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' REPLY BRIEF

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I. INTRODUCTION

Through its Answering Brief, PH argues that summary judgment was appropriately entered in its favor (on all claims and counterclaims) because PH retained discretion to terminate the GRB Agreement and did so because Seibel attempted to defraud PH. PH's argument demonstrates why the PH Order[1] must be reversed—these issues are, by their nature, fact-driven.

PH picks and chooses among those portions of the Opening Brief that PH wishes to address and ignores the rest. For example, PH ignores the evidence supporting GRB's breach of contract claim—a claim that is premised on provisions that survive the GRB Agreement's termination and which the Liquidating Trustee said was worth pursuing (to the extent that his opinions are binding, which, as a matter of law, they are not). Similarly, PH ignores the evidence supporting GRB's implied covenant claim—a claim that requires a jury to assess the motives behind PH's exercise of its termination rights under the GRB Agreement.[2] Further, PH disregards the need for a jury to decide Seibel's credibility as part of evaluating

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[1] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Opening Brief.

[2] PH also ignores the case law cited in the Opening Brief holding that a party who wields absolute and unfettered discretion under a contract must exercise that discretion in good faith. *See also Seidenberg v. Summit Bank*, 791 A.2d 1068, 1076 (N.J. App. Div. 2002) ("[T]he covenant has been held … to permit inquiry into a party's exercise of discretion expressly granted by a contract's terms.").

what occurred in relation to his suitability. For these reasons, as discussed further below, the PH Order must be reversed.

For his part, Ramsay addresses those facts that he believes favor his position while ignoring facts that favor GRB's. Similarly, he characterizes the evidence in a manner that assumes the correctness of his legal arguments. Finally, he recasts GRB's implied covenant claim while failing to cite any case law holding that the implied covenant operates differently for parties with varying obligations under a contract. The fact remains that Ramsay urged PH to stonewall GRB's efforts to dissociate from Seibel and aided PH to continue benefiting from the GRB Agreement despite its termination. Thus, the Ramsay Order is subject to reversal.

In the end, genuine issues of material fact remain to be decided at trial on GRB's claims and PH's counterclaims. The district court erred by taking this case away from the jury.

II. ARGUMENT

Below, GRB and Seibel address PH's and Ramsay's responses to the evidentiary issues raised in the Opening Brief. Then, they rebut the arguments presented by PH and Ramsay related to the claims and counterclaims.

A. PH and Ramsay Continue to Advocate Their Version of Events.

As shown in the Opening Brief, the district court impermissibly drew inferences, weighed the evidence, and resolved factual disputes in favor of PH and

Ramsay. (Op. Br. 23-26.) PH does not disagree. Instead, citing non-binding federal cases, PH argues that the district court was free to use its common sense and human experience in evaluating the evidence presented. (PH Ans. Br. 32-33.)

From there, PH repeats several assertions that require this Court to accept PH's version of events as true. For example, PH argues that Seibel "engaged in a scheme … to hide his unsuitability" and concealed his "criminal conduct." (*Id.* at 9, 15-18, 30, 51-53.) Similarly, PH argues that Seibel's attempt to assign his interest in GRB to the Trust was "a sham." (*Id.* at 17-18, 42.)

There is no legal basis for PH to advocate for the facts and corresponding inferences arising from those facts to be construed in its favor. The law compels the opposite approach. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005); *see also Thurston v. City of N. Las Vegas Police Dept.*, 552 F. App'x 640, 642 (9th Cir. 2014) (finding that a district court failed to view the evidence in a light most favorable to the non-moving party when deciding summary judgment).

Below, GRB and Seibel presented competent, admissible evidence showing that Seibel (i) told executives at Caesars about the criminal investigation (28 AA5757-58, 5764-66; 29 AA5917-17); and (ii) formed the Trust for legitimate reasons (28 AA5755-56, 5783-84; *see also* 23 AA4798-99). It was not for the district court to ignore that evidence when deciding the SJ Motions. Had that evidence been considered, it would leave open genuine issues of material fact

underlying GRB's claims and PH's counterclaims, such as (i) whether PH acted in good faith by refusing to work with GRB to cause it to dissociate from Seibel due to his alleged concealment of material facts and (ii) whether Seibel, in fact, concealed material facts from PH.

Turning to Ramsay, alongside characterizing the evidence in a manner that fits his case,[3] he essentially posits, "So what," in response to the arguments presented in the Opening Brief that the district court impermissibly viewed the evidence in his favor. (Ramsay Ans. Br. 49-53.) Ramsay's arguments assume that his legal analysis underlying each cause of action is correct, *i.e.*, that he owed no implied duties to GRB and cannot be held liable for unjust enrichment. As shown below, he is wrong on both counts.

Ramsay further argues that Seibel's Declaration was self-serving, and thus, could be ignored by the district court. (*Id.*) However, a district court "may not disregard a piece of evidence at the summary judgment stage solely based on its self-serving nature." *Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495, 497 (9th Cir. 2015). To the contrary, assertions by Seibel, even if "uncorroborated," had to be

[3] For example, Ramsay argues that Seibel "purposefully concealed" the criminal investigation and kept it a "secret." (Ramsay Ans. Br. 4, 16.) His inability to remain impartial about the facts demonstrates why summary judgment should not have been entered in his favor.

"accepted as true in resolving [the] motion[s] for summary judgment."[4] *See Yeager v. Harrah's Club, Inc.*, 111 Nev. 830, 835, 897 P.2d 1093, 1095 (1995).

Even then, Seibel presented corroborating evidence:

- As to proof that the Burger Restaurant remained the same, he presented versions of the menu, press release, and employment handbook from before and after the GRB Agreement's termination. (20 AA3936, 3938, 3940, 3942-43, 3945-47; 21 AA4232-34; 25 AA5039-155.)
- As to proof that he revealed the criminal investigation to PH, he supplied evidence verifying that he told a Caesars executive about it. (23 AA4712-14, 4733-34; 27 AA5654-55; 27 AA5654-55; 29 AA6124 at ¶ 16.)
- As to proof of the parties' understanding as to the enforceability of Section 14.21 of the GRB Agreement, he provided emails showing that PH repeatedly acknowledged its contractual limitations. (21 AA3953-57, 3961; 23 AA4693, 4725-27; 24 AA4899.)

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[4] In *Catrone v. 105 Casino Corporation*, this Court found that a party's declaration was "ineffective for the purpose of defeating a motion for summary judgment" because it included a statement that "would not be admissible evidence at trial" and the party did not show that he was "competent to testify to th[e] matters" stated in his declaration. 82 Nev. 166, 171, 414 P.2d 106, 171 (1966). Here, Ramsay does not argue that Seibel made inadmissible statements or was incompetent to testify as to the matters contained in his Declaration.

- As to proof that he did not ask his wife to transfer any money to him that she received from the Trust, he provided copies of her bank statements. (25 AA5171-90; *see also* 28 AA5848; 29 AA6121 at ¶¶ 5-6.)
- As to proof that he sought to dissociate from GRB, he provided letters and emails from his counsel to PH and Ramsay. (20 AA3997-4001, 4003-04, 24 AA4901-02, 4904-06; 29 AA6123-24 at ¶ 16.)

In sum, due to the district court's erroneous approach toward viewing the evidence, summary judgment was improperly entered in favor of PH and Ramsay.

B. PH and Ramsay Fail to Justify the District Court's Reliance on Inadmissible Evidence.

As shown in the Opening Brief, the district court relied on inadmissible evidence when deciding the SJ Motions. (Op. Br. 26-28.) PH disagrees, arguing that the evidence was admissible. (PH Ans. Br. 20, 22.) Ramsay takes a different approach, arguing either that GRB did not properly object to the evidence or that the evidence did not affect the district court's analysis. (Ramsay Ans. Br. 53-56.) This Court should reject each of their arguments.

Starting with the documents relied upon by PH, the Sentencing Submission is not a public record or a report of official proceedings—it is legal brief arguing for the imposition of a sentence and contains attachments that, themselves, constitute inadmissible hearsay. The government's sentencing argument "is not evidence." *McKenna v. State*, 114 Nev. 1044, 1053, 968 P.2d 739, 745 (1998).

With respect to PH's communications with the Nevada Gaming Control Board ("NGCB"), PH does not deny that these letters were highly prejudicial to GRB and Seibel pursuant to NRS 48.035(1). (27 AA5475.) They were used by the district court to find that PH could not have breached the GRB Agreement because the NGCB would have acted differently if PH had breached the GRB Agreement. (33 AA6918.) Further, GRB and Seibel were precluded from deposing the authors of these letters. (19 AA3803-04.) Thus, it was improper for the district court to use these letters against GRB and Seibel as the non-moving parties.[5]

Turning to Ramsay's arguments, concurrent with the Opposition to the Ramsay Motion, GRB and Seibel timely filed their Objections to Evidence Offered by Gordon Ramsay in Support of his Motion for Summary Judgment, including objections to the Liquidating Trustee's Report (19 AA3796-800)—negating any suggestion that they consented to the admission of all documents for which Ramsay sought judicial notice. Further, the district made factual findings based on the inadmissible plea negotiations offered by Ramsay. (33 AA6891-92.)

[5] Worse, while crediting these letters, the district court disregarded the expert opinions from Randy Sayre, GRB and Seibel's gaming expert. (27 AA5434-87, 5489-501.)

As also shown in the Opening Brief, the district court incorrectly relied on the Liquidating Trustee's Report and used it against GRB and Seibel.[6] (Op. Br. 28-30.) In response, PH argues that the Report is a judicial admission while Ramsay argues that the Report is a party admission. (PH Ans. Br. 42-46; Ramsay Ans. Br. 55 n.3.) Both are wrong.

As it relates to PH's argument, PH fails to show that the Report contains "deliberate, clear, and unequivocal" statements of "concrete fact" and not matters of opinion. *Reyburn Law & Landscape Designers, Inc. v. Plaster Dev. Co.*, 127 Nev. 331, 343, 255 P.3d 268, 276 (2011); *see also Hedge v. Bryan*, 425 S.W. 2d 866, 868 (Tex. Ct. App. 1968); *Conagra, Inc. v. Nierenberg*, 7 P.3d 369, 379 (Mont. 2000). The Liquidating Trustee said that he was setting forth "his observations" and, "where necessary[,] giv[ing] his opinion," which was "only that—an opinion." (13 AA2589.) Because the Liquidating Trustee's analysis of

[6] Neither PH nor Ramsay defends the district court's reliance on portions of the Liquidating Trustee's Report. (Op. Br. 30 n.20.) If it was admissible, it needed to be considered in its entirety and not selectively. To that end, because the Liquidating Trustee found that GRB's breach of contract claim was "worth pursuing" (13 AA2614-17), it was improper for the district court to find that the Liquidating Trustee intended to abandon that claim.

GRB's claims, which was based on an incomplete factual record,[7] was a matter of opinion and not fact, the Report is not a judicial admission.

As it relates to Ramsay's argument, he cites no authority providing that opinions given by a court-appointed receiver for a dissolved entity constitute party admissions for purposes of NRS 51.035(3). Worse, he ignores the authority cited in the Opening Brief saying that legal conclusions drawn by a receiver, as here, are inadmissible hearsay. *F.T.C. v. Data Med. Capital, Inc.*, SACV 99-1266AHS(EEX), 2010 WL 1049977, at *28 (C.D. Cal. Jan. 15, 2010). When answering Ramsay's written discovery, the Liquidating Trustee said that his responses were "in no way intended to bind the Seibel parties"—defeating any suggestion that his opinions constitute party admissions. (29 AA5990-91.)

In sum, the district court relied on inadmissible evidence when granting summary judgment in favor of PH and Ramsay.

C. PH's First-to-Breach Argument is Misplaced.

As set forth in the Opening Brief, GRB demonstrated below, through competent, admissible evidence, that PH materially breached the GRB Agreement by (i) failing to close the Burger Restaurant after terminating the GRB Agreement, (ii) failing to cease use of the GRB Marks and General GR Materials, and (iii)

[7] The Liquidating Trustee did not review various materials related to GRB's claims. (29 AA6126 at ¶ 7, 6140 at ¶ 5.)

failing to pay license fees due to GRB during the alleged "wind-up" period—all as required under the GRB Agreement. (Op. Br. 31-35.) These breaches underlying GRB's first cause of action arise from provisions of the GRB Agreement that, by their express terms, survive its termination. (*See* 23 AA4594-95 at § 4.3.2.)

PH does not address these arguments in its Answering Brief. Instead, PH argues that it properly terminated the GRB Agreement. (PH Ans. Br. 33-35.) Whether PH properly exercised its termination rights is the subject of GRB's implied covenant claim (discussed *infra*)—not its breach of contract claim. Because PH failed to support the entry of summary judgment on GRB's first cause of action, this Court should reinstate the breach of contract claim.

In passing, PH implies that GRB initially breached the GRB Agreement, and therefore, GRB is unable to complain of PH's subsequent breaches. (PH Ans. Br. 42.) However, there is a well-recognized exception to this so-called "first to breach" rule. That is, "[s]eeking to benefit from [a] contract after [a] breach operates as a conclusive choice depriving the non-breaching party of an excuse for his own non-performance." *Henry v. Masson*, 333 S.W.3d 825, 841 (Tex. App. 2010); *see also Hanks v. GAB Business Svcs., Inc.*, 644 S.W.2d 707, 708-09 (Tex. 1982). "A non-breaching party may [] waive its right to assert first material breach as a bar to recovery if it accepts the benefits of the contract with knowledge of [the] breach." *Madden Phillips Const., Inc. v. GGAT Dev. Corp.*, 315 S.W.3d 800,

813 (Tenn. Ct. App. 2009); *see also Randy Kinder Excavating, Inc. v. J.A. Manning Constr. Co., Inc.*, 899 F.3d 511, 516 (8th Cir. 2018).

When a party breaches a contract, the non-breaching party has two choices: (i) continue the contract and sue for damages; or (ii) suspend the contract and sue for damages. *See, e.g.*, *Maverick Benefit Advisors, LLC v. Bostrom*, 382 P.3d 753, 758 (Wyo. 2016). The non-breaching party cannot do both, *i.e.*, retain the benefits of the contract *and* repudiate its burdens. *Bergstrom v. Estate of DeVoe*, 109 Nev. 575, 577, 854 P.2d 860, 861 (1993).

Here, PH continues to enjoy the benefits of the GRB Agreement, including the concept conceived by GRB of a casual, gourmet, burger-centric restaurant, with a unique menu and distinctive style, look and feel, and continues to hold the substantial wind-up fees that are owed to GRB.[8] (23 AA4676 at ¶ 3; 29 AA6135 at ¶¶ 21-23.) PH cannot continue to reap the benefits of the GRB Agreement while ignoring its burdens, including those burdens that survive its termination. *Bank of Am. Nat'l Trust & Sav. Ass'n v. Smith*, 336 F.2d 528, 529 (9th Cir. 1964) ("If he receives the benefits he must adopt the burdens.") (citation omitted); *see also Scaffidi v. United Nissan*, 425 F. Supp. 2d 1172, 1183 (D. Nev. 2005).

[8] Neither PH nor Ramsay disputes that GRB conceived the concept for the Burger Restaurant and still owns the intellectual property associated with it.

For these reasons, genuine issues of material fact remain regarding PH's liability for continuing to operate the Burger Restaurant, continuing to use the GRB Marks and General GR Materials, and failing to pay license fees due to GRB during the "wind-up" period.

D. PH and Ramsay Ignore the Interplay Between PH's Contractual Discretion to Terminate the GRB Agreement and the Implied Covenant of Good Faith and Fair Dealing.

Through its Opening Brief, GRB explained how the implied covenant of good faith and fair dealing tempers a party's ability to terminate a contract in its sole and absolute discretion in order to protect against abuse. (Op. Br. 37-39.) Neither PH nor Ramsay disagrees with GRB's authority. Instead, they argue that the implied covenant cannot be used to contradict the express terms of a contract.[9] (PH Ans. Br. 39; Ramsay Ans. Br. 29-33.) Their argument misses the point. GRB is not invoking the implied covenant to impose obligations that contradict the express terms of the GRB Agreement but rather, to show that PH and Ramsay

[9] Ramsay appears to suggest that absent breaching an express term of a contract, a party cannot breach the contract's implied covenant of good faith and fair dealing. (Ramsay Ans. Br. 1, 27-29, 37.) He is wrong: "[A] breach of the implied covenant of good faith and fair dealing does not require a breach of any express provision of the contract." *Jones v. Mississippi Institutions of Higher Learning*, 264 So. 3d 9, 20 (Miss. Ct. App. 2018); *see also Beaudry v. Ins. Co. of the W.*, 50 P.3d 836, 841 (Ariz. Ct. App. 2002). In *Hilton Hotels Corp. v. Butch Lewis Productions*, this Court held that damages are recoverable for breach of the implied covenant even if it is "properly judicially determined that [the party] did not breach its contract." 107 Nev. 226, 232, 808 P.2d 919, 922 (1991).

acted in bad faith in relation to PH's termination of the GRB Agreement. *See United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 511, 780 P.2d 193, 197 (1989).

Starting with PH, the implied covenant prevented PH from exercising its discretionary termination rights in bad faith, *i.e.*, in a manner that deprives GRB of its expressly bargained-for right to cure any alleged improper affiliation with an unsuitable person. *Bike Fashion Corp. v. Kramer*, 46 P.3d 431, 435 (Ariz. Ct. App. 2002) ("[A] party can breach the implied covenant of good faith and fair dealing both by exercising express discretion in a way inconsistent with a party's reasonable expectations and by acting in ways not expressly excluded by the contract's terms but which nevertheless bear adversely on the party's reasonably expected benefits of the bargain."). The GRB Agreement does not contemplate automatic termination in the event that a GR Associate is deemed to be unsuitable (*see* 27 AA5491), rendering moot PH's discussion about its suitability determination—GRB may dissociate from an Unsuitable Person, thereby *avoiding* termination of the GRB Agreement and the loss of a valuable source of revenue arising from an immensely popular restaurant. (23 AA4606-07 at § 11.2; *see* 26 AA5352-56.) And, here, a means existed to cure GRB's affiliation with Seibel, subject to PH's good faith cooperation in the process since PH needed to determine whether any proposed assignee was suitable. (27 AA5451, 5463, 5496.)

PH had the power to accept or reject any proposed assignee of Seibel's interest in GRB so that GRB could remain under contract with PH. (23 AA4606-07 at § 11.2) PH rebuffed GRB's efforts to discuss finding a disinterested third party to acquire Seibel's interest in order to advance its own interests.[10] (23 AA4700-02, 4704-06, 4708-10, 4716-18; 27 AA5439, 5467, 5479-80, 5495; 29 AA6130 at ¶ 14, 6134-35 at ¶¶ 17, 19-20.) In discovery, PH admitted that it did not work with GRB to cause it to dissociate from Seibel. (29 AA6084-91.)

The issue presented is not whether PH literally complied with the GRB Agreement when deciding suitability and termination, but rather, whether PH abused its "sole and exclusive" discretion under the GRB Agreement by acting in bad faith when making its suitability and termination decisions. RESTATEMENT (SECOND) CONTRACTS § 205 cmt. d (1981).

PH acted in bad faith by hastily moving to terminate the GRB Agreement in disregard of its own Compliance Plan and without regard for the financial consequences of its actions. (27 AA5453-54, 5458-59, 5463, 5467-68, 5494-95, 5500.) In fact, termination was a foregone conclusion irrespective of GRB's ability to cure, despite contrary representations by PH to the NGCB. (21 AA4301-03; 24 AA4832; *see also* 27 AA5476, 5480, 5624-25.)

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[10] PH and Ramsay suggest that Seibel only sought to assign his interest in GRB to the Trust. (PH Ans. Br. 21; Ramsay Ans. Br. 17-18.) That is false.

Why? Because PH was more interested in getting out of the deal. (21 AA4305; 27 AA5439, 5495-97.) It is for a jury to decide whether PH acted in good faith by denying GRB an adequate opportunity to cure its affiliation with Seibel. *Duffield v. First Interstate Bank of Denver, N.A.*, 13 F.3d 1403, 1406 (10th Cir. 1993) (affirming a jury's verdict that a bank breached the implied covenant of good faith and fair dealing by taking possession of a borrower's assets as technically permitted under an assignment clause in the borrower's loan agreement in response to the borrower's alleged breach, without affording the borrower "an adequate chance to cure," where the borrower had a "legitimate expectation that the [b]ank would exercise its assignment rights in good faith").

PH separately argues that GRB acted in bad faith, thereby preventing GRB from complaining of PH's bad faith. (PH Ans. Br. 41-42.) Like PH, whether GRB breached the implied covenant is a question of fact. *Consol. Generator-Nevada v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998).

Turning to Ramsay, he argues that because his obligations under the GRB Agreement were limited, the implied covenant somehow imposed a lesser burden on him as it relates to interfering with GRB's performance. (Ramsay Ans. Br. 27-33, 38-43.) However, the implied covenant has no lesser impact on Ramsay than the other parties to the GRB Agreement—it applies equally to everyone. *See, e.g.*, *A.C. Shaw Const., Inc. v. Washoe Cnty.*, 105 Nev. 913, 914, 784 P.2d 9, 9 (1989).

As shown below, Ramsay wanted PH to terminate the GRB Agreement. (21 AA4332; 23 AA4748.) Why else would he tell PH what he thought about Seibel's initial proposed assignment of his interest in GRB to the Trust (21 AA4309-10) if PH was deciding suitability on its own? And, why did he inform PH that he had hoped for Seibel's conviction to work in his favor if he was not intending to interfere with GRB's cure rights? (21 AA4307.)

Worse, despite being told, in writing, that Seibel wanted to meet, in person, in order to discuss a satisfactory means of terminating his relationship with GRB (24 AA4888-89), Ramsay represented to PH that Seibel refused to dissociate from GRB (21 AA4309-10).[11] Of course, Ramsay attempts to downplay his representations to PH and cast them in a light most favorable to him. (Ramsay Ans. Br. 38-40.) He ignores Seibel's overture to transfer his interest in GRB to a disinterested third party—which would have resolved PH's suitability concerns.

Ramsay knew, per the terms of the GRB Agreement, that GRB could preserve its contractual relationship with PH by timely dissociating from Seibel. Despite arguing that he "attempted to work in good faith with Seibel" (Ramsay

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[11] Ramsay and his counsel had been in contact with PH before PH gave notice of its intent to terminate the GRB Agreement. (24 AA4834, 4858-59). From Ramsay's perspective, the only solution was a complete forfeiture of Seibel's interest in GRB (24 AA4885-86)—an outcome that would have caused GRUS to become the sole beneficiary under the GRB Agreement.

Ans. Br. 41), Ramsay, the indirect owner of GRUS (*see* 27 AA5503-19), refused to meet with Seibel to discuss his timely withdrawal from GRB, thereby preventing GRB from taking steps to avoid termination of the GRB Agreement.[12] *Hilton Hotels Corp. v. Butch Lewis Prods.*, 107 Nev. 226, 234, 808 P.2d 919, 923 (1991).

Even if Ramsay did not stand in GRB's way, he took steps following the GRB Agreement's termination that violated GRB's rights. He knew, per the terms of the GRB Agreement, that PH had to cease exploiting the same burger-centric concept and to stop using the GRB Marks and General GR Materials. Yet he entered into a new contract with PH that allows PH to continue capitalizing on the burger-centric concept and utilizing GRB's intellectual property (24 AA4996-5030)—conduct that is barred by the GRB Agreement. (23 AA4594-95 at § 4.3.2.) He thus denied GRB its justified expectation that PH would act in a manner consistent with those obligations that survive the GRB Agreement's termination.

This is not about Ramsay being able to attach his name to another restaurant involving a different cuisine; nor is it about Ramsay being able to contract with another hotel operator to open another hamburger restaurant. (*Contra* Ramsay Ans. Br. 19, 37-38.) This is about Ramsay working with PH to attach his name to

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[12] Ramsay argues that Seibel refused to respond to his requests for information about transferring his membership interest in GRB (*see* Ramsay Ans. Br. 15-16) while failing to mention that he repeatedly refused to meet with Seibel. (20 AA4060-62; 24 AA4888-89.)

the same restaurant in the same space at Planet Hollywood despite knowing that PH is contractually forbidden from doing so. (23 AA4594-95 at § 4.3.2, 4615 at § 14.21.)

Lastly, Ramsay argues that the new restaurant is different from the old restaurant.[13] (Ramsay Ans. Br. 5, 21, 52.) Yet again, he is characterizing the evidence in a light most favorable to him. It is for a jury to evaluate the similarities and differences of the Burger Restaurant from before and after the GRB Agreement's termination.

For these reasons, genuine issues of material fact remain regarding whether PH and Ramsay acted in good faith under the GRB Agreement.

E. Section 14.21 is Enforceable, and PH Breached it; But, if Not, GRB's Unjust Enrichment Claim Against PH and Ramsay is Viable.

In its Opening Brief, GRB argued that PH materially breached Section 14.21 by continuing to operate the Burger Restaurant. (Op. Br. 34-35.) In the alternative, GRB argued that if Section 14.21 is unenforceable, its unjust enrichment claim protects it from continued commercial exploitation of its burger-centric concept and intellectual property by PH and Ramsay. (*Id.* at 49.)

[13] Unlike Ramsay, PH does not deny that the Burger Restaurant stayed the same following termination of the GRB Agreement. (Op. Br. 20-21.)

In response, PH argues that Section 14.21 is an unenforceable "agreement to agree" and, regardless, it is void as against public policy. (PH Ans. Br. 36-38.) Neither argument is meritorious.

Preliminarily, PH does not deny failing to independently move for summary judgment on GRB's unjust enrichment claim. (Op. Br. 47.) PH admits that it solely sought dismissal of this claim for want of prosecution. (PH Ans. Br. 48 n.13.) Because the district court erred by dismissing the claim for want of prosecution (discussed *infra*), this Court should reinstate GRB's third cause of action against PH.

Starting with the "agreement to agree" argument, PH overlooks several emails acknowledging the enforceability of Section 14.21.[14] (21 AA3953-57, 3961; 23 AA4693, 4725-27; 24 AA4899.) PH also ignores that the existence of a contract – e.g., whether sufficient material terms exist for purposes of enforcing Section 14.21 – "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

[14] This Court will not have to decide whether Section 14.21 is an "agreement to agree" if it finds that PH may not continue to operate the Burger Restaurant without sharing in the profits with GRB based on the plain language of the GRB Agreement; and/or that PH may not continue using the GRB Marks and General GR Materials.

528, 531 (8th Cir. 1984); *Ultracuts Ltd. v. Wal-Mart Stores*, 16 S.W.3d 265, 270 (Ark. Ct. App. 2000).

Turning to the public policy argument, it is premised on the assumption that GRB sought to preserve Seibel's membership interest. That is not now, nor has it been GRB's position. If PH had worked in good faith with GRB to cause it to dissociate from Seibel, then PH (and Ramsay) would have remained under contract with GRB without any continuing suitability concerns (and GRB's dissolution proceeding in Delaware would have been avoided). Going forward, PH and Ramsay could enter into future restaurant deals with GRB. The public policy argument is non-existent.

Because Section 14.21 is enforceable, a genuine issue of material fact remains regarding whether PH has breached Section 14.21 by continuing to operate the Burger Restaurant. *Hoffman v. Eighth Jud. Dist. Ct.*, 90 Nev. 267, 270, 523 P.2d 848, 850 (1974).

As it relates to Ramsay, he argues that GRB did not present sufficient evidence that he has been unjustly enriched by the Burger Restaurant's continued operation. (Ramsay Ans. Br. 46-49.) The benefits that he derives from the Burger Restaurant are open and obvious—his name is center-stage on an immensely popular restaurant inside the Planet Hollywood. If there was no benefit to him, he would not attach his name to it. (24 AA4996-5030; *see also* 21 AA4011 at ¶¶ 3-4.)

As discussed in the Opening Brief (and ignored by PH and Ramsay), an unjust enrichment claim is permitted in the absence of an enforceable contract. *See also Hayes v. Moon*, 16-80365-CIV, 2017 WL 2547205, at *5 (S.D. Fla. June 13, 2017) (rejecting "[t]he notion that a contract could be both deficient so as to render it unenforceable, but simultaneously is sufficient so as to limit the availability of equitable relief"). Until the jury decides if Section 14.21 is enforceable, it is premature to enter summary judgment on GRB's third cause of action.

For these reasons, genuine issues of material fact remain regarding whether PH and Ramsay have been unjustly enriched through the continued operation of the Burger Restaurant.

F. PH Fails to Overcome the Legal and Factual Issues Underlying its Fraud and Conspiracy Claims.

Through the Opening Brief, Seibel demonstrated why PH's fraud and conspiracy claims were not ripe for a decision on summary judgment; namely: (i) PH morphed a breach of contract claim into a fraud claim; (ii) PH failed to overcome the intra-corporate conspiracy doctrine; (iii) PH did not present proof of detrimental reliance or evidence of cognizable damages; and (iv) Seibel's credibility is a question of fact. (Op. Br. 50-60.) In response, PH takes liberties with the facts and vilifies Seibel. (PH Ans. Br. 49-53.) PH's arguments fall short of meeting its burden of proof.

To begin, PH ignores the case law cited in the Opening Brief holding that a party cannot transform a breach of contract claim against a contracting party into a fraud claim against the contracting party's principal. (Op. Br. 51-52.) PH maintains that GRB had an obligation to disclose Seibel's conviction to PH under the GRB Agreement. (PH Ans. Br. 51.) Thus, PH had a remedy for any alleged non-disclosure of Seibel's conviction: A lawsuit against GRB for breach of contract. It was wrong for the district court to permit PH to morph its breach of contract claim against GRB into a fraud claim against a Manager of GRB.[15]

Next, PH argues that Seibel "concocted a scheme" with his lawyers for purposes of "personally benefit[ting] from his efforts to deceive Planet Hollywood."[16] (PH Ans. Br. 11, 16-19, 52-53.) PH fails to cite any evidence showing that Seibel's lawyers personally benefitted from their actions so as to

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[15] Because the fraud claim fails, the conspiracy claim also fails. *See, e.g.*, *Jordan v. State ex rel. Dept. of Motor Vehicles & Pub. Safety*, 121 Nev. 44, 75, 110 P.3d 30, 51 (2005), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008).

[16] PH mainly cites documents not included with its summary judgment motion when making these assertions.

trigger this Court's exception to the intra-corporate conspiracy doctrine. The reason: None exists.[17]

Turning to detrimental reliance and damages, PH says nothing about them in its Answering Brief. As a result of such omission, this Court should find that PH lacks evidence underlying essential elements of its tort claims.

Finally, PH fails to explain how this Court may decide Seibel's motives related to the Trust and, for that matter, find that he acted with the requisite intent to commit fraud. This Court cannot do so as part of reviewing the PH Motion.

For these reasons, genuine issues of material fact remain regarding the fraud and conspiracy claims.

G. There is No Evidentiary Support for Dismissal of GRB's Claims For Want of Prosecution.

In its Opening Brief, GRB demonstrated how the district court abused its discretion in dismissing its claims for want of prosecution. (Op. Br. 60-62.) In response, PH argues that dismissal was proper because the Liquidating Trustee (i) was not diligent in filing an answer to PH's Complaint and (ii) failed to participate in discovery. (PH Ans. Br. 10, 25-29, 46-49.) Both arguments miss the mark.

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[17] Seibel's lawyer's interest in earning a fee for representing Seibel—without more—is not enough because that factor is present "in virtually every attorney-client relationship." *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C.*, 284 S.W.3d 416, 433 (Tex. App. 2009).

Starting with the first argument, PH ignores that the "DP Original Complaint" relates to the *other* case that was brought by Caesars against GRB. GRB's alleged inaction as a defendant in Case No. A-17-760537-B is not evidence that GRB failed to pursue its claims as a plaintiff in Case No. A-17-751759-B.

Turning to the second argument, PH fails to mention that GRB produced an initial batch of documents at the outset of discovery and named a number of witnesses. (27 AA5521-32.) Given his lack of personal knowledge of the underlying facts, the Liquidating Trustee was unable to offer anything beyond what Seibel had already disclosed. And, nothing required the Liquidating Trustee to attend depositions taken by Caesars.

Notably, PH did not serve written discovery on GRB related to its claims or seek to take the NRCP 30(b)(6) deposition of GRB. (29 AA6141 at ¶¶ 6-7.) Thus, PH's argument about GRB's purported shortcomings in discovery fall flat.[18]

The law favors a trial on the merits. *See, e.g.*, *Home Sav. Ass'n v. Aetna Cas. & Sur. Co.*, 109 Nev. 558, 563, 854 P.2d 851, 854 (1993). Because there was no delay involving claims brought by GRB (e.g., discovery remained open while the parties were completing discovery in the related case that was initiated by Caesars), the Liquidating Trustee intended for Seibel to pursue GRB's claims after

[18] By contrast, when Ramsay served discovery on GRB, the Liquidating Trustee responded to it. (29 AA5989-93.)

unsuccessfully attempting to informally resolve them with PH and Ramsay, and there is merit to the claims, dismissal for want of prosecution was in error. *Hunter v. Gang*, 132 Nev. 249, 260-61, 377 P.3d 448, 456 (Ct. App. 2016).

H. The C/F Ruling is Irrelevant.

Through its Answering Brief, PH relies on the district court's order compelling Seibel to produce communications with his counsel pursuant to NRS 49.115, as affirmed by this Court in denying Seibel's petition for extraordinary writ relief (the "C/F Ruling").[19] (PH Ans. Br. 9, 11, 17, 21, 50.) So does Ramsay. (Ramsay Ans. Br. 34, 40-41.) In deciding this appeal, this Court should disregard the C/F Ruling for three main reasons.

First, a different standard of decision applies to a discovery motion than a summary judgment motion. Here, the C/F Motion[20] involved determining whether PH had shown, by a preponderance of the evidence, that certain emails were excepted from any claim of privilege under NRS 49.095. *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1094-95 (9th Cir. 2007). To make that

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[19] In seeking summary judgment, neither PH nor Ramsay relied on any communication that was produced by Seibel in response to the C/F Ruling. Thus, this Court should disregard all of PH's citations to the briefing arising out of the C/F Ruling contained in Respondent's Appendix.

[20] "C/F Motion" refers to Caesars' Motion to Compel Documents Withheld on the Basis of Attorney-Client Privilege Pursuant to the Crime-Fraud Exception, filed on January 6, 2021.

determination, the district court had to decide if PH "produced sufficient evidence to invoke the crime-fraud exception to the attorney-client privilege." *In re Grand Jury Investigation*, 628 F. App'x 482, 482-83 (9th Cir. 2016); *see also United States v. Boender*, 649 F.3d 650, 659 (7th Cir. 2011).

By contrast, the SJ Motions involved determining whether there was an absence of a genuine issue of material fact underlying GRB's claims and PH's counterclaims—an assessment that, as noted above, required crediting the evidence presented by GRB and Seibel, as the non-moving parties, and viewing the evidence in a light most favorable to them. NRCP 56(a); *Wood*, 121 Nev. at 729, 121 P.3d at 1029. To make that determination, the district court had to decide if GRB and Seibel produced sufficient evidence in response to the SJ Motions such that a reasonable jury could return a verdict in their favor. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987).

Because the district court approached each issue differently, the outcome of the C/F Motion should have no impact on the outcome of the SJ Motions.

Second, this Court's decision to deny writ relief to Seibel does not operate to affirm the factual findings contained in the C/F Ruling. *See, e.g.*, *Guilbeaux v. Lupo Enterprises, L.L.C.*, 321 So. 3d 447, 453 (La. Ct. App. 2021); *Ex parte Shelton*, 814 So. 2d 251, 255 (Ala. 2001). In deciding the writ, this Court analyzed whether the district court abused its discretion in finding that certain emails were

discoverable. *Seibel v. Eighth Jud. Dist. Ct.*, 138 Nev., Adv. Op. 73, 520 P.3d 350, 354 (2022). In deciding this appeal, this Court analyzes, *de novo*, the propriety of summary judgment. *Wood*, 121 Nev. at 729, 121 P.3d at 1029. Because this Court approached the C/F Ruling differently than it approaches the SJ Orders, its decision on the writ is not relevant to this appeal.[21]

Finally, as just noted, PH only had to establish an alleged fraud by a preponderance of the evidence in seeking to invade Seibel's privilege. By contrast, PH had to show fraud through clear and convincing evidence in order to secure summary judgment on its tort claims. *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 110-11, 825 P.2d 588, 592 (1992). "Clear and convincing evidence is a higher standard than proof by the preponderance of the evidence…." *Fergason v. Las Vegas Metro. Police Dep't*, 131 Nev. 939, 945, 364 P.3d 592, 596 (2015) (internal quotation marks omitted). Due to the differing burdens of proof, PH cannot rely on the evidence presented with the C/F Motion to suggest that it met its burden with respect to the PH Motion.

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[21] Further, the C/F Ruling is not law of the case. *PowerAgent Inc. v. Elec. Data Sys. Corp.*, 358 F.3d 1187, 1191 (9th Cir. 2004) (stating that "a denial of a petition for mandamus usually does not constitute the law of the case"); *see also D.R. Horton, Inc. v. Eighth Jud. Dist. Ct.*, No. 71095, 2017 WL 4158153, at *1 (Nev. Sept. 19, 2017) (unpub. disp.).

"Factual findings made during discovery are not binding on the parties in future proceedings" and are "not admissible." *DeSmeth v. Samsung Am.*, 92 CIV. 3710 SHSRLE, 1998 WL 315469, at *2 (S.D.N.Y. June 16, 1998); *accord Horphag Research Ltd. v. Garcia*, 475 F.3d 1029, 1035 (9th Cir. 2007). The C/F Ruling compelled the disclosure of various emails; it did not serve to adjudicate any party's claims or defenses. Accordingly, the C/F Ruling should not serve to prejudge this Court's *de novo* review of the SJ Orders.

I. Reassignment is Warranted.

In its Opening Brief, GRB and Seibel requested random reassignment of this case on remand. (Op. Br. 62-63.) PH and Ramsay argue that reassignment is not warranted. (PH Ans. Br. 53-54; Ramsay Ans. Br. 56-57.) Their arguments are primarily based on convincing this Court that summary judgment was proper. It was not. Due to the number of improper factual findings made and legal conclusions drawn by the district court, random reassignment is warranted. *Wickliffe v. Sunrise Hosp., Inc.*, 104 Nev. 777, 783, 766 P.2d 1322, 1327 (1988); *see also Roe v. Roe*, -- P.3d --, 2023 WL 4831384, at *13 (Ct. App. 2023) (finding that a district court's "strong negative opinions" of a party, among other factors, warranted reassignment).

III. CONCLUSION

Neither PH nor Ramsay overcomes the following with respect to GRB's claims: (i) whether PH breached the GRB Agreement is a question of fact; (ii) whether PH and Ramsay breached the implied covenant is a question of fact; and (iii) whether PH and Ramsay have been unjustly enriched following the GRB Agreement's termination is a question of fact. Further, PH cannot deny that several questions of material fact underlie its tort claims.

When deciding summary judgment, a district court "may not accept one party's version of events over the other's." *Parker v. LeBron*, 21-12328, 2023 WL 4704877, at *2 (E.D. Mich. July 21, 2023); *see also First Nat. Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968) (stating that the fact-finder resolves "the parties' differing versions of the truth at trial"). Because the district court did just that and, additionally, reached erroneous legal conclusions (including with respect to GRB's implied covenant claim), this Court should vacate the SJ Orders and reverse and remand this matter 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 randomly reassign this matter to a new department.

DATED this 14th day of August, 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 6,999 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 record 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 14th day of August, 2023.

/s/ Joshua P. Gilmore
JOSHUA P. GILMORE

CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 14th day of August, 2023, service of the Reply 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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