CASE NO. 84934

IN THE SUPREME COURT OF NEVADA

ROWEN SEIBEL AND GR BURGR, LLC,

Appellants,

vs.

PHWLV, LLC, AND GORDON RAMSAY,

Respondents,

District Court Case No. A-17-751759-B

APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, Appellants Rowen Seibel ("Seibel") and GR Burgr, LLC ("GRB") (together, the "Appellants") submit this Disclosure:

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

1. GRB is a dissolved Delaware limited liability company and previously had one parent corporation: GR US Licensing, LP ("GRUS").

2. Seibel is an individual.

3. Appellants have been represented by the law firms of Carbajal & McNutt; McNutt Law Firm, P.C.; Adelman & Gettleman, Ltd.; Certilman Balin; Rice Reuther Sullivan & Carroll, LLP; Scarola Zubatov Schaffzin PLLC; and Bailey❖Kennedy in the underlying action. GRB was also previously represented by Newmeyer & Dillion LLP. Bailey❖Kennedy currently represents Appellants in the underlying action and for the purposes of this appeal.

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4. Neither Appellant is using a pseudonym for the purposes of this appeal.

DATED this 10th day of March, 2022.

BAILEY❖KENNEDY

By: /s/ Joshua P. Gilmore
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I. JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRAP 3A(b)(1) because it is an appeal from two final judgments resolving all claims and counterclaims asserted in this case. On May 25, 2022, the district court entered its Findings of Fact, Conclusions of Law, and Order Granting Gordon Ramsay's Motion for Summary Judgment (the "Ramsay Order"), and, on May 31, 2022, the district court entered its Findings of Fact, Conclusions of Law, and Order Granting Caesars' Motion for Summary Judgment No. 2 (the "PH Order") (together, the "SJ Orders"), notice of entry of which occurred on June 2-3, 2022. (33 AA6933-6986.[1]) On June 28, 2022, Appellants timely filed their Notice of Appeal. (33 AA 6987-7002.)

II. ROUTING STATEMENT

The Nevada Supreme Court hears and decides this appeal because this case originated in business court. NRAP 17(a)(9).

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

This appeal presents the following issues for review:

1. Did the district court err by granting summary judgment in favor of PHWLV, LLC ("PH") against GRB on (i) the first, second, and

[1] "AA" refers to Appellants' Appendix. Pursuant to NRAP 30(a), the parties attempted but could not reach an agreement concerning a possible joint appendix. For citation purposes, the number preceding AA refers to the applicable Volume and the number succeeding AA refers to the page number(s).

third causes of action asserted by GRB against PH and (ii) the first and second causes of action asserted by PH against Seibel?[2]

2. Did the district court err by granting summary judgment in favor of Gordon Ramsay ("Ramsay") against GRB on the second and third causes of action asserted by GRB against Ramsay?[3]

3. Did the district court misapply the law by finding that PH could exercise a unilateral right to terminate the contract underlying GRB's contract-based claims in PH's sole and absolute discretion irrespective of the implied covenant of good faith and fair dealing?[4]

4. Did the district court err by finding that PH could bring a fraud claim based on an alleged failure to perform by GRB under the parties' contract?

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[2] GRB does not appeal from the dismissal of its fourth cause of action asserted against PH.

[3] GRB does not appeal from the dismissal of its first and fourth causes of action asserted against Ramsay.

[4] In granting summary judgment, the district court relied on an earlier finding from its order granting in part a motion to dismiss filed by PH related to its interpretation of the contract, even though a decision on a motion to dismiss does not establish the "law of the case for purposes of summary judgment." *McKenzie v. BellSouth Telecommunications, Inc.*, 219 F.3d 508, 513 (6th Cir. 2000).

5. Did the district court abuse its discretion by finding that GRB failed to timely prosecute its claims?

6. Due to these errors, should this case be randomly reassigned on remand?[5]

IV. STATEMENT OF THE CASE

A. Nature of the Case.

This is a civil action arising from the termination of an agreement relating to a successful restaurant at the Planet Hollywood Las Vegas Resort & Casino ("Planet Hollywood") known as Gordon Ramsay Burger f/k/a BurGR Gordon Ramsay (the "Burger Restaurant"). (6 AA1180-1214.) In December 2012, GRB—an entity owned directly by Seibel, a restaurateur, and indirectly by Ramsay, a celebrity chef—entered into a Development, Operation, and License Agreement with PH (the "GRB Agreement") through which GRB granted a license to PH to utilize certain intellectual property rights for the Burger Restaurant in exchange for paying a percentage of gross sales to GRB. (*See* 22 AA4578-621.)

[5] Appellants also appealed from an order denying their motion for a preliminary injunction. That said, because the findings from that order were neither "binding" nor "law of the case" when the district court decided summary judgment, *see, e.g.*, *William G. Wilcox, D.O., P.C. Employees' Defined Ben. Pension Tr. v. United States*, 888 F.2d 1111, 1114 (6th Cir. 1989), and because Appellants no longer seek injunctive relief, Appellants are not asking this Court to review the order denying the motion for a preliminary injunction.

In September 2016, PH terminated the GRB Agreement (at Ramsay's urging) upon finding that Seibel was "unsuitable" without first attempting to work with GRB to cause it to dissociate from Seibel (8 AA2315-16; 20 AA3997-4001, 4003-04)—irrespective of the severe financial consequences that would befall GRB through termination (27 AA5494, 98). PH then refused to pay more than [redacted] in wind-up fees to GRB. (23 AA4676-77.) Worse, with Ramsay's assistance, PH continued to utilize GRB's intellectual property by operating a "rebranded" version of the same restaurant in the same space with the same menu, look, feel, and décor—in violation of the language and intent of the GRB Agreement. (*See, e.g.*, 79 AA6133-38 at ¶¶ 21-24.)

In short, PH stripped itself of the burdens of the GRB Agreement while retaining its benefits. More specifically, PH kept GRB's invaluable concept of a casual, gourmet, burger-centric restaurant while avoiding payments to GRB of more than [redacted] in licensing fees. (*See* 25 AA5258-65; 26 AA5417-22.)

B. Course of the Proceedings.

In February 2017, Seibel initiated this action, derivatively on behalf of GRB, by filing a Verified Complaint against PH and Ramsay, asserting claims for breach of contract, contractual breach of the implied covenant of good faith and fair dealing, unjust enrichment, and civil conspiracy. (1 AA1-36.)

In April 2017, the district court entered an order denying a motion filed by Seibel on behalf of GRB, seeking to enjoin PH from terminating the GRB Agreement or, in the alternative, from continuing to utilize GRB's intellectual property rights at the Burger Restaurant. (5 AA1054-57.)

In June 2017, the district court entered an order granting, in part, a motion to dismiss filed by PH, dismissing – "without prejudice" – portions of GRB's breach of contract claim. (6 AA1170-73.) Seibel then filed a First Amended Verified Complaint ("FAC") on GRB's behalf. (6 AA1180-1214.)

In July 2017, each of PH and Ramsay filed an Answer to the FAC. (6 AA1215-61.) PH also filed a Counterclaim against Seibel, individually, asserting claims for fraudulent concealment and civil conspiracy. (6 AA1237-61.) In August 2017, Seibel filed his Reply to the Counterclaim. (6 AA1267-72.)

In August 2017, a related case was initiated by PH and three of its affiliates (collectively, "Caesars") against Seibel, GRB, and other entities that were previously indirectly owned, in whole or in part, by Seibel. (8 AA1596-99.) The related case was subsequently consolidated with this case. (*Id.*)

While the Nevada cases were pending, GRUS initiated a proceeding in Delaware, seeking to judicially dissolve GRB. (18 AA3522-30.) A Liquidating Trustee was appointed to handle GRB's affairs. (18 AA3531-34.) After spending several years attempting – unsuccessfully – to resolve this case with PH and

Ramsay, in May 2020, the Liquidating Trustee issued a Report and Proposed Liquidation Plan for GRB (the "Report") and, in October 2020, secured an order from the Delaware Chancery Court assigning to Seibel those claims for damages that were asserted by GRB against PH and Ramsay. (21 AA4236-66.) The Delaware Chancery Court did so without passing judgment on the merits of the claims. (13 AA2693-98.)

C. Disposition Below.

In February 2021, PH moved for summary judgment (the "PH Motion") on (i) GRB's claims against PH and (ii) PH's counterclaims against Seibel. (8 AA1715-40.) Ramsay also moved for summary judgment (the "Ramsay Motion") on GRB's claims against him. (15 AA3094-125.) Oppositions were filed in March 2021 (19 AA3809-906) and Replies were filed in November 2021 (30 AA6169-212).[6] The hearing on the PH Motion was held in December 2021 (32 AA6556-691), and the hearing on the Ramsay Motion was held in January 2022 (96 AA6768-6846).

In May 2022, the district court entered the SJ Orders granting the PH Motion and the Ramsay Motion (together, the "SJ Motions"). (33 AA6886-932.)

[6] Supplemental briefing was submitted in December 2021 and January 2022. (32 AA6713-25, 6749-58, 6763-67.)

V. STATEMENT OF FACTS

A. Seibel Revamps Caesars' Restaurants.

In the late 2000s, Seibel was approached by Caesars to open a new restaurant at a Caesars' property in Las Vegas. (28 AA5694-95.) The relationship quickly blossomed and, with Seibel's help, Caesars opened numerous successful restaurants in Las Vegas and other cities. (*See, e.g.*, 29 AA6133-34 at ¶¶ 4-13.) In Caesars' words, "[redacted]" (23 AA4716-18.)

B. Seibel Partners With Ramsay to Open the Burger Restaurant.

After initially helping Caesars to open a dessert restaurant and a steakhouse (29 AA6133 at ¶¶ 6-7), Seibel introduced Caesars to Ramsay and developed the idea of opening Ramsay-branded restaurants within Caesars' properties. (23 AA4683-84; 28 AA5735-36, 5830; 29 AA6028-29.) Ramsay was ecstatic about the opportunity; in his words, the potential was "HUGE." (21 AA4329-30.) Together, the parties opened Ramsay-branded restaurants in several locations. (22 AA4378-414, 4416-54, 4504-38; *see also* 29 AA6133 at ¶¶ 8-11.)

In late 2011, Seibel conceived the idea of a casual, gourmet, burger-centric, Ramsay-branded restaurant at the main entrance to Planet Hollywood. (28 AA5785-86, 5790, 5799-801.) He pitched the idea to Ramsay and PH. (28 AA5786-89, 5798-99.)

Seibel was instrumental in developing the Burger Restaurant. (23 AA4655-57, 4659-74; 29 AA6134 at 15.) He worked on it with his counterpart at Caesars: J. Jeffrey Frederick ("Frederick"), a Regional Vice President of Food & Beverage. (28 AA5787, 5792-96, 5804-05, 5806.)

For purposes of investing in the Burger Restaurant, Seibel and Ramsay formed GRB. (10 AA1938-82.) Seibel's interests were held in his name while Ramsay's were held in GR US Licensing, LP ("GRUS"). (*Id.*; 10 AA1994 at Recital B (referring to Ramsay as a principal of GRB).)

Pursuant to GRB's Operating Agreement, GRB held sole ownership of and exclusive rights to (i) the trademark "BURGR" and all variations thereof, (ii) "[redacted]" created by Seibel utilizing the trademark "BURGR Gordon Ramsay,"[7] (iii) a "[redacted]", and (iv) recipes, menu items, and methods of food preparation developed in furtherance of the concept. (10 AA1939; 23 AA4640.)

C. The GRB Agreement.

In December 2012, GRB, PH, and Ramsay entered into the GRB Agreement. (23 AA4578-621.) [redacted]

[7] GRUS separately owned the "BURGR Gordon Ramsay" trademark. (10 AA1938-39.) Contemporaneous with the creation of GRB, GRUS entered into a license agreement with GRB (the "GRB License") in which it granted GRB the exclusive right to use the "BURGR Gordon Ramsay" trademark. (23 AA4639-53.)

[redacted].[8] (23 AA4598 at § 6.1, 4602 at § 8.1.) [redacted]. (23 AA4592 at § 4.1.)

[redacted]. (23 AA4593 at § 4.2.5.) [redacted]

(23 AA4606-07 at § 11.2.)

[redacted]. (23 AA4595 at § 4.3.3.) [redacted]

[8] Through the GRB Agreement, [redacted]. (23 AA4599 at § 6.4.1.)

[redacted]." (23 AA4594-95 at § 4.3.2.) [redacted]

[redacted]

[redacted]

[redacted]. (*Id*.)

The GRB Agreement contains an "[redacted]" clause ("Section 14.21"), which states [redacted]

[redacted]

[redacted]

[redacted]

[redacted] (23 AA4615 at § 14.21.) [redacted]

[redacted]. (23 AA4594 at § 4.3.1.) In various communications with Seibel, GRB acknowledged that per Section 14.21, "[redacted]

[redacted]

[redacted]" (23 AA4693, 4725-27.)

D. The Burger Restaurant is a Huge Success.

In December 2012, the Burger Restaurant Ramsay opened for business. (29 AA6133 at ¶ 10.) It was incredibly successful—in 2014, it reported gross revenue of [redacted] (26 AA5352.) Within its first few years, PH paid license fees to GRB as follows: [redacted]

[redacted]. (*Id.*) Further, through September 2016, PH paid license fees to GRB in the amount of [redacted] (*Id.*)

PH opened the Burger Restaurant and began paying licensing fees to GRB [redacted]. (*Compare* 23 AA4607 at § 11.2, *with* 24 AA4830.) [redacted].[9] (23 AA4679.)

E. PH and Ramsay Want to Oust Seibel from the Burger Restaurant.

Once Seibel paved the path for Caesars to operate successful restaurants (28 AA5902), including the Burger Restaurant, Caesars decided [redacted] (23 AA4686-88, 4716-18.) Caesars disliked Seibel and viewed as "[redacted]" the fact that he was indirectly (through LLCs) profiting from the restaurants. (23 AA4695-98, 4700-02, 4704-06, 4708-10.) Further, [redacted]. (21 AA4326.)

Ramsay wanted nothing to do with Seibel, either, and demanded that [redacted] (21 AA4332; 23 AA4729-31.) Ramsay was very blunt about it, saying,

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[9] Under the GRB Agreement, [redacted] (23 AA4587 at § 2.2.)

"[redacted]." (23 AA4748.) [redacted]

[redacted].

(21 AA4332.) Ramsay revealed what lay ahead for Seibel and GRB when he told Caesars [redacted]." (23 AA4748.)

F. Seibel Discloses the Criminal Matter to Caesars.

In late 2013, [redacted]. (28 AA5753, 5759-60.) The GRB Agreement does not specify whether this type of information must be disclosed to PH. (*See* 23 AA4606-07 at § 11.2.) For a different restaurant, Caesars had asked Seibel to complete a document entitled Business Information Form ("BIF"). (10 AA1916-25.) [redacted].[10] (10 AA1920 at Question 7.)

Notwithstanding, on January 9, 2014, Seibel told Frederick during an in-person meeting in New York [redacted]

10 [redacted]. (21 AA4312-24 at Questions 8(d), 8(f).)

[redacted][11] (28 AA5757-58, 5764-65.) At the meeting, [redacted] (28 AA5766.) [redacted].[12] (27 AA5615; 28 AA5757.)

G. Seibel Seeks to Dissociate from GRB.

In March 2016, Seibel formed The Seibel Family 2016 Trust (the "Trust"), an irrevocable trust. (23 AA4754-817.) [redacted]. (28 AA5783-84.)

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[11] Seibel's testimony was substantiated by: (i) testimony from his transactional counsel, Brian Ziegler, Esq. ("Ziegler"), who also attended the meeting with Frederick; (ii) Ziegler's billing entry for the meeting; and (iii) a follow-up email from Frederick to Seibel sent in August 2014, [redacted] (23 AA4712-14, 4733-34; 27 AA5654-55; 29 AA6124 at ¶ 16.)

[12] Seibel testified [redacted]. (29 AA5916-17.)

In recognition that the Trust may own interests in entities (like GRB) doing business with Caesars, the Trust provides that [redacted]. (23 AA4798-99 at Art. XXIV.) Further, the Trust provides that [redacted]. (*Id.*) As written, the Trust [redacted]. (29 AA5976-78, 5983-84.) When forming the Trust, Seibel [redacted]. (28 AA5755-56.)

In April 2016, Seibel requested approval from GRUS to transfer his interest in GRB to the Trust. (11 AA2164-70.) GRUS declined. (11 AA2172-74.)

H. PH Improperly Terminates the GRB Agreement at Ramsay's Behest.

In April 2016, Seibel pled guilty to one count of corrupt endeavor to obstruct and impede the due administration of the internal revenue laws. (11 AA2193.) A few months later, he was sentenced. (11 AA2262.)

Immediately upon learning of Seibel's conviction and sentence, Caesars told Ramsay [redacted] (21 AA4305.) Ramsay responded, "[redacted]." (21 AA4307.) They quickly began discussing new business. (24 AA4834, 4858-59.) Notice was *then* given to GRB by PH to dissociate from Seibel. (24AA4870-71.)

In late August 2016 and early September 2016, Seibel reached out to PH to discuss his intent to dissociate from GRB so that GRB could remain under contract with PH. (20 AA3991, 4076-77.) Although Seibel had requested to transfer his interest in GRB to the Trust (20 AA3997-4001), Ramsay told PH to reject the Trust as an assignee of Seibel's interests. (21 AA4309-11.) PH did just that. (20 AA3993, 3995.)

Because the Trust was not acceptable to PH, Seibel asked Ramsay to work with him to "[redacted]." (24 AA4888-89.) Ramsay refused and, instead, [redacted]

[redacted].[13]

(21 AA4297-99.) Despite knowing that Seibel was trying to dissociate from GRB, Ramsay [redacted].

(21 AA4309-11.)

Once Caesars explained its basis for rejecting the Trust as a valid assignee, Seibel conveyed to PH that he was ready, willing, and able to "[redacted]" and asked PH to work with him to find someone who would be suitable to acquire his interest in GRB. (20 AA3997-4001, 4003-04, 24 AA4901-02.) PH ignored Seibel's request and terminated the GRB Agreement.[14] (11 AA2315-16; 29 AA6135 at ¶¶ 19-20.) GRUS followed suit by terminating the GRB License. (20AA4006.)

In short, the evidence shows that Seibel tried to dissociate from GRB but his efforts were rebuffed by PH and Ramsay. (29 AA6135 at ¶ 19.)

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[13] Ramsay admitted that he refused to work with GRB in dissociating from Seibel. (24 AA5033-36.) So did PH. (29 AA6084-84.)

[14] On August 26, 2016—before giving notice to GRB of its need to dissociate from Seibel—[redacted] (*Compare* 24 AA4832, *with* 24 AA4870-71; *see also* 27 AA5624-25.)

I. Caesars Fails to Follow its Compliance Plan and Misleads its Regulators.

Caesars rushed its suitability determination and, as explained by Seibel's gaming law expert—Randy Sayre ("Sayre"), a respected former member of the Nevada Gaming Control Board—[redacted]. (27 AA5434-81.) In communications with gaming regulators, Caesars indicated that [redacted] (24 AA4861-63.) Caesars failed to mention that [redacted]"[15] (*Id.*)

Upon reviewing the actions taken by Caesars, Sayre concluded that Caesars [redacted]. (27 AA5458, 5480-81, 5490-96.) According to Sayre, Caesars could have (and should have) worked in good faith to find an amicable solution with GRB but, instead, [redacted]. (27 AA 5451-54, 5458-67.)

[15] PH's gaming expert admitted that [redacted]. (29 AA5963-64.)

Based on his extensive experience in the gaming industry, Sayre [redacted]. (27 AA5467-79.)

J. The Burger Restaurant Remains Open for Business.

PH did not close the Burger Restaurant after terminating the GRB Agreement. (29 AA6133 at ¶ 10.) In February 2017, PH entered into a virtually identical agreement with Ramsay and another entity owned by Ramsay so that it could continue operating the Burger Restaurant. (20 AA4010-11; 25 AA4996-5030.)

Although PH claims to have "rebranded" the Burger Restaurant, the evidence is to the contrary:

- The name was changed by adding an "e" to the word "burgr" and then moving the word "burger" from the front of the name to the back—"BurGR Gordon Ramsay" became "Gordon Ramsay Burger";[16]
- The menu and employee training manual stayed the same;

[16] In fact, the United States Patent and Trademark Office rejected an application for "Gordon Ramsay Burger" submitted by Ramsay because of its similarity to BurGR Gordon Ramsay, finding it "likely a potential consumer would be confused, mistaken, or deceived…." (29 AA6096-107.)

- The concept—a casual, gourmet, burger-centric restaurant capitalizing on Ramsay's name and brand—stayed the same; and
- The look, feel, and décor stayed the same.

(20 AA3936, 3938, 3940, 3942-43, 3945-47; 21 AA4232-34; 25 AA5039-155; 29 AA6135 at ¶¶ 21-24.)

On top of continuing to use the GRB Marks and General GR Materials, PH withheld [redacted] in accrued license fees that should have been paid to GRB during the alleged wind-up period. (23 AA4676-77; *see* 23 AA4594-95 at § 4.3.2.)

VI. SUMMARY OF ARGUMENT

The district court committed numerous errors when deciding the SJ Motions, as follows:

- The district court weighed the evidence, made credibility findings, and drew inferences in favor of the moving parties—none of which should have occurred under NRCP 56;
- The district court considered inadmissible evidence and relied on non-binding statements of opinion from the Liquidating Trustee for GRB—contrary to the standards for deciding a summary judgment motion;
- The district court improperly resolved material factual disputes—the mere existence of which, by law, should have prevented the granting of summary judgment;

- The district court determined the expectations of the parties under the GRB Agreement—a fact-driven determination that, by law, rests exclusively with the jury;

- The district court disregarded PH's post-termination contractual obligations—even though, by law, a party cannot retain the benefits of a contract while repudiating its burdens;

- The district court found that PH did nothing wrong by exercising its termination rights under the GRB Agreement despite evidence showing that PH exercised its termination rights in bad faith—conduct that, by law, runs afoul of the implied covenant of good faith and fair dealing;

- The district court found that a contractual duty to disclose gives rise to a fraud-based duty to disclose—even though courts routinely forbid parties from morphing contract claims into fraud claims; and

- The district court found that GRB had abandoned its claims—a determination that is belied by the record.

Due to the sheer number of errors that were committed, good cause exists for this case to be randomly reassigned upon remand.

VII. ARGUMENT

A. The District Court Acted as a Fact-Finder When Deciding the SJ Motions.

On a motion for summary judgment, a district court must view the evidence and all reasonable inferences drawn from it "in a light most favorable to the nonmoving party." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). "[A] district court cannot make findings concerning the credibility of witnesses or weight of [the] evidence." *Borgerson v. Scanlon*, 117 Nev. 216, 220, 19 P.3d 236, 238 (2001). Those are "jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Here, the district court impermissibly drew inferences and resolved factual disputes in favor of PH and Ramsay (the *moving* parties). Starting with the PH Order, the district court found:

- "[T]he parties did not agree on material terms regarding future restaurants." (33 AA6915.) GRB presented evidence showing that PH understood that Section 14.21 contained sufficient material terms to be enforceable. (23 AA4693, 4725-27.)

- PH "did not waive, release, or modify the disclosure obligations for Ramsay or GRB" under the GRB Agreement. (33 AA6917.) GRB presented evidence showing that PH waived the requirements of Section 11.2 by making

payments to GRB [redacted]. (23 AA4676; 24 AA4830.)

- Seibel did not notify PH "of the facts underlying the charges against him." (33 AA6917, 6926.) Yes, he did. (28 AA5757-58, 5764-65.)

- PH determined Seibel's suitability based on "applicable Nevada gaming laws and regulations." (33 AA6917.) Sayre said differently. (27 AA 5439, 5451-67, 5480-81.)

- The Liquidating Trustee "refuse[d] to participate in the litigation." (33 AA6919.) That is false. (*See, e.g.*, 18 AA3478-85; 29 AA5989-93.)

- The Liquidating Trustee admitted that GRB has no affirmative claims to pursue. (33 AA6920-21.) The Liquidating Trustee specifically found that several claims were "worth pursuing." (13 AA2614-17.)

- The GRB Agreement does not contain a right to cure based on suitability. (33 AA6922.) Yes, it does. (23 AA4606-07 at § 11.2.)

Turning to the Ramsay SJ Order, the district court found:

- Seibel refused to dissociate from GRB. (33 AA6893.) Not true; Seibel told GRUS (and Ramsay) that he wanted to sell his interest in GRB to a disinterested third party. (20 24 AA4888-89.) He also told PH. (20 AA3997-4001, 4003-04.)

- Ramsay "did not prevent [] Seibel from dissociating from GRB." (33 AA6893.) Yes, he did, and Ramsay's lawyers admitted that they were communicating with PH *on Ramsay's behalf*. (21 AA4298.)

- GRB cited no evidence showing that Ramsay benefits from the Burger Restaurant. (33 AA6895.) Ramsay, through an entity that he controls, granted PH the right to use the "Gordon Ramsay" name for the Burger Restaurant. (25 AA4996-5030.)

- Ramsay had no role in the decision by GRUS to refuse to work with Seibel to dissociate from GRB. (33 AA6893-94.) Yes, he did. (21 AA427-99.)

So, too, the district court impermissibly weighed the evidence and made credibility determinations. Starting with the PH Order, the district court found:

- Seibel "secretly" intended to retain an ownership interest in the Burger Restaurant through the Trust. (33 AA6922.) By reaching this conclusion (which required assessing Seibel's motive in creating the Trust), the district court ignored both the terms of the Trust *and* the testimony from Ziegler (the Trustee of the Trust). (27 AA5666; *see also* 29 AA5960.)

- Seibel engaged in a "fraudulent cure scheme." (33 AA6922.) By reaching this conclusion (which required assessing Seibel's motive), the district court adopted PH's skewed view of Seibel's intentions and ignored countervailing evidence presented by GRB. (28 AA5755-56, 5783-84.)

- Nevada gaming regulators approved PH's actions. (33 AA6918.)

Setting aside that such information was inadmissible as argued *infra*, the district court ignored how PH [redacted]. (12 AA2441-47; *see also* 27 AA5479.)

Turning to the Ramsay Order, the district court found:

- PH opened a new restaurant after terminating the GRB Agreement. (33 AA6894.) No, it is the same restaurant. (29 AA6135 at ¶¶ 21-24.)

- PH could terminate the GRB Agreement "as it saw fit." (33 AA6901.) This interpretation ignores the impact of the implied covenant of good faith and fair dealing, discussed *infra*.

- Seibel pled guilty to a "tax fraud felony." (33 AA6903.) No, he did not. (11 AA2331.)

In sum, the district court failed to approach the SJ Motions consistent with this Court's directives for considering a summary judgment motion.

B. The District Court Considered Inadmissible Evidence When Deciding the SJ Motions.

This Court reviews a district court's "decision to admit or exclude evidence for an abuse of discretion." *M.C. Multi-Family Dev., LLC v. Crestdale Assocs.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008). When deciding a summary judgment motion, the court considers only admissible evidence. *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983).

Here, the district court relied on *inadmissible* evidence submitted by PH and Ramsay—despite timely, valid objections served by Appellants. (19 AA3796-808.) For example, starting with PH:

- It relied on a letter (Exhibit 24 to its Motion) that was unauthenticated and contained inadmissible hearsay. NRS 51.035; NRS 51.065(1); *Frias v. Valle*, 101 Nev. 219, 221-22, 698 P.2d 875, 876-77 (1985).

- It relied on a letter sent by its counsel to gaming regulators (Exhibit 41 to its Motion), which purports to set forth facts outside the personal knowledge of the letter's author. *Frias*, 101 Nev. at 221-22, 698 P.2d at 876-77. Further, Appellants were prevented from questioning the author of the letter concerning its contents due to assertion of the gaming privilege. (28 AA5714-24.) As a result, it was unfairly prejudicial to use the letter against Appellants. NRS 48.035(1).

- It relied on a letter sent by gaming regulators to Caesars' counsel (Exhibit 41 to its Motion), which constitutes inadmissible hearsay. NRS 51.035; NRS 51.065(1). Further, Appellants were unable to depose the author of the letter concerning its contents due to assertion of the gaming privilege. (19 AA3804.) As a result, it was unfairly prejudicial to use the letter against Appellants. NRS 48.035(1).

Turning to Ramsay:

- He relied on a draft plea agreement (Exhibit 13 to his Motion) that was unauthenticated and contained inadmissible hearsay, inadmissible settlement negotiations, and argument of counsel. NRS 51.035; NRS 51.065(1); NRS 48.045(1); *McKenna v. State*, 114 Nev. 1044, 1053, 968 P.2d 739, 745 (1998); *Frias*, 101 Nev. at 221-22, 698 P.2d at 876-77.

- He relied on a letter (Exhibit 14 to his Motion) that was unauthenticated and contained inadmissible hearsay. NRS 51.035; NRS 51.065(1); *Frias*, 101 Nev. at 221-22, 698 P.2d at 876-77.

Further, the district court relied on non-binding statements of opinion contained in the Liquidating Trustee's Report.[17] (33 AA6888-89, 6919, 6922.) Specifically, the district court relied on statements in the Report that *certain* of GRB's claims were allegedly "not worth pursuing." (*See id.*) The district court did so on the basis that the Liquidating Trustee's Report amounted to a judicial admission. (33 AA6921.)

"[D]etermining whether a particular statement constitutes a judicial admission is a question of law" that is subject to *de novo* review. *Estate of Korby v. C.I.R.*, 471 F.3d 848, 852 (8th Cir. 2006). A judicial admission must be of a

[17] The district court had previously indicated that the "Trustee report will have no impact on [this] proceeding." (8 AA1704.)

"concrete fact." *Reyburn Law & Landscape Designers, Inc. v. Plaster Dev. Co.*, 127 Nev. 331, 343, 255 P.3d 268, 276 (2011). It cannot be a matter of opinion or a legal conclusion. *See, e.g.*, *Hedge v. Bryan*, *Conagra, Inc. v. Nierenberg*, 7 P.3d 369, 379 (Mont. 2000).

Here, the Report contained the Liquidating Trustee's *personal* view of the evidence (that he was asked to review) and his application of the law to that evidence.[18] The Liquidating Trustee "is not a judge and his opinion is only that—an opinion informed by the Investigation and the desire to obtain a fair result for GRB (and both of its members)." (13 AA2589.) He did not intend for his views to be binding on Seibel.[19] (21 AA4145; *see also* 29 AA5990-91.)

The Liquidating Trustee's "opinion" as to the merits of GRB's claims "are not the stuff of judicial admissions." *Stroud v. Tunzi*, 72 Cal. Rptr. 3d 756, 761 (Ct. App. 2008). Because the Report did not qualify as a judicial admission, it

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[18] The Liquidating Trustee, who is not a Nevada lawyer, had only limited evidence pertaining to GRB's claims. (29 AA6126 at ¶ 7, 6140 at ¶ 5.)

[19] For this reason, the statements in the Report would not qualify as party admissions under NRS 51.035(3).

constituted inadmissible hearsay.[20] *F.T.C. v. Data Med. Capital, Inc.*, SACV 99-1266AHS(EEX), 2010 WL 1049977, at *28 (C.D. Cal. Jan. 15, 2010).

In sum, the district court relied on inadmissible evidence in granting the SJ Motions.

C. Genuine Issues of Material Fact Prevented the District Court From Granting the SJ Motions.

This Court conducts a *de novo* review of an order granting summary judgment. *Wood*, 121 Nev. at 729, 121 P.3d at 1029.

Here, it was error for the district court to find that no genuine issue of fact remained and that each of PH and Ramsay were entitled to judgment in their favor as a matter of law—both as to GRB's claims against PH and Ramsay and as to PH's counterclaims against Seibel. To the contrary, numerous unresolved questions of material fact remain to be decided by the jury at trial.

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[20] If the district court were intending to rely on the Liquidating Trustee's Report, then it should have taken into consideration the Liquidating Trustee's opinion that GRB's intellectual property "was likely being used" in connection with the Burger Restaurant—post-termination—and adopted the Liquidating Trustee's position that Seibel did not have to engage in "self-flagellation" related to the investigation. (*See* 13 AA2625; 21 AA4151.) It was wrong for the district court to adopt those portions of the Report that favored the moving parties and ignore those portions of the Report that favored the non-moving parties.

1. GRB's Breach of Contract Claim Against PH.

The elements of a breach of contract claim are: "(1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach." *Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 919–20 (D. Nev. 2006). Whether a party breached a contract and whether that breach is material are questions of fact. *Hoffman v. Eighth Jud. Dist. Ct.*, 90 Nev. 267, 270, 523 P.2d 848, 850 (1974). A district court's interpretation of a contract is a question of law and is reviewed *de novo* by this Court. *Nev. State Educ. Ass'n v. Clark Cty. Educ. Assn*, 137 Nev. 76, 80, 482 P.3d 665, 671 (2021).

Here, GRB asserted a breach of contract claim against PH based on PH's failure to pay license fees to GRB during the "wind-up" period, for continuing to operate the Burger Restaurant post-termination, and for continuing to use the "GRB Marks" and "General GR Materials" post-termination. There are genuine issues of material fact underlying the claim.

First, it is a genuine issue of material fact whether PH's failure to pay license fees to GRB was a material breach of the GRB Agreement.[21] Section 4.3.2(a) of the GRB Agreement plainly states that [redacted]

[21] According to Sayre, PH could pay license fees to GRB post-termination without jeopardizing Caesars' gaming licenses. (27 AA5472-73.)

[redacted]. (23 AA4594-95.) PH did not do so. (23 AA4676-77.) It is unclear why the district court granted summary judgment as to this issue because the district court ***failed to make any specific findings*** on this aspect of the claim.

Second, it is a genuine issue of material fact whether PH's continued operation the same casual, gourmet, burger-centric, Gordon Ramsay-branded restaurant in the same space at Planet Hollywood—without paying any license fees to GRB—was a material breach of the GRB Agreement. Although PH claimed that it opened a new restaurant, whether it did was for the jury to decide. The facts as presented by GRB and all reasonable inferences drawn from those facts show that PH is operating the same restaurant in the same space, albeit with an "e" conveniently added to "BURGR."[22] (20 AA3936, 3938, 3940, 3942-43, 3945-47; 21 AA4232-34; 25 AA5039-155; 29 AA6135 at ¶¶ 21-24.)

The law is clear: PH cannot retain the benefits of the GRB Agreement (*e.g.*, the creation and development of the Burger Restaurants and receipt of GRB's

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[22] Further, if not clear from the plain language of the GRB Agreement, Section 4.3.2 is ambiguous in terms [redacted] Stated another way, a genuine issue of material fact exists as to whether the parties intended for PH to continue to capitalize on GRB's concept post-termination without paying license fees to GRB. *See Anvui, LLC v. GL Dragon, LLC*, 123 Nev. 25, 215-16, 163 P.3d 405, 407 (2007) (holding that the contractual intent of the parties is a question of fact).

valuable intellectual property) while, at the same time, rejecting its burdens (*i.e.*, payment of license fees to GRB). *See Bergstrom v. Estate of DeVoe*, 109 Nev. 575, 577, 854 P.2d 860, 861 (1993) ("He cannot at the same time affirm the contract by retaining its benefits and rescind it by repudiating its burdens.") (quoting CORBIN ON CONTRACTS § 1114); *see also Hanks v. GAB Business Svcs., Inc.*, 644 S.W.2d 707, 708-09 (Tex. 1982) (finding that a non-breaching party involved in the purchase of a business was not excused from performance, despite knowledge of the other party's alleged breach, because the non-breaching party retained "all the assets of the business and continued its operation"). Yet again, it is unclear why the district court granted summary judgment as to PH's continued operation of the Burger Restaurant because the district court ***failed to make any specific findings*** on this aspect of the claim.

Third, it is a genuine issue of material fact whether PH materially breached the GRB Agreement by continuing to use the "GRB Marks," which include *any variation* of "BURGR Gordon Ramsay," and "General GR Materials," which include the menus, recipes, décor, and proprietary system put in place by GRB to operate the Burger Restaurant, following termination of the GRB Agreement. The evidence demonstrates that PH utilizes substantially the same menus, recipes, décor, and system at the Burger Restaurant. (*See, e.g.*, 29 AA6135 at ¶¶ 21-24.) Further, the alleged "rebranding" did not alter the casual, gourmet, burger-centric

concept embodied in the GRB Agreement—hence why the press releases looked the same. (*Compare* 20 AA3945-51, *with* 21 AA4232-34.) Again, it is unclear why the district court granted summary judgment on PH's use of the "GRB Marks" and "General GR Materials" because the district court ***failed to make any specific findings*** on this aspect of the claim.

Finally, assuming that PH could operate the same restaurant in the same space and that PH is not using the GRB Marks and General GR Materials, it is a genuine issue of material fact whether PH materially breached Section 14.21. Although the district court (erroneously) found that Section 14.21 was an unenforceable "agreement to agree" (33 AA6898-99, 6925), the evidence demonstrates that the material terms were already agreed to by the parties: The type of restaurant, the duration of the agreement, and the percentage of gross restaurant sales and gross retail sales to be paid to GRB or its affiliate as set forth in the GRB Agreement. (23 AA4615 at § 14.21.) The fact that PH entered into an agreement with an affiliate of Ramsay for continued operation of the Burger Restaurant on the same material terms and conditions as the GRB Agreement shows that the essential terms were reached by the parties. (25 AA4996-5030.) Moreover, PH previously acknowledged – in several emails – that Section 14.21 is valid and enforceable as written. (23 AA4693, 4725-27.)

As this Court has said, "[a] meeting of the minds exists when the parties have agreed upon the contract's essential terms." *Certified Fire Prot., Inc. v. Precision Constr., Inc.*, 128 Nev. 371, 378, 283 P.3d 250, 255 (2012). More importantly, "[w]hether a contract exists is a question of fact …." *Anderson v. Sanchez*, 132 Nev. 357, 360, 373 P.3d 860, 863 (2016); *see also Svoboda v. Bowers Distillery, Inc.*, 745 F.2d 528, 531 (8th Cir. 1984) ("Whether a given agreement is intended to have a presently binding effect or is merely an agreement to agree is to be determined by the trier of fact from all the evidence presented.").

In sum, it was for the jury to decide whether PH committed one or more material breaches of the GRB Agreement. Consequently, the district court's entry of summary judgment on GRB's breach of contract claim was improper. *See Hoffman*, 90 Nev. at 270, 523 P.2d at 850.

2. GRB's Breach of the Implied Covenant Claims Against PH and Ramsay.

"It is well established within Nevada that every contract imposes upon the contracting parties the duty of good faith and fair dealing." *Hilton Hotels Corp. v. Butch Lewis Prods.*, 109 Nev. 1043, 1046, 862 P.2d 1207, 1209 (1993) ("*Hilton II*"). The duty arises "independent of the consensual contractual covenants." *Morris v. Bank of Amer. Nev.*, 110 Nev. 1274, 1278 n.2, 886 P.2d 454, 457 n.2 (1994). A party breaches the implied covenant of good faith and fair dealing by performing under a contract in a manner that is "unfaithful to the purpose of the

contract," thereby denying "the justified expectations of the other party." *Hilton Hotels Corp. v. Butch Lewis Prods.*, 107 Nev. 226, 234, 808 P.2d 919, 923-24 (1991) ("*Hilton I*"). Whether a party literally complied with the terms of the contract is irrelevant. *See id.* at 232, 808 P.2d at 922-23. Indeed, the implied covenant of good faith and fair dealing can modify the express terms of a contract. *J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 286-87, 89 P.3d 1009, 1016 (2004).

Whether a party breached the implied covenant of good faith and fair dealing "is a question of fact." *Consol. Generator-Nevada v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998); *see also Republic Grp. v. Won-Door Corp.*, 883 P.2d 285, 291 (Utah Ct. App. 1994) (reversing grant of summary judgment and holding that "***good faith and fair dealing are fact sensitive concepts***, and whether there has been a breach of good faith and fair dealing is a factual issue, ***generally inappropriate for decision as a matter of law***") (emphasis added). The fact-finder considers whether one party's conduct "f[e]ll outside the reasonable expectations" of the other party—a determination that is guided "by the various factors and special circumstances that shape [the parties'] expectations." *Hilton I*, 107 Nev. at 234, 808 P.2d at 923-24.

a. GRB's Implied Covenant Claim Against PH.

GRB asserted a claim against PH for breach of the implied covenant of good faith and fair dealing based primarily on PH's failure to work with GRB in good faith to effectuate a cure following PH's suitability determination.[23] The district court granted summary judgment on GRB's implied covenant claim based on a misinterpretation of the legal effect of PH's unilateral and unfettered discretion to terminate the GRB Agreement. Further, the district court overlooked genuine issues of material fact regarding whether PH's bad faith conduct amounted to a breach of the implied covenant of good faith and fair dealing. As a result, summary judgment should not have been granted.

(i) *The Implied Covenant Acts as a Counterbalance to PH's Unilateral Authority to Decide Whether Suitability Issues were Curable and to Terminate the GRB Agreement.*

The district court's reliance on PH's unilateral and unbridled authority under the GRB Agreement was misplaced. PH's right to terminate the GRB Agreement in its sole discretion does not immunize PH from breaching the contract's implied covenant of good faith and fair dealing. *See, e.g.*, *Sons of Thunder v. Borden, Inc.*, 690 A.2d 575, 588 (N.J. 1997) ("[A] party to a contract may breach the implied

[23] GRB also alleged that if not expressly prohibited by the GRB Agreement, PH breached the implied covenant of good faith and fair dealing by continuing to operate the same casual, gourmet, burger-centric restaurant using GRB's intellectual property without paying license fees to GRB.

covenant of good faith and fair dealing in performing its obligations even when it exercises an express and unconditional right to terminate."); *cf. Sands Aviation, LLC v. AIS-International, Ltd.*, Nos. 73522, 74114, 2019 WL 1422863, at *1, *3 (Nev. Mar. 28, 2019) (unpub. disp.) (finding that Sands Aviation breached the implied covenant by undermining AIS's contractual rights prior to exercising an express right to terminate the contract).

In fact, such unchecked power directly implicates the implied covenant of good faith and fair dealing, preventing a party with unilateral authority under a contract from weaponizing its discretion in a manner that contravenes the justified expectations of the other party. *See, e.g.*, *GMC v. New A.C. Chevrolet*, 263 F.3d 296, 334-35 (3d Cir. 2001) ("Michigan law … clearly teaches that it is these precise situations—situations in which one party retains unfettered control over part of its performance under a contract—that call most strongly for the application of an implied covenant of good faith."); *Club Specialists Int'l LLC v. Keeneland Ass'n*, No. 5:16-cv-345-KKC, 2017 WL 522945, at *5 (E.D. Ky. Feb. 8, 2017) (noting that "discretion to terminate [a] contract is not unbridled, but is circumscribed by the implied covenant of good faith and fair dealing"); *RBK Spine, LLC v. Lanx, Inc.*, No. 10-cv-02706-RBJ-MJW, 2012 WL 2339830, at *7-8 (D. Colo. June 11, 2012) ("[W]hen a contract grants a party discretionary authority, it may not exercise its discretion in a manner that defeats the reasonable expectations

of the other party."); *see also BA Mortg. & Int'l Realty Corp. v. Am. Nat'l Bank & Tr. Co.*, 706 F. Supp. 1364, 1376-77 (N.D. Ill. 1989) ("Parties with unfettered contractual discretion cannot be allowed to exercise that discretion in bad faith."); *Cook v. Zions First Nat'l Bank*, 919 P.2d 56, 60 (Utah Ct. App. 1996) ("When one party to a contract retains power or sole discretion in an express contract, it must exercise that discretion reasonably and in good faith.").

As a practical matter, if the implied covenant of good faith and fair dealing did not temper or circumscribe a party's unilateral ability to terminate a contract, then the agreement would be illusory, leading "to an absurd result." *Reno Club v. Young Inv. Co.*, 64 Nev. 312, 325, 182 P.2d 1011, 1017 (1947). To illustrate, under the district court's theory, PH could have found GRB unsuitable the moment that the Burger Restaurant opened based on PH's dislike of Seibel and then terminated the GRB Agreement without any recourse for GRB if Seibel refused to immediately forfeit his interest in GRB for no consideration. As Sayre (GRB's expert) explained:

(27 AA5451.)

Equally as applicable, the GRB Agreement does not contemplate automatic termination if PH determines that a "GR Associate" is unsuitable. Instead, GRB expressly bargained for the contractual right to dissociate from any Unsuitable Person in order to avoid termination of the GRB Agreement and remain under contract with PH—albeit, at the mercy of PH to also decide, in its sole discretion, whether GRB could dissociate from the Unsuitable Person (a power that was also susceptible to abuse). The bargained-for cure right to dissociate demonstrates that GRB had a justified expectation that PH would, in good faith, work with GRB to effectuate a satisfactory dissociation from anyone who PH found to be unsuitable.

The district court rejected the premise that the implied covenant of good faith and fair dealing required PH to exercise its discretion to terminate the GRB Agreement in good faith. As a result, the district court's grant of summary judgment was based on an error of law and should be reversed.

(ii) *PH Acted in Bad Faith When Terminating the GRB Agreement.*

"Liability for bad faith is strictly tied to the implied-in-law covenant of good faith and fair dealing arising out of an underlying contractual relationship." *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 511, 780 P.2d 193, 197 (1989).

Here, GRB presented sufficient evidence showing bad faith on PH's part in exercising its termination right. Yet, the district court found that any bad faith on the part of PH was essentially irrelevant due to the express terms of the GRB

Agreement. That is wrong. An implied covenant claim already presumes literal compliance with a contract. *See Hilton I*, 107 Nev. at 232, 808 P.2d at 922-23. The question presented is whether PH's conduct was "unfaithful to the purpose of" the GRB Agreement and deprived GRB of its "justified expectations." *See id.* at 234, 808 P.2d at 923-24. The answer is inherently fact-driven, and there are numerous genuine issues of material fact as to whether PH exercised its sole discretion to terminate the GRB Agreement in good faith. *See Consol. Generator-Nevada*, 114 Nev. at 1312, 971 P.2d at 1256.

To begin, it is undisputed that GRB sought to dissociate from Seibel on terms that would be acceptable to PH in order to preserve the parties' relationship. (20 AA3997-4001, 4003-04.) A means existed to cure GRB's alleged affiliation with an Unsuitable Person without terminating the GRB Agreement, subject to PH's good faith cooperation in the process (as noted by Sayre) since PH needed to say whether any proposed assignee was suitable. (27 AA5436, 5463, 5480.) In other words, termination was not mandatory due to Seibel's unsuitability. (27 AA5491.) Unfortunately, PH refused to engage GRB in good faith "[redacted]." (27 AA5467-68.) Whether PH's refusal to engage with GRB concerning its efforts to dissociate from Seibel was a breach of the implied covenant of good faith and fair dealing is a

genuine issue of material fact that should be decided by the jury. *See* Restatement (Second) Contracts § 205 cmt. d (1981).

Further, the record is replete with facts showing bad faith on the part of PH in terminating the GRB Agreement:

- The record demonstrates that PH (and Ramsay) wanted to use Seibel's conviction to cause a forfeiture (i.e., a complete loss of Seibel's valuable interest in GRB). (21 AA4326, 4332; 23 AA4686-88, 4695-98, 4700-02, 4704-06, 4708-10, 4716-18, 4729-31, 4748.)

- In a rush to terminate the GRB Agreement and ignore any obligation to compensate GRB for its interest in the Burger Restaurant, [redacted]. (27 AA5434-81, 5489-501.)

- PH rejected the proposed assignment of Seibel's interest in GRB to the Trust, without identifying alternative means for GRB to cure its alleged continuing affiliation with Seibel (20 AA3993, 3995) that did not involve a financial windfall for Ramsay and, after the artificial cure period had lapsed, PH terminated the GRB Agreement—thus hindering GRB's ability to effectuate a cure. (11 AA2315-16.)

- PH admitted that it did not work in good faith with GRB with respect to any potential cures. (29 AA6084-84.)

- PH refused to return GRB's phone calls or emails seeking to find a suitable, disinterested third party to whom Seibel could assign his interest in GRB for fair value (and then, terminated the GRB Agreement). (20 AA3997-4001, 4003-04, 24 AA4901-02; 29 AA6135 at ¶¶ 19-20.)

Assuming (*arguendo*) that GRB's proffered solution (*i.e.*, Seibel would assign his interest in GRB to the Trust) was not acceptable, it is a genuine issue of material fact whether the implied covenant of good faith and fair dealing required PH to work with GRB so that it could identify a solution that caused the parties to preserve their mutually beneficial relationship.[24] Without guidance or assistance from PH (given that any assignee of Seibel's interest would have to meet PH's suitability standards), GRB was hamstrung in its ability to perform under the GRB Agreement. However, PH did not engage GRB for purposes of achieving a fair and workable solution because PH wanted to placate Ramsay (who, as discussed below, advocated for PH to terminate the GRB Agreement) and take the casual, gourmet, burger-centric concept for itself.

In sum, the evidence presented, and all reasonable inferences drawn in GRB's favor, demonstrates there are genuine issues of material fact regarding

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[24] PH's own expert admitted that [redacted]. (29 AA5962-64.) And, as stated by Sayre, [redacted]. (28 AA5491.)

whether PH breached the implied covenant of good faith and fair dealing. *See Consol. Generator-Nevada*, 114 Nev. at 1312, 971 P.2d at 1256.

b. GRB's Implied Covenant Claim Against Ramsay.

GRB asserted a claim against Ramsay for breach of the implied covenant of good faith and fair dealing stemming from Ramsay (i) actively encouraging PH to terminate the GRB Agreement and (ii) enabling PH to use GRB's intellectual property post-termination. The district court erred by granting summary judgment on GRB's implied covenant claim against Ramsay, because genuine issues of material fact exist regarding whether Ramsay acted in bad faith.

First, Ramsay's active encouragement of PH to terminate the GRB Agreement so that he (and his affiliated entity) could enter into a new agreement with PH on terms much more financially beneficial to him was in bad faith and denied GRB its justified expectations of participating in a venture involving a casual, gourmet, burger-centric restaurant. Viewing the evidence in a light most favorable to GRB—the *non-moving* party—it is evident that Ramsay wanted PH to terminate the GRB Agreement and actively encouraged PH to do so. (21 AA4309-11.) Further, the record shows that Ramsay had no intention to work with GRB in good faith to address PH's suitability concerns. (21 AA4309-11; 29 AA6135 at ¶ 20.)

Second, the district court's reliance on PH's sole discretion to make suitability determinations (and unilaterally terminate the GRB Agreement) does not shield Ramsay from liability for actively encouraging PH to abuse such discretion. As discussed above, PH's power under the GRB Agreement to terminate the contract in its sole discretion is tempered by the implied covenant good faith and fair dealing. *It has to be; otherwise, as noted by Sayre, it is susceptible to abuse*. GRB thus had a justified expiration that Ramsay (a party to the GRB Agreement) would not encourage PH (also a party to the GRB Agreement) to abuse its discretion. To suggest that a party to a contract acts in good faith by encouraging another party to that same contract to abuse its power contradicts the essential purpose of the implied covenant of good faith and fair dealing. *See J.A. Jones Constr. Co.*, 120 Nev. at 286-87, 89 P.3d at 1016.[25]

Third, there is a genuine issue of material fact regarding whether Ramsay enabled PH to continue to operate the Burger Restaurant and use the GRB Marks and General GR Materials. As discussed above, the Burger Restaurant continues to operate in substantially the same manner, which, under the GRB Agreement,

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[25] Similarly, the district court's finding that Ramsay had no "implied obligation to intervene in [PH's] suitability determination" or "lobby on [] Seibel's behalf for the benefit of GRB" misses the point. (33 AA6902.) Ramsay did not sit idly on the sidelines in PH's decision to terminate the GRB Agreement—Ramsay actively encouraged PH to reject overtures from GRB to coordinate a fair and equitable way for Seibel to dissociate from GRB. (21 AA4309-11.)

requires PH to continue to pay license fees to GRB. However, in contravention of GRB's justified expectation of receiving license fees so long as the Burger Restaurant is open, Ramsay entered into a new agreement that enables PH to capitalize on GRB's intellectual property—including menus that Ramsay (as an individual) developed for the benefit of GRB and understood (under the terms of the GRB Agreement) would not be used by PH post-termination—without payment to GRB. It is a disputed issue of fact whether Ramsay acted in bad faith by knowingly assisting PH in misappropriating GRB's intellectual property.

Finally, GRB presented evidence showing that Ramsay stood firmly in the way of GRB effectuating a cure while maintaining its contractual relationship with PH. Indeed, Ramsay admitted in discovery that he did not engage with Seibel, whom Ramsay wanted "dealt with," so that GRB could dissociate from Seibel—conduct that amounts to bad faith.

In sum, whether Ramsay breached the GRB Agreement by encouraging PH to terminate the GRB Agreement and enabling PH to unfairly profit from GRB's intellectual property are questions of material fact to be decided by the jury. *See Consol. Generator-Nevada*, 114 Nev. at 1312, 971 P.2d at 1256.

3. GRB's Unjust Enrichment Claims Against PH and Ramsay.

The elements of an unjust enrichment claim are: (1) the plaintiff has conferred a benefit on the defendant; (2) the defendant has retained and appreciated

the benefit; and (3) under the circumstances, it would be inequitable for the defendant to retain the benefit without paying the plaintiff for the value thereof. *Nautilus Ins. Co. v. Access Med., LLC*, 137 Nev. 96, 101, 482 P.3d 683, 688 (2021). Whether a party has been unjustly enriched is a question of fact. *See Morris Pumps v. Centerline Piping, Inc.*, 729 N.W.2d 898, 903 (Mich. Ct. App. 2006).

Here, GRB asserted claims against PH and Ramsay for unjust enrichment in the event that the district court found that the GRB Agreement is unenforceable and that, as a result, PH and Ramsay could operate the Burger Restaurant without paying licensing fees to GRB. There are genuine issues of material fact underlying the claim against each of PH and Ramsay.

Beginning with PH, it obtained summary judgment on GRB's unjust enrichment claim ***without even addressing it in its Motion***. (8 AA1715-40.) As this Court has said, the moving party bears the initial burden of production and if it fails to meet that burden, the non-moving party "has no duty to respond on the merits and summary judgment may not be entered against him." *Fergason v. Las Vegas Metro. Police Dep't*, 131 Nev. 939, 943, 364 P.3d 592, 595 (2015).

Here, despite carrying the initial burden of production, PH did not analyze GRB's unjust enrichment claim, at all and the district court failed to make any specific findings concerning this claim in the PH Order. (8 AA 1715-40;

33 AA6913-32.) Due to PH's failure to meet its initial burden of production, GRB had no obligation to address the unjust enrichment claim, and summary judgment should have been denied. *See Fergason*, 131 Nev. at 943, 364 P.3d at 595.

Regardless, as shown above, GRB set forth sufficient evidence showing that PH has been unjustly reaping the benefit of the casual, gourmet, burger-centric concept and related recipes and menus (*i.e.*, the GRB Marks and General GR Materials) that were created by GRB—without compensating GRB. Absent requiring PH to pay for the fair value of the intellectual property conferred upon it by GRB—intellectual property that has translated into [redacted] (26 AA5417-19)—PH will secure a financial windfall.

Turning to Ramsay, he benefits from having his name attached to a successful restaurant positioned at the entrance to the Planet Hollywood that capitalizes on a concept that was created by GRB. Although he argued below that he, personally, is not being paid any fee relating to the Burger Restaurant (as opposed to a company that he owns), "benefit in the unjust enrichment context can include services beneficial to or at the request of the other, denotes any form of advantage, and is not confined to retention of money or property." *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 381, 283 P.3d 250, 257 (2012) (quoting Restatement of Restitution § 1 cmt. b (1937)). The publicity and exposure for Ramsay at the Burger Restaurant, which enhances his reputation and

goodwill in the hospitality industry, is a "benefit" that supports GRB's unjust enrichment claim. The district court erred by limiting its analysis to whether Ramsay received any direct or indirect "financial benefit." (33 AA6895.)

In seeking summary judgment, Ramsay claimed, and the district court found, that the unjust enrichment claim was barred "as a matter of law" due to the GRB Agreement. (33 AA6899-900.) However, having convinced the district court that Section 14.21 is unenforceable, such that neither PH nor Ramsay is bound to contract with GRB (or its affiliate) in continuing to operate the Burger Restaurant, GRB was legally entitled to seek damages under an alternate theory of unjust enrichment. *See Magma Holding, Inc. v. Au-Yeung*, 2:20-cv-00406-RFB-BNW, 2020 WL 2025365, at *6 (D. Nev. Apr. 26, 2020) (noting that an unjust enrichment claim may lie in the absence of a "legal" contract") (citing *Leasepartners Corp. v. Robert L. Brooks Tr. Dated November 12, 1975*, 113 Nev. 747, 755, 942 P.2d 182, 187 (1997)); *see also Longmire v. Danaci*, 155 N.E.3d 1014, 1024 (Ohio Ct. App. 2020) (recognizing the general rule that unjust enrichment is an available remedy where the parties' agreement is found to be unenforceable).

Ramsay also claimed, and the district court found, that nothing under the GRB Agreement prevents Ramsay from participating in future business ventures with PH. (33 AA6899-900.) That misses the point—Ramsay is knowingly participating in a business venture that was created by GRB and Ramsay remains

involved in a restaurant that is a variation of—***if not identical to***—the Burger Restaurant, a concept that was created by GRB.

In sum, it was for the jury to decide whether PH and Ramsay have been unjustly enriched through their continued operation of the Burger Restaurant. *In re Sunrise Suites, Inc.*, 2:04-cv-01133-KJD-LRL, 2007 WL 9728691, at *3 (D. Nev. Mar. 30, 2007) ("Whether there has been unjust enrichment is essentially a question of fact."), *aff'd sub nom. Harry M. Weiss & Assocs., P.C. v. Eric Nelson Auctioneering*, 306 Fed. App'x. 351 (9th Cir. 2008) (citing *Leasepartners Corp.*,l 113 Nev. at 756, 942 P.2d at 187, and *Unionamerica Mortgage & Equity Trust v. McDonald*, 97 Nev. 210, 213, 626 P.2d 1272, 1274 (1981)).

4. PH's Fraud Claim Against Seibel.

The elements of a fraudulent concealment claim are:

> (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant, intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; that is, the defendant, concealed or suppressed the fact for the purpose of inducing the plaintiff to act differently than she would have if she had known the fact; (4) the plaintiff was unaware of the fact and would have acted differently if she had known of the concealed or suppressed fact; (5) and, as a result of the concealment or suppression of the fact, the plaintiff sustained damages.

Leigh-Pink v. Rio Properties, LLC, 138 Nev. Adv. Op. 48, 512 P.3d 322, 325-26 (2022) (citation omitted). The claim must be supported "by clear and convincing

evidence." *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 110-11, 825 P.2d 588, 592 (1992).

Here, the district court found that PH sustained its heightened burden to prove a claim for fraudulent concealment ***by clear and convincing evidence*** against Seibel—a "GR Associate" under the terms of the GRB Agreement—for alleged non-disclosure of his "criminal activities and conviction." (33 AA6926.) Summary judgment should not have been granted for three reasons: (i) the claim is legally defective; (ii) PH did not meet its initial burden of production and lacks cognizable damages; and (iii) questions of material fact remain for the jury.

a. PH Morphed a Contract Claim into a Fraud Claim.

As argued below, a contractual duty to disclose cannot serve as the basis of a fraud-based duty to disclose. *See, e.g.*, *Kattawar v. Logistics & Distribution Servs.*, 111 F. Supp. 3d 838, 854-55 (W.D. Tenn. 2015) (analyzing Nevada law). Courts routinely preclude parties from morphing a breach of contract claim into a fraud claim where the factual premise for the fraud claim arises from the defendant's failure to perform under the parties' contract. *See, e.g.*, *Taizhou Zhongneng Imp. & Exp. Co. v. Koutsobinas*, 509 F. App'x 54, 57-58 (2d Cir. 2013); *Heidtman Steel Prods., Inc. v. Compuware Corp.*, 168 F. Supp. 2d 743, 750 (N.D. Ohio 2001).

Here, the district court found that Seibel owed a duty to PH, pursuant to the "express terms of the GRB Agreement," to disclose the facts "regarding his federal

prosecution and conviction." (33 AA6926.) The above case law makes clear that PH cannot legally sustain its fraud claim against Seibel, an agent of GRB, based on the assertion that Seibel breached the contractual disclosure obligations arising under Section 11.2 of the GRB Agreement. To do so would permit any business that is under contract with another business to bring a fraud claim against the other business's owner in the event that the business (acting through its owner) fails to perform under the contract. *Strum v. Exxon Co., USA*, 15 F.3d 327, 329-31 (4th Cir. 1994) ("Importing tort law principles of punishment into contract … would turn every potential contractual relationship into a riskier proposition.").

b. PH Did Not Present Competent Evidence of Legally Cognizable Damages to Support its Fraud Claim.

As to its fraudulent concealment claim, PH had the burden of proving "the fact that [it] was damaged and the amount thereof." *Gibellini v. Klindt*, 110 Nev. 1201, 1206, 885 P.2d 540, 543-44 (1994).

Here, PH did not submit *evidence* of damages with its Motion. Instead, PH submitted an NRCP 16.1 supplemental disclosure from its attorneys that purported to identify PH's damages. (13 AA2789-90.) As it is often said, argument of counsel is not evidence "and do[es] not establish the facts of the case." *Jain v. McFarland*, 109 Nev. 465, 475, 851 P.2d 450, 457 (1993).

PH attempted to cure this defect through its Reply. (30 AA6209.) By then, it was too late—as noted above, where the moving party fails to meet its initial

burden of production, the non-moving party "has no duty to respond on the merits and summary judgment may not be entered against him." *Fergason*, 131 Nev. at 944, 364 P.3d at 595; *see also Wood*, 121 Nev. at 730, 121 P.3d at 1030 (noting that a motion for summary judgment must be "made and supported" by competent, admissible evidence before the burden shifts to the non-moving party). "[A] party moving for summary judgment cannot meet its prima facie burden by submitting evidence for the first time in reply, and generally, evidence submitted for the first time in reply papers should be disregarded by the court." *Wells Fargo Bank, N.A. v. Osias*, 68 N.Y.S.3d 115, 117–18 (N.Y. App. 2017) (citation omitted).

Assuming (*arguendo*) PH could cure its evidentiary shortcoming through its Reply, it was improper for the district court to find that PH could seek damages for having to "rebrand" the Burger Restaurant. "Whether a party is entitled to a particular measure of damages is a question of law reviewed de novo." *Dynalectric Co. of Nevada, Inc. v. Clark & Sullivan Constructors, Inc.*, 127 Nev. 480, 483, 255 P.3d 286, 288 (2011) (quotation marks and citation omitted).

Here, PH sought damages in the form of what it allegedly cost to "rebrand" the Burger Restaurant. (30 AA6209.) As written, the GRB Agreement does not state that upon its termination, PH may seek to recover the costs that it incurs to open a new restaurant. (23 AA4578-621.) Having failed to contract for such relief, PH cannot claim that such post-termination costs should be recoverable in

response to an act that purportedly causes PH to terminate the GRB Agreement in the first place—an act that PH touts that it had every right to exercise. That is, the parties already contemplated that PH may terminate the GRB Agreement and then operate a different restaurant in the same space. Because it cannot be said that PH unexpectedly had to "rebrand" the restaurant once it terminated the GRB Agreement, this Court should find that PH suffered no cognizable damages. *See, e.g.*, *Hunter v. Up-Right, Inc.*, 864 P.2d 88, 89 (Cal. 1993) (noting that fraud damages cannot arise from termination of a contract); *accord Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1538 (5th Cir. 1984) ("The actual damages for fraud had to arise from different injuries than the damages for contract breach.").

c. Questions of Fact Remain as to the Elements of PH's Fraud Claim.

Notwithstanding these issues, the district court erred by overlooking genuine issues of material fact underlying PH's fraudulent concealment claim. Whether a fraud has been committed is "ordinarily a question of fact." *Epperson v. Roloff*, 102 Nev. 206, 210-11, 719 P.2d 799, 802 (1986); *see also Blanchard v. Blanchard*, 108 Nev. 908, 911, 839 P.2d 1320, 1322 (1992).

As to the first element, Seibel submitted evidence (testimonial and documentary) showing that he disclosed his actions and the ensuing investigation to Frederick, his counterpart at Caesars. (28 AA5757-58, 5764-66.) Although PH

denied it, competing views as to what was or was not said creates an issue of material fact precluding summary judgment. *JS Products, Inc. v. Practical Goods Group, Inc.*, 2:07-CV-00911-KJD, 2010 WL 3885320, at *2 (D. Nev. Sept. 30, 2010).

As to the second element, PH did not show that Seibel owed a *fraud-based* duty to disclose to PH (as opposed to a *contract-based* duty to disclose). In general, "a straightforward vendor-vendee relationship … creates no fraud-based duty to disclose." *Nev. Power Co. v. Monsanto Co.*, 891 F. Supp. 1406, 1416-17 (D. Nev. 1995).

As to the third element, because Seibel presented evidence showing that he disclosed the information to Frederick, it negates any finding that he *intended* to conceal or suppress the investigation from PH. As the non-moving party, Seibel is entitled to have his account of the facts accepted as true—not PH's. *Sawyer v. Sugarless Shops Inc.*, 106 Nev. 265, 267-68, 792 P.2d 14, 15-16 (1990) ("All of the non-movant's statements must be accepted as true and a district court may not pass on the credibility of affidavits."). Ultimately, his intent could not be decided as a matter of law. *See Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, (9th Cir. 1989), *as amended on denial of reh'g and reh'g en banc* (Sept. 19, 1989) ("Actual fraud is a question of fact involving determinations of intent and evaluations of credibility properly resolved by the jury.").

As to the fourth element, PH failed to present evidence showing that it would have acted differently. To the contrary, the evidence shows that PH is *still* enjoying the benefits of the GRB Agreement—*i.e.*, the Burger Restaurant remains open for business. *Glenbrook Homeowners Ass'n v. Glenbrook Co.*, 111 Nev. 909, 915, 901 P.2d 132, 137 n.2 (1995) (finding no detrimental reliance where the evidence shows that the plaintiff would have moved forward with a transaction irrespective of allegedly being misled by the defendant).

As to the last element, as argued above, PH failed to present evidence of cognizable damages.

In sum, the district court should have denied the SJ Motion on PH's fraudulent concealment claim because (i) the claim is not proper as a matter of law, (ii) PH did not meet its initial burden of production of showing that it suffered cognizable damages, and (iii) questions of material fact remain for trial.

5. PH's Conspiracy Claim Against Seibel.

The elements of a "civil conspiracy-to-defraud claim" are: "(1) a conspiracy agreement, i.e., a combination of two or more persons who, by some concerted action, intend to accomplish an unlawful objective for the purpose of harming another; (2) an overt act of fraud in furtherance of the conspiracy; and (3) resulting damages to the plaintiff." *Jordan v. State ex rel. Dept. of Motor Vehicles & Pub. Safety*, 121 Nev. 44, 75, 110 P.3d 30, 51 (2005) (quotation marks and citation

omitted), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008).

Here, the district court found that PH sustained its burden to prove a claim for civil conspiracy against Seibel based on the same factual premise underlying PH's fraudulent concealment claim. (33 AA6926.) As a preliminary matter, because PH's conspiracy claim is derivative of its fraud claim, this Court should reverse the entry of summary judgment in PH's favor on its conspiracy claim upon finding that PH was not entitled to summary judgment on its fraud claim. *See Jordan*, 121 Nev. at 75, 110 P.3d at 51 ("[A]n underlying cause of action for fraud is a necessary predicate to a cause of action for conspiracy to defraud."); *see also Zic v. Italian Gov't Travel Office*, 130 F. Supp. 2d 991, 997 (N.D. Ill. 2001) ("Without a fraud, there can be no conspiracy to defraud.")

Regardless, summary judgment should not have been granted for two reasons: (i) Seibel could not legally conspire with his attorneys; and (ii) questions of material fact remain for the jury to decide at trial.

a. PH Did Not Present Evidence Triggering the Limited Exception to the Intra-Corporate Conspiracy Doctrine.

As argued below, the intra-corporate conspiracy doctrine bars a civil conspiracy claim between a principal and its agent *unless* it is shown that the agent acted solely to advance his own interests and not in furtherance of his principal's interests. *Collins v. Union Fed. Savs. & Loan Ass'n*, 99 Nev. 284, 303, 662 P.2d

610, 622 (1983); *see also Laxalt v. McClatchy*, 622 F. Supp. 737, 745 (D. Nev. 1985). The doctrine applies to an alleged conspiracy between a client and his attorney. *See Fraidin v. Weitzman*, 611 A.2d 1046, 1079 (Md. 1992); *accord Maness v. Star-Kist Foods, Inc.*, 7 F.3d 704, 709 (8th Cir. 1993) ("[A]n attorney who acts within the scope of the attorney-client relationship will not be liable to third persons for actions arising out of his professional relationship unless the attorney exceeds the scope of his employment or acts for personal gain.").

Here, PH argued Seibel conspired with his attorney to defraud PH. (8 AA1736-37.) However, PH did not submit evidence showing that Seibel's attorney was advancing his own, individual interests (let alone desired to harm PH). Barring evidence that would bring this claim outside the scope of the intra-corporate conspiracy doctrine, it was error for the district court to grant summary judgment in PH's favor. *National Crossroads Partners v. Utah Crossing, Ltd.*, Nos. 98-15673, 98-15674, 1999 WL 701898, at *3-*4 (9th Cir. 1999) (affirming dismissal of a conspiracy-to-defraud claim between a law firm and its client where there was no evidence that the law firm "personally benefited" from its representation of the client or "received any compensation other than the law firm's usual legal fees"); *see generally* MALLEN & SMITH, *Legal Malpractice* § 6.1 (3d ed. 1989) ("Liability [of an attorney] as a conspirator requires … proof that the attorney's participation involved more than legal representation.").

b. Questions of Fact Remain as to the Elements of PH's Civil Conspiracy Claim.

The intra-corporate conspiracy doctrine notwithstanding, the district court erred by overlooking genuine issues of material fact underlying PH's civil conspiracy claim. In general, whether two parties have conspired to cause harm to another is a question of fact. *See, e.g.*, *United States v. Crosby*, 294 F.2d 928, 945 (2d Cir. 1961).

Here, PH rested its civil conspiracy claim on correspondence from Ziegler to PH related to Seibel's request to assign his interest in GRB to the Trust. However, drawing all reasonable inferences in favor of Seibel, the *non-moving* party, the evidence shows that Seibel attempted in good faith to dissociate from GRB so that GRB could remain under contract with PH. Absent adjudging Seibel's credibility, which cannot occur on summary judgment, the district court erred by finding that no genuine issue of material fact remains as to Seibel's intent.

The same is true for Ziegler. While PH assigned a nefarious motive to his communications, he was communicating with PH on his client's behalf in response to PH's demand for GRB to dissociate from Seibel. It was wrong for the district court to pass judgment on Ziegler's motives in deciding the PH Motion.

Finally, for the same reasons discussed above in regard to PH's fraudulent concealment claim, PH failed to present evidence of cognizable damages (and failed to meet its initial burden of production in showing that it suffered damages).

In sum, the district court should have denied the SJ Motion on PH's civil conspiracy claim.

D. The District Court Abused its Discretion by Dismissing GRB's Claims for Want of Prosecution.

In moving for summary judgment, PH argued that GRB's claims were subject to dismissal for want of prosecution under the district court's inherent authority. (8 AA1715-40.) The district court found that GRB did not "actively prosecute its claims." (33 AA6925.) The district court's ruling was in error.

A district court's decision to dismiss claims for want of prosecution is reviewed for an abuse of discretion. *N. Ill. Corp. v. Miller*, 78 Nev. 213, 215–16, 370 P.2d 955, 956 (1962). Due to the harshness of the result, a district court should dismiss a case for want of prosecution "sparingly." *Hunter v. Gang*, 132 Nev. 249, 258, 377 P.3d 448, 454 (Ct. App. 2016).

The analysis turns on the plaintiff's diligence. *See id.* at 259, 377 P.3d at 455. And, if dismissal is with prejudice, a district court must consider various factors, including the underlying conduct of the parties and the reason for the delay. *Id.* at 260-61, 377 P.3d at 455-56.

Here, Seibel initially brought claims derivatively on behalf of GRB against PH and Ramsay and actively litigated them, pursuing early motion practice and disclosing an initial list of witnesses and documents. (1 AA37-59; 27 AA5521-

32.) After the dissolution proceeding was initiated by GRUS, the Liquidating Trustee assumed control of the claims in this case. (8 AA1607-09.)

Contrary to PH's contention, the Liquidating Trustee did not ignore or disregard his obligation to pursue the claims. Setting aside the delays that arose due to the COVID-19 pandemic, the Liquidating Trustee spent extensive time trying to informally resolve the claims with PH and Ramsay. (21 AA4131-37.) When those efforts failed, he made it clear that Seibel should be authorized to pursue them. (13 AA2686-87.) The Delaware Chancery Court agreed with him by adopting his Report. (21 AA4236-66.)

In the interim, Seibel continued to actively participate in discovery—having been personally named as a Counterdefendant—by producing tens of thousands of pages of documents and providing sworn testimony at his deposition related to the Burger Restaurant. (27 AA5534-63; 28 AA5785-809) The Liquidating Trustee indicated in discovery that he did not have documents to produce "independent of those already produced by [GRB's] members," *i.e.*, documents produced by Seibel. (13 AA2690.) Nevertheless, when Ramsay served written discovery on GRB, the Liquidating Trustee responded to it. (18 AA3478-85; 29 AA5989-93.)

Importantly, this case did not sit idle on the docket for years due to inactivity on the part of GRB or Seibel. To the contrary, this case was actively litigated by all of the parties for years in conjunction with a related case. The purpose behind

dismissing an action for want of prosecution—preventing a case from lingering indefinitely—has no application here.

In sum, there is no evidentiary basis to support dismissing GRB's claims for want of prosecution, and the district court abused its discretion by doing so.

E. This Court Should Reassign this Case Upon Remand.

This Court will direct random reassignment of a case on remand where the judge has inappropriately expressed an opinion on the ultimate merits of the case. *See FCH1, Ltd. Liab. Co. v. Rodriguez*, 130 Nev. 425, 435, 335 P.3d 183, 190 (2014); *Leven v. Wheatherstone Condo. Corp.*, 106 Nev. 307, 310, 791 P.2d 450, 451 (1990). Although not squarely addressed by this Court, the Ninth Circuit has identified various factors to consider in deciding when reassignment is appropriate, including where a "judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected." *United States v. Arnett*, 628 F.2d 1162, 1165 (9th Cir. 1979).

Here, the judge will have substantial difficultly disregarding the views expressed in the SJ Orders, including his view as to Seibel's credibility, and ignoring the improper factual findings set forth in the SJ Orders, including his belief that PH had unbridled, unfettered authority to terminate the GRB Agreement

irrespective of the implied covenant of good faith and fair dealing. As a result, random reassignment of this case upon remand is warranted.

VIII. CONCLUSION

This Court should vacate the SJ Orders and reverse and remand this case with instructions for the district court to deny the SJ Motions as to the first, second, and third causes of action asserted by GRB against PH, the second and third causes of action asserted by GRB against Ramsay, and the first and second causes of action asserted by PH against Seibel. In addition, this Court should order random reassignment of this case to a new department.

DATED this 10th day of March, 2023.

BAILEY❖KENNEDY

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NRAP 28.2 CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because:

[x] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font size 14.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

[x] Proportionally spaced, has a typeface of 14 points or more, and contains 13,980 words.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the recor[d to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

EXECUTED on this 10th day of March, 2023.

/s/ Joshua P. Gilmore
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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 10th day of March, 2023, service of the Opening Brief was made by electronic service through the Nevada Supreme Court's electronic filing system, electronic service through the Eighth Judicial District Court's electronic filing system, hand delivery, and/or by email as agreed by the parties, and addressed to the following at their last known email address:

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