

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