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 Electronically Filed Sep 05 2018 04:43 p.m. Elizabeth A. Brown Clerk of Supreme Court **MOTION FOR STAY OF ALL DISTRICT COURT PROCEEDINGS**

On June 18, 2018, "Petitioners"[1] petitioned for a writ directing the district court to dismiss the claims against them. Real Parties in Interest ("Real Parties")[2]

[1] "Petitioners" refers to (1) FERG 16, LLC and FERG, LLC (collectively, "FERG"); (2) LLTQ ENTERPRISES 16, LLC and LLTQ ENTERPRISES, LLC (collectively, "LLTQ"); (3) MOTI PARTNERS 16, LLC and MOTI PARTNERS, LLC (collectively, "MOTI"); (4) TPOV ENTERPRISES, LLC ("TPOV") and TPOV 16 ENTERPRISES, LLC ("TPOV 16"); (5) DNT ACQUISITION, LLC ("DNT"), appearing derivatively by one of its two members, R Squared Global Solutions, LLC ("RSG"); and (6) ROWEN SEIBEL, an individual.

[2] "Real Parties" refers collectively to Desert Palace, Inc., Paris Las Vegas Operating Company, LLC, PHWLV, LLC, and Boardwalk Regency Corporation.

answered on August 21, 2018, and Petitioners replied on September 5, 2018.

On June 18, 2018, Petitioners filed a stay motion with the district court. (Ex. A, Stay Mot., June 18, 2018) Real Parties opposed it on July 9, 2018 (Ex. B, Opp'n to Stay Mot., July 9, 2018), and Petitioners replied on July 31, 2018 (Ex. C, Reply for Stay Mot.) The district court denied the motion because it believes Petitioners are unlikely to prevail on the merits of their Petition. (Ex. D, Order, Aug. 22, 2018) Pursuant to NEV. R. APP. P. 8, Petitioners respectfully request that this Court stay all district court proceedings until their Petition is resolved.

I. INTRODUCTION.

In the circumstances at hand, a stay is warranted when (i) the primary objective of a pending writ petition would be defeated without a stay; (ii) the nonmovant would not be harmed by a stay; (iii) the petition does not appear frivolous; and (iv) the petitioner is not seeking a stay "purely for dilatory purposes." *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 89 P.3d 36 (2004) ("*Mikohn Gaming*"); *see also State v. Robles-Nieves*, 129 Nev. 537, 306 P.3d 399 (2013) ("*Robles-Nieves*") (in *Mikohn Gaming* and *Robles-Nieves*, this Court entered stays based on these factors). A stay is appropriate based on these factors.

The basic purpose of the Petition is to have the claims at issue heard by other courts. (*See, e.g.*, Pet. 21 (explaining how the FERG Agreement contains a valid, mandatory forum selection clause granting "exclusive jurisdiction" to New Jersey);

see also Pet. 3-12 (explaining how the same issues already are pending before the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division); Pet. 12-14 (explaining how the same issues already are pending before the United States District Court for the District of Nevada); Pet. 21-26, Reply in Support of the Pet. ("Pet. Reply") 8-18 (explaining why the district court was obligated to enforce the forum selection clause); Pet. 26-31, Pet. Reply 18-27 (explaining why the district court should have dismissed the case under the first-to-file rule and due to forum shopping).) That basic purpose would be defeated if the district court were to entertain the claims. Hence, a stay is warranted.

Petitioners are not seeking a stay for any dilatory purpose; rather, they are seeking only to protect the primary objective of their Petition and are likely to prevail on the merits of their Petition. Real Parties would not suffer any harm from a stay. In contrast, without a stay, Petitioners could lose the benefit of the federal courts' analyses to date. Petitioners also respectfully submit that they likely will prevail on the merits of their Petition. Accordingly, Petitioners respectfully request that this Court stay all proceedings before the district court.

II. STANDARD OF REVIEW.

A stay motion is decided under "the following factors: (1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or

injunction is denied; (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition." NEV. R. APP. P. 8(c). In some cases, a stay may be warranted if one factor strongly favors the movant and counterbalances the other factors. *Robles-Nieves*, 129 Nev. at 542, 306 P.3d at 403 (citing *Mikohn Gaming*, 120 Nev. at 251, 89 P.3d at 38) ("[C]ertain factors may be especially strong and counterbalance other weak factors."); *see also Mikohn Gaming*, 120 Nev. at 251, 89 P.3d at 38 ("We have not indicated that any one factor carries more weight than the others, although [*Hansen v. Dist. Ct.*, 116 Nev. 650, 6 P.3d 982 (2000)] recognizes that if one or two factors are especially strong, they may counterbalance other weak factors.")

In *Mikohn Gaming*, the appellant moved to stay the district court proceedings while it appealed the district court's partial denial of its motion to compel arbitration. *Id.* at 250, 37. This Court said that "in an appeal from an order refusing to compel arbitration . . ., the first stay factor takes on added significance and generally warrants a stay of trial court proceedings pending resolution of the appeal." *Id.* at 251, 38. Likewise, the first factor has added significance here because the Petition concerns a forum selection clause and forum shopping. Just as how the basic purpose of the *Mikohn Gaming* appeal was to have the claims heard elsewhere (*i.e.*, in arbitration), the basic purpose of the Petition is to have the claims heard elsewhere

(*i.e.*, by other courts). For that simple reason, the first factor carries added significance here, as in *Mikohn Gaming*.

In *Mikohn Gaming*, this Court entered a stay because the first factor strongly favored one. *Id.* at 251-52, 38. As for the remaining factors, it said "[n]either [the appellant] nor [the respondent] have demonstrated irreparable or serious harm in this case." *Id.* at 253, 39. It also said "the merits are unclear at this stage." *Id.* at 254, 40. Nonetheless, it ultimately entered a "stay for the duration of this appeal." *Id.* at 254, 40; *see also Robles-Nieves*, 129 Nev. at 547, 306 P.3d at 406 (the *Robles-Nieves* court said "the first factor is most significant in this case" and granted a stay). This Court should enter a stay for the same reasons.

III. LEGAL ARGUMENTS.

A. The Objective of the Petition Would Be Defeated Without a Stay.

As in *Mikohn Gaming*, the first factor (*i.e.*, whether the objective of the petition would be defeated without a stay) strongly favors a stay. At its heart, the Petition has two, related objectives. The ***first*** is to enforce a mandatory forum selection clause which precludes the claims against FERG from being decided by a Nevada court. The ***second*** is to have the allegations, claims, defenses, issues, and theories pending before the federal courts decided by those courts. Both of those objectives would be defeated without a stay.

The objectives of the Petition are the same as in *Mikohn Gaming*. Just as how

the *Mikohn Gaming* petition sought to have the claims before the district court decided by another judicial body (*i.e.*, an arbitrator), the Petition seeks to have the claims at hand decided by other courts. Furthermore, just as how a stay was warranted in *Mikohn Gaming* to prevent the district court from making substantive rulings on the claims that the appellant desired to arbitrate, a stay likewise is warranted here to prevent the district court from making substantive rulings on the claims that Petitioners desire to be heard by other courts.

Petitioners already have obtained some favorable results in the federal cases as to matters now put before the district court by Real Parties. When he mostly denied Paris's motion to dismiss TPOV 16's claims, Judge Mahan recognized that if TPOV validly assigned its interests to TPOV 16, then Paris's argument concerning Seibel's suitability is irrelevant because Seibel is not associated with TPOV 16. (Pet. 12-14 (summarizing the case pending before Judge Mahan; *see also* Judge Mahan's Order, July 3, 2017, 8:26 – 9:2, Petitioners' Writ Appendix ("Pet. App.") 748-49 ("Although Paris argues its 'determination that Seibel is unsuitable is undisputable as a matter of law', . . . TPOV 16 alleges a valid assignment to TPOV that cured any affiliation with an unsuitable person . . . .").)

The bankruptcy court also already has called the debtors' theory that they were fraudulently induced to enter the restaurant agreements "thin" and "dubious." (Pet. 3-12 (summarizing the proceedings before the Illinois bankruptcy court); *see also*

Tr., May 31, 2017, 6:23-24, Pet. App. 597 ("I agree that the debtors' legal theories look thin."); *id.* 10:3 (calling the debtors' legal theories "dubious").) The bankruptcy court also said, "I don't know that the [debtors'] assertions about the validity of the restrictive covenant under Nevada law are accurate." (Tr., Aug. 17, 2016, 8:24-9:1, Pet. App. 1802-03.) If the district court were to reexamine those matters, then Petitioners could lose the benefit of the federal courts' analyses.

In sum, the objectives of Petitioners' Petition would be defeated without a stay. The fundamental purpose of the Petition is to have the claims which Real Parties seek to have adjudicated by the Nevada district court heard by other courts, and that purpose would be defeated if the district court were to hear those claims. Accordingly, this Court should enter a stay.

B. Petitioners Will Suffer Serious Injury Without a Stay, and Real Parties Will Not Be Harmed by a Stay.

Without a stay, Petitioners could lose the benefit of the federal courts' analyses to date. In contrast, Real Parties would not suffer any harm from a stay. Accordingly, the second and third factors under NEV. R. APP. P. 8(c) favor a stay.

C. Petitioners Likely Will Prevail on the Merits of the Petition.

When "the first stay factor [*i.e.*, whether the primary objective of the writ petition would be defeated without a stay] weighs heavily in favor of a stay, the final factor [*i.e.*, the likelihood the petitioner will prevail on the merits] will counterbalance the first factor only when the [writ petition] appears to be frivolous

or the stay sought purely for dilatory purposes." *Robles-Nieves*, 129 Nev. at 546, 306 P.3d at 406 (citing *Mikohn Gaming*, 120 Nev. at 253, 89 P.3d at 40). Petitioners' Petition is not frivolous, and Petitioners are seeking a stay to protect the objectives of their Petition rather than for dilatory purposes. Furthermore, Petitioners likely will prevail on the merits of their Petition.

1. *The District Court Was Required to Dismiss the Claims Against FERG Due to the Forum Selection Clause*.

The development agreement between FERG and CAC makes New Jersey the "exclusive jurisdiction" for any litigation. (FERG Agreement, § 14.10(c), Pet. App. 1990.) Even though it concluded the forum selection clause applies, the district court denied FERG's motion because the parties already are litigating before the Illinois bankruptcy court. (Pet. 21-26; *see also* Tr., May 1, 2018, 49:22 – 50:9, Pet. App. 3530-31.) It also denied the motion after impermissibly considering the "totality of circumstances." (Tr., May 1, 2018, 51:3-4, Pet. App. 3532 ("[C]onsidering the totality of the circumstances, there are far stronger reasons to keep the case in front of me.").)

Under *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49 (2013) ("*Atlantic Marine*"), the district court was required to enforce the forum selection clause unless keeping the claims in Nevada is supported by extraordinary public-interest factors unrelated to the convenience of the parties. (Pet. 25-26; *see also* Pet. Reply 8-13.) There are no such extraordinary public-interest

factors. (*Id*.) FERG therefore will prevail on the merits.

2. *The District Court Should Have Dismissed the Case under the First-to-File Rule.*

In determining whether to dismiss a second-filed lawsuit, the district court should examine three factors: (i) chronology of the lawsuits, (ii) similarity of the parties, and (iii) similarity of the issues. (Pet. 25-26; *see also* Pet. Reply 18-19.) This test has been satisfied because the Nevada State Court Action was filed after the federal cases, the issues are identical, and the parties are substantially similar. Real Parties essentially ask this Court to make an exception to the first-filed rule, but the cases they cite are inapposite and easily distinguishable. (Pet. Reply 19-22.) The district court therefore abused its discretion in failing to dismiss the Nevada State Court Action under the first-filed rule.

3. *The District Court Should Have Dismissed the Case Due to Forum Shopping.*

Real Parties claim they filed the Nevada State Court Action to create a comprehensive forum, not a favorable one, and also because the Eighth Judicial District Court should decide issues related to Nevada contract and gaming law. Real Parties' argument is belied by their unexplainable delay in filing the Nevada State Court Action. (Pet. Reply 22-27.) For over two years, Real Parties neither cared that the parties were litigating before multiple courts nor had any concerns about the federal courts deciding such issues. In fact, they repeatedly asked the federal courts

to rule in their favor based on Nevada contract and gaming law. Right after the federal courts independently demonstrated that they are less than receptive to Real Parties' thin and dubious legal theories, Real Parties suddenly decided to create a comprehensive forum outside the federal judiciary. Based on the timing of Real Parties' actions, it is clear they filed the Nevada State Court Action in search of a more favorable forum. The district court therefore abused its discretion by not dismissing the Nevada State Court Action due to forum shopping.

IV. CONCLUSION.

WHEREFORE, Petitioners respectfully request a stay of all proceedings until their Petition is resolved.

DATED September 5, 2018.

MCNUTT LAW FIRM, P.C.

/s/ Dan McNutt
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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 **MOTION FOR STAY OF ALL DISTRICT COURT PROCEEDINGS** on the date to the addressee(s) shown below:

VIA HAND DELIVERY
Honorable Joseph Hardy
District Court Judge, Dept. 15
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Trustee for GR Burgr, LLC

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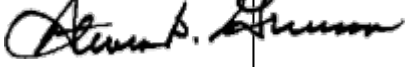
An Employee of McNutt Law Firm, P.C.

Exhibit A



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DISTRICT COURT

CLARK COUNTY, NEVADA

ROWEN SEIBEL, an individual and citizen of New York, derivatively on behalf of Real Party in Interest GR BURGR LLC, a Delaware limited liability company, Plaintiff, v. PHWLV, LLC, a Nevada limited liability company; GORDON RAMSAY, an individual; DOES I through X; ROE CORPORATIONS I	Case No.: A-17-751759-B Dept. No.: 15 Consolidated with: Case No.: A-17-760537-B **DEFENDANTS' MOTION TO STAY ALL PROCEEDINGS IN THE DISTRICT COURT PENDING A DECISION ON THEIR PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION**

through X, Defendants, AND ALL RELATED MATTERS	This document applies to: A-17-760537-B

"Defendants"[1] have filed or will be immediately filing a petition for a writ of mandamus or prohibition concerning this Court's June 1, 2018 order denying their dismissal motions. (Ex. A, Defs.' Pet.) They respectfully request a stay of all proceedings until a ruling is made on their Petition.

DATED June 18, 2018.

MCNUTT LAW FIRM, P.C.

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Attorneys for Defendants

[1] "Defendants" refers collectively to DNT ACQUISITION, LLC ("DNT"), appearing derivatively by one of its two members, R Squared Global Solutions, LLC ("RSG"), FERG 16, LLC and FERG, LLC (collectively, "FERG"), LLTQ ENTERPRISES 16, LLC and LLTQ ENTERPRISES, LLC (collectively, "LLTQ"), MOTI PARTNERS 16, LLC and MOTI PARTNERS, LLC (collectively, "MOTI"), ROWEN SEIBEL, and TPOV ENTERPRISES, LLC ("TPOV") and TPOV 16 ENTERPRISES, LLC ("TPOV 16").

NOTICE OF HEARING

PLEASE TAKE NOTICE that on the 23 day of Jul., 2018, at 9:00 a.m. / ~~p.m.~~ o'clock, the Court will call for hearing **DEFENDANTS' MOTION TO STAY ALL PROCEEDINGS IN THE DISTRICT COURT PENDING A DECISION ON THEIR PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION**.

DATED June 18, 2018.

MCNUTT LAW FIRM, P.C.

/s/ Dan McNutt
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

In the circumstances at hand, a stay in the district court is warranted when (i) the primary objective of a pending writ petition would be defeated without a stay; (ii) the nonmovant would not be harmed by a stay; (iii) the petition does not appear frivolous; and (iv) the petitioner is not seeking a stay "purely for dilatory purposes." *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 89 P.3d 36 (2004) ("*Mikohn Gaming*"); *see also State v. Robles-Nieves*, 129 Nev. 537, 306 P.3d 399 (2013) ("*Robles-Nieves*") (the *Mikohn Gaming* and *Robles-Nieves* courts entered stays under similar circumstances based on these factors). A stay of all proceedings before this Court is appropriate based on these factors.

Defendants have filed or are immediately filing a petition for a writ of mandamus or prohibition (the "Petition") concerning this Court's June 1, 2018 order denying their motions to dismiss (the "Denial Order.") (Ex. A, Defs.' Pet.) The basic purpose of the Petition is to have the claims before this Court heard by other courts (*i.e.*, a New Jersey court for the claims against FERG, the United States District Court for Nevada for the claims against TPOV and TPOV 16, and the United States Bankruptcy Court for the Northern District of Illinois for the remaining claims). That purpose would be defeated if this Court were to entertain the claims. For that simple reason, a stay is warranted.

Defendants are not seeking a stay for any dilatory purpose; rather, they are seeking only to protect the primary objective of their Petition. "Plaintiffs"[2] would not suffer any harm from a stay. In contrast, without a stay, Defendants would be forced to expend duplicative resources in this action and could lose the

[2] "Plaintiffs" refers collectively to Desert Palace, Inc., Paris Las Vegas Operating Company, LLC, PHWLV, LLC, and Boardwalk Regency Corporation.

benefit of the federal courts' analyses to date. Defendants also respectfully submit that they likely will prevail on the merits of their Petition. Accordingly, Defendants respectfully request that this Court stay all proceedings before it until a ruling is made on their Petition.

II. STANDARD OF REVIEW.

A petitioner seeking writ relief from an appellate court "must ordinarily move first in the district court" to obtain a stay while the writ petition is pending. NEV. R. APP. P. 8(1)(a). A stay motion is decided under "the following factors: (1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied; (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition." NEV. R. APP. P. 8(c).

In some cases, a stay may be warranted if one factor strongly favors the movant and counterbalances the other factors. *Robles-Nieves*, 129 Nev. at 542, 306 P.3d at 403 (citing *Mikohn Gaming*, 120 Nev. at 251, 89 P.3d at 38) ("[C]ertain factors may be especially strong and counterbalance other weak factors."); *see also Mikohn Gaming*, 120 Nev. at 251, 89 P.3d at 38 ("We have not indicated that any one factor carries more weight than the others, although [*Hansen v. Dist. Ct.*, 116 Nev. 650, 6 P.3d 982 (2000)] recognizes that if one or two factors are especially strong, they may counterbalance other weak factors.")

In *Mikohn Gaming*, the appellant moved to stay the district court proceedings while it appealed the district court's partial denial of its motion to compel arbitration. *Id.* at 250, 37. The Nevada Supreme Court said that "in an appeal from an order refusing to compel arbitration . . ., the first stay factor takes on added significance and generally warrants a stay of trial court proceedings

pending resolution of the appeal." *Id.* at 251, 38. Likewise, the first factor has added significance here because the Petition concerns a forum selection clause and forum shopping. Just as how the basic purpose of the *Mikohn Gaming* appeal was to have the claims heard elsewhere (*i.e.*, in arbitration), the basic purpose of the Petition is to have the claims heard elsewhere (*i.e.*, before the federal courts). For that simple reason, the first factor carries added significance here, as in *Mikohn Gaming*.

The *Mikohn Gaming* court entered a stay because the first factor strongly favored one. *Id.* at 251-52, 38. As for the remaining factors, it said "[n]either [the appellant] nor [the respondent] have demonstrated irreparable or serious harm in this case." *Id.* at 253, 39. It also said "the merits are unclear at this stage." *Id.* at 254, 40. Nonetheless, it ultimately entered a "stay for the duration of this appeal." *Id.* at 254, 40; *see also Robles-Nieves*, 129 Nev. at 547, 306 P.3d at 406 (the *Robles-Nieves* court said "the first factor is most significant in this case" and granted a stay). This Court should enter a stay because without one, the primary objective of the Petition would be defeated.

III. LEGAL ARGUMENTS.

A. The Objective of the Petition Would Be Defeated Without a Stay.

As in *Mikohn Gaming*, this Court should enter a stay because the first factor (*i.e.*, whether the objective of the petition would be defeated without a stay) strongly favors one. At its heart, the Petition has two, related objectives. The ***first*** is to have the claims against FERG decided by a New Jersey court, as required by the mandatory forum selection clause in the FERG Agreement. The ***second*** is to have the allegations, claims, defenses, issues, and theories pending before the federal courts decided by those courts. Both of those objectives would be defeated without a stay.

The objectives of the Petition are the same as in *Mikohn Gaming*. Just as how the *Mikohn Gaming* petition sought to have the claims before the district court decided by another judicial body (*i.e.*, an arbitrator), the Petition seeks to have the claims at hand decided by other courts. Furthermore, just as how a stay was warranted in *Mikohn Gaming* to prevent the district court from making substantive rulings on the claims that the appellant desired to arbitrate, a stay likewise is warranted here to prevent this Court from making substantive rulings on the claims that Defendants desire to be heard by the federal courts.

Additionally, in its successful stay motion, the *Mikohn Gaming* appellant argued that "in the absence of a stay of the proceedings below, [appellant] will have been unnecessarily subjected to the authority of the District Court, thereby nullifying the benefit derived from a successful appeal and effectively rendering the arbitration clause meaningless." (Ex. B, *Mikohn Gaming*'s Mot. for Stay, Sept. 10, 2003, at 6:12-15.) Likewise, without a stay, Defendants will be "unnecessarily subjected to the authority of" this Court, thereby nullifying the benefit Defendants would derive from succeeding on their Petition.

Finally, without a stay, the *Mikohn Gaming* appellant would have been "forced to spend money and time preparing for trial, thus potentially losing the benefits of arbitration . . . ." *Mikohn Gaming*, 120 Nev. at 254, 89 P.3d at 40. Similarly, it would be most cost-effective for the federal courts to decide the issues before them, and Defendants would lose that benefit without a stay. Defendants already have claims pending in the federal cases.[3] Without a stay, Defendants will have to incur duplicative costs reasserting those claims as counterclaims in this case. Defendants also already have served written

[3] Specifically, TPOV 16 has sued Paris in the United States District Court for Nevada, and some of Defendants have filed proofs of claims or administrative requests in the Illinois bankruptcy court.

discovery in the federal cases and moved to compel.[4] Without a stay, Defendants may have to reserve the discovery and even refile the motions.

Defendants also already have obtained some favorable results in the federal cases. When he mostly denied Paris's motion to dismiss TPOV 16's claims, Judge Mahan recognized that if TPOV validly assigned its interests to TPOV 16, then Paris's argument concerning Seibel's suitability is irrelevant because Seibel is not associated with TPOV 16. (Ex. C to TPOV 16's Mot. to Dismiss, July 3, 2017 Order, 8:26 – 9:2 ("Although Paris argues its 'determination that Seibel is unsuitable is undisputable as a matter of law', . . . TPOV 16 alleges a valid assignment to TPOV that cured any affiliation with an unsuitable person . . . .")

The bankruptcy court also has already called the debtors' theory that they were fraudulently induced to enter the restaurant agreements "thin" and "dubious." (Ex. Q to LLTQ's Mot. to Dismiss, Tr., May 31, 2017, 6:23-24 (" I agree that the debtors' legal theories look thin."); *see also id*. at 10:3 (calling the debtors' legal theories "dubious").) The bankruptcy court also said, "I don't know that the [debtors'] assertions about the validity of the restrictive covenant under Nevada law are accurate." (Ex. K to LLTQ's Mot. to Dismiss, 8:24 – 9:5.) If this Court were to reexamine those matters, then Defendants could lose the benefit of the federal courts' analyses to date.

In sum, the objectives of Defendants' Petition would be defeated without a stay. The fundamental purpose of the Petition is to have the claims before this Court heard by the federal courts already hearing such claims, and that purpose

[4] Specifically, on August 3, 2016, LLTQ and FERG filed a motion to compel discovery from the debtors concerning the restrictive covenants in the restaurant agreements. (Ex. I to LTTQ's Mot. to Dismiss.) TPOV 16 also filed a motion to compel on May 24, 2018. (Ex. C.)

would be defeated if this Court were to hear those claims. Without a stay, Defendants also would be forced to expend duplicative resources, and they could lose the benefit of the federal courts' analyses to date. Accordingly, this Court should stay all proceedings until the Petition is resolved.

B. Defendants Will Suffer Serious Injury Without a Stay, and Plaintiffs Will Not Be Harmed by a Stay.

Without a stay, Defendants likely will suffer the serious harms previously mentioned – *i.e.*, they would be forced to expend duplicative resources, and they could lose the benefit of the federal courts' analyses to date. In contrast, Plaintiffs would not suffer any harm from a stay. Accordingly, the second and third factors under NEV. R. APP. P. 8(c) favor a stay.

C. Defendants Likely Will Prevail on the Merits of the Petition.

When "the first stay factor [*i.e.*, whether the primary objective of the writ petition would be defeated without a stay] weighs heavily in favor of a stay, the final factor [*i.e.*, the likelihood the petitioner will prevail on the merits] will counterbalance the first factor only when the [writ petition] appears to be frivolous or the stay sought purely for dilatory purposes." *Robles-Nieves*, 129 Nev. at 546, 306 P.3d at 406 (citing *Mikohn Gaming*, 120 Nev. at 253, 89 P.3d at 40). Defendants' Petition is not frivolous, and Defendants are seeking a stay to protect the objectives of their Petition rather than for dilatory purposes. Furthermore, Defendants likely will prevail on the merits of their Petition.

1. *The Nevada Supreme Court Will Conclude that Plaintiffs' Claims Against FERG Must Proceed in New Jersey*.

The FERG Agreement contains a plain, clear, and unambiguous forum selection clause granting "exclusive jurisdiction" to the courts of Atlantic County, New Jersey. (Ex. H to LLTQ's Mot. to Dismiss, § 14.10(c); *see also* LLTQ's Mot. to Dismiss at 17:22 – 19:1, ¶¶ 52-57 (explaining why the clause is

applicable to Plaintiffs' declaratory relief claims); LLTQ's Reply at 17:1-14 (same).)[5] Per the phrase "exclusive jurisdiction," the clause is mandatory. *Am. First Fed. Credit Union v. Soro*, 131 Nev. Adv. Op. 73, 359 P.3d 105, 107 (2015) (agreeing with foreign cases defining a mandatory forum selection clause as one that, as here, "requires 'a particular forum be the exclusive jurisdiction for litigation'" and contains "language demonstrating the parties' intent to make jurisdiction exclusive[.]") Because the parties agreed to the exclusive jurisdiction of the New Jersey courts, this Court lacks jurisdiction over the claims against FERG.

At the hearing on Defendants' dismissal motions, Plaintiffs claimed this Court was free to disregard the forum selection clause based on "the totality of the circumstances" and due to their involvement in the Caesars' bankruptcy proceeding in Illinois. (Tr., May 1, 2018, 36:18-21 ("Forum selection clause[s] don't strip Your Honor of jurisdiction, subject matter jurisdiction, for sure. And it becomes a factor to be weighed against the totality of the circumstances."); *see also id.* 38:10-15 (wherein Plaintiffs argued that even when there are several contracts with forum selection clauses involving different forums, the parties are not required to have "different trials on the same exact issue between the same exact parties."); 39:9-10 ("So, we have a problem there already because we're in Illinois.").) Plaintiffs did not present these arguments in their omnibus opposition. (*See* Caesars' Opp'n, March 12, 2018, 17:5-27.)[6]

In response to these new arguments, Defendants explained that after Caesars moved to have the FERG Agreement rejected under the Bankruptcy Code, "the only remedy that FERG had was to object to the Motion. We were

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[5] This Court agreed with FERG that the clause applies to Plaintiffs' claims.

[6] Because Plaintiffs first raised these arguments at the hearing, Defendants were deprived of the opportunity to brief them.

precluded by the automatic stay, Section 362, of bringing an action somewhere else. The proceeding was brought in the Bankruptcy Court as it was required to and we responded." (Tr., May 1, 2018, 43:19-23; *see also id.* 44:3-13 (after this Court asked why FERG did not seek to lift the automatic stay to litigate in Atlantic County, New Jersey, FERG explained that "the nature of the relief [*i.e.*, the debtors' request for the bankruptcy court to reject the FERG Agreement under the Bankruptcy Code] is unique to bankruptcy. It's that ability to reject a contract under 365 of the bankruptcy code. It's a great power for debtors.").)

Ultimately, this Court concluded that by appearing in the Caesars bankruptcy to protect its interests, FERG waived it otherwise enforceable rights under the forum selection clause:

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

(Tr., May 1, 2018, 49:22 – 50:9; *see also id.* 50:20-22 ("[T]he unique and the totality of the circumstances here support denial of the Motion without prejudice as to FERG."); Denial Order 4:9-11.) This Court also said that even though it believes the forum selection clause applies to the claims against FERG, "considering the totality of the circumstances, there are far stronger reasons to keep the case in front of me." (*Id.* 50:22 – 51:4; *see also* Denial Order 4:8-9 (wherein this Court said the FERG Agreement "would ordinarily require that actions, not just arbitration matters, be litigated in New Jersey.").

Defendants respectfully submit that following a review de novo, the

Nevada Supreme Court will conclude that Plaintiffs' claims against FERG must proceed in New Jersey. *LV Car Serv., LLC v. AWG Ambassador, LLC*, 416 P.3d 206, *1 (Nev. 2018) (citing *Am. First Fed. Credit Union v. Soro*, 131 Nev. Adv. Op. 73, 359 P.3d 105, 106 (2015)) ("Whether a forum selection clause applies is a question this court reviews de novo.") Defendants are unaware of any law - let alone Nevada law – waiving a valid, mandatory forum selection clause because the parties are involved in a bankruptcy proceeding outside the selected forum (and also when, as here, bankruptcy was filed by the party against whom enforcement of the forum selection clause is sought).

To the contrary, a clear and unambiguous "contract must be enforced as written . . . ." *Ringle v. Bruton*, 120 Nev. 82, 93, 86 P.3d 1032, 1039 (2004). The forum selection clause clearly and unambiguously applies to Plaintiffs' claims against FERG (as this Court correctly concluded), and the clause should have been enforced as written. Defendants respectfully submit that a district court cannot decline to enforce a clear and unambiguous mandatory forum selection clause based on the totality of circumstances.

In fact, as the United States Supreme Court explained in 2013, "[w]hen the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause. Only under extraordinary circumstances unrelated to the convenience of the parties should a [motion to transfer venue] be denied." *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49, 62 (2013) ("*Atlantic Marine*").[7]

The only circumstance under which a court may refuse to transfer venue

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

under a valid, mandatory forum selection clause is if the clause violates public policy. *Atlantic Marine*, 571 U.S. at 64 ("[A] district court may consider arguments about public-interest factors only[,]" and "those factors will rarely defeat a transfer motion . . . ."); *see also Dolin v. Facebook, Inc.*, 289 F. Supp. 3d 1153, 1158 (D. Haw. 2018) (quoting *Atl. Marine Const. Co.*, 571 U.S. at 67) ("[T]o defeat transfer, Plaintiff must show that the forum-selection clause is not valid and enforceable or does not apply to his claims, or that [venue-related] 'public-interest factors overwhelmingly disfavor a transfer.'"); *Ponomarenko v. Shapiro*, 287 F. Supp. 3d 816, 839 (N.D. Cal. 2018) (a plaintiff's "arguments that the convenience of the parties and witnesses and the interests of justice weigh in favor of venue in [the forum in which the plaintiff filed suit] are simply irrelevant under *Atlantic Marine*.")

Under *Ringle* and *Atlantic Marine*, this Court should not have considered Plaintiffs' "totality of the circumstances" argument. There also is no legal support for the conclusion that FERG waived any right to enforce the forum selection clause by protecting its interests before the bankruptcy court. This is especially true given that (a) Caesars, not FERG, filed bankruptcy; and (b) when Caesars moved to have the FERG Agreement rejected under the Bankruptcy Code, FERG had no choice but to appear in the bankruptcy proceeding to protect its interest. Defendants therefore likely will succeed on their Petition.

2. *The Nevada Supreme Court Likely Will Conclude Plaintiffs' Claims Must Be Dismissed under the First-to-File Rule and Due to Forum Shopping*.

An appellate court "review[s] a court's decision to accept or decline jurisdiction based on the first-to-file rule for abuse of discretion." *Alltrade, Inc. v. Uniweld Prod., Inc.*, 946 F.2d 622, 625 (9th Cir. 1991); *see also Vivendi SA v. T-Mobile USA Inc.*, 586 F.3d 689, 695 (9th Cir. 2009) (same for forum

shopping). The Nevada Supreme Court likely will conclude Plaintiffs' claims must be dismissed under the first-to-file rule and due to forum shopping.

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

In addition to the first-to-file rule, a duplicative action may also warrant dismissal due to forum shopping. Forum shopping is "[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard." *Forum-Shopping*, Black's Law Dictionary (10th ed. 2014); *see also Knapp v. Depuy Synthes Sales Inc.*, 983 F. Supp. 2d 1171, 1178 (E.D. Cal. 2013) (dismissing a complaint seeking declaratory relief because another lawsuit was pending in Pennsylvania based on the same facts and "the manner in which Plaintiff filed this action smacked of forum shopping."); *Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 1181, 969 P.2d 938, 941 (1998) ("Courts have inherent equitable powers to dismiss actions for abusive litigation practices.")

With respect to the first-to-file rule, the federal cases were filed first. Though not identical, the parties in the federal and state cases are substantially similar. This case has sixteen parties (*i.e.*, four plaintiffs and twelve defendants). As Plaintiffs acknowledge, twelve of these parties are involved in one or both of the previously-filed federal cases. (Caesars' Opp'n, March 12, 2018, 11:12-13.)

Furthermore, the issues in the federal and state cases are identical. In their first claim before this Court, Plaintiffs request a judicial declaration that they properly terminated the restaurant agreements. (Compl. ¶¶ 131-135.) That issue already is being litigated in the federal cases. (*See, e.g.*, Ex. B to R. Seibel's Mot. to Dismiss, Paris's Countercl. Against TPOV and TPOV 16 in the United States District Court for Nevada, July 21, 2017, at ¶ 47 (wherein Paris asks the Nevada federal court to issue "a judicial declaration that Paris properly terminated the TPOV Development Agreement.").)

In their second claim before this Court, Plaintiffs request a judicial declaration that they do not have any current or future obligations to Petitioners under the restaurant agreements. (Compl. ¶¶ 136-146.) Again, that issue already is being litigated in the federal cases. In their third and final claim, Plaintiffs request a judicial declaration that the restaurant agreements do not preclude them from doing business with Ramsay. (Compl. ¶¶ 147-156.) Once more, that issue already is being litigated in the federal cases.

This Court concluded that "it would be most efficient to resolve the suitability issues in one forum. This is the most comprehensive action in which to make a determination on this key issue." (Denial Order 3:20-22.) To the contrary, the federal courts are in a better position to determine that issue because their cases are further along, and those courts already have preliminarily examined Plaintiffs' "suitability" argument. Judge Mahan already has recognized that if the TPOV-to-TPOV 16 assignment was valid, then Seibel's

suitability is irrelevant because he is not associated with TPOV 16. (Order, July 3, 2017, 8:26 – 9:2 ("Although Paris argues its 'determination that Seibel is unsuitable is undisputable as a matter of law', . . . TPOV 16 alleges a valid assignment to TPOV that cured any affiliation with an unsuitable person . . . .").)

As for forum shopping, it is telling that Plaintiffs raced to the state courthouse shortly after (a) the bankruptcy court used the terms "thin" and "dubious" to describe their theories, (b) the bankruptcy court said it did not agree with Plaintiffs' legal argument concerning the restrictive covenant in the LLTQ Agreement, and (c) Judge Mahan found TPOV 16's claims cognizable and recognized the lack of relevance to Paris's suitability argument amid the TPOV-to-TPOV 16 assignment. Plaintiffs clearly filed this case to evade the federal courts' unfavorable views of their thin and dubious theories. Plaintiffs' forum shopping is an abusive litigation tactic to which the Nevada Supreme Court likely will put an immediate end by granting Defendants' Petition.

IV. CONCLUSION.

WHEREFORE, Defendants respectfully request a stay of all proceedings until their Petition is resolved.

DATED June 18, 2018.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that pursuant to NEV. R. CIV. P. 5(b) and EDCR 8.05 on June 18, 2018 I caused service of the foregoing **DEFENDANTS' MOTION TO STAY ALL PROCEEDINGS IN THE DISTRICT COURT PENDING A DECISION ON THEIR PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION** to be made by depositing a true and correct copy of same in the United States Mail, postage fully prepaid, addressed to the following or via electronic mail through the Eighth Judicial District Court's E-Filing system to the following at the e-mail address provided in the e-service list:

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Exhibit A

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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ROUTING STATEMENT

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

DATED June 18, 2018.

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RULE 26.1 DISCLOSURE

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

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

DATED June 18, 2018.

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CERTIFICATE OF COMPLIANCE

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

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

DATED June 18, 2018.

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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, and it is true to the best of my personal knowledge, except for those matters stated on information and belief, and as to those matters, I believe them to be true.

DATED June 18, 2018.

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I. INTRODUCTION.

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

II. ISSUES PRESENTED.

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

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

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

III. STATEMENT OF FACTS.

A. The Parties Entered Numerous Restaurant Agreements.

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

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

B. Caesars Filed Bankruptcy in Illinois in 2015.

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

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

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

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

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

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

Rule 9014. Discovery for the contested matters remains ongoing.

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

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

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

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

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

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

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

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

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

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

2. *The MOTI Agreement.*

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

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

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

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

3. *The DNT Agreement*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Real Parties Sue Petitioners in Nevada.

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

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

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

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

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

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

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

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

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

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

IV. WHY THE PETITION SHOULD BE CONSIDERED.

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

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

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

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

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

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

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

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

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

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

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

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

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

V. WHY A WRIT SHOULD ISSUE.

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

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

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

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

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

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

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

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

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

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

selection clause:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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///

VI. CONCLUSION.

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

DATED June 18, 2018.

MCNUTT LAW FIRM, P.C.

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

CERTIFICATE OF SERVICE

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

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

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

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

Exhibit B

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Attorneys for Appellant
MIKOHN GAMING CORPORATION

FILED

IN THE SUPREME COURT OF THE STATE OF NEVADA

SEP 10 2003
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

MIKOHN GAMING CORPORATION,

Appellant,

vs.

CHARLES H. McCREA, JR.,

Respondent.

No. 41822

APPELLANT'S MOTION FOR STAY OF PROCEEDINGS

Appellant Mikohn Gaming Corporation (hereinafter "Mikohn"), by and through its attorneys of record, hereby moves the Court for an Order granting a stay of the proceedings in this matter pursuant to NRAP 8. The request is based upon the fact that Mikohn has timely filed a Notice of Appeal to the Nevada Supreme Court from the District Court's refusal to compel arbitration as to the First, Second, Third, Fourth, and Fifth Causes of Action contained in the Counterclaim of Defendant/Counterclaimant Charles H. McCrea, Jr. (hereinafter "McCrea"). This request is also based upon the fact that the Eighth Judicial District Court previously denied Appellant's Motion for Stay, thereby precipitating Appellant's need to petition the Nevada Supreme Court. Finally, the Court's expedited handling of this Motion is requested since McCrea just recently noticed the depositions for three of Mikohn's key employees for October 15th, 16th, and 17th, respectively.

RECEIVED
SEP 10 2003
CLERK OF SUPREME COURT
By DEPUTY CLERK

03-15174

This motion is based upon Mikohn's Memorandum of Points and Authorities and all pleadings and papers on file in this action.

Dated: September 9, 2003

By: _____

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

At the beginning of his employment with Mikohn as its General Counsel, McCrea signed a valid employment agreement by which the parties mutually agreed to submit controversies involving McCrea's employment with Mikohn to arbitration. Following his termination by Mikohn, McCrea raised seven employment-related causes of action against Mikohn in District Court. Although these seven causes of action are based solely on alleged events that relate to his employment with Mikohn, McCrea wrongfully and unequivocally refused to submit his claims to arbitration.

Following a hearing on Mikohn's Motion to Compel Arbitration, the District Court bifurcated McCrea's claims by ruling that McCrea's First through Fifth Causes of Action should proceed in the judicial forum before the District Court, while the Sixth and Seventh Causes of Action should proceed in the arbitral forum. Mikohn timely filed a Notice of Appeal from the District Court's decision because said decision, which effectively gives McCrea "two bites at the apple," requires Mikohn to litigate the exact same issues of fact and virtually identical issues of law

in two separate and distinct forums at the same time. Accordingly, the Nevada Supreme Court should use its discretion under NRAP 8 to stay the underlying proceedings pending the resolution of Mikohn's appeal because (1) the object of Mikohn's appeal will be defeated if a stay is denied; (2) irreparable or serious harm to Mikohn will occur if a stay is denied; (3) no irreparable or serious harm to McCrea will occur if a stay is granted; and (4) Mikohn has a strong likelihood of success on the merits of its appeal.

II.

STATEMENT OF FACTS

Mikohn is a Nevada corporation that supplies gaming equipment and systems to every major casino in the world. Mikohn has offices in Las Vegas (headquarters), Reno, Colorado, Florida, Mississippi, New Jersey, and Wisconsin. Beginning in April 1994, McCrea became employed as Mikohn's Vice President, General Counsel and Secretary. McCrea was so employed until March 2003 when Mikohn terminated his employment.

On or about April 6, 1994, at the commencement of said employment, McCrea and Mikohn entered into a valid written employment agreement by which the parties agreed to submit controversies involving McCrea's employment with Mikohn to final and binding arbitration. Paragraph 15(d) of the Employment Agreement, entitled "Arbitration," states:

> Other than disputes concerning Sections 7 through 13 of this Agreement, **any controversy between MIKOHN and Employee involving the construction, application, enforceability or breach of any of the terms, provisions, or conditions of this Agreement, including without limitation claims for breach of contract, violation of public policy, breach of implied covenant, intentional infliction of emotional distress or any other alleged claims which are not settled by mutual agreement of the parties, shall be submitted to final and binding arbitration** in accordance with the rules of the American Arbitration Association. The cost of arbitration shall be borne by the losing party. In consideration of each party's agreement to submit to arbitration any and all disputes that arise under this Agreement (except disputes involving Sections 7 through 13), each party agrees that the **arbitration provisions of this Agreement shall constitute his/its exclusive remedy** and each party expressly waives the right to pursue redress of any kind in any other forum. The parties further agree that the arbitrator acting hereunder shall not be empowered to add to, subtract from, delete or in any other way modify the terms of this Agreement.

A true and correct copy of McCrea's Employment Agreement, including subsequent Amendments, is attached hereto as Exhibit 1 (emphasis added).

Significantly, the above arbitration provision expressly covers, *inter alia*, claims for "breach of contract, violation of public policy, breach of implied covenant, [and] intentional infliction of emotional distress." *Id.* The only disputes which the parties mutually agreed to exempt from arbitration where claims that might arise regarding McCrea's covenants of confidentiality, non-disclosure, non-solicitation, non-disparagement, cooperation, and non-competition. *Id.* at ¶¶ 7-13, 15.

On or about March 13, 2003, Mikohn filed a collection action in District Court against McCrea for breach of promissory notes. On or about April 7, 2003, McCrea filed a Verified Answer and Counterclaim. In his Counterclaim, McCrea asserted seven *employment-related causes of action* against Mikohn for (1) breach of contract (indemnification agreement), (2) breach of the covenant of good faith and fair dealing, (3) defamation, (4) breach of fiduciary duty, (5) intentional infliction of emotional distress, (6) breach of contract (employment agreement), and (7) an additional claim of breach of the covenant of good faith and fair dealing. Subsequently, Mikohn filed a Motion to Dismiss and/or Motion for Summary Judgment as to Counterclaim and/or to Compel Arbitration.

On or about July 1, 2003, the District Court issued an Order Regarding Counterdefendant's Motion to Dismiss and/or Motion for Summary Judgment as to Counterclaim and/or to Compel Arbitration. (A true and correct copy of the Notice of Entry of the Court's Order is attached hereto as Exhibit 2). In her Order, Judge Hardcastle denied Mikohn's Motion to Dismiss and/or for Summary Judgment. However, Mikohn's Motion to Compel Arbitration was granted in part, and denied in part. Specifically, Judge Hardcastle ruled that the motion was granted as to the Sixth and Seventh Causes of Action contained in McCrea's Counterclaim, while the motion was denied as to the First, Second, Third, Fourth, and Fifth Causes of Action. Accordingly, the Court held that the First through Fifth Causes of Action should proceed in the judicial forum before the District Court, while the Sixth and Seventh Causes of Action should proceed in the arbitral forum pursuant to the terms of the parties' Employment Agreement.

Mikohn timely filed a Notice of Appeal to the Nevada Supreme Court from the District

Court's refusal to compel arbitration as to the First, Second, Third, Fourth, and Fifth Causes of Action contained in McCrea's Counterclaim. Further, Mikohn filed a Motion to Stay Proceedings Pending Appeal in the District Court. However, the District Court denied Mikohn's motion.[1] As such, Mikohn now seeks on Order from the Nevada Supreme Court granting a stay of the proceedings in this matter, pursuant to NRAP 8, pending resolution of Mikohn's appeal.

II.

STATEMENT OF LAW AND ARGUMENT

A. The Denial of Mikohn's Motion to Compel is an Immediately Appealable Order.

The Uniform Arbitration Act ("UAA")[2] governs arbitration agreements in Nevada. *See* NRS 38.015 – 38.205; *Kindred v. Second Judicial District Court*, 116 Nev. 405, 409, 996 P.2d 903, 906 (2000). By statute, an appeal may be taken from "an order denying an application to compel arbitration made under NRS 38.045." NRS 38.205(1)(a). Further, the appeal "shall be taken in the manner and to the same extent as from orders . . . in a civil action." NRS 38.205(2).

B. The Nevada Supreme Court Should Stay the Proceedings in this Matter Pending Resolution of Mikohn's Appeal Pursuant to NRAP 8.

NRAP 8(a) provides that an application for a stay of an order of a district court pending appeal "must ordinarily be made in the first instance in the district court." Here, this prerequisite has been satisfied. *See* Exhibit 3. In deciding whether to issue a stay, courts generally consider the following factors:

(1) Whether the object of the appeal will be defeated if the stay is denied;

(2) Whether the appellant will suffer irreparable or serious injury if the stay is denied;

(3) Whether the respondent will suffer irreparable or serious injury if the stay is granted; and

(4) Whether the appellant is likely to prevail on the merits in the appeal.

---

[1] A true and correct copy of a Minute Order from the District Court denying Mikohn's Motion for Stay of Proceedings is attached hereto as Exhibit 3. Although McCrea's counsel was ordered to prepare the Order, Mikohn has not yet been provided with the Order.

[2] The UAA, found at NRS 38.015 to 38.205, inclusive, applies to agreements to arbitrate made prior to October 1, 2001. NRS 38.017. On or about April 6, 1994, McCrea and Mikohn entered into the valid written employment agreement at issue in this case, which agreement contained an arbitration provision.

NRAP 8(c); *Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000). When the above factors are applied to the facts at hand, it becomes evident that the Nevada Supreme Court should use its discretion to stay the proceedings in this matter pending the resolution of Mikohn's appeal.

1. The object of Mikohn's appeal will be defeated if a stay is denied.

First, and most importantly, the object of Mikohn's appeal will be defeated if a stay is denied. The object and purpose of Mikohn's appeal is to enforce the arbitration provision that was bargained for and mutually agreed to by the parties in McCrea's Employment Agreement with Mikohn. However, based on the District Court's Order in this case, two causes of action have been directed to arbitration, while the remaining five causes of action are to proceed in the District Court. Should the Nevada Supreme Court reverse the District Court's refusal to compel McCrea's first through fifth causes of action to arbitration, in the absence of a stay of the proceedings below, Mikohn will have been unnecessarily subjected to the authority of the District Court, thereby nullifying the benefit derived from a successful appeal and effectively rendering the arbitration clause meaningless. Accordingly, this factor suggests that a stay is necessary.

2. Irreparable or serious harm to Mikohn will occur if a stay is denied.

Second, Mikohn will suffer irreparable or serious harm if a stay is denied. In the absence of a stay, Mikohn will be required to litigate the exact same issues of facts and virtually identical issues of law in two separate and distinct forums at the same time. In essence, by allowing McCrea to proceed in both the arbitral and judicial forums with his factually identical and overlapping employment-related claims, McCrea will get "two bites at the apple" during both the discovery phase and at trial.

Further, these bifurcated proceedings will inevitably lead to inconsistent and conflicting rulings in the two forums. For instance, based on discovery disputes that have already surfaced to date in this case, there is a strong likelihood that the parties will have disagreements in the future during discovery, *inter alia*, about the scope of discovery, the production of documents, and the application and interpretation of legal privileges. Accordingly, if McCrea is allowed to petition both the District Court and an arbitrator at the same time in regard to various discovery disputes, it is

inevitable that the District Court and an arbitrator will reach conflicting and inconsistent decisions as to various discovery issues. Thus, there is a strong potential that Mikohn will have to comply with conflicting discovery rulings in both the judicial and arbitral forums although McCrea's claims are related and based upon the same facts. Therefore, a discovery ruling in one forum could essentially trump a ruling in the other, for instance, if Mikohn is compelled to produce certain documents by the arbitrator but not by the court. Thus, by providing a stay of the instant matter pending Mikohn's appeal, the parties will not be subjected to duplicate discovery costs and inconsistent ruling on related matters in two different fronts.

Additionally, for the same reasons, judicial economy favors staying all proceedings in the District Court. One important policy behind a judicial stay is to protect the appellate court's jurisdiction so that any decision it reaches is not rendered moot by subsequent trial court proceedings. *See Elsea v. Saberi*, 4 Cal.App.4th 625, 629 (1992); *In re Marriage of Horowitz*, 159 Cal.App.3d 377, 381 (1984). Similarly, allowing a matter to be litigated while a related issue is pending on appeal "could create chaos with the appellate process." *City of Hanford v. Superior Court*, 208 Cal.App.3d 580, 588 (1989). In this case, granting a temporary stay is necessary to protect Mikohn's statutory right of appeal as well as the Nevada Supreme Court's subsequent decision in this matter. Further, if Mikohn prevails on its appeal while a stay was not granted, the District Court will have needlessly and wastefully been involved in litigation for which it had no subject matter jurisdiction.[3] Thus, judicial economy is best served by staying the instant proceedings. Moreover, when examined in the context of facing potentially conflicting discovery rulings on the same employment-related claims and issues, the irreparable harm factor weighs in favor of a stay.

3. No irreparable or serious harm to McCrea will occur if a stay is granted.

Third, McCrea will not suffer irreparable or serious injury if a stay is granted. While a stay may be inconvenient to McCrea, it would not prejudice him in the way that having to relitigate

[3] It is axiomatic that the ability to raise the absence of subject matter jurisdiction is never waived and generally may be brought to the court's attention at any time and in almost any manner. *Meinhold v. Clark County School District*, 89 Nev. 56, 59, 506 P.2d 420, 422 (1973); *S. G. & R. Bank v. Milisich*, 43 Nev. 373, 390, 233 P. 41, 46 (1925).

issues or risking inconsistent outcomes would, which could result if the District Court proceedings are not stayed. Mikohn's Notice of Appeal is from a preliminary order issued at the beginning of this litigation. Discovery in this matter has just commenced. Thus, any potential concerns on McCrea's part about unavailable witnesses or fading memories would be unfounded since this is a relatively new case and there will be ample time to resume discovery should the Nevada Supreme Court ultimately find in McCrea's favor. Therefore, McCrea will not suffer irreparable or serious injury if a stay is granted.

4. Likelihood of success on the merits.

Fourth, a review of the facts of this case and the controlling statutes and case law reveals that Mikohn can demonstrate a strong likelihood of success on the merits. Indeed, it is clear under both the UAA and Nevada case law, that there is a strong presumption favoring arbitration. Similarly, federal law is equally strong in its support of arbitration. It is important to note, however, that while the Court can consider Mikohn's likelihood of success on the merits of its appeal, "a movant does not always have to show a probability of success on the merits" when moving for "a stay pending an appeal." *Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 658-59, 6 P.3d 982, 987 (2000). Thus, this Court has discretion to stay the proceedings pending appeal although Mikohn's original motion to compel arbitration was denied in part.

a. *Mikohn's Counterclaim asserts employment-related causes of action and is subject to a valid arbitration agreement enforceable under Nevada law.*

As previously noted, the UAA governs arbitration agreements in Nevada. *See* NRS 38.015 - 38.205.[4] Under clear principles set out in the UAA, and Nevada case law interpreting the UAA, McCrea's claims are subject to a binding arbitration agreement.

Section 38.035 of the UAA provides in pertinent part:

> A written agreement to submit any existing controversy to arbitration or **a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable**, save upon such grounds as exist at law or in equity for the revocation of any contract. (Emphasis added).

[4] The UAA, found at NRS 38.015 to 38.205, inclusive, applies to agreements to arbitrate made prior to October 1, 2001. NRS 38.017.

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Notably, NRS 38.035 "appl[ies] to arbitration agreements between employers and employees or between their respective representatives unless otherwise provided in the agreement." NRS 38.035. Thus, the type of agreement that exists between Mikohn and McCrea in this case is clearly provided for by the UAA. Additionally, "[t]here is a strong public policy favoring contractual provisions requiring arbitration as a dispute resolution mechanism. Consequently, when there is an agreement to arbitrate we have said there is a 'presumption of arbitrability.'" *Phillips v. Parker*, 106 Nev. 415, 417, 794 P.2d 716, 717 (1990). Thus, arbitration contracts, with certain limited exceptions, are valid, enforceable and irrevocable. *Phillips*, 106 Nev. at 417, 794 P.2d at 717.

In this case, McCrea cannot overcome the "presumption of arbitrability." As described above, McCrea expressly agreed, as a condition to his employment, that (with few exceptions):

> **[A]ny controversy** between MIKOHN and [him] involving the construction, application, enforceability or breach of any of the terms, provisions, or conditions of [their Employment] Agreement, including without limitation claims for breach of contract, violation of public policy, breach of implied covenant, intentional infliction of emotional distress or any other alleged claims which are not settled by mutual agreement of the parties, **shall be submitted to final and binding arbitration**.

See Exhibit 1, ¶15(d). Accordingly, McCrea must arbitrate all claims alleged in his Counterclaim because the parties expressly bargained for arbitration of his employment-related claims.

The Nevada Supreme Court is very strong in its support of such arbitration agreements. *See Kindred v. Second Judicial District Court*, 116 Nev. 405, 409-11, 996 P.2d 903, 906-08 (2000) (noting that the UAA "governs arbitration agreements in Nevada" and that "*Nevada overwhelmingly favors arbitration*") (emphasis added). Further, "in reviewing arbitration agreements, the issue of '[w]hether a dispute is arbitrable is essentially a question of construction of a contract.'" *Kindred*, 116 Nev. at 410, 996 P.2d at 907 (quoting *Clark Co. Public Employees v. Pearson*, 106 Nev. 587, 590, 798 P.2d 136, 137 (1990)). Further, *arbitration clauses are to be construed liberally in favor of arbitration. Phillips v. Parker*, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990) (emphasis added).

b. *Mikohn's Counterclaim asserts employment-related causes of action and is subject to a valid arbitration agreement enforceable under Federal law.*

Federal law's policy in favor of arbitration is also instructive. Under the Federal Arbitration Act ("FAA"), "a written provision in any . . . contract . . . involving commerce to settle by arbitration

a controversy thereafter arising . . . *shall be valid, irrevocable, and enforceable*, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). The FAA was enacted to overcome courts' reluctance to enforce arbitration agreements. *See Allied-Bruce Terminix Cos v. Dobson*, 513 U.S. 265, 270, 115 S. Ct. 834, 838 (1995). The FAA not only placed arbitration agreements on equal footing with other contracts, but also established a federal policy in favor of arbitration. *Portland General Elec. Co. v. U.S. Bank Trust Nat'l Assoc,* 218 F.3d 1085, 1091 (9th Cir. 2000) (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S. Ct. 852, 857 (1984)). This policy is so significant that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719 (9th Cir. 1999).

The FAA specifically operates to require enforcement of arbitration agreements between employers and employees. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 S. Ct. 1302, 1311 (2001). Moreover, the Ninth Circuit in *EEOC v. Luce, Forward, Hamilton & Scripps,* 303 F.3d 994, 1003 (9th Cir. 2002), recently held that an employer may require employees to arbitrate even statutory claims such as Title VII claims as a condition of employment. *See also*, *Lyster v. Ryan's Family Steak Houses, Inc.*, 239 F.3d 943 (8th Cir. 2001) (*citing Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837-38 (8th Cir. 1997)); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (ADEA claims subject to arbitration where the parties have entered into a valid agreement). Plainly, McCrea's Counterclaim is subject to arbitration.

In this case, therefore, there can be no question about whether the employment-related claims in McCrea's Counterclaim fall within the scope of the arbitration provision in his Employment Agreement. The claims, as described above, and as described in McCrea's Verified Answer and Counterclaim, clearly arise out of his employment with Mikohn and are based upon the same set of facts. Thus, McCrea's claims are clearly arbitrable. Therefore, although the District Court did not grant Mikohn's requested relief as to the First through Fifth Causes of Action in McCrea's Counterclaim, Mikohn submits that, based upon Nevada law and its strong policy favoring arbitration, there is a strong likelihood on appeal that McCrea's claims, especially his claim for

intentional infliction of emotional distress which is expressly referred to in McCrea's Employment Agreement, will be compelled to arbitration.

c. *McCrea's indemnification agreement has no bearing on the enforceability of his arbitration clause.*

McCrea will undoubtedly respond to this argument by noting that McCrea also signed an Indemnification Agreement at the beginning of his employment with Mikohn, and that the Indemnification Agreement does not contain an express arbitration clause. However, the legal issues in Mikohn's appeal go much deeper than whether or not the Indemnification Agreement contained an arbitration provision. For instance, McCrea's Employment agreement was subsequently amended on numerous occasions, including in 1995, 1996, 1997, 2000, and 2001. None of the various amendments, however, made any changes to McCrea's agreement to arbitrate his employment-related claims. In fact, McCrea's duty to arbitrate was effectively renewed with each amendment to his earlier agreement. Further, as McCrea made clear in his Declaration attached to his Opposition to Mikohn's Motion to Compel Arbitration, McCrea signed the Employment Agreement and subsequent amendments with a complete and full knowledge that (1) the original contract contained an arbitration clause; and (2) that the arbitration clause was of critical importance to Mikohn.

While it is true that McCrea's Counterclaim asserts a claim for relief for breach of his Indemnification Agreement, McCrea's Indemnification Agreement has no bearing on the enforceability of his arbitration clause. According to McCrea, "[t]he Indemnification Agreement applies to the [Michigan Gaming Control Board] Investigation and requires Mikohn to indemnify McCrea against any losses suffered by him as a result of the MGCB Investigation." (Counterclaim, 8:22). However, Mikohn is not aware of any information indicating that McCrea incurred legal fees as a consequence of the MGCB investigation. Moreover, McCrea was not sued by any entity as a result of the MGCB investigation. As such, it is unclear how McCrea has any right of indemnification in this matter.

Although it is common for corporate executives to have indemnity agreements, the purpose and intent of such agreements is to protect and defend executives from lawsuits and other actions brought against them in their official capacities by third-parties. However, indemnity agreements do not protect executives from corporate decisions that affect their employment status. Again, McCrea has not been sued by anyone or incurred legal fees to defend an action brought against him by a third-party. Thus, McCrea's argument that he is entitled to indemnification for the company's decision to terminate his employment is frivolous. Further, McCrea's attempt to bootstrap all of his employment-related claims as being part of his indemnification agreement should be rejected.

Based upon the application of the above factors, therefore, the Nevada Supreme Court should exercise its discretion to stay the proceedings in this matter pending the resolution of Mikohn's appeal.

III.

CONCLUSION

For the foregoing reasons, Mikohn respectfully requests that this Court issue an Order granting a stay of the proceedings in this matter, pursuant to NRAP 8, pending resolution of Mikohn's appeal.

Dated: September 9, 2003

By: _____

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PROOF OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3930 Howard Hughes Parkway, Suite 200, Las Vegas, Nevada 89109-0945. On September 9, 2003, I served the within document(s): ***APPELLANT'S MOTION FOR STAY OF PROCEEDINGS:***

by facsimile transmission at or about _____ on that date. The transmission was reported as complete and without error. A copy of the transmission report, properly issued by the transmitting machine, is attached. The names and facsimile numbers of the person(s) served are as set forth below.

X by placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Las Vegas, Nevada addressed as set forth below.

by depositing a true copy of the same enclosed in a sealed envelope, with delivery fees provided for, in an overnight delivery service pick up box or office designated for overnight delivery, and addressed as set forth below.

by personally delivering a copy of the document(s) listed above to the person(s) at the address(es) set forth below.

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I am readily familiar with the firm's practice of collecting and processing correspondence for mailing and for shipping via overnight delivery service. Under that practice it would be deposited with the U.S. Postal Service or if an overnight delivery service shipment, deposited in an overnight delivery service pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 9, 2003, at Las Vegas, Nevada.

MARIBEL R. PEREIRA

Exhibit C

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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. AND ALL RELATED MATTERS	Case No.: 2:17-cv-00346-JCM-VCF **MOTION TO COMPEL RESPONSES TO INTERROGATORIES**

Plaintiff TPOV Enterprises 16, LLC ("TPOV 16" or "Plaintiff") hereby respectfully requests an order compelling defendant Paris Las Vegas Operating Company, LLC ("Defendant" or "Paris") to supplement its response to Plaintiff's Interrogatories, dated December 4, 2017. As set forth in the declaration of Paul Sweeney, Esq., attached hereto as Exhibit 1, the parties were unable to resolve this discovery dispute during the meet and confer process. Additionally, Plaintiff provided Paris with the opportunity to submit a supplement to its responses, however, in the supplemental response Paris maintained its refusal to respond to the Interrogatory that is the subject of this motion.

I. RELIEF REQUESTED.

TPOV 16 respectfully requests an Order requiring Defendant Paris to do the following:

1. Respond in full to Interrogatory No. 4, which requests that Paris "Identify each instance in the past 15 years in which the Compliance Committee has determined a person to be unsuitable by the name of the person, the date the determination was made, the basis or grounds on which the determination was made"; and
2. Reimburse TPOV 16 for its fees and costs associated with this Motion.

II. FACTUAL BACKGROUND.

In summary, this action concerns a restaurant venture known as "Gordon Ramsay Steak" ("Steak Restaurant" or "Restaurant".) The Steak Restaurant was jointly conceived and funded by the parties to a Development and Operation Agreement ("TPOV Agreement"), entered into in 2011. After over 4 years of successful and profitable operation, Paris purported to terminate the TPOV Agreement, but continued to operate the Restaurant in contravention of the termination provisions of the Agreement. Paris not only refused to pay TPOV 16 its share of the profits but also refused to repay TPOV's $1 million capital investment in the Restaurant.

In 2010, Counterclaim Defendant, TPOV Enterprises, LLC ("TPOV"), and its then-principal, Counterclaim Defendant Rowen Seibel, introduced Paris to the celebrity chef Gordon Ramsay. TPOV and Paris jointly conceived and built the Steak Restaurant that would utilize intellectual property owned by Ramsay. (ECF No. 1 ¶ 50.) TPOV and Paris jointly funded the capital investment in the Restaurant, with TPOV investing $1 million, nearly 50% of the necessary capital. (ECF No. 1 ¶¶ 10, 26.) The parties entered into the TPOV Agreement in November 2011, setting forth TPOV's obligation to provide capital and possible services for the design, development, construction and operation of the Restaurant in exchange for 50% of the profits, subject to certain capital recoupment and reserves. (Exhibit 2.) Simultaneously, and as an express condition of entering into the TPOV Agreement, Paris entered into a Development, Operation and License Agreement with Gordon Ramsay ("Ramsay Agreement"). (ECF No. 1 ¶ 9.) As the two Agreements expressly reference each other, were executed simultaneously, expressly concern the Steak Restaurant, and could not be carried out without one

another, they are a single integrated contract. (ECF No. 1 ¶ 46.)

The Restaurant opened in Las Vegas in May 2012 to great success and has remained profitable to this day. (ECF No. 1, ¶ 10.) The Restaurant has been so successful that Paris announced the opening of two additional Steak Restaurants, one in Baltimore that opened in November 2017, and one in Atlantic City, New Jersey, that is schedule to open by the end of May 2018.[1] (Exs. 3 and 4.) However, despite the Steak Restaurant's success, in September 2016 Paris purported to terminate the TPOV Agreement. Upon termination, pursuant to the terms of the TPOV Agreement and its express termination provisions, Paris was left with two contractually acceptable options: (1) close the profitable Restaurant and cease any plans for future Steak Restaurants; or (2) continue both operating the Steak Restaurant and planning for additional Steak Restaurant's by buying-out TPOV 16's interest. Paris pursued neither option. Instead, Paris opted for the proverbial "have its cake and eat it too" option: Paris continued to operate the Steak Restaurant and reap the profits, but refused to (i) buy-out TPOV 16, (ii) pay TPOV 16 its share of the profits, and (iii) pay back TPOV 16 the $1 million capital investment.[2] In other words, Paris took the position that upon termination of the TPOV Agreement it should be permitted to continue as if the TPOV Agreement never existed, as if TPOV 16 had no rights,

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[1] Under Section 13.22 of the Development and Operation Agreement between LLTQ Enterprises, LLC (an affiliate of TPOV) and Desert Palace, Inc. (an affiliate of Paris) (the "LLTQ Agreement"), Caesars agreed it could not operate a restaurant similar to the Steak Restaurant without entering a development agreement with Plaintiff or an affiliate. (ECF No. 1 ¶ 76; Ex. 5, § 13.22 providing: "Additional Restaurant Projects. If Caesars elects under this Agreement to pursue any venture similar to (i) the Restaurant (i.e., any venture generally in the nature of a pub, bar, café or tavern) or (ii) the "Restaurant" as defined in the development and operation agreement entered into December 5, 2011 between TPOV Enterprises, LLC (an affiliate of LLTQ), on the one hand, and Paris Las Vegas Operating Company, LLC, on the other hand (i.e., any venture generally in the nature of a steak restaurant, fine dining steakhouse or chop house), Caesars and LLTQ shall, or shall cause an Affiliate to, execute a development and operation agreement on the same terms and conditions as this Agreement, subject only to revisions proposed by Caesars or its Affiliate as are necessary to reflect the difference in location between the Restaurant and such other venture (including, for the avoidance of doubt, the Baseline Amount, permitted Operating Expenses and necessary Project Costs)." Although this provision expressly survives termination, Paris has refused to enter into new contracts with Plaintiff for its new Steak Restaurant ventures.

[2] Because the TPOV Agreement and the Ramsay Agreement are integrated contracts, Paris could not terminate the TPOV Agreement but not the Ramsay Agreement – which is exactly what it did.

even those that expressly survive termination, and as if Paris is permitted to purloin TPOV's $1 million investment (which has not be repaid and without which Paris could never have opened the Steak Restaurant.) This blatant misconduct and misappropriation of capital is what caused TPOV 16 to commence this action.

However, in addition to the above, also at issue in this action is the question of whether Paris properly terminated the TPOV Agreement. Paris claimed to terminate the TPOV Agreement based on its claim that TPOV 16 was "unsuitable". Paris claims that Seibel, who never had any interest or role in TPOV 16 but was a member of an entity that was a member of TPOV, was "unsuitable" based on his guilty plea in August 2016 to one count of impeding the due administration of the tax laws. Paris also claims that a trust created by Seibel, to which he assigned his interests in TPOV and which owns an interest in TPOV 16, is also "unsuitable." By way of background, 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 indirect 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, management rights or responsibility, further isolating the interests in the TPOV Agreement from Seibel. (*Id.* ¶ 34; Ex. 6, April 8, 2016 Letter.) Although Seibel believed that he remained "suitable" to be an investor in a restaurant with no gaming component, he took this action out of an abundance of caution. Paris accepted the assignment from TPOV to TPOV 16 and, in fact, continued to make payments to TPOV 16 under the Agreement. (*Id.* ¶ 39.)

Thus, when Paris terminated the TPOV Agreement and determined TPOV 16 to be "unsuitable," it did so despite the fact that Seibel has never had any interest in TPOV 16 and had even assigned his indirect interest in TPOV to the Seibel Family 2016 Trust. Ignoring these facts, Paris declared TPOV "unsuitable", and then purported to retroactively reject the assignment to TPOV 16 (five months after the fact), while also declaring the Seibel Family 2016 Trust and TPOV 16 "unsuitable" because of their alleged connection to Seibel. Paris's claim that the Seibel Family 2016 Trust and TPOV 16 are "unsuitable" was particularly egregious in light of the fact that Paris refused TPOV 16's offer to allow Paris to review the Trust documents which contain provisions that prohibited

the Trust's direct or indirect association with any "unsuitable" person.[3] (ECF No. 1 ¶ 63; Ex. 7, Sept. 16, 2016 Letter.) Although no gaming authority has ever declared TPOV 16 (or the Seibel Family 2016 Trust) to be unsuitable, and despite the fact that Paris' relationship with TPOV 16 did not involve gaming activities or revenues, Paris claimed that it had to declare TPOV 16 "unsuitable" due to it fear of repercussions from the Gaming Authorities. (Ex. 8., Sept. 12, 2016 Letter.)

III. PRESENT DISPUTE

In this action, Plaintiff TPOV 16 has at least two claims relating to the purported termination of the TPOV Agreement: (1) breach of contract based, in part, on Paris wrongfully "purporting to terminate the TPOV Agreement on the alleged unsuitability of Seibel"; and (2) breach of the implied covenant of good faith and fair dealing based, in part, on Paris purporting to terminate the TPOV Agreement in bad faith by "claiming TPOV and/or TPOV 16 was an Unsuitable Person due to Mr. Seibel's conduct." (ECF No. 1 ¶¶89(c), 95(b).) As set forth in the Complaint, Plaintiff is aware that Paris and its affiliates have voluntarily done business with individuals, and promoted to the public its relationship with individuals, who had criminal convictions and associations with the underworld, but claimed it could not do business with Plaintiff. (ECF No. 1 ¶¶ 64-67.)

Accordingly, on or about December 4, 2017, TPOV 16 served its First Set of Interrogatories ("Interrogatories"). (Exhibit 9.) Among the Interrogatories, Plaintiff requested in Interrogatory No. 4:

> Identify each instance in the past 15 years in which the Compliance Committee has determined a person to be unsuitable by the name of the person, the date of the determination was made, the basis for the grounds on which the determination was made.

When Paris served it responses to TPOV 16's Interrogatories, Paris objected to Interrogatory No. 4 in

[3] Seibel is not a trustee of the Seibel Family 2016 Trust, nor is he a beneficiary. (ECF No. 1 ¶ 34.)

its entirety.[4] (Ex. 10.)

The parties held a meet and confer regarding Paris' response to Interrogatory No. 4, as well as certain other Interrogatory responses, on January 29, 2018. (Sweeney Dec. ¶ 5.) It is TPOV 16's understanding that the primary basis for Paris' objection was its contention that the individuals whose identity would be disclosed in any response had an expectation of privacy that would be violated. TPOV 16 stated its position that (i) privacy concerns do not shield relevant information from disclosure in litigation; and (ii) the Order Regarding the Stipulated Confidentiality Agreement and Protective Order, dated June 14, 2017 ("Protective Order") in this action, which provides for multiple levels of confidentiality, can adequately protect against any such concern. (Sweeney Dec. ¶ 5; Ex. 11, Protective Order.) Paris agreed to consider supplementing its responses to the subject Interrogatories. After further meet and confer discussions during which TPOV 16 agreed to limit the request to the past 10 years, on March 21, 2018, Paris stated that it would disclose only "general information," stating: "We won't disclose the identifying and/or contact information for any entities/individuals that were deemed unsuitable, but we will provide the date (or range) when they were found be unsuitable, identify the area/category of the entity or person who was found to be unsuitable, and the reason for the finding." (Exhibit 12; March 21, 2018 Email from Mercera.) Plaintiff informed Paris that this proposed limitation was not acceptable as it would not provide Plaintiff sufficient information on the prior instances of unsuitability determinations for Plaintiff to understand the facts surrounding such determinations.

[4] Paris' initial objection stated: "Paris objects because the terms and phrases, 'Compliance Committee,' and 'basis or grounds on which the determination was made' are vague, ambiguous, and subjective, requiring speculation to their intended meaning. Further, Paris objects to this Interrogatory because it is overly broad in time and overly broad in scope, and thus, this Interrogatory is not proportional to the needs of this case. This Interrogatory is further objectionable to the extent it calls for communications protected by the attorney-client and/or other privileges. Moreover, Paris objects to this Interrogatory to the extent it seeks information that is commercially sensitive, confidential, financial, private, and/or propriety and/or not otherwise available to the public and is not discoverable. Additionally, Paris objects to this Interrogatory because it seeks nondiscoverable/irrelevant information unrelated to the subject matter of this action and unrelated to any claim or defense asserted in this action in violation of Fed. R. Civ. P. 26(b). Paris further objects to this Interrogatory because it assumes and/or mischaracterizes facts. Finally, Paris objects to this Interrogatory as it is an invasive fishing expedition designed to annoy and harass." (Ex. 10, p. 12.)

(Sweeney Dec. ¶ 7.) On or about May 7, 2018, Paris issued their First Supplemental Responses to Plaintiff's First Set of Interrogatories ("Supplemental Response.") (Exhibit 13.) In the Supplemental Response, Paris reiterated it objection to Interrogatory No. 4.[5] As a result, TPOV 16 now brings the present motion.

IV. LEGAL ARGUMENTS.

A. Defendants Should Be Compelled to Fully Respond to Interrogatory No. 4

As previously stated, Plaintiff TPOV 16 has two claims relating to the termination of the TPOV Agreement: (1) breach of contract based on "purporting to terminate the TPOV Agreement on the alleged unsuitability of Seibel"; and (2) breach of the implied covenant of good faith and fair dealing for purporting to terminate the TPOV Agreement in bad faith by "claiming TPOV and/or TPOV 16 was an Unsuitable Person due to Mr. Seibel's conduct." (ECF No. 1 ¶¶89(c), 95(b).)[6] In its July 3, 2017 Order ("MTD Order"), this Court, *inter alia,* denied Paris' motion to dismiss the breach of contract and breach of the implied covenant claims. (ECF No. 30.) With regard to the breach of contract claim, this Court stated: (1) "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." (ECF No. 30, pp. 8-9) (Internal citations omitted.) Regarding the implied covenant claim, this Court found the allegations sufficient to state a claim, specifically:

> "The complaint, as discussed above, alleges a contract by assignment between TPOV 16 and Paris. TPOV 16 alleges that – among other things – rejecting the assignment to TPOV 16, claiming TPOV 16 was unsuitable, claiming TPOV 16 was affiliated with someone who was unsuitable, and continuing to operate GR Steak show bad faith and constitutes breaches of Paris's duty under the contract so as to deny TPOV 16's expectations. Moreover, TPOV 16 alleges that the purported termination of the contract itself was in bad faith, in violation of the duty Paris owed TPOV 16."

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[5] The parties were able to resolve their differences with regard to the other Interrogatory Responses that were discussed during the meet and confer. (Sweeney Dec. ¶ 8.)

[6] TPOV 16 respectfully refers the Court to the Complaint for a more complete description of the bases for its breach of contract and breach of the implied covenant causes of action. (ECF No. 1 ¶¶ 83-97)

(ECF No. 30, p. 9) As this MTD Order recognizes, relevant to Plaintiff's claims are facts related to the alleged bad faith determination by Paris that TPOV 16 was unsuitable, the bad faith determination that TPOV 16 was affiliated with an unsuitable person, and that the TPOV Agreement was terminated in bad faith.

A. The Information Sought is Relevant

As this Court stated in the MTD Order:

> In Nevada, "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and execution." *A.C. Shaw Constr., Inc. v. Washoe Cnty*., 784 P.2d 9, 9 (Nev. 1989). This implied covenant requires that parties "act in a manner that is faithful to the purpose of the contract and the justified expectations of the other party." *Morris v. Bank of Am. Nev*., 886 P.2d 454, 457 (Nev. 1994) (internal quotation marks omitted). "When one party performs a contract in a manner that is unfaithful to the purpose of the contract ... damages may be awarded against the party who does not act in good faith." *Hilton Hotels v. Butch Lewis Prods*., 808 P.2d 919, 923 (Nev. 1991). A breach of the duty of good faith and fair dealing can occur "[w]here the terms of a contract are literally complied with but one party to the contract deliberately contravenes the intention and spirit of the contract." *Id.* at 922–23. To prevail on a theory of breach of the covenant of good faith and fair dealing, a plaintiff must establish each of the following: (1) plaintiff and defendant were parties to a contract; (2) defendant owed a duty of good faith to plaintiff; (3) defendant breached that duty by performing in a manner that was unfaithful to the purpose of the contract; and (4) plaintiff's justified expectations were denied. *Perry v. Jordan*, 900 P.2d 335, 338 (Nev. 1995).

(ECF No. 30 p. 9.) Thus, relevant to TPOV 16's claims (1) whether Paris acted in good faith in determining TPOV 16 to be "unsuitable"; (2) whether Paris acted in good faith in determining the Seibel Family Trust to be "unsuitable"; (3) whether Paris acted in good faith in determining TPOV to be "unsuitable"; (4) whether Paris deliberately contravened the intention and spirit of the TPOV Agreement by purporting to terminate it based on unsuitability grounds; (5) TPOV 16's reasonable expectations were denied due to Paris's purported termination.

It is Plaintiff's contention in this action that the purported termination was in bad faith and the alleged unsuitability determination was a pretextual reason for termination. Relevant to whether Paris acted in good faith is nature of its prior determinations that persons are "unsuitable" and what Plaintiff's reasonable expectations were. As set forth in the Complaint, Paris and its affiliates

constantly engage in business and promote their associations with convicted felons who they apparently do not find to be "unsuitable." (ECF No. 1 ¶¶ 64-67.) The disparate treatment afforded TPOV 16 is relevant to its claims because, among other reasons, the implied covenant "prohibits arbitrary or unfair acts by one party that work to the disadvantage of the other." *Nelson v. Heer*, 163 P.3d 420, 427 (Nev. 2007). Accordingly, also relevant to showing Paris's bad faith to TPOV 16 are those prior instances in which Paris and its affiliates have found persons or entities to be "unsuitable." For instance, it is relevant to Paris' bad faith whether it or its affiliates have ever found a party like TPOV 16 to be unsuitable; in other words a party: (1) with whom Paris already had a contractual relationship; (2) that was not involved in gaming activities or gaming revenues; (3) that was assigned a contract by an allegedly unsuitable person; and/or (4) that was owned by an irrevocable trust in which the allegedly unsuitable person was neither a trustee or a beneficiary. Disclosure of how prior instances in which it determined persons or entities to be unsuitable is plainly relevant to Paris's bad faith. *See Henderson v. Property & Cas. Ins. Co. of Hartford*, No. 2:12-CV-00148 (KJD)(PAL), 2012 WL 3730533, at *6-*7 (D. Nev. Aug. 28, 2012) (permitting discovery on bad faith claim into how insurer "construed its obligations to its insured, and interpreted its policy provisions regarding the conditions under which underinsured motorist benefits were or were not payable"); *Wells Fargo Bank, N.A. v. ANC Vista I, LLC*, No. 2:14-CV-00840, 2015 WL 557069, at *4-*5 (D. Nev. Feb. 11, 2015) (permitting discovery on bad faith claim of insurer's pre-litigation appraisal as sufficiently relevant to overcome the "exceptional circumstances" requirement for production of opinion work product.)

Moreover, the express reason by which Paris claims that TPOV 16 is unsuitable was "the Company's experiences with the Nevada Gaming Control Board and other gaming authorities" and the claim that the alleged "relationship" between TPOV 16 and Seibel "would be unacceptable to the

Gaming Regulatory Authorities." (Ex. 8; Sept. 12, 2016 Letter.)[7] Thus, critical to Plaintiff's claim is whether this "belief" as to how the Gaming Regulatory Authorities would view the purported "relationship" between Seibel, TPOV and TPOV 16. Clearly relevant to whether Paris's purported "belief" that the Nevada Gaming Control Board would find TPOV 16 "unsuitable" was genuine are the facts surrounding prior "unsuitability" determinations, which are also allegedly guided by how Paris believed the Gaming Regulatory Authorities view the subject of the determinations. For these reasons, the information requested by Interrogatory 4 is clearly relevant to this action.

B. Paris Cannot Carry Its Heavy Burden

Once it is shown that the requested discovery is relevant, the party resisting discovery carries a "heavy burden." *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975). That party must demonstrate that the discovery request is irrelevant, duplicative, unduly costly or burdensome, overly broad, or disproportional in light of "the issues at stake." Fed.R.Civ.P. 26(b)(2)(C). The reasons why each request is improper must be specifically detailed. *Sanhueza v. Lincoln Tech. Inst., Inc.*, No. 2:13-CV-2251-JAD-VCF, 2014 WL 6485797, at *1 (D. Nev. Nov. 18, 2014). Paris claimed during the meet and confer that privacy concerns of the subjects of its prior unsuitability determinations outweighs Plaintiff's right to relevant information. The basis for this claim of privacy must be "specifically detailed." Paris has not provided any detailed explanation for the basis of its purported privacy concerns.

However, even if Paris had articulated a legitimate privacy concern, any such concern is adequately safeguarded by the Protective Order in place in this action. (Ex. 11.) The Protective Order requires that discovery marked "Confidential" must be maintained in confidence and disclosed only

[7] Paris's belief as what constituted an unsuitable conduct is tethered to the Nevada Gaming Authorities and its rules and regulations, as is Plaintiff's reasonable expectation of any such Paris's unsuitability determinations, under Section 10.2 of the TPOV Agreement, which begins with the following: "TPOV acknowledges that Paris and Paris' Affiliates are businesses that are or may be subject to and exist because of privileged licenses issued U.S., state, local and foreign governmental, regulatory and administrative authorities, agencies, boards and officials (the "Gaming Authorities") responsible for or involved in the administration of application of laws rules and regulations relating to gaming or gaming activities …" (Ex. 2 § 10.2.)

to specifically identified individuals. (Ex. 11 ¶¶ 9, 12.) The Protective Order also contains a higher level of confidentiality for information marked "Highly Confidential", which imposes more stringent confidentiality provisions.

The terms of the Protective Order more than sufficiently safeguard against any legitimate privacy concerns. In *Sanhueza*, 2014 WL 6485797, at *2 (D. Nev. Nov. 18, 2014), the court rejected the privacy concerns as a basis for resisting discovery and found:

> Federal courts are sensitive to customers' privacy interests and routinely grant businesses protective orders, which permit businesses to redact customer information or produce customer information under seal. *See, e.g.*, Fed.R.Civ.P. 5.2, 26(c). These protective orders are designed to prevent sensitive personal information from being publicly displayed on the internet through the court's docket. *See, e.g., Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1180 (9th Cir.2006). Here, however, Defendants rely on their customers' privacy rights as a basis for resisting discovery. This is mistaken. Generally, a business cannot vicariously assert its customers' rights to litigate its own claims and defenses. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973).

Similarly, in *Volvo Const. Equip. Rents, Inc. v. NRL Rentals, LLC*, No. 2:09-CV-32 JCM (LRL), 2010 WL 2836330, at *1 (D. Nev. July 15, 2010), the court required production of discovery finding:

> While defendants state that the production unnecessarily invades their privacy interests, they do not show how any individual request is overly broad, nor that any request seeks patently irrelevant information. Defendants fail to allege, other than a privacy concern, any specific harm that will befall them from permitting discovery to go forward. Additionally, no party who has heretofore answered a subpoena has complained of it being overly burdensome. (Doc. # 290). The protective order properly limits production to documents relevant to the case.

The identical result was reached in *Wells Fargo Bank, N.A. v. Iny*, No. 2:13-CV-01561-MMD, 2014 WL 1796216, at *3 (D. Nev. May 6, 2014). In *Wells Fargo*, the court stated:

> While Defendants assert vaguely that some of their banking records may contain "sensitive" information, Docket No. 62, at 9, they have failed to make a showing of harm or prejudice sufficient to deny the discovery. Indeed, the Court finds that Defendants' privacy concerns can be mitigated by subjecting the banking records to a stipulated protective order that limits the use of the documents and the people with access to them. *See, e.g., Heritage Bond Litig.*, 2004 WL 1970058, at *5 n. 12 ("Any privacy concerns [ ] defendants have in their bank records and related financial statements are adequately protected by the protective order, and are not sufficient to prevent production in this matter"). Moreover, as discussed above, Defendants'

> banking records are highly relevant to significant issues in this case for which discovery is required. Weighing the competing considerations, it is clear that any privacy concern is not sufficient here to warrant quashing the subpoenas.

See also, Comcast of Illinois X, LLC v. Pyxis Grp., Inc., No. 203CV00962DAEPAL, 2008 WL 11388717, at *2 (D. Nev. Dec. 4, 2008) ("The court further finds that although Defendant has a legitimate privacy interest in his financial information, the necessity to preserve evidence outweighs that need.")

Due to the relevance of the information sought, and the privacy protections afforded by the Protective Order, Paris should be required to supplement its response to Plaintiff's Interrogatory No. 4.

IV. REQUEST FOR FEES AND COSTS.

Before filing its Motion, TPOV 16 attempted to resolve this discovery dispute in good faith. TPOV 16 gave Paris multiple opportunities to supplement its Responses to Interrogatories so that they comply with their discovery obligations, but to no avail. Paris could have avoided this motion by either complying with the original discovery requests, or by properly supplementing their Interrogatory Responses after the parties' meet and confer. Instead, Plaintiff was forced to make this motion to obtain compliance. Accordingly, TPOV 16 respectfully requests that the Court award TPOV 16 its reasonable fees and costs pursuant to FED. R. CIV. P. 37(a)(5)(A).

V. CONCLUSION.

WHEREFORE, this Court should (1) compel Defendant Paris to supplement its response to TPOV 16's Interrogatory No. 4; and (2) award TPOV 16 its fees and costs.

DATED May 24, 2018.

MCNUTT LAW FIRM, P.C.

/s/ Dan McNutt
DANIEL R. MCNUTT (SBN 7815)
MATTHEW C. WOLF (SBN 10801)
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that pursuant to F.R.C.P. 5 on the May 24, 2018, I caused service of the foregoing **MOTION TO COMPEL RESPONSES TO INTERROGATORIES** 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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DISTRICT COURT

CLARK COUNTY, NEVADA

ROWEN SEIBEL, an individual and citizen of New York, derivatively on behalf of Real Party in Interest GR BURGR LLC, a Delaware limited liability company,

Plaintiff,

v.

PHWLV, LLC, a Nevada limited liability company; GORDON RAMSAY, an individual; DOES I through X; ROE CORPORATIONS I through X,

Defendants,

and

GR BURGR LLC, a Delaware limited liability company,

Nominal Plaintiff.

AND ALL RELATED MATTERS

Case No.: A-17-751759-B

Dept. No.: XVI

Consolidated with A-17-760537-B

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STAY ALL PROCEEDINGS IN THE DISTRICT COURT PENDING A DECISION ON THEIR PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION

Date of Hearing: August 7, 2018

Time of Hearing: 9:00 a.m.

I. INTRODUCTION

Nearly a year after Caesars[1] filed this action, the Seibel Defendants[2] are continuing their campaign to avoid this litigation. After their arguments were soundly rejected by not one, but ***two*** separate courts, the Seibel Defendants are now seeking a third bite at the apple to avoid participating in this litigation. There is, however, no basis to stay this litigation—particularly where, as here, the factors do not weigh in favor of a stay and, in fact, weigh heavily in favor of denying the stay request.

First, the Seibel Defendants cannot show that the object of their appeal – *i.e.*, preventing this Court from adjudicating claims they would prefer other courts to hear – will be defeated if a stay is not granted. Had the Seibel Defendants actually believed that a stay was necessary, they could have filed a motion after the first court rejected their arguments. They chose not to do so, and instead have now submitted answers and counterclaims in this action. Moreover, Caesars has filed motions to stay the pending federal court actions, which will avoid inconsistent decisions and the duplication of efforts and costs. This factor, therefore, weighs in favor of denying a stay request.

Second, Nevada law makes clear that the costs and expenses of defending against litigation do not constitute irreparable harm. Moreover, Caesars is the party actually trying to consolidate all of the issues and parties into one court. Without more, this factor also weighs in favor of denying the stay request.

Third, Caesars, will be prejudiced by a stay. Despite their apparent concerns regarding costs, it is the Seibel Defendants who are needlessly increasing costs with these frivolous appeals and insistence on piecemeal litigation. Now that the Seibel Defendants have answered the

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[1] Plaintiffs are Desert Palace Inc. ("Caesars Palace"), Paris Las Vegas Operating Company, LLC ("Paris"), PHWLV, LLC ("Planet Hollywood") and Boardwalk Regency Corporation d/b/a Caesars Atlantic City ("CAC," and collectively with Caesars Palace, Paris, and Planet Hollywood, "Caesars").

[2] Defendants are Rowen Seibel, LLTQ Enterprises, LLC ("LLTQ Enterprises"), LLTQ Enterprises 16, LLC ("LLTQ 16," and together with LLTQ Enterprises, "LLTQ"), FERG, LLC, FERG 16, LLC ("FERG 16," and together with FERG, LLC, "FERG"), MOTI Partners, LLC ("MOTI Partners"), MOTI Partners 16, LLC ("MOTI 16," and together with MOTI Partners, "MOTI"), DNT Acquisition, LLC ("DNT"), TPOV Enterprises, LLC ("TPOV Enterprises"), and TPOV Enterprises 16, LLC ("TPOV 16," and together with TPOV Enterprises, "TPOV," and collectively with Seibel, LLTQ, FERG, and MOTI, the "Seibel Defendants")

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Complaint and asserted counterclaims, it is time to move this case forward. This factor, while not determinative, leans in favor of denying a stay request.

Fourth, the Seibel Defendants are unlikely to succeed on the merits, as has already been determined by two separate courts. It is unlikely that the Nevada Supreme Court will substitute its judgment to negate this Court's decision on the Seibel Defendants' motions to dismiss, which is also supported by the findings and conclusions of the Nevada Bankruptcy Court. This factor weighs heavily in favor of denying the stay request. With none of the factors weighing in favor of a stay, the Seibel Defendants' Motion to Stay All Proceedings in the District Court Pending a Decision on their Petition for a Writ of Mandamus or Prohibition (the "Motion") should be denied in its entirety.

II. STATEMENT OF FACTS

A. The Seibel Agreements and Seibel's Criminal Activity.

Beginning in 2009, Caesars entered into six agreements (the "Seibel Agreements") with entities owned by, managed by, and/or affiliated with Seibel relating to the operation of restaurants at Caesars' casinos (the "Seibel-Affiliated Entities"). (Compl., Aug. 25, 2017, ¶ 1, on file.) 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 (the "DNT Agreement");
- A Development and Operation Agreement between TPOV and Paris, dated November 2011 (the "TPOV Agreement");
- A Development and Operation Agreement between LLTO Enterprises, LLC and Desert Palace, Inc., dated April 4, 2012 (the "LLTO 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 Burger Agreement"); and
- A Consulting Agreement between FERG, LLC and Boardwalk Regency Corporation dba Caesars Atlantic City, dated May 16, 2014 (the "FERG Agreement").

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(*Id.* ¶¶ 26-90.) Because of the highly regulated nature of Caesars' businesses, each of the Seibel Agreements contained provisions designed to ensure that the Seibel-Affiliated Entities were "suitable" and Caesars was not entering into a business relationship that would jeopardize its good standing with gaming regulators. (*Id.* ¶¶ 1, 27-34, 58-64, 80-86, on file.)

However, unbeknownst to Caesars at the time, Seibel was engaged in criminal conduct that would have rendered him "unsuitable" when the parties entered into each of the Seibel Agreements had the information been disclosed. (*Id.* ¶ 2.) Specifically, for years, Seibel maintained foreign bank accounts which he did not report to U.S. tax authorities. (*Id.* ¶¶ 92-102.) In addition to his failure to disclose, Seibel signed and caused to be submitted certain false statements to the Internal Revenue Service ("IRS") with respect to such accounts. (*Id.* ¶¶ 103-05.) As a result of Seibel's actions, in April 2016, he was charged with defrauding the IRS. (*Id.* ¶¶ 2, 106.) Seibel did not contest the charges and, instead, pled guilty to one count of a corrupt endeavor to obstruct and impede the due administration of the Internal Revenue Laws, 26 U.S.C. § 7212, a Class E Felony. (*Id.* ¶¶ 106.)

Despite these suitability issues, Seibel never informed Caesars that he was engaged in criminal activity, much less that he had been charged and convicted for his criminal endeavors. (*Id.* ¶ 108.) Although Caesars was not aware of it at the time, Seibel's criminal conduct rendered him unsuitable when the parties entered into each of the Seibel Agreements. (*Id.* ¶ 2.) Despite his obligation to disclose such relevant information to Caesars under the Seibel Agreements, Seibel did not disclose his criminal conduct to Caesars at the outset of their relationship or at any point during their relationship. (*Id.* ¶ 109.) It was not until August 2016 that Caesars learned of Seibel's felony conviction for tax evasion and impending prison sentence through press reports. (*Id.*) As a result, Caesars promptly terminated all of the Seibel Agreements, as it was entitled to do in its ***sole and exclusive judgment*** under the express terms of those agreements. (*Id.* ¶¶ 109-119.)

B. <u>The Ensuing Cross-Country Litigation.</u>

As a result of Caesars' exercise of its right to terminate the Seibel Agreements, the parties' respective rights and obligations thereunder have become the subject of litigation in courts across

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the country, including in state and federal courts in Nevada, Delaware, Illinois, and New York. The various actions include:

- an action in Delaware Chancery Court seeking to dissolve GRB (*In re GR Burger, LLC*, Case No. 12825 (VCS) (Del. Ch.));
- an action for breach of contract, fraud, and declaratory relief in New York state court asserted by The Old Homestead Restaurant, Inc. ("OHR") against Seibel and others based on the DNT joint venture between OHR and an entity affiliated with Seibel (*The Original Homestead Restaurant, Inc. et al. v. Rowen Seibel et al.*, Case No. 650145 (N.Y. Sup. Ct.));
- an action in Nevada federal court initiated by Seibel against Caesars and Mr. Ramsay relating to a Ramsay steak restaurant at Caesars' non-debtor affiliate Paris (*TPOV Enterprises 16, LLC v. Paris Las Vegas Operating Co., LLC*, Case No. 17-346 (D. Nev.)) (the "Nevada Federal Lawsuit");
- an action in Nevada state court initiated by Seibel against Caesars and Mr. Ramsay relating to the BurGR Gordon Ramsay restaurant, which has now been consolidated with this lawsuit;
- the contested matters in the Illinois Bankruptcy Court involving LLTQ, FERG, MOTI, and DNT (*In re Caesars Entertainment Operating Co., Inc.*, Case No. 15-1145 (Bankr. N.D. Ill.)) (the "Contested Matters"); and
- this action, which was initiated by Caesars and includes as parties all of Caesars' relevant debtor and non-debtor affiliates, Seibel, and all of the Seibel-Affiliated Entities.

The action before this Court is the most comprehensive lawsuit as it involves all of the Caesars entities and all of the Seibel-Affiliated Entities and Seibel Agreements. On August 25, 2017, Caesars filed this action seeking declaratory relief against Seibel and all of the Seibel-Affiliated Entities. Specifically, Caesars seeks a declaration that it properly terminated the Seibel Agreements based on its determination that Seibel and the Seibel-Affiliated Entities were unsuitable due to Seibel's felony conviction and criminal activities, and their failure to disclose either the conviction or the underlying activities. (Compl. Count I.) Caesars also seeks a declaration that it does not have any current or future obligations or commitments to Seibel or the Seibel-Affiliated Entities. (Compl. Counts II and III.)

This action was brought, in part, at the suggestion of counsel for LLTQ and FERG, who argued in the Contested Matters that the propriety and effect of the termination of the Seibel Agreements should be brought elsewhere. (Ex. 1, Contested Matters, Bankruptcy Docket No. 6906

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at 2 ("Termination and the related issue of suitability should remain separate from the Contested Matters."); *see also id.* at 1 ("[T]he [Debtors'] fraudulent inducement claim, like the issue of whether the Termination [of the agreements with LLTQ and FERG] was proper in the first instance, is not presently before [the Illinois Bankruptcy Court] and should be resolved in separate proceedings (likely in state or federal district court.").) However, the Seibel Defendants seek to avoid the very litigation they once argued was necessary to adjudicate these important issues.

C. The Seibel Defendants Seek to Delay and Obstruct this Action.

For nearly nine months, the Seibel Defendants have been trying to stall this litigation so they can litigate related claims in the Illinois Bankruptcy Court. After service of the complaint, on September 27, 2017, LLTQ, FERG, and MOTI removed certain of the claims asserted against them in this action to the U.S. Bankruptcy Court for the District of Nevada ("Nevada Bankruptcy Court") and subsequently filed motions to transfer those claims to the Illinois Bankruptcy Court.[3] *See Desert Palace, Inc. v. MOTI Partners, LLC*, Case No. 17-01237 (Bankr. D. Nev.) (the "MOTI Removal Action") and Desert Palace, Inc. v. LLTQ Enters., LLC, Case No. 17-01238 (Bankr. D. Nev.) (collectively, the "LLTQ and FERG Removal Action"). In their removal petitions and transfer briefing, LLTQ, FERG, and MOTI repeatedly argued that the Illinois Bankruptcy Court was the proper forum to resolve Caesars' declaratory judgment claims. However, the Nevada Bankruptcy Court rejected these positions and, on December 14, 2017, granted Caesars' motions to remand and denied as moot the motions to transfer from LLTQ, FERG, and MOTI. (Exs. 2-4, MOTI Removal Action, Docket Nos. 68–70; Exs. 5-7, LLTQ and FERG Removal Action, Docket Nos. 70, 72, 74.) Specifically, in granting Caesars' motion to remand, the Nevada Bankruptcy Court found:

- the removed claims involved state law contract issues;
- "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";
- Counts II and III are not "related to" the interpretation or enforcement of the Reorganized Debtors' plan of reorganization in the bankruptcy case;

[3] Although only certain Seibel Defendants removed claims, the entire action was removed from this Court and closed. (Ex. 8, Minute Order Case No. A-17-760537-B, Sept. 28, 2017.)

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- "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.

(Ex. 2, MOTI Removal Action, Docket No. 68 ¶¶ M, N, X, Y, Z; Ex. 5, LLTQ and FERG Removal Action, Docket No. 70 ¶¶ M, N, X, Y, Z.) LLTQ, FERG, and MOTI appealed the orders of the Nevada Bankruptcy Court remanding the claims back to Nevada State Court and denying the transfer orders. (Ex. 9, MOTI Removal Action, Docket No. 81; Ex. 10, LLTQ and FERG Removal Action, Docket No. 79.) They did not, however, seek to stay this action pending their appeal to the Ninth Circuit Bankruptcy Appellate Panel. That appeal is currently pending before the Ninth Circuit Bankruptcy Appellate Panel and has been scheduled for oral argument on July 27, 2018. (Ex. 11, Notice of Case Set for Hr'g.)

After the Nevada Bankruptcy Court rejected the Seibel Defendants' removal attempts and the matter was remanded to this Court, the Seibel Defendants filed motions to dismiss on January 5, 2018. (Ex. 12, Docket Case No. A-17-760537-B.) At that time, the action was pending before the Honorable Nancy Allf. (*See id.*) However, on or about February 9, 2018, the parties stipulated to consolidate this action with the action initiated by Seibel against Caesars and Mr. Ramsay relating to the BurGR Gordon Ramsay restaurant. (Stip. & Order to Consolidate Case No. A-17-760537-B with and into Case No. A-17-751759-B, Feb. 9, 2108, on file.) As a result, the January motions to dismiss were taken off calendar and the Seibel Defendants did not re-file their motions to dismiss until February 22, 2018. The motions sought to dismiss, among other things, the claims LLTQ, FERG and MOTI removed and were arguing on appeal are not properly before this Court. Thereafter, the hearing on the Seibel Defendants' Motion to Dismiss came before the Court on May 1, 2018. After extensive briefing and argument from counsel, the Court denied all of the Seibel Defendants' Motions to Dismiss and entered extensive findings in support of the denial. (Order Den., without Prejudice, Motions to Dismiss, June 4, 2018, on file.) The Court particularly agreed with Nevada Bankruptcy Court's Findings of Fact and Conclusions of Law and incorporated them in its order. (*Id.* at 3:23-4:2.) In denying the Motions, the Court also

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determined that a stay of this action would be inappropriate and denied the request. (*Id.* at 4:3-4.) Specifically, the Court determined:

> - the ***subject contracts have nearly identical suitability provisions***, which supports denial of the Motions [and] . . . [***d]enying the Motions will help alleviate if not resolve the potential of inconsistent rulings on suitability amongst all of the various actions***.
>
> - ***comity supports denial of the Motions***. In reaching its conclusion on the Motions and determining that these matters should be proceeding before this Court, the Court agrees with Judge Davis' Findings of Fact and Conclusions of Law ("FFCL") related to MOTI, MOTI 16, LLTQ, LLTQ 16, FERG, & FERG 16's Motions to Transfer Venue and the Caesars Parties' Motions to Remand
>
> - the ***parties are already involved in litigation in a forum other than New Jersey***, namely the United State Bankruptcy Court in Illinois, which along with the other circumstances . . . supports denial of LLTQ, LLTQ 16, FERG, & FERG 16's Motion to Dismiss,
>
> - 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 3:14-4:16 (emphasis added).)

In response to the Court's order, the Seibel Defendants filed this Motion and the writ petition. Importantly, while the Seibel Defendants moved for a stay, they did not seek entry of any such order before the time to respond to the complaint expired. The Seibel Defendants had until June 21, 2018 to respond to the Complaint. However, the Seibel Defendants did not respond to the Complaint, nor did they request an extension of time to respond. As a result, Caesars was forced to file notices of intent to take default. (Notices of Intent to Take Default, June 25, 2018.) After a meet and confer, the Seibel Defendants finally agreed to file their responsive pleadings on July 2, 2018, over ***ten months*** after the complaint was filed in this action. In response to the complaint, the FERG, LLTQ, and DNT Defendants also asserted counterclaims against Caesars for breach of contract and accounting. (*See* Def. DNT Acquisition, LLC's Answer to Pls.' Compl. & Countercl., July 6, 2018, on file; LTQ/FERG Defs.' Answer & Affirmative Defenses to Pls.' Compl. & Countercls., July 6, 2018, on file.)

Finally, the reorganized Caesars' debtors have moved to stay the Contested Matters in the Illinois bankruptcy court on the grounds that the Nevada state court action provides the most

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comprehensive forum and will be addressing overlapping issues. That motion will be fully-briefed on July 18 and is scheduled for a hearing on August 15.

III. ARGUMENT

A. Standard for Issuance of a Stay.

In determining whether to issue a stay pending adjudication of a writ, this Court must consider:

(1) Whether the object of the writ petition will be defeated if the stay is denied;

(2) Whether petitioner will suffer irreparable or serious injury if the stay is denied;

(3) Whether respondent/real party in interest will suffer irreparable or serious injury if the stay is granted; and

(4) Whether petitioner is likely to prevail on the merits of the writ petition.

Hansen v. Eighth Jud. Dis. Ct., 116 Nev. 650, 657, 6 P.3d 982, 986 (2000) (citing NRAP 8(c); *Kress v. Corey*, 65 Nev. 1, 189 P.2d 352 (1948)). No single factor is conclusive. *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004). A stay should be denied when the writ petition "appears frivolous or if the appellant apparently filed the stay motion purely for dilatory purposes." *Id.* at 253, 89 P.3d at 40. "[W]hen moving for a stay pending an appeal or writ proceedings, . . . ***the movant must 'present a substantial case on the merits*** when a serious legal question is involved ***and show that the balance of equities weighs heavily in favor of granting the stay.***" *Hansen*, 116 Nev. at 659, 6 P.3d at 987 (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir.1981) (emphasis added). Importantly, "' [a] stay is not a matter of right, even if irreparable injury might otherwise result.'" *Powertech Tech. Inc. v. Tessera, Inc.*, C 11-6121 CW, 2013 WL 1164966, at *1 (N.D. Cal. Mar. 20, 2013) (quoting *Nken v. Holder*, 556 U.S. 418, 427 (2009)). Here, the factors do not clearly weigh in favor of granting a stay. To the contrary, the factors weigh heavily in favor of denying the stay request.

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1. The object of the writ petition will not be defeated if the stay motion is denied.

In support of their Motion, the Seibel Defendants heavily rely on *Mikohn Gaming Corp.* However, their reliance is entirely misplaced as *Mikohn Gaming* is not applicable to the facts at issue here. The litigation in *Mikohn Gaming* arose as a result of the company's termination of its general counsel and secretary. *Id.* at 250, 89 P.3d at 38. During his employment, the company and its general counsel entered into certain employment and indemnification agreements. *Id.*, 89 P.3d at 38. "The employment agreement included an arbitration clause, which subjected certain controversies arising from [the general counsel's] employment to ***binding*** arbitration." *Id.*, 89 P.3d at 38. After litigation ensued, Mikohn moved to dismiss certain counterclaims brought by its general counsel and/or compel arbitration in accordance with the employment agreement between the parties. *Id.* at 251, 89 P.3d at 38. The district court granted the motion to compel arbitration as to certain counterclaims but denied it as to others. *Id.*, 89 P.3d at 38. Mikohn Gaming moved for a stay pending an appeal, which the district court denied. *Id.*, 89 P.3d at 38.

On appeal, the Nevada Supreme Court noted that "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." *Id.*, 89 P.3d at 38. In Nevada, there is a strong public policy in favor of arbitration and "courts are not to deprive the parties of the benefits of arbitration they have bargained for, and arbitration clauses are to be construed liberally in favor of arbitration." *Id.* at 252, 89 P.3d at 39. "Arbitration, as an alternative dispute resolution mechanism, is generally designed to avoid the higher costs and longer time periods associated with traditional litigation." *Id.*, 89 P.3d at 39. As a result, "[t]he benefits of arbitration would likely be lost or eroded if it were necessary for an appellant to simultaneously or sequentially proceed in both judicial and arbitral forums." *Id.*, 89 P.3d at 39. Thus, the Nevada Supreme Court concluded that a stay was warranted in that instance and more broadly stated to the extent its docket permits, the Nevada Supreme Court would "expedite appeals from orders denying motions to compel arbitration." *Id.* at 254, 89 P.3d at 40.

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Here, the Seibel Defendants are not appealing from an order to compel arbitration. Nor is the availability of arbitration an issue here. Instead, the Seibel Defendants argue that their desire to proceed with related claims in forums they prefer over this Court is equivalent to a contractual provision requiring binding arbitration. Neither the law nor the facts support this interpretation. Indeed, in *Mikohn Gaming*, the court's entire holding and analysis focused on the narrow issue and implications of binding agreements to arbitrate disputes, not competing judicial forums as the Seibel Defendants suggest. As a result, *Mikohn Gaming* offers no support for their position.[4]

The Seibel Defendants also assert a number of other arguments as to why the objective of the petition would be defeated without a stay. First, they claim that a stay would promote the objective of having the claims against FERG decided by a New Jersey court. But if their petition is successful, the FERG claims will be litigated in the *Illinois* bankruptcy court, not a New Jersey court. Second, they claim that a stay would promote the objective of having federal courts decide certain claims instead of this Court. This objective may, however, be defeated without a stay because Caesars has moved to stay the federal actions. In addition, the Seibel Defendants have already answered the Complaint in this action, and this Court has already entertained related claims in the GRB litigation. Third, the Seibel Defendants claim that a stay would promote the objective of limiting duplicative costs. To be clear, it is Caesars who has advocated for one comprehensive forum where all of the issues can be decided in the most efficient manner. Finally, the Siebel Defendants claim that a stay would allow the parties to take advantage of "favorable results in the federal cases." They omit, however, that these purportedly "favorable results" related to statements made in the context of discovery disputes and a motion to dismiss—rather than a decision on the merits—and regardless misrepresent the records from these actions.

In ruling on a motion to dismiss, the Nevada federal court did not determine that "TPOV validly assigned its interests to TPOV 16." Instead, the Court simply determined that TPOV 16 had

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[4] *State v. Robles-Nieves*, 129 Nev. 537, 306 P.3d 399 (2013), provides even less support for the Seibel Defendants' position. *Robles-Nieves* did not involve a stay request pending litigation in other jurisdictions. Rather, the court in *Robles-Nieves* addressed a motion to stay trial pending an interlocutory appeal of an order granting a motion to suppress an incriminating statement ***in the same case***. *Id.* at 539-40, 306 P.3d at 401.

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pled sufficient facts to survive a motion to dismiss. (Ex. 13, Order, ECF No. 30, 8:21-9:2.) The Court made clear that "[w]hether Paris could or did reject the assignment [wa]s a factual dispute between the parties, which the court [did] not consider on a motion to dismiss." (*Id.* at 8:24-26.) As recognized by this Court, the validity of any arguments or defenses have not yet been determined.[5] (*See* Order Den., without Prejudice, Mots. to Dismiss, June 4, 2018, on file ("***[D]etermination on the merits have not been reached in the other actions.***") (emphasis added).)

2. The Seibel Defendants will not be irreparably harmed.

With the exception of the forum selection clause in the FERG Agreement, the Seibel Defendants have not and cannot point to any provision in the Seibel Agreements that require litigation to proceed in other courts rather than this one. The reason, of course, is because no such requirement exists. Aware that this fact is fatal to their position, the Seibel Defendants next argue that they would be irreparably harmed by being forced to expend resources to proceed in this forum. (Mot. at 7:8:2.) However, the Nevada Supreme Court has repeatedly held "that ***litigation costs, even if potentially substantial, are not irreparable harm.***" *Mikohn Gaming Corp.*, 120 Nev. at 253, 89 P.3d at 39 (emphasis added). In *Hansen*, the defendant similarly "argue[d] that it should not be required to participate 'needlessly' in the expense of lengthy and time-consuming discovery, trial preparation, and trial." *Hansen*, 116 Nev. at 658, 6 P.3d at 986-87. The Nevada Supreme Court rejected that argument and found that "[s]uch litigation expenses, while potentially substantial, are neither irreparable nor serious." *Id.* at 658, 6P.3d at 986-87 (citing *Dixon v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029, 1029–30 (1987)). Thus, the possibility that the Seibel Defendants will incur litigation costs is not a basis to grant a stay.

[5] In their Motion, the Seibel Defendants also cite the Illinois Bankruptcy Court's statements that the Debtors' theories were "thin" and "dubious." But they omit that the Bankruptcy Court has also commented on weaknesses in Defendants' positions. (Ex. 15, May 31, 2017 Hr'g Tr. at 8:21-9:4 ("The facts adduced thus far suggest that Seibel may have made a false disclose to the debtors in 2009, a disclosure the debtors insist they relied on in connection with the LLTQ and FERG agreements. The facts also suggest that the LLTQ and FERG agreements required their affiliates (Seibel was an affiliate) to behave with honesty and integrity. Seibel's conviction, another fact, tends to show he did neither."). All of these comments, however, were made in the context of discovery disputes and are not decisions on the merits as the Seibel Defendants suggest.

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With respect to the FERG forum selection clause, FERG cannot seek to enforce a contractual provision it has waived.[6] *See, e.g., In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 712 (Tex. 2016) ("[L]ike other contractual rights, a forum-selection clause may be waived, and it would ordinarily be unreasonable or unjust for a court to enforce a forum-selection clause after it has been waived.") (internal quotations omitted); *Principal Invs. v. Harrison*, 366 P.3d 688, 693 (2016) ("The right to enforce an agreement to arbitrate, ***like any contract right, can be waived.***") (emphasis added). Here, as correctly pointed out by this Court, FERG is already litigating claims outside of the forum provided in the contract. Moreover, by its own admission, FERG argues that the claims in the Contested Matters are related to the claims at issue before this Court and FERG seeks to transfer the claims to Illinois, not New Jersey, as would be required if it were truly trying to enforce the forum-selection clause as it claims. Thus, FERG ignores that contractual provision when convenient and seeks to litigate everywhere else but before this Court. By its conduct, FERG has forced Caesars to litigate in forums other than those contemplated in the FERG Agreement so it cannot now seek to enforce the provision it waived.

In its Motion, FERG claims it did not have an opportunity to address this argument before this Court. However, as FERG must concede, it was the Court, not Caesars, that *sua sponte* inquired about the effect of other litigation. (Ex. 14, Hr'g. Tr., May 1, 2018, at 38:22-24.) Both FERG and Caesars had the same opportunity to address this argument before the Court at the hearing:

> THE COURT: Well, on -- well, since we're on that one, the issues between -- I'll just generically refer to FERG and Caesars, are currently being litigated where?
>
> MR. PISANELLI: The FERG and Caesars, that is the Illinois.
>
> THE COURT: Illinois Bankruptcy Court?
>
> MR. PISANELLI: Yeah. And, so, we take now that we're in Illinois and the FERG agreement says, as Your Honor has before you, that they -- the parties: Each agree to submit to the exclusive jurisdiction of any state or Federal Court within Atlantic County, New Jersey. So, we have a problem there already because we're in Illinois.
>
> . . . .

---

[6] The Seibel Defendants also argue that this Court lacks jurisdiction over the claims against FERG. But "even a mandatory forum-selection clause does not in fact divest a court of jurisdiction that it otherwise retains." *Silva v. Encyclopedia Britannica, Inc.*, 239 F.3d 385, 388 n.6 (1st Cir. 2001).

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> THE COURT: Is there a difference here, though, in terms of the factual and procedural background that we're dealing with now, in terms of you all are litigating in a forum that's not the forum in the forum selection clause?
>
> MR. RUGG: Yes and no, Your Honor. It's a different situation but it doesn't affect this because it's the supremacy clause of the Constitution. This was a Chapter 11 bankruptcy case. Caesars here was the first one to breach this contract. They stopped paying us and they did it on a very legitimate basis, which was they wanted to reject the contract under the bankruptcy code. It's one of the powers of the data. But that's the only place they could have brought the action because of the supremacy clause and the only remedy that FERG had was to object to the Motion. We were precluded by the automatic stay, Section 362, of bringing an action somewhere else. The proceeding was brought in the Bankruptcy Court as it was required to and we responded. And they mentioned earlier, that sets off a whole new -- basically, it's like filing a Complaint as soon as we object. The matter is now a live Compliant in front of the Bankruptcy Court.
>
> THE COURT: So, if -- so, again, I don't know a lot about bankruptcy, but, so, you're saying you couldn't litigate because of supremacy -- litigate in New Jersey because of the supremacy clause and the automatic stay. I may know little enough to be dangerous, I guess, but I mean, don't you have potential, at least option, to move to lift the automatic stay?
>
> MR. RUGG: We would, Your Honor, except that the nature of the relief is unique to bankruptcy. It's that ability to reject a contract under 365 of the bankruptcy code. It's a great power for debtors. They can say, we're not going to perform this contract and all your damages are going to be tiny, prepetition claims, so that is why we're precluded. And now it's Caesars who is brought the new action. There -- so, it's -- this is the first instance, effectively, that the forum selection clause could come into play and that's where we find ourselves. Did Your Honor have any other questions on the forum selection?
>
> THE COURT: No. Thank you very much

(*Id.* at 38:22-39:10, 43:6-44:22.) FERG's claims of prejudice are little more than a red herring.

3. Caesars will be prejudiced by a stay.

As discussed above, Caesars initiated this action over 10 months ago and the Seibel Defendants have only just filed their responsive pleadings. Now that the Seibel Defendants have responded, the parties can promptly move forward with discovery and proceed to adjudicate the claims on their merits. If the Court issues a stay, Caesars would once again be hampered in its efforts to obtain resolution on the outstanding issues regarding the parties' rights and obligations under the Seibel Agreements. In contrast, by allowing this matter to proceed, the parties would have a consistent resolution on an issue that affects all of the Seibel Agreements, instead of having to resolve issues piecemeal in litigation across the country.

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4. The Defendants are unlikely to prevail on the merits on their writ.

The Seibel Defendants claim that when "the first stay factor [*i.e.*, whether the primary objective of the writ petition would be defeated without a stay] weighs heavily in favor of a stay the final factor [*i.e.*, the likelihood the petitioner will prevail on the merits] will counterbalance the first factor only when the [writ petition] appears to be frivolous or the stay sought purely for dilatory purposes." As discussed above, the first stay factor does not weigh in favor of a stay and thus this analysis is inapplicable here. Even if it was, however, a writ petition based on a claim that the FERG claims should be litigated in New Jersey courts — when the Seibel Defendants have requested that all of the claims be litigated in the Illinois bankruptcy court — qualifies as frivolous and dilatory. Moreover, had the Seibel Defendants truly believed that a stay was necessary to protect their interests and prevent this Court from entertaining these claims, it could have filed a stay motion pending its appeal to the Ninth Circuit Bankruptcy Appeal Court. It chose not to and instead gambled on filing a motion to dismiss in this Court to try to dismiss the claims that are the subject of the appeal. The Seibel Defendants cannot now claim irreparable harm as a result of their own actions.

In any event, the issues addressed by the Seibel Defendants' writ are some of the most thoroughly briefed, argued, and determined in this action.[7] The Nevada Bankruptcy Court has considered and ruled upon these issues, they have been briefed before the Ninth Circuit Bankruptcy Appellate Panel, and they have been considered and decided by this Court. However, thus far, every court that has considered the Seibel Defendants' arguments has resoundingly rejected them. There is no basis to argue that the Nevada Supreme Court will view things any differently.[8] The Seibel Defendants cannot show that they are likely to succeed on the merits.

First, "[w]rit relief is an extraordinary remedy that will only issue at the discretion of this court." *State v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 118 Nev. 140, 146, 42 P.3d 233, 237

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[7] Caesars hereby incorporates its Combined Opposition to Certain Defendants' Motions to Dismiss filed on March 12, 2015, as though fully restated herein.

[8] To date, the Nevada Supreme Court has not ordered briefing on the Seibel Defendants' writ petition.

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(2002). Generally, the Nevada Supreme Court will not exercise its "discretion to consider writ petitions that challenge orders of the district court denying motions to dismiss or motions for summary judgment." *Smith v. Eighth Jud. Dist. Court In & For Cty. of Clark*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997). In certain limited exceptions, the court may consider such petitions where "where no disputed factual issues exist" or where "pursuant to clear authority under a statute or rule, the district court is obligated to dismiss an action." *Id.* at 1345, 950 P.2d at 281. "***Writ relief is not proper to control the judicial discretion of the district court*** unless discretion is manifestly abused or is exercised arbitrarily or capriciously." *State*, 118 Nev. at 147, 42 P.3d at 237–38 (emphasis added). The Nevada Supreme Court's review of the Seibel Defendants' writ petition will not involve substituting its judgment for that of this Court. *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990) (noting that under an abuse of discretion standard, this Court will not substitute its judgment for that of the district court); *see also Houston Gen. Ins. Co. v. Eighth Jud. Dist. Ct. In & For Clark Cty.*, 94 Nev. 247, 248–49, 578 P.2d 750, 751 (1978) (quoting *Pinana v. Dist. Ct.*, 75 Nev. 74, 334 P.2d 843 (1959)) ("[I]t is not the province of an extraordinary writ, such as prohibition or mandamus, to control the judicial discretion of a district court.") Here, this Court's decision to decline to apply the first to file doctrine was within its full discretion and the Seibel Defendants cannot show that this Court abused its discretion or applied a clearly erroneous legal standard.

Second, the first-to-file rule does not mandate that this action be dismissed, but rather is a doctrine of discretion. As this Court already recognized, the first-filed rule creates a rebuttable presumption that a second forum should yield to the first. *Amlin Corp. Member Ltd. v. Leeward*, No. 3:12–cv–0360–LRH–VPC, 2012 WL 6020107, at *1 (D. Nev. Nov. 27, 2012). Indeed, "[t]he rule is discretionary and, in determining whether the rule should apply, ***the court should '"yield to the forum in which all interests are best served."'*** *Id.* (quoting *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Payless Shoesource, Inc.*, 2012 U.S. Dist. LEXIS 112346, *7 (N. D. Cal. 2012) (emphasis added).

In this instance, the forum where all interests are best served is here due to the inclusion of all parties and necessary claims. Indeed, as this Court already found, this action "involves issues

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of suitability pertaining to Mr. Seibel and . . . ***there exists a great potential for inconsistent rulings amongst the various actions***."[9] (Order Den. Mots. to Dismiss, June 1, 2018 at 3:15-17, on file (emphasis added).) By allowing this action to proceed, the danger of inconsistent rulings will be alleviated. Moreover, Nevada has a strong public policy with respect to the issues presented in this case. Specifically, the Nevada legislature has found that, as "public policy of [Nevada]," the "gaming industry is vitally important to the economy of the State and the general welfare of the inhabitants," and "the continued growth and success of gaming is dependent upon public confidence and trust that . . . gaming is free from criminal and corruptive elements." NRS 463.0129(1)(a)-(b); *see also* Nevada Gaming Regulation 5.011. Here, this Court will determine issues of vital importance to the gaming industry, namely the ability of a gaming licensee to comply with its suitability obligations in its dealings with third parties. Indeed, the Nevada Bankruptcy Court agreed that these issues should be resolved by a Nevada court. (Ex. 2, MOTI Removal Action, Docket No. 68 ¶ Y ("Comity dictates that Nevada courts should have the right to adjudicate the exclusively state law claims involving Nevada-centric plaintiffs and Nevada-centric transactions."); Ex. 5, LLTQ and FERG Removal Action, Docket No. 70 ¶ Y (same).); *see also Amlin Corp.*, 2012 WL 6020107, at *2 (determining that, although a lawsuit was filed second, it was better to have a Nevada court resolve a dispute governed by Nevada law because it "deals with Nevada law regularly"); *see also Editorial Planeta Mexicana, S.A. de C.V. v. Argov*, No. 2:11-CV-01375-GMN-CWH, 2012 WL 3027456, at *4 (D. Nev. July 23, 2012) (although a lawsuit was first filed in Nevada, the second-in-time Massachusetts court should resolve a contractual dispute because it would be more efficient, the actions were not identical, and Massachusetts law applied). Thus, this Court is best suited to address these issues in this forum.

Third, the litigation before this Court is broader than the matters currently being litigated in Illinois or in Nevada federal court because this action involves additional defendants and plaintiffs who are not parties to the other actions. This Court will also decide issues that are not present in the other litigations. For example, the Illinois Bankruptcy Court may determine issues related to

[9] In their writ petition, the Seibel Defendants concede there is a risk of inconsistent rulings. (Mot, at Ex. A, at 16:14-16.)

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the administrative claims filed by LLTQ, FERG, MOTI, and DNT but not the enforceability of the restrictive covenants or Caesars' prospective obligations as set forth in Counts II and III of the Complaint. Thus, the additional parties and additional claims warranted denial of the Seibel Defendants' motions to dismiss. *See, e.g.*, *Mitchell Capital, LLC v. Powercom, Inc.*, No. 64669, 2015 WL 5774161, at *3 n.2 (Nev. Sept. 29, 2015) (unpublished) (denying motion to dismiss subsequently filed declaratory judgment action that included additional parties); *Jones v. Eighth Jud. Dist. Ct. of Cty. of Clark*, No. 62614, 2013 WL 3944042, at *2 (Nev. July 24, 2013) (unpublished) (refusing to dismiss declaratory judgment action where there was no guarantee that court in first lawsuit would resolve all claims).

Fourth, the irony of the Seibel Defendants' argument that forum shopping merits dismissal of this action is lost on no one. It is the Seibel Defendants who have initiated a cross-country litigation campaign with actions in Illinois and federal and state courts in Nevada. These actions have inevitably resulted in piecemeal litigation across the country with certain issues being decided by certain courts. By comparison, this action, which involves all of the Seibel Defendants, Caesars, and all of the Seibel Agreements will result in a comprehensive resolution of issues related to Seibel's unsuitability, Caesars' determination and decision to terminate the Seibel Agreements, and the parties' respective rights and obligations under the Seibel Agreements. That single, consistent determination on the merits is exactly what the Seibel Defendants are seeking to avoid. The Seibel Defendants' request for a stay should be denied.

IV. CONCLUSION

Based on the foregoing, Caesars respectfully requests that this Court deny the Seibel Defendants' Motion in its entirety.

DATED this 9th day of July, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC and that, on this 9th day of July 2018, I caused to be served via the Court's e-filing/e-service system a true and correct copy of the above and foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STAY ALL PROCEEDINGS IN THE DISTRICT COURT PENDING A DECISION ON THEIR PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION** to the following:

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Exhibit C

RPLY

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DISTRICT COURT

CLARK COUNTY, NEVADA

ROWEN SEIBEL, an individual and citizen of New York, derivatively on behalf of Real Party in Interest GR BURGR LLC, a Delaware limited liability company, Plaintiff, v. PHWLV, LLC, a Nevada limited liability company; GORDON RAMSAY, an individual; DOES I through X; ROE CORPORATIONS I	Case No.: A-17-751759-B Dept. No.: 15 Consolidated with: Case No.: A-17-760537-B **REPLY IN SUPPORT OF DEFENDANTS' MOTION TO STAY ALL PROCEEDINGS IN THE DISTRICT COURT PENDING A DECISION ON THEIR PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION**

through X, Defendants, AND ALL RELATED MATTERS	This document applies to: A-17-760537-B **Hearing Date: 08/07/18** **Hearing Time: 9:00 a.m.**

On June 18, 2018, Defendants filed a writ petition (the "Petition") with the Nevada Supreme Court and moved to stay the district court proceedings until their petition is resolved.[1] Plaintiffs opposed Defendants' motion on July 9, 2018. Defendants respectfully submit this reply in support of their stay motion.

I. INTRODUCTION.

This case arises from a series of contracts the parties entered to operate multiple restaurants across the United States, some of which bear the name and likeness of celebrity chef Gordon Ramsay. For several years, the parties have been litigating their related claims in two federal courts. Specifically, in January 2015, Caesars Entertainment Operating Company and several subsidiaries and affiliates (collectively, "CEOC") filed bankruptcy in Illinois. The restaurant agreements are subject to extensive, ongoing litigation before the bankruptcy court. (*See* Defs.' Pet. at 3-12 (summarizing the bankruptcy litigation).)[2] Furthermore, in February 2017, TPOV 16 sued Paris before the United States District Court for Nevada, and Paris counterclaimed against TPOV and TPOV 16. (*Id*. 12-14.)

After the federal courts made some unfavorable rulings and expressed some unfavorable views, Plaintiffs raced to the Eighth Judicial District Court

[1] On July 19, 2018, the Nevada Supreme Court directed Plaintiffs to answer the Petition.

[2] On June 20, 2018, Defendants filed an erratum and attached the Petition they filed with the Nevada Supreme Court. All citations herein to the Petition correspond to the copy of the Petition attached to the errattum.

courthouse and filed this lawsuit. This lawsuit simply repackages the claims, issues, and theories that already are being litigated before the federal courts. Plaintiffs clearly filed this lawsuit to evade the federal courts' unfavorable rulings and views and are engaged in blatant forum shopping.

Defendants originally removed this lawsuit to the United States Bankruptcy Court for Nevada, but it was remanded. They then filed several motions to dismiss. Therein, FERG asked the district court to dismiss the claims against it because the May 2014 consulting agreement between FERG and CAC (the "FERG Agreement") requires all claims to be litigated in Atlantic County, New Jersey. (Ex. A, FERG Agreement § 14.10(c) ("FERG and CAC each agree to submit to the exclusive jurisdiction of any state or federal court within the Atlantic County, New Jersey . . . .").) Defendants also asked the district court to dismiss the claims under the first-to-file rule and due to forum shopping.

The district court denied Defendants' motions, and on June 18, 2018, Defendants filed the Petition with the Nevada Supreme Court. Defendants now ask this Court to stay all proceedings until their Petition is resolved. The primary objective of the Petition is to have Plaintiffs' claims heard by other courts, and that objective would be defeated if this Court were to entertain the claims. This Court should enter a stay because the primary objective of the Petition would be defeated without one, Plaintiffs would not be harmed, the Petition is not frivolous, and Defendants are not seeking a stay for dilatory purposes. Wherefore, this Court should stay all proceedings until the Petition is resolved.

II. LEGAL ARGUMENTS.

A. The Stay Standard from *Mikohn Gaming* is Applicable.

Under *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 89 P.3d 36 (2004) ("*Mikohn Gaming*"), a stay may be entered when (i) the primary objective of an appeal would be defeated without one; (ii) the nonmovant would not be harmed;

(iii) the appeal does not appear frivolous; and (iv) the appellant is not seeking a stay "purely for dilatory purposes." A stay is warranted under these factors.

In *Mikohn Gaming*, Mikohn Gaming Corporation ("MGC") employed Charles McCrea as its general counsel and secretary. *Id.* at 250, 38. MGC and McCrea entered two agreements: (i) an employment agreement, which contained an arbitration clause; and (ii) an indemnification agreement, which did not contain an arbitration clause. *Id.* MGC sued McCrea for breaching a promissory note, and McCrea asserted seven counterclaims against MGC. *Id.* at 250–51, 38.

MGC moved to dismiss McCrea's counterclaims or compel arbitration, but the district court denied MGC's motion with respect to five of McCrea's counterclaims because they arose under the indemnification agreement, not the employment agreement. *Id.* MGC appealed and moved for a stay before the district court, but the district court denied the motion. *Id.* MGC subsequently filed a stay motion before the Nevada Supreme Court. *Id.* at 251-52, 38.

The Nevada Supreme Court said that for an appeal of an order refusing to compel arbitration, "the first stay factor takes on added significance and generally warrants a stay of trial court proceedings pending resolution of the appeal. The other stay factors remain relevant, but absent a strong showing that the appeal lacks merit or that irreparable harm will result if a stay is granted, a stay should issue to avoid defeating the object of the appeal." *Id.* at 251-52, 38. With respect to the first stay factor, the *Mikohn Gaming* court said "[t]he object of an appeal seeking to compel arbitration is to enforce the arbitration agreement and attain the bargained-for benefits of arbitration. As a result, because the object of an appeal seeking to compel arbitration will likely be defeated if a stay is denied, a stay is generally warranted." *Id.* at 253, 39. Because the objective of MGC's appeal would have been defeated without a stay, the Nevada Supreme Court entered a stay even though MGC failed to show it would suffer irreparable

or serious harm and "the merits are unclear at this stage." *Id.* at 253-54, 39-40.

In response, Plaintiffs argue that the stay standard in *Mikohn Gaming* is limited to appeals concerning arbitration clauses. (Opp'n 10:15 – 11:7.) Plaintiffs are mistaken, as evident from the Nevada Supreme Court's reliance on *Mikohn Gaming* in *State v. Robles-Nieves*, 129 Nev. 537, 306 P.3d 399 (2013) ("*Robles-Nieves*"). In that criminal case, the district court suppressed a confession, and the State filed an interlocutory appeal. *Id.* at 539-40, 401-402. The State filed an unsuccessful stay motion with the district court and then renewed the motion with the Nevada Supreme Court. *Id.*

After concluding NEV. R. APP. P. 8(c) applies to an interlocutory criminal appeal, the Nevada Supreme Court entered a stay. *Id.* Citing *Mikohn Gaming*, the *Robles-Nieves* court said "the first and third factors [under NEV. R. CIV. P. 8(c)] take on added significance in our stay analysis." *Id.* at 542, 403; *see also id*. (citing *Mikohn Gaming* and stating "we have recognized that depending on the type of appeal, certain factors may be especially strong and counterbalance other weak factors."); *id*. at 546, 406 (citing *Mikohn Gaming* and stating that "[b]ecause the first stay factor weighs heavily in favor of a stay, the final factor will counterbalance the first factor only when the appeal appears to be frivolous or the stay sought purely for dilatory purposes.")

The *Robles-Nieves* court entered a stay for essentially the same reasons as the *Mikohn Gaming* court:

> [W]e conclude that the first factor is most significant in this case. There has not been a sufficient showing of irreparable harm to Robles–Nieves or that there is not a likelihood of success on the merits to counterbalance that factor—if a stay is denied and the trial commences, the object of the appeal will be defeated as will the purpose of NRS 177.015(2). We therefore grant the State's motion and stay the trial pending resolution of this appeal.

Id. at 547, 406. *Robles-Nieves* demonstrates that *Mikohn Gaming* is not limited to appeals concerning arbitration clauses.

This instant matter is highly analogous to *Mikohn Gaming*. In the Petition, Defendants challenge the district court's refusal to enforce the forum clause in the FERG Agreement, which requires all claims to be litigated in Atlantic County, New Jersey. Defendants also challenge the district court's refusal to dismiss under the first-to-file rule and due to forum shopping because Plaintiffs' claims already are before the federal courts.

Just as how the objective of the *Mikohn Gaming* appeal was to have McCrea's claims heard elsewhere (*i.e.*, in arbitration), the Petition's objective is to have Plaintiffs' claims heard in federal courts. Furthermore, just as how the objective of MGC's appeal would have been defeated if the district court had proceeded to entertain McCrea's claims, the objective of the Petition would be defeated if this Court were to proceed to entertain Plaintiffs' claims.

In their discussion of *Mikohn Gaming*, Plaintiffs also emphasize the fact Nevada public policy strongly favors arbitration clauses. (Opp'n 10:15 – 11:7.)[3] Plaintiffs, however, overlook the fact that the claims against FERG are governed by New Jersey law (FERG Agreement § 14.10(a)), and New Jersey public policy strongly favors forum selection clauses. *See, e.g., Kultur Int'l Films Ltd. v. Covent Garden Pioneer, FSP., Ltd.*, 860 F. Supp. 1055, 1069 (D.N.J. 1994) ("New Jersey has a long standing policy that favors enforcement of forum selection clauses."); *see also Kowalski v. YellowPages.com, LLC*, 2010 WL 3323749, at *5 (D.N.J. Aug. 18, 2010) ("New Jersey has a policy that favors the

[3] Plaintiffs paradoxically rely in their Opposition on Nevada law concerning arbitration clauses. (Opp'n 13:5-6 (quoting *Principal Investments v. Harrison*, 366 P.3d 688, 693 (Nev. 2016) for the proposition that "[t]he right to enforce **an agreement to arbitrate**, like any contract right, can be waived.") (emphasis added).)

enforcement of forum selection clauses.") Accordingly, the Petition is highly analogous to *Mikohn Gaming* because both matters involve the district court's refusal to enforce contractual provisions strongly favored by public policy.

Based on the strong similarities between the Petition and *Mikohn Gaming*, this Court should apply the stay standard in *Mikohn Gaming* and enter a stay because the primary objective of the Petition would be defeated without one, Plaintiffs would not be harmed by a stay, the Petition is not frivolous, and Defendants are not seeking a stay for dilatory purposes.

B. Defendants Will Suffer Serious Injury Without a Stay, and Plaintiffs Will Not Be Harmed by a Stay.

Under *Mikohn Gaming*, the second and third factors under NEV. R. APP. P. 8(c) are relevant only when the nonmovant would be irreparably harmed by a stay. *Mikohn Gaming*, 120 Nev. at 253, 89 P.3d at 40 ("Because the object of an appeal seeking to compel arbitration will be defeated if a stay is denied, and irreparable harm will seldom figure into the analysis, a stay is generally warranted."); *see also id.* at 251-52. 38 ("[A]bsent a strong showing that the appeal lacks merit or that irreparable harm will result if a stay is granted, a stay should issue to avoid defeating the object of the appeal.") These factors favor Defendants because they will suffer serious harm without a stay, whereas Plaintiffs would not be harmed by a stay.

1. *Defendants Would Be Harmed Without a Stay*.

Without a stay, Defendants would be forced to expend duplicative resources litigating this action. (Mot. 9:5-11.) None of the cases in the federal courts have been stayed. Defendants already have served written discovery and filed motions to compel in the federal cases. In fact, right after Defendants filed their Motion, the Nevada federal court compelled Paris to supplement its interrogatory answers. (Ex. B, Order, June 21, 2018.) Without a stay, Defendants

would be forced to serve the same written discovery and likely file the same discovery motions in this case. That duplicative work would be a tremendous waste of Defendants' time and resources.

In response, Plaintiffs point out that litigation costs do not constitute irreparable harm under NEV. R. APP. P. 8(c). (Mot. 12:11-21.) The Nevada Supreme Court has not yet addressed whether that rule of law applies to *duplicative* litigation costs.[4] The rationale for that rule is that litigation costs inevitably will have to be incurred at some point in the litigation. That is not true of duplicative litigation costs, which are needless and unnecessary. In considering stay motions under FED. R. APP. P. 8, the majority of federal courts consider whether the movant would incur wasteful, unrecoverable, and duplicative costs. *See, e.g.*, *Huffman v. Prudential Ins. Co. of Am*., 2018 WL 1281901, at *2 (E.D. Pa. Mar. 12, 2018) (collecting cases) ("Courts appear split over whether litigation costs alone establish irreparable harm; *most*, however, *seem to find that 'wasteful, unrecoverable, and possibly duplicative costs are proper considerations'* to be balanced among others.") (emphasis added). The Nevada Supreme Court likely would follow this approach. *Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005) (federal decisions "provide persuasive authority when this court examines its rules.")

Without a stay, Defendants also could lose the benefit of the federal courts' analyses of Plaintiffs' claims that are reasserted in these proceedings. (Mot. 9:5-11.) The bankruptcy court already has called Plaintiffs' fraudulent inducement theory "thin" and "dubious," and it also questioned the accuracy of

[4] Defendants are unaware of any cases in which the Nevada Supreme Court or the Nevada Court of Appeals has addressed whether the second factor under NEV. R. APP. P. 8(c) is satisfied when the movant demonstrates that without a stay, it would be forced to expend duplicative resources.

Plaintiffs' arguments about the validity of the restrictive covenants. (Mot. 8:12-20.) Judge Mahan also recognized that if TPOV validly assigned its interests to TPOV 16, then Plaintiffs' arguments concerning Seibel's suitability would be irrelevant because Seibel is not associated with TPOV 16. (*Id.* 8:3-11.) Finally, Magistrate Judge Ferenbach recently concluded that Paris's business relations in the past ten years with persons and entities it has deemed unsuitable is relevant to TPOV 16's implied covenant claim and must be disclosed. (Ex. B, Order, June 21, 2018.)[5]

In response, Plaintiffs claim that when the bankruptcy court called their fraudulent inducement theory "thin" and "dubious," it did so in the context of discovery disputes without ruling on the merits of the theory. (Opp'n 12, n.5.) While true, Plaintiffs' argument misses the point – *i.e.*, that the bankruptcy court examined the substance of the theory in the context of discovery disputes. In addition to casting doubt on Plaintiffs' theories, the bankruptcy court's rulings on the disputes expanded the discovery available to Defendants in contesting the claims now at issue in these proceedings. Defendants could lose the benefit of that analysis and expanded discovery without a stay.

Plaintiffs also accuse Defendants of falsely representing to this Court that the Nevada federal court found the TPOV-to-TPOV 16 assignment valid. (Opp'n 11:23-24 ("[T]he Nevada federal court did not determine that 'TPOV validly assigned its interests to TPOV 16.'").) Plaintiffs' argument intentionally misquotes and misrepresents the Motion. (Mot. 8:3-7 ("When he mostly denied Paris's motion to dismiss TPOV 16's claims, Judge Mahan recognized that ***if***

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[5] It should be noted that on April 4, 2018, Paris filed a motion with the Nevada federal court to stay TPOV 16's lawsuit, and that motion remains pending. (Ex. C, Paris's Stay Mot., April 4, 2018.) Defendants respectfully submit that because it subsequently ordered Paris to supplement its interrogatory answers, the Nevada federal court likely will deny Paris's stay motion.

TPOV validly assigned its interests to TPOV 16, then Paris's argument concerning Seibel's suitability is irrelevant because Seibel is not associated with TPOV 16.") (emphasis added).) Without a stay, Defendants could lose the benefit of Judge Mahan's analysis to date. For these reasons, the second factor under NEV. R. APP. P. 8(c) favors a stay.

2. *Plaintiffs Would Not Be Harmed by a Stay*.

The third factor under NEV. R. APP. P. 8(c) is whether the nonmovant "will suffer *irreparable or serious* injury if the stay or injunction is granted[.]" (emphasis added). A stay would not harm Plaintiffs, let alone irreparably or seriously harm them. Plaintiffs claim they would be harmed because a stay would prevent the parties from "promptly mov[ing] forward with discovery and proceed[ing] to adjudicate the claims on their merits." (Opp'n 14:19-27.) If a delay in the case were sufficient to satisfy the third factor in NEV. R. CIV. P. 8(c), then a stay motion would never be granted because every stay delays the case. Plaintiffs' argument also is frivolous because even if this Court were to enter a stay, Plaintiffs could still litigate (or rather continue to litigate) their claims and theories at issue before the federal courts, neither of which has entered a stay. Plaintiffs therefore would not suffer any irreparable or serious harm from a stay.

Moreover, the crux of the disputes before the federal courts and the district court is the Plaintiffs' ongoing and future contractual obligations to Defendants with respect to a series of restaurant ventures that remain open and profitable to date. Plaintiffs have stopped remitting payment to Defendants as required under the subject contracts and therefore continue to benefit from the unresolved disputes among the parties.

C. Defendants Will Prevail on the Merits of their Petition.

1. *Writ Relief is Appropriate*.

Plaintiffs claim the Petition will be denied because the first-to-file rule

and forum shopping are discretionary matters and writ relief ordinarily is not available to challenge the district court's discretion. (Opp'n 15:23 – 16:18.) Plaintiffs' argument fails for at least two reasons. ***First***, the Petition challenges the district court's refusal to enforce the mandatory forum clause in the FERG Agreement, and the Nevada Supreme Court will review that refusal de novo rather than for abuse of discretion. *See, e.g., LV Car Serv., LLC v. AWG Ambassador, LLC*, 416 P.3d 206, *1 (Nev. 2018) (citing *Am. First Fed. Credit Union v. Soro*, 131 Nev. Adv. Op. 73, 359 P.3d 105, 106 (2015)) ("Whether a forum selection clause applies is a question this court reviews de novo.")

Second, the Petition raises two issues of first impression. *Int'l Game Tech., Inc. v. Dist. Ct.*, 122 Nev. 132, 142, 127 P.3d 1088, 1096 (2006) (although "[g]enerally, this court declines to consider writ petitions that challenge district court orders denying motions to dismiss[,]" it "may exercise its discretion to consider" such a petition "when an important issue of law needs clarification and this court's review would serve considerations of public policy or sound judicial economy and administration.") As for the first issue, even though it concluded the forum clause applies to the FERG claims, the district court refused to enforce the clause because the parties already are litigating before the bankruptcy court. Defendants are unaware of any Nevada law allowing a district court to disregard a valid, mandatory forum clause because a party (and the party against whom enforcement is sought) filed bankruptcy outside the forum.

As for the second issue, the district court refused to enforce the forum clause based on the totality of circumstances (and never expressly identified the circumstances it considered). (Tr., May 1, 2018, 50:20-22 ("[T]he unique and the totality of the circumstances here support denial of the Motion without prejudice as to FERG.").) It appears the Nevada Supreme Court has not yet addressed under what circumstances and factors, if any, a district court may

refuse to enforce a valid, mandatory forum clause. The Nevada Supreme Court therefore likely will entertain the Petition because (i) the district court did not have the discretion to refuse to enforce the forum clause; and (ii) the Petition raises issues of first impression in Nevada.

2. *The District Court Was Required to Dismiss the Claims Against FERG Under the Forum Clause*.

The district court correctly concluded that the forum clause applies to the FERG claims. In plain and clear language, the clause requires all claims to be brought in Atlantic County, New Jersey. Under Nevada law, a district court must enforce a clear and unambiguous contract "as written." *Ringle v. Bruton*, 120 Nev. 82, 93, 86 P.3d 1032, 1039 (2004); *see also Tuxedo Int'l Inc. v. Rosenberg*, 127 Nev. 11, 25, 251 P.3d 690, 699 (2011) (the district court must conduct "a careful and thorough study of" a forum clause, and if the question of whether a claim is subject to the clause "can be resolved based on this examination, then the district court's analysis is concluded."); *Fantastic Entm't Enterprises, LLC v. Pink Personality, LLC*, 2016 WL 3267296, at *2 (D. Nev. June 8, 2016) (quoting *Atl. Marine Const. Co. v. Dist. Ct*., 571 U.S. 49, 66 (2013)) ("Courts should be hesitant to 'unnecessarily disrupt the parties' settled expectations by failing to transfer a case when a valid, unambiguous forum-selection clause so requires.") Because the clause unambiguously requires the FERG claims to be brought in New Jersey, the district court was required to dismiss them.

"[A]s the party defying the forum-selection clause, [Plaintiffs] bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted." *Atl. Marine*, 571 U.S. at 63. Citing *Texas* law, Plaintiffs argue that FERG waived the forum clause. (Opp'n 13:1-14.) While it appears neither the Nevada Supreme Court nor the Nevada Court of Appeals has addressed this

issue,[6] the District of Nevada has addressed it. The Nevada Supreme Court likely would follow the approach of the District of Nevada rather than Texas.

In 2016, the District of Nevada (Hon. James C. Mahan) explained in *Fantastic Entm't Enterprises, LLC v. Pink Personality* ("*Fantastic Entertainment*") that "[i]n determining the validity of the forum-selection clause, the court must resolve three issues: (1) which laws govern the validity of the forum-selection clause; (2) whether, under the applicable law, the forum-selection clause is valid; and (3) if the forum-selection clause is valid then the court must determine if public interest would defeat the validity of the forum-selection clause." 2016 WL 3267296, at *2 (D. Nev. June 8, 2016) (internal citations omitted). As for the first factor, "when a contract contains a choice-of-law provision, the provision's specified law governs the validity of the forum-selection clause." *Id.* at *2. The FERG Agreement is governed by New Jersey law; therefore, New Jersey law would apply for the first factor. (FERG Agreement § 14.10(a) ("The laws of the State of New Jersey applicable to agreements made in that State shall govern the validity, construction, performance and effect of this Agreement.").)[7]

Fantastic Entertainment is highly analogous and directly on point. The contract in that case "contained a choice-of-law and forum-selection clause that requires the parties to litigate any disputes that arise under the contract in New York and under the laws of New York." *Id.* at *1. The defendants moved to

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[6] Based on their reliance on Texas law, it appears Plaintiffs agree that neither the Nevada Supreme Court nor the Nevada Court of Appeals has addressed the waiver of a forum clause. By raising yet another issue of first impression, Plaintiffs' waiver argument increases the likelihood the Nevada Supreme Court will entertain the Petition on its merits.

[7] In the briefs they filed before the bankruptcy court, Plaintiffs acknowledge New Jersey law governs their relationship with FERG. (Ex. D, Caesars' Obj. to FERG and LLTQ's Mot. for Protective Order, April 26, 2017, at 11, n.5.)

transfer the lawsuit to New York. *Id*. Like Plaintiffs, the *Fantastic Entertainment* plaintiff opposed the motion by arguing that (i) "the controversy that gives rise to this case is substantially localized and Nevada courts have an interest in settling a local dispute" and (ii) "Nevada law applies, giving preference to adjudication in Nevada courts." *Id.* at *4.

The *Fantastic Entertainment* court rejected the plaintiff's arguments and granted the motion. *Id.* at *5. It explained that under the United States Supreme Court's seminal opinion in *Atlantic Marine*, public interest factors may warrant the denial of a motion "based on an otherwise valid forum-selection clause" only when the "public interests factors create an 'extraordinary circumstance.'" *Id.* at *4 (citing *Atl. Marine*, 571 U.S. at 62)). It said the "[p]laintiff's public interest considerations do not rise to the level of 'extraordinary circumstance.'" *Id.* at *4. It also said "a local interest to adjudicate a case is not enough to satisfy the 'exceptional circumstance' threshold." *Id.* (quoting *Monastiero v. appMobi, Inc*., 2014 WL 1991564, at *4 (N.D. Cal. May 15, 2014)).

As in *Fantastic Entertainment*, none of the arguments raised by Plaintiffs rise to the level of extraordinary circumstance. Plaintiffs argue that the forum clause should not be enforced because "Nevada has a strong public policy with respect to the issues presented in this case." (Opp'n 17:4-5.) This argument fails because (i) the claims against FERG are governed by New Jersey law (regardless of the forum); and (ii) under *Fantastic Entertainment*, Nevada's alleged "interest in settling a local dispute" is not an extraordinary circumstance.

Plaintiffs also argue that FERG waived the forum clause because it "is already litigating claims outside of the forum provided in the contract." (Opp'n 13:7-8.) Once again, such conduct is not an extraordinary circumstance. Plaintiffs' argument also is disingenuous 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. FERG had no choice but to object to that motion. 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 Caesars' conduct, FERG did not waive the forum 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 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. Likewise, because Caesars forced it to appear before the bankruptcy court to protect its interests, FERG did not waive the forum clause.

Plaintiffs also argue that FERG waived the forum clause by arguing before the bankruptcy court that the issues of suitability and termination should be litigated elsewhere. (Opp'n 5:26 – 6:6.) Although it is true FERG made that argument in a discovery motion it filed with the bankruptcy court, Plaintiffs intentionally fail to inform this Court that in their opposition, they argued that these issues should be litigated before the bankruptcy court. (Ex. D, Caesars' Obj. to FERG and LLTQ's Mot. for Protective Order, April 26, 2017, at 3

("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.").)

The bankruptcy court ultimately agreed with Plaintiffs, denied FERG's motion, and allowed Plaintiffs' to proceed with their suitability and termination claims in the bankruptcy case. Having succeeded, Plaintiffs are now estopped from taking the opposite position. *Liberty Mut. Ins. Grp. v. Panelized Structures, Inc.*, 2013 WL 760343, at *2 (D. Nev. Feb. 26, 2013) (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227, n. 8 (2000)) ("[J]udicial estoppel 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'")

In summation, the district court was obligated to enforce the forum clause by dismissing the claims against FERG. Plaintiffs' argument that public policy favors adjudicating those claims in Nevada is unpersuasive because (i) the claims are governed by New Jersey law, and (ii) under *Fantastic Entertainment*, Nevada's supposed interest in hearing the claims is not an extraordinary circumstance. FERG did not waive the forum clause by appearing before the bankruptcy court because it was forced to do so. Having successfully argued that the issues of suitability and termination should be litigated before the bankruptcy court, Plaintiffs are judicially estopped from taking the opposite position. For these reasons, Defendants will prevail on the merits of their Petition.

3. *The District Court Abused its Discretion by Refusing to Dismiss the Claims under the First-to-File Rule and Due to Forum Shopping.*

As aforementioned, Plaintiffs' claims already are being litigated before the federal courts. For example, in the action before the Nevada federal court,

Paris counterclaimed against TPOV and TPOV 16 and requested "a judicial declaration that Paris properly terminated the TPOV Development Agreement." (Ex. E, Paris's Countercl., July 21, 2017, ¶ 47.) This is the very same relief Paris seeks in this lawsuit. (Compl. ¶ 134 ("Caesars therefore seeks a declaration that the Seibel Agreements were properly terminated.").)

After the bankruptcy court called their fraudulent inducement theory "thin" and "dubious" and Judge Mahan mostly denied Paris's motion to dismiss and recognized the potential lack of relevance to its argument about Seibel's suitability, Plaintiffs filed this lawsuit to evade the federal courts' unfavorable rulings and views. The district court should have put an immediate end to Plaintiffs' forum shopping.

In response, Plaintiffs point out that the first-to-file rule and the prohibition against forum shopping are discretionary. (Opp'n 16:19-20.) While true, that point is unpersuasive because, as here, even discretion can be abused. *Shirley v. State of N.C.*, 528 F.2d 819, 822 (4th Cir. 1975); *see also FGA, Inc. v. Giglio*, 128 Nev. 271, 276, 278 P.3d 490, 493 (2012) (reversing and remanding because the district court abused its discretion). For the reasons set forth in the Petition, the district court clearly abused its discretion, and Defendants will prevail on the merits on that issue. (Pet. 26-34.) Accordingly, the fourth factor under NEV. R. APP. P. 8(c) favors a stay.

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III. CONCLUSION.

For the foregoing reasons, Defendants respectfully request a stay of all proceedings until their Petition is resolved.

DATED July 31, 2018.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that pursuant to NEV. R. CIV. P. 5(b) and EDCR 8.05 on July 31, 2018 I caused service of the foregoing **REPLY IN SUPPORT OF DEFENDANTS' MOTION TO STAY ALL PROCEEDINGS IN THE DISTRICT COURT PENDING A DECISION ON THEIR PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION** to be made by depositing a true and correct copy of same in the United States Mail, postage fully prepaid, addressed to the following or via electronic mail through the Eighth Judicial District Court's E-Filing system to the following at the e-mail address provided in the e-service list:

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Exhibit D

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

ROWEN SEIBEL, an individual and citizen of New York, derivatively on behalf of Real Party in Interest GR BURGR LLC, a Delaware limited liability company,

Plaintiff,

v.

PHWLV, LLC, a Nevada limited liability company; GORDON RAMSAY, an individual; DOES I through X; ROE CORPORATIONS I through X,

Defendants,

and

GR BURGR LLC, a Delaware limited liability company,

Nominal Plaintiff.

AND ALL RELATED MATTERS.

Case No.: A-17-751759-B

Dept. No.: XVI

Consolidated with A-17-760537-B

NOTICE OF ENTRY OF ORDER DENYING DEFENDANTS' MOTION TO STAY ALL PROCEEDINGS IN THE DISTRICT COURT PENDING A DECISION ON THEIR PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

PLEASE TAKE NOTICE that an *Order Denying Defendants' Motion to Stay All Proceedings in the District Court Pending a Decision on Their Petition for Writ of Mandamus or Prohibition* was entered in the above-captioned matter on August 22, 2018, a true and correct

copy of which is attached hereto.

DATED this 22 day of August 2018.

PISANELLI BICE PLLC

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC and that, on this 22 day of August 2018, I caused to be served via the Court's e-filing/e-service system true and correct copies of the above and foregoing **NOTICE OF ENTRY OF ORDER DENYING DEFENDANTS' MOTION TO STAY ALL PROCEEDINGS IN THE DISTRICT COURT PENDING A DECISION ON THEIR PETITION FOR WRIT OF MANDAMUS OR PROHIBITION**

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

ROWEN SEIBEL, an individual and citizen of New York, derivatively on behalf of Real Party in Interest GR BURGR LLC, a Delaware limited liability company,

Plaintiff,

v.

PHWLV, LLC, a Nevada limited liability company; GORDON RAMSAY, an individual; DOES I through X; ROE CORPORATIONS I through X,

Defendants,

and

GR BURGR LLC, a Delaware limited liability company,

Nominal Plaintiff.

AND ALL RELATED MATTERS

Case No.: A-17-751759-B

Dept. No.: XVI

Consolidated with A-17-760537-B

ORDER DENYING DEFENDANTS' MOTION TO STAY ALL PROCEEDINGS IN THE DISTRICT COURT PENDING A DECISION ON THEIR PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION

Date of Hearing: August 7, 2018

Time of Hearing: 9:00 a.m.

AUG 20 2018

Defendants Rowen Seibel ("Seibel"), LLTQ Enterprises, LLC ("LLTQ"), LLTQ Enterprises 16, LLC ("LLTQ 16"), FERG LLC ("FERG"), FERG 16, LLC ("FERG 16"), MOTI Partners, LLC ("MOTI"), MOTI Partners 16, LLC ("MOTI 16"), TPOV Enterprises, LLC ("TPOV"), TPOV 16 Enterprises, LLC ("TPOV 16"), and DNT Acquisition, LLC's ("DNT") (collectively "Defendants") Motion to Stay All Proceedings in the District Court Pending a Decision on their Petition for a Writ of Mandamus or Prohibition (the "Motion") came before the Court for hearing on August 7, 2018, at 9:00 a.m.

James J. Pisanelli, Esq., M. Magali Mercera, Esq., and Brittnie Watkins, Esq., of the law firm PISANELLI BICE PLLC and William Arnault, Esq. of the law firm KIRKLAND & ELLIS LLP appeared on behalf of PHWLV, LLC ("Planet Hollywood"), Desert Palace, Inc. ("Caesars Palace"), Paris Las Vegas Operating Company, LLC ("Paris"), and Boardwalk Regency Corporation d/b/a Caesars Atlantic City ("CAC" and collectively with Caesars Palace, Paris, and Planet Hollywood, "Caesars"). Daniel R. McNutt, Esq. and Matthew Wolf, Esq. of the MCNUTT LAW FIRM, P.C. appeared on behalf of Defendants. Allen Wilt, Esq. of the law firm FENNEMORE CRAIG appeared on behalf of Gordon Ramsay.

The Court having considered the Motion and related briefings, as well as argument of counsel presented at the hearing, and good cause appearing therefor,

THE COURT FINDS the four factors enumerated in NRAP 8(c) are to be considered in determining whether to issue a stay pending adjudication of a writ.

THE COURT FURTHER FINDS that under the facts of this case Defendants are not likely to prevail on the merits of their writ petition, particularly in light of the Court's prior decision in this matter, the unique issues of suitability raised by this case, and further taking into consideration the comity points raised by the Honorable Laurel Davis with respect to the unique issues of Nevada law in this Nevada-centric case.

PISANELLI BICE
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LAS VEGAS, NEVADA 89101

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Motion shall be, and hereby is, DENIED.

IT IS SO ORDERED.

DATED this 21st day of August 2018.

THE HONORABLE TIMOTHY C. WILLIAMS
EIGHTH JUDICIAL DISTRICT COURT

Respectfully submitted by:

PISANELLI BICE PLLC

By: _____
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Attorneys for Desert Palace, Inc.; Paris Las Vegas Operating Company, LLC; PHWLV, LLC; and Boardwalk Regency Corporation d/b/a Caesars Atlantic City

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