CASE NO. 86462

IN THE SUPREME COURT OF NEVADA

ROWEN SEIBEL, MOTI PARTNERS, LLC; MOTI PARTNERS 16, LLC; LLTQ ENTERPRISES, LLC; LLTQ ENTERPRISES 16, LLC; TPOV ENTERPRISES, LLC; TPOV ENTERPRISES 16, LLC; FERG, LLC; FERG 16, LLC; CRAIG GREEN; R SQUARED GLOBAL SOLUTIONS, LLC, Derivatively on Behalf of DNT ACQUISITION, LLC; and GR BURGR, LLC,

Appellants,

vs.

DESERT PALACE, INC.; PARIS LAS VEGAS OPERATING COMPANY, LLC; PHWLV, LLC; and BOARDWALK REGENCY CORPORATION,

Respondents.

District Court Case No. A-17-760537-B

APPELLANTS' OPENING BRIEF | REDACTED

BAILEY❖KENNEDY
JOHN R. BAILEY
Nevada Bar No. 0137
DENNIS L. KENNEDY
Nevada Bar No. 1462
JOSHUA P. GILMORE
Nevada Bar No. 11576
PAUL C. WILLIAMS
Nevada Bar No. 12524

8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148-1302
Telephone: (702) 562-8820
Facsimile: (702) 562-8821
jbailey@baileykennedy.com
dkennedy@baileykennedy.com
jgilmore@baileykennedy.com
pwilliams@baileykennedy.com

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, Rowen Seibel ("Seibel"); Craig Green ("Green"); Moti Partners, LLC ("Moti"); Moti Partners 16, LLC ("Moti 16"); LLTQ Enterprises, LLC ("LLTQ"); LLTQ Enterprises 16, LLC ("LLTQ 16"); TPOV Enterprises, LLC ("TPOV"); TPOV Enterprises 16, LLC ("TPOV 16"); FERG, LLC ("FERG"); FERG 16, LLC ("FERG 16"); R Squared Global Solutions, LLC ("R Squared"), derivatively on behalf of DNT Acquisition LLC ("DNT"); and GR Burgr LLC ("GRB") (collectively, "Appellants" or the "Development Parties") submit this Disclosure:

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

1. Moti is a New York limited liability company with no parent corporations. No publicly held companies own ten (10) percent or more of its stock.

2. Moti 16 is a Delaware limited liability company with no parent corporations. No publicly held companies own ten (10) percent or more of its stock.

3. LLTQ is a Delaware limited liability company and its parent corporations are: GR Pub/Steak Holdings, LLC ("GR Pub/Steak"); Elite Acquisition Team, LLC ("Elite"); CNV Acquisition Group IV, LLC ("CNV Acquisition"); and CPGR Acquisition, LLC ("CPGR Acquisition"). No publicly held companies own ten (10) percent or more of its stock.

4. LLTQ 16 is a Delaware limited liability company and its parent corporations are: GR Pub/Steak; Elite; CNV Acquisition; and CPGR Acquisition. No publicly held companies own ten (10) percent or more of its stock.

5. TPOV is a New York limited liability company and its parent corporations are: GR Pub/Steak; Elite; CNV Acquisition; and CPGR Acquisition. No publicly held companies own ten (10) percent or more of its stock.

6. TPOV 16 is a New York limited liability company and its parent corporations are: GR Pub/Steak; Elite; CNV Acquisition; and CPGR Acquisition. No publicly held companies own ten (10) percent or more of its stock.

7. FERG is a Delaware limited liability company with no parent corporations. No publicly held companies own ten (10) percent or more of its stock.

8. FERG 16 is a Delaware limited liability company with no parent corporations. No publicly held companies own ten (10) percent or more of its stock.

9. R Squared is a Nevada limited liability company with no parent corporations. No publicly held companies own ten (10) percent or more of its stock.

10. DNT is a Delaware limited liability company and its parent corporations are: R Squared and the Original Homestead Restaurant, Inc. No publicly held companies own ten (10) percent or more of its stock.

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

12. No Appellant is using a pseudonym for the purposes of this appeal.

DATED this 27th day of September, 2023.

BAILEY❖KENNEDY

By: /s/ Joshua P. Gilmore
JOHN R. BAILEY
DENNIS L. KENNEDY
JOSHUA P. GILMORE
PAUL C. WILLIAMS
Attorneys for Appellants

I. JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRAP 3A(b)(1) because it is an appeal following entry of final judgments resolving all claims and counterclaims. Specifically, on May 31, 2022, the district court entered its Findings of Fact, Conclusions of Law, and Order Granting Caesars' Motion for Summary Judgment No. 1 (the "Initial MSJ Order"), notice of entry of which occurred on June 3, 2022 (34 AA7119-41[1]); and, on March 22, 2023, the district court entered its Findings of Fact, Conclusions of Law, and Order: (1) Denying Green's Motion for Summary Judgment; (2) Granting Caesars' Counter-Motion for Summary Judgment Against Green; and (3) Granting Caesars' Cross-Motion for Summary Judgment Against Seibel and the Seibel-Affiliated Entities (the "Subsequent MSJ Order"), notice of entry of which occurred on March 28, 2023 (42 AA9066-83).

On April 21, 2023, the Development Parties timely filed their Notice of Appeal. (42 AA9105-08.)

II. ROUTING STATEMENT

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

---

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

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

This appeal presents the following issues for review:

1. Did the district court err by granting summary judgment in favor of Caesars[2] against Seibel and the Development Entities[3] on (i) the claims for declaratory relief asserted by Caesars and (ii) the counterclaims for breach of contract asserted by the LLTQ/FERG Parties[4] and DNT?

2. Did the district court err by granting summary judgment in favor of Caesars against Seibel, Green, and the Development Entities on the claims for coercive relief asserted by Caesars?

3. Did the district court misapply the law by finding that Caesars could exercise a unilateral right to terminate the contracts at issue in this case in its sole and absolute discretion irrespective of the implied covenant of good faith and fair dealing?[5]

---

[2] "Caesars" refers to Desert Palace, Inc. ("Desert Palace"); Paris Las Vegas Operating Company, LLC ("Paris"); PHWLV, LLC ("PH"); and Boardwalk Regency Corporation ("Boardwalk").

[3] "Development Entities" refers to Moti; Moti 16; LLTQ; LLTQ 16; TPOV; TPOV 16; FERG; FERG 16; R Squared, derivatively on behalf of DNT; and GRB.

[4] "LLTQ/FERG Parties" refers to LLTQ; LLTQ 16; FERG; and FERG 16.

[5] This issue is also the subject of the appeal docketed at Nevada Supreme Court Case No. 84934.

4. Did the district court ignore the law by permitting Caesars to morph its contract claims into tort claims?

5. Did the district court err by striking the Amended Counterclaims that were filed by the Moti/TPOV Parties,[6] the LLTQ/FERG Parties, and DNT in response to Caesars' First Amended Complaint?

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

IV. STATEMENT OF THE CASE

A. Nature of the Case.

This is a civil action concerning numerous successful restaurants at various hotels and casinos owned and operated by Caesars. (*See, e.g.*, 28 AA5708-09.) Between March 2009 and December 2012, Caesars entered into six (6) contracts (collectively, the "Agreements") with certain of the Development Entities and, for some, Gordon Ramsay ("Ramsay"), related to the following restaurants (collectively, the "Restaurants"): (i) Serendipity 3; (ii) Old Homestead Steakhouse (the "Old Homestead"); (iii) Gordon Ramsay Steak in Las Vegas ("GR Steak LV"); (iv) Gordon Ramsay Pub & Grill in Las Vegas ("GR Pub LV"); (v) Gordon Ramsay Burger f/k/a BurGR Gordon Ramsay ("GR Burger"); and (vi) Gordon

[6] "Moti/TPOV Parties" refers to Moti; Moti 16; TPOV; and TPOV 16.

Ramsay Pub & Grill in Atlantic City ("GR Pub AC"). (27 AA5592-93.) The Development Entities conceived the ideas for opening these Restaurants, and, in certain instances, provided significant capital to help Caesars build them. (27 AA5476, 5484, 5494, 5504; 5512, 5528; 30 AA6402-03 at¶¶ 4-13, 15.)

In September 2016, Caesars terminated the Agreements upon finding that Seibel, an alleged affiliate of the Development Entities, was unsuitable. (*See, e.g.*, 25 AA5137.) Caesars did so without first attempting to work with the Development Entities so that they could timely dissociate from Seibel to Caesars' satisfaction—completely ignoring the Development Entities' good faith attempts to work with Caesars in an attempt to cure its suitability concerns. (21 AA4266-70; 28 AA5708-09, 5749-50.) Except for Serendipity 3, Caesars continued operating the Restaurants in violation of the Agreements.[7] (30 AA6402 at ¶¶4-11.)

In short, Caesars stripped itself of the Agreements' burdens while retaining their benefits—*i.e.*, Caesars avoided paying more than [redacted] in fees and profits to the Development Entities while retaining their intellectual property and seven-figure capital investments, a win-win for Caesars. (*See* 27 AA5691.)

---

[7] Affiliates of Caesars subsequently opened the following restaurants without involving the Development Entities or their affiliates in violation of the Agreements (collectively, the "New Ventures"): Gordon Ramsay Fish & Chips ("GR F&C"); Gordon Ramsay Steak in Baltimore ("GR Steak Baltimore"); Gordon Ramsay Steak in Atlantic City ("GR Steak AC"); and Gordon Ramsay Steak in Kansas City ("GR Steak KC"). (*See, e.g.*, 30 AA6403 at ¶¶12-13.)

B. Course of the Proceedings.

In February 2017, Seibel, a 50% member of GRB, initiated an earlier case, derivatively on behalf of GRB, against PH and Ramsay, asserting contract-based claims related to GR Burger. (1 AA1-36.) In June 2017, Seibel filed a First Amended Verified Complaint. (1 AA41-75.)

In July 2017, PH and Ramsay each filed an Answer. (1 AA76-122.) PH separately filed a Counterclaim against Seibel, individually, asserting tort claims for conduct allegedly related to GR Burger. (1 AA98-122.) In August 2017, Seibel filed his Reply. (1 AA168-73.)

In August 2017, Caesars initiated this case against Seibel and the Development Entities, seeking judicial declarations: (i) that Caesars properly terminated the Agreements; (ii) that Caesars has no past, present or future obligations under the Agreements; and (iii) that Caesars is not bound by the future restaurants clauses in the Agreements.[8] (1 AA128-67.) The earlier case was subsequently consolidated with this case.[9] (1 AA214-17.)

---

[8] Although Caesars also sued its former Regional VP of Food & Beverage, J. Jeffrey Frederick ("Frederick"), it did not assert any claims against him. (1 AA128-67.) He was subsequently dismissed from this case. (2 AA481-82.)

[9] PH and Ramsay prevailed in the earlier case on summary judgment—the subject of Nevada Supreme Court Case Nos. 84934 and 86359.

In July 2018, Seibel and the Development Entities filed their Answers. (1 AA225-45; 2 AA246-338.) The LLTQ/FERG Parties and DNT also filed Counterclaims against Desert Palace and Boardwalk, asserting contract-based claims related to three of the Restaurants (Old Homestead, GR Pub LV, and GR Pub AC) and two New Ventures (*i.e.*, GR F&C and GR Steak Baltimore).[10] (2 AA283-338.)

In October 2018, the district court entered an order permitting The Original Homestead Restaurant, Inc. ("OHR"), a party to the Agreement for Old Homestead and a 50% member of DNT, to intervene in this case. (2 AA381-83.) OHR then asserted a claim for declaratory relief against Desert Palace related to Old Homestead. (2 AA389-405.)[11]

In the interim, GR US Licensing, LP ("GRUS"), the other 50% member of GRB, initiated a proceeding in Delaware, seeking to judicially dissolve GRB due to PH's termination of the Agreement for GR Burger. (20 AA4087.) Eventually, Seibel was assigned the right to defend the claims that were asserted in this case by

---

[10] By this time, the TPOV Parties were pursing contract-based claims against Paris related to GR Steak LV in federal court. (*See, e.g.*, 30 AA6378-86.) Similarly, the Moti Parties were pursuing contract-based claims against Desert Palace related to Serendipity 3 in bankruptcy court. (*See id.*)

[11] OHR voluntarily dismissed its claim in June 2022. (34 AA7113-18.)

Caesars against GRB. (22 AA4505-15.) Seibel then substituted in GRB's place. (20 AA4080-83.)

In October 2019, the LLTQ/FERG Parties requested leave to amend their Counterclaims in order to assert additional contract-based claims against Desert Palace and Boardwalk related to one additional New Venture (*i.e.*, GR Steak AC). (3 AA488-604.) The motion was denied. (4 AA759-62.)

In December 2019, Caesars requested leave to amend its Complaint in order to assert four tort claims against Seibel and Green and one contract-based claim against the Development Entities for conduct that was both covered by and, simultaneously, not covered by the Agreements. (4 AA770-86.) The motion was granted (5 AA1088-92) and Caesars filed its First Amended Complaint in March 2020 (5 AA1101-47).

In June 2020, Seibel, Green, and the Development Entities filed their Answer to the First Amended Complaint. (6 AA1231-81.) The Development Entities (except for GRB) also filed Amended Counterclaims against Caesars, asserting contract-based claims related to the Restaurants (except for GR Burger, which was the subject of the earlier case) and the New Ventures. (*Id.*)

In July 2020, Caesars moved to strike the Amended Counterclaims. (6 AA1303-15.) The motion was granted.[12] (13 AA2626-39.)

Finally, as relevant to this appeal, in February 2021, the district court entered a written order on competing discovery motions. (13 AA2657-64.) The district court denied a request by Seibel, Green, and the Development Entities to re-depose Caesars in response to its First Amended Complaint; and granted a request by Caesars to re-depose Green in response to its First Amended Complaint. (*Id.*)

C. Disposition Below.

In February 2021, Caesars moved for summary judgment (the "Initial MSJ") on (i) its claims for declaratory relief and (ii) the initial Counterclaims asserted by the LLTQ/FERG Parties and DNT (collectively, the "Termination Claims"). (13 AA2701-26.) The Opposition was filed in March 2021 (20 AA4126-75) and a Reply was filed in November 2021 (31 AA6453-76).[13] The hearing was held in December 2021. (33 AA6820-935.) The district court entered the Initial MSJ Order in May 2022. (34 AA7052-71.)

---

[12] This issue was the subject of a writ petition (Nevada Supreme Court Case No. 82448). On October 22, 2021, this Court entered an order denying the writ petition, finding that the Development Entities could raise the issue on appeal.

[13] Supplemental briefing was submitted in December 2021 and January 2022. (33 AA6957-69, 6993-7002.)

In July 2022, Caesars counter/cross-moved for summary judgment (the "Subsequent MSJ") on its remaining claims (the "Marketing Claims"). (35 AA7450-75.) Oppositions were filed in August 2022 (38 AA8101-45) and an omnibus Reply was filed in October 2022 (39 AA8436-52). The hearing was held in November 2022. (42 AA8879-9023.) The district court entered the Subsequent MSJ Order in March 2023. (42 AA9066-83.)

V. STATEMENT OF FACTS

The following facts are taken as true, together with all reasonable inferences drawn from them. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

A. Seibel Revamps Caesars' Restaurants.

In the late 2000s, Seibel—a popular restaurateur—was approached by Caesars to open a new restaurant in Las Vegas. (29 AA5963.) The relationship quickly blossomed and, with Seibel's help, including an introduction to Ramsay, Caesars opened numerous successful restaurants in Las Vegas and other cities. (*See, e.g.*, 29 AA6004-05, 6054-56, 6099; 30 AA6298, 6402-03 at¶¶ 4-13.) In Caesars' words, "[redacted]."[14] (24 AA4985.)

[14] Seibel routinely advised Caesars of ways to improve the Restaurants' operations. (24 AA4924-26, 5009-11; 29 AA6073-74; 30 AA6403 at ¶15.)

B. The Agreements.

Caesars entered into the Agreements with Moti, DNT, TPOV, LLTQ, GRB, and FERG—entities that were owned, in whole or in part, directly or indirectly, by Seibel—to design, develop, construct, and operate the Restaurants, as follows:

- In 2009, Desert Palace and Moti entered into the "**Moti Agreement**" for the operation of Serendipity 3. (14 AA2746-68.) Desert Palace agreed to pay a [redacted] to Moti in exchange for the non-exclusive right to use the Serendipity brand. (*Id.*) Moti contributed [redacted] to build the Restaurant and helped design it. (*Id.*) Serendipity 3 opened in April 2009 and closed in December 2016. (30 AA6402 at ¶6.)

- In 2011, Desert Palace and DNT (a joint venture between R Squared and OHR) entered into the "**DNT Agreement**" for the operation of Old Homestead. (14 AA2778-823.) Desert Palace agreed to pay a [redacted] to DNT in exchange for the non-exclusive right to use the Old Homestead brand. (*Id.*) Old Homestead opened in December 2011 and closed in May 2023.[15] (30 AA6402 at ¶7.)

- In 2011, Paris and TPOV entered into the "**TPOV Agreement**" for the operation of GR Steak LV. (14 AA2824-57.) Paris agreed to pay a [redacted]

[15] Old Homestead closed after the district court entered its Initial MSJ Order.

[redacted] to TPOV in exchange for a [redacted], to be repaid over time, and assistance with developing the Restaurant. (*Id.*) GR Steak LV opened in May 2012 and remains in operation. (30 AA6402 at ¶8.)

- In 2012, Desert Palace and LLTQ entered into the "**LLTQ Agreement**" for the operation of GR Pub LV. (14 AA2859-93.) Desert Palace agreed to pay a [redacted] to LLTQ in exchange for a [redacted], to be repaid over time, and assistance with developing the Restaurant. (*Id.*) GR Pub LV opened in December 2012 and remains in operation. (30 AA6402 at ¶9.)

- Also in 2012, PH and GRB (a joint venture between Seibel and GRUS, an entity indirectly owned by Ramsay) entered into the "**GRB Agreement**" for the operation of GR Burger. (15 AA2976-3019.) PH agreed to pay a [redacted] to GRB in exchange for the non-exclusive right to use its intellectual property for a casual, gourmet, burger-centric restaurant. (*Id.*) GR Burger opened in December 2012 and remains in operation. (30 AA6402 at ¶10.)

- In 2014, Boardwalk and FERG entered into the "**FERG Agreement**" for the operation of GR Pub AC. (15 AA3049-87.) Boardwalk agreed to pay a [redacted] to FERG in exchange for assistance with developing the Restaurant. (*Id.*) GR Pub AC opened in February 2015 and remains in operation. (30 AA6402 at ¶11.)

These Restaurants have been incredibly successful. (28 AA5701; 29 AA5971-72.) For example, between December 2012 and December 2019, GR Steak LV and GR Burger reported gross restaurant sales of [redacted] and [redacted], respectively. (27 AA5659, 5686.)

Each Agreement vests Caesars with discretionary termination rights based upon suitability concerns with affiliates of the Development Entities; provided, however, that each Agreement expressly contemplates that any suitability issue is subject to cure, as follows: the Development Entity will "[redacted]," unless Caesars determines, in its discretion, that the relationship is not subject to cure. (*See, e.g.*, 14 AA2757 at §9.2; 14 AA2847 at §10.2; 15 AA3004-05 at §11.2.)

Further, at Caesars' request, the LLTQ Agreement contains a provision (the "Future Restaurants Clause") stating that Caesars shall involve LLTQ or its affiliates in Gordon-Ramsay branded restaurants in the general nature of a pub, bar, café, tavern, or steakhouse that may be opened in the future.[16] (14 AA2890 at §13.22; *see also* 24 AA4892.) Caesars understood that clause to mean exactly what it says; namely, that Caesars cannot "[redacted]."

[16] A Future Restaurants Clause also appears in the GRB Agreement for a Gordon Ramsay-branded burger centric restaurant. (24 AA4884 at §14.21.)

(24 AA4962; *see also* 21 AA4222, 4224, 4227; 24 AA4959-60, 4994-96; 25 AA5168.)

C. The Parties' Relationship Deteriorates.

Once Seibel paved the path for Caesars to operate profitable restaurants, Caesars decided [redacted] (24 AA4985.) Caesars disliked Seibel and viewed as "[redacted]" and "[redacted]" the fact that Seibel was indirectly (through the Development Entities) profiting from the Restaurants. (23 AA4595; 24 AA4955-57, 4964-67, 4969, 4973, 4977.) Indeed, Caesars [redacted]. (23 AA4595.)

Ramsay wanted nothing to do with Seibel, either, and demanded that [redacted]ngs. (24 AA4999; *see also* 24 AA5017.) He actively encouraged Caesars to part ways with any company owned by Seibel. (23 AA4601.)

D. Seibel Discloses the Criminal Matter to Caesars.

In late 2013, [redacted] (29 AA6022, 6028-30.) The Agreements do not specify whether this type of information must be disclosed to Caesars. (*See, e.g.*, 14 AA2847 at §10.2.) For the Moti Agreement and the DNT Agreement, Caesars had asked Seibel to complete a Business Information Form ("BIF"). (14 AA2735-44, 2770-76.) The BIF required disclosure [redacted]

[redacted][17] (14 AA2739 at Question 7.)

Notwithstanding, on January 9, 2014, Seibel told Frederick, his "[redacted]" at Caesars (28 AA5884), during an in-person meeting in New York [redacted][18] (29 AA6026-27, 6033-35.) At the meeting, Frederick specifically [redacted][19] (29 AA6035.)

---

17 [redacted]. (23 AA4588 at Questions 8(d), 8(f).)

18 Seibel's testimony was substantiated by: (i) testimony from his transactional counsel, Brian Ziegler, Esq. ("Ziegler"), who attended the meeting with Frederick; (ii) Ziegler's billing entry for the meeting; and (iii) a follow-up email from Frederick to Seibel sent in August 2014, [redacted] (24 AA4981-83, 5002-03; 28 AA5907, 5923-24; 30 AA6393 at ¶16.)

By law, Caesars was charged with knowledge of information disclosed by Seibel to Frederick related to the investigation. *In re Amerco Derivative Litig.*, 127 Nev. 196, 214, 252 P.3d 681, 695 (2011).

19 Seibel testified [redacted]. (30 AA6185-89.)

E. The Amendment.

In May 2014, the parties amended the Agreements (the "Amendment") in order to permit the Development Entities [redacted]. (24 AA4989-92.) Caesars agreed to the Amendment without inquiring as to the motivation behind it. (28 AA5889-90; *see also* 25 AA5090.)

F. The Trust.

In March 2016, Seibel formed The Seibel Family 2016 Trust (the "Trust"), an irrevocable trust. (25 AA5023-86.) [redacted]

(29 AA6052-53; 30 AA6192, 6218.)

In recognition that the Trust may own interests in the Development Entities, the Trust provides that [redacted] (25 AA5067-68 at Art. XXIV.) Further, the Trust provides that [redacted]. (*Id.*)

As written, the Trust [redacted]

[redacted][20]

(30 AA6245-53.) When forming the Trust, Seibel [redacted]. (29 AA6024-25.)

G. Seibel Dissociates from the Development Entities.

In April 2016, Seibel informed Caesars that he had assigned his interests in the Development Entities to the Trust (the "Assignments") and notified Caesars of the Trust's Beneficiaries and Trustees.[21] (16 AA3139-48; *see also* 25 AA5245-63; 28 AA5834-45; 30 AA6399 at ¶11, 6403 at ¶16.) Caesars accepted the Assignments and continued making payments under the Agreements. (25 AA5092-93; *see also* 28 AA5868-74; 30 AA6399 at ¶12.)

H. Caesars Terminates the Agreements.

Later in April 2016, Seibel pled guilty to a tax-related felony. (16 AA3179.)

In August 2016, upon learning of Seibel's conviction, Caesars [redacted] (23 AA4574.) Ramsay was pleased to hear it, saying, "[redacted]

---

20 [redacted]

21 By doing so, the Trust took title to the Development Entities. (28 AA5935.)

[redacted] (23 AA4576.) They quickly began discussing new deals. (*Id.*; *see also* 25 AA5103, 5127-28.)

In September 2016, Caesars terminated the Moti Agreement, the TPOV Agreement, the LLTQ Agreement, and the FERG Agreement—without affording an opportunity to cure (*i.e.*, dissociate from Seibel). (16 AA3289, 3291, 3293, 3295.) Caesars separately gave notice that it would terminate the DNT Agreement and the GRB Agreement absent an immediate separation by DNT and GRB from Seibel.[22] (16 AA3281-82, 3286-87.)

In response, Seibel reached out to Caesars, seeking to discuss his intent to dissociate from the Development Entities so that they could remain under contract with Caesars. (21 AA4260, 4345-46.) Upon being informed that the Trust was not an acceptable assignee of his interests (21 AA4262), Seibel expressed his willingness to immediately "[redacted]" and asked Caesars to work with him in order to find someone who would be suitable in Caesars' eyes to acquire the Trust's interests in the Development Entities. (*See* 21 AA4266-70, 4272-73; 25 AA5170-71.)

[22] Notwithstanding, [redacted] (*See* 25 AA5101; 28 AA5893-95.)

Caesars flatly ignored his overture and terminated the DNT Agreement and the GRB Agreement. (16 AA3301-02; 25 AA5177-78; 28 AA5892.)

In short, the Development Entities tried, in good faith, to dissociate from Seibel, but their efforts were rebuffed by Caesars. (30 AA6399 at ¶¶13-14, 6403-04 at ¶¶16-20.)

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

Determined to rid itself of the Agreements, Caesars rushed its suitability determination and, as explained by Randy Sayre ("Sayre"), a respected former member of the Nevada Gaming Control Board, [redacted]. (28 AA5705, 5708-09, 5727-28, 5760.) In communications with gaming regulators, [redacted] (16 AA3297-99.) Caesars failed to mention that [redacted].[23] (*Id.*)

[23] Caesars made no effort to [redacted] (28 AA5764.) Caesars' gaming expert [redacted] (30 AA6231-33.)

Upon reviewing the actions taken by Caesars, Sayre found that Caesars [redacted] (28 AA5722, 5727-28, 5732-33, 5743, 5750, 5759, 5769.) Separately, Sayre found that Caesars could have (and should have) worked in good faith to find an amicable solution with the Development Entities but, instead, [redacted] (*Id.*) Sayre [redacted].[24] (28 AA5732, 5736.) In conclusion, Sayre found that [redacted] (28 AA5709, 5763.)

J. With One Exception, the Restaurants Remain Open for Business.

Except for Serendipity 3, which closed in December 2016, Caesars did not close the Restaurants after terminating the Agreements despite being contractually obligated to do so. (*See, e.g.*, 14 AA2793 at §4.3.2; 15 AA2992 at §4.3.2.)

[24] Caesars' Articles of Incorporation state that Caesars may redeem any shares held by an unsuitable shareholder—not that the shareholder's shares are forfeited for no consideration upon an unsuitability finding. (21 AA4193.)

Caesars falsely claimed to have "rebranded" GR Burger, despite evidence showing that it is still capitalizing on the same menu, concept, brand, look, feel, and décor. (21 AA4205, 4207, 4209, 4214-20; 24 AA4928-43; 26 AA5308; 29 AA6075-76; 30 AA6040-06 at ¶¶21-23.) The other Restaurants continued doing business as usual, as if nothing had changed—except that Caesars stopped remitting any of their profits to the Development Entities, which, by Caesars' own admission, [redacted] (25 AA5125.)

The numbers for these Restaurants explain Caesars' actions: [redacted] (28 AA5701.) For example, the average operating incomes for GR Steak LV, GR Pub LV, and GR Pub AC are [redacted] higher than their respective predecessors. (*Id.*)

K. Caesars Opens the New Ventures Without Complying With the Future Restaurants Clauses.

By the Agreements' express terms, the Future Restaurants Clauses survive termination. (14 AA2873-74 at §4.3.1; 24 AA4863 at §4.3.1.) Yet, Caesars opened the New Ventures without involving affiliates of the Development Entities. (27 AA5516-17, 5522-23, 5534-35; *see also* 30 AA6403 at ¶¶12-13.)

L. Seibel's Marketing Relationships with Vendors.

While the Agreements were in place, Seibel introduced certain vendors to Caesars and lobbied Caesars to purchase products from them. (38 AA8160-61 at ¶¶4-5, 8205-06, 8228, 8234-40, 8243; 39 AA8290, 8331.) Caesars agreed to do

so; as a result, the vendors agreed to pay marketing fees to entities that were owned or controlled by Seibel. (*Id.*)

Because Caesars and the Development Entities were not "[redacted]" in the Restaurants (*see, e.g.*, 34 AA7288 at §13.1), the Agreements did not contain clauses that prohibited either party from pursuing related business opportunities absent accounting for the profits derived from those opportunities to the other party. (*See also* 38 AA8212.) Nevertheless, Seibel disclosed his relationships with these vendors to Caesars. (38 AA8161 at ¶6; *see also* 38 AA8164, 8209-11, 8215-16; 39 AA8285-87, 8393-96.)

Green – an agent for Seibel and the Development Entities[25] – communicated with these vendors at Seibel's request. (35 AA7425-26, 7436; 38 AA8175; 43 AA9125-26 at ¶¶5-7, 9135, 9148, 9152, 9155.) He did not develop the relationships with these vendors or negotiate their terms (35 AA7432, 7434, 7438); nor did he benefit from them – *e.g.*, his compensation as a consultant was not tied to the fees paid by vendors. (39 AA8342; 43 AA9126 at ¶11.) He understood that Caesars was aware of the relationships and that, in general, they are common and widespread in the hospitality industry. (38 AA8188, 8192-93, 8268, 8271-72; 39 AA8320 at ¶5, 8336-39, 8343; 43 AA9126 at ¶¶8-9, 9150-51.)

[25] As part of dissociating from the Development Entities, Seibel resigned as Manager and appointed Green in his place. (30 AA6398 at ¶5.)

VI. SUMMARY OF ARGUMENT

Through summary judgment, Caesars avoided the contractual obligation to remit [redacted] in licensing fees and net profits derived from the Restaurants and the New Ventures to the Development Entities *and* secured the right to continue benefitting from the Agreements vis-à-vis keeping the Restaurants and the New Ventures open for business.[26] Nevada law does not condone such a grossly inequitable result; nor should this Court. *See Bergstrom v. Estate of DeVoe*, 109 Nev. 575, 577, 854 P.2d 860, 861 (1993) ("He cannot at the same time affirm the contract by retaining its benefits and rescind it by repudiating its burdens.") (quoting 5 CORBIN ON CONTRACTS § 1114).

The district court committed numerous errors when deciding the Initial and the Subsequent MSJs (together, the "MSJs"), as follows:

- The district court weighed the evidence, made credibility findings, and drew inferences in favor of Caesars—none of which should have occurred under NRCP 56;

[26] Not only that, Caesars secured a damages award against Seibel, Green, and the Development Entities for conduct that was known to Caesars (and is commonplace in the hospitality industry).

- The district court considered inadmissible evidence presented by Caesars—contrary to the standards for deciding a summary judgment motion;

- The district court improperly resolved material factual disputes—the mere existence of which, by law, should have prevented the granting of summary judgment;

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

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

- The district court found that Caesars did nothing wrong by exercising its contractual termination rights despite ample evidence showing that Caesars did so in bad faith—conduct that, by law, runs afoul of the implied covenant of good faith and fair dealing;

- The district court found that Caesars could pursue tort claims against Seibel and Green for conduct that is expressly governed by the Agreements—an outcome that defies basic contract law; and

- The district court found that Seibel and Green defrauded Caesars—a ruling that requires making a credibility finding, which, as a matter of law, cannot occur on summary judgment.

Before deciding summary judgment, the district court also erred by refusing to allow the Development Entities to bring their Amended Counterclaims that were, minimally, proportional to the breadth of the changes made in Caesars' First Amended Complaint. The district court disregarded the overwhelming weight of federal authority holding that a defendant may, as a matter of right, file an amended counterclaim in response to an amended complaint so long as its changes are comparable in breadth to those made by the plaintiff in its complaint.

Due to these errors, combined with other questionable pretrial rulings that inexplicably favored Caesars, good cause exists for this case to be randomly reassigned upon remand.

VII. ARGUMENT

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

On a motion for summary judgment, a district court must view the evidence and all reasonable inferences drawn from it "in a light most favorable to the nonmoving party." *Wood*, 121 Nev. at 729, 121 P.3d at 1029. "[A] district court cannot make findings concerning the credibility of witnesses or weight of [the] evidence." *Borgerson v. Scanlon*, 117 Nev. 216, 220, 19 P.3d 236, 238 (2001).

Those are "jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Here, the district court impermissibly drew inferences and improperly resolved factual disputes in favor of Caesars (the *moving* party). Starting with the Initial MSJ Order, the district court improperly found:

- The parties "did not agree on material terms regarding future restaurants." (34 AA7055.) Caesars acknowledged, in writing, that the Future Restaurants Clauses contained sufficient material terms to be enforceable—[redacted] (21 AA4222, 4224, 4227; 24 AA4959-60, 4962, 4994-96; 25 AA5168.)

- The BIF required disclosure if an affiliate "[redacted]" or was "the subject of any criminal investigation." (34 AA7057.) The BIF required no such thing. (14 AA2739 at Question 7.)

- Caesars "did not waive, release, or modify the disclosure obligations" under the Agreements. (34 AA7057.) The Development Entities presented evidence showing that Caesars did just that by [redacted] (17 AA3525-27; 24 AA4948, 5013-15; 25 AA5099.) Moreover, Caesars was free to [redacted]

[redacted] (*See, e.g.*, 24 AA4856 at § 2.2.)

- Seibel did not notify Caesars of the criminal investigation or related facts "underlying the charges against him." (34 AA7058-59.) Yes, he did—he told Frederick and Selesner. (29 AA6026-27, 6033-35; 30 AA6185-89.)

- Caesars determined Seibel's suitability based on "applicable Nevada gaming laws and regulations." (34 AA7060.) That is false. (*See* 28 AA5727-29.)

- The Agreements do not contain cure rights for suitability concerns. (34 AA7061-62.) Yes, they do—each Development Entity may "[redacted]." (*See, e.g.*, 14 AA2804 at §11.2.)

Turning to the Subsequent MSJ Order, the district court improperly found:

- Seibel and Green "coerced payments from vendors" and threatened vendors. (42 AA9074.) No, they did not. (39 AA8306-07, 8310.) There is no evidence in the record proving that any vendor was threatened or coerced.

- Caesars was "in the dark" and "unaware" of the fees paid by vendors. (42 AA9071, 9076.) There is nothing in the record from anyone at Caesars claiming that s/he was unaware of the fees paid by vendors.

- Seibel and Green engaged in commercial bribery. (42 AA9071, 9074.) That is false—NRS 207.295(1) does not apply here because payments were

not made by Seibel or Green to Caesars' employees in order to cause them to convince Caesars to purchase products from vendors.

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

- Seibel still holds "both a beneficial and actual ownership interest" in the Development Entities. (34 AA7061-62.) By reaching this conclusion, the district court assigned a nefarious intent to Seibel's Prenuptial Agreement even though his Trust negated the Prenuptial Agreement.[27] (30 AA 6245-53.)

- Seibel "secretly" engaged in a "fraudulent cure scheme" that was designed to "deceive Caesars." (34 AA7059-62.) By reaching those conclusions, the district court decided Seibel's intentions and, worse, ignored evidence showing that Seibel (i) did not receive distributions from the Trust and (ii) was ready to assign his interests to a disinterested third party. (30 AA6390 at ¶5; 30 AA6403 at ¶¶16-20.)

- Nevada gaming regulators approved Caesars' actions. (34 AA7060.)

Setting aside that such information was inadmissible as argued *infra*, the district

[27] Caesars' gaming expert admitted that "[redacted]." (30 AA6229-30, 6234.)

court reached this conclusion by ignoring how Caesars [redacted] (28 AA5729, 5738-41.)

Turning to the Subsequent MSJ Order, the district court improperly found:

- Seibel and Green "extorted kickbacks" from vendors. (42 AA9070-71.) Nonsense—the payments were for marketing services, including introducing these vendors to Caesars. (38 AA8160-61 at ¶¶4-5, 8205-06, 8228, 8234-40, 8243; 39 AA8290, 8331.)

- Seibel and Green admit that they procured "kickbacks" from vendors. (42 AA9071.) They never said that. (38 AA8161 at ¶6; 39 AA8320 at ¶5; 43 AA9125-26 at ¶7.)

- Seibel and Green undertook a scheme to "undermine the [] Agreements in order to reap kickbacks." (42 AA9070.) By reaching this conclusion, the district court assumed the worst of Seibel and Green (the *non-moving* parties).

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

B. The District Court Considered Inadmissible Evidence When Deciding the MSJs.

This Court reviews a district court's "decision to admit or exclude evidence for an abuse of discretion." *M.C. Multi-Family Dev., LLC v. Crestdale Assocs.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008). When deciding a summary

judgment motion, the court considers only admissible evidence. *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983).

Here, the district court relied on *inadmissible* evidence submitted by Caesars—despite timely, valid objections served by Seibel, Green, and the Development Entities. (20 AA4118-25; 38 AA8151-54.) For example, starting with the Initial MSJ Order:

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

- The district court relied on a letter sent by Caesars' counsel to gaming regulators (Exhibit 40 to the Initial MSJ), which purports to set forth facts outside the author's personal knowledge. *Frias*, 101 Nev. at 221-22, 698 P.2d at 876-77. Further, Seibel and the Development Entities were prevented from questioning the author concerning the letter's contents due to Caesars' assertion of the gaming privilege. (20 AA4120-21.) As a result, the letter was unfairly prejudicial. NRS 48.035(1).

- The district court relied on a letter sent by gaming regulators to Caesars' counsel (Exhibit 41 to the Initial MSJ), which constitutes inadmissible hearsay. NRS 51.035; NRS 51.065(1). Further, Seibel and the Development Entities were unable to depose the author concerning the letter's contents due to

Caesars' assertion of the gaming privilege. (20 AA4120-21.) As a result, the letter was unfairly prejudicial. NRS 48.035(1).

Turning to the Subsequent MSJ Order:

- The district court relied on Caesars' supplemental disclosures (Exhibit 29 to the Subsequent MSJ), which contain inadmissible argument of counsel. *McKenna v. State*, 114 Nev. 1044, 1053, 968 P.2d 739, 745 (1998).

- The district court relied on conclusory interrogatory responses (Exhibit 34 to the Subsequent MSJ) for which Caesars did not lay a proper foundation (e.g., by producing the underlying documents). *Frias*, 101 Nev. at 221-22, 698 P.2d at 876-77.

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

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

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

Here, it was error for the district court to find the absence of genuine issues of material fact and that Caesars is entitled to judgment in its favor as a matter of law on all claims and counterclaims. To the contrary, numerous unresolved questions of material fact remain to be decided by the jury at trial.

For organizational purposes, the Termination Claims are addressed separately from the Marketing Claims.

1. The Termination Claims.

As shown below, there are discrete issues of material fact underlying the Termination Claims that prevented the district court from granting summary judgment.

a. Whether Caesars' Suitability and Termination Decisions Were Made in Good Faith are Genuine Issues of Material Fact.

The district court found that Caesars properly exercised its unilateral discretion to decide suitability and terminate the Agreements. (34 AA7060-61, 7065.) The district court stopped short in its analysis and overlooked genuine issues of material fact regarding whether Caesars' conduct amounted to a breach of the implied covenant of good faith and fair dealing.

As shown below, the implied covenant of good faith and fair dealing tempers a parties' exercise of unilateral authority under a contract in order to ensure that the other party is not denied its justified expectations. With that in mind, there are two primary issues of material fact to be decided by the jury at trial related to Caesars' suitability and termination decisions: (1) Was Caesars' failure to give the Development Entities a meaningful opportunity to cure—despite their contractual cure rights—in good faith?; and (2) Was Caesars' unsuitability

finding—through which Caesars [redacted]—in good faith?

The evidence, and all reasonable inferences drawn from the evidence, show that the answer to each question is "no." As a result, it was error for the district court to grant summary judgment on Caesars' first claim for declaratory relief and the LLTQ/FERG Parties' and DNT's related counterclaims.

(i) The Implied Covenant Acts as a Counterbalance to a Party's Discretionary Contract Rights.

"It is well established within Nevada that every contract imposes upon the contracting parties the duty of good faith and fair dealing." *Hilton Hotels Corp. v. Butch Lewis Prods.*, 109 Nev. 1043, 1046, 862 P.2d 1207, 1209 (1993) ("*Hilton II*"). The duty arises "independent of the consensual contractual covenants." *Morris v. Bank of Amer. Nev.*, 110 Nev. 1274, 1278 n.2, 886 P.2d 454, 457 n.2 (1994). A party breaches the implied covenant of good faith and fair dealing by performing under a contract in a manner that is "unfaithful to the purpose of the contract," thereby denying "the justified expectations of the other party." *Hilton Hotels Corp. v. Butch Lewis Prods.*, 107 Nev. 226, 234, 808 P.2d 919, 923-24 (1991) ("*Hilton I*"). Whether a party literally complied with the terms of the contract is irrelevant. *See id.* at 232, 808 P.2d at 922-23.

As relevant to this appeal, where a contract gives one party the unilateral authority to affect the rights of the other party, the party with such authority must

exercise it in good faith. *See, e.g.*, *Travellers Int'l, A.G. v. Trans World Airlines*, 41 F.3d 1570, 1575 (2d Cir. 1994); *Cal. Lettuce Growers v. Union Sugar Co.*, 289 P.2d 785, 791 (Cal. 1955).

So, too, where a party maintains the ability to control its own performance under a contract, the implied covenant of good faith and fair dealing bars it from acting in a manner that defeats the other party's justified expectations. *See, e.g.*, *GMC v. New A.C. Chevrolet*, 263 F.3d 296, 334-35 (3d Cir. 2001); *Hamilton v. SunTrust Mortg. Inc.*, 6 F. Supp. 3d 1300, 1311 (S.D. Fla. 2014); *Cook v. Zions First Nat'l Bank*, 919 P.2d 56, 60 (Utah Ct. App. 1996); *Centronics Corp. v. Genicom Corp.*, 562 A.2d 187, 193 (N.H. 1989).

In short, "[p]arties with unfettered contractual discretion cannot be allowed to exercise that discretion in bad faith." *BA Mortg. & Int'l Realty Corp. v. Am. Nat'l Bank & Tr. Co.*, 706 F. Supp. 1364, 1376-77 (N.D. Ill. 1989).

(ii) **Caesars Terminated the Agreements in Bad Faith by Failing to Afford a Meaningful Cure to the Development Entities.**

Good faith "is a question of fact." *Consol. Generator-Nevada v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998); *see also Republic Grp. v. Won-Door Corp.*, 883 P.2d 285, 291 (Utah Ct. App. 1994). The fact-finder considers whether one party's conduct "f[e]ll outside the reasonable expectations" of the other party, which determination is guided "by the various factors and

special circumstances that shape [the parties'] expectations." *Hilton I*, 107 Nev. at 234, 808 P.2d at 923-24.

Here, Caesars unfairly denied the Development Entities their express cure rights by immediately terminating the Agreements in response to Seibel's conviction.[28] (28 AA5736, 5743, 5763.) Worse, Caesars failed to engage with the Development Entities in their good faith efforts to find a cure.[29] (28 AA5759, 5769.) The Development Entities undeniably sought guidance from Caesars with respect to dissociating from Seibel to Caesars' satisfaction. (*See* 21 AA4266-70, 4272-73; 25 AA5170-71.) Most importantly, they offered to sell their interests to a suitable third-party after Caesars rejected the Trust as a valid assignee of Seibel's interests. (*Id.*) Caesars not only failed to work with the Development Entities, Caesars failed to respond to their good faith overtures to dissociate from Seibel. (25 AA5170-71; 28 AA5892.)

---

[28] Caesars afforded hollow cure rights to DNT and GRB because, as shown above, Caesars was intending to terminate their Agreements irrespective of any efforts undertaken to dissociate from Seibel. (28 AA5745.)

[29] Through discovery, the Development Entities disclosed expert testimony confirming that Caesars acted in bad faith by refusing to engage with the Development Entities, instead stripping them of their valuable interests in the Restaurants (and New Ventures). (28 AA5708, 5732, 5736, 5743, 5759.) As Sayre said, [redacted] (28 AA5720.)

In discovery, Caesars admitted that it made no effort to work with or provide guidance to the Development Entities (30 AA6320, 6328-29, 6337, 6345, 6354), despite the fact that Caesars controlled the suitability determination of any proposed assignee of the Development Entities' interests. In other words, the Development Entities could not unilaterally assign their interests to a third party absent Caesars' involvement because Caesars [redacted] (*See also* 21 AA4262.)

The Agreements state that the Development Entities could cure any finding of unsuitability made by Caesars—giving them a reasonable, justified expectation that Caesars will work with them, in good faith, to cure any affiliation with an unsuitable person. (28 AA5720, 5769.) The presence of cure rights in the Agreements is indicative of the parties' intent for the Development Entities to cure any improper affiliation with an unsuitable person prior to losing their right to participate in the Restaurants' profits—an outcome that was overlooked by the district court. *See, e.g.*, *MMAWC, LLC v. Zion Wood Obi Wan Tr.*, 135 Nev. 275, 279, 448 P.3d 568, 572 (2019) (noting that the parties' intent is discerned from the plain language of a contract).

In real time, Caesars represented to gaming regulators [redacted] (25 AA5130-32.) Caesars knew that a cure

was anticipated and required under the Agreements; thus, the regulators [redacted]. (29 AA6137-38.) An assignment of the Development Entities' interests in the Agreements to a [redacted] third-party would have resolved Caesars' suitability concerns and, at the same time, allowed the Development Entities to be fairly compensated for their interests in the Restaurants (28 AA5732) —not subject to a forfeiture of those interests, contrary to law.[30] *Mainor v. Nault*, 120 Nev. 750, 776, 101 P.3d 308, 326 (2004).

Caesars' motives in denying the Development Entities their cure rights are patent—termination allowed it to keep the [redacted] in profits that it formerly shared with the Development Entities for itself. (28 AA5749-50.) The record reflects Caesars' [redacted] (23 AA4595; 24 AA4955-57, 4964-67, 4969, 4973, 4977, 4985; 25 AA5125.)

Notwithstanding, the district court found that the Development Entities engaged in bad faith, thus losing their cure rights. (34 AA7063-64.) This finding overlooks that the Development Entities' good faith is itself a question of fact. *See United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 511, 780 P.2d 193, 197 (1989).

---

[30] For example, Caesars could have purchased their interests in the Agreements—just as Caesars may purchase a shareholder's shares when it learns that a shareholder is unsuitable. (21 AA4189-96 at Art. V; *see also* 28 AA5732, 5740-48, 5763-64.)

In other words, just as determining Caesars' good faith is a fact-sensitive inquiry, so, too, the Development Entities' good faith is a fact-sensitive inquiry that is not ripe for determination on summary judgment.

As a final note, the fact that Caesars had the right to terminate the Agreements in its sole and absolute discretion (34 AA7061) is irrelevant—Caesars is still liable for not acting in good faith. *See, e.g.*, *Sons of Thunder v. Borden, Inc.*, 690 A.2d 575, 588 (N.J. 1997); *cf. Sands Aviation, LLC v. AIS-International, Ltd.*, Nos. 73522, 74114, 2019 WL 1422863, at *1, *3 (Nev. Mar. 28, 2019) (unpub. disp.). As noted above, an implied covenant claim presumes literal compliance with a contract. *See Hilton I*, 107 Nev. at 232, 808 P.2d at 922-23. The question remains whether Caesars' conduct was "unfaithful to the purpose of" the Agreements and deprived the Development Entities of their "justified expectations." *See id.* at 234, 808 P.2d at 923-24. According to Sayre, Caesars [redacted] (28 AA5765.)

In sum, there remains a genuine issue of material fact as to whether Caesars' decision to deprive the Development Entities of their bargained-for cure rights and steadfast refusal to work in good faith with the Development Entities in their efforts to find a cure were material breaches of the implied covenant of good faith and fair dealing, preventing the grant of summary judgment. *Consol. Generator-Nevada*, 114 Nev. at 1312, 971 P.2d at 1256.

(iii) Caesars Acted in Bad Faith When Assessing Seibel's Suitability.

Preceding its termination of the Agreements, Caesars made a suitability determination with respect to Seibel. The implied covenant of good faith and fair dealing required Caesars to exercise good faith in assessing Seibel's suitability. (28 AA5760.)

Notwithstanding, the evidence reflects that Caesars did not decide suitability in good faith. Specifically, Caesars [redacted]. (28 AA5722, 5727-28, 5732-33, 5743, 5750, 5759-60, 5763-66.)

For example, Caesars' Compliance Plan required [redacted] (*see* 15 AA3027 at "[redacted]"); but here, Caesars' compliance officer [redacted] (29 AA6131-33, 6151.) Moreover, the information provided to Caesars' Compliance Committee [redacted] (28 AA5728-36.)

According to Sayre, [redacted] (28 AA5727-29, 5732-33.) The Development Entities had a reasonable, justified expectation that Caesars would follow its own approved procedure in making a suitability determination in its "sole" discretion if an

affiliate was found to be unsuitable. (28 AA5720, 5765, 5768.) [redacted] (28 AA5760.)

Like with its termination decision, Caesars' motive is relevant in assessing its suitability determination, given that Caesars was eager to rid itself of its ongoing obligation to share in the Restaurants' [redacted] with the Development Entities. (28 AA5736, 5743.) Caesars' initial reaction to Seibel's conviction was not a concern for its gaming [redacted][31] (23 AA4574.) Caesars viewed the timing of Seibel's conviction as fortuitous and a convenient way [redacted] (30 AA6362.) A jury could easily find that its suitability determination was pretextual. *See S.M. v. M.P.*, 79 N.E.3d 1050, 1057 (Mass. Ct. App. 2017) (holding that a fact-finder may look to a party's motives in evaluating whether it used "its discretionary power" under a contract "in a pretextual manner").

In sum, whether Caesars made its suitability determination in good faith is a genuine issue of material fact that prevents the grant of summary judgment. *Consol. Generator-Nevada*, 114 Nev. at 1312, 971 P.2d at 1256.

---

[31] As Sayre found, [redacted]. (28 AA5741.)

b. Whether Caesars May Continue Operating the Restaurants is a Genuine Issue of Material Fact.

The district court found—without explanation—that Caesars did not breach the Agreements by continuing to operate the Restaurants; regardless, the district court found that the Development Entities were the first to breach, thereby preventing them from enforcing their rights under the Agreements. (34 AA7061, 7063-64.) The first finding belies the language and intent of the Agreements, and the second finding is contrary to law. Thus, it was error for the district court to grant summary judgment on Caesars' second claim for declaratory relief and the LLTQ/FERG Parties' and DNT's related counterclaims.

In general, whether a party breached a contract and whether that breach is material are questions of fact. *Hoffman v. Eighth Jud. Dist. Ct.*, 90 Nev. 267, 270, 523 P.2d 848, 850 (1974). A district court's interpretation of a contract is a question of law and is reviewed *de novo* by this Court. *Nev. State Educ. Ass'n v. Clark Cty. Educ. Assn*, 137 Nev. 76, 80, 482 P.3d 665, 671 (2021).

Here, Caesars had to cease operating "the Restaurant" underlying each Agreement following its termination. (*See, e.g.*, 14 AA2793 at §4.3.2; 15 AA2992 at §4.3.2.) Because that obligation survived termination (*see* 14 AA2793 at §4.3.1; 15 AA2992 at §4.3.1), Caesars is in material breach of the Agreements by failing to close the Restaurants.

Any other interpretation of the Agreements would undermine the Development Entities' rights.[32] It is undisputed that the Development Entities conceived and, in certain instances, funded the Restaurants in exchange for an ongoing share of their net profits. Caesars could not—as a matter of law—take for itself the Development Entities' concepts and financial assistance and then terminate the Agreements so that it could reap the Restaurants' net profits for itself. *Bergstrom*, 109 Nev. at 577, 854 P.2d at 861; *see also Hanks v. GAB Business Svcs., Inc.*, 644 S.W.2d 707, 708-09 (Tex. 1982). The district court erred by allowing Caesars to do just that.

Relatedly, the law also says that Caesars cannot "pick and choose" among those provisions of the Agreements that "advantage it" while freeing itself of the remaining provisions. *See, e.g.*, *Bedrosky v. Hiner*, 430 N.W.2d 535, 539 (Neb. 1988). Alongside the Agreements, Caesars entered into corresponding licensing agreements with Ramsay and OHR. (*See* 23 AA4647-83, 4725-71; 24 AA4809-45; *see also* 24 AA5005.) Those agreements were executed around the same time, concern the same subject matters, and reference one another. By law, they are

---

[32] At the minimum, the Agreements are ambiguous as to whether Caesars may continue to operate the Restaurants, such that the jury must decide whether Caesars must account to the Development Entities for continuing to operate the Restaurants. *See Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 212, 215–16, 163 P.3d 405, 407 (2007).

presumed to form a single, integrated contract for each Restaurant. *See Whitemaine v. Aniskovich*, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008).

With that in mind, Caesars could not unilaterally terminate the Agreements without also terminating its corresponding agreements with Ramsay and OHR. Because Caesars did not terminate its agreements with Ramsay and remained under contract with OHR (*see* 25 AA5184-86; 28 AA5895), it remains bound by the Agreements, including its ongoing obligation to remit a share of the Restaurants' net profits to the Development Entities.

The Future Restaurants Clauses further support the argument that Caesars is in material breach of the Agreements by continuing to operate the Restaurants without involving the Development Entities. Their enforceability notwithstanding (discussed *infra*), their presence in the Agreements reflects the parties' intent for Caesars to involve the Development Entities in the Restaurants (and the New Ventures) so long as they remain open for business. *See, e.g.*, *Solid v. Eighth Jud. Dist. Ct.*, 133 Nev. 118, 124, 393 P.3d 666, 672 (2017) (noting that all portions of a contract must be given effect if possible). While Caesars is free to preserve its business relationships with Ramsay and OHR, it may not continue profiting from Restaurants that were funded and/or conceived by the Development Entities.

The so-called "first to breach" rule, as adopted by the district court, does not require a different outcome. By law, "[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).

Here, because Caesars continues to enjoy the benefits of the Agreements, it cannot ignore their burdens, including those burdens that survive termination. *See, e.g.*, *Bank of Am. Nat'l Trust & Sav. Ass'n v. Smith*, 336 F.2d 528, 529 (9th Cir. 1964); *Scaffidi v. United Nissan*, 425 F. Supp. 2d 1172, 1183 (D. Nev. 2005). Thus, if the Restaurants stay open, profit sharing must continue.

In sum, there are genuine issues of material fact concerning Caesars' past, present, and future obligations under the Agreements and whether Caesars materially breached its post-termination obligations, preventing the grant of summary judgment. *Hoffman*, 90 Nev. at 270, 523 P.2d at 850.

c. Whether the Future Restaurants Clauses are Enforceable is a Genuine Issue of Material Fact.

The district court found that the Future Restaurants Clauses are "unenforceable agreement[s] to agree." (34 AA7064.) The law and the facts prove otherwise.

In general, "[w]hether a given agreement is intended to have presently binding effect or is merely an agreement to agree is to be determined by the trier of fact from all the evidence presented." *Svoboda v. Bowers Distillery, Inc.*, 745 F.2d 528, 531 (8th Cir. 1984); *accord Anderson v. Sanchez*, 132 Nev. 357, 360, 373 P.3d 860, 863 (2016) ("Whether a contract exists is a question of fact ...."). Although "[a] valid contract cannot exist when material terms are lacking or are insufficiently certain and definite," a valid contract can exist where "the parties have agreed to the material terms, even though the contract's exact language is not finalized until later." *Anderson*, 132 Nev. at 672, 119 P.3d at 1254.

Here, the material terms of the agreement for any New Venture are the material terms of the LLTQ Agreement—save and except certain non-essential terms that are "[redacted]."[33] (14 AA2890 at

[33] The Future Restaurants Clause in the FERG Agreement does not even require (or contemplate) a new agreement [redacted] (15 AA3062 at §4.1.)

§13.22.) While Caesars argued below that the variant terms are essential, whether a term is essential is a question of fact and "depends on the agreement and its context and also on the subsequent conduct of the parties, including the dispute which arises and the remedy sought." *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 378, 283 P.3d 250, 255 (2012) (internal quotation marks omitted); *accord* 1 CORBIN ON CONTRACTS § 2.9.

That said, Caesars' former Global President testified that [redacted].[34] (29 AA5969.) Further, Caesars' executives admitted, in writing, that the Future Restaurants Clauses are enforceable. (21 AA4222-30; 24 AA4962, 4995; 25 AA5168.)

Importantly, the mere fact that certain non-essential terms were subject to further discussion does not render the Future Restaurants Clauses unenforceable. *See Hotel Del Coronado Corp. v. Foodservice Equip. Distributors Ass'n*, 783 F.2d 1323, 1325 (9th Cir. 1986); *accord Cable & Computer Tech. Inc. v. Lockheed Sanders, Inc.*, 214 F.3d 1030, 1035 (9th Cir. 2000). It would be inequitable to allow Caesars, having accepted the benefits of the LLTQ Agreement, to avoid its attendant burdens by arguing that its Future Restaurants Clause is unenforceable.

[34] Ramsay himself classified the agreements for the New Ventures as "[redacted]" of the existing agreements. (23 AA4576.)

See Hastings Assocs. v. Local 369 Bldg. Fund, 675 N.E.2d 403, 410 (Mass. Ct. App. 1997) (preventing a party from claiming that a contract is an unenforceable agreement to agree after the party "accepted its benefits").

In sum, the essential terms of the Future Restaurants Clauses are concrete and enforceable. As a result, it was error for the district court to grant summary judgment on Caesars' third claim for declaratory relief and the LLTQ/FERG Parties' and DNT's related counterclaims. *Ultracuts Ltd. v. Wal-Mart Stores*, 16 S.W.3d 265, 270 (Ark. Ct. App. 2000).

2. The Marketing Claims.

Like with the Termination Claims, there are discrete issues of material fact underlying the Marketing Claims that prevented the district court from granting summary judgment.

a. <u>The Conspiracy Claim.</u>

Caesars brought a conspiracy claim against Seibel and Green for allegedly securing "kickbacks" from the Restaurants' vendors. (42 AA9072.) Summary judgment was improper on this claim for three main reasons.

First, the claim is based on "a legal impossibility." *Marmott v. Maryland Lumber Co.*, 807 F.2d 1180, 1184 (4th Cir. 1986); *cf. Nanopierce Techs., Inc. v. Depository Trust & Clearing Corp.*, 123 Nev. 362, 379 n.9, 168 P.3d 73, 85 n.9 (2007). Nevada law says that agents cannot legally conspire with their

principals—the intra-corporate conspiracy doctrine. *Collins*, 99 Nev. at 303, 662 P.2d at 622.

Here, Caesars alleged that Green (an agent) conspired with Seibel (his principal) for purposes of defrauding Caesars. (5 AA1142.) Because Green was Seibel's agent, the claim rested on Seibel conspiring with himself, which cannot occur. *Cole v. Univ. of Hartford*, 391 F. Supp. 888, 892 (D. Conn. 1975).

Second, there is an absence of evidence supporting the district court's finding that Green acted outside his capacity as an agent to avoid the intra-corporate conspiracy doctrine. (42 AA9074.) As noted above, vendors did not pay Green, and he understood that Seibel was advancing legitimate business relationships that were known to Caesars and that were not prohibited under the Agreements (due to the absence of a partnership relationship between the Development Entities and Caesars). Because Green did not personally gain from the relationships, the intra-corporate conspiracy doctrine barred the claim.

Finally, there is no evidence showing that Green and Seibel (i) entered into an agreement to allegedly defraud Caesars, (ii) engaged in unlawful or improper conduct, and (iii) harmed Caesars—all essential elements of Caesars' conspiracy

claim.[35] At a minimum, Seibel and Green presented evidence (summarized above) showing (i) that Green worked for, and not with, Seibel, (ii) that the relationships were permissible under the Agreements and are commonplace in the hospitality industry, and (iii) that Caesars was aware of the relationships.

For these reasons, it was improper to resolve this claim on summary judgment.

b. The Unjust Enrichment Claim.

Caesars brought an unjust enrichment claim against Seibel and Green for allegedly benefiting from the relationships with vendors. (42 AA9072.) Summary judgment was improper on this claim—both as to Green and as to Seibel.

Starting with Green, Caesars did not show that he received and appreciated any benefit arising from the relationships with vendors. (35 AA7447.) Most importantly, he did not profit from the relationships—he merely worked as a consultant for Seibel and companies owned or controlled by Seibel. In turn, the Agreements for the Restaurants were between the Development Entities and Caesars—not Green and Caesars.

---

[35] Caesars asked the district court to presume harm rather than prove it. (25 AA7465.) However, "[a]n award of compensation cannot be based solely upon possibilities and speculative testimony." *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 424, 851 P.2d 423, 425 (1993).

Notwithstanding, the district court found that Green benefited from these relationships because his health insurance was funded by one of the companies to whom the payments were made by vendors. (42 AA9075.) But, Caesars made no showing that Green is the company's alter ego. The district court thus erred by disregarding the corporate fiction and finding that Green benefited simply because his principal benefited. *LFC Mktg. Group, Inc. v. Loomis*, 116 Nev. 896, 903-04, 8 P.3d 841, 846 (2000) (noting that the corporate veil is not lightly thrown aside in Nevada); *see also Hillcrest Invs., Ltd. v. Am. Borate Co.*, No. 2:15-cv-01613-RFB-GWF, 2016 U.S. Dist. LEXIS 135811, at *20-21 (D. Nev. Sep. 30, 2016) ("Plaintiffs have not cited and the Court is not aware of any legal authority that permits [unjust enrichment] claims based only on a transaction with an entity not party to the instant suit.").

Finally, Caesars did not show that Green has inequitably retained any benefit arising from the relationships with vendors that, under the circumstances, should be returned to Caesars. (*See also* 35 AA7447-48.) In fact, it contravenes Nevada law to hold him liable for payments that were made to others. *See Korte Constr. Co. v. State on Rel. of Bd. of Regents of Nevada Sys. of Higher Educ.*, 137 Nev. Adv. Op. 37, 492 P.3d 540, 544 (2021).

Turning to Seibel, similar issues plagued Caesars' unjust enrichment claim. Caesars admitted in discovery that it lacked evidence of money [redacted]

[redacted] (35 AA7448.) Moreover, Caesars did not show that it conferred a benefit upon Seibel, and nothing under the Agreements foreclosed him from having business relationships with vendors. Indeed, if Caesars wished to preclude the Development Entities' affiliates from engaging in business relationships with vendors that supplied products to the Restaurants, it could have said so in drafting the Agreements. Lastly, the payments did not go to Seibel, they went to companies that Caesars declined to sue. (*See also* 35 AA7448.)

For these reasons, it was improper to resolve this claim on summary judgment.

c. The Interference Claim.

Caesars brought a tortious interference claim against Seibel and Green for allegedly disrupting Caesars' relationships with the Development Entities. (42 AA9072.) Summary judgment was improper on this claim—legally and factually.

From a legal perspective, this claim should have failed for two main reasons. First, this claim is an iteration of Caesars' breach of the implied covenant of good faith and fair dealing claim against the Development Entities (discussed *infra*). By law, a breach of contract claim against a corporation cannot be transformed into an intentional interference claim against the corporation's agent. *See, e.g.*, *Holloway*

v. Skinner, 898 S.W.2d 793, 795 (Tex. 1995); *Alexander & Alexander Inc. v. B. Dixon Evander & Assocs., Inc.*, 650 A.2d 260, 269 (Md. Ct. App. 1994).

Second, this claim is premised on the argument that affiliates of the Development Entities could tortiously interfere with the Agreements. But, only a "stranger" to a contract can legally interfere with it. *See, e.g.*, *Waddell & Reed, Inc. v. United Investors Life Ins. Co.*, 875 So.2d 1143, 1157 (Ala. 2003); *Atlanta Market Ctr. Mgmt. Co. v. McLane*, 503 S.E.2d 278, 283 (Ga. 1998). Because Seibel and Green were agents of the Development Entities, Caesars could not sue them for tortious interference. *Alam v. Reno Hilton Corp.*, 819 F. Supp. 905, 911 (D. Nev. 1993)

From a factual perspective, Caesars failed to meet its burden of proof to secure summary judgment. For example, Caesars did not show that either Green or Seibel intended to act in a manner that was designed to disrupt Caesars' contractual relationships with the Development Entities. *See J.J. Indus., LLC v. Bennett*, 119 Nev. 269, 274, 71 P.3d 1264, 1267 (2003). For Green, he understood that Caesars was aware of the relationships (*see* 38 AA8192-93, 8268, 8271-72; 39 AA8320 at ¶5, 8336-39, 8343; 43 AA9126 at ¶9, 9150-51); for Seibel, he disclosed the relationships to Caesars (*see* 38 AA8161 at ¶6; 8209-11, 8215-16; 39 AA8285-87).

Similarly, Caesars did not show that it had a right to share in a percentage of the fees paid by vendors for marketing services. As noted above, the Agreements

do not prohibit business dealings between Seibel or companies that he owns or controls and vendors of the Restaurants.

Finally, Caesars failed to attach evidence showing that it would have (as opposed to could have) paid less for products from these vendors. Saying that it could have saved money, without more, does not make it so. *See, e.g.*, *Clark Cnty. Sch. Dist. v. Richardson Const., Inc.*, 123 Nev. 382, 397, 168 P.3d 87, 97 (2007).

For these reasons, it was improper to resolve this claim on summary judgment.

d. The Fraud Claim

Caesars brought a fraud claim against Seibel and Green for allegedly concealing their relationships with vendors from Caesars. (42 AA9072.) Summary judgment was improper on this claim for the following reasons.

First, this claim, like the tortious interference claim, is a disguised breach of contract claim. The purpose "behind the tort of fraudulent concealment" is not to turn "every breach of contract action [into] a claim for fraudulent misrepresentation when the defendant was aware that it was actively breaching the contract but remained silent." *Reno Tech. Ctr. 1, LLC. v. New Cingular Wireless PCS LLC*, No. 3:17-CV-00410-LRH-WGC, 2019 WL 507461, at *8 (D. Nev. Feb. 7, 2019). Like other courts that have addressed these circumstances in the past, the district court should have rejected Caesars' attempt to transform its breach of

contract claim into a fraud claim. *See, e.g.*, *Strum v. Exxon Co., USA*, 15 F.3d 327, 329 (4th Cir. 1994); *Kattawar v. Logistics & Distribution Servs.*, 111 F. Supp. 3d 838, 854-55 (W.D. Tenn. 2015); *CAMOFI Master LDC v. Coll. P'ship*, 452 F. Supp. 2d 462, 476 (S.D.N.Y. 2006).

Second, neither Seibel nor Green owed a fraud-based duty to disclose to Caesars. Contrary to the district court's finding (*see* 42 AA9077), no duty arose under the holding in *Villalon v. Bowen*[36] because Caesars knew about the relationships. At a minimum, it is a question of fact whether Caesars could have discovered the relationships through an "ordinary investigation." *See id.* at 468, 273 P.3d at 415.

Third, Caesars did not meet its burden of proof for this claim, because it did not show (i) that Green and Seibel withheld information from Caesars, (ii) that Green owed the same duty as Seibel despite the patent differences in their respective relationships with Caesars, (iii) that Green and Seibel misled Caesars about the relationships with vendors, (iv) that Caesars was unaware of the relationships, and (v) that Caesars suffered damages due to these relationships.[37]

---

[36] 70 Nev. 456, 273 P.2d 409 (1954).

[37] Because Caesars alleges that the same conduct amounts to a breach of the implied covenant of good faith and fair dealing, it lacks cognizable damages supporting its fraud claim. *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1538 (5th Cir. 1984).

By contrast, Seibel and Green set forth evidence showing (i) that Caesars was aware of the relationships and (ii) that the Agreements did not prohibit affiliates from doing business with the Restaurants' vendors.

For these reasons, it was improper to resolve this claim on summary judgment.

e. The Implied Covenant Claim.

Aside from bringing tort claims against Seibel and Green, Caesars brought an implied covenant of good faith and fair dealing claim against the Development Entities for allegedly permitting their affiliates to do business with the Restaurants' vendors. (42 AA9072.) Summary judgment was improper on this claim for the following reasons.

First, the Agreements do not contain clauses that prohibit the Development Entities from doing business with persons involved with the Restaurants absent sharing in the profits of those opportunities with Caesars. Such an omission was not due to a mere oversight; the parties (who were sophisticated and represented by counsel) affirmed, in writing, that they were not partners or joint venturers. (*See, e.g.*, 34 AA7288 at §13.1.)

Second, the claim defies logic because the Development Entities did not benefit from the relationships with vendors. If anything, the harm claimed by

Caesars (*i.e.*, failing to credit the payments from vendors toward the Restaurants' operating expenses prior to calculating net profits) would equally apply to them.

Finally, whether the Development Entities' actions amount to bad faith is a question of fact to be decided by the jury. *Hilton I*, 107 Nev. at 233, 808 P.2d at 923. Based on the evidence presented, the district court should not have reached the conclusion that the Development Entities needed to call the fact of Seibel's relationships with vendors to Caesars' attention. To the contrary, they could find comfort in knowing that Caesars was aware of them.

For these reasons, it was improper to resolve this claim on summary judgment.

D. The District Court Erred by Striking the Amended Counterclaims.

This Court conducts a de novo review of a district court's "interpretation of the Nevada Rules of Civil Procedure." *Lund v. Eighth Jud. Dist. Ct.*, 127 Nev. 358, 362, 255 P.3d 280, 283 (2011).

During discovery, Caesars amended its pleading in order to (i) assert a bevy of claims for coercive relief arising from a *different* fact pattern than that underlying its *three* claims for declaratory relief and (ii) add an additional defendant. (5 AA1101-47.) In response, the Development Entities amended their pleading in order to assert additional contract-based claims arising from the *same* fact pattern underlying the existing counterclaims and Caesars' declaratory relief

claims. (6 AA1231-81.) The Development Entities did nothing more than add more restaurants to this case; whereas Caesars suddenly sought damages based on new and distinct legal theories. By all accounts, the Development Entities' changes to their pleading were less drastic than those made by Caesars; at a minimum, their changes were proportional.

The district court struck the Amended Counterclaims. (13 AA2626-39.) When doing so, the district court misapplied NRCP 16 and ignored federal authority addressing a defendant's right to file amended counterclaims in response to an amended complaint. (*See id.*) Those issues, in reverse order, are addressed below.

1. This Court Should Adopt the Moderate Approach to Evaluating the Scope of Amended Counterclaims That a Defendant May Assert as a Matter of Right in Response to an Amended Complaint.

This Court has not addressed whether and how a defendant may assert amended counterclaims as a matter of right in response to an amended complaint. As a result, federal case law is "strong persuasive authority" on the issue. *See Exec. Mgmt. Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002).

Federal courts have, with near unanimity, held that a defendant may assert amended counterclaims, as a matter of right, in response to an amended complaint where the amended complaint changes the theory or scope of the case. *See, e.g.*, *Poly-Med, Inc. v. Novus Sci. Pte Ltd.*, Civil Action No. 8:15-cv-01964-JMC, 2017

WL 2874715, at *2 (D.S.C. July 6, 2017); *UDAP Indus. v. Bushwacker Backpack & Supply Co.*, No. CV 16-27-BU-JCL, 2017 WL1653260, at *2-3 (D. Mont. May 2, 2017); *Va. Innovation Scis. Inc. v. Samsung Elecs. Co.*, 11 F. Supp. 3d 622, 632-33 (E.D. Va. 2014); *Hydro Eng'g, Inc. v. Petter Invs., Inc.*, No. 2:11-cv-00139-RJS-EJF, 2013 WL 1194732, at *2-3 (D. Utah Mar. 22, 2013); *Elite Entm't, Inc. v. Khela Bros. Entm't*, 227 F.R.D. 444, 446 (E.D. Va. 2005); *Uniroyal Chem. Co. v. Syngenta Crop Prot., Inc.*, No. 3:02-CV-02253-AHN, 2005 WL 677806, at *2-3 (D. Conn. Mar. 23, 2005).

These decisions are based on equity and fairness—*i.e.*, if a plaintiff is granted leave to expand the scope of the case through an amended complaint, a defendant should be afforded the same privilege through an amended counterclaim. *See, e.g.*, *Va. Innovation Scis. Inc.*, 11 F. Supp. 3d at 632-33; *Deutsch v. Health Ins. Plan*, 573 F. Supp. 1443, 1445 (S.D.N.Y. 1983); *Tralon Corp. v. Cedarapids, Inc.*, 966 F. Supp. 812, 832 (N.D. Iowa 1997). "The underlying premise to this approach is 'what is good for the goose is good for the gander.'" *Uniroyal Chem. Co.*, No. 3:02-CV-02253-AHN, 2005 WL 677806, at *2.

The overwhelmingly "predominant [approach] in the case law"—labeled the "moderate" approach—holds that a defendant may file amended counterclaims in response to an amended complaint as a matter of right "when the amended complaint changes the theory or scope of the case" so long as the "the breadth of

the changes in the amended [counterclaims] … reflect the breadth of the changes in the amended complaint." *Elite Entm't, Inc.*, 227 F.R.D. at 446. The breadth requirement "is one of proportionality"; it "does not require the changes to [the amended counterclaims] to be directly tied [or tailored] to the changes in the amended complaint." *Va. Innovation Scis. Inc.*, 11 F. Supp. 3d at 633; *accord Poly-Med, Inc.*, Civil Action No. 8:15-cv-01964-JMC, 2017 WL 2874715, at *2; *UDAP Indus.*, No. CV 16-27-BU-JCL, 2017 WL1653260, at *3.

The moderate approach appropriately balances equity and fairness with the interests of district courts in managing their dockets. It also limits changes in amended counterclaims to only those that are proportional in scope (or less drastic) to those changes in the amended complaint.

For these reasons, this Court should adopt the moderate approach.

2. The District Court Misapplied the Moderate Approach.

The district court stated that even if it were to have applied the moderate approach, "the Development Entities' counterclaims would not be permitted because the breadth of the changes in their Amended Counterclaims do not reflect the breadth of the changes in Caesars' First Amended Complaint (*i.e.*, the alleged kick-back scheme)." (13 AA2633.) The district court further held that the First Amended Complaint "did not open the door for the Development Entities to

expand the scope of the litigation." (13 AA2634.) The district court erred in its application of the moderate approach.

As noted above, the moderate approach does not require the changes to an amended counterclaim to relate to the same subject matter as the amended complaint. *See, e.g.*, *Va. Innovation Scis. Inc.*, 11 F. Supp. 3d at 633. Thus, while Caesars added the Marketing Claims, which were separate and distinct from the Termination Claims, nothing required the Development Entities' Amended Counterclaims to arise from the same fact pattern or subject matter as the Marketing Claims. Instead, the Amended Counterclaims were proper so long as they did not *disproportionately* impact the scope of this case. *See, e.g.*, *UDAP Indus.*, No. CV 16-27-BU-JCL, 2017 WL1653260, at *3.

Under the moderate approach, the Development Entities were allowed to file their Amended Counterclaims as a matter of right because the breadth of their changes was *minor* when compared with the breadth of Caesars' changes. For example, Caesars substantially increased both the theory and scope of this case by asserting five new claims and adding a new defendant. By contrast, the Development Entities based their Amended Counterclaims on the same facts and legal theories previously asserted by them, whether in their defenses to Caesars' declaratory relief claims and/or their initial counterclaims.

Moreover, unlike Caesars' First Amended Complaint, the Amended Counterclaims required virtually no additional discovery. The parties conducted extensive discovery on matters surrounding Caesars' termination of the Agreements. (*See* 7 AA1467-93.) The only additional discovery needed was financial data for two New Ventures (*i.e.*, GR Steak AC and GR Steak KC).

Equally important, the Development Entities—including the Moti/TPOV Parties (who did not previously assert counterclaims)—were arguably required to assert all compulsory counterclaims based on Caesars' assertion of coercive claims for relief. Under the "declaratory judgment exception" to the doctrine of claim preclusion—which this Court has adopted—a party responding to a claim solely for declaratory relief is not required to assert compulsory counterclaims under NRCP 13(a) and may instead assert such claims in a subsequent action (subject to any issue-preclusive effects of the declaratory judgment). *See Boca Park Martketplace Syndications Group, LLC v. Higco, Inc.*, 133 Nev. 923, 927, 407 P.3d 761, 765 (2017). However, where a party asserts a coercive claim for relief in addition or in response to a claim for declaratory relief, the exception no longer applies—*i.e.*, the party responding to the coercive claim for relief must assert all compulsory counterclaims under NRCP 13(a). *See, e.g.*, *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 600 F.3d 190, 197 (2d Cir. 2010).

Here, when Caesars filed its initial Complaint only seeking declaratory relief, none of the Development Entities had to assert counterclaims under NRCP 13(a). *Marketplace Syndications Group, LLC*, 133 Nev. at 927, 407 P.3d at 765. However, once Caesars asserted coercive claims for relief, the Development Entities were arguably required to assert all compulsory counterclaims under NRCP 13(a). *See Duane Reade, Inc.*, 600 F.3d at 197. It was error for the district court to preclude them from doing so.

In sum, because the Amended Counterclaims were, *minimally*, proportional to the breadth of the changes in the First Amended Complaint, the Development Entities were entitled to assert them as a matter of right. *Va. Innovation Scis. Inc.*, 11 F. Supp. 3d at 632-33.

3. The District Court Erroneously Applied a Rule 16 Analysis.

If amended counterclaims are proportional (or less drastic), then defendants may file them as a matter of right in response to a plaintiff's amended complaint—other requirements (e.g., NRCP 15 and 16) are inapplicable. *See, e.g.*, *Hydro Eng'g, Inc. v. Petter Investments, Inc.*, 2:11-CV-00139-RJS, 2013 WL 1194732, at *4 (D. Utah Mar. 22, 2013); *Spellbound Dev. Grp., Inc. v. Pac. Handy Cutter, Inc.*, No. SACV 09-951 DOC ANX, 2011 WL 1810961, at *2 (C.D. Cal. May 12, 2011); *Sierra Dev. Co. v. Chartwell Advisory Grp. Ltd.*, No. 13:cv-00602 BEN (VPC), 2016 WL 6828200, at *2-3.

Here, when evaluating the Amended Counterclaims, the district court required the Development Entities to demonstrate good cause for filing them under NRCP 16. (13 AA2633-34.) That was in error.

Initially, the district court's reliance on *Nutton v. Sunset Station* was misplaced. (*See id.*) There, the Court of Appeals analyzed the interplay between NRCP 15(a), which governs amendments of pleadings, and NRCP 16(b), which governs scheduling orders. 131 Nev. 279, 285-86, 357 P.3d 966, 971 (Ct. App. 2015). The *Nutton* Court held that where a party seeks leave to amend its pleading after the deadline to amend has passed, it must demonstrate good cause, under NRCP 16(b), for the failure to seek leave before the deadline expired, in addition to meeting the amendment requirements under NRCP 15(a). *Id.*

Here, unlike in *Nutton*, the district court had already determined that the pleadings could be amended when it allowed Caesars to increase the scope of this case after the deadline to amend had passed. (5 AA1088-92.) Once the district court elected to give Caesars leave to amend, it could not equitably deny the Development Entities the same privilege. *See, e.g.*, *Va. Innovation Scis. Inc.*, 11 F. Supp. 3d at 632-33; *Uniroyal Chem. Co.*, No. 3:02-CV-02253-AHN, 2005 WL 677806, at *1-3. Because the requirements of NRCP 15 and 16 were inapplicable, it was error for the district court to impose them upon the Development Entities as justification for filing their Amended Counterclaims.

In sum, this Court should find that the Development Entities were allowed to file their Amended Counterclaims, as a matter of right, in response to Caesars' First Amended Complaint. *Spellbound Dev. Group, Inc.*, No. SACV 09-951 DOC ANX, 2011 WL 1810961, at *2.

E. This Court Should Reassign this Case Upon Remand.

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

Here, the judge will have substantial difficultly disregarding the views expressed in the MSJ Orders, including his view as to Seibel's credibility, and ignoring the improper factual findings set forth in the MSJ Orders, including his belief that Caesars had unbridled, unfettered authority to terminate the Agreements. Further, the judge's pretrial rulings call into question his ability to

remain impartial – e.g., the district court refused to permit the LLTQ/FERG Parties leave to amend their pleading but allowed Caesars to do so (*compare* 4 AA759-62 *with* 5 AA1088-92); and, the district court refused to permit the Development Entities to re-depose Caesars after it filed its First Amended Complaint but allowed Caesars to re-depose Green (*see* 13 AA2657-64). The inconsistency in those pretrial rulings is inexplicable.

For these reasons, random reassignment of this case upon remand is warranted.

VIII. CONCLUSION

This Court should vacate the Initial and Subsequent MSJ Orders and reverse and remand this matter with instructions for the district court to deny the MSJs. In addition, this Court should instruct the district court to vacate its order striking the Amended Counterclaims and direct Caesars to respond to them.

DATED this 27th day of September, 2023.

BAILEY❖KENNEDY

By: /s/ Joshua P. Gilmore
JOHN R. BAILEY
DENNIS L. KENNEDY
JOSHUA P. GILMORE
PAUL C. WILLIAMS
Attorneys for Appellants

NRAP 28.2 CERTIFICATE OF COMPLIANCE

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

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

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

[x] Proportionally spaced, has a typeface of 14 points or more, and contains 13,996 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 27th day of September, 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 27th day of September, 2023, service of the Opening Brief was made by electronic service through the Nevada Supreme Court's electronic filing system, electronic service through the Eighth Judicial District Court's electronic filing system, hand delivery, and/or by email as agreed by the parties, and addressed to the following at their last known email address:

JAMES J. PISANELLI — Email: JJP@pisanellibice.com
DEBRA L. SPINELLI — DLS@pisanellibice.com
M. MAGALI MERCERA — MMM@pisanellibice.com
PISANELLI BICE PLLC — *Attorneys for Respondents*
400 South 7th Street, Suite 300
Las Vegas, NV 89101

/s/ Susan Russo
Employee of BAILEY❖KENNEDY