

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 84934

ROWEN SEIBEL AND GR BURGR, LLC,
Appellants,

v.

PHWLTV, LLC AND GORDON RAMSAY,
Respondents.

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District Court Case No. A-17-751759-B
Appeal from the Eighth Judicial District Court

**RESPONDENT PHWLTV, LLC'S
ANSWERING BRIEF**

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RULE 26.1 DISCLOSURE

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

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

- a. PHWLV, LLC is wholly owned by Caesars Growth PH, LLC – a Delaware Limited Liability Company, which is wholly owned by:
 - i. Caesars Nevada Newco, LLC – a Nevada Limited Liability Company, which is owned by:
 - 1. Caesars Palace LLC – a Delaware Limited Liability Company, which is wholly owned by:
 - a. Caesars World LLC – a Florida Limited Liability Company, which is wholly owned by:
 - i. CEOC, LLC – a Delaware Limited Liability Company, which is wholly owned by:
 - 1. Caesars Resort Collection LLC – a Delaware Limited Liability Company which is wholly owned by:
 - a. Caesars Growth Partners, LLC – a Delaware Limited Liability Company which is wholly owned by:
 - i. Caesars Holdings, Inc. – a Delaware corporation

which is wholly owned
by:

- ii. Caesars Entertainment,
Inc., a publicly traded
corporation.

Pisanelli Bice PLLC is the only law firm whose attorneys are expected to appear for Real Parties in Interest. Previously, attorneys from Kirkland and Ellis also appeared for PHWLTV.

DATED this 14th day of June 2023.

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TABLE OF CONTENTS

RULE 26.1 DISCLOSURE	1
TABLE OF CONTENTS.....	3
TABLE OF AUTHORITIES	5
ISSUES PRESENTED FOR REVIEW.....	8
I. INTRODUCTION AND SUMMARY OF THE ARGUMENT.....	9
II. STATEMENT OF FACTS AND CASE	12
A. Planet Hollywood, a Gaming Licensee, and GRB, a Seibel-Affiliated Entity, Enter into a Business Relationship.....	12
B. Seibel Engages in Criminal Conduct and Intentionally Conceals it from Planet Hollywood.	15
C. Planet Hollywood Uncovers Seibel's Felony Criminal Conviction and Terminates the Relationship.	19
D. GRUS Files for Dissolution in Delaware and Seibel Files Derivate Claims on Behalf of GRB in Nevada.	23
E. Planet Hollywood Files an Additional Action in Nevada and GRB Fails to Either Prosecute or Defend Any of the Litigation.	25
F. The District Court Grants Summary Judgment in Favor of Planet Hollywood.....	30
III. ARGUMENT.....	31
A. The District Court Correctly Granted Summary Judgment.	31
B. The District Court Correctly Granted Summary Judgment Because GRB (Repeatedly) Failed to Prosecute its Claims.	46

C.	The District Court Correctly Granted Summary Judgment Because Seibel Failed to Disclose his Criminal Conviction and Instead Attempted to Defraud Planet Hollywood	49
D.	There is no Basis to Re-Assign this Matter.....	53
IV.	CONCLUSION	55
	CERTIFICATE OF COMPLIANCE.....	56
	CERTIFICATE OF SERVICE	58

TABLE OF AUTHORITIES

Cases

<i>Am. Title Ins. Co. v. Lacelaw Corp.</i> , 861 F.2d 224 (9 th Cir. 1988)	43, 44
<i>Bradley v. Nev.-Cal.a-Oregon Ry.</i> , 42 Nev. 411, 178 P. 906 (1919)	42
<i>City of Reno v. Silver State Flying Serv., Inc.</i> , 84 Nev. 170, 438 P.2d 257 (1968).	36
<i>Collins v. Union Fed. Sav. & Loan Ass'n</i> , 99 Nev. 284, 662 P.2d 610 (1983)	53
<i>Consol. Generator-Nev., Inc. v. Cummins Engine Co., Inc.</i> , 114 Nev. 1304, 971 P.2d 1251 (1998)	52
<i>Crawford v. State</i> , 121 Nev. 744, 121 P.3d 582 (2005)	47
<i>Daul v. PPM Energy, Inc.</i> , 267 F.R.D. 641 (D. Or. 2010)	44
<i>Dow Chem. Co. v. Mahlum</i> , 114 Nev. 1468, 970 P.2d 98 (1998)	50, 51
<i>Emmons v. State</i> , 107 Nev. 53, 807 P.2d 718 (1991)	22
<i>Envirotech, Inc. v. Thomas</i> , 259 S.W.3d 577 (Mo. Ct. App. 2008)	52
<i>Frantz v. Johnson</i> , 116 Nev. 455, 999 P.2d 351 (2000)	38
<i>Gaston v. Drake</i> , 14 Nev. 175 (1879)	37
<i>Green v. MOBIS Alabama, LLC</i> , 995 F. Supp. 2d 1285 (M.D. Ala. 2014)	33
<i>Greenland Super Mkt., Inc. v. KL Vegas, LLC</i> , 135 Nev. 650, 452 P.3d 411, 2019 WL 6247676 (2019)	44
<i>Hartranft v. Encore Cap. Grp., Inc.</i> , 543 F. Supp. 3d 893 (S.D. Cal. 2021)	32
<i>HCP of Illinois, Inc. v. Farbman Grp. I, Inc.</i> , 978 F. Supp. 2d 943 (N.D. Ill. 2013)	33
<i>Hilton Hotels Corp. v. Butch Lewis Productions, Inc.</i> , 107 Nev. 226, 808 P.2d 919 (1991)	39
<i>Hunter v. Gang</i> , 132 Nev. 249, 377 P.3d 448 (Nev. App. 2016)	47
<i>In re Barker</i> , 839 F.3d 1189 (9 th Cir. 2016)	43

<i>Kernan v. State</i> , 460 P.3d 998 (Nev. App. 2020)	22
<i>LaMantia v. Redisi</i> , 118 Nev. 27, 38 P.3d 877 (2002)	32
<i>Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League</i> , 791 F.2d 1356 (9th Cir. 1986)	41
<i>Matter of Dunleavy</i> , 104 Nev. 784, 769 P.2d 1271 (1988)	54
<i>May v. Anderson</i> , 121 Nev. 668, 119 P.3d 1254 (2005)	36
<i>MB Am., Inc. v. Alaska Pac. Leasing</i> , 132 Nev. 78, 367 P.3d 1286 (2016)	47
<i>McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC</i> , 121 Nev. 815, 123 P.3d 748 (2005)	31
<i>Millen v. Eighth Jud. Dist. ex rel. Cnty. of Clark</i> , 122 Nev. 1245, 148 P.3d 694 (2006)	54
<i>Miller v. FiberLight, LLC</i> , 343 Ga. App. 593, 808 S.E.2d 75 (2017)	39
<i>Moore v. Cherry</i> , 90 Nev. 390, 528 P.2d 1018 (1974)	47
<i>N. Ill. Corp. v. Miller</i> , 78 Nev. 213, 370 P.2d 955 (1962)	49
<i>Nat'l Amusements, Inc. v. Town of Dedham</i> , 43 F.3d 731 (1st Cir.1995)	33
<i>Orr v. Bank of Am., NT & SA</i> , 285 F.3d 764 (9th Cir. 2002)	20
<i>Perry v. Jordan</i> , 111 Nev. 943, 900 P.2d 335 (1995)	39
<i>Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.</i> , 127 Nev. 331, 255 P.3d 268 (2011)	43, 44
<i>River Glider Ave. Tr. v. Bank of New York Mellon as Tr. of Certificateholders of CWALT, Inc. Alternative Loan Tr. 2006-24CB, Mortg. Pass-Through Certificates</i> , 472 P.3d 190, 2020 WL 5637071 (2020)	44
<i>Seibel v. Eighth Judicial District Court</i> , 138 Nev. Adv. Op. 73, 520 P.3d 350 (2022)	9, 11, 17, 21
<i>Sentenby v. Fire Ins. Exch.</i> , 101 Nev. 654, 707 P.2d 1149 (1985)	34
<i>Sheehan & Sheehan v. Nelson Malley & Co.</i> , 121 Nev. 481, 117 P.3d 219 (2005)	34

<i>Standard Fire Ins. Co. v. Knowles</i> , 568 U.S. 588 (2013).....	43
<i>Sylver v. Regents Bank, N.A.</i> , 129 Nev. 282, 300 P.3d 718 (2013).....	37
<i>Tennier v. Wells Fargo Bank, N.A.</i> , No. 3:14-CV-0035-LRH-VPC, 2015 WL 128672 (D. Nev. Jan. 8, 2015).....	40
<i>Turner v. S. Nev.Reg'l Hous. Auth.</i> , 135 Nev. 729 (Nev. App. 2019).....	32
<i>Vitek v. Bank of Am., N.A.</i> , No. 8:13-CV-816-JLS ANX, 2014 WL 1042397 (C.D. Cal. Jan. 23, 2014).....	39
<i>Wood v. Safeway, Inc.</i> , 121 Nev. 724, 121 P.3d 1026 (2005)	31, 32

Statutes

6 Del. C. § 18-803	25
NRS § 463.0129	40
NRS § 463.01293	12
NRS § 51.155	20
NRS § 52.085	20

Regulations

Nev. Gaming Reg. § 3.080.....	41
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ISSUES PRESENTED FOR REVIEW

1. Whether the district court correctly granted summary judgment in favor of PHWLTV, LLC ("Planet Hollywood" or "Caesars") and against GR Burgr, LLC ("GRB") because (a) GRB's liquidating trustee admitted to the Delaware court that its claims for wrongful termination of the GRB Agreement, breach of the implied covenant of good faith and fair dealing, and breach of section 14.21 were unworthy of pursuit; (b) Planet Hollywood had an express and unequivocal right to terminate the GRB Agreement to due GRB's or its associates' unsuitability; and (c) Section 14.21 of the GRB Agreement constitutes an agreement to agree and enforcement of which would violate public policy.

2. Was summary judgment properly granted in favor of Planet Hollywood and against GRB because GRB failed to prosecute any of its claims or otherwise meaningfully participate in the litigation.

3. Whether the district court correctly granted summary judgment in favor of Planet Hollywood and against Rowen Seibel ("Seibel") because (a) Seibel failed to disclose his criminal behavior and conviction to Planet Hollywood, and instead; (b) Seibel attempted to defraud Planet Hollywood with assistance from his counsel and others to transfer his interests to a family trust to avoid termination of the GRB Agreement.

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

Planet Hollywood entered into a contract with GRB to develop a restaurant in Las Vegas. Given Planet Hollywood's status as a gaming licensee, the agreement with GRB contained extensive and strict suitability and disclosure requirements to ensure that Planet Hollywood was not jeopardizing its gaming license by doing business with an unsuitable party. However, as this Court learned in a recent related published decision, *Seibel v. Eighth Judicial District Court*, 138 Nev. Adv. Op. 73, 520 P.3d 350 (2022), GRB's associate and principal, Seibel, was secretly unsuitable. In fact, Planet Hollywood would later learn through public news reports that Seibel was convicted of a tax crime and, for years, hid his criminal conduct, investigation, plea, and conviction from Planet Hollywood despite an express obligation to disclose this information.

Instead of disclosing his unsuitability to Planet Hollywood or even his other business partner, GRUS US Licensing LP ("GRUS"), Seibel engaged in a scheme with his lawyers to hide his unsuitability so he could continue to enjoy the financial benefits of his relationship with Planet Hollywood despite his unsuitability under the GRB Agreement and Nevada gaming laws.

Once the truth came out, Seibel was forced to face the consequences. Planet Hollywood terminated the GRB Agreement after GRB failed to disassociate from Seibel. Unwilling to admit his wrongdoings, Seibel, derivatively on behalf of GRB,

instead preemptively initiated litigation against Planet Hollywood for exercising its express right under the GRB Agreement to terminate its relationship with an unsuitable entity. However, before long, Seibel's other business partner in GRB also sued in the Delaware courts to dissolve GRB and disassociate from Seibel.

With the dissolution of GRB, a liquidating trustee was assigned to step into GRB's shoes and wind down the affairs of the company. This appointment included prosecuting and defending litigation on behalf of GRB. Despite this mandate, the liquidating trustee (*i.e.*, GRB) failed to engage and the litigation filed by GRB became stagnant. Planet Hollywood attempted to engage GRB in the litigation, but the liquidating trustee repeatedly refused to participate in the lawsuit of GRB's own making. Once GRB finally engaged counsel, that counsel was similarly unwilling to participate in discovery. Simply said, GRB failed to prosecute its own claims. This result was unsurprising because the liquidating trustee openly told the Delaware court that certain claims brought by GRB were unworthy of pursuing.

The district court correctly determined that Planet Hollywood acted within its discretion when it terminated the GRB Agreement after it learned from public reports about Seibel's felonious conduct and related guilty plea. This finding, in and of itself, was sufficient grounds for the entry of summary judgment. But GRB's admissions that its claims were not worthy of pursuit coupled with the lack of

participation in the underlying action confirm that the district court rightly entered summary judgment against GRB.

Further, the district court did not err when it entered summary judgement against Seibel on Planet Hollywood's claims for fraudulent concealment and civil conspiracy. In discovery and in filings before the district court, Seibel admitted that he did not disclose his guilty plea to the Class E felony of a corrupt endeavor to obstruct and impede the due administration of the Internal Revenue Laws, 26 U.S.C. § 7212. His alleged efforts to disassociate from GRB were fraudulent and the district court previously held that "statements made to Caesars about Seibel's purported disassociation were false when made and designed exclusively for the purpose of defrauding Caesars so that Seibel could continue to benefit from the relationship despite his unsuitability to conduct business with a gaming licensee . . ." Indeed, this Court has already determined that those findings were "supported by substantial evidence in the record and . . . not clearly erroneous." *Seibel*, 138 Nev. Adv. Op. 73, 520 P.3d at 355. Seibel's efforts constitute fraudulent concealment and civil conspiracy. There is simply no basis to vacate the district court's grant of summary judgment or remand this matter for further proceedings. The district court should be affirmed.

II. STATEMENT OF FACTS AND CASE

A. Planet Hollywood, a Gaming Licensee, and GRB, a Seibel-Affiliated Entity, Enter into a Business Relationship.

Planet Hollywood¹ and its affiliates are gaming licensees. (10 AA 02018).² In Nevada, such licenses are a privilege, not a right, which subject licensees to rigorous regulations that, among other things, require licensees to self-police. (NRS § 463.01293).

On or about December 13, 2012, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (10 AA 01990-2034). In light

¹ Appellants make much ado about who introduced Ramsay to Planet Hollywood and its affiliates. (Opening Br. at 9). Planet Hollywood disputes that Seibel introduced Ramsay to the company, but nevertheless, this dispute is irrelevant to the issues before the Court. Whether Seibel introduced Ramsay to Planet Hollywood or Planet Hollywood knew of Ramsay before does not change the terms of the GRB Agreement or any of the obligations thereunder. This "dispute" is not material and this Court can disregard it.

² "AA" refers to Appellants' Appendix and "RA" refers to Respondent's Appendix. Pursuant to NRAP 30(a), the parties attempted but could not reach an agreement concerning a possible joint appendix.

³ GRB was a Delaware limited liability company with two members, Rowen Seibel ("Seibel"), and GR US, LLC ("GRUS"), a Delaware limited liability partnership associated with Gordon Ramsay. (6 AA 01182).

of self-policing obligations imposed by gaming regulations, Planet Hollywood included language in the GRB Agreement [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(10 AA 02018). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(Id.).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *(See id.)*

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(10 AA 002019 (emphasis added)). "[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(10 AA 01999) (emphasis added).

[REDACTED]

[REDACTED] (10 AA 02005) [REDACTED]

[REDACTED]

[REDACTED]

Notably, per the express language of the GRB Agreement, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

B. Seibel Engages in Criminal Conduct and Intentionally Conceals it from Planet Hollywood.

Unbeknownst at the time to Planet Hollywood, Seibel was an Unsuitable Person as that term is defined in the GRB Agreement. As Planet Hollywood and the public have now learned, Seibel began using foreign bank accounts to defraud the IRS in 2004 and was later investigated, charged, and pleaded guilty to one count of a corrupt endeavor to obstruct and impede the due administration of the Internal

Revenue Laws, 26 U.S.C. § 7212(a), a Class E Felony. (11 AA 02331-36). This is not a disputed fact; GRB's own liquidating trustee acknowledged Seibel's criminal conduct. (13 AA 02596) ("On April 18, 2016, Seibel pled guilty to a one-count felony criminal information charging him with impeding the administration of the Internal Revenue Code (26 U.S.C. § 7212) after employing an undeclared Swiss bank account and Panamanian shell company to hide taxable income.")

Neither Seibel nor GRB informed Planet Hollywood of Seibel's criminal conduct or conviction. (*See* 13 AA 02733-34). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Instead of disclosing his criminal conduct, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (4 RA 0773).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁴ Seibel's fraudulent attempt to continue benefitting from the Seibel Agreements by the creation of a Trust and related prenuptial agreement was the subject of writ petition before this Court. *See Seibel v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 138 Nev. Adv. Op. 73, 520 P.3d 350, 355 (2022).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(4 RA 0784-85). [REDACTED]

[REDACTED]

[REDACTED] (4 RA 0787).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (4 RA 0784-85). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (4 RA 0785).

C. Planet Hollywood Uncovers Seibel's Felony Criminal Conviction and Terminates the Relationship.

Seibel's fraud worked for a while, but ultimately, Planet Hollywood and its affiliates heard of Seibel's felony conviction from press reports four months after he pleaded guilty.⁵ (11 AA 02288). In fact, Seibel similarly kept his other partners in the dark about his criminal conduct. (13 AA 02596). Upon learning of his felony conviction and failure to disclose, Planet Hollywood, [REDACTED]

[REDACTED]

⁵ Seibel argues there was a genuine issue of material fact precluding summary judgment by claiming that he told certain Planet Hollywood executives about his criminal investigation. (Opening Br. 14-15.) Not so. This Court need only look to Seibel's own admissions. [REDACTED]. (13 AA 02733). In fact, in the Complaint filed by GRB in February 2017, GRB admitted "[n]either Ramsay nor PH was aware in April 2016 of the tax investigation that resulted in the judgment against Seibel's plea." (6 AA 01187).

[REDACTED]

[REDACTED] (11 AA 02295).⁶

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.*) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁶ Appellants complain that Planet Hollywood inappropriately relied on Exhibit 24, the U.S. Government's Sentencing Submission in *United States v. Rowen Seibel*, because it was unauthenticated and purportedly contained inadmissible hearsay. (Opening Br. at 27). Appellants are mistaken on both counts. First, Seibel himself produced the document which he now complains of. (*See* 11 AA 02211). As such, the Sentencing Submission is deemed authentic. *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 777 (9th Cir. 2002) (*citing Maljack Prods., Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 889 n. 12 (9th Cir. 1996) ("[D]ocuments produced by a party in discovery were deemed authentic when offered by the party-opponent[.]"); *see also* NRS § 52.085(1) ("Evidence that [a] writing authorized by law to be recorded or filed and in fact recorded or filed in a public office ... is sufficient to authenticate the writing.") Further, the Sentencing Submission is not inadmissible hearsay as it is a public record or report. *See* NRS § 51.155 ("Records, reports, statements or data compilations, in any form, of public officials or agencies are not inadmissible under the hearsay rule if they set forth (1) [t]he activities of the official or agency; [or] (2) [m]atters observed pursuant to duty imposed by law . . . unless the sources of information or the method or circumstances of the investigation indicate lack of trustworthiness.")

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.*)⁷

[REDACTED]

[REDACTED]

[REDACTED] (11 AA 02316). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (11 AA02295;
11 AA 02315). Even GRB agreed that the termination was a proper exercise of
Planet Hollywood's "bargained-for discretion." (13 AA 02618). [REDACTED]

[REDACTED]

⁷ Ultimately, discovery in this litigation revealed that Seibel's proposal would not serve to dissociate Seibel. *See* Section II(B) *supra*; *see also Seibel*, 520 P.3d at 355.

[REDACTED]⁸ (12 AA 02426). [REDACTED]

[REDACTED]

[REDACTED] (*Id.*) [REDACTED]

[REDACTED]

⁸ Appellants take issue with GRB's reliance on exchanges with Nevada gaming regulators. (Opening Br. at 27.) The letter from gaming regulators does not constitute inadmissible hearsay because the gaming regulator is a disinterested, investigatory body with no apparent motive to lie, the evidence is admissible under the general exception to the hearsay rule. *See, e.g., Emmons v. State*, 107 Nev. 53, 57, 807 P.2d 718, 721 (1991), *overruled on other grounds by Harte v. State*, 116 Nev. 1054, 1072, 13 P.3d 420, 432 (2000) (admitting opinions of a disinterested third party under the general exception). Indeed, as a neutral, third party, the Nevada Gaming Control Board no potential gain or loss from the result of Planet Hollywood's handling of its disassociation from Seibel and GRB, thus there was no motive for them to lie in their findings.

Further, Exhibit 40 (incorrectly identified as Exhibit 41 in Appellants' Opening Brief) is a letter from Planet Hollywood's counsel to the Nevada Gaming Control Board. (12 AA 02356-59). Appellants complain that it constitutes inadmissible evidence because it was unfairly prejudice. (Opening Brief at 27.)

[REDACTED] (12 AA 02356-59). Under Nevada law, "[u]nfair prejudice' is defined 'as an appeal to the emotional and sympathetic tendencies of a jury, rather than the jury's intellectual ability to evaluate the evidence.'" *Kernan v. State*, 460 P.3d 998 (Nev. App. 2020) (quoting *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 933, 267 P.3d 777, 781 (2011)).

[REDACTED] This letter was appropriately considered by the district court.

[REDACTED]

[REDACTED] (*Id.*)

D. GRUS Files for Dissolution in Delaware and Seibel Files Derivate Claims on Behalf of GRB in Nevada.

Following Planet Hollywood's termination of the GRB Agreement, on or about October 13, 2016, GRUS filed a petition for judicial dissolution in the Court of Chancery of the State of Delaware. (11 AA 02318-29). Before GRB could be dissolved, Seibel filed a complaint in Nevada state court purportedly derivatively on behalf of GRB against Planet Hollywood and Ramsay for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and civil conspiracy. (1 AA 00002-34). Shortly afterward, Seibel sought a preliminary injunction, which the district court denied on March 22, 2017, determining that, among other things, Seibel failed to demonstrate a likelihood of success on the merits. (5 AA 01061). Following some additional motion practice dismissing certain GRB claims, on July 21, 2017, Planet Hollywood answered and filed counterclaims against Seibel individually for fraudulent concealment and civil conspiracy based on his failure to disclose his criminal activities as required by the GRB Agreement. (6 AA 01237).

After Planet Hollywood filed counterclaims, again purportedly on behalf of GRB, Seibel filed a motion for partial summary judgment on September 18, 2017. (7 AA01277-84). Although GRB's motion for partial summary judgment came

before the district court for hearing, the district court continued the hearing because it had "concerns with Seibel's ability to pursue claims derivatively on behalf of [GRB]." (8 AA 01614).⁹ Around this time, the Court of Chancery of the State of Delaware issued an order dissolving GRB. (11 AA 02338-46). Specifically, the Delaware court "concluded that it is no longer reasonably practicable to carry on the business of GRB," ordered GRB dissolved, and further ordered that "GRB's affairs . . . be promptly wound up by a liquidating trustee under the direction of this Court and in accordance with the Act and the limited liability company agreement of GRB." (11 AA 02340).

The GRB Liquidating Trustee was granted "all the powers generally available to a trustee, custodian, or receiver appointed pursuant to 6 Del. C. § 18-803, unless the exercise of any said power would be inconsistent with any specific provision of this Order or any other Order entered by the [Delaware court]." (11 AA 02340). Importantly, the order from the Delaware court authorized and empowered the liquidating trustee

with the sole and exclusive authority to act through and in the name of GRB as necessary (a) to carry out all duties hereunder; (b) to identify and marshal the assets of GRB and liquidate those assets, including the Delaware Counterclaims (to the extent such claims are derivative) and Nevada Claims, in the manner the Liquidating Trustee determines is in

⁹ On March 7, 2018, the District Court issued an order vacating Seibel's motion for partial summary judgment and determining "that to pursue the Motion, the Motion must be re-filed rather than re-noticed." (8 AA 01614) Neither GRB nor Seibel ever re-filed the motion for partial summary judgment.

the best interests of GRB; (c) to ***prosecute and defend any litigation by or on behalf of GRB***; (d) to wind up the affairs of GRB in accordance with the terms of the Act and the LLC Agreement; and (e) to execute and/or deliver, or cause to be executed and/or delivered, all assignments, instruments, pleadings, and documents necessary to carry out the Liquidating Trustee's duties as outlined in th[e] [o]rder.

(11 AA 02341).¹⁰ In other words, the liquidating trustee stepped into the shoes of GRB and was empowered to prosecute the claims brought derivatively by Seibel and defend against any claims brought against GRB. (*See id.*)

E. Planet Hollywood Files an Additional Action in Nevada and GRB Fails to Either Prosecute or Defend Any of the Litigation.

On August 25, 2017, Planet Hollywood and its affiliates filed a complaint for declaratory relief against the Seibel-Affiliated Entities,¹¹ including GRB (the "DP Original Complaint"). (1 RA 0001-43). The DP Original Complaint sought declaratory relief related to Planet Hollywood and its affiliates' proper termination of Seibel Agreements. (1 RA 0038-43). In light of the related issues, on February 9,

¹⁰ 6 Del. C. § 18-803 provides in relevant part, that "[u]pon dissolution of a limited liability company . . . ***the persons winding up the limited liability company's affairs may, in the name of, and for and on behalf of, the limited liability company, prosecute and defend suits, whether civil,*** criminal or administrative."

¹¹ The Seibel-Affiliated Entities include Seibel, LLTQ Enterprises, LLC, LLTQ Enterprises 16, LLC (collectively, with LLTQ Enterprises, LLC, "LLTQ"), FERG, LLC, FERG 16, LLC (collectively, with FERG, LLC, "FERG"), Moti Partners, LLC, Moti Partners 16, LLC (collectively, with Moti Partners, LLC, "MOTI"), TPOV Enterprises, LLC, TPOV Enterprises 16, LLC (collectively, with TPOV Enterprises, LLC, "TPOV"), DNT Acquisition, LLC ("DNT"), and GRB.

2018, the district court consolidated *Seibel v. PHWL, LLC* (A-17-751759-B) and *Desert Palace, Inc. v. Seibel* (A-17-760537-B). (8 AA 01596-99).

GRB's liquidating trustee requested an indefinite extension to respond to the DP Original Complaint. (12 AA 02435). Planet Hollywood advised that it was unable to agree to an indefinite extension but offered to extend GRB's time to answer the DP Original Complaint until February 15, 2018. (12 AA 02437). GRB did not answer the DP Original Complaint.

At a status check over a year later, on February 28, 2019, the district court inquired into the participation of GRB/the liquidated trustee in the proceedings. (1 RA 0044-45). The district court stated that it intended to set a hearing on an order to show cause directed at the liquidating trustee. (1 RA 0045). Although a hearing was set for March 27, 2019, the parties were unable to reach a resolution on the controlling language of the order and continued the hearing. (*Id.*)

Several months after that, on December 13, 2019, the liquidating trustee requested a two-month extension of any GRB obligation in the consolidated Nevada action. (12 AA 02555). Planet Hollywood agreed to provide the extension but inquired as to the status of GRB retaining counsel in the consolidated action. (*Id.*) Subsequent to this agreed-upon extension, on or about December 20, 2019, lead counsel for the Seibel Parties unexpectedly passed away. (1 RA 0064). As a result, the parties agreed to extend discovery deadlines, postponed additional meet and

confers on discovery issues, agreed to postpone the hearings on pending motions, and agreed to postpone depositions that the parties were attempting to schedule for January 2020. (*Id.*).

Just shy of three months later, on March 11, 2020, Planet Hollywood and its affiliated entities amended the DP Original Complaint (the "DP First Amended Complaint"). (1 RA 0068-114). Once again, Planet Hollywood served the liquidating trustee with a copy of the DP First Amended Complaint, but the liquidating trustee again refused to participate in the litigation. (12 AA 02574-76).

Then the COVID-19 Pandemic broke out. As a result, the parties entered into a two-month stay. (12 AA 02575). But, the liquidating trustee attempted to argue that because of the stay, GRB need not engage in the litigation or respond to the DP First Amended Complaint. (*Id.*) Importantly, in support of its refusal to engage in the litigation, despite its express authority to do so, the liquidating trustee claimed that GRB *did not have any discoverable information* and *did not have any independent knowledge of the facts*. (*Id.* (emphasis added)) While Planet Hollywood's counsel was willing to accommodate even a longer extension than that provided to other parties in the litigation, Planet Hollywood offered the liquidating trustee thirty days to respond to the DP First Amended Complaint. (12 AA 02574). The liquidating trustee against failed to respond. (8 AA 01724).

Left with no other recourse, after multiple attempts to engage GRB, on May 20, 2020, Planet Hollywood filed a notice of intent to take default against GRB. (1 RA 0137-39). In response, the liquidating trustee sent a letter to the district court and the Delaware court requesting that the courts "communicate and coordinate with each other so that the proceedings in the two courts can be completed in an orderly fashion without the possibility of inconsistent adjudications relating to GRB." (13 AA 02631). The letter confirmed, among other things, that "GRB has never appeared in the Nevada litigation," that "GRB has no discovery to offer," that GRB has no assets to defend itself or to retain counsel to respond to a default motion, and that the Delaware action should be allowed to proceed before actions are taken against GRB in Nevada. (13 AA 02632-33). However, the district court made clear, that the Delaware action should not impact the case in Nevada. (8 AA 01724-25).

In April 2020, the liquidating trustee filed a Report and Proposed Liquidation Plan for GRB (the "GRB Report").¹² (13 AA 02581). Of note, the GRB Report specifically identifies that nearly all of GRB's claims are unworthy of pursuit and the liquidating trustee's (*i.e.*, GRB's) reasons for these conclusions. (13 AA 02617-36). Specifically, the liquidating trustee (*i.e.*, GRB) identified the following claim as not worthy of pursuit: (1) wrongful termination of the GRB Agreement; (2) breach

¹² The Delaware court fully adopted the GRB Report on October 13, 2020. (13 AA 02693).

of the implied covenant of good faith and fair dealing and the purported scheme to oust Seibel; and (3) breach of Section 14.21 of the GRB Agreement. (13 AA 02617-22). The liquidating trustee expressly told the Delaware court that his determination was reached after a full investigation and reliance on "*primarily undisputed facts*." (13 AA 02589 (emphasis added)).

After filing the GRB Report, on June 9, 2020, GRB finally retained counsel and filed a notice of appearance in the district court. (1 RA 0140-41). On June 19, 2020, GRB filed its long overdue answer to the DP First Amended Complaint. (1 RA 0142-62). Thereafter, on July 24, 2020, GRB served its initial disclosures. (13 AA 02689-91). These disclosures further demonstrated GRB's intention to continue to not participate in the litigation, stating that (1) GRB has no witnesses; (2) GRB has no documents to produce; and (3) "GRB asserts no affirmative claims on its own behalf." (13 AA 02690).

GRB failed to attend a single deposition in the underlying litigation, confirming through its retained counsel that GRB had no plans to participate in the depositions and no one from GRB would be attending or participating. (*See, e.g.*, 13 AA 02727; *see also* 12 AA 02510). Having failed to prosecute its claims or meaningfully participate in discovery, Planet Hollywood moved for summary judgment against GRB. (8 AA 1715-40).

F. The District Court Grants Summary Judgment in Favor of Planet Hollywood.

Planet Hollywood's motion for summary judgment came before the district court for hearing on December 6, 2021. (33 AA 06967). After taking the motion under advisement, the district court granted Planet Hollywood's motion in its entirety and entered judgment in its favor and "and against GRB on all of GRB's claims." (33 AA 06926). The GRB Agreement granted Planet Hollywood "the express right to determine whether a [GRB] Associate is an Unsuitable Person, and whether the GRB Agreement must be terminated in its 'sole discretion.'" (33 AA 06922). Once Planet Hollywood learned of Seibel's guilty plea and conviction, it determined that Seibel was unsuitable and terminated the GRB Agreement as it was expressly permitted to do. (33 AA 06917). GRB, through its liquidating trustee, admitted its claims were "not worth pursuing" and failed to prosecute the same for years. (33 AA 06922, 06925). Further, the district court entered judgment in Planet Hollywood's favor and against Seibel, individually, on Planet Hollywood's claims for fraudulent concealment and civil conspiracy" because Seibel failed to disclose his criminal conduct and plea to Planet Hollywood despite a duty to disclose. (*Id.*) Instead, Seibel undertook a fraudulent scheme to hide his conviction and continued association with the Seibel-Affiliated Entities. (33 AA 06922).

III. ARGUMENT

A. The District Court Correctly Granted Summary Judgment.

1. *Standard of review.*

"This [C]ourt reviews a district court's grant of summary judgment de novo." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). "Summary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Id.* at 731, 121 P.3d 1031. "The purpose of summary judgment 'is to avoid a needless trial when an appropriate showing is made in advance that there is no genuine issue of material fact to be tried, and the movant is entitled to judgment as a matter of law.'" *McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC*, 121 Nev. 815, 819, 123 P.3d 748, 750 (2005) (quoting *Coray v. Ham*, 80 Nev. 39, 40-41, 389 P.2d 76, 77 (1964)); *see also* NRCP 56(a) ("The court *shall* grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.") (emphasis added).

"To successfully oppose a motion for summary judgment, the non-moving party must show specific facts, rather than general allegations and conclusions, presenting a genuine issue of material fact for trial." *LaMantia v. Redisi*, 118 Nev.

27, 29, 38 P.3d 877, 879 (2002). "While the pleadings and other proof must be construed in a light most favorable to the nonmoving party, that party bears the burden to 'do more than simply show that there is some metaphysical doubt' as to the operative facts in order to avoid summary judgment being entered in the moving party's favor." *Wood*, 121 Nev. at 732, 121 P.3d at 1031 (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). Instead, "the nonmoving party 'must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him.'" at 732, 121 P.3d at 1031 (quoting *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992). Moreover, "[t]he Court will consider the substance of evidence that would be admissible at trial even if the form of the evidence is improper so long as that same evidence may be admissible in another form." *Hartranft v. Encore Cap. Grp., Inc.*, 543 F. Supp. 3d 893, 914–15 (S.D. Cal. 2021).

"[A] factual dispute is only 'genuine' enough to defeat summary judgment if a reasonable jury could return a verdict in favor of the non-moving party on that issue. Evidence that is merely colorable or trivially probative is insufficient to preclude summary judgment." *Turner v. S. Nev.Reg'l Hous. Auth.*, 135 Nev. 729 (Nev. App. 2019) (J. Tao, Dissenting) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "While judges in summary judgment proceedings are not to make

credibility determinations, they are not to ignore common sense and human experience. Indeed, common sense and human experience always have a significant role to play in judging and in assessing what inferences may reasonably be drawn from a given set of facts." *HCP of Illinois, Inc. v. Farbman Grp. I, Inc.*, 978 F. Supp. 2d 943, 946 n.1 (N.D. Ill. 2013) (citation omitted); *see also Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 743 (1st Cir.1995) ("While the summary judgment mantra requires us to draw every reasonable inference in favor of the nonmoving party, inferences, to qualify, must flow rationally from the underlying facts; that is, a suggested inference must ascend to what common sense and human experience indicates is an acceptable level of probability."); *Green v. MOBIS Alabama, LLC*, 995 F. Supp. 2d 1285, 1308 (M.D. Ala. 2014), *aff'd*, 613 F. App'x 788 (11th Cir. 2015) ("While it is true that a court may not make credibility determinations at the summary judgment stage and must draw all inferences in favor of the non-moving party, the Court does not believe that the summary judgment standard so dulls common sense as to require it to ignore the obvious.").

2. *The District Court Appropriately Granted Summary Judgment Because Planet Hollywood Properly Exercised Its Rights - including to Terminate the GRB Agreement.*

GRB spends much of its Opening Brief arguing that the district court improperly evaluated the claims related to the GRB Agreement. But a review of the terms of the GRB Agreement and the Parties' conduct, as well as the law, show that

the district court properly granted summary judgment in favor of Planet Hollywood on GRB's claims.

Here, GRB's contractual obligations are undisputed. Indeed, GRB does not, and cannot, allege that the suitability and termination provisions of the GRB Agreement are somehow ambiguous. To the contrary. Nevada law is clear that courts "construe unambiguous contracts . . . according to their plain language." *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 487–88, 117 P.3d 219, 223–24 (2005). Moreover, this Court has held that courts "should not rewrite contract provisions that are otherwise unambiguous." *Senteney by Senteney v. Fire Ins. Exch.*, 101 Nev. 654, 656, 707 P.2d 1149, 1150 (1985) (citation omitted). "Nor should this Court attempt to increase the legal obligations of the parties where the parties intentionally limited such obligations." *Id.* at 656, 707 P.2d at 1150 (citation omitted).

In the GRB Agreement, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (10 AA 02018).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (10 AA 002019).

[REDACTED]

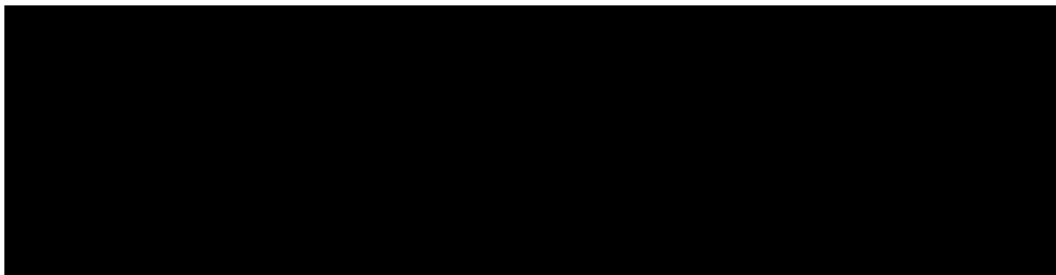
[REDACTED] (13 AA 02619-20).

[REDACTED] (13 AA 02620-21). GRB, by its own admission, acknowledged "that Seibel's felony conviction not only 'could' negatively impact [Planet Hollywood], but already has, as evidenced by the rampant press reports in late August 2016." (13 AA 02619). Even GRB concluded the arguments that Seibel has made throughout the underlying litigation that he was not unsuitable were unpersuasive. (*Id.*) ("Seibel's argument appears, at best, to be disingenuous, considering Seibel's failure to disclose that his plan to plead guilty to a felony was the reason he desired to transfer his interest in GRB to the Trust.") As GRB conceded in the GRB Report, Planet Hollywood negotiated for the express right to terminate the GRB Agreement should any GRB Associate be an Unsuitable Person. (13 AA 02618). Based on these undisputed facts, the district court correctly entered judgment against this claim.

3. ***The District Court Appropriately Granted Summary Judgment Because Section 14.21 of the GRB Agreement Constitutes an Agreement to Agree and Is Unenforceable as a Matter of Public Policy.***

GRB argues that whether Planet Hollywood could continue to operate a new restaurant in the same space is a genuine issue of material fact, which therefore precludes the district court entrance of summary judgment. (Opening Br. at 34-35). The district court correctly determined that Section 14.21 was an unenforceable "agreement to agree," (33 AA6898-99, 6925) and the provision had no binding effect.

Under Nevada law, "[a] valid contract cannot exist when material terms are lacking or are insufficiently certain and definite." *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). "[P]reliminary negotiations do not constitute a binding contract unless the parties have agreed to all material terms." *Id.* at 672, 119 P.3d at 1257. Thus, it is well-established that "[a]n agreement to agree at a future time is nothing and will not support an action for damages." *City of Reno v. Silver State Flying Serv., Inc.*, 84 Nev. 170, 176, 438 P.2d 257, 261 (1968) (internal quotation omitted). GRB's claims that Planet Hollywood breached Section 14.21 of the GRB Agreement is belied – again – by the very language of the GRB Agreement:



[REDACTED]

(10 AA 02027). [REDACTED]

[REDACTED]

[REDACTED]

(*Id.*)

In fact, since GRB is dissolved, its unclear what party Planet Hollywood would be contracting with on any such new restaurants.

Even if Section 14.21 could be read to include all material terms (it cannot), the provision is unenforceable as a matter of public policy. *See Gaston v. Drake*, 14 Nev. 175, 181 (1879) (citations omitted) ("It cannot be doubted at this day, nor is it denied, that a contract will not be enforced if it is against public policy, or that, if a part of the consideration of an entire contract is illegal as against public policy or sound morals, the whole contract is void."); *Sylver v. Regents Bank, N.A.*, 129 Nev. 282, 290, 300 P.3d 718, 723 (2013) (citations omitted) ("Under existing Nevada law, a contract is unenforceable on public policy grounds where the policy against enforcement of a contact clearly outweighs the interest in its enforcement.").

Again, Planet Hollywood and its affiliates are gaming licensees, subject to rigorous regulation. (10 AA 02018). [REDACTED]

[REDACTED]

[REDACTED]

(10 AA

02005, 10 AA 02018-19). By seeking to enforce Section 14.21 of the GRB Agreement, GRB is asking this Court to ignore GRB's unsuitability and require Planet Hollywood to do business with an Unsuitable Person. Such a result would turn gaming laws on their heads. Indeed, GRB itself has already admitted that such a result would be nonsensical. (13 AA 02623) (the liquidating trustee "is similarly unconvinced that [Planet Hollywood], which operates in the gaming space, was required to enter into a new license with the same Unsuitable Person who caused the termination of the [GRB] Agreement.") The district court properly granted summary judgment on this claim.

4. *The District Court Appropriately Granted Summary Judgment Because Planet Hollywood Properly Exercised Its Rights - including to Terminate the GRB Agreement.*

The district court also did not err when it granted summary judgment on GRB's breach of the implied covenant of good faith and fair dealing claim. (Opening Br. at 37-44). An implied covenant of good faith and fair dealing exists in every Nevada contract and essentially forbids *arbitrary, unfair acts* by one party that disadvantage the other. " *Frantz v. Johnson*, 116 Nev. 455, 465 n.4, 999 P.2d 351, 358 n.4 (2000) (emphasis added) (citing *Consolidated Generator v. Cummins Engine*, 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998)). "When one party performs a contract in a manner that is unfaithful to the purpose of the contract and the justified expectations of the other party are thus denied, damages may be awarded against the party who does not act in good faith." *Hilton Hotels Corp. v.*

Butch Lewis Productions, Inc., 107 Nev. 226, 234, 808 P.2d 919, 923 (1991)."Reasonable expectations are to be 'determined by the various factors and special circumstances that shape these expectations.'" *Perry v. Jordan*, 111 Nev. 943, 948, 900 P.2d 335, 338 (1995) (quoting *Hilton*, 107 Nev. at 234, 808 P.2d at 924).

However, "one generally cannot base a claim for breach of the implied covenant on conduct authorized by the terms of the agreement." *Miller v. FiberLight, LLC*, 343 Ga. App. 593, 607, 808 S.E.2d 75, 87 (2017) (quoting *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (C) (Del. 2005)); *see also Vitek v. Bank of Am., N.A.*, No. 8:13-CV-816-JLS ANX, 2014 WL 1042397, at *5 (C.D. Cal. Jan. 23, 2014) (citation omitted) ("In general, acting in accordance with an express contractual provision does not amount to bad faith.") "In other words, 'a party does not act in bad faith by relying on contract provisions for which that party bargained where doing so simply limits advantages to another party.'" *Miller*, 343 Ga. App. at 607–08, 808 S.E.2d at 87 (quoting *Alpha Balanced Fund, LLLP v. Irongate Performance Fund, LLC*, 342 Ga. App. 93, 102–103 (1), 802 S.E.2d 357 (2017) (emphasis added)).

Here, the GRB Agreement

[REDACTED] (10 AA 002018-19). The law does not allow GRB to maintain a cause of action against Planet Hollywood for exercising the exact contractual provisions it agreed to. Moreover, Planet Hollywood did not improperly exercise its contractual right. [REDACTED]

[REDACTED] GRB did not.

GRB also complains that the district court should not have granted summary judgment on its breach of the implied covenant claim because it's a fact-intensive analysis. However, the law allows the district court to consider this claim as a matter of law. *Tennier v. Wells Fargo Bank, N.A.*, No. 3:14-CV-0035-LRH-VPC, 2015 WL 128672, at *7 (D. Nev. Jan. 8, 2015) (*quoting Andrew v. Century Sur. Co.*, No. 2:12-cv-0978, 2014 WL 1764740, at *10 (D. Nev. Apr.29, 2014) ("[W]hen there is no factual basis for concluding that a defendant acted in bad faith, a court may determine the issue of bad faith as a matter of law.") To this day, GRB acknowledges it remains associated with an Unsuitable Person. Even after the years of the litigation, GRB is still being directed by Seibel. (19 AA 03831). The law does not require Planet Hollywood to continue doing business with GRB.

In fact, the opposite is true, the law requires that Planet Hollywood not do business with GRB because of its ongoing association with Seibel. *See* NRS § 463.0129(1)(c) ("***Public confidence and trust can only be maintained by strict regulation of all persons, locations, practices, associations and activities related to***

the operation of licensed gaming establishments and the manufacture, sale or distribution of gaming devices and associated equipment.") (emphasis added); *see also* NRS § 463.0129(2) ("Any license issued or other Commission or Board approval granted pursuant to the provisions of this chapter or chapter 464 of NRS is a revocable privilege.") Indeed, Nevada gaming authorities can revoke a finding of suitability of a gaming licensee if they are associated with an unsuitable person. Nev. Gaming Reg. § 3.080 ("The commission may deny, revoke, suspend, limit, condition, or restrict any registration or finding of suitability or application therefor upon the same grounds as it may take such action with respect to licenses, licensees and licensing; without exclusion of any other grounds. The commission may take such action on the grounds that the registrant or person found suitable is associated with, or controls, or is controlled by, or is under common control with, an unsuitable person.")

Moreover, GRB's failure to act in good faith bars its claim against Planet Hollywood. (30 AA 006201-02). The "implied promise of good faith and fair dealing is reciprocal, a two-way street which demands mutual compliance from the contracting parties." *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 791 F.2d 1356, 1361 (9th Cir. 1986) (internal quotations omitted). Stated differently, "if both parties have breached this implied promise, neither can recover on it." *Id.* at 1356, 1361.

As this Court knows (yet GRB fails to acknowledge), the district court previously determined that "Seibel did not inform Caesars that he was engaging in criminal activity, being investigated for it, or that he pled guilty to one count of corrupt endeavor to obstruct and impede the due administration of the Internal Revenue Laws, 26 U.S.C. § 7212, a Class E Felony." (13 AA 02733)). [REDACTED]

[REDACTED] (See, e.g., 4 RA 0773-74). Seibel cannot claim a breach of the implied covenant of good faith and fair dealing, when he failed in the first instance to engage in good faith conduct with Planet Hollywood. See, e.g., *Bradley v. Nev.-Cal.a-Oregon Ry.*, 42 Nev. 411, 178 P. 906, 908 (1919) ("If there is anything well settled, it is that the party who commits the first breach of a contract cannot maintain an action against the other for a subsequent failure to perform.")

5. *The District Court Properly Determined that the Liquidating Trustee's Admissions Were Binding on GRB.*

The Seibel Parties complain that the district court relied on inadmissible evidence when deciding the summary judgment motions. (Opening Br. at 26). "Specifically, the district court relied on statements in the Report that *certain* of GRB's claims were allegedly 'not worth pursuing.' The district court did so on the basis that the Liquidating Trustee's Report amounted to a judicial admission." (*Id.* (internal citations omitted)). The district court did not misstep when it concluded

the statements contained in the Report constituted judicial admissions, and considered them in deciding the motion for summary judgment.

"Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge." *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.*, 127 Nev. 331, 343, 255 P.3d 268, 276 (2011) (quoting *Smith v. Pavlovich*, 394 Ill.App.3d 458, 333 Ill. Dec. 446, 914 N.E.2d 1258, 1267 (2009)); see also *In re Barker*, 839 F.3d 1189, 1195 (9th Cir. 2016) (quoting *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988)) ("Judicial admissions are formal admissions in the pleadings which have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.")

Importantly, "[j]udicial admissions are 'conclusively binding on the party who made them.'" *In re Barker*, 839 F.3d at 1195 (quoting *Am. Title Ins. Co.*, 861 F.2d at 226); see also *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 592, (2013) (quoting 9 J. Wigmore, *Evidence* § 2590, p. 822 (J. Chadbourn rev. 1981) (emphasis added) ("[T]he 'vital feature' of a judicial admission is 'universally conceded to be its conclusiveness upon the party making it.'"))

As a result, "[w]hat constitutes a judicial admission should be determined by the circumstances of each case and evaluated in relation to the other testimony presented in order to prevent disposing of a case based on an unintended statement

made by a nervous party." *Reyburn Lawn & Landscape Designers, Inc.*, 127 Nev. at 343, 255 P.3d at 276 (citation omitted). "[S]tatements of fact contained in a brief *may* be considered admissions of the party in the discretion of the district court." *Am. Title*, 861 F.2d at 227. "For purposes of summary judgment, the courts have treated representations of counsel in a brief as admissions even though not contained in a pleading or affidavit." *Id.* at 226; *see also Daul v. PPM Energy, Inc.*, 267 F.R.D. 641, 648 (D. Or. 2010) (discussing *United States v. Crawford*, 372 F.3d 1048, 1055 (9th Cir. 2004) ("[T]he Ninth Circuit held that the defendant was bound by the clear and express concessions made by defense counsel in both the appellate briefs and at oral argument.")).

The statements need not be made before the same court to be considered judicial admissions. *See, e.g., River Glider Ave. Tr. v. Bank of New York Mellon as Tr. of Certificateholders of CWALT, Inc. Alternative Loan Tr. 2006-24CB, Mortg. Pass-Through Certificates*, 472 P.3d 190, 2020 WL 5637071, at *1 (2020) (unpublished disposition) (finding "that substantial evidence support[ed] the district court's finding that appellant's bankruptcy court filings constituted a judicial admission that respondent's deed of trust survived the HOA's foreclosure sale."); *see also Greenland Super Mkt., Inc. v. KL Vegas, LLC*, 135 Nev. 650, 452 P.3d 411, 2019 WL 6247676 (2019) (unpublished disposition) ("In the First Action, Greenland admitted that it understood it needed to submit financial statements including an

income statement and information for gross sales. Consequently, that is a fact that the district court could appropriately rely on in making its decision, and it was not error to the extent it did so.")

The liquidating trustee stood in the shoes of GRB and had "full control and dominion over the dissolution and liquidation of GRB and . . . access to all books and records of GRB." (11 AA 02341). Through this mandate, the liquidating trustee was "*authorized and empowered with the sole and exclusive authority to act through and in the name of GRB* as necessary" including "to prosecute and defend any litigation by or on behalf of GRB." (*Id.* (emphasis added)). All of the actions taken by the liquidating trustee in this capacity were "presumed to be taken on an informed basis, in good faith, and in the honest belief that such actions taken were in the best interests of GRB." (11 AA 02343). With this backdrop, the liquidating trustee submitted the GRB Report to the Delaware court, stating several of GRB's claims were "not worth pursuing", including the claim for wrongful termination of the GRB Agreement, the claim of breach of the implied covenant of good faith and fair dealing, and even the claim regarding purported breach of Section 14.21 of the GRB Agreement. (13 AA 02617-23). Stated more clearly, the liquidating trustee (*i.e.*, GRB) agreed that Planet Hollywood "likely had the right to terminate" the GRB Agreement because "the situation [was] one of Seibel's 'own making.'" (13 AA 02618). The liquidating trustee (*i.e.*, GRB) went so far as to state that he believed

Planet Hollywood likely had the right to terminate the GRB Agreement based on the plain language of Section 4.2.5 and 11.2 thereof. (*Id.*) In fact, the liquidating trustee (*i.e.*, GRB) told the Delaware court that he believed that Planet Hollywood validly exercised its bargained-for discretion and Seibel's claim for the improper termination of the [GRB] Agreement [was] not likely to survive summary judgment." (13 AA 02618-19).

Even more damning, as to the claim regarding any purported breach of Section 14.21 of the GRB Agreement, the liquidating trustee (*i.e.*, GRB) told the Delaware court that the claim appeared to be "equal parts impossible and, frankly, inequitable." (13 AA 02623). The liquidating trustee (*i.e.*, GRB) remained "unconvinced" that Planet Hollywood, "which operates in the gaming space, was required to enter into a new license with the same Unsuitable Person who caused the termination of the [GRB] Agreement." (*Id.*) Having made these admissions to the Delaware court, they are "conclusively binding" on GRB and it cannot now seek to undo its prior admissions.

B. The District Court Correctly Granted Summary Judgment Because GRB (Repeatedly) Failed to Prosecute its Claims.

In addition to GRB's binding judicial admissions, the district also granted summary judgment based on GRB's failure to prosecute its claims. While GRB now seeks refuge in Seibel's litigation conduct (Opening Br. at 60), the district court

properly considered the lack of diligence on the part of GRB when it dismissed GRB's claims.

"The decision of a trial court in dismissing a cause for lack of prosecution will not be disturbed on appeal unless it is made to appear that there has been a gross abuse of discretion." *Moore v. Cherry*, 90 Nev. 390, 395, 528 P.2d 1018, 1021 (1974) (citation omitted); *see also Hunter v. Gang*, 132 Nev. 249, 259, 377 P.3d 448, 455 (Nev. App. 2016) (citation omitted) ("This court will not disturb the decision of the district court in dismissing an action for want of prosecution unless the district court grossly abused its discretion.") "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (internal quotations omitted); *see also MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016) (citations omitted) ("An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or it disregards controlling law.")

"The elimination of delay in the trial of cases and the prompt dispatch of court business are prerequisites to the proper administration of justice." *Moore*, 90 Nev. at 395, 528 P.2d at 1021 (quoting *Sweeney v. Anderson*, 129 F.2d 756, 758 (10th Cir. 1942)). "The duty rests upon the plaintiff to use diligence and to expedite his case to a final determination." *Id.*, 528 P.2d at 1021. But, "[e]very court has the

inherent power, in the exercise of a sound judicial discretion, to dismiss a cause for want of prosecution." *Id.*, 528 P.2d at 1021. "The element necessary to justify dismissal for failure to prosecute is lack of diligence on the part of the plaintiff, whether individually or through counsel." *Id.*, 528 P.2d at 1021.

GRB filed its original complaint in February 2017 and subsequently filed an amended complaint in July 2017. In its amended complaint, GRB (derivatively through Seibel) asserted claims for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment,¹³ and civil conspiracy against Planet Hollywood. Yet, GRB failed to prosecute its claims. Instead, in the course of discovery GRB admitted *it had no witnesses, no documents, and no affirmative claims to prosecute*. Planet Hollywood repeatedly attempted to get GRB, through its liquidating trustee, to engage in the litigation it brought and the consolidated action. The liquidating trustee – repeatedly – refused. Even after finally retaining counsel years after initiating the litigation, GRB failed to participate in the discovery process, not even attending depositions in the underlying litigation.

GRB's neglect of its own case – and subsequent admission that a number of its claims were not worthy of pursuit – warranted dismissal of the action. *N. Ill.*

¹³ GRB erroneously argues that Planet Hollywood did not specifically address its unjust enrichment claim at summary judgment. But, Planet Hollywood sought dismissal of the entirety of GRB's claims against Planet Hollywood for want of prosecution. The elements of a claim for unjust enrichment claim were not necessary as Planet Hollywood sought judgment on this basis.

Corp. v. Miller, 78 Nev. 213, 217, 370 P.2d 955, 957 (1962) (citing *Horn v. Cal.-Oregon Power Co.*, 221 Or. 328, 351 P.2d 80) ("[W]hen a case has been long neglected and no adequate excuse is offered for the neglect, an inference arises that the case lacks merit, and a party whose case is dismissed for lack of prosecution and who asks an appellate court to reverse the order of dismissal must see to it that the record contains something substantial which will justify a reversal.")

The only excuse GRB musters is that the then-pending dissolution action of GRB in the Delaware court. But the pendency of the dissolution action in another is not an acceptable excuse for failing to prosecute the case below. At any point, GRB, through its liquidating trustee, could have retained counsel and asked the district court to stay the proceedings until the Delaware dissolution proceedings were completed. It did not. That strategic choice cannot be used as both a sword and a shield to prevent dismissal of the dormant claims. Having failed to take any steps to prosecute the claims it brought, GRB must live with its choices. The district court properly granted summary judgment.

C. The District Court Correctly Granted Summary Judgment Because Seibel Failed to Disclose his Criminal Conviction and Instead Attempted to Defraud Planet Hollywood

Seibel's strategy in hoping that this Court will reverse the district court's decision is remarkably similar to his approach following his guilty plea: omit information and hope that it's not uncovered. The Opening Brief omits many

relevant facts, from this Court's upholding the district court's determination that Seibel and his attorneys' communications had to be disclosed based on the crime-fraud exception, *see Seibel*, 520 P.3d at 355-56, to the distribution of Seibel's funds under his prenuptial agreement. (4 RA 0785). The district court, however, found material facts undisputed even considering them in the light most favorable to the non-moving party. There are no questions of material fact for trial. The district court did not err when it granted summary judgment on Planet Hollywood's fraudulent concealment claim and Planet Hollywood has shown that it suffered cognizable damages.

1. Seibel Has a Duty to Disclose his Criminal Investigation, Plea, and Conviction, Yet Failed to Do So.

Under Nevada law, to prevail on a claim for fraudulent concealment, the plaintiff must show that:

(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.

Dow Chem. Co. v. Mahlum, 114 Nev. 1468, 1485, 970 P.2d 98, 109–10 (1998), *abrogated on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P.3d 11 (2001) (citing *Nev. Power Co. v. Monsanto Co.*, 891 F. Supp. 1406, 1415 (D. Nev.1995)). Seibel rehashes the same arguments from his opposition to claim (incorrectly) that summary judgment was inappropriately granted because there was

no independent legal duty to disclose. (Opening Br. at 51-56.) In other words, he argues that Planet Hollywood cannot convert a contract claim into a tort claim. But, Planet Hollywood did not assert a breach of contract claim against GRB based on Seibel's failure to disclose. "A party's superior knowledge thus imposes a duty to speak in certain transactions, depending on the parties' relationship." *Id.* at 1486, 970 P.2d at 110. "Nondisclosure will become the equivalent of fraudulent concealment when it becomes the duty of a person to speak in order that the party with whom he is dealing may be placed on an equal footing with him." *Id.* at 1486, 970 P.2d at 110 (quoting *Mackintosh v. Jack Matthews & Co.*, 109 Nev. 628, 634–35, 855 P.2d 549, 553 (1993)).

Seibel was under a duty to disclose that he was being investigated and was convicted of one count of a corrupt endeavor to obstruct and impede the due administration of the Internal Revenue Laws, 26 USC § 7212, a Class E Felony. Not only did that duty arise from the contractual relationship between GRB and Planet Hollywood, but also by the parties' relationship. Seibel knew Planet Hollywood was a gaming licensee and took steps to intentionally conceal his criminal conduct instead of disclosing it to Planet Hollywood. His concealment efforts were specifically designed to deprive Planet Hollywood of its contractual right to terminate and harmed Planet Hollywood. Indeed, as set forth in the record, [REDACTED]

[REDACTED]

Seibel's reliance on the intra-corporate conspiracy doctrine is of no moment. "Agents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage." *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 303, 662 P.2d 610, 622 (1983) (emphasis added). The intra-corporate conspiracy doctrine protects companies and their employees and ensures that every claim against a company does not morph into a conspiracy claim against the individual employees. However, here, the district recognized (more than once) that Seibel and his co-conspirators acted for their own personal benefit. (3 RA 0694, 3 RA0714). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(4 RA 0784-85). His use of his attorneys only shows his attempts to personally benefit from his efforts to deceive Planet Hollywood. The district court properly granted summary judgment in favor of Planet Hollywood.

D. There is no Basis to Re-Assign this Matter.

In a parting request, Appellants once again ask that this case be reassigned if remanded. But this request is legally flawed. "A judge is presumed to be unbiased." *Millen v. Eighth Jud. Dist. ex rel. Cnty. of Clark*, 122 Nev. 1245, 1254–55, 148 P.3d

694, 701 (2006). Thus, "disqualification for personal bias requires 'an extreme showing of bias [that] would permit manipulation of the court and significantly impede the judicial process and the administration of justice.'" *Id.* at 1254–55, 148 P.3d at 701 (quoting *City of Las Vegas Downtown Redevelopment Agency v. Hecht*, 113 Nev. 632, 636, 940 P.2d 127, 129 (1997)). "The personal bias necessary to disqualify must 'stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'" *Matter of Dunleavy*, 104 Nev. 784, 790, 769 P.2d 1271, 1275 (1988) (quoting *United States v. Beneke*, 449 F.2d 1259, 1260–61 (8th Cir. 1971)). "[R]ulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification." *Id.* at 789, 769 P.2d at 1275.

Appellants' dislike for the rulings made by the district court fall far short of the high bar to re-assign this matter to a different judge. If remanded, this case should not be re-assigned.

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IV. CONCLUSION

Based on the foregoing, the district court's Findings of Fact, Conclusions of Law, and Order Granting Caesars' Motion for Summary Judgment No. 2 should be affirmed.

DATED this 14th day of June 2023.

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CERTIFICATE OF COMPLIANCE

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

I further certify that I have read this brief and that it complies with the page or type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and 12,083 words.

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

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

DATED this 14th day of June 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC and that, on this 14th day of June 2023, I electronically filed and served a true and correct copy of the above and foregoing **RESPONDENT PHWLTV, LLC'S ANSWERING BRIEF** properly addressed to the following:

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