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.

RESPONDENTS' APPENDIX

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CHRONOLOGICAL INDEX

Date	Description	Bates no.
04/04/2018	Paris Las Vegas Operating Company, LLC's Motion to Stay Pending Resolution of Parallel State Court Action	Resp. App. 0001-0019
04/18/2018	Opposition of Plaintiff TPOV Enterprises 16, LLC to Defendants' Motion for a Stay of This Action	Resp. App. 0020-0036
04/18/2018	Transcript of Proceedings Before the Honorable A. Benjamin Goldgar	Resp. App. 0037-0050
04/25/2018	Reply in Support of Paris Las Vegas Operating Company, LLC's Motion to Stay Pending Resolution of Parallel State Court Action	Resp. App. 0051-0062
05/23/2018	Reorganized Debtors' Supplemental Brief in Support of Motion for Entry of an Order (A) Staying All Contested Matters Involving LLTQ Enterprises, LLC, LLTQ Enterprises 16, LLC, FERG, LLC, FERG 16, LLC, MOTI Partners, LLC, MOTI Partners 16, LLC and DNT Acquisition, LLC, and (B) Abstaining from Hearing These Contested Matters	Resp. App. 0063-0079
06/27/2018	Combined Objection to Motion of Reorganized Debtors to Stay Pending Litigation or to Abstain	Resp. App. 0080-0103
06/27/2018	Objection to Reorganized Debtors' Motion to Stay or Abstain from Hearing All Contested Matters, Including as Against DNT Acquisition, LLC and to the Original Homestead Restaurant, Inc.'s Joinder in the Reorganized Debtors' Motion	Resp. App. 0104-0120
07/18/2018	Reorganized Debtors' Reply Brief in Support of Motion for Entry of an Order (A) Staying All Contested Matters Involving LLTQ Enterprises, LLC, LLTQ Enterprises 16, LLC, FERG, LLC, FERG 16, LLC, MOTI Partners, LLC, MOTI Partners 16, LLC and DNT Acquisition, LLC, and (B) Abstaining from Hearing These Contested Matters	Resp. App. 0121-0134

Date	Description	Bates no.
08/07/2018	Reporter's Transcript of Defendant's Motion to Stay All Proceedings in the District Court Pending a Decision on Their Petition for a Writ of Mandamus or Prohibition	Resp. App. 0135-0207
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Date	Description	Bates no.
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08/20/2018	Opinion of U.S. Bankruptcy appellate Panel of the Ninth Circuit	0208-0224
04/18/2018	Opposition of Plaintiff TPOV Enterprises 16, LLC to Defendants' Motion for a Stay of This Action	Resp. App. 0020-0036
04/04/2018	Paris Las Vegas Operating Company, LLC's Motion to Stay Pending Resolution of Parallel State Court Action	Resp. App. 0001-0019
07/18/2018	Reorganized Debtors' Reply Brief in Support of Motion for Entry of an Order (A) Staying All Contested Matters Involving LLTQ Enterprises, LLC, LLTQ Enterprises 16, LLC, FERG, LLC, FERG 16, LLC, MOTI Partners, LLC, MOTI Partners 16, LLC and DNT Acquisition, LLC, and (B) Abstaining from Hearing These Contested Matters	Resp. App. 0121-0134

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04/25/2018	Reply in Support of Paris Las Vegas Operating Company, LLC's Motion to Stay Pending Resolution of Parallel State Court Action	Resp. App. 0051-0062
08/07/2018	Reporter's Transcript of Defendant's Motion to Stay All Proceedings in the District Court Pending a Decision on Their Petition for a Writ of Mandamus or Prohibition	Resp. App. 0135-0207
04/18/2018	Transcript of Proceedings Before the Honorable A. Benjamin Goldgar	Resp. App. 0037-0050

DATED this 20th day of August 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 20th day of August 2018, I electronically filed and served a true and correct copy of the above and foregoing **APPENDIX IN SUPPORT OF ANSWER TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** properly addressed to the following:

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TPOV ENTERPRISES 16, LLC, a Delaware Limited Liability Company, Plaintiff, vs. PARIS LAS VEGAS OPERATING COMPANY, LLC, a Nevada limited liability company, Defendant.	CASE NO. 2:17-cv-00346-JCM-VCF **PARIS LAS VEGAS OPERATING COMPANY, LLC'S MOTION TO STAY PENDING RESOLUTION OF PARALLEL STATE COURT ACTION** **ORAL ARGUMENT REQUESTED**
PARIS LAS VEGAS OPERATING COMPANY, LLC, a Nevada limited liability company, Counterclaimant. vs. TPOV ENTERPRISES, LLC, a Delaware Limited Liability Company, TPOV ENTERPRISES 16, LLC, a Delaware Limited Liability Company, ROWEN SIEBEL, an individual. Counter-defendants.	

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Paris Las Vegas Operating Company, LLC ("Paris") hereby moves for a stay of this lawsuit pending the resolution of a parallel state court action**.** As TPOV Enterprises, LLC ("TPOV"), TPOV Enterprises 16, LLC ("TPOV 16"), and Rowen Seibel ("Seibel") (collectively the "Seibel Parties") must concede, active and contentious litigation exists in state and federal trial courts across

the country concerning whether Caesars' entities properly terminated their agreements with Seibel and his related entities due to Seibel's felony conviction, his failure to disclose the conviction or his involvement in the related criminal activities, and the effect of that termination. Litigation exists in Nevada (state and federal courts), Delaware, Illinois, and New York that will consider these very issues. It is unreasonable for all of these courts to waste precious judicial resources policing the frequent pretrial disputes and deciding the many overlapping issues in each of these related suits. Instead, a consolidated Nevada state court action, styled as *Desert Palace, Inc. et al. v. Rowen Seibel, et al.*, Case No. A-17-760537-B, consolidated with A-17-751759 in the Eighth Judicial District Court in Clark County, Nevada (the "Nevada Consolidated Action"), provides the most comprehensive forum for these disputes to proceed. The Nevada Consolidated Action involves all of the Caesars and Seibel entities that contracted with each other with respect to various restaurants at Caesars' properties. The Consolidated Nevada Action will also address threshold state law contract and gaming issues, which are at the core of the various disputes between the parties.

Allowing the Nevada Consolidated Action to proceed first will avoid burdening multiple courts with adjudicating these overlapping legal and factual issues, eliminate the risk of inconsistent decisions, and reduce the attorneys' fees and costs incurred by the parties from litigating these claims in multiple forums. Importantly, it will also allow the Nevada state court, as a matter of comity, to determine the state law contract and gaming issues at the heart of these disputes. Courts have inherent power to stay the cases before them as a matter of controlling their own dockets and the *Colorado River*[1] factors favor a stay. Here, because the balance favors a stay, this Court should exercise its discretion and grant the Motion to Stay and abstain from this action until the Nevada Consolidated Action concludes.

/ / /

[1] *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817–18 (1976).

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This Motion is made and based on the papers and pleadings on file herein, the following Memorandum of Points and Authorities, any and all exhibits thereto, and any and all oral argument this Court may allow at the time of hearing on this matter.

DATED this 4th day of April 2018.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. RELEVANT FACTUAL BACKGROUND

A. The Agreements Between Caesars and Seibel.

Beginning in 2009, Caesars-related entities entered into six agreements with entities owned by, managed by, and/or affiliated with Rowen Seibel (the "Seibel Entities") relating to restaurants at Caesars' gaming properties (the "Seibel Agreements"). These agreements included:

- A Development, Operation and License Agreement between MOTI Partners, LLC and Desert Palace, Inc. dated March 2009 (the "MOTI Agreement");
- A Development, Operation and License Agreement between DNT Acquisition, LLC, the Original Homestead Restaurant, Inc., and Desert Palace, Inc., dated June 21, 2011, dated June 21, 2011 (the "DNT Agreement");
- A Development and Operation Agreement between TPOV and Paris dated November 2011 (the "TPOV Agreement");
- A Development and Operation Agreement between LLTQ Enterprises, LLC and Desert Palace, Inc. dated April 4, 2012 (the "LLTQ Agreement");
- A Development, Operation and License Agreement between PHW Las Vegas, LLC dba Planet Hollywood by its manager, PHW Manager, LLC, GR BURGR, LLC, and Gordon Ramsay, dated December 13, 2012 (the "GR Burgr Agreement"); and
- A Consulting Agreement between FERG, LLC and Boardwalk Regency Corporation dba Caesars Atlantic City, dated May 16, 2014 (the "FERG Agreement");

Because of the highly-regulated nature of Caesars' gaming businesses, each of these agreements contained provisions designed to ensure that Seibel and his entities were suitable and to prevent Caesars from entering into a business relationship that would jeopardize its good standing with gaming authorities. Unbeknownst to Caesars, when the parties entered into each of the Seibel Agreements, Seibel was engaged in criminal conduct that rendered him unsuitable. Indeed, Seibel and his related entities failed to truthfully disclose that Seibel had been party to criminal activities that resulted in his felony conviction within the last ten years. Had the Caesars-related entities been aware of Seibel's criminal activity, they would not have entered into any of the Seibel Agreements. Instead, it was not until August 2016 that Caesars learned of Seibel's conviction and impending prison sentence for felony tax evasion through news reports. Upon learning of Seibel's criminal

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activity and felony conviction, Caesars promptly terminated each of the Seibel Agreements as allowed under the express terms of each agreement. (*See, e.g.*, Ex. A, TPOV Agreement § 10.2.)

Although Seibel has no one to blame but himself for the consequences of his criminal activity, he and his entities continue to argue Caesars improperly terminated the Seibel Agreements. This has resulted in litigation in courts across the country. In addition to this matter, there are two Nevada state court actions that were recently consolidated before the Honorable Joseph Hardy. (Ex. B, Desert Palace Compl.; Ex. I, GRB Compl.) There is another action in Delaware Chancery Court concerning GR BURGR ("GRB"), a recently dissolved joint venture between Seibel and an affiliate of British celebrity chef Gordon Ramsay. (*See, e.g.*, Ex. E, GRB Dissolution Order). The Original Homestead Restaurant ("OHR") filed an action in New York state court against Seibel and others based on a joint venture (DNT) between OHR and a Seibel entity. (Ex. F, DNT Compl.) And, there are also several contested matters involving LLTQ, FERG, and MOTI brought during the chapter 11 cases filed by Caesars Entertainment Operating Company, Inc. and certain of its affiliates that remain pending before the U.S. Bankruptcy Court for the Northern District of Illinois (the "Illinois Bankruptcy Court"). Consistent with the relief sought in this motion, Caesars has filed a motion to stay the contested matters before the Illinois Bankruptcy Court. (Ex. G, Motion to Stay.) That court has held briefing on that motion in abeyance until after the Nevada state court decides the pending motions to dismiss or, alternatively, stay those proceedings on April 12, 2018.

B. <u>The Nevada Consolidated Action.</u>

On January 11, 2017, Seibel, purportedly derivatively on behalf of GRB, filed a complaint in the United States District Court for the District of Nevada naming Planet Hollywood as a defendant. (Ex. C, GRB Federal Compl.) That action was dismissed on jurisdictional grounds. Seibel then re-filed a similar complaint in the Eighth Judicial District Court in Clark County, Nevada, Case No. A-17-751759 (the "Planet Hollywood Action") on February 28, 2017. (Ex. D, GRB Compl.) Planet Hollywood moved to dismiss the Planet Hollywood Action and the Court granted the motion, in part, to the extent it was based on Caesars allegedly receiving money that should have been paid to GRB under the GRB Agreement, Caesars' failure to provide GRB with an opportunity to cure its association with any unsuitable persons, Caesars' failure to terminate its

relationship with Ramsay, and Caesars' efforts to open a rebranded restaurant with Ramsay. (Ex. H, Order on Mot. to Dismiss.) Seibel subsequently filed an Amended Complaint. (*See* Ex. I, Am. GRB Compl.)

On August 25, 2017, Desert Palace Inc. ("Caesars Palace"), 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") brought a Complaint against Seibel, his related entities, and J. Jeffrey Frederick in the Eighth Judicial District Court in Clark County, Nevada. (Ex. B, Desert Palace Compl.) The omnibus action seeks a declaration that Caesars properly terminated the Seibel Agreements based on its determination that Seibel and his entities were unsuitable as a result of Seibel's criminal activities, resulting felony conviction, and failure to disclose the conviction or the underlying activities (the "Desert Palace Action"). (*Id.* ¶ 134.)

On September 27, 2017, some of Seibel's entities, LLTQ, FERG, and MOTI, removed certain of the claims asserted against them in the Desert Palace Action to the U.S. Bankruptcy Court for the District of Nevada ("Nevada Bankruptcy Court"). However, the Nevada Bankruptcy Court granted Caesars' motions to remand those claims back to the Nevada state court. (*See* Ex. J; LLTQ Findings of Fact & Conclusions of Law; Ex. K; MOTI Findings of Fact & Conclusions of Law.) In granting Caesars' motions to remand, the Nevada Bankruptcy Court found that "similar issues involving Nevada law permeate all of the Removed Claims, as well as the claims that have already been remanded back to the State Court," "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, the parties would be subject to the risk of inconsistent decisions by different courts. (*See, e.g.*, Ex. J, ¶¶ M, N, X, Y, Z.) LLTQ, FERG, and MOTI appealed the remand orders, and a decision

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remains pending. Despite the appeal, the parties are proceeding with litigation in the Desert Palace Action, which is now consolidated[2] with *Seibel v. Planet Hollywood*, Case No. A-17-751759.

C. This Action.

On February 3, 2017, TPOV 16 filed a complaint in this Court alleging (i) Paris breached the TPOV Development Agreement by refusing to continue to pay TPOV 16 and terminating the TPOV Development Agreement; (ii) Paris breached the implied covenant of good faith and fair dealing by disputing the validity of the assignment of the TPOV Development Agreement and claiming that TPOV is an Unsuitable Person; (iii) Paris has been unjustly enriched by its failure to pay TPOV 16 in accordance with the TPOV Development Agreement; and (iv) TPOV 16 is entitled to a declaration that the assignment of the TPOV Development Agreement from TPOV to TPOV 16 was valid and TPOV 16 is not associated with an Unsuitable Person. (ECF No. 1.) Paris moved to dismiss TPOV 16's claims and this Court granted the motion in part, dismissing TPOV 16's claim for unjust enrichment. (ECF No. 30.) Thereafter, Paris answered the complaint, and asserted counterclaims for breach of contract, breach of the implied covenant, fraudulent concealment, civil conspiracy, and declaratory relief against TPOV, TPOV 16, and Seibel personally. (ECF No. 32.)

Since then, the parties have initiated discovery, but the lion's share remains to be completed. The parties have exchanged initial disclosures, written discovery, and Paris is in the process of reviewing thousands of documents to be produced consistent with the search terms exchanged between the parties. However, the parties have not yet taken any depositions or exchanged additional documents.

II. ARGUMENT

"Courts have inherent power to stay the cases before them as a matter of controlling their own dockets and calendars. This power to stay is incidental to the power inherent in every court to control . . . its docket with economy of time and effort for itself, for counsel, and for litigants."

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[2] Following consolidation, Seibel, DNT, TPOV, TPOV 16, LLTQ, FERG, and MOTI filed motions to dismiss and/or alternatively stay the claims asserted against them. Those motions remain pending and a hearing is currently set for April 12, 2018.

Calkins v. Credit One Bank, N.A., No. 2:16-CV-2602-APG-NJK, 2017 WL 956195, at *1 (D. Nev. Mar. 10, 2017) (footnote omitted) (citation omitted). "Every court has the ***inherent power to stay causes on its docket with a view to avoiding duplicative litigation, inconsistent results, and waste of time*** . . . ." *Stern v. United States*, 563 F. Supp. 484, 489 (D. Nev. 1983) (emphasis added). In determining whether to grant a stay, the Court must weigh competing interests, including "the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of simplifying or complicating of issues, proof, and questions of law . . . ." *Calkins*, 2017 WL 956195, at *1. The party requesting the stay "bears the burden of showing that a stay is warranted." *Id.* (citing *Clinton v. Jones*, 520 U.S. 681, 708 (1997)).

Given the duplicative nature of this action and the Nevada Consolidated Action, the Court should stay this matter pending resolution of the Nevada Consolidated Action. Not only would a stay avoid the waste of resources by this Court and the parties, who would be forced to deal with the same pre-trial matters in both actions simultaneously, it would, more importantly, avoid inconsistent results. The Nevada Consolidated Action will consider the same facts at issue here but will do so in a more comprehensive manner because it will consider not only the TPOV Agreement, but all of the other Seibel Agreements as well. In contrast, the matter before this Court would be considered in a vacuum with only the TPOV Agreement at issue. As the more comprehensive case, the Nevada Consolidated Action is the appropriate forum to determine the suitability issues related to Seibel and his entities – including TPOV, TPOV 16, and the TPOV Agreement – and all of the other Seibel Agreements. *See Stern*, 563 F. Supp. at 489; *see also Terway v. Syngenta Seeds, LLC*, No. 216CV01587GMNGWF, 2016 WL 4435745, at *1 (D. Nev. Aug. 19, 2016) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936) ("District courts have the inherent power to stay proceedings."); *City of Henderson v. Span Sys., Inc.*, No. 2:12-CV-00780-JCM, 2013 WL 1104428, at *1 (D. Nev. Mar. 15, 2013) ("Courts have inherent power to stay the cases before them as a matter of controlling their own docket and calendar.").

Moreover, the law is clear that "a federal court may stay a federal case in favor of a parallel state proceeding." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800,

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817–18 (1976); *see also Holder v. Holder*, 305 F.3d 854, 867 (9th Cir. 2002) ("Under *Colorado River*, considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, may justify a decision by the district court to stay federal proceedings pending the resolution of concurrent state court proceedings involving the same matter." (quotation omitted)). "Exact parallelism is not required; it is enough if the two proceedings are 'substantially similar." *Holder*, 305 F.3d at 867 (quotation omitted).

Under a *Colorado River* stay, "the district court must carefully consider 'both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise.'" *R.R. St. & Co. v. Transp. Ins. Co.*, 656 F.3d 966, 978 (9th Cir. 2011) (quoting *Colorado River*, 424 U.S. at 818)); *see also Sierra Dev. Co. v. Chartwell Advisory Grp., Ltd.*, No. 13CV602 BEN (VPC), 2016 WL 1733443, at *1 (D. Nev. May 2, 2016) (same).

Colorado River and its progeny offer an eight-factor test for courts to consider when determining whether federal abstention is warranted. *Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 841 (9th Cir. 2017). The eight factors for consideration include the following:

> (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

Id. at 841–42 (quoting *R.R. St.*, 656 F.3d at 978–79). "These factors are not a 'mechanical checklist'; indeed, some may not have any applicability to a case." *Id.* at 842 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983)). Rather, the U.S. Supreme Court has instructed courts to apply the factors in "a pragmatic, flexible manner with a view to the realities of the case at hand." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 21. Consistent with the Supreme Court's directive, the factors are in turn, and pragmatically, below.

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A. Staying the federal court case avoids piecemeal litigation.[3]

A substantial factor for consideration in the *Colorado River* analysis is avoidance of piecemeal litigation. *Seneca*, 862 F.3d at 842. "Piecemeal litigation occurs when different tribunals consider the same issue, thereby duplicating efforts and possibly reaching different results." *R.R. St.*, 656 F.3d at 979. A "case must raise a special concern about piecemeal litigation which can be remedied by staying or dismissing the federal proceeding." *Id.* (internal quotations omitted). In assessing this factor, courts consider issues such as whether the federal court is being asked "to adjudicate rights that [we]re implicated in a 'vastly more comprehensive' state action'" or there is a "highly interdependent" relationship between the claims in the federal and state actions. *Id.* at 979-80 (quoting *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1369 (9th Cir. 1990)).

That is the case here. The Nevada state court consolidated multiple cases, which allows for a comprehensive scheme to resolve the claims regarding the nearly identical Siebel Agreements. There also exists a highly interdependent relationship between the consolidated cases in the Nevada State Court Action and the action before this Court, as the claims in both courts aim to determine the parties' rights and obligations, current, and future, as it pertains to the TPOV Development Agreement.

In fact, the Nevada state court has also made substantive determinations. In addressing Planet Hollywood's Motion to Dismiss, the State Court determined that Plaintiff "failed to plead facts sufficient to support a breach of contract claim against Planet Hollywood for: (1) continuing to do business with Ramsay; (2) refusing to provide GR BURGR, LLC ("GRB") with an opportunity to cure its affiliation with Plaintiff; and (3) attempting and/or planning to operate a rebranded restaurant." (Ex. H, Order on Mot. to Dismiss at 2:3-8.) The court further found that ***"[t]he plain***

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[3] This is the third factor in the *Colorado River* analysis. The first and second factors are neutral. The first factor asks which court first assumed jurisdiction over property. In this case, no property is in dispute, and neither the federal nor the state court has assumed jurisdiction over any property. *See Seneca*, 862 F.3d at 842 (finding the res factor neutral because neither court had asserted jurisdiction over a property); *see also Commercial Cas. Ins. Co.*, 616 F. Supp. 2d at 1035 ("This first factor of the *Colorado River* analysis is not relevant to the present case because there is no property in dispute that is the sort of tangible physical property referred to in *Colorado River*."). As to the second factor, there is no issue regarding inconvenience of the federal forum or the state forum. Both forums are in Nevada and the Seibel Entities filed suit in both.

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language of the agreement precludes th[ose] claims as a matter of law." (*Id.* (emphasis added).) Especially significant is the Nevada state court's determination that Caesars was not obligated under the terms of the contract to provide Seibel with an opportunity to cure its affiliation with Seibel. (*See id.*) Although the TPOV Agreement contains nearly identical language, here the Court has yet to consider that issue. (ECF No. 30 at 8.)[4] This issue – which has been resolved in the Nevada Consolidated Action – is thus an outstanding issue in this matter that could lead to inconsistent results between this matter and the Nevada Consolidated Action and result in piecemeal litigation. Instead, because (1) the Nevada state court consolidated multiple cases that will resolve TPOV 16's claims; (2) the federal and state court actions are highly interdependent; and (3) the Nevada state court has made substantive determinations central to the matters at issue here, staying the federal court case avoids piecemeal litigation.

B. <u>The comparable progress made in each forum favors a stay</u>.

Factor four concerns the order in which the forums obtained jurisdiction. The U.S. Supreme Court's directive to be pragmatic and flexible, rather than mechanical, is particularly pertinent to the order in which parallel forums obtain jurisdiction. *See, e.g., Cone*, 460 U.S. at 21 (giving little weight to filing dates when the same relative progress had been made in the state and federal proceedings); *Am. Int'l Underwriters (Philippines), Inc. v. Cont'l Ins. Co.*, 843 F.2d 1253, 1258 (9th Cir.) ("It is true that this factor must be applied in a pragmatic, flexible manner, so that priority is not measured exclusively in terms of which complaint was filed first, but rather in terms of how much progress was actually made in the state and federal actions."). Although this matter was filed before the Planet Hollywood Action and the Nevada Consolidated Action, discovery in this action is still in its early stages, with the parties having exchanged initial disclosures, some written discovery and taken no depositions. Further, the parties are in the process of negotiating a

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[4] In ruling on Paris' Motion to this Dismiss, this Court stated that "[w]hether Paris could or did reject the assignment is a factual dispute between the parties, which ***the court does not consider on a motion to dismiss***. Although Paris argues its 'determination that Seibel is unsuitable is undisputable as a matter of law,' TPOV 16 still pleaded facts on which relief can be granted." (ECF No. 30 at 8:24-9:1.)

stipulation to use any discovery that has been disclosed in this matter across other cases, including the Consolidated Nevada Action.[5] Thus, from a pragmatic application, this factor is neutral.

C. The source of law factor should be heavily weighted and it favors a stay.

Where one suit is in federal court on grounds of diversity with no federal claims, courts typically defer to a parallel state court claim. *Nobuyuki Sakakibara, Ubon, Inc. v. Pride FC Worldwide Holdings, LLC*, No. 2:08CV00418-HDMRJJ, 2008 WL 4093706, at *2 (D. Nev. Aug. 28, 2008); *see also Butler v. Judge of U S Dist CT In & For N. Dist of Cal, N. Div.*, 116 F.2d 1013, 1016 (9th Cir. 1941) (emphasizing the duty of the federal trial court in the exercise of its discretion to avoid unseemly conflict with a state court). This is especially true when a question of state law is at issue. *Globe Grain & Milling Co. v. De Tweede Nw. & Pac. Hypotheekbank*, 69 F.2d 418, 428 (9th Cir. 1934) ("The decisions of the Supreme Court of the United States also make it clear that federal courts should refrain from any attempt to interfere with the exclusive right of the state Supreme Courts to interpret state statutes, having gone to the extent of modifying their own opinion.").

Here, as in *R.R. Commission*, this court is confronted with the choice of offering a tentative answer that "may be displaced tomorrow by a state adjudication." *See id.* at 500 (citing *Glenn v. Field Packing Co.*, 290 U.S. 177 (1933); *Lee v. Bickell*, 292 U.S. 415 (1934)). By all measures, this action is fundamentally governed by state law, as it is a contract dispute at its core. *See Nobuyuki*, 2008 WL 4093706, at *2 (providing that a contract dispute is fundamentally a state court issue). "Furthermore, Nevada gaming requirements . . . undergird several of the provisions in the contracts." *Id.* (explaining why the issues at bar were issues for state court consideration).[6]

As admitted in TPOV 16's Complaint, Seibel agreed and understood that Paris was a gaming licensee subject to rigorous suitability requirements, which would require truthful disclosures from

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[5] This is particularly important here, because while the parties have spent substantial time reviewing documents for production, those efforts may not have to be duplicated in the Nevada Consolidated Action.

[6] As a material condition of Paris's execution of the TPOV Development Agreement, TPOV was required to submit to background checks conducted by Paris's Compliance Committee. (Ex. A,

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him and his entities. He also agreed and understood that Paris had the ability to terminate the TPOV Development Agreement in its "sole discretion" based on suitability grounds. Nevertheless, Seibel was engaged in tax fraud before executing the TPOV Development Agreement, sought amnesty for his crimes, and pleaded guilty to and was convicted of a felony tax charge in April and August 2016, respectively. (ECF No. 1, ¶ 15.) Neither TPOV nor TPOV 16 nor Seibel disclosed these material facts to Paris, a gaming licensee, bound by statutory suitability requirements. (*Id.*) Plaintiffs' allegations in the Complaint make clear that issues of contract and gaming license issues are intertwined with the claims before both courts.

Gaming issues in particular should be decided by Nevada state courts for three reasons. First, issues of safety, health, and morality are traditionally left to the states. *In re Boyce*, 27 Nev. 299, 75 P. 1, 14 (1904) ("The police power is inherent in the Legislature, and founded upon the duty of the state to protect life, health, and property of the community, and to preserve good order and morality."); *Thomas v. Bible*, 694 F. Supp. 750, 760 (D. Nev. 1988) ("Licensed gaming is a matter reserved to the states within the meaning of the Tenth Amendment to the United States Constitution. Within this context, we find no room for federally protected constitutional rights." (internal quotation omitted).) NRS 463.0129 (1)(d) specifically recognizes gaming and the licensing of persons engaged in gaming as important "to protect the public health, safety, morals, good order and general welfare of the inhabitants of the State."

Second, the gaming industry is vitally important to Nevada's economy. NRS 463.0129 (1)(b); Nevada Gaming Regulation 5.011; *see also* NRS 463.0129 (1)(d) (providing that gaming

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§ 10.2.) Thus, prior to the execution of the 'TPOV Development Agreement, TPOV was required to provide written disclosures regarding TPOV Associates. (*Id.*) To ensure continued suitability, TPOV Associates were required to update their disclosures without Paris's prompting if anything became inaccurate or material changes occurred. (*Id.*)

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must be licensed and controlled "to foster the stability and success of gaming and to preserve the competitive economy and policies of free competition of the State of Nevada").

Third, the statutory framework governing gaming is detailed and broad, espousing the state's intent to provide strict, state level control. *See Thomas*, 694 F. Supp. at 768 ("Nevada's interest in strict regulation of licensed gaming necessarily includes discretion in selective prosecution."). Two administrative agencies with broad regulatory authority were created in furtherance of this goal: the Gaming Control Board, established pursuant to NRS463.030, and the Gaming Commission, established pursuant to NRS 463.022. The duty to develop internal compliance systems, the decisions that Plaintiffs dispute as being consistent with Paris's statutory and regulatory obligations, is a duty created by Nevada's vast gaming statutory and regulatory framework. *See, e.g.*, Nevada Gaming Regulation 5.045. Suitability, which is also one of the state statutory and regulatory constructions at issue here, is addressed by Nevada Gaming Regulation 3.090; N.R.S. 463.167; N.R.S. 463.170.

Because gaming issues are of the upmost importance to the state of Nevada, abstention is even more important and the last word on the meaning of the gaming statutes and regulations should go to the Nevada state courts. *See R.R. Comm'n*, 312 U.S. at 499–500 (1941) ("The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas.") And "[t]he reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court." *Id.* at 500.

Therefore, this factor weighs heavily in favor of abstention. *See Nobuyuki*, 2008 WL 4093706, at *2 (finding after recognizing contractual and gaming issues in Plaintiff's complaint that "this factor weighs in favor of abstention to allow the state court to resolve any questions of state law that may be implicated in the contract provisions").

E. <u>The state forum is adequate, and therefore favors a stay</u>.

"This factor involves the *state* court's adequacy to protect *federal* rights." *Travelers*, 914 F.2d at 1370. Federal district courts may not abstain from a federal court proceeding if the parallel state court proceeding cannot adequately protect the rights of the litigants. *R.R. St.*, 656 F.3d at

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981. In this case, there can be no dispute that the Nevada state court has authority to address the parties' rights and remedies. *Contra. Cone*, 460 U.S. at 26–27 (emphasizing that the state court might lack the power to enter the order that the plaintiff was seeking in federal court); *Holder*, 305 F.3d at 869 n.5 (noting that the state court probably lacked jurisdiction to hear the plaintiff's federal ICARA claim). Indeed, Seibel himself has commenced an action there that is now part of the Nevada Consolidated Action. Therefore, there is no reason for this Court to be concerned with the protections afforded in Nevada state court. This factor favors abstention too.

F. The federal and state court suits are conceptually parallel, and favor a stay.

This factor concerns whether the state court proceeding sufficiently parallels the federal court proceeding. This factor does not require "exact parallelism," only that the two actions be "substantially similar." *Nakash v. Marciano*, 882 F.2d 1411, 1416 (9th Cir. 1989) ("We agree that exact parallelism does not exist, but it is not required. It is enough if the two proceedings are substantially similar." (quotations omitted)); *Travelers*, 914 F.2d at 1372 (same); *Cincinnati Ins. Co. v. Nat'l Print Grp.*, No. 2:14-CV-2174-GMN-VCF, 2015 WL 5009298, at *2 (D. Nev. July 29, 2015) ("[S]trict parallelism is not required."). In fact, the federal court is only precluded from staying the federal court action where "the existence of a substantial doubt as to whether the state proceedings will resolve the federal action precludes a *Colorado River* stay or dismissal." *R.R. St.*, 656 F.3d at 982 (internal quotations omitted).

The parallel proceedings here are substantially similar. First, although the claims in the state court proceeding are more comprehensive than those presented here, they both address the same issue. In general, both this federal court action and the Nevada Consolidated Action involve questions related to the propriety of Caesars' termination of its contracts with Seibel Entities on "suitability" grounds, the effect of such termination on the parties' relationship, and whether future promises in those agreements limit Caesars' ability to partner with Ramsay in current or future restaurants. *See Butler*, 116 F.2d at 1016 (determining that the two cases were identical, considering that both turned on the interpretation of a contract and whether the work at issue fell within the meaning of the contract). Moreover, TPOV 16's supplemental claims in this action, such as breach of the implied covenant of good faith and fair dealing, unjust enrichment, declaratory relief, and an

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accounting, ask the Court to determine the exact issues for which Paris seeks declaratory relief in the Nevada state court action. (*See* Ex. B, Desert Palace Compl.) Even if these particular claims were not addressed in the parallel complaints, so long as the state court would make a determination as to the relevant issues in reaching its outcome, sufficient parallelism is achieved. *See Weiner v. Shearson, Hammill & Co.*, 521 F.2d 817, 822 (9th Cir. 1975) ("The state court does have power to grant the parties relief under the 1933 Act or the state law counterclaim, and in doing so, it also may . . . resolve the 1934 Act issues.").

Second, the ultimate legal determination in each action—whether Paris breached the TPOV Development Agreement—***depends on the same set of facts***: Seibel's conviction and failure to disclose the underlying criminal activity. The fact that all the legal issues are not plead the same way is not material. *See Pac. Emp'rs Ins. Co. v. Herman Kishner Trust*, No. 2:10–cv–897–JCM–PAL, 2011 WL 977019, at *2 (D. Nev. Mar. 18, 2011) (Mahan, J.) ("[E]ven though all of the legal issues were not parallel, the federal action does parallel the state action in the sense that the ultimate legal determination in each depends upon the same facts." (internal quotation marks omitted) (citations omitted).)

Third, each of the parties in this case are also parties in the Nevada state court action. The fact that the Nevada state court action involves a greater number of parties is no bar to a stay. *Am. States Ins. Co. v. Brother Int'l Corp.*, No. 2:12-CV-01335-LRH, 2013 WL 1249591, at *2 (D. Nev. Mar. 27, 2013) ("The difference between the named plaintiffs . . . is no bar to application of the *Colorado River* doctrine. Rather, the court's analysis is anchored by the realities of the case at hand." (quotation omitted)).

Furthermore, having additional, key parties before the Nevada state court is advantageous to the Nevada state court's breadth of understanding of the issues and consistency of determinations related thereto. *Montanore Minerals Corp. v. Bakie*, 867 F.3d 1160, 1170 (9th Cir. 2017) ("[W]e are particularly reluctant to find that the actions are not parallel when the federal action is but a spin-off of more comprehensive state litigation." (quotations omitted)). As noted above, this federal action is just one part of widespread litigation involving numerous parties in multiple forums. The

Nevada state court litigation is the most comprehensive forum of the Seibel-related proceedings across the country.

Because the claims in each action address the same legal issues, the facts upon which the legal issues must be decided are the same, and both parties are parties to the Nevada state court action, the parallelism factor favors a stay. *See Montanore*, 867 F.3d at 1170 ("The parallelism requirement was met even though additional parties were named in the state suit, the federal suit included additional claims, and the suits arguably focused on different aspects of the dispute."); *Butler*, 116 F.2d at 1016 ("[T]he fact that two employees of Cooley Butler were joined as defendants in the state court and that the property in the action in the federal court involved other lots [we]re not decisive of the question before [the court].").

F. To avoid forum shopping, this Court may enter a stay.

"[F]orum shopping weighs in favor of a stay when the party opposing the stay seeks to avoid adverse rulings made by the state court or to gain a tactical advantage from the application of federal court rules." *Travelers*, 914 F.2d at 1371; *see also Nakash*, 882 F.2d at 1417 (noting that forum shopping pertains to the avoidance of adverse rulings). Here, neither party seeks to obtain a tactical advantage avoid any adverse rulings from this Court. Instead, a stay is appropriate because the Nevada Consolidated Action is the most comprehensive forum to resolve the issues related to the Seibel Agreements – including the TPOV Agreement – and prevent inconsistent rulings in the litigation around the country. Thus, this factor is neutral.

G. Balancing the factors requires abstention.

"The factors relevant to a given case are subjected to a flexible balancing test, in which one factor may be accorded substantially more weight than another depending on the circumstances of the case." *Holder*, 305 F.3d at 870–71. On balance, the *Colorado River* factors favor a stay of this action. Factors one and two are not relevant here. Factor three promotes a stay in order to avoid piecemeal litigation, as the Nevada state court has already made substantive determinations. Factor four, the order in which forums obtained jurisdiction, is neutral. The most important factor—source of law—given that these are state law contract and gaming disputes strongly supports state court resolution. The sixth factor, adequacy of the state court forum, counsels in favor of a stay because

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it cannot be disputed that the state court has the authority to resolve the issues presented herein. Factor seven concerns parallelism of the suits and weighs heavily in favor of a stay. The claims in each action address the same legal issues, the facts upon which the legal issues must be decided are the same, and all parties here are in the Nevada state court action. Avoiding forum shopping, the eighth and final factor, is neutral. With five factors weighing in favor of a stay, and factors five and seven given the most weight, the balance tips sharply in Paris's favor. Therefore, this Court should "avoid[] the waste of judicial resources from duplicative litigation in two courts," *Attwood v. Mendocino Coast Dist. Hosp.*, 886 F.2d 241, 244 (9th Cir. 1989), and stay the current proceedings.

III. CONCLUSION

For all of the foregoing reasons, Paris respectfully requests that this Court grant its motion to stay and enter an order staying this federal court action until the Nevada state court action reaches its conclusion.

DATED this 4th day of April 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC and that, on this 4th day of April 2018, I caused to be sent via the Court's E-Filing/E-Service system a true and correct copy of the above and foregoing **PARIS LAS VEGAS OPERATING COMPANY, LLC'S MOTION TO STAY PENDING RESOLUTION OF PARALLEL STATE COURT ACTION** properly addressed to the following:

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TPOV ENTERPRISES 16, LLC, a Delaware Limited Liability Company, Plaintiff, v. PARIS LAS VEGAS OPERATING COMPANY, LLC, a Nevada limited liability company, Defendant.	Case No.: 2:17-cv-00346-JCM-VCF **OPPOSITION OF PLAINTIFF TPOV ENTERPRISES 16, LLC TO DEFENDANTS' MOTION FOR A STAY OF THIS ACTION**

Plaintiff TPOV Enterprises 16, LLC ("TPOV 16"), and counterclaim defendants TPOV Enterprises, LLC ("TPOV") and Rowen Seibel ("Seibel") hereby submit this opposition to the motion for a stay of this action filed by defendant Paris Las Vegas Operating Company, LLC ("Defendant" or "Paris") on April 4, 2018 (ECF No. 49).

INTRODUCTION

Fourteen (14) months after this action was commenced by Plaintiff, Defendant Paris seeks a stay of this action based on its filing a declaratory relief action in Nevada State Court against TPOV 16 that includes twelve (12) parties who are not parties to the present action ("State Court Action"). The State Court Action was filed in August 2017, and yet Paris did not bring the motion until eight (8) months later. In its motion, Paris provides no explanation for its dilatory conduct as to why it did not bring the State Court Action until seven (7) months after this Action was commenced, or why it waited another 8 months after the State Court Action was commenced before seeking a stay of this action. In the meantime, the parties here have been engaged in significant discovery.

Not surprisingly, Paris' motion for a stay seeks to achieve a result that this Court rejected when

Paris moved to dismiss TPOV 16's Complaint on jurisdictional grounds– namely, getting this Court to refrain from hearing the TPOV 16's claims in favor of the State Court. After this action was commenced in February 2017, this Court heard and rendered a decision denying in large part Paris' motion to dismiss this action. This Court rejected Paris' argument that this Court had no jurisdiction to hear TPOV 16's claim. Now, nine (9) months after that decision was rendered, Paris seeks to have this Court abstain from hearing the claims in the Complaint in favor of Paris' subsequently filed State Court Action. Such blatant forum shopping should not be permitted by this Court.

Dilatory conduct and forum shopping aside, the premise of Paris' motion is false – that an omnibus action filed in State Court that combines sixteen (16) different parties in a single action that seeks adjudication of multiple disputes -- involving six (6) different contracts with their own specific terms, each concerning different restaurants, with different factual circumstances and distinct legal issues -- is somehow judicially efficient. In fact, TPOV 16, along with other defendants in the State Court Action, filed a motion to dismiss, or in the alternative stay, based on the prior pending proceeding in this Court, as well as in United States Bankruptcy Court, Northern District of Illinois. If that motion is granted, the present motion is moot. But even if the State Court Action is not dismissed or stayed, the premise of Paris's motion – that this action, which has been pending for over 15 months and in which the parties have engaged in significant discovery, should be stayed in favor of another later-filed action that is in preliminary stages – no discovery has been conducted and motions to dismiss are pending – makes little sense. Staying this action would severely prejudice Plaintiff further delaying the adjudication of its claims in favor of an action that will entangle Plaintiff in various inevitable unrelated disputes and legal issues that will certainly arise in that 16-party litigation. Moreover, TPOV 16 has filed numerous claims in this action that will not be fully resolved by the State Court Action.

In sum, and as discussed in further detail below, Paris's dilatory conduct and forum shopping actions should not be permitted, and certainly not in favor an action that will be neither a comprehensive nor an efficient manner of adjudicating only some of the issues and claims before this Court.

FACTUAL BACKGROUND

In its motion, Paris offers an abbreviated and yet highly misleading description of facts underlying this action. The following attempts to correct that record.

This action concerns a restaurant venture known as "Gordon Ramsay Steak" ("Steak Restaurant" or "Restaurant").

In 2011, the parties discussed entering into an agreement to develop the Steak Restaurant concept that would be located on the premises of Paris' resort hotel casino in Las Vegas. The parties, with Gordon Ramsay (who was introduced to Paris and its affiliates by Seibel, a then-principal of TPOV), jointly conceived of the concept. TPOV and Paris agreed to initially contribute equal amounts of capital to develop the restaurant -- $1 million each.[1] (ECF No. 1 ¶¶ 10, 26.) Accordingly, in November 2011, TPOV and Paris entered into a "Development and Operation Agreement," which provided that TPOV would contribute $1 million in capital for the design, development, construction and operation of the Steak Restaurant. (Mot. Ex. A, § 3.2(d).) In addition to being entitled to repayment of its capital contribution, TPOV was also entitled to share in the profits of the restaurant. (Mot. Ex. A, Art. 7.) At the same time, Paris and Ramsay entered into an agreement that expressly references the TPOV Agreement and also concerns the same Steak Restaurant ("Ramsay Agreement"). (ECF No. 1 ¶ 9.) The TPOV Agreement and the Ramsay Agreement are a single integrated contract.

The Agreement states that Paris is a gaming licensee subject to the regulations of the Gaming Authorities, and as a result Paris has a "Compliance Committee" that "does its own background checks on, and issue approvals of" persons involved with Paris. (Mot. Ex. A, § 10.2.) Prior to executing the Agreement and prior to any monies being paid, TPOV was to provide "written disclosures" and the Paris Compliance Committee "shall have issued approvals of the TPOV Associates." (*Id.*) Paris had the right at any time to demand further information from TPOV. (*Id.*) However, while Paris argues in its motion that Seibel "failed to disclose" certain information, Paris does not identify any misrepresentation in the Agreement or any false written disclosure that was made by TPOV in connection with the Agreement. In fact, Paris does not claim that at any time prior to executing the Agreement, or prior to paying TPOV money due under the Agreement, it requested *any* written disclosures from TPOV. Paris also does not claim that its Compliance Committee ever requested or reviewed information about TPOV or that it ever issued a written approval of TPOV. Instead, Paris,

[1] Gordon Ramsay did not contribute any of the capital.

anxious to obtain TPOV's $1 million capital contribution and the expected profits from the Steak Restaurant concept, moved forward with the opening of the Steak Restaurant.

The Restaurant opened in May 2012 to great success. The Steak Restaurant has been profitable during its entire existence and continues to be opened and extremely profitable to this day. (ECF No. 1, ¶ 10.) Nearly four and one-half years later, in April 2016, and without any demand from Paris, Seibel took action to protect TPOV's business relationship with Paris. Seibel divested his interests in the TPOV Agreement by (a) assigning his entire membership interest in TPOV to The Seibel Family 2016 Trust of which he is neither a beneficiary or trustee and (b) causing TPOV to assign its interest in the TPOV Agreement to a newly formed entity TPOV 16 in which Seibel never had an equity interest or management rights or responsibility further isolating the interests in the TPOV Agreement from Mr. Seibel. (*Id.* ¶ 34; Ex. 1, April 8, 2016 letter.) Seibel took this action out of an abundance of caution in anticipation that he would be pleading guilty to one count of impeding the due administration of tax laws. (*Id.* ¶ 15.) Paris accepted the assignment from TPOV to TPOV 16 and, in fact, continued to make payments to TPOV 16 under the Agreement. (*Id.* ¶ 39.)

Seibel pled guilty on April 18, 2016, and in August 2016, Seibel was sentenced to 30 days in prison on his guilty plea to one count of impeding the due administration of the tax laws. The plea concerned Seibel's involvement with a foreign bank account during the tax years 2004 through 2008. Thus, while Paris claims that Seibel was "engaged in criminal conduct" when the Agreements were entered into (Mot. 4), that is false. Seibel plead guilty to a single count that concerned activity that long preceded the 2011 Agreement.

Paris claims it did not know about Seibel's tax issues until August 2016. (Mot. 4.) However, as will be revealed in discovery, a top executive of Caesars has acknowledged that in early 2014 he was advised by Seibel about his tax situation. Paris argues that it "would not have entered into" the Agreement had it known of Seibel's conduct. (*Id.* 4.) Leaving aside the facts that Paris made no attempt to look into TPOV's ownership or background, that Paris needed TPOV's $1 million contribution to develop and open the Steak Restaurant, and that TPOV was integral in forming the concept of the Steak Restaurant, Paris' argument is belied by their own statements. For example, members of the Compliance Committee of Caesars Entertainment Corp., the parent of Paris ("Caesars"), testified in

2013 before the Massachusetts Gaming Commission that in unanimously approving a license agreement with Gansevoort Hotel Group, whose principal was alleged to have ties to Russian organized crime and nefarious activities, Caesars' justification for the approval was that "the operations were run by Caesars and the compensation paid to the Gansevoort was not from gaming." (Ex. 1, p. 237.) That is the precise situation here – Paris was to operate the Steak Restaurant, with no gaming component, and the revenues were exclusively from food and beverage. In addition, Seibel was not accused of organized crime ties, but rather, after dissociating himself from TPOV, pled guilty to a tax-related crime that predated his involvement with TPOV. There is simply no basis to believe that had Paris known about Seibel's tax situation – and there is no claim by Paris that Seibel knew in 2011 that he would ever be charged with a crime – it would not have entered into the TPOV Agreement.

Nevertheless, Paris took advantage of the plea to send a notice purporting to terminate the Agreement and relieve itself of the obligation to share the profits from the Restaurant with TPOV 16 (notwithstanding the continued operation of the Restaurant.) (Ex. 3, Sept. 2, 2016 letter.) Paris purported to terminate the Agreement in September 2016 based on the claim that Seibel's plea rendered him "unsuitable", despite the fact that Seibel has never had any interest in TPOV 16 and had even assigned his interest in TPOV to the Seibel Family 2016 Trust, and the fact that the relationship between Paris and TPOV and TPOV 16 was non-gaming. Paris ignored this fact and declared TPOV to be "unsuitable", and then purported to reject the assignment to TPOV 16 (five months after the fact), declaring the Seibel Family 2016 Trust "unsuitable" because of its alleged connection to Seibel. Paris's failure to recognize the Seibel Family 2016 Trust as "suitable" was particularly egregious in light of the fact that Paris refused TPOV 16's offer to allow Paris to review the Trust documents, and the Trust's provision that if any of its trustees or beneficiaries are "unsuitable" the Trust must designate new trustees or beneficiaries. (ECF No. 1 ¶ 63; Ex. 4, Sept. 16, 2016 letter.) In other words, Paris pre-determined that it would cut TPOV out of the Restaurant, and no facts, no previously accepted assignment, or disassociation with an allegedly "unsuitable" person was going to get in the way. Critically, at the time of the purported termination of the TPOV Agreement, Mr. Seibel's interest in the assignor, TPOV, as well as the assignee, TPOV 16, was non-existent.

Even if Seibel had remained associated with TPOV or TPOV 16, the determination that he is

"unsuitable" because, as Paris claimed, it feared repercussions from the Gaming Authorities is false. Paris claims that Seibel's conduct "rendered him unsuitable." (Mot. 4.) However, the Nevada Gaming Board has never declared Seibel "unsuitable." That determination was made solely by Paris, a discretionary determination that had to be exercised in good faith, but was not. Paris and its Caesars affiliates could not possibly have a reasonable basis to declare Seibel unsuitable because, in addition to the suitability standards they followed as presented to the Massachusetts Gaming Commission, they have repeatedly and continually done business with, and promoted the presence at their properties of, people convicted of crimes so long as it is in their financial interest to do so. Just a few examples are: (a) Steve Davidovici, who pled guilty for filing a false income tax return relating to income generated from a nightclub operated on Caesars' property, was permitted by Caesars to transfer his companies' ownership stake to his wife Charissa; (b) Chris Brown, who pled guilty to felony assault; (c) the Rapper T.I., who was convicted on felony drug charges; (d) Lil Wayne, who was convicted of felony weapons possession; (e) 50 Cent, who was sentenced to two years' probation for battery and assault charges; (f) CeeLo Green, who pleaded no contest to a felony; (g) Don King, who was convicted of second degree murder; (h) Lawrence Taylor, who pleaded guilty to misdemeanors of sexual misconduct and patronizing a prostitute, and is a registered sex-offender. (ECF No. 1 ¶¶ 64-67.)

Nevertheless, Paris claimed to terminate the Agreement based on Seibel's unsuitability. However, instead of making the choice between buying out TPOV 16 from the Agreement or closing the Steak Restaurant, Paris decided to have its cake and eat it too: it purportedly terminated the Agreement, it kept the exact same Restaurant open with Ramsay and has continued to enjoy the Steak Restaurant's profits, and it further determined that it was no longer required to pay back TPOV's $1 million investment. While Paris argues that Seibel "has no one to blame but himself" for the current situation (Mot. 5), Paris fails to admit to its own unconscionable conduct. Paris's position, which caused this litigation, is that they may continue to operate *the exact same Restaurant* that TPOV initially contributed to the conception and development of in addition to putting up half of the capital for, while concurrently ceasing payment of any profit share to TPOV 16 and refusing to repay the capital investment. Even if Paris had grounds for termination of the Agreement (which it did not) and even if Paris properly determined TPOV 16 to be an "Unsuitable Person" (which it also did not), if Paris treated

TPOV 16 like one of its shareholders it would have paid TPOV 16 fair market value for its interest. In fact, pursuant to Caesars' Second Amended and Restated Certificate of Incorporation, that is precisely how Caesars would have been required to act had one of its shareholders been deemed "unsuitable" – Caesars would be required to purchase such person's securities in Caesars at their fair value. (Ex. 5 §§ 5.4(a), 5.1(o).) Here, at a minimum, Paris and Caesars could have (and should have) bought out TPOV 16 at fair market value rather than just pocketing TPOV 16's future profits and capital investment.

PROCEDURAL BACKGROUND

TPOV 16 initiated this action in February 2017, asserting claims for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, declaratory relief, and accounting. The breach of contract claim sets forth no less than eight (8) breaches of the Agreement, such as failing to pay fees/profits due under the Agreement; failure to repay the Capital Contribution; improper termination; operating the Restaurant following the purported termination of the Agreement; and failing to provide TPOV 16 with a reasonable and good faith opportunity to cure its purported association or affiliation with any unsuitable persons.

Paris moved to dismiss on or about March 17, 2017 on the grounds that this Court lacked subject matter jurisdiction, that the Complaint failed to state a claim upon which relief can be granted, and failure to join an indispensable party (Ramsay).[2] On July 3, 2017, this Court denied Paris' attempt to have this action refiled in the state court and found that diversity jurisdiction exists. The Court further denied Paris's motion to the extent that Paris claimed Ramsay was an indispensable party, rejecting Paris's argument that the failure to join Ramsay could subject Paris "to the risk of multiple or inconsistent obligations …" (ECF No. 30 at 7; ECF No. 9 at 7.) Finally, the Court denied Paris' motion to dismiss for failure to state a claim for all the claims in the Complaint, except the unjust enrichment claim, which was dismissed. (ECF No. 30 at 8-12.)

While the motion to dismiss was pending, Paris sought a stay of discovery. (ECF No. 13.) This Court granted, in part, the motion for a stay but required the parties to proceed with initial disclosures and permitted jurisdictional discovery. (ECF No. 23.) The parties proceeded with exchanging initial

[2] Although Paris took the position that Ramsay was an indispensable party, when Paris sued TPOV in the State Court Action it did not name Ramsay as a party.

disclosures, including limited document productions. The parties agreed upon a stipulated ESI protocol, a confidentiality agreement, and a protective order in April 2017. The parties exchanged initial disclosures on June 12, 2017. Paris served its first supplemental disclosures on June 14, 2017 and Plaintiff served its first supplemental disclosure on June 20, 2017.

The stay was lifted on July 5, 2017 and the parties continued to pursue discovery in this action. Apparently unhappy with this Court's July Order and being forced to litigate this action in this Court, on or about August 25, 2017, Paris attempted an end run around the Order and initiated the State Court Action, with Paris as one of the four (4) plaintiffs, and TPOV, TPOV 16 and Seibel among the twelve (12) defendants. However, Paris did not seek a stay of this action but instead continued to engage in discovery in this case.

Plaintiff served interrogatories on Paris on September 29, 2017, and responses were served on January 19, 2018. The parties then engaged in multiple "meet and confer" conference calls in an effort to resolve Plaintiffs' objection to certain responses by Paris. As of the last meet and confer on March 28, 2018, Paris agreed to amend three of its responses, but the parties were unable to resolve their disagreement over the adequacy of one of Paris' responses. Plaintiff has not received the amended responses, but once they are served that disagreement will be the subject of motion practice.

Plaintiff served two non-party subpoenas on Paris on or about January 16, 2018. Paris served objections on February 1, 2018. The parties have had numerous meet and confer conferences in an attempt to resolve their differences and those negotiations are continuing.

The parties have served and responded to written document demands.[3] The parties engaged in extensive discussions and negotiations regarding the search terms each would use for the collection of electronically-stored documents. On April 6, 2018, Plaintiffs' produced over 11,000 pages of documents to Paris. Paris has yet to produce documents since its initial disclosures in June 2017. Unfortunately, this foot-dragging appears to be strategic and the alleged lack of further progress in discovery is being used as a basis for the requested stay.

[3] Plaintiff's document demands were served on November 9, 2017, and written responses were served on December 13, 2017. Paris's document demands were served on Plaintiff, counterclaim-defendants TPOV and Seibel on March 2, 2018, and responded to on April 3, 2018.

In the meantime, the State Court Action has been, and continues to be, the subject of jurisdictional and other motion practice. Six defendants: LLTQ Enterprises, LLC, LLTQ Enterprises 16, LLC; FERG, LLC; FERG 16, LLC, MOTI Partners, LLC, and MOTI Partners 16, LLC, removed the claims against them to United States Bankruptcy Court, District of Nevada, and thereafter moved to transfer venue to United States Bankruptcy Court, District of Illinois, on the ground that the claims were the subject of ongoing disputes before that Court. Plaintiffs in the State Court Action moved for remand. Those claims were remanded, but that order is presently on appeal before the Ninth Circuit. (Ex. 6.) Upon remand, all defendants except defendant Jeffrey Frederick moved to dismiss the Complaint. TPOV and TPOV 16's motion to dismiss or, in the alternative to stay, was filed on January 5, 2018, and was based primarily on the present Action being the first-filed action. Seibel separately moved to dismiss, or in the alternative to stay, based in part on this case being the first-filed and in part on the fact that he is not an appropriate party to the declaratory relief claims in the State Court Action, as he is not individually a party to the subject agreements. All the moving defendants in the State Court action further disputed the argument that the State Court Action could provide full and complete relief, as certain claims were either required to be heard by the Bankruptcy Court or, as in the case of the TPOV 16 claims asserted here, would not be fully adjudicated by the declaratory relief claims. Moving defendants further disputed the argument that the State Court Action was an efficient manner of resolving the disputes as the action concerned six (6) different contracts, with different terms, concerning different restaurants, parties and factual circumstances.[4] Those motions are to be heard on May 1, 2018.

Fourteen months after his action was commenced, on April 4, 2018, Paris filed the present motion for a stay.

[4] Paris asserts that the parties are negotiating a stipulation "to use any discovery that has been disclosed in this matter across other cases, including the [State Court Action]." (Mot. 11-12.) That is not entirely accurate. The parties are negotiating a stipulation that would permit documents produced in one action to be used in another action and subject to the protective order in the second action. The stipulation will not consolidate discovery between cases. Indeed, while there may be some overlap between the discovery demands in the various actions because each action concerns a different agreement, between different parties, involving different restaurants, the discovery demands significantly diverge in many, many respects.

ARGUMENT

Federal Courts have a "virtually unflagging" obligation to hear cases within their jurisdiction. *Colorado River Water Conservation Dist. v. United* States, 424 U.S. 800, 817, 96 S. Ct. 1236, 1246 (1976); *see also Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1367 (9th Cir. 1990) ("Because of the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them, generally, as between state and federal courts, the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction" (internal quotations omitted).) "The *Colorado River* doctrine is a narrow exception to the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Smith v. Cent. Ariz. Water Conservation Dist.*, 418 F.3d 1028, 1033 (9th Cir. 2005).

The underlying principle guiding a *Colorado River* review is a strong presumption against federal abstention: "[o]ur task in cases such as this is not to find some substantial reason for the exercise of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that can suffice under Colorado River to justify the surrender of that jurisdiction" (emphasis added) (internal citation omitted). *Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 842 (9th Cir. 2017). Eight factors are considered to determine whether a stay is warranted in accordance with *Colorado River*:

> (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

Id. at 841–42 (quoting *R.R. St. & Co. Inc. v. Transp. Ins. Co.*, 656 F.3d 966, 978-79 (9th Cir. 2011)). "Any doubt as to whether a factor exists should be resolved against a stay, not in favor of one" (internal citation omitted). *Id.* (citing *Travelers Indem. Co.*, 914 F.2d at 1367). Though "[t]he factors relevant to a given case are subjected to a flexible balancing test, in which one factor may be accorded substantially more weight than another depending on the circumstances of the case," the *Colorado River* factors are considered with "the balance heavily weighted in favor of exercising jurisdiction." *Owen v. Labor Ready Inc.*, 146 F. App'x 139, 142 (9th Cir. 2005). With respect to application of the

Colorado River doctrine to stay an action, "courts may refrain from deciding an action for damages only in 'exceptional' cases." *R.R. St. & Co. Inc.*, 656 F.3d at 978.

As set for the below, the instant action should not be stayed pursuant to *Colorado River* abstention principles.

A. The Instant Action is not Parallel to the State Court Action.

Prior to weighing the factors to determine if "exceptional circumstances" justify a stay pursuant to *Colorado River*, the Court must find that Paris has demonstrated that the instant action and the State Court action are "substantially similar". As this Court has noted, an "exceptional circumstance" warranting *Colorado River* abstention does not lie where, "[w]hile several of the key factual and legal questions in these two cases will be the same, they are not identical or substantially similar because a victory for [plaintiff] in the state court action would not result in a monetary judgment against [defendant], as it would here." *Malone v. State Farm Mut. Auto Ins. Co.*, No. 217CV1568JCMNJK, 2017 WL 5180420, at *2 (D. Nev. Nov. 8, 2017) (Mahan, J.). Because the instant action and the State Court Action involve different parties, different claims, and different relevant periods, they are not "parallel" for abstention purposes under *Colorado River*. *R.R. St. & Co. Inc. v. Transp. Ins. Co.*, 656 F.3d 966, 982 (9th Cir. 2011) ("the existence of a substantial doubt as to whether the state proceedings will resolve the federal action precludes a Colorado River stay or dismissal" (internal citation omitted)). Vitally, with respect to both substantial similarity and parallelism as applied in a *Colorado River* analysis, "[e]ach factor is more relevant when it counsels against abstention, because while inadequacy of the state forum or insufficient parallelism may preclude abstention, the alternatives never compel abstention." *Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 845 (9th Cir. 2017).

As an initial matter, the parties are different. In fact, the State Court Action contains sixteen different parties as opposed to the four parties in the instant action, including third-party defendants TPOV and Seibel. Although Paris argues that "the fact that the [State Court Action] involves a greater number of parties is no bar to a stay" and that the multitude of additional parties in the State Court Action is "advantageous" to the "understanding of issue and consistency of determinations thereto" (Mot. 16), the countless distinctions between the terms of the six subject agreements and parties thereto, the varying factual circumstances, and distinct time periods involved render Paris's attempt to paint

with a broad stroke all but meaningless.

Additionally, different claims are involved in both actions. This action seeks damages based on claims of breach of contract and breach of the implied covenant of good faith and fair dealing. The only relief sought in the State Court Action is declaratory. For that reason, the actions are not sufficiently similar to warrant a stay. *Malone v. State Farm Mut. Auto Ins. Co.*, No. 217CV1568JCMNJK, 2017 WL 5180420 at *2.

Moreover, the breach of contract claim sets forth no less than eight (8) breaches of the Agreement, such as failing to pay fees/profits due under the Agreement; failure to repay the Capital Contribution; improper termination; operating the Restaurant following the purported termination of the Agreement; and failing to provide TPOV 16 with a reasonable and good faith opportunity to cure its purported association or affiliation with any unsuitable persons. In contrast, the State Court Action seeks an omnibus determination on no less than six (6) different contracts with different terms, concerning different restaurants, parties and factual circumstances. The three claims in the State Court Action are (1) that Caesars properly terminated the so-called "Seibel Agreements", (2) that Caesars has no current or future obligations to the twelve (12) defendants in the State Court Action, and (3) that the "Seibel Agreements" do not prohibit or limit existing or future restaurant ventures between Caesars and Gordon Ramsay. While there is some overlap between the State Court Action declaratory relief claims and some of the grounds for Plaintiff's breach of contract damages claim and declaratory relief claim in this action, the court in the State Court Action would not necessarily make a determination as to the relevant issues in reaching its outcome, which belies the parallelism necessary for this factor to weigh in favor of abstention. For example, the State Court Action certainly cannot determine Plaintiffs' accounting claim or the issues relevant to that claim.

Last, several of the contracts at issue in the State Court action predate the TPOV Agreement by several years. In fact, the claims in the State Court Action date back to 2009 (Mot. Ex. B. ¶ 1), whereas the TPOV Agreement was entered into in or around November 2011. (ECF No. 1 ¶ 8.) Therefore, there is also no parallelism as to the relevant time periods of the State Court Action and the instant action.

As there is no substantial similarity or parallelism between the State Court Action and the instant action, Paris's motion to stay should be dismissed prior to a review of the *Colorado River*

abstention factors.

B. A Stay of the Instant Action Would Not Avoid Piecemeal Litigation.

Paris argues that a stay of the instant action would avoid piecemeal litigation, arguing: (1) that the State Court Action consolidated multiple cases that will resolve TPOV 16's claims, (2) that the federal and state court actions are interdependent, and (3) that the Nevada state court has made substantive determinations central to the matters at issue here. (Mot. 11.) Paris's interpretation of the State Court Action is misguided, and a stay would cause piecemeal litigation rather than avoid it.

First, a stay of the instant action would not resolve TPOV 16's claims but have the opposite effect: because the claims asserted by TPOV 16 are not fully addressed in the State Court Action, a stay here would simply further delay the litigation of the balance of TPOV 16's claims until after the State Court Action is resolved. This is because of the additional causes of action contained in the instant action that are not present in the State Court Action. *See* Section A, *supra*.

Second, the federal and state court actions are only interdependent to the extent that one of the members of TPOV – a party to this action only by virtue of being named by Paris as a third-party defendant – is Seibel, who was also involved to various degrees with the other six agreements that are the subject of the State Court Action. However, each of the six contracts involves entirely separate entities on both sides, including different Caesars-related entities, and comprising vastly different terms among the six otherwise unrelated agreements. Different factual circumstances also pervade the agreements, which were entered into at different times and between different parties. Some of those agreements do not even involve Gordon Ramsay, despite Caesars' third claim in the State Court Action that seeks a declaration that the so-called "Seibel Agreements" do not inhibit Caesars' ability to continue or develop additional restaurant ventures with Ramsay. Simply put, in its haste to include the various alleged "Seibel-related" entities in a single action to avoid the unfavorable rulings against it, Caesars did not even draw a distinction between the six agreements it claims are interdependent.

Third, the Nevada state court has not made a single ruling regarding the TPOV Agreement. Despite Paris's desire to draw parallels between a case involving Planet Hollywood and GR BURGR in an attempt to argue that "substantive determinations" have been made as to the parties' rights pursuant to the TPOV Agreement, the ruling cited by Paris was actually made pursuant to an entirely

separate agreement – the GR BURGR Agreement. (Mot. 10-11.) Paris acknowledges that no such determination has been made as to the TPOV Agreement, yet argues that this is "an outstanding issue…that could lead to inconsistent results…and result in piecemeal litigation". *Id.* at 11. The Ninth Circuit analyzed a situation similar to this case in *Travelers*, in which it found that the district court abused its discretion by permitting a stay of the proceedings:

> Since at the time of the district court's stay order the state court had made no rulings whatsoever in regard to this dispute, there is no certainty that duplicative effort would result. *Cf. American Int'l Underwriters,* 843 F.2d at 1258 (the state court having already decided several substantive issues in the case, it was clear that the federal court would have to decide those issues anew if it exercised jurisdiction). In addition, whichever court were to first reach a judgment on the merits, that judgment would most likely have conclusive effect on the other court. *See Mobil Oil Corp. v. City of Long Beach*, 772 F.2d 534, 542 (9th Cir. 1985).

Travelers Indem. Co. v. Madonna, 914 F.2d 1364, 1369 (9th Cir. 1990). Not only did the ruling cited by Paris have nothing to do with the TPOV Agreement, but a stay in this action would have the effect of causing further piecemeal litigation, as many of the claims asserted by TPOV 16 in the instant action are not addressed in the State Court Action. Because the Nevada state court has not made a ruling with respect to this dispute, having not addressed the TPOV Agreement in the ruling Paris argues is dispositive, "there is no certainty that duplicative effort would result." *Id.* This factor accordingly weighs against *Colorado River* abstention.

C. <u>The Order in which the Forums Obtained Jurisdiction and the Comparable Progress Made in Each Forum Does Not Favor a Stay.</u>

Paris argues that the factor of comparable progress made in each forum is neutral, despite acknowledging that this action was filed before the State Court Action and submitting that "discovery in this action is still in its early stages". (Mot. 11.) In a blatant attempt to forum shop, Defendant filed the State Court Action more than six months after the instant action was initiated, and after Paris had already been denied its motion to dismiss as to all but one of TPOV 16's claims. Crucially, the six-plus month gap between the first-filing of the instant action and the belated filing of the State Court Action notwithstanding, far more progress has been made in the instant action than in the State Court Action, weighing heavily against a stay. Discovery has not commenced in the State Court Action, in which motions to dismiss by eleven of the twelve named defendants are still pending.

In contrast to the State Court Action, in which motions to dismiss are currently pending and the

parties have not exchanged any written discovery, the instant case has seen Paris and TPOV 16 involved in significant and extensive negotiations regarding discovery. The parties exchanged disclosures on June 12, 2017. Paris served its first supplemental disclosures on June 14, 2017 and Plaintiff served its first supplemental disclosure on June 20, 2017. Plaintiff served interrogatories on Paris on September 29, 2017, and responses were served on January 19, 2018. The parties then engaged in multiple "meet and confer" conference calls in an effort to resolve Plaintiffs' objection to certain responses by Paris. As of the last meet and confer on March 28, 2018, Paris agreed to amend three of its responses, but the parties were unable to resolve their disagreement over the adequacy of one of Paris' responses. Plaintiff served two non-party subpoenas on Paris on or about January 16, 2018. Paris served objections on February 1, 2018. The parties have had numerous meet and confer conferences in an attempt to resolve their differences and those negotiations are continuing. The parties have served and responded to written document demands. The parties engaged in extensive discussions and negotiations regarding the search terms each would use for the collection of electronically-stored documents. On April 6, 2018, Plaintiffs' produced over 11,000 pages of documents to Paris.

Paris has yet to produce documents since its initial disclosures in June 2017. Paris has continued to drag its proverbial feet with respect to various discovery-related issues that have arisen, including the finalization of e-Discovery search terms, and more recently with the categorization of documents responsive to requests for the production of documents, in an apparent strategy to utilize the alleged lack of further progress as a basis for the requested stay. Paris's tactics notwithstanding, this factor weighs heavily against the imposition of a stay.

D. Paris's Blatant Forum Shopping Weighs Against a Stay.

"When evaluating forum shopping under Colorado River, we consider whether either party improperly sought more favorable rules in its choice of forum or pursued suit in a new forum after facing setbacks in the original proceeding." *Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 846 (9th Cir. 2017). As outlined at length *supra*, the State Court Action, filed on August 25, 2017, was initiated more than six months after the commencement of the instant action on February 3, 2017. Paris and various other Caesars-related entities filed the State Court Action only after Paris was denied its motion to dismiss as to all but one of TPOV 16's causes of action and following the lifting of a stay

that allowed discovery to proceed in full in the instant action. Ironically, it is Paris that sought to avoid the effects of unfavorable outcomes in the instant case by filing the State Court Action in a deliberate attempt to forum shop. The Ninth Circuit has "instructed that federal courts should generally decline to entertain reactive declaratory actions" where a defendant to a pending litigation files a declaratory action "merely to obtain a tactical advantage." *R.R. St. & Co. Inc. v. Transp. Ins. Co.*, 656 F.3d 966, 976 (9th Cir. 2011). Although Paris argues that this factor is neutral (Mot. 17), it is clear that this factor weighs heavily against abstention.

E. Balancing the Factors Weigh Heavily Against Abstention.

Due to the lack of parallelism and/or substantial similarity between the instant action and the State Court Action, the Court should decline to surrender its jurisdiction via abstention without having to reach the balance of the *Colorado River* factors. Even when the *Colorado River* factors are considered, the balance of the factors weigh heavily against abstention in the instant case. Paris's blatant forum shopping in the face of unfavorable decisions against it by this Court should not enable it to obtain an abstention in favor of its belatedly filed State Court Action, which attempts to characterize a variety of disparate agreements with the same lens in an attempt to gain a more favorable venue for the claims against it. As discussed *supra*, the third, fourth, seventh, and eighth factors of the *Colorado River* analysis weigh against abstention, in addition to the lack of parallelism and substantial similarity between the actions that is a prerequisite for reaching the balance of the *Colorado River* factors. The balance of the factors are neutral. Because "any doubt as to whether a factor exists should be resolved against a stay" (*R.R. St. & Co. Inc.*, 656 F.3d at 979), Paris's instant motion for a stay should be denied.

DATED April 18, 2018.

MCNUTT LAW FIRM, P.C.

/s/ Dan McNutt
DANIEL R. MCNUTT (SBN 7815)
MATTHEW C. WOLF (SBN 10801)
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Attorneys for Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that pursuant to F.R.C.P. 5 on the April 18, 2018, I caused service of the foregoing **OPPOSITION OF PLAINTIFF TPOV ENTERPRISES 16, LLC TO DEFENDANTS' MOTION FOR A STAY OF THIS ACTION** by mailing a copy by United States Postal Service, postage prepaid, via email, and/or via electronic mail through the United States District Court's CM/ECF system to the following at their last known address and e-mail:

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CAESARS ENTERTAINMENT OPERATING COMPANY, INC., et al.,	)	No. 15 B 01145
	)	Chicago, Illinois
	)	10:30 a.m.
Debtor.	)	April 18, 2018

TRANSCRIPT OF PROCEEDINGS BEFORE THE
HONORABLE A. BENJAMIN GOLDGAR

APPEARANCES:

For the Debtors:	Mr. William Arnault;
For the U.S. Trustee:	Ms. Denise DeLaurent;
For FERG, LLC; LLTQ Enterprises, LLC; Moti Partners, LLC:	Mr. Steven Chaiken;
For the Original Homestead Restaurant:	Mr. Alan Lebensfeld; (Telephonically)
For R Squared Global Solutions, LLC, and DNT Acquisition, LLC:	Mr. Robert Nosek; (Telephonically)
Court Reporter:	Amy Doolin, CSR, RPR U.S. Courthouse 219 South Dearborn Room 661 Chicago, IL 60604.

THE CLERK: Caesars Entertainment Operating Company, Incorporated.

MR. ARNAULT: Good morning, Your Honor. Bill Arnault from Kirkland & Ellis on behalf of the reorganized debtors.

MR. CHAIKEN: Good morning, Your Honor Steve Chaiken on behalf of -- and I'll take my time here for the court reporter -- LLTQ Enterprises, LLC; LLTQ 16, LLC; FERG, LLC, FERG 16, LLC; MOTI Partners, LLC; and MOTI Partners 16, LLC.

THE COURT: And you did all that from memory too.

MR. CHAIKEN: It's been a long case.

THE COURT: Very impressive.

And we have counsel on the phone.

MR. LEBENSFELD: Yes. Good morning, Your Honor. Alan Lebensfeld for the Original Homestead Restaurant, Inc.

MR. NOSEK: Good morning, Your Honor. Robert Nosek, Certilman, Balin, Adler, Hyman for R Squared Global Solutions, LLC, individually, as well as DNT Acquisition, LLC.

THE COURT: Good morning.

All right. The only matter really up today to be discussed is the continued motion of the

reorganized debtors for a stay. And last time I continued the motion because it seemed to me there was the possibility of developments in the Nevada state court and the New York state court. And I don't know if anything has happened.

MR. ARNAULT: No, Your Honor. Since that point in time, there have not been any developments. We were scheduled to have an oral argument on the motions to dismiss in the Nevada state court scheduled for, I believe, April 4th. That had to get moved or rescheduled to last week.

And then last week the judge in Nevada state court was having a bench trial, my understanding, and then just didn't have time to have the hearing on the motions to dismiss. So now those have been moved out to May 1st.

THE COURT: Okay.

MR. ARNAULT: So there have been -- so we don't have any decision on that.

THE COURT: All right. So there is no news?

MR. ARNAULT: Correct.

MR. CHAIKEN: Correct. There is no rulings on anything. The state court action, which -- May 1st will be the motions to dismiss

hearing.

And in the Ninth Circuit BAP there is -- everything is fully briefed now. We don't have any set dates as to whether they will take oral arguments or have a hearing or just rule.

THE COURT: I don't know the practice out there. Most appellate courts don't entertain argument on motions. But I couldn't say what they do, and I couldn't say when they would do it, if they will do it.

All right. Well, what I'd like to do then is get this thing moving. And so I'm going to set a briefing schedule. And I want the debtors to file a supporting memorandum because the motion did not really do what I wanted done.

I would like the parties here to do what I would do if called upon to decide this, which I think I will be, and that is this:

The fundamental question for me is whether given the litigation pending in other courts, if there is any claim that I can decide that won't duplicate another court's effort or potentially contradict what another court is doing.

To know that, I need to know for each claim in the matters pending before me whether there

is another claim in another court that is essentially the same thing so that a decision on the claim in another court will decide potentially the issue before me either directly or by implication. Because sometimes a decision on issue X can affect issue Y. All right.

So, unfortunately -- and this will not be fascinating, I realize -- that will require you to identify all of the claims we're dealing with here. And you're going to have to pin all of those claims to something somewhere else. If you can't do that, then it seems to me that the motion should be denied at least in part and granted in part.

So, that's what I would have to do if I were to get into this, and that hasn't been done yet. I have to be able to line up claims in different places and see whether every judge somewhere else is covering what I would do - or let me put it differently, whether some judge somewhere else is covering everything that I would potentially do.

If there's something left over, and no court somewhere else is going to decide it either directly or by implication, then there is something productive that I can do. And I'd like to go ahead

and do it.

So there is lining up the issues, and then there is the preclusion question. And that gets complicated, because under our circuit law, as I understand it, for that matter as I understand Supreme Court precedent, the preclusion issue will be governed by the state law that applies in the state court.

So, you know, in your Nevada case, the preclusive effect of a decision in Nevada is going to depend on -- the preclusive effect of a decision from the Nevada court on the matter pending here will depend on Nevada law, and the same with the New York matters. So different preclusion law is going to apply.

Now, I'm assuming that whatever gets decided somewhere else will be decided on the merits, and not on some other basis. So, you know, there's some factual assumptions you're going to have to make. But, again, if it's not going to have any preclusive effect here, then I might as well go ahead and decide it. So that's the other piece of the puzzle.

I think this will probably be a lot of work. I'm happy to give you time to do it, but I

think we better start because I just don't know when other courts are going to do something. I thought something was going to happen potentially that might obviate the need to do all of this, but it hasn't happened yet.

MR. CHAIKEN: The only caveat to that, Judge -- and, obviously, we'll go with whatever schedule you want -- is we do have motions to dismiss the Nevada state court action up for hearing on May 1st. So...

THE COURT: Well, I know, and that occurred to me when I was thinking about setting a briefing schedule and telling you what I really needed. And, you know, if that happens, if there are developments, we'll just have to deal with it.

And one of the features of this whole dispute has been its fluidity. It's always changing. And it's very hard to pin it down at any particular moment -- at least for me it's been hard -- and actually get something decided, because I never know quite what I'm dealing with. So it's been kind of hard to grasp.

And if that happens and the presentations have to change or we need supplemental memos, then I guess that's just what we'll do. We

just have to roll with it, because I can't see another solution. At some point somebody has got to do something here.

So we might as well get this going. And since, as I said, this is the analysis that I would do, I would like some help from you on this. Okay?

So, I'm happy to give you whatever you think you need as far as time. I mean, today is April 18. You want something -- I would think something, you know, toward the end of May, maybe May 23.

What is that? That's four, five weeks.

MR. ARNAULT: I think that makes sense, Your Honor, and probably for the reasons that Mr. Chaiken mentioned. Because if something does happen on May 1st, that may change the direction of where this brief goes --

THE COURT: Exactly.

MR. ARNAULT: -- and obviate -- we may be addressing different issues.

THE COURT: Yes.

MR. ARNAULT: So it may be helpful to kick it out a little bit beyond May 1st.

THE COURT: Okay, yeah. So May 23rd.

MR. ARNAULT: Yes, I think that makes sense, Your Honor.

THE COURT: Okay. And, you know, obviously, there is going to be some groundwork laid so you're not going to have to do it from scratch although you may want to. But I'm happy to give you time. I've got kind of a full plate right now anyway.

I mean, I know we're going out a good bit, but June 27? I'm giving you each a month.

MR. CHAIKEN: Okay.

THE COURT: Okay. So June 27 for a response.

And then why don't we say July 18. That's a long time, I know, but we've been dealing with this a long time too.

Do we have an August omnibus date?

THE LAW CLERK: No. I think the last omnibus is in June.

THE COURT: Yes. I knew you were going to hand me the list.

We can set some more, unless we've gotten to the point where omnibus hearings don't make sense. I know Mr. Graham's view was he still wanted

to have them.

MS. DELAURENT: That's right.

THE COURT: And things are, from my point of view at least, relatively quiet right now. But they could get a lot noisier because I know I'm going to see claim objections. They've been threatened for months.

MS. DELAURENT: Well, I mean, I don't know. They've been working out individually motions to lift the stay --

THE COURT: Right.

MS. DELAURENT: -- because there are a lot of PI claims that are out there, and that's -- and they're trying to find those, deal with them. So that's being done. And I'm seeing those. There may be more claims objections, so I think Mr. Graham probably is the person that we're going to have to talk to about it.

MR. ARNAULT: I think that's right. I can't decide --

MS. DELAURENT: So in May -- hopefully, you know, you can go back and we can see, you know --

THE COURT: Yes.

MS. DELAURENT: -- what you think. I

would just give them a date in July to appear on this at this point, if you want to do that, Your Honor. I mean, this matter is going to be here no matter what, I think.

THE COURT: Well, in some form --

MR. ARNAULT: We'll see.

MS. DELAURENT: Yeah, maybe.

THE COURT: Well, if we were to have an August omnibus date, it would be August 15th. So why don't we just do that.

Why don't we put all of what I call the FERG, LLTQ matters -- and I realize there are other matters that don't involve those parties that are related or raise similar issues -- maybe I should call them the Rowen Seibel matters. I don't know. He seems to be the common entity, common player.

Let's just say 8/15 at -- we've been doing this at 10:30. So 10:30 on August 15. And we'll see what happens.

And then if either Mr. Graham could appear on May 16 or at least you could get some direction from him about whether we should continue to do omnibus dates, and then we'll set some. That would be fine.

MR. ARNAULT: I think that makes

sense, Your Honor.

And then to the extent that things do -- there are developments on May 1st that maybe change the trajectory, then we can address those as those come up.

THE COURT: Yes, right. You could file a motion. You could just do it on the day orally. That would be fine.

MR. ARNAULT: Okay.

MR. CHAIKEN: You do have a May omnibus hearing?

THE COURT: I do. In fact, we also have a June omnibus date. That's as late as they go.

MR. CHAIKEN: Would it make sense for us if there's anything to report to just come back on May 16th and kind of update the court if there is anything on that?

THE COURT: You know, maybe we should do that.

MR. CHAIKEN: Maybe --

THE COURT: Let's put the stay motion out until August 15. And let's put all the other matters just for status to May 16. And then you can let me know if something is going on.

MR. ARNAULT: And my only concern is

that we just don't get jammed on the briefing. And we can talk about that. And I know we won't.

THE COURT: You won't. I mean, as you probably know now from having dealt with me for a couple of years, I'm not going to let anybody get jammed.

MR. ARNAULT: I appreciate that.

THE COURT: Whatever we need, we'll do because the idea is to decide this sensibly.

And I've mostly been talking to Mr. Chaiken here because he's right in front of me. But if there are others, parties who are affected who want respond to the motion once a supporting memorandum from the reorganized debtors comes in, of course, that's fine. I would expect that.

So it will be responses plural rather than response --

THE CLERK: Yes, Judge.

THE COURT: -- on June 27.

All right?

MR. ARNAULT: Makes sense.

THE COURT: Anything else we need to discuss today?

MR. CHAIKEN: I don't think so.

MR. ARNAULT: No, Your Honor.

THE COURT: All right. Thank you very much.

Thank you counsel on the phone.

MR. LEBENSFELD: Thank you, Your Honor.

MR. NOSEK: Thank you, Your Honor.

(Which were all the proceedings had in the above-entitled cause, April 18, 2018, 10:30 a.m.)

I, AMY B. DOOLIN, CSR, RPR, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT OF PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE.

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TPOV ENTERPRISES 16, LLC, a Delaware Limited Liability Company, Plaintiff, vs. PARIS LAS VEGAS OPERATING COMPANY, LLC, a Nevada limited liability company, Defendant.	CASE NO. 2:17-cv-00346-JCM-VCF **REPLY IN SUPPORT OF PARIS LAS VEGAS OPERATING COMPANY, LLC'S MOTION TO STAY PENDING RESOLUTION OF PARALLEL STATE COURT ACTION**
PARIS LAS VEGAS OPERATING COMPANY, LLC, a Nevada limited liability company, Counterclaimant. vs. TPOV ENTERPRISES, LLC, a Delaware Limited Liability Company, TPOV ENTERPRISES 16, LLC, a Delaware Limited Liability Company, ROWEN SIEBEL, an individual. Counter-defendants.	

I. INTRODUCTION

TPOV Enterprises, LLC ("TPOV"), TPOV Enterprises 16, LLC ("TPOV 16"), and Rowen Seibel's ("Seibel") (collectively the "Seibel Parties") Opposition to Paris Las Vegas Operating

Company, LLC's ("Paris") Motion rests on two premises that are directly contrary to the facts and the Seibel Parties' prior statements in the Nevada Consolidated Action.

First, the Seibel Parties repeatedly assert that a stay is not warranted because the instant action and the Nevada Consolidated Action arise out of "six contracts [that] involve[] entirely separate entities on both sides, including different Caesars-related entities, and comprising vastly different terms among the six otherwise unrelated agreements." (*See, e.g.*, Opp'n at 13.) Notwithstanding these representations, the Seibel Parties know that the six contracts they claim involve "entirely separate entities on both sides" were all actually signed by Seibel as principal, manager, member, and/or owner of all six entities. The Seibel Parties also know that this dispute hinges on the proper application of the termination and unsuitability provisions in these agreements—which are either identical or nearly identical across all six agreements—and Seibel's failure to disclose his criminal activities to Paris or its affiliates. Thus, in reality, the dispute between Caesars and the Seibel Parties comes down to Seibel's failure to disclose his criminal activities and the implications of his nondisclosure and subsequent guilty plea based on a few provisions that are nearly-identical in the six agreements.

Second, the Seibel Parties contend this action and the Nevada Consolidated Action are neither parallel nor substantially similar because "different claims are involved in both actions." (Opp'n at 12.) This contention, however, cannot be squared with the Seibel Parties' prior representations in the Nevada Consolidated Action that "[t]he same claims that are the subject of the claims against the TPOV Entities in this action are already the subject of ongoing litigation in the United States District Court for the District of Nevada." (Ex. L, Def.'s TPOV Enters. & TPOV Enters. 16's Mot. to Dismiss Pls.' Claims, at 2:21-22 *see also* Ex. M, Def.'s TPOV Enters. & TPOV Enters. 16's Reply Mem. of Law in Support of Mot. to Dismiss, or, in the Alternative to Stay, at 3:6-7 ("Plaintiffs do not contest that the claims pending between TPOV and Paris in the Federal Action are identical to the claims between those parties in this action.") And though it may be true the causes of action differ between the two actions; the Seibel Parties wrongly contend that a stay will be inefficient and lead to piecemeal litigation. To the contrary, any determinations in the Nevada Consolidated Action will likely be dispositive of causes of action here. For example, the

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court in the Nevada Consolidated Action will determine (i) the propriety of Paris' termination of the TPOV Agreement due to the Seibel Parties' unsuitability and/or failure to disclose his criminal activities; and (ii) Paris' current or prospective obligations to TPOV or Seibel (if any). A finding for Paris on these issues will significantly narrow what remains for this Court to decide.

Given the overlapping facts, parties, and disputes, Caesars initiated the Nevada Consolidated Action in the hopes of efficiently litigating in one forum the issues that are now being litigated in courts across the country. Accordingly, contrary to the Seibel Parties' assertions, Paris is not seeking to dismiss this action or remove it from the jurisdiction of this Court. Instead, Paris is requesting that this Court temporarily stay this action to allow the Nevada Consolidated Action to proceed first because the Nevada Consolidated Action will address the threshold issues common to all of the active and contentious litigation that currently exists between various Seibel and Paris entities' around the country. This request is designed to not only avoid piecemeal litigation, but, most importantly, to avoid inconsistent results as the parties litigate in several forums. Once the Nevada state court has ruled on whether Caesars' entities properly terminated their agreements with Seibel and his related entities due to Seibel's felony conviction, his failure to disclose the conviction or his involvement in the related criminal activities, and the effect of that termination, this action can and then should proceed.

II. RELEVANT FACTUAL BACKGROUND

The Seibel Parties' Opposition contains a lengthy factual background section. Paris will not address all of the allegations contained in that section but disputes and disagrees with many of the statements contained therein. Specifically, Paris takes issues with Seibel's attempts to portray Paris as the bad actor in this dispute. It was Seibel, not Caesars, who in 2004 began using foreign bank accounts to defraud the IRS. And it was Seibel, not Caesars, who in 2009 lied to the federal government regarding his illegal activities. Just as Seibel lied to and withheld information from the federal government, he did the same with Caesars. In 2009, Seibel submitted a Business Information Form to Caesars wherein he represented that he had not been a party to a felony in the last ten years and there was nothing "that would prevent [him] from being licensed by a gaming authority." Those representations were not true. In 2011, Seibel submitted another Business

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Information Form wherein he again represented that he had not been a party to a felony in the last ten years and there was nothing "that would prevent [him] from being licensed by a gaming authority." Those representations were again untrue. Relying on these representations and Seibel's contractual duty to update these disclosures and provide information regarding his suitability, Caesars contracted with Seibel on additional restaurants (including GR Steak).

Seibel again knowingly misled and withheld information from Caesars relating to the purported assignment of his interests in his entities in April 2016. Though he admits that this assignment was due to a guilty plea he would be entering in just a few days, Seibel never disclosed to Caesars the reason for the purported assignment or his guilty plea. Instead, Caesars did not learn of Seibel's conviction until press reports surfaced four months later. Shortly thereafter Paris terminated its agreement with TPOV (and all of the other entities affiliated with Seibel), as it had the ability to do in its "***sole discretion***."

III. ARGUMENT

A. The Seibel Parties Admit this Action and the Nevada Consolidated Action are Parallel and/or Substantially Similar.

The Seibel Parties first argue that the instant motion should be dismissed prior to a review of the *Colorado River* factors because it is not parallel to the Nevada Consolidated Action—*i.e.*, it involves different claims, different parties, and different contracts with "vastly different terms." But "[e]xact parallelism' is not required; 'it is enough if the two proceedings are 'substantially similar.'" *Holder v. Holder*, 305 F.3d 854, 867 (9th Cir. 2002) (quoting *Nakash v. Marciano*, 882 F.2d 1411, 1416 (9th Cir.1989)). Here, the actions are "substantially similar."

To begin, while they now argue that the actions are not parallel, when convenient, the Seibel Entities have embraced the fact that this action and the Nevada Consolidated Action are nearly "identical." (*See* Ex. L, Def.'s TPOV Enters. & TPOV Enters. 16's Mot. to Dismiss Pls.' Claims, at 2:21-22 ("***The same claims that are the subject of the claims against the TPOV Entities in this action are already the subject of ongoing litigation in the United States District Court for the District of Nevada.***") (emphasis added); *see also* Ex. M, Def.'s TPOV Enters. & TPOV Enters. 16's Reply Mem. of Law in Support of Mot. to Dismiss, or, in the Alternative to Stay, at 3:6-7 ("***Plaintiffs***

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do not contest that the claims pending between TPOV and Paris in the Federal Action are identical to the claims between those parties in this action.") (emphasis added).) The Seibel Parties cannot escape this admission. Their own words in the Nevada Consolidated Action demonstrate that this action should be stayed as a parallel action.

Further, while the Seibel Parties take issue with the fact that the Nevada Consolidated Action has more parties, this fact does not preclude a finding that this action is substantially similar to the Nevada Consolidated Action. *Nakash*, 882 F.2d at 1417-18 ("Nakash's further argument that the parties are not identical is disingenuous. The present parties are all named in the California suit; the only difference is the absence of all of the corporate entities owned and operated by the parties."); *see also Montanore Minerals Corp. v. Bakie*, 867 F.3d 1160, 1170 (9th Cir. 2017) (citations omitted) ("The parallelism requirement was met even though additional parties were named in the state suit, the federal suit included additional claims, and the suits arguably focused on different aspects of the dispute.")

Like in *Nakash*, all of the parties in this action – TPOV, TPOV 16, and Rowen Seibel – are also named in the Nevada Consolidated Action along with the other Seibel and Caesars' Entities. The addition of these parties does not diminish the fact that the cases are similar – a fact the Seibel Parties' conceded.[1] Moreover, the fact that all the legal issues are not plead the same way is not material. *See Pac. Emp'rs Ins. Co. v. Herman Kishner Tr.*, No. 2:10-CV-897 JCM PAL, 2011 WL 977019, at *2 (D. Nev. Mar. 18, 2011) (quoting *Allstate Ins. Co v. Mercier*, 913 F.2d 273, 279 (6th Cir.1990) ("[E]ven though all of the legal issues were not parallel, 'the federal action does parallel the state action in the sense that the ultimate legal determination in each depends upon the same facts.'") (emphasis added).

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[1] The Seibel Parties' reliance on *Malone v. State Farm Mut. Auto Ins. Co.*, No. 217CV1568JCMNJK, 2017 WL 5180420 (D. Nev. Nov. 8, 2017), is misplaced. In *Malone*, the Court found the actions not to be similar because "in the state court action pending below, it appear[ed] on th[e] record that Malone ha[d] not filed a cause of action against State Farm under the underinsured motorist policy, while in th[e] [federal] action, she ha[d]." *Id.* at *2. Here, both this Action and the Nevada Consolidated Action involve causes of action related to the TPOV Agreement, among others. As a result, *Malone* is not applicable.

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Here, the ultimate legal determination of whether the Caesars entities properly terminated the agreements and properly found Seibel unsuitable involve the same facts in both this Action and the Nevada Consolidated Action. Although the Nevada Consolidated Action deals with additional contracts, Caesars' ability to terminate based upon Seibel's unsuitability – and his efforts to conceal his wrongdoings – are universal facts across all of the agreements. Indeed, although the Seibel Parties make much ado about the fact that the various agreements are dissimilar, notably absent from their "analysis" is any actual description of the terms of the various agreements. Of course, while they all involve separate restaurants and different Seibel entities, Caesars' suitability obligations and its rights to terminate the agreements due to unsuitability are universal and nearly identical across all of them.

Further, the Seibel Parties attempt to deemphasize Seibel's role across agreements is disingenuous, especially considering how the Seibel Parties repeatedly highlight Seibel's central role during their superfluous narration of immaterial facts. (Opp'n 4:5-6 ("Seibel took action to protect TPOV's business relationship with Paris."), 4:6-7 ("Seibel divested his interests in the TPOV Agreement . . ."), 3:4-6 ("The parties, with Gordon Ramsay (who was introduced to Paris and its affiliates by Seibel, a then-principal of TPOV) . . . .").) Moreover, the cases are highly interdependent because the claims in both courts aim to determine the parties' rights and obligations, current, and future, as it pertains to the TPOV Development Agreement, among others. In this situation, the ***Court, "should be particularly reluctant to find that . . . actions are not parallel when the federal action is but a 'spin-off' of more comprehensive state litigation***." *Nakash*, 882 F.2d at 1417 (9th Cir. 1989) (emphasis added).

B. <u>The *Colorado River* Factors Weigh in Favor of a Stay.</u>

In their Opposition, the Seibel Parties cherry pick certain *Colorado River* factors and fail to consider the balancing called for by *Colorado River* and its progeny. However, "[t]he factors relevant to a given case are subjected to a flexible balancing test, in which one factor may be accorded substantially more weight than another depending on the circumstances of the case." *Holder*, 305 F.3d at 870–71. As analyzed in Paris' motion, on balance, the *Colorado River* factors favor a stay of this action.

> The Court must consider eight factors in determining whether a stay is warranted:
>
> (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

Seneca Ins. Co., Inc. v. Strange Land, Inc., 862 F.3d 835, 841-42 (9th Cir. 2017) (quoting *R.R. St. & Co. v. Transp. Ins. Co.*, 656 F.3d 966, 978-79 (9th Cir. 2011)).

At the outset, the Seibel Entities failed to address all of the *Colorado River* factors.[2] Specifically, the Seibel Parties do not address the source of law factor—the factor which weighs most heavily in favor of a stay–nor do they address the adequacy of the state forum factor. By these omissions, the Seibel Parties concede these arguments. *S. Nev. Shell Dealers Ass'n v. Shell Oil Co.*, 725 F. Supp. 1104, 1109 (D. Nev. 1989) ("The plaintiffs, in failing to respond to ARCO's argument in their opposition paper, have implicitly conceded that a finding of compliance with the PMPA precludes liability under the Tenth Claim for Relief. Summary judgment is also warranted as to this claim. "); *see also Cruz v. Dubin*, No. 2:11-CV00342-APG-VCF, 2013 WL 5492577, at *4 (D. Nev. Oct. 1, 2013) ("This conclusion is bolstered by the fact that Cruz failed to oppose Lexington's argument, which the court considers conceded under Local Rule 7–2(d)."); *Edward & Marjorie Austin Unitrust v. U.S. Mortg. Corp.*, No. 2:06CV01235 BESPAL, 2007 WL 2886036, at *1 n.1 (D. Nev. Sept. 27, 2007) ("The lack of diversity is conceded by Plaintiffs, who fail to respond to this argument in their Opposition."). These and the remaining factors weigh in favor of a stay.

1. This Case Raises a Special Concern of Piecemeal Litigation.

"Piecemeal litigation occurs when different tribunals consider the same issue, thereby duplicating efforts and possibly reaching different results." *R.R. St.*, 656 F.3d at 979. A "case must

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[2] The first factor – which court first assumed jurisdiction over any property at stake – is immaterial in this analysis and is neutral. In this case, no property is in dispute, and neither the federal nor the state court has assumed jurisdiction over any property. *See Seneca*, 862 F.3d at 842 (finding the res factor neutral because neither court had asserted jurisdiction over a property). Similarly, the second factor is also neutral as there is no issue regarding inconvenience of the federal forum or the state forum. Both forums are in Nevada and the Seibel Entities filed suit in both.

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raise a special concern about piecemeal litigation which can be remedied by staying or dismissing the federal proceeding." *Id.* (internal quotations omitted). In assessing this factor, courts consider issues such as whether the federal court is being asked "to adjudicate rights that [we]re implicated in a 'vastly more comprehensive' state action'" or there is a "highly interdependent" relationship between the claims in the federal and state actions. *Id.* at 979-80 (quoting *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1369 (9th Cir. 1990)).

Although the Seibel Parties attempt to deemphasize the significance of the Nevada state court's rulings and its applications with respect to the Planet Hollywood Agreement, arguing they have "nothing to do with the TPOV Agreement" the actual facts prove otherwise. While the contracts relate to different restaurants and different Seibel entities, the terms in the Planet Hollywood Agreement on which the state court based its dismissal of Seibel's breach of contract claim are nearly identical to the terms in the TPOV Agreement:

TPOV Agreement, § 10.2:	Planet Hollywood Agreement, § 11.2:
. . . If any TPOV Associate fails to satisfy or such requirement, if Paris or any of Paris' Affiliates are directed to cease business with any TPOV Associate by any Gaming Authority, or ***if Paris shall determine, in Paris' sole and exclusive judgment, that any TPOV Associate is an Unsuitable Person***, whether as a result of a TPOV Change of Control or otherwise, then (a) TPOV shall terminate any relationship with the Person who is the source of such issue, (b) TPOV shall cease the activity or relationship creating the issue to Paris' satisfaction, in Paris' sole judgment, or ***(c) if such activity or relationship is not subject to cure as set forth in the foregoing clauses (a) and (b), as determined by Paris in its sole discretion, Paris shall, without prejudice to any other rights or remedies of Paris including at law or in equity, have the right to terminate this Agreement and its relationship with TPOV. . . . Any termination by Paris pursuant to this Section 10.2 shall not be subject to dispute by TPOV*** and shall not be the subject of any proceeding under Article 12.	. . . If any GR Associate fails to satisfy any such requirement, if PH or any of PH's Affiliates are directed to cease business with any GR Associate by any Gaming Authority, or ***if PH shall determine, in PH's sole and exclusive judgment, that any GR Associate is an Unsuitable Person***, then immediately following notice by PH to Gordon Ramsay and GRB, (a) Gordon Ramsay and/or GRB shall terminate any relationship with the Person who is the source of such issue, (b) Gordon Ramsay and/or GRB shall cease the activity or relationship creating the issue to PH's satisfaction, in PH's sole judgment, or ***(c) if such activity or relationship is not subject to cure as set forth in the foregoing clauses (a) and (b), as determined by PH in its sole discretion, PH shall, without prejudice to any other rights or remedies of PH including at law or in equity, have the right to terminate this Agreement and its relationship with Gordon Ramsay and GRB. . . . . Any termination by PH pursuant to this Section 11.2 shall not be subject to dispute by Gordon Ramsay or GRB*** and shall not be the subject of any proceeding under Article 13.

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(*Compare* Ex. A, TPOV Agreement, § 10.2 *with* Ex. N, Planet Hollywood Agreement, § 11.2.) Because the relevant language is nearly identical, the Nevada state court's determination based on this plain language will likely be the same for the TPOV Agreement. Moreover, the Nevada state court's substantive determinations were made based on the allegations in the respective complaints. (*Compare* Ex. C, *Seibel v. Planet Hollywood* Original Compl. ¶ 68(f) *with* ECF No. 1, ¶ 89(h).) Thus, here the Court will have to decide this and other issues already decided in the Nevada Consolidated Action, which would result in a duplicative effort and "a strong possibility of inconsistent results." *See Am. Int'l Underwriters (Philippines), Inc. v. Cont'l Ins. Co.*, 843 F.2d 1253, 1258 (9th Cir. 1988) [hereinafter *Underwriters*]. This factor weighs in favor of a stay.

2. *The Order in Which This Court Obtained Jurisdiction Does Not Preclude a Stay.*

In an attempt to distinguish the cases, the Seibel Parties repeatedly highlight a six-month gap between the filing of this action and the Nevada Consolidated Action. However, priority is not "measured exclusively in terms of which complaint was filed first." *Underwriters*, 843 F.2d at 1258 ("It is true that this factor must be applied in a pragmatic, flexible manner, so that priority is not measured exclusively in terms of which complaint was filed first, but rather in terms of how much progress was actually made in the state and federal actions.")

Paris does not dispute that this case has progressed further than the Nevada Consolidated Action. However, as the Seibel Parties must concede, much work remains to be done in all of these actions. Depositions have not been scheduled and the parties are still reviewing thousands of documents for production.[3] Moreover, this progress is to the benefit of the Nevada Consolidated

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[3] The Seibel Parties' attacks on Paris' discovery efforts are not only misplaced but a far cry from the cooperative tone between the parties thus far in discovery. Indeed, it is quite disappointing to see this tactic employed so recklessly. As the Seibel Parties know, Paris' production of documents has been unnecessarily burdened due to the volume of documents that initially resulted from the overbroad search terms proposed by the Seibel Parties. As a result, Paris was forced to go back to the Seibel Parties to narrow the search terms. Paris has no intention of delaying discovery and intends to produce documents on a rolling basis. Paris can only assume that the Seibel Parties' baseless attacks are an attempt to deflect this Court's attention from the actual issue before it: whether this matter should be stayed pending resolution of the Nevada Consolidated Action.

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Action as well as the parties are negotiating an agreement to share certain discovery across actions. Thus, when considering relative progress pragmatically, knowing that discovery will be shared across cases, this factor is neutral.

3. The Seibel Parties have not stated a case for forum shopping.

"[F]orum shopping weighs in favor of a stay when the party opposing the stay seeks to avoid adverse rulings made by the state court or to gain a tactical advantage from the application of federal court rules." *Travelers*, 914 F.2d at 1371; *see also Nakash*, 882 F.2d at 1417 (noting that forum shopping pertains to the avoidance of adverse rulings). The Seibel Parties' accusations of forum shopping are peculiar in light of the multi-state litigation campaign the Seibel entities have waged against Paris and its related entities. As this Court will recall, the Seibel entities are involved in litigation in Delaware, Illinois, New York, and in both state and federal court in Nevada. Unlike the cross-country litigation trek taken by the Seibel entities, Paris' Motion is simply designed to avoid inconsistent rulings between the state and federal courts in Nevada and resolve all of these disputes in one comprehensive forum. Because the Nevada Consolidated Action includes all of the Seibel entities and will address the Seibel Agreements wholesale, it makes sense to stay this action to avoid inconsistent rulings, duplication of efforts, and a waste of judicial resources. Importantly, by this Motion, Paris is not relitigating its Motion to Dismiss. Indeed, Paris is not arguing that this Court does not have jurisdiction to hear this matter. Instead, based on the balance of the *Colorado River* factors, Paris simply seeks to stay this matter while the state court rules on the comprehensive litigation.

4. Balancing the factors requires abstention.

Because Nevada Consolidated Action and this action are parallel actions, this Court should stay this action. On balance, the *Colorado River* factors favor a stay of this action. Specifically, "the desire to avoid piecemeal litigation" weighs in favor of a stay as the Nevada state court has already made substantive determinations. As detailed in Paris' Motion, the source of law factor also weighs in favor of a stay. These are state law contract and gaming disputes and thus should be resolved by state court–a factor that was not addressed and was thus conceded by the Seibel Parties.

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The adequacy of the state court forum also weighs in favor of a stay because the state court has the authority to resolve the overlapping issues.

III. CONCLUSION

Paris therefore respectfully requests that this Court grant its motion to stay and enter an order staying this federal court action pending resolution of the Nevada Consolidated Action.

DATED this 25th day of April 2018.

PISANELLI BICE PLLC

By: /s/ M. Mercera

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC and that, on this 25 day of April 2018, I caused to be sent via the Court's E-Filing/E-Service system a true and correct copy of the above and foregoing **REPLY IN SUPPORT OF PARIS LAS VEGAS OPERATING COMPANY, LLC'S MOTION TO STAY PENDING RESOLUTION OF PARALLEL STATE COURT ACTION** properly addressed to the following:

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
CAESARS ENTERTAINMENT OPERATING COMPANY, INC., et al.,[1]	)	Case No. 15-01145 (ABG)
Reorganized Debtors.	)	(Jointly Administered)
	)	**Hr'g Date: August 15, 2018 at 10:30 a.m. (CT)**

REORGANIZED DEBTORS' SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR ENTRY OF AN ORDER (A) STAYING ALL CONTESTED MATTERS INVOLVING LLTQ ENTERPRISES, LLC, LLTQ ENTERPRISES 16, LLC, FERG, LLC, FERG 16, LLC, MOTI PARTNERS, LLC, MOTI PARTNERS 16, LLC AND DNT ACQUISITION, LLC, AND (B) ABSTAINING FROM HEARING THESE CONTESTED MATTERS

[1] A complete list of the Reorganized Debtors and the last four digits of their federal tax identification numbers may be obtained at https://cases.primeclerk.com/CEOC.

Pursuant to the Court's request during the April 18, 2018 status conference, the Reorganized Debtors submit this supplemental brief in support of their *Motion for Entry of an Order (A) Staying All Contested Matters Involving LLTQ Enterprises, LLC, LLTQ Enterprises 16, LLC, FERG, LLC, FERG 16, LLC, MOTI Partners, LLC, MOTI Partners 16, LLC and DNT Acquisition LLC, and (B) Abstaining from Hearing these Contested Matters* (Dkt. No. 7847) (the "Motion") until a final judgment is entered in the Nevada Action.[2] In further support of their Motion, the Reorganized Debtors respectfully state:

1. The Court has asked the "fundamental question" of "whether given the litigation pending in other courts, if there is any claim that [the Court] can decide that won't duplicate another court's efforts or potentially contradict what another court is doing." (4/18/18 Hr'g Tr. at 4:19–23) The answer to the Court's question is no.

2. For each of the Contested Matters pending before this Court, "there is another claim in another court that is essentially the same thing so a decision on the claim in another court will decide potentially the issue before [this Court] directly or by implication." (*Id.* at 4:24–5:4) There is simply nothing "left over" that would be "productive" for this Court to address now. (*Id.* at 5:22–25) It is unlikely the Seibel-Related Entities will contend otherwise. They have repeatedly argued to the Nevada state court, the U.S. Bankruptcy Court for the District of Nevada, and this Court that the claims in the Nevada Action are "identical" to and "mirror" the claims being litigated in the Contested Matters.

3. The Nevada Action seeks declarations that the Reorganized Debtors and other Caesars entities that are party to agreements with the Seibel-Affiliated Entities (collectively, "Caesars") do not have any current or future obligations to Mr. Seibel or the Seibel-Affiliated

[2] Capitalized terms used but not defined have the meanings ascribed to them in the Motion.

Entities, including under certain restrictive covenants in those agreements. If the Nevada state court grants the requested declarations, there will be nothing left for this Court to decide as the state court decisions will be binding on the parties here. To the extent the Nevada state court declines to issue the declaratory relief, there may be additional narrow bankruptcy-specific issues for this Court to decide but it can do so with the benefit of the full record developed in Nevada. These issues include whether the Debtors' decision to reject their contracts with LLTQ and FERG represents the exercise of their business judgment and if the Seibel-Affiliated Entities requesting administrative expense claims provided any post-petition benefits to the estates. Because these issues could be moot based on the outcome of the Nevada Action, it would be inefficient and duplicative for this Court to address these narrow bankruptcy-specific issues now. Even if the Court determined these issues today, it would not materially advance the litigation among the parties as the Reorganized Debtors' suitability-related defenses based on fraudulent inducement and the first breach doctrine would still need to be decided in the Nevada Action prior to the entry of any final judgment in the Contested Matters.

4. Accordingly, for the reasons described in the Motion and this supplemental memorandum, the Court should stay or abstain from hearing the Contested Matters until a final judgment is entered in the Nevada Action.

Supplemental Background

5. On March 7, 2018, the Reorganized Debtors filed their motion to stay or abstain from hearing the Contested Matters. (Dkt. 7847) Since then, there have been three significant developments, all of which further support the relief sought in the Motion.

6. First, on May 1, 2018, the Nevada state court denied without prejudice the five motions filed by Seibel and the Seibel-Affiliated Entities to dismiss or stay the claims in the

Nevada Action. In these motions, Seibel and the Seibel-Affiliated Entities argued that because the Nevada Action raised identical legal and factual issues as the Contested Matters, the Nevada state court should dismiss or stay the Nevada Action. For example:

- "Counts II and III of the NV Action are simply a repackaging and new presentation of the claims and defenses the same parties have been litigating in the Contested Bankruptcy Matters." (2/22/17 LLTQ and FERG Am. Mot. to Dismiss at 19) (attached as **Exhibit A)**

- "The claims and defenses in both matters cannot be separated." (*Id*. at 20)

- "The MOTI Defendants and Caesars have litigated in Caesars' chapter 11 cases the same allegations, claims, and defenses at issue in the NV Complaint – i.e. the rights and obligations of the parties in connection with the Serendipity restaurant previously located in Las Vegas and operated by Caesars." (2/22/17 MOTI Am. Mot. to Dismiss at 3) (attached as **Exhibit B)**

- "Specifically, the matters at issue here, namely, the issues related to the propriety of the termination of the DNT Agreement and fraud in the inducement had to be asserted in the Illinois Bankruptcy Court and have been asserted here." (2/22/17 DNT Mot. to Dismiss at 17) (attached as **Exhibit C**)

7. Although the Nevada state court agreed the Nevada Action and other Seibel-related litigation raised certain key issues that are nearly identical across matters, it denied the motions to dismiss or stay. (5/1/18 Hr'g Tr. at 46:8–9 (attached as **Exhibit D**)) It found the various Seibel actions "involve issues of suitability, vis a vi[s] Mr. Seibel, prior to the contracts and after the contracts." (*Id.* at 47:9–12) Because the "contracts do have nearly identical suitability provisions," the Nevada state court determined "[t]here is a great potential for inconsistent rulings amongst all the various actions." (*Id*. at 47:12–21) The court 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) The Nevada state 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) While making clear it was not telling other courts what to do, the Nevada state court also found the Nevada 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) Once the Nevada state court enters the order denying the motions to dismiss, the Seibel-Related Entities will have ten days to answer.

8. Second, the Nevada state court entered a discovery schedule setting November 5, 2018 as the close of all discovery in the Nevada Action.[3] (Attached as **Exhibit E**) Although certain modifications may be necessary, the following is the current schedule:

- Add parties or amend pleadings — August 6, 2018
- Initial expert disclosures — September 5, 2018
- Rebuttal expert disclosures — October 5, 2018
- Discovery cut-off — November 5, 2018
- Motions in limine and dispositive motions — December 5, 2018

9. Third, the appeals filed by LLTQ, FERG, and MOTI of the Nevada bankruptcy court's decision to remand certain claims back to Nevada state court are fully briefed. In their appellate briefs, LLTQ, FERG, and MOTI continue to repeatedly argue that the Contested Matters and the Nevada Action raise identical legal and factual issues. *See, e.g.*, 3/5/18 LLTQ and FERG Opening Br. at 3 (attached as **Exhibit F**) ("In the state court complaint… the Debtors sought declaratory judgments on claims and objections already at issue in the Illinois Court"); *id.* at 4 ("The declaratory judgment questions presented in the NV Complaint reflect the same allegations and arguments asserted by the Debtors to support their rejection motions and as defenses to LLTQ/FERG's administrative expense claims pending in the Illinois Court."); *id.* at 19 (LLTQ and FERG "raised issues identical to those pending before the Illinois Court"); *id.* at 25 ("[I]t is

[3] On February 9, 2018, the Nevada state court entered an order consolidating the Nevada Action with the derivative action initiated by Mr. Seibel against non-debtor Planet Hollywood.

clear that the Removed Claims, which challenge the existence, enforceability and survival of the restrictive covenants in the Pub Agreements, are one and the same as, the claims and defenses being litigated in the Contested Bankruptcy Matters"); *id.* at 37 ("the issues in the Removed Claims and the Contested Bankruptcy Matters are one and the same"); 4/9/18 LLTQ and FERG Reply Br. at 1 (attached as **Exhibit G**) ("the Removed Claims issues are subsumed into the Contested Bankruptcy Matters"); *id.* ("In order to decide the Contested Bankruptcy Matters, the Illinois Court will have to decide each of the issues raised in the Removed Claims"); *id*. at 3 ("the defenses raised by the Debtors to the Contested Bankruptcy Matters are identical to the issues on which they sought declaratory relief through the Removed Claims"); *id.* at 6 ("What is relevant is that the Removed Claims must be adjudicated to resolve the Contested Bankruptcy Matters").

10. The appeal and the Reorganized Debtors' motion to dismiss the appeal are awaiting decision by the Ninth Circuit Bankruptcy Appellate Panel.

Argument

I. Because the Claims and Issues in the Nevada Action and the Contested Matters Are Duplicative, the Court Should Stay or Abstain from Hearing the Contested Matters Until the Nevada Action is Resolved.

11. The Seibel-Related Entities have repeatedly argued that the issues in the Nevada Action and the Contested Matters are identical. Now that the Nevada state court has decided to proceed with the Nevada Action and entered a schedule that includes a November 2018 discovery cutoff, the Court should stay or abstain from hearing the Contested Matters. As set forth below, if the Nevada state court grants the requested declaratory relief, there will be nothing left for this Court to do on the rejection and administrative expense motions pending before it. To the extent the Nevada state court declines to issue the declarations, the Court can address any remaining narrow bankruptcy-specific issues at that time with the benefit of the record developed in Nevada.

This approach will ensure this Court does not duplicate efforts with the Nevada state court or potentially reach inconsistent decisions on key overlapping issues.

A. The Debtors' Rejection Motions as to LLTQ, FERG, and Ramsay

12. On June 8, 2015, the Debtors filed a motion to reject (i) the Development and Operation Agreement, dated as of April 4, 2012, between LLTQ Enterprises, LLC and Desert Palace Inc. (the "LLTQ Agreement") and (ii) the Consulting Agreement, dated as of May 16, 2014, between FERG, LLC and Boardwalk Regency Corporation d/b/a Caesars Atlantic City (the "FERG Agreement"). (Dkt. No. 1755) The LLTQ Agreement and FERG Agreement relate to two Gordon Ramsay-branded pubs (the "Ramsay Pubs"). The Debtors assert rejection is appropriate under 11 U.S.C. § 365(a) because the LLTQ Agreement and FERG Agreement were executory contracts, and the Debtors determined in their business judgment that the costs of these agreements outweighed any potential benefits to the Debtors. (*Id.* ¶¶ 14–16) The Debtors request retroactive rejection *nunc pro tunc* to June 11, 2015. (*Id.* ¶¶ 17–19)

13. LLTQ and FERG filed their preliminary objection to the rejection motion on June 15, 2015. (Doc. 1774) LLTQ and FERG argue the Court should deny the Debtors' motion because the LLTQ Agreement and FERG Agreement are not executory and regardless are integrated with other agreements the Debtors entered into with Gordon Ramsay for the Ramsay Pubs that the Debtors did not seek to reject. LLTQ and FERG also object to retroactive rejection. (*Id.* ¶ 11)

14. On January 14, 2016, the Debtors filed a motion to reject the agreements with Mr. Ramsay that LLTQ and FERG argue are integrated with the LLTQ Agreement and FERG Agreement and for authority to enter into new agreements with Mr. Ramsay for the Ramsay Pubs. (Doc. 3000) LLTQ and FERG filed their preliminary objection to the Debtors' motion on February 10, 2016. (Doc. 3209) LLTQ and FERG argue the Debtors cannot reject their agreements with

Mr. Ramsay and enter into new ones because of restrictive covenants in the LLTQ Agreement and FERG Agreement. (*Id.* ¶¶ 10–13) They likewise challenge the Debtors' business judgment on the grounds that the new agreements with Mr. Ramsay are purportedly inferior to the existing agreements with Mr. Ramsay for the Ramsay Pubs. (*Id.* ¶¶ 14–15)

15. The core issues in the Debtors' rejection motions will be decided in the Nevada Action. Count I of the Nevada Complaint seeks a determination that Caesars properly terminated all of its agreements with the Seibel-Related Entities on suitability or non-disclosure grounds. (Dkt. No. 7847, Ex. B ¶ 134)

16. Based in part on the determination in Count I, Count II requests a declaration that Caesars does not have any current or future obligations or commitments to Mr. Seibel or the Seibel-Affiliated Entities for three reasons. (*Id.* ¶ 139) First, the relevant contracts state Caesars has no future obligations to the Seibel-Affiliated Entities where, as here, termination is based on suitability or non-disclosure grounds. (*Id.* ¶ 140) Second, Mr. Seibel and the Seibel-Affiliated Entities fraudulently induced Caesars to enter into the LLTQ Agreement, FERG Agreement, and other relevant agreements when they failed to disclose Mr. Seibel's illegal activities. (*Id.* ¶¶ 141–43) Under Nevada law, fraudulent inducement renders a contract voidable, allowing the defrauded party to stop performing and then raise fraud as a defense if sued. *Havas v. Alger*, 85 Nev. 627, 631 (1969) (finding the defrauded party may "rescind … or he may, if the contract is still executory … refuse to perform and raise the defense of fraud when sued"); *Mendenhall v. Tassinari*, 403 P.3d 364, 369 (Nev. 2017) (recognizing "fraud in the inducement is an affirmative defense to a breach of contract claim"). Third, the Seibel-Affiliated Entities repeatedly breached their agreements when they failed to update their prior disclosures to reflect Mr. Seibel's illegal activities. (Dkt. No. 7847, Ex. B. ¶ 144) Nevada law is clear that "the party who commits the first

breach of the contract cannot maintain an action against the other for subsequent failure to perform." *Bradley v. Nev.-Cal.-Or. R.R.*, 42 Nev. 411, 421, 178 P. 906, 907 (1919); *see also Liu v. Watec America Corp.*, 2009 WL 703402, at *5 (D. Nev. 2009) (first breach must be "material").

17. Count III seeks a declaration that the restrictive covenants in the LLTQ Agreement and FERG Agreement on which LLTQ and FERG base their defense to the Debtors' motion to reject the Ramsay agreements are unenforceable as a matter of law. Among other reasons, the restrictive covenants leave open material terms for future contracts and therefore are unenforceable "agreements to agree." *City of Reno v. Silver State Flying Servs., Inc.*, 438 P.2d 257, 261 (Nev. 1968) (renewal option that required parties to subsequently negotiate terms of extension unenforceable because "either party by the terms of the promise may refuse to agree to anything to which the other party will agree").

18. If the Nevada state court grants the declaratory relief in Count II, the Debtors' rejection motions will be moot. The Nevada state court will have determined the Debtors owe no current or future obligations to LLTQ and FERG. Because LLTQ and FERG will assert their integration theory as an affirmative defense to Count II, that issue will be decided within the scope of the Nevada Action too. Even if the Nevada state court only grants the declaratory relief in Count III, it will significantly narrow the issues with respect to the Debtors' motion to reject the Ramsay agreements as LLTQ's and FERG's primary defense—the restrictive covenants under the LLTQ Agreement and FERG Agreement—will have been rejected.

19. If the Nevada state court does not grant the declaratory relief in Count II, there may be narrow bankruptcy-specific issues for this Court to decide. For example, this Court may need to determine whether the Debtors' decision to reject the LLTQ Agreement and FERG Agreement was based on their business judgment, whether retroactive rejection is appropriate, and the amount

of any rejection damages claim. But it does not make sense for the Court to address these issues now as they all would be moot if the Nevada state court grants the declaratory relief in Count II.

Rejection Motions as to LLTQ, FERG, and Ramsay

Contested Matters Issues	Scope of Nevada Action
Caesars' Ability to Operate Ramsay Pubs Post-Rejection Without Seibel Involved	**Duplicative.** Count II seeks a declaration that Caesars owes no current or future obligations to LLTQ and FERG given the express terms of the LLTQ Agreement and FERG Agreement and suitability-based defenses (fraudulent inducement or first breach). Count III seeks a declaration that restrictive covenants in the LLTQ Agreement and FERG Agreement are unenforceable. LLTQ and FERG will raise integration as an affirmative defense in the Nevada Action to argue Caesars cannot operate the Ramsay Pubs without LLTQ and FERG.
Consideration to LLTQ/FERG for Caesars Operating Ramsay Pubs Post-Rejection	**Duplicative.** Count II seeks a declaration that Caesars owes no current or future obligations to LLTQ and FERG given the express terms of the LLTQ Agreement and FERG Agreement and suitability-based defenses (fraudulent inducement or first breach).
Enforceability of Restrictive Covenants as Defense to Ramsay Rejection Motion	**Duplicative.** Count III seeks a declaration that the restrictive covenants in the LLTQ Agreement and FERG Agreement are unenforceable.
Rejection as Exercise of Debtors' Business Judgment	**Not directly addressed but the Nevada state court's decisions may render this issue moot.**
Retroactive Rejection	**Not directly addressed but the Nevada state court's decisions may render this issue moot.**
Amount of any Rejection Damages	**Not directly addressed but the Nevada state court's decisions may render this issue moot.**

B. LLTQ and FERG Administrative Expense Motions

20. On November 4, 2015, LLTQ and FERG filed a request for payment of administrative expense seeking amounts under the LLTQ Agreement and FERG Agreement from the operation of the Ramsay Pubs post-petition. (Dkt. No. 2531 ¶ 13) On November 17, 2017, LLTQ and FERG filed an amended request to seek payments related to additional Ramsay-branded restaurants based on the restrictive covenants in the LLTQ Agreement and FERG Agreement. (Dkt. No. 7605 ¶¶ 43–55)

21. The Debtors filed their preliminary objections on November 10, 2015 (Dkt. No. 2555) and November 27, 2017 (Dkt. No. 7628). The Debtors assert LLTQ and FERG failed to provide any services post-petition and thus have not provided any post-petition benefit to the estate. (Doc. 7628 ¶ 1) They also contend the restrictive covenants on which LLTQ and FERG base their amended administrative expense claims are unenforceable and that the Debtors have suitability-based defenses (fraudulent inducement and material breach) to all of the claims asserted by LLTQ and FERG. (*Id.* ¶¶ 2–5)

22. For the reasons discussed above with respect to the Debtors' rejection motions, the relief in Counts II and III of the Nevada Action would resolve all of the issues before this Court on LLTQ's and FERG's requests for administrative expense. If granted, these declarations would moot any narrow bankruptcy-specific issues for this Court to determine such as whether LLTQ and FERG provided any post-petition services or benefits to the Debtors or the amount of any allowed administrative claim.

LLTQ and FERG Administrative Expense Motions

Contested Matters Issues	Scope of Nevada Action
Caesars' Ability to Operate Ramsay Pubs Post-Termination Without Seibel	**Duplicative.** Count II seeks a declaration that Caesars owes no current or future obligations to LLTQ and FERG given the express terms of the LLTQ Agreement and FERG Agreement and suitability-based defenses (fraudulent inducement or first breach). Count III seeks a declaration that the restrictive covenants in the LLTQ Agreement and FERG Agreement are unenforceable. LLTQ and FERG will raise integration as an affirmative defense in the Nevada Action to argue Caesars cannot operate the Ramsay Pubs without LLTQ and FERG.
Consideration to LLTQ/FERG for Caesars Operating Ramsay Pubs Post-Termination	**Duplicative.** Count II seeks a declaration that Caesars owes no current or future obligations to LLTQ and FERG given the express terms of the LLTQ Agreement and FERG Agreement and suitability-based defenses (fraudulent inducement or first breach).
Post-Petition Benefit to the Debtors from LLTQ and FERG	**Not directly addressed but the Nevada state court's decisions may render this issue moot.**

Contested Matters Issues	Scope of Nevada Action
Amount of Administrative Expense Claims	**Not directly addressed but the Nevada state court's decisions may render this issue moot.**

C. MOTI Administrative Expense Motion

23. On November 30, 2016, MOTI filed a request for payment of administrative expense seeking license fees for the post-termination wind-up period and an early termination fee. (Dkt. No. 5862 ¶¶ 29–30) The Debtors filed objections to MOTI's request on December 7, 2016 (Dkt. No. 5901) and January 11, 2017 (Dkt. No. 6267). Among other things, the Debtors object because their agreement with MOTI (the "MOTI Agreement") does not provide for an early termination fee or wind-up payments when the termination is based on suitability grounds, the Debtors have suitability-based defenses (fraudulent inducement or first breach) to any MOTI claim, and MOTI did not provide any post-petition benefit to the estate. (Dkt. No. 6267 ¶¶ 3–5)

24. For the reasons discussed above, if the Nevada state court grants the declaratory relief in Count II of the Nevada Complaint, MOTI's request for payment of administrative expense will be moot. Separately, if the Nevada state court concludes the Debtors properly terminated their agreement with MOTI on suitability grounds under Count I, MOTI cannot obtain an early termination fee or wind-up payments under the express terms of the MOTI Agreement. Conversely, if the Nevada state court does not grant any relief to Caesars, this Court may need to determine whether MOTI provided a post-petition benefit and, if so, the amount of the administrative expense claim awarded to MOTI.

MOTI Administrative Expense Motion

Contested Matters Issues	Scope of Nevada Action
Consideration to MOTI for Caesars Operating Restaurant Post-Termination	**Duplicative.** Count II seeks a declaration that Caesars owes no current or future obligations to MOTI given the express terms of the MOTI Agreement and suitability-based defenses (fraudulent inducement or first breach). Separately, Count I addresses whether

Contested Matters Issues	Scope of Nevada Action
	the Debtors properly terminated the MOTI Agreement and on what grounds. If the Debtors properly terminated the MOTI Agreement on suitability grounds, no early termination fee or wind-up payments are due under the MOTI Agreement.
Post-Petition Benefit from MOTI to the Debtors	**Not directly addressed but the Nevada state court's decisions may render this issue moot.**
Amount of Administrative Expense Claim	**Not directly addressed but the Nevada state court's decisions may render this issue moot.**

D. DNT Administrative Expense Motions

25. On November 20, 2017, DNT, purportedly derivatively through its Seibel-affiliated member R Squared Global Solutions, filed a request for payment of administrative expense seeking amounts under an agreement with DNT (the "DNT Agreement") for the operation of the Old Homestead Steakhouse post-termination. (Dkt. No. 7607 ¶ 1) DNT also argues that even if the termination was proper, Caesars cannot operate the Old Homestead Steakhouse for more than a 120-day wind-down period and it may also owe DNT an early termination fee. (*Id.* ¶ 3)

26. On December 6, 2017, the Reorganized Debtors filed their preliminary objection. (Dkt. No. 7658) The Reorganized Debtors assert Caesars properly terminated the DNT Agreement on suitability grounds and therefore does not owe DNT any payments or an early termination fee, Caesars continues to operate the Old Homestead Steakhouse under a new contract with the owner of the Old Homestead intellectual property and recipes, and DNT did not provide any post-petition benefit to the estate that would entitle it to an administrative claim. (*Id.* ¶¶ 1, 3–7)

27. As discussed with the other administrative claims above, if the Nevada state court grants the declaratory relief in Count II of the Nevada Complaint, DNT's administrative expense request will be moot. Separately, if the Nevada state court concludes the Debtors properly terminated the DNT Agreement on suitability grounds under Count I, DNT cannot obtain an early termination fee under the express terms of that agreement. But if the Nevada state court denies

Caesars' requests in their entirety, this Court would need to determine whether DNT provided a post-petition benefit and, if so, the amount of the administrative claim to DNT.

DNT Administrative Expense Motion

Contested Matters Issues	Scope of Nevada Action
Caesars' Ability to Operate Old Homestead Restaurant Post-Termination Without Seibel	**Duplicative.** Count II seeks a declaration that Caesars owes no current or future obligations to DNT given the express terms of the DNT Agreement and suitability-based defenses (fraudulent inducement or first breach).
Consideration to DNT for Caesars Operating Old Homestead Restaurant Restaurant Post-Termination	**Duplicative.** Count II seeks a declaration that Caesars owes no current or future obligations to DNT given the express terms of the DNT Agreement and suitability-based defenses (fraudulent inducement or first breach). Separately, Count I addresses whether the Debtors properly terminated the DNT Agreement and on what grounds. If the Debtors properly terminated the DNT Agreement on suitability grounds, no early termination fee is due under the DNT Agreement.
Post-Petition Benefit to the Debtors from DNT	**Not directly addressed but the Nevada state court's decisions may render this issue moot.**
Amount of Administrative Expense Claim	**Not directly addressed but the Nevada state court's decisions may render this issue moot.**

28. In sum, the key issues in the Nevada Action are duplicative of the issues before this Court. The Nevada state court's decisions may moot any narrow, bankruptcy-specific issues in the Contested Matters. Put differently, the claims in the Nevada Action are "essentially the same thing" as the claims pending before this Court such that a "decision on the claim in another court will decide potentially the issue before [this Court] directly or by implication." (4/18/18 Hr'g Tr. 4:24–5:4) Accordingly, this Court should stay and abstain from hearing the Contested Matters until these duplicative issues are resolved in the Nevada Action.

II. The Nevada State Court's Determinations Will Bind the Parties Before this Court.

29. Any determination by the Nevada state court will have preclusive effect on the parties in the Contested Matters.

30. The preclusive effect of the Nevada state court's rulings is determined under Nevada law. *In re Tharp*, 1997 WL 851434, at *5–6 (Bankr. N.D. Ill. Sep. 25, 1997) (pursuant to Full Faith and Credit, "a state court judgment commands the same preclusive effects in federal court that it would have in the court that entered it"). Under Nevada law, issue preclusion requires four elements: "(i) the issue decided in the prior litigation must be identical to the issue presented in the current action; (ii) the initial ruling must have been on the merits and become final; (iii) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (iv) the issue was actually and necessarily litigated." *Alcantara ex. rel Alcantara v. Wal-Mart Stores, Inc.*, 321 P.3d 912, 916 (Nev. 2014).

31. Based on the assumptions set forth by the Court, all four elements will be met here. First, the core issues in the Nevada Action are duplicative of the issues before this Court. Indeed, the Seibel-Related Entities have repeatedly argued the claims in the Nevada Action are "identical" to those before this Court and therefore are unlikely to challenge this first factor. The Court has assumed that the second factor will be met as the Nevada state court will issue a ruling on the merits. (4/18/18 Hr'g Tr. at 6:16–23) All of the parties to the Contested Matters are also parties to the Nevada Action, thus satisfying the third factor. The Court likewise is assuming that the fourth factor will be met as the key duplicative issues will actually be litigated in the Nevada Action. (*Id.*) Accordingly, the determinations made by the Nevada state court will have a preclusive effect on the parties here.

Conclusion

32. For the foregoing reasons, the Reorganized Debtors respectfully request that the Court stay and abstain from hearing the Contested Matters until the Nevada state court enters a final judgment in the Nevada Action.

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Dated: May 23, 2018
Chicago, Illinois

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
CAESARS ENTERTAINMENT OPERATING COMPANY, INC., *et al.*	)	Case No. 15-01145 (ABG)
	)	
	)	(Jointly Administered)
Debtors.	)	
	)	

COMBINED OBJECTION TO MOTION OF REORGANIZED DEBTORS TO STAY PENDING LITIGATION OR TO ABSTAIN

NOW COME FERG, LLC (together with its successors and assigns, "FERG"), LLTQ ENTERPRISES, LLC (together with its successors and assigns, "LLTQ"), and MOTI Partners, LLC (together with its successors and assigns, "MOTI", and with LLTQ and FERG, the "Administrative Claimants"), by and through their undersigned counsel, and hereby submit their combined objection (the "Objection") to the motion filed by the Reorganized Debtors (sometimes referred to as "Debtors") to stay or abstain from hearing the contested matters currently pending among the Reorganized Debtors and the Administrative Claimants [Dkt No. 7847] (the "Stay Motion")[1]. In support of the Objection, the Administrative Claimants state as follows:

I. INTRODUCTION

After insisting that this Court can and should decide their fraud in the inducement and rescission claims, and prevailing on taking discovery on such issues, the Debtors now want those same matters decided in a Nevada state court, not here. Long after the rejection motions and administrative claims had been filed, and while these matters were being actively litigated, Debtors feared that this Court was questioning their anticipated defenses. Accordingly, they

[1] Capitalized terms not defined herein shall have the same meaning as ascribed in the Stay Motion or the Debtors' supplemental brief in support of the Stay Motion [Docket No. 7970] (the "Supplemental Brief").

orchestrated the filing of the Nevada Action, a lawsuit with four plaintiffs and twelve defendants, to hijack the disputes with the Administrative Claimants to what they expect to be a friendlier forum in Nevada. The Debtors request that this Court abstain or stay its proceedings even though this Court is the only court that can provide complete relief for the Administrative Claimants[2], and can decide the pending rejection motions and administrative claim requests (the "Contested Matters") most quickly and efficiently.

Debtors' justifications for stay or abstention (Stay Motion, pp. 14-15) fall apart upon closer scrutiny. The Contested Matters ultimately can and must be decided by this Court – determining claim validity, rejection motions and administrative claims is one of the primary functions of this Court after the effective date of the Debtors' plan. Second, the state law issues involved are ordinary contract matters, which bankruptcy courts consider all the time. As to gaming laws, the Debtors have not cited any specific gaming law implicated at all in these matters, much less demonstrating any uncertainty in how "gaming laws" should be interpreted. Third, the presence of a related proceeding in Nevada should be noted with skepticism, particularly as a purported reason to stay or abstain. The Nevada Action was created as a tool for forum shopping, which should not be rewarded. Moreover, the resolution of the Nevada Action will still leave issues undecided in this Court. For example, even if the relief sought by the Debtors in the Nevada Action against the Administrative Claimants was granted (i.e. termination was proper and no future obligations owing), this Court will still need to resolve the administrative claims through termination. Finally, judicial economy will not be served by stay

[2] The Debtors' assertion that resolution of the Nevada Action will resolve all contested matters before this Court (Supplemental Brief, ¶3) is premised on the assumption that Debtors will prevail on every count in the Nevada Action against each of the Administrative Claimants (Supplemental Brief, ¶ 22). If the Debtors do not succeed, then this Court will still have to decide bankruptcy-specific issues related to the Contested Matters.

or abstention. So far, these efforts to serve "judicial economy" have resulted in gridlock as the parties continue litigation about the appropriate forum in which to have the underlying merits heard. Had Debtors wanted to serve the cause of judicial economy, they would have continued to litigate the Contested Matters before this Court, and then utilized its rulings to shorten the litigation in other courts. Even at this juncture, the most efficient way forward is for this Court to pick up where it left off and decide the Contested Matters, thereby rendering complete and full relief to the Administrative Claimants, mooting the issues as to the same contracts in the Nevada Action and, perhaps, leading to a faster resolution of the remaining non-debtor contract issues there.

Moreover, there are pending appeals which, if ruled upon in favor of the Administrative Claimants, could result in one or more of the claims asserted in the Nevada Action being dismissed, stayed or transferred to this Court. Until such matters are completed, the Stay Motion remains premature.

II. SUPPLEMENTAL BACKGROUND AND PROCEDURAL HISTORY

A. Contested Matters pending before this Court for three years

i. LLTQ and FERG, and the Ramsay Pubs

1. Debtors filed that certain Fourth Omnibus Motion for the Entry of an Order Authorizing the Debtors to Reject Certain Executory Contracts Nunc Pro Tunc to June 11, 2015 [Dkt. No. 1755] (the "Rejection Motion"). In the Rejection Motion the Debtors seek to reject the LLTQ Agreement and the FERG Agreement (collectively the "Pub Agreements") concerning the development and operation of the Ramsay Pubs located in Las Vegas and in Atlantic City. True and correct copies of the Pub Agreements are attached hereto as **Exhibit A** (LLTQ Agreement) and **Exhibit B** (FERG Agreement).

2. The LLTQ Agreement is governed by Nevada law (LLTQ Agmt. § 13.10), and the FERG Agreement is governed by New Jersey law. (FERG Agmt. § 14.10).

3. By the very filing of the Rejection Motion, the Debtors indicated their unequivocal intent to breach the Pub Agreements. The Debtors immediately ceased making payments to the LLTQ and FERG, but continued to operate and profit from the Ramsey-branded Pubs, further breaching the Pub Agreements. Operations continue to date, but LLTQ and FERG have not been paid for three years.

4. On June 15, 2015, LLTQ and FERG filed a preliminary objection to the relief sought in the Rejection Motion [Dkt. No. 1774]. NV Complaint, ¶ 121. Therein, LLTQ and FERG initially asserted, among other things, that: (i) the Pub Agreements are integrated with certain contracts (the "Original Ramsay Agreements") between the Debtors and Gordon Ramsay and his affiliate(s) (collectively, "Ramsay"); and (ii) the terms of the LLTQ Agreement preclude the operation of the Ramsay-branded Pubs by the Debtors without participation by LLTQ and FERG.

5. On November 4, 2015, LLTQ and FERG filed that certain Request for Payment of Administrative Expense [Dkt. No. 2531] (as amended on November 17, 2017, the "LLTQ/FERG Admin Request"). Therein, they requested this Court require the Debtors to remit payments owed under the Pub Agreements notwithstanding the pending Rejection Motion. The request is premised on the Debtors' continued operations of the Ramsay-branded Pubs, which are the object of the Pub Agreements.

6. The Debtors objected to the relief sought in the LLTQ/FERG Admin Request. First, on November 10, 2015, the Debtors filed a preliminary objection [Dkt. No. 2555] in which they insisted the LLTQ/FERG Admin Request must be decided together with the Rejection

Motion. Subsequently (as detailed below), the Debtors asserted in the Contested Matters, allegations of fraudulent inducement and affirmative defenses that the Pub Agreements are void and subject to rescission.

7. On January 14, 2016, the Debtors filed that certain Motion for the Entry of an Order Authorizing the Debtors to (A) Reject Certain Existing Restaurant Agreements and (B) Enter Into New Restaurant Agreements [Dkt. No. 3000] (the "Ramsay Rejection Motion"). In the Ramsay Rejection Motion the Debtors seek to reject the Original Ramsay Agreements and to simultaneously enter into new agreements with Ramsay to continue operating the same Ramsay-branded Pubs (the "New Ramsay Agreements").

8. On February 10, 2016, LLTQ and FERG filed a joint preliminary objection to the relief sought in the Ramsay Rejection Motion [Dkt. No. 3209] (the "2-10-16 Objection") asserting, among other things, that Section 13.22 of the LLTQ Agreement and Sections 4.1 and 4.2 of the FERG Agreement are enforceable restrictive covenants which preclude the Debtors from pursing or operating certain Ramsay-branded ventures (including the Ramsay-branded Pubs) absent participation with LLTQ and FERG.

9. Discovery for all three Contested Matters was consolidated.

10. In connection with the Contested Matters, on August 3, 2016, LLTQ and FERG filed a motion to compel certain discovery from the Debtors relating to the restrictive covenants contained in the Pub Agreements [Dkt. No. 4579] (the "Restrictive Covenant Motion to Compel").

11. On August 10, 2016, the Debtors filed an objection to the Restrictive Covenant Motion to Compel [Dkt. No. 4631] (the "8-10-16 Objection"). In the 8-10-16 Objection, the Debtors argued, among other things, that Section 13.22 of the LLTQ Agreement is unenforceable

as matter of law under Nevada law.

12. On August 17, 2016, a hearing on the motion to compel was conducted. A true and correct copy of the August 17, 2016 hearing transcript is attached hereto as **Exhibit C**. At this hearing, this Court granted the motion to compel, in part, and stated:

> 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.

Exh. C, p. 8, line 24 – p. 9, line 5.

13. On or about September 2, 2016, the Debtors purported to terminate the Pub Agreements. Notwithstanding the purported termination of the Pub Agreements, the Ramsay Pubs remain open and operated by the Debtors. Under the express terms of the Pub Agreements, the Debtors are obligated to operate, and are compensated for operating, the Ramsay-branded Pubs. (Exh. A, Articles 3 and 7; Exh. B, Articles 3 and 8). The same provisions of the Pub Agreements that provide for compensation to the Debtors for restaurant operations require payment to the Administrative Claimants based restaurant operations. (Exh. A, Article 7; Exh. B, Article 8).

14. On October 5, 2016, LLTQ and FERG filed a combined motion for partial summary judgment [Dkt. No. 5197] (the "MSJ"), in which they sought determinations that: (i) under Nevada and New Jersey state law, the Pub Agreements are integrated with the Ramsay Pub Agreements; and (ii) LLTQ and FERG are entitled to allowance and payment of administrative expense claims through at least September 2, 2016 (i.e. the purported termination date).

15. On October 12, 2016, the Debtors filed a preliminary objection to the MSJ [Dkt. No. 5246] (the "10-12-16 Objection"), asserting an affirmative defense based on fraudulent

inducement and voiding the Pub Agreements. A true and correct copy of the 10-12-16 Objection is attached hereto as **Exhibit D**.

16. In the 10-12-16 Objection, the Debtors: (i) acknowledged that until recently, they had believed one of the focuses of the Contested Bankruptcy Matters would be "the enforceability of restrictive covenants"; and (ii) informed the court that they now "intend to oppose the [MSJ] on the grounds that the agreements are void, voidable, or void *ab initio*." Exh. D, p. 2, ¶ 1 and p. 3, ¶ 7. The Debtors also requested that the Court allow them to take discovery on suitability matters to oppose the MSJ. *Id.* at ¶9.

17. Based on their request, this Court denied the MSJ without prejudice so that the Debtors could engage in "suitability" discovery against Mr. Seibel, LLTQ and FERG.

18. After engaging in certain "suitability" discovery, on April 7, 2017, LLTQ and FERG filed a motion for a protective order [Dkt. No. 6781] (the "Protective Order Motion") specific to the new "suitability" discovery, asserting that the rescission of the Pub Agreements and fraudulent inducement claims were factually deficient and unavailable as a matter of law. A true and correct copy of the Protective Order Motion (without exhibits) is attached hereto as **Exhibit E**.

19. On April 26, 2017, the Debtors filed an objection to the Protective Order Motion [Dkt. No. 6887] (the "Protective Order Objection"), a true and correct copy of which (without exhibits) is attached hereto as **Exhibit F**. The allegations asserted by the Debtors in the Protective Order Objection (pp. 1-9) serve as the template for both (a) their fraudulent inducement and rescissions affirmative defenses in the Contested Matters, and now (b) the allegations in the Nevada Action.

20. In the Protective Order Objection, the Debtors expressly asserted the following

defenses to the Contested Bankruptcy Matters, all of which they subsequently reasserted in the NV Complaint:

> **Discovery on the subject of suitability is directly relevant and appropriate here, however, because it will be used to establish that LLTQ and FERG breached the agreements and that breach excuses the Debtors' performance and, thereby, any obligation to pay LLTQ and FERG an administrative expense claim.** Exh. F p. 3 (emphasis added).
>
> LLTQ and FERG breached the relevant agreements each time they failed to disclose to the Debtors that they and their affiliates were unsuitable parties. The Debtors are entitled to discovery on that breach. **Moreover, the Debtors are entitled to discovery into whether they were fraudulently induced into entering the LLTQ and FERG Agreements.** *Id.* (emphasis added).
>
> **Given these material breaches, the Debtors are relieved of any obligations to perform under the agreements**, including any obligation to pay any administrative expense claim. In the alternative, if the representations and warranties were false when made, then the LLTQ and FERG contracts could be rescinded and LLTQ and FERG would likewise not be entitled to administrative expenses. *Id.* at p. 9-10 (emphasis added).
>
> If [LLTQ and FERG] breached, they have no right to demand the Debtors' continued performance under those contracts through payment of an administrative expense claim. And **the Debtors should be able to defend the claim on this basis. No separate adversary proceeding for rescission or breach of contract is required** under *Arlington*. *Id.* at p. 12 (emphasis added).
>
> **Debtors have claims for fraudulent inducement and rescission of the contracts**. Procedurally, the Court may, under Bankruptcy Rule 9014, direct that Bankruptcy Rules 7008 and 7013 apply to a contested matter. . . If the Court does so, the Debtors can assert fraudulent inducement as either an affirmative defense or counterclaim. Alternatively, the Debtors are willing to initiate an adversary proceeding if necessary. *Id.* at p. 14 (emphasis added).

21. On May 9, 2017, LLTQ and FERG filed a reply in support of the Protective Order Motion [Dkt. No. 6906] (the "5-9-17 Reply"), a true and correct copy of which is attached hereto as **Exhibit G**. In the 5-9-17 Reply, LLTQ and FERG reiterated statements from this Court that the fraudulent inducement claims and the propriety of the termination of the Pub Agreements were not presently before the Court and thus procedurally improper.

22. On May 31, 2017, however, the Court denied the Protective Order Motion. A true and correct copy of the May 31, 2017 hearing transcript is attached hereto as **Exhibit H**. At this hearing, the Court referred to the Debtors' legal theories of fraud in the inducement and rescission as "thin" and "dubious" and stated that rescission "did not look like a possibility here." Exh. H, p. 6, line 23 – p. 7, line 7; p.10, line 3. Nonetheless, the Court declined to rule on the claims definitively in the context of the Protective Order Motion. Instead, the Court denied the relief sought in the Protective Order Motion and allowed the Debtors to take discovery on and pursue their defenses of fraud in the inducement and rescission without requiring the Debtors to file a separate adversary proceeding in the Chapter 11 Cases (or otherwise necessitating the filing of any other separate action – i.e. the NV Complaint).

> [LLTQ and FERG] have objected to discovery as if they were moving for summary judgment, claiming that the facts and law show the debtors' [fraud in the inducement/rescission] theories are so devoid of merit that all discovery on suitability should stop. 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.

Exh. H, p. 9, line 23 – p. 10, line 6.

23. The parties have thus continued to engage in "suitability" discovery premised solely on the Debtors' objections and defenses to the LLTQ/FERG Admin Expense and their claims that the Pub Agreements are subject to rescission and may be void due to a fraud in the inducement theory. As part of this discovery, the Debtors also issued subpoenas to Mr. Seibel and certain members of his family, which have also been subject to dispute, motion practice, and production in the Contested Matters.

ii. MOTI and the Serendipity Restaurant

24. MOTI filed a proof of claim in the Chapter 11 Cases on May 22, 2015 (Claim No. 3922) (the "MOTI Claim"). The MOTI Claim is over $700,000, based on fees, revenues and

operating income due under section 6.1 of the MOTI Agreement based on Debtors' operation of the Serendipity restaurant at Caesars Palace in Las Vegas, Nevada.

25. On or about September 2, 2016, Caesars terminated the MOTI Agreement.

26. On November 30, 2016, approximately ten months prior to Caesars filing the Nevada Action, MOTI filed that certain *Request for Payment of Administrative Expense* [Dkt. No. 5862] (the "Admin Expense Motion") seeking payment based on Caesars' continued use of the license and the continued operation of Serendipity after termination. On December 7, 2016, Caesars filed the *Debtors' Preliminary Objection to Request for Payment of Administrative Expense filed by the MOTI Parties* [Dkt. No. 5901].

27. On January 11, 2017, Caesars filed the *Debtor's Objection to Request for Payment of Administrative Expense* [Dkt. No. 6267]. In its Objection, Caesars asserts both that (a) no payments are contractually due under the MOTI Agreement, and (b) Caesars can rescind the MOTI Agreement and eliminate any requirement to pay MOTI as requested in the Admin Expense Motion. On February 1, 2017, MOTI filed its *Reply Brief in Support of Request for Payment of Administrative Expense* [Dkt. No. 6518].

28. On February 15, 2017, a hearing was held on the Admin Expense Motion. A true and correct copy of the February 15, 2017 hearing transcript is attached hereto as **Exhibit I**. At this hearing, this Court invited the parties to submit further briefing to assist determining what terms governed the parties' continued relationship. If and after the MOTI Agreement expired, depending on such terms, the Court questioned whether the suitability requirements upon which Caesars relied are even relevant in the first instance:

> Isn't there also a question about this suitability requirement if in fact the contract expired? I mean, I don't think you can pull these issues apart. If the written agreement that had that requirement in it expired, and the parties were operating on some other basis, then I don't know if it would be relevant any more. I'm just

not sure. That's why, again, I can't get past this expiration problem.

Exh. I, p. 25, lines 1 – 9.

29. On April 21, 2017, MOTI filed its *Supplemental Brief in Support of Request for Payment of Administrative Expense* [Dkt. No. 6878]. On May 12, 2017, Caesars filed the *Debtors' Limited Response to MOTI's Supplemental Brief in Support of Request for Payment of Administrative Expense* [Dkt. No. 6912] (attached hereto as **Exhibit J**). In the Limited Response, Caesars states:

> If the Court concludes that MOTI may be entitled to a claim, the Debtors request that the Court allow the Debtors to conduct discovery into Mr. Seibel's suitability as an additional defense to MOTI's continued request for administrative payment by the Debtors after MOTI breached the MOTI Agreement by, for example, not informing the Debtors that Mr. Seibel had engaged in criminal activity as required by section 9.2

Exh. J, p. 3.

30. On June 21, 2017, a hearing was held on the Admin Expense Motion, during which this Court concluded that a factual question existed as to the terms under which the parties continued to operate post-expiration of the MOTI Agreement and, therefore, would require an evidentiary hearing.

B. Debtors and their affiliates file the Nevada Action

31. There are three counts to the NV Complaint. Count I seeks a determination that the Debtors (and its non-debtor affiliates) properly terminated the subject restaurant contracts based on express "suitability" provisions *in the contracts*. While Count I is based on enforcing the Debtors' rights under the restaurant contracts that have similar language, Counts II and III seek to rescind such contracts and all of the Debtors' obligations thereunder, namely the restrictive covenants that are the lynchpins to the Contested Matters. Importantly, that determination requires different analysis for each of the various contracts, which have different

language, and were entered into among different parties under different circumstances.

32. To compare, when the Debtors filed the Nevada Action the Contested Matters had effectively been narrowed down to the following issues:

> **First**, whether the contracts entered into between the Administrative Claimants and the Debtors for the underlying restaurants are void or may be rescinded based on fraudulent inducement (i.e. the same issue presented in Count II of the NV Complaint).
>
> **Second**, whether the restrictive covenants and other provisions contained in the Pub Agreements: (i) preclude the Debtors from operating the Ramsay Pubs without compensating the Administrative Claimants; and (ii) are enforceable and survive rejection and termination of the contracts (i.e. the same issues presented in Count III of the NV Complaint).
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> **Third**, whether the Pub Agreements are integrated with the companion agreements which the Debtors contemporaneously negotiated and entered into with Gordon Ramsay with respect to the development and operation of the Ramsay Pubs.

C. Status of appeals and motions to dismiss in Nevada

33. The Nevada Action is subject to five separate motions to dismiss (collectively, the "Motions to Dismiss") filed by each of: (i) LLTQ and FERG, (ii) MOTI, (iii) Rowen Seibel, (iv) DNT ACQUISITION, LLC, appearing derivatively by one of its two members, R Squared Global Solutions, LLC ("DNT"), and (v) TPOV Enterprises, LLC (with its successors and assigns, "TPOV").

34. On June 1, 2018, the Nevada state court entered an order denying without prejudice the Motions to Dismiss. A true and correct copy of the order, without exhibits, is attached hereto as **Exhibit K**. As noted in the Supplemental Brief, the Nevada state court focused on the uniformity of the suitability termination issues, i.e. Count I of the Nevada Action. Exh. K, lines 14-18. Specifically, because the underlying restaurant contracts had similar

termination provisions based on suitability, the state court ruled that suitability should be decided together. *Id.* at lines 14-15.

35. On June 18, 2018, the Administrative Claimants and other defendants to the Nevada Action filed that certain *Petition for Writ of Mandamus or Prohibition* in the Supreme Court of the State of Nevada (the "Petition for Writ"), thereby challenging the order denying the Motions to Dismiss. The parties also filed a motion to stay the Nevada Action while the Petition for Writ is pending. The stay motion has been scheduled for an initial hearing on July 23, 2018.

36. As of the filing of this response, only one of twelve defendants has filed an answer in the Nevada Action, which remains at the pleading stage, not at issue. Accordingly, the discovery schedule for the Nevada Action referenced in the Supplemental Brief (¶8) does not apply to the Administrative Claimants, DNT or TPOV.

37. LLTQ and FERG, and MOTI, have filed separate appeals of the Nevada Bankruptcy Court orders remanding claims asserted in the Nevada Action back to the Nevada state court (the "Appeals"). The Debtors filed a motion to dismiss the Appeals, which is fully briefed. The Bankruptcy Appellate Panel for the Ninth Circuit (the "BAP") ruled that the Debtors' motion to dismiss will be heard at the same time as oral argument for the Appeals, which is now set for July 27, 2018.

D. The TPOV Action continues to date and is not stayed

38. The Motion to Dismiss filed by TPOV seeks dismissal of the Nevada Action based on a prior pending action TPOV filed in in the United States District Court for the District of Nevada on February 3, 2017, in connection with a Gordon Ramsay steak restaurant (the "TPOV Action"). The TPOV Action seeks relief similar to that requested in the Nevada Action, but predates the Nevada Action by six months.

39. While the Debtors' affiliate moved the District Court to stay that action in a motion filed April 4, 2018, the District Court has not yet ruled on the motion. Thereafter, TPOV filed a motion to compel certain discovery, which motion was granted on June 21, 2018. A true and correct copy of the order is attached hereto as **Exhibit L** (the "TPOV Order"). Thus, discovery is going forward in the TPOV Action, notwithstanding the Debtors' attempt to limit all related matters to the Nevada Action.

III. ARGUMENT

A. Introduction

40. In its comments at the April 18, 2018 status conference, this Court noted the "fluidity" of this dispute and the difficulties this fluidity poses. While the procedural aspects have changed, the ultimate issues for the Court to decide have remained essentially the same since LLTQ and FERG filed their motion for partial summary judgment in November 2016. In the Stay Motion, the Debtors ask this Court to condone and bless their about-face forum selection process (i.e. by asking this Court to stay the very matters and legal theories they fought and prevailed to take discovery upon before this Court so they can now be pursued elsewhere). The Administrative Claimants contend granting such request will inevitably continue to increase the time for resolution of these issues, and needlessly split the litigation between this Court and the Nevada state court ("NV Court") presiding over the Nevada Action. Indeed, but for the Debtors' attempts to evade this Court's scrutiny of the long-pending issues, these matters could very well have been resolved by now.

41. At the status hearing, the Court sought information in order to assess how it could be "productive" in this situation. The Administrative Claimants respectfully submit that the Court should deny the Motion, exercise the jurisdiction it has, which is complete, to decide the

issues that have been pending for three years. It should set an appropriate discovery schedule leading to a hearing on all issues related to the dispute at the soonest date possible.

B. In the normal course, courts should adjudicate issues properly before them

42. As the Seventh Circuit has stated, "[W]e are mindful that federal courts generally should exercise their jurisdiction if properly conferred and that abstention is the exception rather than the rule." *In re Chicago, Milwaukee, St. Paul & Pacific RR Co.*, 6 F.3d 1184, 1189 (7th Cir. 1993). There is no question as to this Court's jurisdiction to determine all relevant issues before it. This Court should therefore decide the issues unless there is a good reason to make an exception.

C. Under the appropriate flexible multi-factor test, the interests of justice will be served by denying the Stay Motion and adjudicating the Contested Matters

43. The Seventh Circuit has emphasized that decisions as to stay or abstention are to be made with the relevant factors of a particular case kept firmly in mind. After quoting a list of potential factors to consider, the *Chicago Milwaukee* court admonished, "Courts should apply these factors flexibly, for their relevance and importance will vary with the particular circumstances of each case, and no one factor is necessarily determinative. At the same time, because section 1334(c)(1) is concerned with comity and respect for state law, whether a case involves unsettled issues of state law is always significant." *Id*. at 1189. [3] The relevant factors, taken together, overwhelmingly support this Court's continuing to adjudicate the Contested Matters and denying the Motion.[4]

[3] Since the relevant factors governing granting a stay, and abstaining under 28 U.S.C. 1334(c)(1), are so similar, this brief will consider the matters together.

[4] In arguing to the contrary, the Motion relies in part on the Nevada Bankruptcy Court's opinion granting a remand of the removed Nevada Action (Stay Motion, ¶11), upon which this Court should not rely. First, the remand order is subject to the Appeals. Second, the Nevada Bankruptcy Court decided the remand issue with a far scantier knowledge of the facts and circumstances than this Court possesses. For example, it found that a bankruptcy court had no jurisdiction to adjudicate Counts I, II, and III of the NV Complaint, even though this Court is already entertaining the same issues. Third, the opinion is premised on the following errant Conclusions of Law:

i. This Court is the only court that can determine all relevant issues to determine the Contested Matters in full

44. To read Debtors' papers, one might think that this case was primarily concerned with complicated issues of Nevada gaming law, but this is a red herring. This Court may decide the Contested Matters based on simple contract principles and the Bankruptcy Code. Each of the restaurant contracts include a basis for termination related to "suitability." The contacts have straightforward remedies for the parties after termination. Using the LLTQ Agreement as an example: (a) section 10.2 provides Caesars the right to terminate for unsuitability; (b) Article 4 covers term and termination of the LLTQ Agreement; (c) section 4.2.5 indicates Caesars can terminate the contract based on suitability per section 10.2; (d) section 4.3 generally covers what happens upon termination; (e) section 4.3.1 states that Article 13 survives termination (that includes section 13.22, one of the key restrictive covenants at issue); (f) section 4.3.2. states that Caesars keeps its rights in the Restaurant Premises, the furniture and equipment and its marks, and that Caesars can operate a "a restaurant in the Restaurant Premises." Exh. A, LLTQ Agmt.

> C. Counts II and III seek a declaration regarding [the Debtor's] right to terminate the LLTQ/FERG Agreements under state law, a fact that LLTQ and FERG concede. LLTQ/FERG nevertheless argue that the "unique circumstances" of the Caesars Bankruptcy Case require a different conclusion. (See AECF No. 55 at p. 6). The court disagrees.
>
> D. The disclosure statement approved in the Caesars Bankruptcy Case listed an estimated 1,800 administrative claims that are provided for by either payment in full or other resolution during the post-confirmation period. (ECF No. 4220-1 at p. 105). Any state law issue arising in Counts II and III is distinct from the LLTQ/FERG Administrative Expense Claim.

Findings of Fact and Conclusions of Law (NV Bankruptcy Court Docket No 70), attached hereto as Exhibit P. Rather, Count I of the Nevada Action is the sole count in the Nevada Action seeking a declaration regarding the right to terminate, not Counts II and III. LLTQ and FERG did not concede this misstatement of fact. And, as the Debtors now admit, Counts II and III are not distinct from the very issues already present as part of the pending administrative claims. In fact, the Debtors now admit the issues in Counts II and III are duplicative of the matters at issue in the administrative claims. (Supplemental Brief, pp. 9-11).

The Pub is defined as the "Restaurant" and therefore, LLTQ asserts, cannot be operated by Caesars post-termination of the LLTQ Agreement.[5]

45. The Contested Matters thus present simple contract disputes that require this Court to interpret the plainly written language in the Pub Agreements and MOTI Agreement. The gaming laws of Nevada do not play a role with respect to the parties' express remedies in the event of termination. Nevada gaming laws also do not apply to the FERG Agreement in the first instance, as it is controlled by New Jersey law.

46. Rather than Nevada gaming law, the overarching issues are bankruptcy rejection and the standards for allowance of administrative claims under the Bankruptcy Code. While this Court can evaluate the Nevada and New Jersey contract law issues, if they become relevant, the Nevada court cannot resolve the bankruptcy questions. Thus, even if this Court were to stay or abstain, the case would ultimately have to come back to this Court

47. In addition, the Contested Matters do not require Mr. Seibel as a party. Despite Debtors' efforts to conflate Mr. Seibel with the Administrative Claimants, this Court has already addressed that issue. At a hearing on February 15, 2017, months before the filing of the NV Action, this Court commented that LLTQ, FERG and MOTI "are not Mr. Seibel. . ." Exh. I; *see* p. 23, lines 16-19. This Court also stated that the disputes between the Debtors and LLTQ and FERG on the one hand, and their disputes with MOTI on the other, were different and had to be kept separate. "I don't want to have one great big – I don't want to think of this as the Rowen Seibel dispute singular. I would rather keep these apart, if we can, because I have a sense they're really different. There is the Ramsay stuff and there is the Moti stuff." A true and correct copy

[5] Accordingly, if this Court agrees with the contract interpretation espoused by LLTQ and FERG --i.e. Caesars cannot continue to operate the Ramsay Pubs post-termination without providing compensation required under the contracts-- then regardless of whether the contracts were properly terminated the Court can find in favor of the Administrative Claimants.

of the 3-23-17 Transcript is attached hereto as **Exhibit M**; *see* p. 21, lines 18-21 (Emphasis added).

48. As a result of this apparent dead end, the Debtors filed the Nevada Action and named Mr. Seibel, individually, as a defendant.

ii. This Court will determine the Contested Matters More Quickly Than the NV Court.

49. In their Motion (¶15), the Debtors urge the Court should stay or abstain "[i]n an effort to streamline 'the Seibel-related litigation[.]'" If the Contested Matters are included in the phrase "Seibel-related litigation", stay or abstention will have the opposite effect. That's because "Seibel-related litigation" is not monolithic at all -- the Nevada Action contains several separate contracts, between several separate parties, invoking several different sources of law – bankruptcy, Nevada law, and New Jersey law, at least. To pry the Contested Matters away from this Court, Debtors have created a "bloated" litigation landscape which they now seek to "streamline" by attacking Administrative Claimants' only hope for a quick adjudication of the Contested Matters, which can only happen before this Court. The Contested Matters did not require any streamlining before the Nevada Action was filed, and none is needed now.

50. The other defendants whom the Debtors have added to the Nevada Action have different contracts than the ones before this Court, the interpretation of which will only complicate and slow the Nevada Action. Equally important, the Nevada Action, for all practical purposes, has not gotten off the ground. Other than by defendant Jeffrey Frederick, whom is not a party to any of the restaurant contracts at issue, no answers have been filed and discovery has not begun. It will likely take years for the Nevada Action to conclude, after which, in all likelihood, the dispute will return to this Court's docket for further proceedings. Thus, stay or abstention will delay and expand these proceedings, not streamline them. If the Debtors really

wanted to streamline proceedings, they would allow this Court to resolve the Contested Matters (and the TPOV Action to conclude), and then resume the Nevada Action, if necessary, in light of such rulings.

51. The Contested Matters present a straightforward determination for this Court where the language of the contracts and commonsense that the Debtors cannot disavow their obligations under the contracts (and the existence of the contracts as well) while continuing to profit from the operation of the restaurants created by the purportedly terminated contracts.

52. Regardless of whether the Debtors properly terminated the contracts based on Mr. Seibel's suitability, the contracts provide that the Debtors cannot continue to operate the restaurants without compensation to the Administrative Claimants. The very object and purpose of the contracts is "to design, develop, construct and operate" of the restaurants. (Exh. A, LLTQ Agmt., Recital B; Exh. B, FERG Agmt., Recital B). The restaurants and the concept of Ramsay Pubs did not exist before the contracts or before the Administrative Claimants made capital infusions thereunder. Thus, the relief the Debtors seek both in the Nevada Action and in the Contested Matters is inherently contradictory. They seek to continue to enjoy the benefits of the underlying contracts and to enforce their suitability termination provisions, while at the same time ignore the contractual terms governing what happens after termination. The Debtors also seek to disavow all of their obligations under the contracts and impose an equitable remedy rescinding their very existence, while simultaneously continuing to profit from the underlying restaurant operations.

iii. The state law issues are neither sufficiently central nor unsettled so as to implicate comity concerns

53. At this point, it is unclear at best how state law issues will come into play in further proceedings on the Contested Matters. The Court will certainly have to interpret the

relevant contracts between the parties, but no one has suggested that Nevada contract interpretation principles are unique in any way, or that Nevada has any special interest in interpreting its own contracts. If this were sufficient to ground stay or abstention, the bankruptcy courts would be deferring to state courts on virtually all claims litigation.

54. Despite the rhetoric regarding "suitability", these Contested Matters boil down to simple contract disputes that are unique to the Administrative Claims and should be readily resolved by this Court, thus eliminating the need for the Nevada state court to determine them.[6] The foregoing issues are not complicated issues under Nevada law, which applies to the LLTQ Agreement and MOTI Agreement, or New Jersey law, which applies to the FERG Agreement. The disputes are straightforward because the language of the contracts are clear as to what the parties can and cannot do after termination, and because the Debtors continue (and intend to continue) to operate the restaurants that are the subject of the contracts.

55. For example, integration of two independently executed agreements under Nevada law is subject to a straightforward three-part test. *See Whitemaine v. Aniskovich*, 183 P.3d 137, 141-42 (Nev. 2008). In *Whitemaine*, the Supreme Court of Nevada held that multiple contracts are integrated when "(1) they are contemporaneously executed, (2) they concern the same subject matter, and (3) one of the instruments refers to the other." *Id.* at 141. The court applied the test to conclude that two employment agreements among three parties constituted one agreement, even though one of the agreements contained an integration clause. *Id.* (citation omitted).

[6] In any event, Debtors are using suitability for contradictory purposes, to assert (1) they properly terminated the restaurant contracts based on the express terms of the contract, and (2) that the suitability issues require that the contracts be rescinded. They thus seek to simultaneously enforce the contracts and deny their very existence.

56. Even if the Debtors had the right to terminate the contract, that determination is unlikely to have an adverse impact on the Contested Matters because Administrative Claimants would still have the rights provided by the Pub Agreements and the MOTI Agreement which expressly survive termination. Accordingly, this Court's decision on Counts II and III, which directly overlap with the Contested Matters, will be *res judicata* on the same matters pending in the Nevada Action between Debtors and the Administrative Claimants, and will narrow the scope of the Nevada Action to the remaining counts involving non-debtor parties.

57. Moreover, there is nothing to indicate that the Nevada laws involved, including gaming rules are unsettled or complex. The Debtors, who bear the burden on the Motion, have provided insufficient information about the current state of Nevada law, or any other facts they deemed relevant, to allow this Court to meaningfully consider whether legitimate comity concerns are invoked. Furthermore, the FERG Agreement is governed by New Jersey law, not Nevada law. Ex. A, FERG Agmt. §14.10.

58. Importantly, the TPOV Action is progressing in discovery as well, and the Nevada District Court just entered an order compelling discovery in this regard, notwithstanding a pending fully-briefed motion to stay the TPOV Action. *See* Exh. L.

iv. The Debtors should not be rewarded for filing a declaration judgment action to have a Nevada court determine the matters already at issue in the Contested Matters

59. The Contested Matters were pending for over two years before the Debtors filed the Nevada Action. During this period and as they proceeded to conduct discovery, the Debtors never claimed that the Nevada Action was necessary to avoid an injustice to them were the matters adjudicated before this Court. To the contrary, the Debtors informed this Court they would file an adversary proceeding before this Court if the Court deemed such necessary to

allow the Debtors to pursue their suitability legal theories. This was not the case, thus no adversary was filed.

60. By filing the Nevada Action, Debtors have achieved considerable delay, and extended the time in which the Administrative Claimants are effectively stopped from receiving moneys due them under the plain terms of the restaurant contracts. Perhaps Debtors believe that a Nevada venue might be a more propitious one for a casino company based in Nevada. In addition to the comments noted above, there are several instances where this Court has cast doubt on the fraud and rescission theories re-plead in the Nevada Action:

> I don't understand how the fraud argument plays into all of this. Fraud is a basis to -- in the inducement is a basis to rescind the contract. You can affirm the contract and sue for damages if you think there is a breach or you can rescind.
>
> ****
> The other point, which I think is one that the FERG folks were making, is that in order to rescind a contract, you have to put both sides back in the position they were in. And I don't understand how that could be done here or if that's even something the Caesars people would really want.
>
> (Transcript of the April 19, 2017 Hearing, attached hereto as **Exhibit N**; p 14., lines 17-22, p. 15, lines 6-11).
>
> Meanwhile, the relevance of the information the debtors sought is open to serious question. In denying FERG and LLTQ's motion for protective order, I described as "thin" the legal theories the debtors have advanced to justify what they call "suitability" discovery. As I explained, rescission does not seem to be a possibility here, and neither the LLTQ and FERG dispute nor the MOTI dispute appears to involve anticipatory repudiation. Nine months have passed since the debtors learned of Seibel's conviction, and still they have articulated no coherent theory that would make relevant the documents they want from him.
>
> 6-21-17 Transcript attached hereto as **Exhibit O**, p. 25, lines 17-25, p. 26, lines 1-4.

61. This Court made all of the foregoing comments months before the Debtors filed the Nevada Action.

62. Whatever the reason, the Debtors filing and prosecution of the Nevada Action is hurting the Administrative Claimants, both by delay and by multiplying the cost of the litigation. And it's so simple to do – file a declaratory judgment action in a distant state court, and an expensive chain of events begins which is hard to stop quickly. If this Court elects to abstain or stay its hand in the face of these litigation tactics, it will encourage future attempts to do so, and place yet one more hurdle in the path of bankruptcy creditors to an efficient recovery.

There are certainly cases where a stay or abstention is appropriate, but this is not one of those exceptions to the general rule that jurisdiction is meant to be exercised, especially in light of the uncertain path the Nevada Action will follow, if any, given the pending Appeals and Petition for Writ.

IV. CONCLUSION

The parties are in agreement that Counts II and Count III of the Nevada Action duplicate the key issues that this Court must decide to resolve the Contested Matters. The question is now which court should decide the matters. Because (a) the Contested Matters have been pending for three years in this Court, (b) this Court is the only court that can provide complete relief among the Administrative Claimants and the Debtors with respect to the Contested Matters, (c) straightforward application of New Jersey and Nevada state contract law, together with the Bankruptcy Code, will resolve these matters, and (d) the Contested Matters have advanced through significant discovery while the Nevada Action is still in the pleading stage, this Court should proceed. Further, this Court should not countenance the Debtors' forum shopping, which has served to only further delay relief in the Contested Matters while Caesars continues to withhold contractually-due funds. Accordingly, the Court should deny to the motion for a stay.

Respectfully submitted,

FERG, LLC, FERG 16, LLC, LLTQ ENTERPRISES, LLC, LLTQ ENTERPRISES 16, LLC, MOTI PARTNERS, LLC, and MOTI PARTNERS 16, LLC

By: /s/ Nathan Q. Rugg
One of Their Attorneys

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
CAESARS ENTERTAINMENT OPERATING COMPANY, INC., et al.,[1]	)	Case No. 15-01145 (ABG)
	)	
	)	
Debtors.	)	(Jointly Administered)
	)	
	)	**Hearing Date: August 15, 2018**
	)	**Hearing Time: 10:30 a.m. (CT)**

OBJECTION TO REORGANIZED DEBTORS' MOTION TO STAY OR ABSTAIN FROM HERAING ALL CONTESTED MATTERS, INCLUDING AS AGAINST DNT ACQUISTION, LLC AND TO THE ORIGINAL HOMESTEAD RESTAURANT, INC.'S JOINDER IN THE REORGANIZED DEBTORS' MOTION

R Squared Global Solutions, LLC ("RSG") and DNT Acquisition LLC ("DNT," and collectively with RSG, the "Claimants"), derivatively through RSG, as a member of DNT, by and through RSG's undersigned counsel, file this objection to the *Reorganized Debtors' Motion for Entry of an Order (A) Staying all Contested Matters Involving LLTQ Enterprises, LLC, LLTQ Enterprises 16, LLC, FERG, LLC, FERG 16, LLC, Moti Partners, LLC, Moti Partners 16, LLC, and DNT Acquisition, LLC, and (B) Abstaining from Hearing These Contested Matters* [Dkt. No. 7847][2] (the "Motion to Stay"), as supplemented by the Reorganized Debtors' Supplemental Brief [Dkt. No. 7970] (the "Debtors' Supplemental Brief") filed by the above-captioned reorganized debtors (collectively, before the effective date of their plan of

[1] The last four digits of Caesars Entertainment Operating Company, Inc.'s tax identification number are 1623, and the last four digits of Desert Palace, Inc.'s tax identification number are 7966. A complete list of the Debtors (as defined herein) and the last four digits of their federal tax identification numbers may be obtained at https://cases.primeclerk.com/CEOC.

[2] Capitalized terms not defined herein shall have the same meaning as ascribed in the Motion to Stay or the Debtors' Supplemental Brief.

reorganization, the "Debtors," and after the effective date of their plan of reorganization, the "Reorganized Debtors")[3] and *The Original Homestead Restaurant, Inc.'s Joinder in the Reorganized Debtor's Motion for Entry of an Order (A) Staying the Contested Matter Involving DNT Acquisition, LLC and (B) Abstaining from Hearing that Contested Matter* [Dkt. No. 7849], and its Brief in Further Support [Dkt. No. 7971] (collectively, the "Joinder") by The Original Homestead Restaurant, Inc. ("OHR"), the other member of DNT, which seeks an order of this Court staying or abstaining from hearing the Claimants' Request for Payment of Administrative Expense, which was filed by RSG on its own, as well as derivatively on behalf of DNT based on RSG being a member of DNT [Dkt. No. 7607] (the "DNT/RSG Admin Claim"). As set forth herein, the Court should deny the Motion to Stay and the Joinder and proceed with determining the DNT/RSG Admin Claim.

I. INTRODUCTION

1. Spread across the docket of this case is a multitude of filings starting in or about June 2015 involving various disputes between Caesars and certain of its debtor and non-debtor affiliates and certain contract counterparties, including DNT, concerning the certain restaurants in various locations of the Reorganized Debtors. Also included among those contract counterparties are FERG, LLC (together with its successors and assigns, "FERG"), LLTQ ENTERPRISES, LLC (together with its successors and assigns, "LLTQ"), and MOTI Partners, LLC (together with its successors and assigns, "MOTI", and with LLTQ and FERG, the "Non-DNT Administrative Claimants"). For a detailed history of those ongoing litigations, as well as common arguments, the Claimants refer to, join in, and incorporate herein by reference the *Combined Objection to Motion of Reorganized Debtors to Stay Pending Litigation or To Abstain*

[3] Desert Palace, Inc. ("Caesars") is included within the definitions of Debtors and Reorganized Debtors herein.

[Dkt. No. 8075] (the "Non-DNT Admin Claimant Objection"), filed by the Non-DNT Administrative Claimants in response to the Motion to Stay.

2. The Nevada State Court Action is nothing more than a brazen attempt by the Reorganized Debtors to have their non-bankruptcy law defenses to the DNT/RSG Admin Claim, and the claims of the Non-DNT Administrative Claimants, determined outside of this Court. The common thread between all of the pending proceedings in which the Claimants, the Non-DNT Administrative Claimants and the Reorganized Debtors are involved is whether the Reorganized Debtors must pay out on timely filed requests for payment of administrative expenses, including the DNT/RSG Admin Claim, as well as timely filed proofs of claim for prepetition amounts owed and/or rejection damages. As discussed below, such attempt to avoid this Court is not based on any jurisdictional concerns raised by the Reorganized Debtors, because there is none.

3. Rather, contrary to their own Confirmed Plan, the Reorganized Debtors seek to move at least a part of the claims resolution process from this Court to the state court in Nevada. There is simply no justification to do so in this instance.

4. During the status conference on the Motion to Stay on April 18, 2018, the Court posed the following question: "[t]he fundamental question for me is whether given the litigation pending in other courts, if there is any claim that I can decide that won't duplicate another court's effort or potentially contradict what another court is doing." (4/18/18 Hr'g Tr. 4:19-23). Additionally, the Court also requested that the Reorganized Debtors address the preclusive effect of any determinations by another court on this Court. (*Id.* at 6:2-23). The only reason there is litigation involving the Claimants in Nevada is because of the Reorganized Debtors' forum shopping. And OHR's commencement of the New York State Court Action was to further attempt to complicate the disputes between Caesars and the Claimants.

5. The Motion to Stay asserts that the contested matters currently pending before this Court involving the Claimants, and other entities, should be stayed until a declaratory judgment action that the Reorganized Debtors and certain of their non-Debtor affiliates filed in the Nevada state court (the "Nevada State Court Action") is resolved. Through the Joinder, OHR similarly believes that any resolution of the Claimants' DNT/RSG Admin Claim should be stayed, or the Court abstain from hearing that claim, until the Nevada State Court Action is resolved. OHR also submits that its own recently filed action against RSG, and others, in New York state court (the "New York State Court Action") should be resolved before this Court hears and decides any disputes in this Court involving the DNT/RSG Admin Claim. On the other hand, the Claimants believe that the Court can and should hear the contested matters in which they are parties in this case without any delay.

II. SUPPLEMENTAL BACKGROUND AND PROCEDURAL HISTORY

a. Contested Matter that the Reorganized Debtors and OHR Seek to Stay or Have the Court Abstain from Hearing.

i. Claimants Request to Pay Administrative Expenses

6. On November 20, 2017, RSG directly, and derivatively on behalf of DNT as a member of DNT, filed the DNT/RSG Admin Claim. In summary, that claim seeks payment from Caesars under the DNT Agreement for the period of September 21, 2016 through and including October 6, 2017, which is the date the DNT Agreement was deemed rejected by Caesars. The Claimants challenge Caesars' purported termination of the DNT Agreement and assert, among other things, that even if the DNT Agreement was terminated back on September 21, 2016, the effect of termination provisions in that agreement expressly survived such termination and still give rise to claims by the Claimants against Caesars based on Caesars' continued operation of the Old Homestead Restaurant.

b. Claimants' Proofs of Claim for Pre-Petition Amounts Due and Rejection Damages

7. Between April 30, 2015 and May 22, 2015, OHR, DNT, and RSG each filed a separate proof of claim against ((the "OHR POC"), (the "DNT POC") and (the "RSG POC", and collectively with the OHR POC and the DNT POC, the "Pre-Petition POCs"), respectively] asserting a pre-petition debt against Caesars for monies due and owing to each of them under the DNT Agreement as of the Petition Date. The OHR POC and DNT POC were both filed in the same amount of no less than $204,964.75, with RSG filing its claim in the amount of no less than $91,201.62, representing its share of the total money owed to DNT. Additionally, on November 6, 2017, RSG, in its own right, filed a proof of claim asserting rejection damages against Caesars (the "RSG Rejection Damages POC") and derivatively on behalf of DNT, as a member of DNT (the "DNT Rejection Damages POC," and collectively with the RSG Rejection Damages POC, the "DNT/RSG Rejection Damages POCs").

8. Although Caesars has not yet filed an objection in this Court to the Prepetition POCs or the DNT/RSG Rejection Damages POCs, as discussed below, Count II in the Nevada State Court Action is, in effect, an objection seeking to determine certain of Caesars' defenses to the such claims and the DNT/RSG Admin Claim, albeit filed in the wrong court.

9. As to the New York State Court Action, a motion to dismiss or stay OHR's complaint (the "NYS Motion to Dismiss") was filed by RSG and the other defendants in that action on March 6, 2018, with that motion fully briefed and oral argument scheduled for June 29, 2018.

III. ARGUMENT

i. The Disputed Claims Procedures Under Caesars' Confirmed Plan and the Bankruptcy Code Require the DNT/RSG Admin Claim to be Resolved in this Court.

10. The Reorganized Debtors' Confirmed Plan sets forth a claims resolution process which (i) includes the resolution of both proofs of claims and administrative expenses; and (ii) is consistent with the claims resolution process under the Bankruptcy Code.

a. Claims Resolution Procedures Under the Caesars' Confirmed Plan

11. With regard to that claims resolution process, the Confirmed 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.

Art. VII(A)(2) (emphasis added). The Confirmed Plan 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).

12. It further provides that administrative claims asserted under section 503(b) of the Bankruptcy Code, are considered "Claims." *See id.* at Art. I(A)(16) ("Administrative Claim" means a Claim for the costs and expenses of administration of the Estates pursuant to section 503(b) and 507(a)(2) of the Bankruptcy Code, including: (a) the actual and necessary costs and expenses incurred after the Petition Date and through the Effective Date of preserving the Estates and operating the businesses of the Debtors . . . . ").

13. Moreover the use of "'File,' 'Filed,' or 'Filing'" in the Confirmed Plan means "file, filed, or filing with the Bankruptcy Court (including the clerk thereof) in the Chapter 11 Cases . . . ." *Id.* at Art. I(A)(131). Thus, the Confirmed Plan requires objections by the Reorganized Debtors to proofs of claim claims and administrative expense requests to be filed and resolved in this Court. Those procedures do not provide for the Reorganized Debtors to file objections to Claims (as defined in the Confirmed Plan) or Administrative Claims (as defined in the Confirmed Plan) in another forum. To date, the Reorganized Debtors have not sought this Court's permission to do so, or to otherwise modify the terms of the Confirmed Plan to allow such filings.

b. Claims Resolution Process Under the Bankruptcy Code

14. The claims resolution process contained in the Confirmed Plan is consistent with the Bankruptcy Code and Federal Rules of Bankruptcy Procedure which set forth procedures for objecting to proofs of claim. *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"); 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). Those procedures governed the Reorganized Debtors' conduct concerning the claims resolution process prior to the confirmation of the Confirmed Plan.

15. Accordingly, it is clear that under the Confirmed Plan the DNT/RSG Admin Claim is a "claim" and that all administrative claims, such as the DNT/RSG Admin Claim, as

well as all objections to such claims and administrative expense requests, were required to be brought in this Court. The same is true outside the provisions of the Confirmed Plan under the Bankruptcy Code and Bankruptcy Rules.

16. Despite the clear requirement pursuant to the Confirmed Plan that challenged claims be brought in this Court, Caesars and several affiliates commenced the Nevada State Court Action seeking solely declaratory relief against twelve defendants, including DNT. Through that action, the Reorganized Debtors seek adjudication in the Nevada state court of the same issues that are already the subject of this bankruptcy proceeding.

ii. The Claimants Are Entitled to Have This Court Decide the DNT/RSG Admin Claim.

17. With the claims resolution process fully cemented in these cases, "[t]he court's obligation to rule on a claim objection is mandatory, and the creditor's right to a ruling is also unqualified." *In re C.P. Hall Co.*, 513 B.R. 540, 544 (Bankr. N.D. Ill. 2014) ("Section 502(b)(1) declares that when a party in interest objects to a claim, "the court *shall* determine the amount of such claim ... and *shall* allow [the] claim" in that amount unless the claim is objectionable under sections 502(b)(1)-(9). 11 U.S.C. § 502(b)(1)[.]"). Although this Court's ruling in *C.P. Hall* focused on the objecting creditor's right to have its objection determined by this Court, there is nothing in that decision, the Confirmed Plan, or in the Bankruptcy Code, to indicate that a creditor filing a claim against a debtor's estate lacks that same right to have the bankruptcy court determine any objections thereto. By filing their proofs of claim and the DNT/RSG Admin Claim, the Claimants submitted to the jurisdiction of this Court to allow this Court to decide such claims and should be afforded the entitlement to have that claim, and all of their claims, determined by this Court.

iii. The Reorganized Debtors Have Not Offered a Compelling Reason

as to Why This Court Should Stay or Abstain from Ruling on the DNT/RSG Admin Claim.

a. There is No Jurisdictional Issues Preventing this Court from Resolving the DNT/RSG Admin Claim.

18. There is no dispute that this Court has the jurisdiction to decide the bankruptcy related aspects of the DNT/RSG Admin Claim including whether it sets forth a valid basis for allowance under section 503(b) of the Bankruptcy Code. There is also no question that the bankruptcy issues are currently before this Court. Even the Reorganized Debtors admit that if they are not successful on obtaining all of the relief they seek in the Nevada State Court Action, "this Court would need to determine whether [the Claimants] provided a post-petition benefit and, if so, the amount of the administrative claim to [the Claimants]. Debtors' Supp. Brief ¶ 27. Thus, the disputes between the Claimants and Caesars over the DNT Agreement will not terminate regardless of any ruling in the Nevada State Court Action.

19. In its Supplemental Brief, the Reorganized Debtors assert the position that even if this Court determined the clear bankruptcy issues now, the overall litigation would not be advanced because the "Reorganized Debtors' suitability-related defenses based on fraudulent inducement and the first breach doctrine would still need to be decided in the Nevada Action prior to the entry of a final judgment" here. *Id.* at ¶ 3. It provides no support as to why it believes only the Nevada state court can determine the suitability-related defenses. It cannot be based on a jurisdictional infirmity. Caesars would actually be hard pressed to raise jurisdictional issues here considering (i) "[a]n objection to allowance of a claim against the bankruptcy estate may only arise in a bankruptcy case and, thus, is a core proceeding under 28 U.S.C. § 157(b)(2)(B) in which this court has constitutional authority to enter final orders," *In re Kaiser*, 525 B.R. 697, 700–01 (Bankr. N.D. Ill. 2014) (citing *In re C.P. Hall Co.*, 513 B.R. 540, 543

(Bankr. N.D. Ill. 2014); and (ii) its own Confirmed Plan preserved this Court's jurisdiction over the claims resolution process. *See* Confirmed Plan, Art. IX(1)[4].

b. The Reorganized Debtors are Seeking to Litigate Defenses to Claims Against Them, Not Asserting Claims Against the Claimants

20. By the Reorganized Debtors' own admission, the Nevada State Court Action involves its non-bankruptcy defenses to the DNT/RSG Admin Claim. Debtors' Supp. Brief ¶ 3. Count II in the complaint in the Nevada State Court Action (the "Nevada Complaint") seeks a declaratory judgment that "Caesars does not have any current or future financial obligations or commitments to [DNT]." (Compl. ¶ 145). Caesars asserts that there are three grounds for such relief: (i) "the express language of the [DNT Agreement] states that Caesars has no future obligations to [DNT] where, as here, termination is based on suitability or non-disclosure grounds" (Compl. ¶ 140); (ii) an alleged fraudulent inducement by Seibel and DNT to enter into the DNT Agreement, which should result in a rescission of the DNT Agreement (Compl. ¶¶ 141-143); and (iii) Seibel's and DNT's obligation to update prior disclosures relieves Caesars from any obligation to perform under the DNT Agreement. (Compl. ¶ 144).

21. Accordingly, Count II is clearly an affirmative defense to all claims asserted by the Claimants against Caesars because it seeks to pay nothing to DNT on the DNT/RSG Admin

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[4] Article IX of the Confirmed Plan addresses the Court's post-confirmation jurisdiction and clearly states in relevant part 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, including jurisdiction to: all, disallow, determine, liquidate, classify, estimate, or establish the priority, Secured or unsecured status, or amount of any Claim or Interest, including the resolution of any request for payment of any Administrative Claim and the resolution of any and all objections to the Secured or unsecured status, priority, amount, or allowance of Claims or Interests. . . .

Confirmed Plan, Art. IX(1).

Claims, or any other claims. Furthermore, as discussed at length in the Non-DNT Administrative Claimants Objection, the facts underlying Caesars' fraudulent inducement affirmative defense focused on suitability issues have already been raised in opposition to the administrative claims asserted by the Non-DNT Administrative Claimants, with discovery on those issues well underway. That should continue in this Court.

22. Count I of the Nevada Complaint seeks a declaratory judgment that Caesars' determination of unsuitability as the basis for terminating the DNT Agreement was proper. (Compl. ¶ 134). To the extent Count I is an additional defense that Caesars is asserting against the DNT/RSG Admin Claims, the discussion concerning Count II above is equally applicable. However, similar to the point raised in the Non-DNT Admin Claimant Objection that regardless of whether Seibel is found to be "unsuitable," the DNT Agreement, like several of the other agreements, have provisions that survive a termination of that agreement. *See, e.g.*, ¶ 44-47, 52; *see also*, DNT Agr. 4.3. Resolution of whether those provisions survive is not a suitability issue, but would involve a straightforward determination by this Court using language from the DNT Agreement and commonsense.

23. Furthermore, notwithstanding the Nevada State Court Action having been commenced prior to the filing of the DNT/RSG Admin Claim, DNT and RSG's filing of their respective Prepetition Proofs of Claim gave rise to Caesars at some point asserting defenses against those claims, which now extends to the DNT/RSG Admin Claim and the DNT/RSG Rejection Damages Claims.

24. The "[T]he filing of a proof of claim is merely the bankruptcy analog of filing a complaint[.]" *In re Brimmage*, 523 B.R. 134, 138 (Bankr. N.D. Ill. 2015); *see also O'Neill v. Continental Airlines, Inc. (In re Continental Airlines)*, 928 F.2d 127, 129 (5th Cir. 1991) ("[T]he

filing of a proof of claim is analogous to the filing of a complaint in a civil action, with the bankrupt's objection the same as the answer."); *Nortex Trading Corp. v. Newfield*, 311 F.2d 163, 164 (2d Cir. 1962) (stating that under the Bankruptcy Act of 1898 that a creditor's filing of "its proof of claim is analogous to the commencement of an action within the bankruptcy proceeding."); *In re 20/20 Sport, Inc.*, 200 B.R. 972, 978 (Bankr. S.D.N.Y. 1996) ("In bankruptcy cases, courts have traditionally analogized a creditor's claim to a civil complaint, an objection [to that claim] to an answer and an adversarial proceeding to a counterclaim.").

25. Accordingly, when the Reorganized Debtors filed the Nevada State Court Action asserting only defenses, it was, in effect, the equivalent of filing an answer and affirmative defenses. Considering the expansive definition of "Claims," even though the DNT/RSG Admin Claim and the DNT/RSG Rejection Damages Claims had not yet been filed, they all flow from the DNT Agreement as contingent claims to which Caesars responded.

26. Finally, the Claimants join in and adopt the arguments and analysis in the Non-DNT Admin Claimants Objection concerning (i) the inherent contradiction of the Reorganized Debtors' arguments whereby Caesars seeks to continue to enjoy the benefits of the DNT Agreement and enforce suitability termination provisions but ignore those provisions of that agreement that survive termination; (ii) application of the flexible multi-factor test whether a bankruptcy court should stay or abstain from hearing a pending request for payment from a creditor; and (iii) and the ability of this Court to resolve the DNT/RSG Admin Claim more expeditiously than another court.

IV. OHS JOINDER REQUEST FOR THIS COURT TO STAY OR ABSTAIN FROM RESOLVING THE DNT/RSG ADMIN CLAIM SHOULD BE DENIED

27. OHS joined in the Motion to Stay. For the reasons discussed above, OHS's request for this Court to stay or abstain from resolving the DNT/RSG Admin Claim until resolution of the Nevada State Court Action should be denied. Moreover, its request for the same relief as to its own New York State Court Action should be denied as well. The Debtor nowhere seeks such relief in the Motion and it is inappropriate for OHS to seek such independent relief through a joinder. *See, e.g.*, Fed. R. Bankr. P. 9013.

28. As discussed above, the Court requested that any supplement identify common claims which could result in inconsistent rules, and, separately, the preclusive effect of any rulings on those claims by another court, in this case the New York Court. The OHS supplement addresses neither of those questions. The claims in the New York Action focus on corporate governance issues not before this Court. The closest those claims may come to this Court is OHS's apparent challenge to the standing of RSG to act on behalf of DNT in this case. However, the standing of RSG in this case is not subject to an objection and, regardless, is within this Court's jurisdiction to decide, not the New York state court.

29. The OHS Supplement cites the following reasons as for why it believes that the Court should stay or abstain from hearing the pending matter concerning the DNT/RSG Admin Claim until after the Nevada State Court Action is resolved, but also after its own New York Action is resolved.

30. First, it argues that such action should take precedent over the matter in this Court because the principals of DNT and DNT's managers agreed in their corporate documents that any disputes need to be resolved in a New York Court. OHS Supp. 3-4. That is not a proper basis for granting a stay or abstaining, and, regardless, is contrary to the claims resolution process already in place in this case.

31. Second, OHS contends that because it is challenging RSG's ability to bring the DNT/RSG Admin Claim derivatively, which, if successful may remove RSG as a member of DNT, this Court should defer hearing the DNT/RSG Admin Claim because RSG might in the future no longer be able to assert such claim on a derivative basis on behalf of DNT.

32. The corporate governance issues and disputes between the managers and owners of DNT are not before this Court and are not at issue in the Nevada State Court Action. Thus, the fact that such issues may be pending in the New York State Court Action has no bearing here. Moreover, there has been no motion filed in this case seeking to challenge the standing of RSG, whether in its own right as a creditor, or acting derivatively on behalf of DNT. *See* 11 U.S.C. § 1109(b) ("[a] party interest, including . . . a creditor . . . may raise and may appear and be heard on any issue in a case under this chapter.").

33. The Seventh Circuit recently reiterated its long-standing position on "party in interest" standing in chapter 11 cases which provides that "everyone with a claim to the res [the debtor's assets] has a right to be heard before the res is disposed of since that disposition will extinguish all such claims." *In re C.P. Hall Co.*, 750 F.3d 659, 661 (7th Cir. 2014) (quoting *In re James Wilson Assocs.*, 965 F.2d 160, 1969 (7th Cir. 1992)). Even if OHS prevails in the New York Action in removing RSG as a member of DNT, its independent standing before this Court would not be implicated and its ability to continue to prosecute the DNT/RSG Admin Claim would not be impeded. Neither would DNT's standing. The only thing that would occur is that control of DNT's claims on a derivative basis in this case may change. But, until such issue is decided in New York, Delaware law clearly states that a member of a Delaware LLC may bring actions and asserts claims on behalf of the LLC. *See* Del. Code Ann. tit. 6, § 18-1001. No court

has made any other determination, and no basis for holding up the matters in this case on that issue have been brought forward.

34. Third, OHS argues that if this Court was to move forward with deciding the DNT/RSG Admin Claim, "it would be required to determine complex internecine partnership and restaurant related operation issues between DNT's members and managers (both real and feigned), applying state law and in a forum contrary to the jurisdiction voluntarily selected by the parties themselves – issue which have no connection to bankruptcy law." OHS Supp. 5. It reaches that conclusion by asserting that OHR's and its owners' rights to enter into the OHR Replacement Agreement can only be determined by looking at the DNT LLC Agreement and the effects, if any, the alleged gross misconduct of RSG and Seibel "vitiated any rights they otherwise may have had" under that agreement. OHR Supp. 4-5.

35. What is clear is that Caesars' purported termination of the DNT Agreement is not before the New York state court, meaning that that court will not be ruling on the propriety of that alleged termination as between Caesars and DNT. As a result, to the extent OHR's request for a declaratory judgment in the New York State Court Action that it was proper for OHR and its owners to enter into a new agreement with Caesars is, itself, dependent on another court first finding that the DNT Agreement was no longer enforceable after September 20, 2016. Thus, there would be no conflict with this Court finding that Caesars did not properly terminate the DNT Agreement.

36. Fourth, OHR raises a theoretical jurisdictional issue that has not been raised before this Court. As discussed above, the requested stay or abstention is not based on any alleged jurisdictional infirmity. Regardless, OHR is not even currently a party to the contested

matter involving the DNT/RSG Admin Claim. Accordingly, OHR's issue regarding jurisdiction of this Court over the managers of DNT is not present.

37. Based on the foregoing, there is simply no support for or reason that this Court should stay or abstain from proceeding on the DNT/RSG Admin Claim in deference to whatever is going on in the New York State Court Action. Accordingly, to the extent OHR is seeking that relief, it should be denied.

V. CONCLUSION

The claims resolution process in these cases dictate that Caesars assert all of its defenses to the DNT/RSG Admin Claim, as well as the Prepetition POCs and the DNT/RSG Rejection Damages POCs, in this Court. The state court of Nevada is simply not the proper forum in which to litigate those defenses, and the Claimants are entitled to have this Court determine all aspects of their claims against Caesars. Caesars' forum shopping to avoid having this Court adjudicate its non-bankruptcy defenses to the Claimants' claims should not be permitted. Moreover, as discussed in the Non-DNT Admin Claimant Objection as applicable here, neither the Reorganized Debtors nor OHR have sufficiently articulated a basis as to why this Court should stay or abstain from moving forward on the DNT/RSG Admin Claim because of, among other things, the straightforward application of basis contract law principals, and that only this Court can provide complete relief. Accordingly, the Court should deny the Motion to Stay and the Joinder.

Dated: June 27, 2018

Respectfully submitted,

R Squared Global Solutions, LLC and DNT Acquisition LLC, derivatively through R Squared Global Solutions, LLC, as a member of DNT Acquisition LLC

/s/Richard J. McCord
By:_____
One of Their Attorneys

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
CAESARS ENTERTAINMENT OPERATING COMPANY, INC., et al.,[1]	)	Case No. 15-01145 (ABG) (Jointly Administered)
Reorganized Debtors.	)	Re: Dkt. Nos. 7847, 7970, 8075, 8076
	)	**Hr'g Date: August 15, 2018, 10:30 a.m. CT**

REORGANIZED DEBTORS' REPLY BRIEF IN SUPPORT OF MOTION FOR ENTRY OF AN ORDER (A) STAYING ALL CONTESTED MATTERS INVOLVING LLTQ ENTERPRISES, LLC, LLTQ ENTERPRISES 16, LLC, FERG, LLC, FERG 16, LLC, MOTI PARTNERS, LLC, MOTI PARTNERS 16, LLC AND DNT ACQUISITION, LLC, AND (B) ABSTAINING FROM HEARING THESE CONTESTED MATTERS

[1] A complete list of the Reorganized Debtors and the last four digits of their federal tax identification numbers may be obtained at https://cases.primeclerk.com/CEOC.

The Reorganized Debtors submit this reply brief in support of their Motion (Dkt. 7847) and *Supplemental Brief in Support of Motion for Entry of An Order (A) Staying All Contested Matters Involving LLTQ Enterprises, LLC, LLTQ Enterprises 16, LLC, FERG, LLC, FERG 16, LLC, MOTI Partners, LLC, MOTI Partners 16, LLC and DNT Acquisition, LLC, and (B) Abstaining from Hearing these Contested Matters* (Dkt. 7970) ("Supplemental Brief"), and in response to the *Combined Objection to Motion of Reorganized Debtors to Stay Pending Litigation or to Abstain* (Dkt. 8075) ("Objection") and the *Objection to Reorganized Debtors' Motion to Stay or Abstain from Hearing [sic] All Contested Matters, Including as Against DNT Acquisition, LLC and to the Original Homestead Restaurant, Inc.'s Joinder in the Reorganized Debtors' Motion* (Dkt. 8076) ("RSG Objection").[2] In further support of their Motion, the Reorganized Debtors respectfully state:

1. The Court could not have been more clear. At the April 18 status conference, it asked each of the "parties here to do what [the Court] would do if called upon to decide" the Motion. (4/18/18 Tr. at 4:16–17) First, the Court asked the parties to "line up" the claims in the Contested Matters and Nevada Action to allow the Court to determine "if there is any claim that [the Court] can decide that won't potentially duplicate another court's effort or potentially contradict what another court is doing." (*Id.* at 4:19–23) Second, the Court asked the parties to address the preclusive effect of a determination in the Nevada Action on the Contested Matters. (*Id.* at 6:2–23)

2. As set forth in the detailed analysis of claims pending in the Nevada Action and the Contested Matters in the Supplemental Brief, there is nothing for this Court to do right now. (Supp. Br. ¶¶ 3, 11–28) If the Nevada State Court grants the declaratory relief requested by

[2] Capitalized terms used but not defined have the meaning ascribed to them in the Motion and the Supplemental Brief.

Caesars, this Court will not need to decide any contested issues as the declarations will be binding on the parties here. (*Id.* ¶¶ 29–31) To the extent the Nevada State Court declines to issue the declaratory relief, there may be additional narrow bankruptcy-specific issues for this Court to decide with the benefit of the full record developed in Nevada. But the Court should not decide these bankruptcy-specific issues now given that they may be rendered moot by the Nevada Action and regardless are sufficiently narrow that they will not materially advance the resolution of the pending litigation among the parties. (*Id.* ¶¶ 19, 22, 24, 27)

3. The Seibel-Affiliated Entities do not contend otherwise. They ignored the Court's request that each of the parties line up the pending claims and identify anything "left over" for this Court to do that another court is not "going to decide … either directly or by implication." (4/18/18 Tr. at 5:22–6:1) Perhaps that is not surprising as the Seibel-Affiliated Entities repeatedly have argued to the Nevada State Court, the Nevada Bankruptcy Court, and this Court that the claims in the Nevada Action are "identical" to and "mirror" the claims being litigated in the Contested Matters. (*See, e.g.,* Supp. Br. ¶ 7 (summarizing prior statements by the Seibel-Affiliated Entities)) Indeed, they once again confirm in their objections to the Motion their view that Counts II and III of the Nevada Action "directly overlap with" and present the "same issues" as the Contested Matters. (Obj. ¶¶ 32, 56; *see also id.* at 23 ("Counts [*sic*] II and Count III of the Nevada Action duplicate the key issues that this Court must decide to resolve the Contested Matters."); RSG Obj. ¶ 16 ("Through [the Nevada Action], the Reorganized Debtors seek adjudication in Nevada state court of the same issues that are already the subject of this bankruptcy proceeding."))

4. In fact, despite submitting a combined 39 pages of briefing, the Seibel-Affiliated Entities identified only a single claim they believe this Court could decide now without

duplicating the efforts of or potentially contradicting the Nevada State Court. Specifically, LLTQ, FERG and MOTI argue that "even if the relief sought by the Debtors in the Nevada Action against [them] was granted (i.e., termination was proper and no future obligations owing), this Court will still need to resolve the administrative claims through termination." (Obj. at 2) But the relief Caesars requests in the Nevada Action is broader than a declaration that it owes "no future obligations" to Mr. Seibel and the Seibel-Affiliated Entities. Count II specifically seeks a declaration that "Caesars does not have any ***current or future*** financial obligations or commitments to Mr. Seibel or the Seibel-Affiliated Entities." (Compl. ¶ 145 (attached as Ex. B to Mot.) (emphasis added); *see also* RSG Obj. ¶ 20 (acknowledging that requested relief addresses "current or future financial obligations or commitments"))

5. Instead of arguing that a stay or abstention is improper based on the "fundamental question" and resulting standard articulated by this Court at the April 18 status conference, the Seibel-Affiliated Entities attempt to reframe the issue: "[t]he question is now which court should decide the matters." (Obj. at 23) But the "question" before this Court is not whether the Nevada State Court should stand down while this Court adjudicates the Contested Matters. The Nevada State Court already has denied five motions to dismiss or stay the Nevada Action filed by Mr. Seibel and the Seibel-Affiliated Entities that attempted to shut down that lawsuit. It concluded the Nevada Action should proceed because it is the "most comprehensive" and "most efficient" action, and that it will avoid "a great potential for inconsistent rulings amongst all the various actions." (5/1/18 Tr. at 47:12–25 (attached as Ex. D to Supp. Br.)) Absent the Nevada Supreme Court granting the Seibel-Affiliated Entities' extraordinary Writ of Mandamus or Prohibition and reversing the Nevada State Court's dismissal order, litigation of the Seibel-related disputes will proceed in Nevada. And even if they were relevant, the Seibel-Affiliated Entities' arguments as

to why this Court should proceed to the exclusion of all others should fail here for the same reasons they were rejected by the Nevada State Court and Nevada Bankruptcy Court.

6. Having failed to convince the Nevada State Court to stand down, the Seibel-Affiliated Entities ask this Court to hurry up and decide the Contested Matters. (Obj. at 3, ¶ 41) But that would still leave two courts deciding duplicative issues, which is the antithesis of judicial efficiency and risks inconsistent rulings. The better course is for this Court to stay or abstain from hearing the Contested Matters while the Nevada State Court decides the duplicative issues arising from Mr. Seibel's felony conviction and the nondisclosure of his underlying criminal activities with respect to near-identical contracts involving closely-related parties.

Additional Background

7. Since the Reorganized Debtors filed their Supplemental Brief on May 23, there have been additional developments that support the relief sought in the Motion.

8. First, on June 1, the Nevada State Court issued a written order memorializing its May 1 oral ruling denying without prejudice the five motions to dismiss or stay the Nevada Action filed by Mr. Seibel and the Seibel-Affiliated Entities.[3] (*See* Obj. Ex. K) Consistent with its oral ruling, the Nevada State Court found "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) It likewise concluded "comity supports denial of the

[3] Given this Order, it is unclear why the Seibel-Affiliated Entities suggest to this Court that their motions to dismiss are still pending in Nevada. (*See, e.g.,* Obj. ¶ 33 ("The Nevada Action is subject to five separate motions to dismiss…."); *id.* ¶ 38 ("The Motion to Dismiss filed by TPOV seeks dismissal of the Nevada Action….")

Motions" for the same reasons found by the Nevada Bankruptcy Court in remanding the claims that the Seibel-Affiliated Entities had removed back to the Nevada State Court. (*Id.* at 3–4) Finally, the Nevada State Court rejected the Seibel-Affiliated Entities' 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)

9. Second, on June 14, Mr. Seibel and the Seibel-Affiliated Entities filed a *Petition for Writ of Mandamus or Prohibition* (the "Petition") with the Nevada Supreme Court, seeking reversal of the Nevada State Court's order denying their motions to dismiss or stay. On June 18, Mr. Seibel and the Seibel-Affiliated Entities also moved to stay the Nevada Action pending resolution of the Petition. The Nevada State Court scheduled a hearing on the motion to stay for August 7. The Nevada Supreme Court has not ruled on the Petition.

10. Third, the Nevada Action continues to progress. Although Mr. Seibel and the Seibel-Affiliated Entities moved to stay the Nevada Action while the Petition is pending, they did not seek entry of the order before the time to respond to the declaratory judgment complaint expired on June 21. When Mr. Seibel and the Seibel-Affiliated Entities did not file answers or seek an extension of time to respond, Caesars served notices of intent to take defaults. Following a meet and confer and Caesars' agreement to another extension of time to answer, Mr. Seibel and the Seibel-Affiliated Entities filed their answers on July 2—more than 10 months after Caesars filed its declaratory judgment complaint.

11. In their answers, LLTQ, FERG, MOTI, and DNT expressly incorporated their "allegations and claims" from the Contested Matters as affirmative defenses:

- "The LLTQ/FERG Defendants expressly incorporate herein as affirmative defenses their allegations and claims in the contested matters between the LLTQ/FERG

Defendants, Caesars Palace and CAC filed in the Bankruptcy Actions and all related matters and proceedings." (*See* **Ex. A**, ¶158)

- "The MOTI Defendants expressly incorporate herein as affirmative defenses their allegations and claims in the contested matters between the MOTI Defendants and Caesars Palace in the Bankruptcy Actions and all related matters and proceedings." (*See* **Ex. B**, ¶ 158)

- "DNT expressly incorporates herein as affirmative defenses its allegations and claims in *In re: Caesars Entertainment Operating Company, Inc., et. al.,* case no. 15-01145 (ABG) in the United States Bankruptcy Court for the Northern District of Illinois (Eastern Division) and all related matters and proceedings." (*See* **Ex. C**, ¶ 158)

12. Fourth, on July 2, LLTQ, FERG and DNT also asserted counterclaims against two of the Reorganized Debtors for breach of contract and an accounting of amounts purportedly owed under their agreements with Caesars. (Ex. A, Counterclaims ¶¶ 74–101; Ex. C, Counterclaims ¶¶ 34–47) Although the issues raised in the counterclaims are identical to the litigation in the Contested Matters, LLTQ, FERG and DNT purport to limit the damages they are seeking to the period following the Reorganized Debtors' emergence from chapter 11. (Ex. A, Prayer; Ex. C, Prayer) LLTQ, FERG and DNT also each include a "Reservation of Rights" stating they are not intending to bring any claims that are the subject of the Contested Matters but "reserve the right to pursue any such claims before [the Nevada State Court] in the event the Bankruptcy Court either stays or abstains from hearing any such claims." (Ex. A, Reservation of Rights; Ex. C, Reservation of Rights)

13. Fifth, the Ninth Circuit Bankruptcy Appellate Panel scheduled oral argument on the appeals filed by LLTQ, FERG, and MOTI with respect to the Nevada Bankruptcy Court's remand decision for July 27. Although they are arguing on appeal that the Nevada State Court should not hear certain claims, LLTQ, FERG and MOTI have hedged their bets by continuing to seek dismissal of those claims through their motions to dismiss before the Nevada State Court and subsequent Petition to the Nevada Supreme Court while the appeal has been pending.

Argument

I. There Are No Claims for This Court to Decide Now that Will Not Duplicate or Potentially Contradict Another Court's Efforts and Determinations

14. As shown in the claim-by-claim analysis in the Supplemental Brief, for each of the Contested Matters, "there is another claim in another court that is essentially the same thing so a decision on the claim in another court will decide potentially the issue before [this Court] directly or by implication." (Supp. Br. ¶ 2, citing 4/18/18 Tr. at 4:24–5:4) Simply put, the Nevada State Court will determine whether Caesars has any current or future obligations to Mr. Seibel or the Seibel-Affiliated Entities based on the express terms of their agreements following termination on suitability grounds or in light of certain state law defenses (such as the first breach doctrine and fraudulent inducement). (*Id.* ¶¶ 15–17) If the Nevada State Court grants the requested declaratory relief, there will be nothing left for this Court to decide as the Seibel-Affiliated Entities do not dispute the declaration will be binding on the parties here.

15. The Seibel-Affiliated Entities only identify one claim they believe this Court can decide now without duplicating the efforts of or potentially contradicting the determinations by the Nevada State Court. They argue that "even if the relief sought by the Debtors in the Nevada Action against the Administrative Claimants is granted (i.e. termination was proper and no future obligations owing), this Court will still need to resolve the administrative claims through termination)." (Obj. at 2) But that misstates the relief Caesars is seeking in the Nevada Action. Count II specifically seeks a declaration that "Caesars does not have any ***current or future*** financial obligations or commitments to Mr. Seibel or the Seibel-Affiliated Entities." (Compl. ¶ 145 (attached as Ex. B to Mot.) (emphasis added); *see also* RSG Obj. ¶ 20 (acknowledging that requested relief addresses "current or future financial obligations or commitments"))

16. Payments for the pre-termination period fall squarely within the Nevada Action. For example, Caesars alleges that Mr. Seibel and the Seibel-Affiliated Entities fraudulently induced Caesars to enter into the LLTQ Agreement, FERG Agreement, MOTI Agreement and other restaurant agreements when they failed to disclose Mr. Seibel's illegal activities. Under Nevada law, fraudulent inducement renders a contract voidable, allowing the defrauded party to stop performing and then raise fraud as a defense if sued. (Supp. Br. ¶ 16 (citing cases)) Alternatively, Caesars asserts that the Seibel-Affiliated Entities breached the restaurant agreements at inception by failing to disclose Mr. Seibel's illegal activities. Nevada law is clear that the party who commits the first breach of contact cannot maintain an action against the other for subsequent failure to perform. (*Id.*) If the Nevada State Court grants the declaratory relief Caesars is seeking based on either of these theories, the Seibel-Affiliated Entities cannot recover any payments with respect to the pre-termination period.

17. In the Nevada Action, the Nevada State Court will determine these and other duplicative issues once for each of the Caesars entities litigating with Mr. Seibel and the Seibel-Affiliated Entities. If the Nevada State Court agrees with Caesars on each of the three counts in the Nevada Action, such a determination will resolve all contested issues before this Court. (Obj. at 2 n.2) If the Nevada State Court declines to issue the requested declarations, there may be additional narrow bankruptcy-specific issues for this Court to decide with the benefit of the record developed in Nevada. (*Id.*) Even if that occurs, the parties collectively will have benefitted from having a single—and thereby necessarily consistent—determination of these core issues that will be binding on the parties here. The Court should allow that to occur by granting the Motion.

II. The Seibel-Affiliated Entities' Arguments that this Court Should Proceed Instead of the Nevada State Court Are Not Relevant Here and Have Been Twice Rejected

18. The Seibel-Affiliated Entities argue that because the Nevada Action "duplicate[s] the key issues that this Court must decide to resolve the Contested Matters," the "question is now which court should decide the matters." (Obj. at 23) That, of course, is not the "fundamental question" that the Court asked the parties to address on this Motion. (4/18/18 Tr. at 4:19–23 ("The fundamental question for me is whether given the litigation pending in other courts, if there is any claim that I can decide that won't duplicate another court's effort or potentially contradict what another court is doing.")) Even if the Seibel-Affiliated Entities were attempting to answer the correct question, their arguments as to why this Court should proceed to the exclusion of the Nevada State Court already have been rejected by two courts and fare no better here.

19. ***First***, the Seibel-Affiliated Entities argue this Court can resolve the Contested Matters more quickly than the Nevada State Court because the Nevada Action "has not gotten off the ground" and will take longer to litigate because it is broader in scope. (Obj. ¶¶ 49–52) But the Nevada Action has "gotten off the ground" despite extensive efforts by Mr. Seibel and his entities to keep it grounded. For example, the Seibel-Affiliated Entities argue that "[a]s of the filing of this response [on June 27], only one of the twelve defendants has filed an answer in the Nevada Action." (*Id.* ¶ 36; *see also id.* ¶ 50 ("Other than by defendant Jeffrey Frederick, whom is not a party to any of the restaurant contracts at issue, no answers have been filed and discovery has not begun.")) But they fail to inform the Court that "as of the filing of" their objections, the Seibel-Affiliated Entities had missed their June 21 deadline to file their answers, Caesars had served its three-day notice of intent to default, and the parties were meeting and

conferring over a new deadline to file the answers. All of the Seibel-Affiliated Entities filed their answers on July 2.

20. It is likewise misleading to suggest that the parties have not started discovery. (Obj. ¶ 50 ("discovery has not begun")) As this Court is aware, the parties have conducted extensive discovery in the Contested Matters and elsewhere. The Nevada State Court already has indicated that "[a]ny discovery that's been taken in any other actions presumably can be used in this case…." (Supp. Br., Ex. D at 49) Caesars certainly has no objection to that approach. It is unlikely that the Seibel-Affiliated Entities would object to it either. In fact, while certain modifications may be needed, the current close of all discovery in the Nevada Action is November 5, 2018. (Supp. Br., Ex. E) By comparison, there is no current discovery schedule in the Contested Matters. (*See also* 3/21/18 Tr. at 5:20–24 (noting that the Nevada and New York "cases seem to be on a track that's faster than mine"))

21. ***Second***, the Seibel-Affiliated Entities argue the Reorganized Debtors have failed to show that there are "legitimate comity concerns" with respect to the Seibel litigation, calling the issues related to Nevada gaming law "a red herring." (Obj. ¶¶ 44, 57) Of course, both the Nevada State Court and Nevada Bankruptcy Court concluded that comity supported proceeding with the Seibel-related disputes in Nevada. (*See* Obj. Ex. K at 3; *id.* at Ex. 1 ¶ Y) Since then, the Seibel-Affiliated Entities themselves have injected additional gaming-related issues into the Nevada Action. In their counterclaims, LLTQ, FERG and DNT allege Caesars has breached its contracts by terminating the Seibel-Affiliated Entities even though "Caesars has not been fined or sanctioned in any manner by gaming authorities in connection with its continued operations" of the restaurants. (Ex. A, Counterclaim ¶¶ 80, 88; Ex. C, ¶ 40) Similarly, the Seibel-Affiliated Entities argue in their affirmative defenses that they cured any suitability issues by assigning

various rights and obligations to a "Seibel Family Trust" and other individuals immediately before Mr. Seibel pleaded guilty to a felony, injecting additional issues of Nevada law and gaming regulations into the Nevada Action. (*See, e.g.*, Ex. A ¶ 169 ("The alleged unsuitability of Seibel is immaterial and irrelevant because, inter alia, he assigned his interests, if any, in LLTQ/FERG Defendants or the contracts."); Ex. B ¶ 169 (similar); Ex. C ¶ 168 (similar))

22. ***Third***, the Seibel-Affiliated Entities continue to accuse the Reorganized Debtors of forum shopping. (Obj. ¶¶ 59–62) The Nevada Bankruptcy Court and the Nevada State Court each rejected this argument. (Mot. Ex. C and D, ¶ V (Nevada Bankruptcy Court finding that "the evidence does not indicate that any party chose … its respective forum in an attempt to abuse or manipulate the judicial process"); Obj. Ex. K at 4 (Nevada State Court order finding 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.")) Caesars commenced the Nevada Action to obtain efficient and uniform rulings regarding all of the parties' rights and obligations with respect to the six near-identical contracts involving closely-affiliated parties. That is not forum shopping. *See, e.g., R.R. Street & Co, Inc. v. Transp. Ins. Co.*, 656 F.3d 966, 981 (9th Cir. 2011) (it is not forum shopping to create a "*comprehensive* forum, not merely a favorable one") (emphasis in original).

23. ***Finally***, RSG and DNT (through its member RSG) argue the Reorganized Debtors' Plan of Reorganization precludes Caesars from initiating the Nevada Action because all claims objections must be brought in this Court. (RSG Obj. ¶¶ 10–16) Of course, that is not what the Plan actually states. Instead, it provides that the Reorganized Debtors have the "authority" to file claims objections. (Plan (Dkt. 6318), Section VII(A)(2)) Nor is the Nevada

Action a claim objection. If the Court stays the Contested Matters, it will need to enter an order addressing each of the pending claims in light of the findings from the Nevada Action, which no one disputes are binding on the parties here, and perhaps additional bankruptcy specific issues this Court will need to address. Even if the Plan had precluded the Nevada Action, this Court could exercise its discretion and allow the Nevada Action to proceed as it has done with prior claims. (*See, e.g.,* 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")) There is nothing improper about this Court using findings from another proceeding to adjudicate claims.

Conclusion

24. For the reasons set forth above and in the Motion and Supplemental Brief, the Reorganized Debtors respectfully request that the Court stay and abstain from hearing the Contested Matters until the Nevada State Court enters a final judgment in the Nevada Action.

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Dated: July 18, 2018
Chicago, Illinois

/s/ Jeffrey J. Zeiger

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CASE NO. A-17-751759-B

DOCKET U

DEPT. XVI

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

ROWEN SEIBEL,

Plaintiff,

vs.

PHWLV LLC,

Defendant.

REPORTER'S TRANSCRIPT
OF
DEFENDANT'S MOTION TO STAY ALL PROCEEDINGS IN THE DISTRICT COURT PENDING A DECISION ON THEIR PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION

BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

DISTRICT COURT JUDGE

DATED TUESDAY, AUGUST 7, 2018

REPORTED BY: PEGGY ISOM, RMR, NV CCR #541,

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LAS VEGAS, NEVADA; TUESDAY, AUGUST 7, 2018

9:15 A.M.

P R O C E E D I N G S

* * * * * * *

THE COURT: We'll move on. Next up page 13. Rowen Seibel versus PHWLV LLC, et al.

Good morning. And let's go ahead and note our appearances for the record.

09:16:11 MR. PISANELLI: Good morning, your Honor. James Pisanelli on behalf of the Caesars entities. A little confusion of who's the plaintiff and the defendant because of consolidated action.

THE COURT: I understand.

09:16:20 MS. MERCERA: Good morning, your Honor. Magali Mercera on behalf of the Caesars parties.

MR. ARNAULT: Good morning, your Honor. Bill Arnault on behalf of Caesars entities.

MS. WATKINS: Good morning, your Honor.

09:16:26 Brittnie Watkins on behalf of the Caesars entities.

MR. WILT: Good morning, your Honor. Allen Wilt for Gordon Ramsey.

MR. McNUTT: Good morning, your Honor. Dan McNutt and Matt Wolf on behalf of the other side which

09:16:38 includes TPOV, TPOV 16, FERG, FERG 16, MOTI, DNT -- not

DNT. I apologize for that, your Honor. Also Rowen Seibel as well, but not derivatively on behalf of GRB as there's a trustee involved for GRB.

THE COURT: All right. Once again, good morning.

And it's my understanding we have a motion to stay all proceedings in district court pending a decision on the appeal on the petition; is that correct?

MR. McNUTT: That's right, your Honor.

THE COURT: Okay. Sir, you have the floor.

MR. McNUTT: Thank you.

Good morning, your Honor. And welcome to -- welcome to this piece of litigation which is not one piece, but has myriad aspects to it that go back literally over three years.

Initially there -- what's at the heart of all these things are various restaurants inside various casino hotels both here in Las Vegas as well as Atlantic City. Multiple hotels.

In 2015 Caesars filed bankruptcy, as everyone knows, in Chicago, and some litigation that relates to FERG as well as LLTQ commenced there.

Caesars chose that forum. And litigation has ensued with respect to some of the defendants in the

09:18:08 newly filed action, or plaintiffs in the other action.

We also have federal court litigation that we filed here on behalf of TPOV over a year and a half ago that's currently pending in front of Judges Ferenbach and Judge Mahan.

09:18:21 We also had a case we filed in this Court originally which was originally filed in federal court as well. There was motion practice regarding subject matter jurisdiction. We acquiesced and simply refiled in state court. And that was the original case that Judge Hardy had.

09:18:37 Whereupon, over a year after those cases were filed and two and a half years after the original bankruptcy was filed, Caesars then decides that we are going to file an omnibus lawsuit in Clark County state court Nevada and seek to hail all of the defendants in.

09:18:53 And in the consolidated action there are now 16 parties. I think there are four plaintiffs and 12 defendants in the new action. Twelve or 13 of those which were all involved for years in the prior filed cases.

09:19:15 And with respect to the new consolidated action, all of my clients brought a motion to dismiss and specifically FERG and FERG 16 brought motions to dismiss on behalf of -- on the basis that they had a

09:19:35

09:19:38 mandatory forum selection clause that required their matter to be heard by a New Jersey court.

That case or that contract is governed by New Jersey law. It's a mandatory exclusive jurisdiction, 09:19:53 was to be found in New Jersey.

At the motion to dismiss, Judge Hardy said that, in effect, he believed that he recognized that it was a valid clause. He recognized it applied to the claims and the parties. He just believed that at some 09:20:12 level because FERG chose to defend its rights or was required to defend its right in truth in the bankruptcy court that it had somehow effectively waived the forum selection clause.

Now, let's parse that for a minute. Caesars 09:20:32 chose the forum or the jurisdiction in which it decided to file bankruptcy. That was not any of my client's choosing. Caesars then chose within the context of the bankruptcy code under Section 365 to attempt to reject the FERG agreement.

09:20:50 Now, as all of us that are not bankruptcy practitioners but know a little bit about it, bankruptcy code has some very unique remedies, one of which allows the debtor to potentially reject a contract. And they brought that motion.

09:21:04 So FERG was obligated to -- well, I guess,

they could have allowed that to go forward and have their contract rejected, which is a little bit illogical to do with this type of money at stake. So they, obviously, they went into the bankruptcy court, and they opposed that motion.

And so they were -- they were forced into the Illinois court. They never waived their forum selection clause. They promptly raised that issue in this Court. Quite frankly --

THE COURT: Tell me this. And understand I don't have a full grasp of the entire procedural history of this case. But I was listening to you, and apparently there was an original action filed by your client in district court in Clark County?

MR. McNUTT: Yes, sir.

THE COURT: Okay. What impact does that have on the forum selection clause?

MR. McNUTT: That's a different client, your Honor.

THE COURT: Okay. I just want to make sure.

MR. McNUTT: So --

THE COURT: You said that. I want to make sure I understand what's going on.

MR. McNUTT: Correct. So the original case filed with Judge Hardy was by Rowen Seibel on behalf of

GR BURGR, the Gordon Ramsey Burger restaurant inside the Planet Hollywood. That was one of the contracts that Caesars attempted to terminate and not pay any followon monies, even irrespective of what the contract called for.

That case was brought. There is now a trustee involved.

THE COURT: Did that case have the same forum selection clause?

MR. McNUTT: No, it did not. But it did not involved FERG.

THE COURT: Okay.

MR. McNUTT: So F-E-R-G and FERG 16 are the entities that their contract had a forum selection clause requiring New Jersey.

So TPOV and TPOV 16 filed an action in the federal district court here. Chose this jurisdiction and did not have a forum selection clause. GR BURGR Rowen Seibel filed an action in state court here did not have a forum selection clause.

It is a complicated and slightly tortured procedural history. Nonetheless, Judge Hardy denied the motion to dismiss. And we brought a writ petition asking the Nevada Supreme Court to reverse that decision and enforce the mandatory forum selection

clause.

We also asked that the Nevada Supreme Court through that same writ to look at the forum shopping that occurred as well as to look at the first-to-file rules which were also raised by FERG and FERG 16. And the first-to-file rule is obvious. We have litigation going back to 2011. Additional litigation in 2017, January and February respectively. And there were negative commentary. Whether you want to call it a ruling or dicta, but there were certainly some negative effects and negative commentary made by the various judges, whether Judge Goldfarb in Illinois or whether it was Judge Mahan in his order denying the motion to dismiss that case.

To which Caesars says, Well, don't worry. We've brought an omnibus action that we feel encompasses all of the arguments. And, in fact, we'll move to stay the federal court action so there's no duplication of effort.

The problem with that is they filed a motion to stay in April of this year which still has not been ruled upon and no hearing has been set, although it's been fully briefed. Subsequent to that, we filed a motion to compel in front of the Magistrate Ferenbach which has been ruled on. So when an older filed motion

09:24:52 has not been ruled upon and a subsequently filed motion has been, I think we can reasonably conclude that that motion to stay is not going to be granted at this point.

09:25:02 So that brings us essentially to present. And we filed a writ petition with the Nevada Supreme Court. And under the rules of procedure 8(c) and under Nevada Supreme Court precedent and Mikohn Gaming, and its progeny, we've got a four-factor test. And really the

09:25:20 Court looks primarily at the first factor. And they ask the question would the purpose of the writ be defeated if there is not a stay entered in the district court until the writ has been resolved. And the answer in that case in -- for here is absolutely.

09:25:39 Because if we proceed to litigate this matter, what happens is the Court has given away the contractually agreed to jurisdiction and the rights the parties negotiated in the FERG agreement, which chose the forum selection clause of New Jersey to have all

09:25:57 their disputes heard. To which --

THE COURT: What about this? It appeared to me -- and I did read the points and authorities, and more specifically I think there was a discussion by Judge Hardy as it related to the bankruptcy court

09:26:12 matter and the procedural posture of that case.

09:26:19 And it appears to me implicit he was concerned about a potential waiver.

MR. McNUTT: He --

THE COURT: And the reason why I bring that up, he talked about the impact of the automatic stay, had there been some sort of relief sought to seek relief from the automatic stay and the like and that was my impression.

MR. McNUTT: That's an accurate impression, your Honor. He did raise those issues.

THE COURT: Right.

MR. McNUTT: The problem is, and respectfully, not everybody gets things right all the time. The critical fact is this: It was a unique remedy to the bankruptcy court under Section 365.

So FERG -- Judge Hardy's question literally was why didn't you go lift the automatic stay and challenge their rejection apparently in federal court in New Jersey or state court in New Jersey?

They could not because it was a unique remedy to the bankruptcy. So literally, Caesars chose that forum, and FERG was forced to react in order to protect its property rights. And these are not small claims, your Honor. These are wildly successful restaurants that were -- are associated with Gordon Ramsey. They

09:27:37 are still open and operating today. Whether it's in the Paris, Gordon Ramsey Steak with a burger restaurant in Planet Hollywood or other venues in the other jurisdictions.

09:27:49 So it had to be brought there. It's impossible for Caesars' conduct to act as a waiver of my client's interest. That simply can not happen. And that's essentially the argument they're making. They're saying we chose to file in Illinois, which is

09:28:07 in derogation of your forum selection clause rights. And then we chose to reject your contract knowing full well that the only place we could oppose that is in the Illinois bankruptcy court. So no, your Honor, there has been absolutely no waiver by FERG of its forum

09:28:28 selection clause.

Does that answer the Court's question on that, sir?

THE COURT: It does. I understand your position.

09:28:37 MR. McNUTT: With respect to the other factors, your Honor, the Court looks pretty lightly at whether or not there's irreparable harm or significant harm on both sides of the aisle. And that's pretty well briefed. We say we don't want to the duplicate

09:28:52 efforts. They point out, Well, legal fees are not

irreparable harm and everyone knows that.

They say, Well, there's going to be a delay if a stay is entered. There's a Nevada Supreme Court precedent that says a short delay is also not irreparable harm. And that's true, your Honor, especially when the litigation goes back literally over three and a half years at this point. We have two cases here in Nevada that go back -- they're coming up on their two-year anniversary.

The discovery that's occurred in all of those cases would take me too long to enumerate. At this point we now are in the process of scheduling depositions.

In the TPOV matter in the federal court, all of the claims that they pretend to bring in this current action are pending elsewhere. And that's the other aspect of our writ. We asked the Supreme Court to reverse Judge Hardy's decision so that they can look at this first-to-file rule, and if all these cases, all these claims are already pending in other jurisdictions to let that process carry through to conclusion.

And that's why we're seeking a stay right now, your Honor. Because we want the Supreme Court to have the opportunity to rule on the petition, make its decision, and then we're either going to come book

09:30:18 here, and we'll move forward with the consolidated action. Or, in fact, more likely we will end up, FERG will have its result where it can exercise its forum selection clause. It will, ultimately, end up in 09:30:28 Illinois because of the reasons I articulated. The TPOV case will move forward in federal court with Judges Ferenbach and Mahan. And the GRB case is likely going to be resolved and for -- to not get into too much in the weeds there, there's a tentative deal or 09:30:52 possibly a complete deal done between the trustee and Caesars with respect to GRB.

So in affect, if we're successful on the writ petition, and we believe we will be on multiple grounds, everything in state court Nevada will likely 09:31:11 go away, but for the -- there is always a potential that down to the documentation of the GRB deal that that won't happen and that case will go forward as a derivative action or on behalf of the trustee on behalf of Mr. Seibel's claims and GRB.

09:31:32 So we think the process should be allowed to play out with the Supreme Court without this Court saying I'm going to deny this stay and thrust us into discovery in yet another piece of litigation because Illinois has not been stayed, the Federal Court 09:31:48 litigation here has not been stayed. This literally

opens up yet another massive piece of litigation that just hails everybody into state court whether they should be there or not. And in the case of FERG, they absolutely should not be.

THE COURT: How much discovery would be anticipate that would have to be conducted in this case?

MR. McNUTT: Your Honor --

THE COURT: And the reason why I bring this up, I mean, I look at it. I -- this is my first opportunity to take a look at the case.

And one of the primary issues from what I gather specifically deals with the suitability clause in one of the contracts. And as a result, it's my understanding there's been criminal convictions stemming from tax issues. And so that's something that a trial court could take judicial notice of.

And, I guess, at the end of the day there's a question as to what impact that has, if any, on the contracts that were in place.

So I'm looking at it from this perspective. What type of discovery would have to be done, really and truly? Would it be limited? Would it be significant? Because this all revolves around the suitability clause. And then I'll have another

question for you after that.

MR. McNUTT: Okay, your Honor. Let me deal with that first. Suitability is not the end of the day because most of the contracts, or at least some of the contracts, depending which ones we're dealing with, were assigned to entities that have nothing to do with Rowen Seibel. So Rowen Seibel is the individual that plead guilty to one count of obstruction of justice related to taxes. It's a fact.

Having said that, his interests were assigned to other entities and to trusts that were properly assigned that in some cases were ratified by Caesars because they acknowledged the assignment, they paid the assignee under the original contract.

And so we -- as Judge Mahan said in his order denying their motion to dismiss, he said If -- and I'm paraphrasing -- he said, Seibel and TPOV -- sorry, not Seibel in that case -- TPOV alleges that they properly assigned the contract to the TPOV 16, then termination occurred. And that's a fact. There's no dispute that the contract was assigned. And then the contract was terminated.

In which case he raises the point that suitability isn't the issue. It's the issue of the validity of the assignment. So suitability is one

prong of discovery that will take place. The validity of the assignments are clearly the second prong and the amount of damages that discovery is going to be had on is massive.

So we're talking about restaurants that in the aggregate are tens of millions of dollars of revenue and profits per year.

So the Court well knows how much discovery will ensue just on the damages component, let alone with respect to the suitability component, let alone with respect to the assignment component, et cetera.

THE COURT: I --

MR. McNUTT: Have I answered your question, sir?

THE COURT: Yeah, it does. And I have another question, and this is one of the -- it's interesting when I was reviewing the points and authorities, and I was thinking about the suitability component and in this matter. And it really wasn't until page 17 that the questions I have are somewhat addressed in the opposition. And the reason why I bring that up is this:

I was thinking about this case. And we all can agree Nevada is very unique as far as gaming is concerned. It really and truly is. And from a

historical perspective, Nevada has always been a leader in that area.

And so I was looking at it from this perspective: Specifically you have businesses that are Nevada based, and they have to go in front of the Gaming Commission. And as we know the regulations are very stringent as far as suitability for licensing is concerned. And that's a tremendous issue.

So I was sitting here. I don't -- I don't -- the opposition didn't really address it this way. But in my mind, I was thinking about it, and I've had other cases where I've specifically looked at forum selection, choice of law, and those types of things and this happens way more than one time.

But here's one of the things I was thinking about because they do talk about strong public policy. And I don't know if this was addressed or not, but my question is this: Clearly parties can contract. There's no doubt about it. And say, hypothetically, if this case were strictly a breach of a lease or something like that that didn't involve suitability, maybe the forum selection provision under the contract could be enforced by the Nevada Supreme Court.

In contrast, and as we all know, that under certain circumstances, and this is assuming there's no

09:37:13 waiver and all those types of things that were raised earlier, but when it comes to issues of public policy from time to time our many courts have said those types of contractual provisions are not enforceable. And the
09:37:27 reason why I'm asking that, I'm looking. I was thinking about this. Shouldn't Nevada be very concerned about suitability issues that have impact on gaming and businesses and those types of things in the state of Nevada?

09:37:46 MR. McNUTT: Shouldn't Nevada be concerned about that?

THE COURT: Yes.

MR. McNUTT: Sure. And there's a legislature that should address that. But there's no case that I'm
09:37:54 aware of, sir, whether it's -- the United States Supreme Courts case Atlantic Marine, whether it's a Ninth Circuit case, or whether it's Nevada Supreme Court regarding forum selection clauses, there's two pieces. Either the clause is enforceable and then is
09:38:08 it mandatory or optional?

And so there's no -- there's been no question. Even Judge Hardy said the clause is otherwise enforceable. Applies to these claims. Applies to these parties. He just believed that there --

09:38:22 THE COURT: Well, the reason why I'm bringing

09:38:24 that up, I mean, at the end of the day whatever he said will probably control the appeal. But it was raised here that there's a strong public policy with respect to issues presented in this case specifically the
09:38:38 Nevada legislature has found that a public policy of Nevada, the gaming industry is vitally important to the economy of this state, et cetera, et cetera.

And so I realize -- and I've had a lot of cases of first impression, you know. But you say
09:38:55 there's no case that deals with that. But I was wondering if there's no case that specifically has ruled either way, we don't know what the ultimate answer is, do we?

MR. McNUTT: Sir, that was slightly different
09:39:07 than what I said. There's no -- let me start with this. There's no statute that says that a Court can render an otherwise valid forum selection clause invalid on the basis of something that we are speculating about today.

09:39:26 THE COURT: Well --

MR. McNUTT: That's where --

THE COURT: But there's never -- I mean, let's face it. Many times violations of public policy there's not necessarily a statute. The Nevada Supreme
09:39:36 Court can dictate what public policy is without a

statute; right?

MR. McNUTT: Your Honor, these cases do not -- there's not one cause of action called violation of public policy. These are breach of contract cases. That's it.

THE COURT: But can't we all agree that this -- I mean, you can have contracts. But if contracts are in violation of the public policy of this specific state, are those contracts enforceable notwithstanding whether or not there's a "statute" on point?

And, I mean, we see that all the time with unconscionability, right, in consumer contracts.

MR. McNUTT: Of course, there's no allegation of that --

THE COURT: Yeah, but --

MR. McNUTT: -- here, your Honor.

THE COURT: But I'm just saying. You're saying, Look, Judge, there's a blanket prohibition. And the law, as we know, is much different than that. There's many shades of gray. There just are. And it's because there hasn't been the first case that does that, maybe. I don't know.

MR. McNUTT: I don't believe they're shades of gray in this matter, your Honor. And let me give you

09:40:31 an example. Assuming that, you know, another court went down the line of inquiry. Or if, even if the case comes back here and we go down that line of inquiry, the Court will say, well, let's deal with the
09:40:44 suitability question. And what does that do? The best day, if they win on suitability, your Honor, all that would do in this case is say we're -- we were justified in terminating the contract.

That leaves the following issues still to be
09:41:03 resolved. It leaves one issue that is, Well, what about the issues where the contract was assigned before any suitability-type issue came up, and before the contracts were terminated. So that's still going to go forward.

09:41:20 And possibly the most important piece, your Honor, is this: There's still going to be money damages flowing from the termination of the contracts. The contracts provide for, in some cases, waterfall provisions for how profits are to be distributed.

09:41:42 Let me give you one example. The Burger restaurant in Planet Hollywood that's open today, it's called Burger Gordon Ramsey. It's spelled without an E. They terminated that contract. The contract says they can't operate that without us.

09:42:00 They then say we're going to rebrand the

restaurant. So they rebranded it from B-U-R-G-R to "Gordon Ramsey Burger" with an E. It's the completely same restaurant. Oh, they changed the napkins, no question. But it's called Gordon Ramsey Burger.

Now, even under that termination, the contract calls for them to pay my client money during the, quote unquote, "windup period." We had to file the lawsuit for that to happen. And that's the original case that was in front of Judge Hardy here that we referred to as the GR BURGR matter.

So when the Court looks at the suitability issue, it cannot look at it in a vacuum, and say, Well, if there's a public policy regarding suitability, then everything else about these cases goes away. It does not. None of the cases go away.

We don't believe that the unsuitability issue is going to be determined against us. But just for the sake of argument, even if it is, there are still damages, admitted damages that flow from the breach, in our opinion, or from their view that flow from the termination.

Give you one more example with respect to the case pending in front of Judge Mahan. My client TPOV funded the build-out of the Gordon Ramsey Steak restaurant inside the Paris Hotel to the tune of

$1 million capital contribution.

Are they allowed to terminate the contract and keep our restaurant? Part -- it's partly ours. We helped build it. We were a partner in the restaurant. Do they not have to pay us back the million dollars? Do they not have to live up to the rest of the contract that calls for what happens if the restaurant continues to stay open and profits continue to generate?

And with respect to the steak restaurant, they didn't even go to the courtesy of alleging to rebrand it. They've never changed it one bit. They didn't change the spelling. It's simply Paris Gordon Ramsey Steak.

So those issues, quite frankly, your Honor, I believe are the bigger issues that are being determined in discovery in the federal court action here as well as in the discovery that's taken place in the bankruptcy court.

Quite frankly, I think the suitability is almost the smaller of those. It's not the easier, but it's the smaller more finite issue than these other things.

THE COURT: I understand.

MR. McNUTT: Any further questions, your Honor?

09:44:58 THE COURT: Not at this time.

MR. McNUTT: I could go through a few more areas of the case to provide procedural history, but I'll -- I will rest on this note:

09:45:07 We think that the other cases literally should continue to go forward. This case should be stayed in the district court. Let the Nevada Supreme Court weigh in on the forum selection clause. It will have cascading and significant events on all the rest of the

09:45:26 litigation and, quite frankly, on all of the litigants. Thank you.

THE COURT: Thank you, sir.

MR. PISANELLI: Good morning, your Honor.

THE COURT: Good morning.

09:45:38 MR. PISANELLI: James Pisanelli on behalf of the Caesars entities.

Your Honor, you made some comments that stole my thunder a little bit. We are hitting upon the same points that seem to be central to this.

09:45:54 The central core issue of this, as counsel characterized it, rightly so, complicated and tortured procedural history is this: The question that will be asked of this Court in our dec relief action is whether a gaming licensee may exercise a contract right to

09:46:18 terminate a contract due to the unsuitability of a

convicted felon. Here, Mr. Seibel.

This case will touch on contract law. It will touch upon gaming law. It will touch upon public policy concerning the interaction of those two bodies of law. Which raises a rhetorical question. Is there a worse place in all the United States for Mr. Seibel to litigate issues of this sort? Is there a worse place than Nevada for him to be? I offer that rhetorically to this Court. But he has answered that question through his actions with a resounding no doing virtually everything he can to get out of this jurisdiction.

And we spent lots of time this morning. Lots of time in their brief. Lots of time before Judge Davis in the bankruptcy Court here. Lots of time before Judge Hardy here talking about forum selection clause, which I'm prepared to address today of course.

But before I do, I just want to make this important point about that forum selection clause and why we believe it's a red herring.

You heard this morning only minutes ago the same thing we've been hearing in all of this briefing. That this case from their perspective will, ultimately, land back in Illinois. That's all they've been asking to do.

09:47:50 Now, they say not our choice. We have no problem. And let me accept them at that, at their word on that. But that's not the point. The point is there is no denial for one of these entities. FERG only is 09:48:05 the only one that has this forum selection clause for New Jersey. And they are trying to have that one entity with one clause, that tail wag the dog of all the other parties to this case. When at the end of the day, not even FERG is successful across the board on 09:48:27 every issue, not even FERG will end up in New Jersey. Even this morning counsel said, ultimately, "it will, ultimately, end up in Illinois."

So when we're sitting here trying to balance how a public policy affect the gaming law issues versus 09:48:46 the contract issues, we'll never get to that point in this debate. The Supreme Court will never get to that point in this debate, unlike an arbitration clause in the Mikohn case. Did a party lose the benefit of their bargain? We'll never get to the loss of the benefit of 09:49:02 the bargain because not even Mr. Seibel and his related entities are seeking to go back to New Jersey. New Jersey is off the table.

And so it is a big distraction and a red herring. Even if, your Honor, it was applicable across 09:49:17 the board to all of the parties, even if it was in all

six contracts, which it's not, it's only in one, even if they had all of those facts lined up, even the plaintiff says we're not going to end up in New Jersey anyway, so unlike Mikohn we're not being denied anything by this process.

So what's really at issue here? We have a series of contracts between Caesars and the different entities, FERG being one of many. They're listed in our opposition and in the opening brief, our opposition at page 3. Caesars learned through the media, of all places, that Mr. Seibel had not been forthright. He came to the table to do business with a gaming licensee as all gaming licensees do with a known affirmative obligation of disclosure.

You have to tell a licensee who you are, what you do with your business, what you do in your personal life. And even after contracting with the gaining licensee, you have to keep the licensee informed of who you are, what you've been doing, and whether your character has now changed from what may have been suitable at one point to what now the state of Nevada deems unsuitable as a person doing business with a gaming licensee.

Mr. Seibel violated those responsibilities from day one until we'll call it day X. That being

09:50:50 today. He's never stopped violating those responsibilities of full transparent disclosure to his contracting party the Caesars entity. Caesars found out in the news, of all places, that he had been 09:51:04 convicted of a class E felony and sentenced to prison in August of 2016.

We hear that that's a big distraction, and we shouldn't worry about his suitability because he just took his interests and put them in a family trust. 09:51:23 Well, that's convenient to say, Okay. Now, my wife or my children will control these assets, similar to some of the debates we have in politics today. It doesn't end the debate. It certainly doesn't move the needle for purposes of suitability to do business with a 09:51:44 gaming licensee.

It's also important to remember, your Honor, when we're talking about this suitability issue this isn't an open negotiation between the licensee on the one hand and its vendor on the other to decide are you 09:51:57 suitable or are you not. Because the license is the crown jewel of any gaming licensee.

It comes as no surprise that these contract provisions are pretty standard across the industry in that the licensee retains from a contractual 09:52:10 perspective the sole discretion to make the

09:52:13 determination of whether you my contracting party are suitable or whether you will put my business, my crown jewel at risk. If in my view the licensee, you put me at risk, I am not only entitled but obligated to remove you from my business. And a convenient shifting of the assets from your personal estate to a one controlled by family members in a trust doesn't change that analysis at all. The discretion and judgment is to be exercised by the licensee as the Nevada gaming authorities would require, and that's what's happened here.

So Mr. Seibel unsatisfied, dissatisfied with Caesars' decisions to protect itself and its operations launched litigation as did other entities across the nation. By my count at least six different cases are pending from Delaware to New York state, here in federal court, Illinois bankruptcy court, two state court actions, and this case.

Now, one of the debates we had on the motion to dismiss before Judge Hardy was the same debate that happened in front of Judge Davis in the bankruptcy court.

And that is there's a very big risk that is obvious to all of us, and certainly to your Honor who deals with these issues far more frequently than we do as litigators. And that is when we have different

courts analyzing the same issue, there's a very big risk of inconsistency, inconsistency in the judgment which is most important. So we have fractured litigation across the country, literally coast to coast. Maybe a little shy of the coast here on our side in the west. But nonetheless, and we have different parties going to analyze the same exact contract clause.

Caesars will always be involved on one end or its subsidiaries. And then Mr. Seibel will always be involved in the other, or some of his entities. So there's different legal entities but the same core groups fighting the same contract clause.

And while counsel can downplay the enforceability of suitability clause, that is key to all of these cases. It is the very first domino to fall, and as we decide every single thing. Even with counsel's examples today with the Burger with an E and BURGR without an E, that necessarily requires first if there's any rights left for Mr. Seibel because he was terminated.

His issues about with an E or without an E are meaningless if this Court, for example, were to determine in a dec relief action or otherwise that he was properly terminated because he was unsuitable, and

09:55:01 the contract allowed for that. Once terminated, he doesn't hold rights for future contracts with an E or without an E.

And so we start always with the very first 09:55:12 important issue that only one case has before it. That is this case where Judge Hardy recognized is this is the only case pending before now your Honor that has all the parties together in one place to decide the most important issue.

09:55:30 We take the biggest risk of all the litigations spread across the country and virtually limit it by this consolidated action allowing it to move forward because all of the parties are here and all of the parties will be bound by this Court's 09:55:46 determination on what happens under these circumstances when unsuitable character is doing business with the gaming licensee.

So we can say that there are satellite issues and collateral issues. Maybe so.

09:56:01 We can say that after we figure out the termination issue that we can see if money now needs to be exchanged between the parties on a post termination wind down. Sure. But none of that analysis can start in this court or any other court until we decide the 09:56:19 very first issue of the enforceability of the

suitability clause.

And what greater disaster could there be than having six different courts have six different results or six courts with four results or with two results or three results. In other words it is consistency of the core issue that is most important, and it was in our view what Judge Hardy saw in particular as the most important point.

Even this issue that some discovery has taken place already in the other actions on an earlier filed action doesn't mean that that work goes down the drain and has been lost. That work is sworn discovery on parties that will find its way into this court if relevant. It won't be duplicated here. It won't need to be duplicated here. It's not lost. It's not irrelevant. It doesn't matter if it was conducted there or conducted here.

Whatever place it has in the debate over this -- these issues, that you -- the two discrete issues you have before you, it will find its way into the record and can be utilized. And Judge Hardy found that important as well.

Your Honor, it's also important to remember, Judge Hardy and Judge Davis didn't merely reject this theory that this consolidated action should be

dismissed, and whether it be FERG with its one forum selection clause should go off somewhere else or not, but Judge Hardy also specifically addressed these motions. A request for a stay was given to Judge Hardy. It's directly in his order where he said it was inappropriate. For the reasons he was denying the motion to dismiss, he also denied the exact arguments that are being presented to you today and said, no, he did not see any reason to stay this case. And so what we have here seems to be a convenient second bite at the apple without really characterizing it as a motion for reconsideration.

So at the end, your Honor, we look to see if there is anything new that is being presented today, and I would suggest to you that the answer is no.

We do have some issues we agree on, and they're worth pointing out. We have a four-prong standard. We agree with that. The first being whether the writ petition will be defeated. The second two having to do with reparable serious injury to either side.

I think counsel's right when he characterizes those issues as somewhat neutral or balancing one another out. We do both have interests in moving forward. We have, for instance, asked the other courts

09:59:09 to stay their actions so that we can decide this case first. They have asked you to stay this action so those cases can go first.

So we all have to be careful in just how 09:59:19 vigorously we defend this irreparable injury issue because it's flipped on the other court when we're asking for the same stay. So, yes, there is the possibility of increased fees, but that may happen anyway that the litigation is going to cost the 09:59:36 parties. And there's a -- there's, of course, a possibility of delay which we think would cause us harm here because all other cases, all other issues in all other actions are first, as I said, keyed upon this key issue that's presented to you.

09:59:51 So it seems that the two core issues for this today: The first is whether the writ will be defeated; and second, whether they're likely to prevail.

Talking about whether the writ will be defeated, I think there is some misplaced reliance in 10:00:06 plaintiff's brief on the Mikohn case. The Mikohn case is very specific in connection with that stay because they're talking about an arbitration clause, your Honor. And our Supreme Court even said, and I'm quoting.

10:00:19 "The stay analysis in an appeal from an

order refusing to compel arbitration necessarily reflects the unique policies and purposes of arbitration and the interlocutory nature of the appeal."

10:00:34 So there is an appellate right there. And we're talking about a contractual right of an arbitration that would not go forward without the stay. The case there was going to proceed in litigation, and there would not be an arbitration while the appeal was pending.

10:00:49 That's not what we have here. First of all we don't have the compelling state -- or the compelling policy, public policy, about enforcing arbitration. There is no compelling public policy about a New Jersey clause for one of many parties. And, ultimately, as I said at the beginning, we're not going to New Jersey anyway. And so everything about the Mikohn case, all those eggs in that basket seem to be misplaced.

What we're talking about here is whether there

10:01:18 is some right that will be lost. There will be no right lost. These parties are going to litigate somewhere other than the one forum selection clause in one of six contracts. That's going to happen no matter what.

10:01:32 And then on the issue likely to prevail on the

merits, let's not lose focus of what that writ is about. That is a writ to the Supreme Court asking the Court to analyze Judge Hardy's refusal to grant a motion to dismiss. We have lots and lots of authority from our Supreme Court saying that that is not an appropriate subject matter for a writ. They don't want to hear writs on denials of summary judgment. They don't want to hear writs on denials of motions to dismiss. They're discretionary acts of the trial court as its characterized.

And so counsel and Mr. Seibel will have to concede while they are passionate about their position, while they're even more passionate about getting out of Nevada they will have to concede that they have quite an uphill battle in trying to convince the Supreme Court that Judge Hardy should have granted a motion to dismiss when the record is pretty solid in all of the benefits there were and there are to this consolidated -- consolidated action moving forward.

Your Honor, the remaining points that we've made have been put in our brief. So if you have any questions, I'll certainly address them.

At the end of the day the issue is this: We have one very important issue that touches upon a very important issue for the state of Nevada. Judge Davis

recognized it when she sent the case back to the state court system. Judge Hardy recognized it when he refused to grant the motion to dismiss.

Nevada is the place for the adjudication of a Nevada gaming licensee exercising a standard industry clause designed to protect the gaming licensee. There's no better place in the United States to debate this dec relief action than before your Honor.

And all of the reasons that Mr. Seibel and his team have come up with don't seem to rise to the level of importance of the issues before you. They don't rise to the level of importance of having a gaming issue for a gaming company in the Nevada industry decided in this jurisdiction.

And with that I would ask your Honor to follow the earlier ruling of Judge Hardy. Deny this stay. Let this case move forward so that this first domino can be analyzed and the parties can start really getting to the heart of the merits of this case.

THE COURT: Thank you, sir.

MR. PISANELLI: Thank you.

THE COURT: Sir.

MR. McNUTT: Quickly, your Honor. The Nevada Supreme Court will review the refusal of the district court to enforce a forum selection clause de novo. So

10:04:30 the theory that this is an inappropriate writ petition is not well stated.

I heard a lot about Mr. Seibel thinks the last place he wants to be, or Mr. Seibel and his entities, 10:04:44 and they love to lump them all together. Yet Mr. Seibel as a derivative action chose to file a lawsuit in state court Nevada.

He's not scared of the facts. He's not scared of the state court judge hearing that Caesars 10:05:02 terminated the contract which says in Section 2.3.4 subsection C that if they terminate the contract, they can no longer operate the restaurant at large. And restaurant's a capitalized term is defined as GR BURGR.

So Mr. Seibel is not scared to have his matter 10:05:23 litigated here. TPOV and the TPOV 16, Mr. Seibel was involved in TPOV. He assigned all of his interests to TPOV 16. Paris ratified that assignment. They started paying TPOV 16. That matter was filed in Nevada in federal court. So if we're all lumped together, the 10:05:48 statement that we're afraid of having a Nevada judge decide these matters simply has no merit. We filed two lawsuits here.

The reality is those cases belonged here because of the contracts that were involved, and 10:06:04 because of the parties that were involved. In fact,

10:06:08 Caesars raised the jurisdictional issues to get out of federal court. We don't want to be in federal court. Raised jurisdictional issues. We want to prosecute the cases, move them forward because we're owed a lot of
10:06:22 money. And so we refiled the case here.

That case has largely been resolved, the GR BURGR case. Before it was resolved, obviously, this case got filed later on, and we find ourselves back here.

10:06:37 I was remiss in not mentioning to the court Judge Mahan's 2016 decision called Fantastic Entertainment, with one of my favorite performers involved, I think Mr. Pisanelli's too, Nicki Minaj. We're big fans. And he said directly, that Nevada's
10:06:58 public policy concerns cannot invalidate a forum selection clause. So I think that's -- we briefed that on several different pages. But the one that comes to mind is page 16 of our reply brief.

THE COURT: But tell me ultimately, that will
10:07:15 be up to the Nevada Supreme Court to decide, right?

MR. McNUTT: Yes, sir, it is. And it will be. And that's what we're asking. We're asking -- you stay --

THE COURT: The reason why I bring that up, I
10:07:24 mean, we see a lot of the HOA cases. And our Nevada

10:07:28 Supreme Court specifically decided not to follow the lead of the Ninth Circuit as it related to specific issues in the HOA cases. In fact, we just got another decision that came down within days. They pushed back
10:07:42 bigly, maybe I'll say that, on that issue.

And so, you know, I respect some of our -- I mean, all of our federal bench. But I'll give you an example. I remember they had problems handling one of the companion cases I had that was a companion case
10:07:58 In Re Kitec. You know.

And it was a very complex construction defect matter that was class action, probably had 25- 30,000 homes. And they had a lot of difficulty over there bringing that case home. And I didn't have much
10:08:15 difficulty at all. I'll say that. And so I look at it differently, you know.

A couple of things. And this is what Mr. Pisanelli brought up one issue. He said you know what, Judge, Judge Hardy addressed the stay issue in
10:08:29 his decision. Is that true or not? Or?

MR. McNUTT: Your Honor, that was a pre-petition. So I do believe, and I can't -- either there was a request at the end of oral argument that the case be stayed pending filing a writ, or there may
10:08:47 have been some alternative relief requested in the

10:08:51 reply. I don't recall that either way. But it's inapplicable because, quite frankly, there was no writ on file. And that is when filing a motion to stay the district court proceedings, because otherwise -- 10:09:04 Mr. Pisanelli talked about look at the fourth factor -- you've got to look at what's the likelihood of success on the merits of the writ.

Well, I suggest to you that under NRAP 8(c) you can't even do that analysis until the writ is 10:09:18 filed, obviously.

THE COURT: Well, I understand that.

MR. McNUTT: So --

THE COURT: Here's my follow-up question. And this was raised too. I guess at the end of the day 10:09:30 this case wouldn't go to New Jersey anyway; is that true or not?

MR. McNUTT: Correct. Because it's a unique-to-bankruptcy issue. They're trying to reject the contract under one federal statute of the 10:09:42 bankruptcy code.

So we're forced to be and deal with that in Illinois. But, quite frankly, your Honor, the heart of your question is, Well, if it's not going to be Nevada with respect to FERG, should it be New Jersey or 10:09:58 Illinois? And that is up to the Nevada Supreme Court

to determine. And that's why we're asking for the stay here.

Additionally, with respect --

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.

So if -- but that doesn't change the fact that the forum selection clause is valid, enforceable, and has never been waived by FERG. It was negotiated by FERG. It was negotiated by Caesars. They agreed. I mean, quite frankly, if there's a party that should be held responsible for their conduct, it's Caesars. They chose Illinois. We did not. They chose to attempt to reject the contract under the bankruptcy code. We did not choose that.

It's simply -- to suggest that we're denied

10:11:16 our rights because we can't be in a court because Caesars literally knowingly and tack -- and in a very, you know, tactical manner filed their action in a way that deprives us of that right.

10:11:39 THE COURT: But, I mean, they have a right to file bankruptcy; right? I'm assuming the bankruptcy wasn't discharged.

MR. McNUTT: Your Honor, the plan has been confirmed at this point. I mean, literally, with

10:11:49 respect to the other pieces of litigation --

THE COURT: So, I mean, and at the end of the day I want to make sure I'm clear on this because this case is new to me. The bankruptcy Court will not address or be addressing the suitability issue; is that

10:12:03 correct?

MR. McNUTT: Your Honor, I don't think that's clear at this point. But with respect to the TPOV case, Judge Mahan is going to make the determination about suitability, about the breach, about

10:12:17 assignability of the contracts, and about damages. That's who is going to make the determination there.

If the GRB, the underlying settlement for the GRB case for the burger restaurant, if that doesn't get documented, you're going to make that decision on

10:12:31 suitability, on assignability, on damages. So there's

going to be two Nevada --

THE COURT: Well, I understand the discussion doesn't end on suitability. I get that. But I was just bringing up and focusing on the suitability as being a primary issue. One of the -- it appears to me one of the positions Caesars is taking in this case, and if that's not going to be addressed by the Illinois bankruptcy court, why can't Nevada address that?

MR. McNUTT: Well, your Honor, you -- maybe I misunderstood your question. I thought you asked whether it was going to be exclusively determined in Illinois. And my answer to that is no. It's going to be determined by Judge Mahan in the TPOV case in federal court. It's going to be determined by your Honor if the GRB settlement doesn't get documented and signed.

So Nevada courts will absolutely weigh in on the suitability. But again, suitability is just merely one piece of the larger issue. And I've heard a lot of -- I've heard a lot of -- in every hearing I hear about the bad fact about Mr. Seibel. But it's unclear to me how Caesars comes into the Court and acts like they have clean hands when they have terminated the contracts, yet don't agree or don't comply with the post-termination obligations of the contract.

10:13:58 The contracts can be terminated for a variety of reasons. Suitability is one of them. They chose that path. There's obligations that have to occur post termination for any reason.

10:14:09 And they took our million dollars. They built a restaurant. It's continuing to operate. They don't want to pay it back. I'm unclear how, you know, they act like they're wearing the white hat in this regard.

THE COURT: Tell me this. And understand

10:14:25 you're the moving party. How will your client suffer irreparable injury or serious injury?

MR. McNUTT: Your Honor, I think that that's pretty even for both of us. As I said initially, I don't know. Obviously, it's going to cost us a lot of

10:14:41 money. And everybody knows that money is not irreparable damages.

THE COURT: It's not.

MR. McNUTT: Just like Caesars, and the Nevada Supreme Court agree, that a slight delay to let the

10:14:51 Nevada Supreme Court make this decision also does not constitute irreparable damages. And Mr. Pisanelli acknowledged when he got up and said, you know, that it's essentially a wash, my language not his, with respect to those factors.

10:15:06 And under the Mikohn Gaming case and

10:15:09 Robles-Nieves, both of those cases say that the first factor is clearly most significant when the district court is analyzing whether to stay the case, and that they can counterbalance literally all other factors.

10:15:22 Let me address Mikohn Gaming. Mikohn Gaming is about an arbitration. It's Mikohn Gaming V Charles McCrea Jr. He was their general counsel. He was trying to invoke a forum -- I'm sorry. Mikohn Gaming was trying to invoke an arbitrability clause. What's

10:15:42 similar is this. Both cases involve a stay to get out of district court. So one wanted to be in arbitration, and here it's a forum selection clause.

So to suggest that it's inapposite to the facts here, takes all of the analysis that

10:16:00 Justice Hardesty did in that case and throws it out the window.

THE COURT: But isn't there a distinction? Because, you know, when you deal with arbitration clauses, and the enforceability of them, and I realize

10:16:15 there's been a lot of litigation on that issue, not just in state court but also in the federal courts, but at the end of the day the parties bargained for a much more streamlined and cost-effective form of dispute resolution. That's what they agreed to. That's much

10:16:34 different than a forum selection. Because at the end

of the day in that scenario, there's going to be litigation, depositions, discovery, and the like. And so that's a much different analysis the way I see that.

MR. McNUTT: So is a motion to suppress the testimony, the arrest testimony of Mr. Robles-Nieves. And that's a 2013 case. That says, up to the Nevada Supreme Court where the defendant was claiming he wanted the right to a constitutional speedy trial. And the state said, Well, the district court has suppressed his testimony, his prior testimony to the cops admitting to the crime. And the state said we have to have that to go to trial so we can't get whipsawed by the speedy trial. And the Nevada Supreme Court in 2013, Justice Hardesty used the Mikohn Gaming case as the framework for his analysis to deal with a criminal suppression motion.

So clearly Mikohn Gaming, if it's broad enough and Justice Hardesty believes the analysis of that 2004 case was on point with respect to NRAP 8(c), which is what we're dealing with here, and it applies to a constitutional right to a speedy trial, and they granted a stay because they said the state's case without that --

THE COURT: But isn't that a different analysis? Because you have certain rights guaranteed

10:18:12 under the Sixth Amendment of the United States Constitution. And assuming the criminal defendant didn't waive those, he has a right to enforce that; right? And there's nothing our Nevada Supreme Court 10:18:28 can do about that. There's nothing anyone can do about it because that's a mandate under the constitution. Here we're not talking about constitutional right.

MR. McNUTT: Your Honor, maybe I wasn't very clear.

10:18:39 THE COURT: Yeah.

MR. McNUTT: The point is that the Nevada Supreme Court even in a criminal context when analyzing a stay said we're going to use the framework of the analysis from Mikohn Gaming.

10:18:51 So, of course --

THE COURT: The four points?

MR. McNUTT: From Barker?

THE COURT: Yes.

MR. McNUTT: Or from NRAP 8(c).

10:18:59 THE COURT: Yeah. So, your Honor, the point is that whether it's arbitration, whether it's forum selection clause or whether it's in the context of a criminal case, the Nevada Supreme Court is going to look at those four points.

10:19:13 And so the question the Court has to answer

today that is the most pressing upon is whether or not the petition is rendered moot, our petition to the Supreme Court is rendered moot unless you stay the district court case, and the answer from our perspective is clearly yes.

THE COURT: Here's my last question on that issue. It seems to me if that's the controlling analysis, then I'd grant a stay in every case; right? Because it becomes -- if I continue, the purpose of the stay becomes moot; right?

MR. McNUTT: Well, of course not, your Honor. I mean, you would simply -- you have to analyze every case on its own --

THE COURT: I understand.

MR. McNUTT: -- merits.

THE COURT: But you're asking me to give more weight to number one than the other.

MR. McNUTT: No, sir. The Nevada Supreme Court suggests that you give more weight to number one.

THE COURT: Whether the -- whether the object of a writ petition will be defeated if the stay is denied, I can -- I mean, I've had a lot of motions to stay dealing with specifically evidentiary issues, the failure to grant motions for summary judgment. And I'm just thinking to myself if I -- if that was the

10:20:21 controlling issue, then I'd grant a stay in every case; right? Because when you think about it, the object of the petition would be defeated.

MR. McNUTT: Your Honor, I can't rewrite the

10:20:32 rule.

THE COURT: I understand.

MR. McNUTT: I also cannot rewrite Mikohn Gaming. I cannot rewrite Robles-Nieves.

That's what the rule says. That's what the

10:20:42 Nevada Supreme Court has interpreted. Look, your Honor could look at the fourth factor and say likelihood of success on the merits.

THE COURT: Well, to me that's an important factor.

10:20:50 MR. McNUTT: Of course it is.

THE COURT: It really is.

MR. McNUTT: I'm not saying that number one is dispositive, your Honor. I'm simply saying that number one can, in the words of Justice Hardesty,

10:20:57 counterbalance the other factor. So that's where we're at.

We've got other -- when you look at the likelihood of success, your Honor, it's not simply on the forum selection clause. You have the first-to-file

10:21:11 rule which is a substantial part of our repetition,

10:21:14 which affects all of the other entities involved.
I mean, you literally have Caesars taking the following position. You're saying -- they're saying that we have a game that's in the seventh inning.
10:21:26 We're a run behind. And they want to -- they want to start the game over in a new stadium with a new umpire. That's literally their position.
The bankruptcy case has been going on since January of 2015. I filed two cases here in state court
10:21:41 and in federal court in February of 2017. So, again, we're coming up on the two-year mark.
So why does Caesars want to hit the reset button and say forget all of the work that was done there. Forget all the discovery there. We want to
10:21:58 corral everyone here even to the point where they rollover someone's contractual right to a forum selection clause.
THE COURT: I understand.
MR. McNUTT: Unless the Court has other
10:22:16 questions, your Honor.
THE COURT: All right. No, I don't think so at this time.
Any other comments anyone wants to make before I rule?
10:22:26 MR. PISANELLI: Your Honor, just to clarify

10:22:27 the record. The request for a stay was made in our earlier hearing before Judge Hardy by DNT, LLTQ, FERG and MOTI defendants. And on page 4 of Judge Hardy's order he states "The Court further finds that stay is 10:22:44 inappropriate and denies the request without prejudice."

MR. McNUTT: So that was at the hearing, your Honor. Again, that was pre-petition.

MR. PISANELLI: It was in the motion as well.

10:22:56 MR. McNUTT: Again, pre-petition.

THE COURT: All right. Anything else? Is that it?

MR. PISANELLI: No, your Honor.

THE COURT: All right. Regarding defendants' 10:23:16 motion to stay all proceedings in the district court pending the decision on their petition for a writ of mandamus or prohibition, I'm going to deny the stay in this case.

And I do understand what our Nevada Supreme 10:23:33 Court has discussed as it relates to number one. But I look at it from this perspective. I can't say under the facts of this case number one would be controlling. I think at the end of the day it's whether the petition is likely to prevail on the merits of this writ 10:23:56 petition.

10:23:57 And to me it appears that when it talks about likely you're talking more -- you're talking about more likely true than not. It's almost like a preponderance of the evidence standard, more likely.

10:24:10 And under the facts of this case, I can't -- the way I currently understand them, I can't say that there's a likelihood of prevailing on the merits of the writ petition.

Especially in light of Judge Hardy's prior

10:24:31 decision in this matter and also taking into consideration even some of the points that were raised by Judge Davis regarding unique issues of Nevada law, and it's a Nevada centric case.

And I think just as important too, and this is

10:24:46 something maybe our Supreme Court will grapple with, sometimes it's been my impression, I've seen them do this from time to time, they will even address issues that aren't raised by the parties. They do it a lot.

And it's -- I think the discussion on page 17

10:25:05 is going to be something they're going to address as it relates to gaming, licensees, and suitability issues. I don't know if they'll address it from a public policy perspective or not vis-à-vis a forum selection clause.

But it will be interesting to see what they do

10:25:26 with it because they won't limit themselves necessarily

10:25:29 to what's placed before them. They sometimes go beyond that, and that's okay. So that's my decision.

Can you prepare an order, sir?

MR. PISANELLI: We will do that, your Honor. 10:25:39 Thank you. Run it by counsel before we submit it.

THE COURT: Run it by counsel before. And if you can't agree, prepare competing orders.

MR. PISANELLI: We will. Your Honor, just, again, trying to clean up the procedural quagmire. We 10:25:52 are in need of a Rule 16 conference to make sure that everything is moving forward.

THE COURT: All right. We can set one today.

MR. PISANELLI: That's great.

THE COURT: Is that fine?

10:26:03 MR. PISANELLI: That's good with us.

MR. McNUTT: Sure.

THE COURT: Is that fine? All right.

Do you have my trial calendar up there?

Because I'd like to set it for an afternoon if 10:26:16 we can. Say, 1:15 p.m. Do we have a date we can do that in two to three weeks?

THE COURT CLERK: We can do it on the next week, Wednesday the 29th.

THE COURT: You mean, next week?

10:26:37 THE COURT CLERK: No. The 29th.

10:26:38 THE COURT: How is the 29th of August?
Is that correct, ma'am?
THE COURT CLERK: It's August.
THE COURT: And which day of the week is that?
10:26:47 THE COURT CLERK: Wednesday, August 29.
THE COURT: It's a Wednesday, the 29th.
MR. McNUTT: Your Honor, I'll have to consult my calendar, but I think that probably works. If it doesn't --
10:26:54 MR. PISANELLI: That will work for us as well.
THE COURT: Wednesday, September 29 at 1:15.
MR. PISANELLI: September 29?
MS. MERCERA: September or August?
THE COURT: I'm sorry. August 29.
10:27:02 Is that correct; ma'am?
THE COURT CLERK: Yeah. August 29 at 1:15 p.m.
THE COURT: Okay. And we'll submit a -- we'll prepare an order --
10:27:09 MR. PISANELLI: Great.
THE COURT: -- for you in that regard.
Remind Lynn to do that. Can you do that for me?
THE COURT CLERK: Yes.
10:27:15 THE COURT: Okay.

10:27:16

MR. McNUTT: Thank you, your Honor.

THE COURT: Everyone, enjoy your day.

IN UNISON: Thank you, your Honor.

(Proceedings were concluded.)

* * * * * * * * *

REPORTER'S CERTIFICATE

STATE OF NEVADA)
:SS
COUNTY OF CLARK)

I, PEGGY ISOM, CERTIFIED SHORTHAND REPORTER DO HEREBY CERTIFY THAT I TOOK DOWN IN STENOTYPE ALL OF THE PROCEEDINGS HAD IN THE BEFORE-ENTITLED MATTER AT THE TIME AND PLACE INDICATED, AND THAT THEREAFTER SAID STENOTYPE NOTES WERE TRANSCRIBED INTO TYPEWRITING AT AND UNDER MY DIRECTION AND SUPERVISION AND THE FOREGOING TRANSCRIPT CONSTITUTES A FULL, TRUE AND ACCURATE RECORD TO THE BEST OF MY ABILITY OF THE PROCEEDINGS HAD.

IN WITNESS WHEREOF, I HAVE HEREUNTO SUBSCRIBED MY NAME IN MY OFFICE IN THE COUNTY OF CLARK, STATE OF NEVADA.

_____
PEGGY ISOM, RMR, CCR 541

FILED

ORDERED PUBLISHED

AUG 20 2018

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re: CAESARS ENTERTAINMENT OPERATING COMPANY, INC., Debtor.	BAP No. NV-17-1386-LBTa BAP No. NV-17-1388-LBTa (Related Appeals) Adv. No. 2:17-ap-01237-LEB Adv. No. 2:17-ap-01238-LEB
MOTI PARTNERS, LLC; MOTI PARTNERS 16, LLC, Appellants, v. DESERT PALACE, INC.; PARIS LAS VEGAS OPERATING COMPANY, LLC; PHWLV, LLC; BOARDWALK REGENCY CORPORATION, DBA Caesars Atlantic City; ROWEN SEIBEL; LLTQ ENTERPRISES, LLC; LLTQ ENTERPRISES 16, LLC; FERG, LLC; FERG 16, LLC; TPOV ENTERPRISES, LLC; TPOV ENTERPRISES 16, LLC; DNT ACQUISITION, LLC; GR BURGR, LLC; J. JEFFREY FREDERICK, Appellees.	**OPINION**

LLTQ ENTERPRISES 16, LLC; LLTQ ENTERPRISES, LLC; FERG, LLC; FERG 16, LLC,

Appellants,

v.

DESERT PALACE, INC.; PARIS LAS VEGAS OPERATING COMPANY, LLC; PHWLV, LLC; BOARDWALK REGENCY CORPORATION, DBA Caesars Atlantic City; ROWEN SEIBEL; MOTI PARTNERS, LLC; MOTI PARTNERS 16, LLC; TPOV ENTERPRISES, LLC; TPOV ENTERPRISES 16, LLC; DNT ACQUISITION, LLC; GR BURGR, LLC; J. JEFFREY FREDERICK,

Appellees.

Argued and Submitted on July 27, 2018
at Las Vegas, Nevada

Filed – August 20, 2018

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Laurel E. Babero, Bankruptcy Judge, Presiding

Appearances: Nathan Q. Rugg of Barack Ferrazzano Kirschbaum & Nagelberg LLP argued for Appellants; Jeffrey Zeiger of Kirkland & Ellis LLP argued for Appellees.

Before: LAFFERTY, BRAND, and TAYLOR, Bankruptcy Judges.

LAFFERTY, Bankruptcy Judge:

INTRODUCTION

Appellants challenge the bankruptcy court's orders: (1) remanding certain removed claims to Nevada state court based on lack of subject matter jurisdiction; and (2) denying as moot Appellants' motions to transfer venue to the Bankruptcy Court for the Northern District of Illinois.

Because 28 U.S.C. § 1447(d) prohibits review of remand orders that are based on a lack of subject matter jurisdiction, we DISMISS these related appeals.

FACTUAL BACKGROUND

The Caesars-Seibel Restaurant Agreements

Caesars Entertainment Operating Company ("Caesars") and its various affiliates operate multiple casinos in numerous states. Between 2009 and 2014, Caesars affiliates Desert Palace, Inc. ("Desert Palace") and Boardwalk Regency Corporation d/b/a Caesars Atlantic City ("Boardwalk") entered into agreements with entities affiliated with Rowen Seibel (the "Seibel Agreements") to design, develop, construct, and operate restaurants in

Caesars' casinos in Las Vegas, Nevada, and Atlantic City, New Jersey.

Specifically, in 2009, Desert Palace contracted with Seibel affiliate MOTI Partners, LLC ("MOTI") to design, develop, construct, and operate the Serendipity restaurant at Caesar's Palace in Las Vegas, Nevada. In 2012, Desert Palace contracted with Seibel affiliate LLTQ Enterprises, LLC ("LLTQ") to design, develop, construct, and operate a restaurant branded under the name of celebrity chef Gordon Ramsay at Caesar's Palace in Las Vegas. In 2014, Boardwalk contracted with Seibel affiliate FERG, LLC ("FERG") to design, develop, construct, and operate a second Ramsay-branded restaurant at Caesars Atlantic City in New Jersey.

Each of the Seibel Agreements included representations, warranties, and conditions to ensure that Caesars and its affiliates (the "Caesars Affiliates") were not entering into business relationships that would jeopardize their good standing with gaming regulators. To ensure that the Caesars Affiliates were not doing business with an "Unsuitable Person," as defined in the agreements, the Seibel Agreements required Mr. Seibel to provide at the outset of the business relationships "Business Information Forms," in which Mr. Seibel represented that he had not been a party to a felony in the last ten years and that there was nothing that would prevent him from being licensed by a gaming authority. The Seibel Agreements also required Mr. Seibel and his entities to update those disclosures if they became inaccurate; they never provided an update.

Unbeknownst to the Caesars Affiliates, when the parties entered into the Seibel Agreements, Mr. Seibel was engaged in criminal conduct that rendered him "Unsuitable" as defined by the Seibel Agreements. Specifically, beginning in 2004 Mr. Seibel was using foreign bank accounts to defraud the IRS. In April 2016, Mr. Seibel was charged with and pleaded guilty to one count of a corrupt endeavor to obstruct and impede the due administration of Internal Revenue Laws. In August 2016 Mr. Seibel was sentenced to federal prison, home confinement, and community service. Mr. Seibel never informed the Caesars Affiliates of any of his criminal activities or his conviction, which the Caesars Affiliates discovered from August 2016 press reports. The Caesars Affiliates terminated the Seibel Agreements on September 2, 2016.

The Caesars Bankruptcies

Caesars and numerous affiliates including Desert Palace and Boardwalk each filed chapter 11[1] bankruptcy petitions in the Bankruptcy Court for the Northern District of Illinois in January 2015. The cases were ordered jointly administered, with Caesars designated as the lead case.

In June 2015, Caesars moved to reject the LLTQ and FERG agreements related to the operation of the Ramsay-branded restaurants. In January 2016, Caesars moved to reject the MOTI agreement related to the operation of the

[1]Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure.

Serendipity restaurant. LLTQ and FERG filed a request for payment of administrative expenses in November 2015. MOTI and MOTI Partners 16, LLC (the "MOTI Entities") filed a request for payment of administrative expenses in November 2016. The motions to reject and requests for payment of administrative expenses–which involve the impact of Mr. Seibel's criminal activity on the parties' rights and liabilities under the Seibel Agreements–remain pending before the Illinois bankruptcy court.

Caesars' plan of reorganization was confirmed on January 17, 2017, and the plan's effective date occurred on October 6, 2017.

Nevada State Court Action

On August 25, 2017, Desert Palace, Boardwalk, Paris Las Vegas Operating Company, LLC, and PHWLV, LLC ("Caesars Plaintiffs"), filed a lawsuit against LLTQ, LLTQ Enterprises 16, LLC, FERG, FERG 16, LLC (collectively, "LLTQ/FERG"), the MOTI Entities, and others[2] in the District Court of the State of Nevada, Clark County ("Nevada Action"). The complaint seeks three counts of declaratory relief against all defendants: Count I seeks a declaration confirming that under Nevada law the Caesars Plaintiffs properly terminated their agreements with the Seibel-affiliated entities; Count II seeks a declaration that under Nevada law the Caesars Plaintiffs have

[2]The other defendants are Rowen Seibel, TPOV Enterprises, LLC, TPOV Enterprises 16, LLC, DNT Acquisition, LLC, GR Burgr, LLC, and J. Jeffrey Frederick. The TPOV entities, DNT, and GR Burgr are Seibel affiliates who are parties to other agreements with Caesars entities.

no current or future obligations to the defendants under the Seibel Agreements because they were fraudulently induced to enter into the Seibel Agreements and because Mr. Seibel and his affiliated entities breached the agreements by failing to disclose material facts; and Count III seeks a declaration that under Nevada law the Seibel Agreements do not prohibit or limit existing or future restaurant ventures between the Caesars Plaintiffs and Gordon Ramsay.

Proceedings in the Nevada Bankruptcy Court

On September 27, 2017, the MOTI Entities and LLTQ/FERG each filed Notices of Removal of certain claims in the Nevada Action to the Bankruptcy Court for the District of Nevada, creating Adv. Nos. 17-1237 and 17-1238. The Caesars Plaintiffs filed identical motions in each adversary proceeding to remand the removed claims to the Nevada state court. They argued that the bankruptcy court lacked subject matter jurisdiction because (1) the removed claims did not arise under the Bankruptcy Code; and (2) the claims were not sufficiently related to the bankruptcy proceedings to confer jurisdiction on the bankruptcy court because Caesars had already confirmed a plan of reorganization and the claims did not satisfy the "close nexus" test for postconfirmation jurisdiction. In the alternative, the Caesars Plaintiffs argued that even if the court had jurisdiction, it should remand on equitable grounds.

After a hearing, the bankruptcy court took the matters under submission and issued findings of fact and conclusions of law and orders (1) granting the

Caesars Plaintiffs' motions to remand; and (2) denying the MOTI Entities' and LLTQ/FERG's motions to transfer venue as moot. In its findings, the bankruptcy court concluded that it lacked subject matter jurisdiction over the removed claims because the removing parties had not established the requisite close nexus between those claims and Caesars' confirmed plan. Alternatively, the bankruptcy court determined that if it had jurisdiction, it would exercise its discretion to remand the claims to the state court on equitable grounds pursuant to 28 U.S.C. § 1452(b).

The MOTI Entities and LLTQ/FERG timely appealed.

Motions to dismiss

As discussed below, Appellees, the Caesars Plaintiffs, have moved to dismiss these appeals; Appellants oppose the motions. For the reasons explained below, we grant Appellees' motions to dismiss.

JURISDICTION

The bankruptcy court had jurisdiction, if at all, pursuant to 28 U.S.C. §§ 1334. We have jurisdiction under 28 U.S.C. § 158.

ISSUES

Did the bankruptcy court abuse its discretion in deciding the remand motions before the transfer motions?

Should these appeals be dismissed?

STANDARD OF REVIEW

A bankruptcy court's decision regarding the order in which to consider

a motion to remand and a motion to transfer venue is reviewed for abuse of discretion. *See Hawkins v. Biotronik, Inc.*, No. 8:16-cv-02227, 2017 WL 838650, at *3 (C.D. Cal. Mar. 3, 2017) (district courts have discretion over whether to hear a motion to transfer prior to a motion to remand).

To determine whether the bankruptcy court has abused its discretion, we conduct a two-step inquiry: (1) we review de novo whether the bankruptcy court identified the correct legal rule to apply to the relief requested and (2) if it did, whether the bankruptcy court's application of the legal standard was illogical, implausible, or without support in inferences that may be drawn from the facts in the record. *United States v. Hinkson*, 585 F.3d 1247, 1262–63 & n.21 (9th Cir. 2009) (en banc).

DISCUSSION

A. The bankruptcy court did not abuse its discretion in deciding the remand motions before the transfer motions.

Appellants argue that the bankruptcy court abused its discretion in not transferring the remand motions to the Illinois bankruptcy court for determination. In other words, they contend that the bankruptcy court should have considered the transfer motions before the remand motions.

"Most courts, when faced with concurrent motions to remand and transfer, resolve the motion to remand prior to, and/or to the exclusion of, the motion to transfer. . . . Only in rare circumstances should transfer motions be considered before remand motions." *Pac. Inv. Mgmt. Co. LLC v. Am. Int'l Grp.*,

Inc., No. 8:15-cv-00687, 2015 WL 3631833, at *4 (C.D. Cal. June 10, 2015) (citations omitted). Such rare circumstances include multi-district litigation and where "related to" bankruptcy jurisdiction and removal raise difficult questions. *Id. See also Hawkins*, 2017 WL 838650, at *3, and *Kamana O'Kala, LLC v. Lite Solar, LLC*, No. 3:16–cv–01532, 2017 WL 1100568, at *4 (D. Or. Feb. 13, 2017).

Appellants have not shown that the jurisdictional questions presented in the remand motions were "difficult issues" that could be addressed only by the Illinois bankruptcy court. Appellants argue that the Illinois court was "more invested" in the case and "better equipped to address the jurisdictional and remand analysis," because the matters had been pending in that court for over two years and because that court would ultimately have to reconcile and deal with the consequence of the decision on the remand motions. We find these arguments unconvincing, and conclude that the bankruptcy court did not abuse its discretion in considering the remand motions first.

B. We must dismiss these appeals because 28 U.S.C. § 1447(d) prohibits review of the remand orders.

Appellees move to dismiss these appeals on two grounds: first, they argue that the bankruptcy court's remand orders are not appealable to the extent they were based on lack of subject matter jurisdiction; second, they argue that Appellants waived their right to contest the remand orders because they have continued litigating those claims in state court. Because we agree

with Appellees that we are prohibited from reviewing the remand orders, we need not address the waiver argument.

Two federal statutes dealing with removal and remand are relevant here. The first, 28 U.S.C. § 1447, governing procedures after removal generally, provides, in part, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). Importantly, the statute further provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ." 28 U.S.C. § 1447(d). The Supreme Court has interpreted these provisions to mean that only remands based on grounds specified in § 1447(c)—a timely raised defect in removal procedure or lack of subject matter jurisdiction—are immune from review under § 1447(d). *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-28 (1995).

The second relevant statute is the bankruptcy removal statute, 28 U.S.C. § 1452, which provides:

> (a) A party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.
>
> (b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under

> section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

Under this statute, a remand order that is based on equitable grounds under 28 U.S.C. § 1452(b) is reviewable only by a district court or bankruptcy appellate panel, but not by a court of appeals or the Supreme Court. *McCarthy v. Prince (In re McCarthy)*, 230 B.R. 414, 417 (9th Cir. BAP 1999).

Although the bankruptcy court did not cite 28 U.S.C. § 1447(c) in its findings and conclusions, its finding that it lacked subject matter jurisdiction over the removed claims places the remand orders squarely under 28 U.S.C. § 1447(d). *See Telluride Asset Resolution, LLC v. Bullock (In re Telluride Income Growth LP)*, 364 B.R. 390, 400 (10th Cir. BAP 2007) (bankruptcy court's findings were in effect a determination that it lacked subject matter jurisdiction and thus 28 U.S.C. § 1447(d) precluded review).

In *Things Remembered*, in determining that a court of appeals could not review a district court's order remanding a state court lawsuit against a chapter 11 debtor, the Supreme Court held that 28 U.S.C. § 1447(d) bars appellate review of a remand order that is made for any of the reasons set forth in 28 U.S.C. § 1447(c), even if the removal was effected under the bankruptcy removal statute, 28 U.S.C. § 1452(a). "Section 1447(d) applies 'not only to remand orders made in suits removed under [the general removal statute], but to orders of remand made in cases removed under **any other statutes**, as well.'" 516 U.S. at 128 (quoting *United States v. Rice*, 327 U.S. 742,

752 (1946)). In other words, even if a claim is removed under the bankruptcy removal statute (or another removal statute), if it is remanded for lack of subject matter jurisdiction (or because of a timely raised defect in the removal procedure), appellate review is barred by 28 U.S.C. § 1447(d).

At least two bankruptcy appellate panels have interpreted *Things Remembered* as barring review of a bankruptcy court decision remanding claims for lack of subject matter jurisdiction. *See In re Telluride Income Growth LP*, 364 B.R. 390, and *Auto-Owners Ins. v. Rossi (In re Rossi)*, 444 B.R. 170, 172-73 (6th Cir. BAP 2011). District courts, including at least one in the Ninth Circuit, have reached the same conclusion. *See Hall Family Props. Ltd. v. Gosnell Dev. Corp. of Ariz.*, No. 2:15-cv-00289, 2015 WL 8528497, at *4 (D. Ariz. Dec. 11, 2015) ("[T]he apparent basis of the bankruptcy court's Remand Order–that the court lacks jurisdiction–would deprive this Court of jurisdiction to hear any appeal thereof."); *See also Richardson v. Carrasco (In re Richardson)*, 319 B.R. 724, 728-29 (S.D. Fla. 2005) (28 U.S.C. § 1447(d) precludes review of remand orders based on lack of subject matter jurisdiction even if the decision is wrong).

As contrary authority, Appellants cite an unpublished decision by this Panel, *Williams v. Franklin Towers Homeowners Ass'n, Inc. (In re Williams)*, No. CC-04-1605-MaMoPa, 2006 WL 6817587 (9th Cir. BAP Mar. 10, 2006). In *Williams*, appellees argued that the remand order at issue was not reviewable because it was based in part on a timely raised defect in the removal procedure: specifically, an untimely notice of removal. But in *Williams*, the

appellant did not provide the Panel with the bankruptcy court's findings and conclusions; thus the Panel could not ascertain the basis for the court's ruling. Instead of dismissing or affirming on that basis, the Panel exercised its discretion to review the record it had to see whether any plausible basis existed on which the bankruptcy court might have exercised its discretion to remand. Lacking any findings from the bankruptcy court that the remand was based on a procedural defect, the Panel applied the "any equitable ground" standard of 28 U.S.C. § 1452(b). *Id.* at *5-6. Although the Panel found that the record supported a finding that the notice of removal was untimely under Rule 9027, it did not analyze whether that circumstance precluded review under 28 U.S.C. § 1447(d). We thus decline Appellants' invitation to read *Williams* as authority for our review of the remand orders.

Appellants also cite *McVey v. Johnson (In re SMBC Healthcare, LLC)*, 547 B.R. 661 (S.D. Tex. 2016), and *In re D'Angelo*, 479 B.R. 649 (E.D. Pa. 2012). In *SMBC Healthcare*, the district court held that, notwithstanding 28 U.S.C. § 1447(d) and *Things Remembered*, it had jurisdiction to review a bankruptcy court remand order that was based on lack of subject matter jurisdiction. The district court distinguished *Things Remembered* because that case addressed the jurisdiction of the court of appeals over an order of remand issued by a district court, not the jurisdiction of a district court to review a bankruptcy court's remand order. *In re SMBC Healthcare*, 547 B.R. at 675. In addition, the *SMBC* court concluded that "[c]ourts that have interpreted *Things Remembered*

as precluding district courts from reviewing bankruptcy court remand orders also overlook the fact that their interpretation impermissibly deprives Article III district courts of the right to oversee Article I bankruptcy courts." *Id.*

D'Angelo, cited by Appellants and relied upon by the *SMBC* court, is not persuasive. The appeal in *D'Angelo* was from a bankruptcy court's award of attorney's fees for wrongful removal, but the appellant urged the district court to treat the appeal as challenging the bankruptcy court's remand order and moved to dismiss the appeal under 28 U.S.C. §§ 1447(d) and 1452(b). The district court denied the motion because the remand order had not been appealed, and it found that it had jurisdiction over the appeal of the separate fee award. In dicta, the court explained that 28 U.S.C. § 1452(b) prohibits review by a court of appeals and the Supreme Court, but not by a district court and added that 28 U.S.C. § 1452(b) could not preclude review of a bankruptcy court's remand order by a district court "without running afoul of the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). *Marathon* concluded that Congress impermissibly delegated Article III functions to bankruptcy courts through the Bankruptcy Act of 1978." *In re D'Angelo*, 479 B.R. at 655 (parallel citations omitted). The *D'Angelo* court did not consider or analyze the applicability of 28 U.S.C. § 1447(d), nor did it need to.

In our view, however, if Congress had intended to permit (or require)

Article III review of bankruptcy court remand orders made on the grounds specified in 28 U.S.C. § 1447(c), it could have easily said so. In fact, post-*Marathon*, Congress has amended 28 U.S.C. §§ 1334 and 1452 and 11 U.S.C. § 305(c) to specify that certain abstention or remand orders issued under those statutes cannot be reviewed by the court of appeals or the Supreme Court. Yet Congress chose not to amend 28 U.S.C. § 1447(d). *See Pio v. Gen. Nutrition Cos., Inc.*, 488 F. Supp. 2d 714, 717-18 (N.D. Ill. 2007). And while we have found no published Ninth Circuit decisions on point, two unpublished Ninth Circuit decisions bolster our conclusion that we may not review the remand orders. *See Durham v. Kartchner (In re Durham)*, 91 F.3d 151 (9th Cir. 1996) (unpublished table decision) (affirming the district court's decision to dismiss an appeal of a bankruptcy court's 28 U.S.C. § 1447(c) remand order on the basis that those orders were unreviewable); *Kartchner v. Knauss (In re Knauss)*, 91 F.3d 152 (9th Cir. 1996) (unpublished table decision) (same).

Based on the foregoing, we conclude that we are prohibited from reviewing the bankruptcy court's remand orders. The plain language of 28 U.S.C. § 1447(d) is that a remand order that is based on the grounds set forth in 28 U.S.C. § 1447(c) is not reviewable, period.[3] And *Things Remembered* makes clear that this rule applies even if the claims at issue were removed

[3]Courts have recognized a "substantive law exception" to the prohibition on review. That exception permits review of an order that dismisses a claim that precedes the order of remand. *In re Telluride Income Growth LP*, 364 B.R. at 400. The substantive law exception is inapplicable here; no party has argued otherwise.

pursuant to 28 U.S.C. § 1452. 516 U.S. at 128.[4]

CONCLUSION

For the reasons explained above, we DISMISS the appeals of the remand orders. We also DISMISS the appeals of the orders denying Appellants' motions to transfer, which were rendered moot by the remand orders.

[4]As noted, the bankruptcy court alternatively found that if it had jurisdiction, it would remand on equitable grounds under 28 U.S.C. § 1452(b). Because we cannot review the remand orders, we need not consider any alternate basis for remand. If we were to do so, however, we would find no abuse of discretion. The bankruptcy court found that nearly all of the 14 factors to be weighed in determining whether to remand on equitable grounds tipped the scales in favor of remand. *See Nilsen v. Neilson (In re Cedar Funding, Inc.)*, 419 B.R. 807, 820 n.18 (9th Cir. BAP 2009). For example, the court found that the removed claims are all state law contract issues; comity weighs in favor of remand; the Nevada Action remains pending and various claims have already been remanded; the substance of the issues in the removed claims is not inextricably bound to the Illinois contested matters; the claims are not core proceedings; and there are several nondebtor parties involved in the Nevada Action who could be impacted by potentially inconsistent decisions.