IN THE SUPREME COURT OF THE STATE OF NEVADA

ROWEN SEIBEL; LLTQ ENTERPRISES, LLC; LLTQ ENTERPRISES 16, LLC; FERG, LLC; FERG 16, LLC; MOTI PARTNERS, LLC; MOTI PARTNERS 16, LLC; TPOV ENTERPRISES, LLC; TPOV 16 ENTERPRISES, LLC; DNT ACQUISITION, LLC, appearing derivatively by one of its two members, R Squared Global Solutions, LLC

Petitioners,

vs.

CLARK COUNTY DISTRICT COURT, THE HONORABLE JOSEPH HARDY, DEPARTMENT 15,

Respondent,

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

Real Parties in Interest.

Case Number: 76118

Eighth Judicial District Court
Case No. A-17-760537-B,
Dept. 15, Honorable Joseph Hardy

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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I. INTRODUCTION.

For more than two years before Real Parties filed the Nevada State Court Action, the parties had been litigating the very same issues before federal courts in Illinois and Nevada. During that time, Real Parties neither cared that the parties were litigating before multiple courts nor had any concerns about the federal courts deciding issues related to Nevada contract and gaming law. In fact, Real Parties repeatedly asked the federal courts to rule in their favor based on Nevada contract and gaming law. (*See, e.g.*, Debtors' Obj. to LLTQ and FERG's Mot. for Partial Sum. Judg., Oct. 12, 2016, at Petitioners' Appendix ("Pet. App.") 2152-53, ¶ 3 (claiming gaming regulators could discipline Caesars for continuing to do business with Real Parties); *see also* Debtors' Obj. to LLTQ and FERG's Mot. to Compel, Aug. 10, 2016, at Pet. App. 2046-47, ¶¶ 18-19 (making arguments based on Nevada contract law); Debtors' Obj. to LLTQ and FERG's Mot. for Protective Order, April 26, 2017, at Pet. App. 2196 (same); Order, July 3, 2017, Pet. App. 748-49 (rejecting Paris's argument that TPOV 16's breach of contract claim fails as a matter of law based on Rowen Seibel's alleged unsuitability).)

After the Illinois bankruptcy court called some of their legal theories "thin" and "dubious" and questioned the accuracy of their arguments concerning Nevada contract law and about five weeks after the Nevada federal court recognized the potential lack of relevance to their suitability argument, Real Parties raced to the

Eighth Judicial District Court and filed the Nevada State Court Action. Real Parties claim they did so to create "one comprehensive forum" (Ans. 2) and because the Eighth Judicial District Court should decide issues related to Nevada contract and gaming law (*id*. 35 ("These suitability issues are best decided by a Nevada state court.").) These arguments are belied by the fact that Real Parties' purported concerns about litigating before multiple courts and having federal courts decide these issues suddenly arose, for the first time in over two years, right after the federal courts questioned their legal theories.

In February 2018, Petitioners moved to dismiss the Nevada State Court Action under the first-to-file rule and due to forum shopping. (Pet. 14-17 (summarizing the district court proceedings).) FERG also sought dismissal because the development agreement between it and CAC requires all claims to be litigated in New Jersey. (FERG Agreement, § 14.10(c), Pet. App. 1990.) The district court recognized the validity of the forum selection clause but denied Petitioners' motions. (Denial Order, June 1, 2018, Pet. App. 3574-3582.) On June 18, 2018, Petitioners filed their Petitioner requesting a writ directing the district court to dismiss the Nevada State Court Action. Real Parties answered the Petition on August 21, 2018.

In their Answer, Real Parties argue that this Court should not entertain the Petition. (Ans. 3, 22-25.) This Court should entertain it because, amongst other reasons, (i) the claims against FERG must be litigated in New Jersey per a valid,

mandatory forum selection clause, and the district court was obligated to dismiss those claims pursuant to clear Nevada legal authority, and (ii) there are several matters of first impression, including whether this Court should adopt the United States Supreme Court's analysis in *Atl. Marine Constr. Co., Inc. v. U.S. Dis. Ct. for W. Dist. of Tex.*, 571 U.S. 49 (2013) ("*Atlantic Marine*"). With respect to matters of first impression, Real Parties ask this Court to adopt *Atlantic Marine* and recognize a public policy exception to forum selection clauses for the first time. (Ans. 27 ("No Nevada state court has addressed the public policy exception as it relates to enforcement of 'mandatory' forum selection clauses.")[1]

Both Petitioners and Real Parties agree that this Court should follow *Atlantic Marine* in determining whether the district court erred by refusing to enforce the forum selection clause. In *Atlantic Marine*, the United States Supreme Court said a district court must enforce a forum selection clause unless allowing the case to remain before the nonchosen forum is warranted by extraordinary public-interest factors unrelated to the convenience of the parties. The *Atlantic Marine* court applied the public-interest factors for forum non conveniens. This Court should do the same by applying the public-interest factors it identified for forum non conveniens in

[1] It also appears this Court has never addressed the first-to-file rule in a citable opinion. (Pet. 27, n.10; *see also* Ans. 32-37 (failing to identify a citable opinion from this Court concerning the first-to-file rule).)

Provincial Gov't of Marinduque v. Placer Dome, Inc., 131 Nev. Adv. Op. 35, 350 P.3d 392 (2015) ("*Marinduque*").

The *Marinduque* public-interest factors strongly favor enforcement of the forum selection clause. A local Nevada interest in the case does not exist because the FERG Agreement is governed by New Jersey law and concerns a New Jersey restaurant. A New Jersey court would be more familiar with New Jersey law. If the district court were to entertain the claims against FERG, it would impose tremendous burden and expense on the district court and only worsen the Eighth Judicial District Court's severe congestion. There simply are no extraordinary public-interest factors that could overcome the forum selection clause.

As for the first-to-file rule, this Court should adopt the Ninth Circuit's three-part test, which examines the (i) chronology of the lawsuits, (ii) similarity of the parties, and (iii) similarity of the issues. Real Parties essentially concede that this test has been satisfied but ask this Court to make an exception to it. (Ans. 32-37.) The cases cited by Real Parties are inapposite and easily distinguishable. They concern federal abstention, not the first-to-file rule, and involve situations in which the second action was filed mere days after the first action, not years later (Caesars filed the bankruptcy litigation against LLTQ and FERG in June 2015, and Real Parties filed the Nevada State Court Action in August 2017). The district court abused its discretion by refusing to apply the first-to-file rule.

With respect to forum shopping, Real Parties claim they filed the Nevada State Court Action to create a comprehensive forum, not a favorable one. (Ans. 38.) As previously explained, that argument is belied by Real Parties' unexplainable delay in filing the Nevada State Court Action. Real Parties' true motivation for filing the Nevada State Court Action is shown by the fact that after having litigated for several years before multiple federal courts, Real Parties suddenly desired to create a comprehensive forum outside the federal judiciary right after the federal courts independently demonstrated a lack of receptiveness to their legal theories. Only one conclusion can be drawn from these facts: Real Parties filed the Nevada State Court Action in search of a more favorable forum. The district court therefore abused its discretion by refusing to dismiss due to forum shopping.

Petitioners therefore respectfully request a writ compelling the district court to vacate the Denial Order and dismiss the claims against them.

II. WHY THE PETITION SHOULD BE CONSIDERED.

A. The District Court Was Obligated to Dismiss the Claims Against FERG Pursuant to Clear Nevada Precedent.

Real Parties acknowledge that although this Court generally declines to consider writ petitions concerning motions to dismiss, it may "consider such writ petitions when the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule . . . ." *Int'l Game Tech., Inc. v. Dist. Ct*., 122 Nev.

132, 142, 127 P.3d 1088, 1096 (2006) (quoted at Pet. 17-18; Ans. 22-23).[2] This Court should entertain the Petition because the district court was obligated to dismiss the claims against FERG pursuant to clear legal authority. (Pet. 18.) The forum selection clause unambiguously requires those claims to be litigated in New Jersey. (*Id.* 21-22.) Under clear Nevada legal authority, an unambiguous contract must be enforced as written. (*Id.* 24-25 (citing *Ringle*, 120 Nev. at 93, 86 P.3d at 1039).)

B. There Are Matters of First Impression.

This Court also should entertain the Petition because "important issue[s] of law need[] clarification and this court's review would serve considerations of public policy or sound judicial economy and administration." *Int'l Game Tech*., 122 Nev. at 142, 127 P.3d at 1096 (quoted at Pet. 18); *see also Double Diamond v. Dist. Ct*., 131 Nev. Adv. Op. 57, 354 P.3d 641, 643 (2015) (entertaining a writ petition concerning a motion to dismiss). Without clarification, these same issues likely will continue to be brought before this Court in writ petitions in future cases.

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[2] Real Parties claim Petitioners "do not even attempt [in their Petition] to meet their burden of showing one of the[] two narrow exceptions [under *Int'l Game Tech., Inc*. v. Dist. Ct., 122 Nev. 132, 127 P.3d 1088 (2006)] for this Court to consider the Petition." (Ans. 23.) Real Parties' argument is inaccurate. The Petition cites *International Gaming Technology* and argues that this Court should entertain it because (i) the district court was obligated to dismiss the claims against FERG under clear Nevada legal authority; and (ii) there are matters of first impression. (Pet. 18 ("[T]he district court was absolutely required by the law to dismiss the claims against FERG under the mandatory forum selection clause."); *see also id.* ("[I]t appears the Denial Order raises an issue of first impression.")

Even though it concluded the forum selection clause applies to the claims against FERG, the district court denied FERG's motion because the parties already are litigating before the Illinois bankruptcy court. (Pet. 16-17; 23-24.) It also denied the motion based on the totality of circumstances (and never precisely identified the specific circumstances on which it relied). (*Id.*) Petitioners are unaware of – and Real Parties do not identify – any Nevada law allowing a district court to disregard a forum selection clause because one of the parties filed bankruptcy outside the selected forum or based on the totality of circumstances. (*Id.* 18-19.)

Simply ignoring these matters of first impression, Real Parties claim "the denial of FERG's motion to dismiss with respect to the forum selection clause does not raise issues of first impression." (Ans. 24.) Ironically, however, Real Parties raise a matter of first impression by asking this Court to recognize for the first time a public-interest exception to forum selection clauses. (Ans. 27 ("No Nevada state court has addressed the public policy exception as it relates to enforcement of 'mandatory' forum selection clauses.").) Based on the existence of matters of first impression, this Court should entertain the Petition.

C. Petitioners Do Not Have a Plain, Speedy and Adequate Remedy in the Ordinary Course of the Law, and the District Court Manifestly Abused its Discretion.

Because Petitioners are not entitled under NEV. R. APP. P. 3A(b) to appeal the Denial Order at this time, they do not have a plain, speedy and adequate remedy in

the ordinary course of law. (Pet. 17, 20.) Without writ relief, FERG would be forced to litigate in the wrong forum. Real Parties' sole response is to characterize that fact as "irrelevant." (Ans. 24.) That fact is relevant under NEV. REV. STAT. § 34.170, which provides that a writ of mandamus "shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." Finally, this Court should entertain the Petition because the district court manifestly abused its discretion by refusing to dismiss the action under the first-to-file rule and due to forum shopping. (Pet. 17-18, 20-21.) For each of these independent reasons, this Court should entertain the Petition.

III. WHY A WRIT SHOULD ISSUE.

A. The District Court Was Obligated to Dismiss the Claims Against FERG Due to the Forum Selection Clause.

1. *A District Court May Decline to Enforce a Forum Selection Clause Based Only on Extraordinary Public-Interest Factors Unrelated to the Convenience of the Parties*.

The parties agree that this Court should follow *Atlantic Marine* but disagree on whether it permitted the district court to deny FERG's motion based on the totality of circumstances. (*See* Pet. 17-20, 25-26; *compare to* Ans. 27-30.) Real Parties bear the burden of convincing this Court to affirm de novo. *Atl. Marine*, 571 U.S. at 64 ("[T]he plaintiff must bear the burden of showing why the court should not transfer the case to the forum to which the parties agreed."); *see also* Pet. 1-2, ¶ 1 (rulings concerning forum selection clauses are reviewed de novo).

Under *Atlantic Marine*, a district court must enforce a forum selection clause unless transfer to the selected forum is disfavored by extraordinary public-interest factors unrelated to the convenience of the parties. *Atl. Marine*, 571 U.S. at 52 ("[A] district court should transfer the case unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer."); *see also id.* at 64 ("[A] district court may consider arguments about public-interest factors only.") Public-interest factors "will rarely defeat a transfer motion," and "forum-selection clauses should control except in unusual cases." *Id.* at 64. Furthermore, "the plaintiff's choice of forum merits no weight." *Id.* at 63.[3]

2. *This Court Should Apply the Public-Interest Factors Identified in Marinduque for Forum Non Conveniens.*

Real Parties correctly note that "[n]o Nevada state court has addressed the public policy exception as it relates to enforcement of 'mandatory' forum selection

[3] Real Parties misread *Atlantic Marine* with respect to whether the district court may afford any weight to the plaintiff's choice of forum. Real Parties claim the district court "must also give some weight to the plaintiffs' choice of forum." (Ans. 28 (quoting *Atl. Marine*, 571 U.S. at 63, n.6).) To the contrary, the district court may consider the plaintiff's choice of forum only in a "case not involving a forum-selection clause" in which a motion to transfer venue is brought under 28 U.S.C. § 1404(a). *Atl. Marine*, 571 U.S. at 62. The district court's analysis under § 1404(a) changes in three ways when there is a forum selection clause, and the first change is that "the plaintiff's choice of forum merits no weight." *Atl. Marine*, 571 U.S. at 63.

clauses." (Ans. 27.)[4] They rely on a random collection of mostly unpublished opinions from federal courts in California, Maryland, and Wisconsin concerning the public-interest factors. (Ans. 30.) They also fail to identify the precise public-interest factors they believe this Court should apply. Rather than combing through the cases cited by Real Parties to identify the relevant public-interest factors, this Court should use the public-interest factors it already has identified for forum non conveniens.

Indeed, in *Atlantic Marine*, the United States Supreme Court used the public-interest factors for forum non conveniens. *Atl. Marine*, 571 U.S. at 63 (citing *Piper Aircraft Company v. Reyno*, 454 U.S. 235, n.6 (1981)); *see also Yei A. Sun v. Advanced China Healthcare, Inc.*, --- F.3d ---, 2018 WL 4000257, at *4 (9th Cir. Aug. 22, 2018) (using the factors); *Morse v. Ten X Holdings, LLC*, 2017 WL 4079264, at *4 (D. Nev. Sept. 13, 2017) (same); *Infinite Fin. Sols., Inc. v. Strukmyer, LLC*, 2014 WL 12598866, at *5 (D. Nev. Jan. 28, 2014) (same).

In *Marinduque*, this Court identified the public-interest factors relevant to forum non conveniens as "the local interest in the case, the district court's familiarity

[4] Citing *Miller v. A & R Joint Venture*, 97 Nev. 580, 636 P.2d 277 (1981), Real Parties claim that "[u]nder well-established Nevada law, Nevada's public interests can render private contractual bargains unenforceable." (Ans. 27.) In *Miller*, this Court was reluctant to allow public policy to prevail over the freedom of contract. It said it was "not convinced that public policy requires us to refuse to enforce [the exculpatory provision in a lease], which was freely contracted to by the parties. The lease provision was a valid exercise of the freedom of contract." *Id.* at 582, 278.

with applicable law, the burdens on local courts and jurors, court congestion, and the costs of resolving a dispute unrelated to the plaintiffs chosen forum." 350 P.3d at 397 (citing *Lueck v. Sundstrand Corp*., 236 F.3d 1137, 1147 (9th Cir. 2001)).[5] This Court should apply these public-interest factors.

3. *The Public-Interest Factors from Marinduque Do Not Disfavor – And in Fact Favor – Dismissal of the Claims Against FERG.*

In *Marinduque*, this Court affirmed the dismissal of an action for forum non conveniens. With respect to "the local interest in the case," the *Marinduque* case lacked "any genuine connection" to Nevada because the parties were foreign citizens and "no events related to this litigation occurred in Nevada." *Marinduque*, 350 P.3d at 397. Similarly, CAC and FERG are headquartered outside Nevada. (FERG Agreement, Pet. App. 1967 (identifying their principal places of business).) Real Parties also have not identified any relevant events in Nevada. Furthermore, the restaurant at issue is in New Jersey. (FERG Agreement, Pet. App. 1967, Recitals A-B.) The FERG Agreement also is governed by New Jersey law. (*Id.*, Pet. App. 1989, § 14.10(a).) Nevada has no local interest in a dispute over a New Jersey restaurant governed by New Jersey law.

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[5] Although the cost of resolving a dispute unrelated to the plaintiffs' chosen forum is relevant to forum non conveniens, it should not be considered here because a district court evaluating a motion "based on a forum-selection clause should not consider arguments about the parties' private interests." *Atl. Marine*, 571 U.S. at 64.

As for "the district court's familiarity with applicable law," a New Jersey court would be more familiar with New Jersey law. As for "the burdens on local courts and jurors," the *Marinduque* court said "[i]t cannot be disputed that this complicated case will impose heavy burdens on any court." *Marinduque*, 350 P.3d at 397. The same is true here. As demonstrated by the factual background sections in the Petition and Answer totaling thirty pages, the litigation has been extensive and intensive to date. (Pet. 2-17; Ans. 6-21.) Handling the litigation will impose tremendous burden and expense on the district court.

As for "court congestion," the *Marinduque* court concluded "the district court did not abuse its discretion by finding that severe court congestion in the Eighth Judicial District favored dismissal." *Marinduque*, 350 P.3d at 397. Litigating the claims against FERG likely will involve voluminous motion practice, frequent court hearings, and a lengthy and complex trial. These events will worsen the Eighth Judicial District Court's "severe" congestion. Accordingly, the public-interest factors in *Marinduque* warrant enforcement of the forum selection clause.

To prove a forum selection clause should not be enforced based on public policy, "the plaintiff must point to a statute or judicial decision that clearly states such a strong public policy." *Yei A. Sun v. Advanced China Healthcare, Inc.*, --- F.3d ---, 2018 WL 4000257, at *6 (9th Cir. Aug. 22, 2018) (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)) (internal citation omitted); *see also Infinite*

Fin. Sols., Inc. v. Strukmyer, LLC, 2014 WL 12598866, at *5 (D. Nev. Jan. 28, 2014) (the *Infinite Financial Solutions* plaintiffs failed to provide any support for their contention "that some of their claims are local claims that would best be resolved 'at home' . . . .") Real Parties fail to identify any Nevada law expressly recognizing any public-interest factors that could overcome the forum selection clause.

Furthermore, with respect to Real Parties' "inconsistent rulings" argument, that ignores the fact that the parties to the Nevada and New Jersey actions would be different (*i.e.*, CAC and FERG would be the only parties to the New Jersey action). There also is no reason at this time to believe that the Nevada and New Jersey courts would make inconsistent rulings. As the Ninth Circuit has noted, it is not the nonchosen forum's job to predict any outcome in a foreign court. *See, e.g., Adema Techs., Inc. v. Wacker Chem. Corp.*, 657 F. App'x 661, 663 (9th Cir. 2016) (quoting *Richards v. Lloyd's of London*, 135 F.3d 1289, 1296 (9th Cir. 1998)). This Court therefore should disregard Real Parties' "inconsistent rulings" argument and reverse the district court's decision based on the *Marinduque* public-interest factors.

4. *The Foreign and Mostly Unpublished Cases cited by Real Parties are Inapposite and Easily Distinguishable.*

Real Parties fail to cite any cases that could carry their burden of convincing this Court to affirm de novo. In the multidistrict litigation case *In re Rolls Royce Corp*. (cited at Ans. 29), the Fifth Circuit issued a writ directing the Western District

of Louisiana to sever and transfer claims subject to a forum selection clause even though the forum selection clause did not apply to all claims and parties. 775 F.3d 671 (5th Cir. 2014). It said judicial economy still could be served by "common discovery among [the] separated cases . . . ." *Id.* at 683. Similarly, Real Parties' "judicial economy" argument is unpersuasive because discovery could be coordinated between the Nevada and New Jersey actions.[6]

In *Artech Info. Sys., LLC v. ProTek Consulting* (cited at Ans. 30), the chosen forum had "no connection to the conduct alleged and businesses involved," and "the motion to transfer — in its entirety — [was] three pages long with little analysis." 2018 WL 3575054, at *5 (D. Md. July 25, 2018). In contrast, the FERG Agreement concerns a New Jersey restaurant and is governed by New Jersey law.

Real Parties cite several cases involving complex civil conspiracies. (Ans. 30.) In the price-fixing case *Ashley Furniture Indus., Inc. v. Packaging Corp. of Am.*, the Western District of Wisconsin was "persuaded that public interest factors favoring all members of an alleged conspiracy to restrain trade be judged in one lawsuit weigh strongly against" transferring venue. 275 F. Supp. 3d 957, 964 (W.D. Wis. 2017). In

[6] The concurring opinion in *In re Rolls Royce Corp*. expresses concern that the majority's opinion could open the door for "any clever party to a lawsuit [to] readily join another party or individual in an attempt to avoid the forum selection clause." 775 F.3d 671, 685 (5th Cir. 2014). The same could occur here if this Court were to uphold the district court's denial of FERG's motion to dismiss.

In re TFT-LCD (Flat Panel) Antitrust Litig., the plaintiffs alleged "an array of conspiratorial conduct by multiple defendants . . . [T]he vast majority of the alleged wrongdoing in this case is not governed by the agreement" with the forum selection clause. 2014 WL 1477748, at *1 (N.D. Cal. Apr. 14, 2014). In contrast to these cases, Real Parties have not pled a conspiracy claim. (State Compl., Pet. App. 1-40.)

In the civil rights case *Bronstein v. U.S. Customs & Border Prot.*, the plaintiffs sued Princess Cruise Lines, U.S. Customs and Border Protection, and the United States after being arrested on a ship. 2016 WL 861102, at *1 (N.D. Cal. Mar. 7, 2016). The contract between plaintiffs and Princess Cruise Lines required all claims to be litigated in Los Angeles County. *Id.* at *2. Plaintiffs filed suit in the Northern District of California, and Princess Cruise Lines moved to transfer venue to the Central District of California. *Id.* One of the reasons the *Bronstein* court denied the motion is because the Central District of California would have lacked subject matter jurisdiction over the claims against Princess Cruise Lines. *Id.* at *6 ("Princess Lines has not shown that the Central District of California would be able to hear the severed claims.") There are no such jurisdictional issues here.

In summation, Real Parties have "not shown the extraordinary circumstances necessary to prevent transfer pursuant to a valid forum-selection clause to which [CAC and FERG] agreed." *Rand v. InfoNow Corp*., 2015 WL 3948840, at *4 (D. Nev. June 29, 2015). The Nevada public-interest factors in *Marinduque* all support

enforcement of the forum selection clause. Accordingly, this Court should direct the district court to dismiss the claims against FERG.

5. *Real Parties' Remaining Arguments Concerning the Forum Selection Clause Are Without Merit.*

a. *FERG Did Not Waive the Forum Selection Clause.*

Real Parties' remaining arguments concerning the forum selection clause are without merit. For starters, Real Parties argue that FERG waived the forum selection clause because it "never sought relief from the automatic stay to allow it to pursue litigation in New Jersey . . . ." (Ans. 31.) Similarly, the district court also concluded that FERG waived the forum selection clause by litigating before the Illinois bankruptcy court. (Pet. 23-24 (citing Tr., May 1, 2018, 49:22 – 50:9, Pet. App. 3530-31).) Real Parties fail to cite a single case finding that a party waived a forum selection clause by failing to file a lift-stay motion. This Court should decline Real Parties' invitation to recognize a "lift-stay" exception to forum selection clauses.

With respect to the district court's finding of waiver, it was clearly erroneous because FERG was forced to litigate before the bankruptcy court to protect its interest. Specifically, CEOC filed bankruptcy and then moved to reject the FERG Agreement. (Pet. 3-7.) FERG had no choice but to object. Similarly, to obtain payments from CEOC for its post-bankruptcy claims, FERG was required by applicable bankruptcy law to file such claims in the bankruptcy court. Because

appearing before the bankruptcy court was necessitated by CAC's conduct, FERG did not waive the forum selection clause.

In 2016, the Fifth Circuit addressed this exact scenario in *Wellogix, Inc. v. SAP Am., Inc.*, 648 F. App'x 398 (5th Cir. 2016). In that case, Germany was the selected forum under the licensing agreement between SAP America, Inc. and SAP A.G. ("SAP") and Wellogix, Inc. ("Wellogix"). *Id.* at 399. SAP filed a declaratory relief action in Texas against Wellogix, and Wellogix countersued for theft and appropriation of trade secrets. *Id.* SAP moved for summary judgment on Wellogix's claims under the forum selection clause. *Id.* The district court granted the motion and "rejected Wellogix's contention that SAP waived the forum selection clause by filing the [declaratory relief action]." *Id.* Affirming, the Fifth Circuit held that "SAP did not waive the forum selection clause by filing the [declaratory relief action], a case necessitated by Wellogix's threat to pursue infringement litigation in the same U.S. court." *Id.* at 401. Because it was forced it to appear before the bankruptcy court to protect its interests, FERG did not waive the forum selection clause.

b. *Real Parties Control Which Court Will Hear the Claims Against FERG if They Are Dismissed.*

Real Parties point out that if given its druthers, FERG would prefer to have the Illinois bankruptcy court hear the claims against it due to its familiarity with the issues. (*See, e.g.*, Ans. 4 ("Petitioners do not intend to seek to have the claims against

FERG litigated in New Jersey . . . .").) Real Parties overlook the simple fact, however, that they, not FERG, will control which court will hear the claims if the Petition is granted. Specifically, if this Court were to direct the district court to dismiss the claims, then Real Parties would have to decide whether to refile them in New Jersey or pursue them in connection with the bankruptcy, where the claims are already pending. This Court therefore should disregard Real Parties' argument concerning FERG's preferred forum.

c. *Real Parties' "Jurisdiction" Argument is Irrelevant and Ignores the Forum Selection Clause.*

Finally, Real Parties argue that the forum selection clause did not divest the district court of subject matter jurisdiction. (Ans. 23; *see also id.* at 26-27.) This argument is irrelevant because the fact remains that the district court was obligated to dismiss the claims against FERG. It also ignores the plain and clear language of the forum selection clause, in which the parties agreed "to submit to the *exclusive jurisdiction* of any state or federal court within the Atlantic County, New Jersey . . . ." (FERG Agreement, § 14.10(c), Pet. App. 1990 (emphasis added).) This Court therefore should disregard Real Parties' "jurisdiction" argument.

B. The District Court Abused Its Discretion by Not Dismissing the Nevada State Court Action Under the First-to-File Rule.

1. *Real Parties Concede that the Three-Part Test for the First-to-File Rule Has Been Satisfied.*

Although this Court has never addressed the first-to-file rule in a citable

opinion, the Ninth Circuit has said a district court should examine "three factors: chronology of the lawsuits, similarity of the parties, and similarity of the issues." (Pet. 27 (quoting *Kohn Law Grp., Inc. v. Auto Parts Mfg. Mississippi, Inc*., 787 F.3d 1237, 1240 (9th Cir. 2015)).) The district court may dismiss the second-filed action even if the claims and parties are not identical; the rule merely requires substantial similarity. (*Id.* (citing *Kohn*, 787 F.3d at 1240; *Inherent.com v. Martindale–Hubbell*, 420 F.Supp.2d 1093, 1097 (N.D.Cal.2006)).)

Real Parties do not dispute that (i) this Court should adopt the three-part test used by the Ninth Circuit; (ii) the federal actions were filed long before the Nevada State Court Action; (iii) the issues are identical (*see, e.g.*, Ans. 2 (acknowledging the cases involve "similar facts and nearly identical contract provisions")); and (iv) though not identical, the parties are substantially similar. (Ans. 32-37.) Instead, while essentially conceding the first-to-file rule has been satisfied, Real Parties ask this Court to make an exception to it. (*Id.*) This Court should not make an exception.

2. *The Cases Cited by Real Parties Are Easily Distinguishable*.

In their Answer, Real Parties fail to identify a single case declining to apply the first-to-file rule under similar circumstances (*i.e.*, a case in which the three-part test was satisfied, and the second action was filed years after the first action). Instead, they rely mostly on federal cases concerning abstention, not the first-to-file rule, and involving situations where the second action was filed days after the first action.

The main case cited by Real Parties is *Cont'l Ins. Co. v. Hexcel Corp.*, 2013 WL 1501565 (N.D. Cal. Apr. 10, 2013) ("*Continental Insurance*"). (Ans. 33-34.) In that case, two lawsuits were filed eight days apart in California and New Jersey concerning whether numerous insurers were required to defend or indemnify their common insured, Hexcel Corporation, for property damage and contamination. *Id.* at *1. Hexcel moved to dismiss the California action under the *Wilton/Brillhart* abstention doctrine. *Id.* The Northern District of California dismissed it because eighteen of Hexcel's insurers were parties to the New Jersey action but only four were parties to the California action. *Id.*

Real Parties claim that under *Continental Insurance*, the district court is permitted to consider "public policies when deciding whether to apply the first-filed rule." (Ans. 34.) That assertion is incorrect. Because Hexcel's motion was based on abstention rather than the first-to-file rule, the *Continental Insurance* court did not address the first-to-file rule but rather examined the nine factors related to the federal abstention doctrine. It examined New Jersey's public interest only because it was relevant to the seventh factor for *Wilton/Brillhart* abstention – *i.e.*, entanglement between federal and state courts. *Id.* at *3, 5. Simply put, *Continental Insurance* does not support the proposition that a district court may consider public policies when

deciding whether to dismiss a second-filed action.[7]

In addition to the fact it involves abstention, *Continental Insurance* is distinguishable for other reasons. Whereas the two lawsuits in *Continental Insurance* were filed only eight days apart, the Illinois bankruptcy was filed more than two years before the Nevada State Court Action, and the Federal Action was filed more than six months before it.[8] Furthermore, whereas only four of the eighteen insurers were parties to the California action in *Continental Insurance*, twelve of the sixteen parties to the Nevada State Court Action are parties to the federal actions.

Real Parties also claim that in *Kohn Law Group*, the Central District of California stayed the second-filed action so as to "defer[] to the more comprehensive

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[7] Real Parties also cite *Knapp v. Depuy Synthes Sales Inc*., 983 F. Supp. 2d 1171 (E.D. Cal. 2013) for the same proposition. (Ans. 34; *see also* Pet. 28-29 (citing *Knapp* in relation to forum shopping, not the first-to-file rule).) Like *Continental Insurance*, *Knapp* also involves abstention. In that case, defendant Depuy Synthes Sales moved to dismiss under the *Brillhart* abstention doctrine. *Id.* at 1171-1178. Plaintiff George Knapp raised the first-to-file-rule as a defense to abstention, but the Ninth Circuit noted the first-to-file rule "is not an absolute bar under *Brillhart* abstention." *Id.* at 1178 (citing *Pacesetter Sys., Inc. v. Medtronic, Inc*., 678 F.2d 93 (9th Cir.1982)). The *Knapp* court declined to exercise jurisdiction over Knapp's declaratory relief claim because "the manner in which [Knapp] filed this action smacked of forum shopping. . . . [Knapp] presumably prepared his complaint in anticipation of resigning and filing this action in order to use the 'first-to-file' rule as a sword. This is not the purpose of the 'first-to-file' rule." *Id.* at 1178.

[8] The time lapse between the cases also distinguishes *Amlin Corp. Member Ltd. v. Leeward* (cited at Ans. 33, 36), in which the District of Nevada declined to apply the first-to-file rule when "[t]he Florida litigation was filed only two days before the present action and has not yet progressed beyond the pleading stages." 2012 WL 6020107, at *2 (D. Nev. Nov. 27, 2012).

lawsuit." (Ans. 34 (citing 787 F.3d 1237 (9th Cir. 2015)).) To the contrary, the Central District of California stayed the second-filed action because the question it was asked to resolve already was "at the heart" of the first-filed action. *Kohn Law Grp.*, 787 F.3d at 1241. Likewise, the fundamental question that Real Parties ask the district court to answer – *i.e.*, whether Real Parties owe any money to Petitioners – already is at the heart of the federal actions.

Real Parties also rely on *Editorial Planeta Mexicana, S.A. de C.V. v. Argov,* 2012 WL 3027456 (D. Nev. July 23, 2012), in which the District of Nevada declined to apply the first-to-file rule. (Ans. 36.) *Editorial Planeta Mexicana* was written in 2012 and is no longer good law. It declined to apply the first-to-file rule because the issues were not identical, but three years later in 2015, the Ninth Circuit said the issues need not be identical. *See Editorial Planeta Mexicana*, 2012 WL 3027456, at *7 ("In order for [the first-to-file] rule to apply, the issues in both suits must be 'identical.'"); *compare to Kohn Law Grp.*, 787 F.3d at 1240 ("The issues in both cases also need not be identical, only substantially similar.")

3. *Real Parties' Argument About Wanting the Eighth Judicial District Court to Decide Matters Concerning Nevada Contract and Gaming Law is Specious and Disingenuous.*

Real Parties also argue that the first-to-file rule should not apply because issues concerning Nevada contract and gaming law should be decided by the Eighth Judicial District Court. (Ans. 35.) That argument is specious. The claims against

FERG arise under New Jersey contract law, and Nevada gaming laws and regulations are inapplicable to a restaurant inside a New Jersey gaming establishment. In fact, if the district court were to entertain the claims against FERG, it would have to rule on issues related to New Jersey gaming law. Furthermore, Real Parties do not explain why the United States District Court for the District of Nevada would be unable to decide issues related to Nevada contract and gaming law in the Federal Action currently before Judge Mahan. (*See* Pet. 12-14 (summarizing the Federal Action).)

Real Parties' argument also is disingenuous. For more than two years, Real Parties had no problem with the federal courts deciding matters related to Nevada contract and gaming law. (*See, e.g.*, Debtors' Obj. to LLTQ and FERG's Mot. for Partial Sum. Judg., Oct. 12, 2016, at Pet. App. 2152-53, ¶ 3 (wherein Real Parties argued to the Illinois bankruptcy court that "if Caesars were to maintain, directly or indirectly, any unsuitable relationships or associations, the [gaming] regulatory agencies may impose such disciplinary actions."); *see also* Debtors' Obj. to LLTQ and FERG's Mot. to Compel, Aug. 10, 2016, at Pet. App. 2046-47, ¶¶ 18-19 (wherein Real Parties argued to the Illinois bankruptcy court that "the restrictive covenant in the LLTQ Agreement is the very type of overly broad covenant that Nevada courts routinely deem to be unenforceable."); Debtors' Obj. to LLTQ and FERG's Mot. for Protective Order, April 26, 2017, at Pet. App. 2196 (wherein Real

Parties argued to the Illinois bankruptcy court that under Nevada and New Jersey law, "LLTQ and FERG breached the agreements when they continuously failed to provide the requisite disclosures to the Debtors regarding their lack of suitability.").)

Real Parties suddenly decided it would be best for the Eighth Judicial District Court to decide these issues after Judge Mahan mostly denied Paris's motion to dismiss and the Illinois bankruptcy court called their fraud in the inducement and rescission theories "thin" and "dubious" and said it did not know if their "assertions about the validity of the restrictive covenant under Nevada law are accurate." (Tr., Aug. 17, 2016, Pet. App. 1802-1803.) Clearly, Real Parties filed the Nevada State Court Action in search of a more favorable forum, not because they genuinely believe the Eighth Judicial District Court should decide these issues.

In summation, the first-to-file rule is applicable because the federal actions were filed first, the issues are identical, and parties are substantially similar. The cases cited by Real Parties are distinguishable, and Real Parties have not satisfied any recognized exceptions to the rule. *See, e.g., Alltrade, Inc. v. Uniweld Prod., Inc*., 946 F.2d 622, 628 (9th Cir. 1991) ("The circumstances under which an exception to the first-to-file rule typically will be made include bad faith, anticipatory suit, and forum shopping.") Real Parties' argument about wanting the Eighth Judicial District Court to decide matters related to Nevada contract and gaming law is specious and disingenuous. The district court therefore abused its discretion.

C. The District Court Abused Its Discretion by Not Dismissing the Nevada State Court Action Due to Forum Shopping.

Relying on a single quote taken out of context from *R.R. St. & Co. Inc. v. Transp. Ins. Co*., 656 F.3d 966 (9th Cir. 2011), Real Parties claim they filed the Nevada State Court Action because they sought "a *comprehensive* forum, not merely a favorable one." (Ans. 38 (quoting *R.R. St. & Co.*, 656 F.3d at 981) (emphasis in original).)[9] *R.R. Street & Co.* actually supports the dismissal of the Nevada State Court Action. In that case, the Ninth Circuit emphasized that district courts should dismiss reactive declaratory relief actions:

> We have instructed that federal courts should generally decline to entertain reactive declaratory actions. For example, we held that when an insurer filed a declaratory judgment action in federal court during the pendency of a non-removable state court action presenting the same issues of state law, and the insurer did so merely to obtain a tactical advantage from litigating in a federal forum, the defensive or reactive nature of the insurer's action warranted dismissal.

656 F.3d at 976 (internal citations and quotes omitted). The Nevada State Court Action is nothing more than a reactive declaratory relief action that was filed to gain a tactical advantage by litigating in a different forum.

If Real Parties truly had desired to create a comprehensive forum or to have the Eighth Judicial District Court decide the issues, then they would have filed the

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[9] *R.R. Street & Co*. is yet another abstention case in which the Ninth Circuit affirmed the Central District of California's dismissal of a removed action under the *Colorado River* abstention doctrine. *R.R. St. & Co. Inc*., 656 F.3d at 972-73.

Nevada State Court Action much sooner. Instead, they filed it more than two years after Caesars filed the bankruptcy litigation against LLTQ and FERG in June 2015 and shortly after Judge Mahan denied Paris's motion to dismiss in July 2017. (Pet. 13-14 (citing Judge Mahan's Order, July 3, 2017, Pet. App. 740-751).) In its motion, Paris had hoped its argument concerning Rowen Seibel's alleged unsuitability would defeat TPOV 16's claims as a matter of law. Real Parties felt no need to create a comprehensive forum or to have the Eighth Judicial District Court decide this issue while it was still possible that Judge Mahan might agree with their argument.

Judge Mahan rejected Paris's argument because Seibel is not affiliated with TPOV 16, and he recognized that if TPOV validly assigned its interests to TPOV 16, then Seibel's alleged unsuitability would be irrelevant. (Pet. App. 748-49 ("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. TPOV 16 alleges a valid assignment to TPOV that cured any affiliation with an unsuitable person then relief can be granted.") (internal citations omitted).) Real Parties abruptly filed the Nevada State Court Action about five weeks later. As is readily apparent, Real Parties waited to see Judge Mahan's responsiveness to Paris's suitability argument and then filed the Nevada State Court Action in reaction to his denial of Paris's motion rather than to create a comprehensive forum.

In response to Petitioners' argument that they filed the Nevada State Court

Action to evade the federal courts' unfavorable views of their legal theories, Real Parties point out that the federal courts expressed those views in relation to discovery motions and a motion to dismiss without ruling on the merits. (Ans. 39.) While true, Real Parties' argument misses the fundamental point: the federal courts took a preliminary peek at their legal theories and were less than impressed with them, and in response, Real Parties filed the Nevada State Court Action.

In short, to believe Real Parties' motivation for filing the Nevada State Court Action was to create a comprehensive forum rather than forum shopping, this Court would have to believe it was a mere coincidence Real Parties suddenly desired to create a comprehensive forum outside the federal judiciary right after two different federal courts independently expressed skepticism of their theories. The timing of the Nevada State Court Action is no coincidence; rather, it demonstrates that Real Parties filed the case in search of a more "favorable jurisdiction or court in which [the claims between the parties] might be heard." *Forum Shopping*, Black's Law Dictionary (10th ed. 2014). The district court therefore abused its discretion by failing to dismiss the Nevada State Court Action due to forum shopping.

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IV. CONCLUSION.

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

DATED September 5, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this writ petition reply and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure. I also certify that this brief complies with the formatting requirements of NEV. R. APP. P. 32(a)(4), the typeface requirements of NEV. R. APP. P. 32(a)(5) and the typestyle requirements of NEV. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14-point font. Finally, I certify that this brief complies with all applicable procedural rules, in particular NEV. R. APP. P. 28(e), which requires every section of the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied is to be found.

DATED September 5, 2018.

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VERIFICATION

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

DATED September 5, 2018.

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CERTIFICATE OF SERVICE

Pursuant to NEV. R. APP. P. 25, I certify that I am an employee of MCNUTT LAW FIRM. On September 5, 2018, I electronically filed and served a copy of the **REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** on the date to the addressee(s) shown below:

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