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

APPENDIX OF EXHIBITS TO APPELLANT'S OPENING BRIEF

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APPENDIX OF EXHIBITS TO APPELLANTS' OPENING BRIEF

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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 foregoing was made by mandatory electronic service through the Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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/s/ Susan Russo
Employee of BAILEY❖KENNEDY

TAB 60

CASE NO. A-17-751759-B

DOCKET U

DEPT. XVI

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

ROWEN SEIBEL,

Plaintiff,

vs.

PHWLV LLC,

Defendant.

REPORTER'S TRANSCRIPT
OF
MOTION

(TELEPHONIC HEARING)

BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

DISTRICT COURT JUDGE

DATED WEDNESDAY, MAY 20, 2020

REPORTED BY: PEGGY ISOM, RMR, NV CCR #541

APPEARANCES:

FOR THE PLAINTIFF:

(PURSUANT TO ADMINISTRATIVE ORDER 20-10, ALL MATTERS IN DEPARTMENT 16 ARE BEING HEARD VIA TELEPHONIC APPEARANCE)

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BY: JOHN BAILEY, ESQ.

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* * * * *

LAS VEGAS, NEVADA; WEDNESDAY, MAY 20, 2020

11:48 A.M.

P R O C E E D I N G S

* * * * * * *

09:47:45

THE COURT: All right. Good morning. We have the last matter on calendar, and that's Rowen Seibel vs. PHWLV LLC, et al.

Let's go ahead and place our appearances on the record. We'll start first with the plaintiff and move on to the defense.

MR. BAILEY: Good morning, and almost good afternoon. Your Honor, this is John Bailey, Josh Gilmore, and Paul Williams from Bailey Kennedy on behalf of Mr. Seibel, Mr. Green, and the development entities.

THE COURT: All right. Do we have Mr. Pisanelli?

THE COURT CLERK: There are three people mooted. Maybe *4?

THE COURT: Can we *4. Somebody -- I think three people are mooted right now.

MS. MERCERA: Good morning, your Honor. This is Magali Mercera on behalf of the Desert Palace Inc., Paris Las Vegas Operating Company, PHWLV, and the

11:48:23

11:48:39

11:48:57

11:49:07

Boardwalk Regency Corporation.

THE COURT: Thank you, ma'am.

MS. WATKINS: Good morning, your Honor. This is Brittnie Watkins.

THE COURT: Can you state your name again because it's a little muffled.

MS. WATKINS: Yes. This is Brittnie Watkins also on behalf of the Caesars entities.

THE COURT: Thank you, ma'am.

Anyone else?

MR. PISANELLI: Your Honor, this is James Pisanelli. I made my appearance. I'm not sure you heard me.

THE COURT: I can hear you now, sir. All right.

MR. PISANELLI: Okay. Thank you, your Honor. I'm here on behalf of the Caesars entities as well.

THE COURT: Thank you, sir.

And let's go ahead and deal specifically with the motion to dismiss Counts Four, Five, Six, Seven, and Eight of Caesars' first amended complaint.

MR. GILMORE: Thank you, your Honor. Again, this is Joshua Gilmore on behalf of Mr. Seibel, Mr. Green, and the collectively referring to as the development entities. Please stop me any time if you

have trouble hearing me.

This is our motion to dismiss the first amended complaint that was filed a couple of months ago by the Caesars entities. (indiscernible) atypical to see a motion to dismiss this far along in the midst of the case. Your Honor, of course, probably knows the case better than our office. (telephonic audio drop) plaintiffs months ago. We understand it.

Furthermore, (indiscernible) in this case has arisen from a decision made by Caesars, one of the largest gaming companies, back in 2016 determining that a series of contracts that it had with various entities that were previously owned here, whole or in part, by Mr. Seibel. Those entities being the development that we've referred to.

Discovery has really centered around focused on that decision and what comes from it. And from our perspective really there's a central issue. Whether Caesars may continue to operate these various restaurants that, setting aside the recent COVID-19 closures, have by all accounts been very successful and very profitable. Being able to continue to enjoy the benefits of those restaurants that derive from these contracts without being inconvenienced by their burden, that being either as to continue to remit the profits

that arise from those restaurants due to the development entities or buy out the development entities' interest in those restaurants. Not just take the money and keep it for himself while continuing to operate the restaurant.

So that's -- that, what we perceive, has really been the central issue and continues to be the central issue.

There's been a (indiscernible) reason we believe on Caesars' part to look at other conduct and take away from that issue at what gives rise to this first amended complaint that is focused on rebates that were being received by nonparty entities, I'm going to refer to them as, today, nonparty entities Caesars chose not to name or join as defendants in this action.

The arguments that were made in the past that aren't really in front of you today but made before was, Well, we didn't know about this until discovery got going and we had a chance to take different depositions.

We didn't agree with that. We think the evidence shows they were aware of it. Be that as it may, we would grant the file this first amended complaint. And if these claims are allowed to proceed past the pleading stage and into discovery, it's going

11:53:23 to change the landscape of this case. And the reason why I say that is Caesars initially filed declaratory relief claims and in a sense that Judge Hardy can have a disagreement over their (indiscernible) contracts, 11:53:38 seek some guidance from you. Hear our opposition as I respond.

Counterclaims are permissive in a declaratory relief action but not necessarily mandatory.

But now, we have Caesars adding permanent 11:53:54 claims for relief seeking damages looking to couple those with the declaratory relief claims. And if those claims go forward, it may then compel the filing of what now might be compulsory counterclaims where in the past they would have been permissive.

11:54:13 The declaratory relief claims and the facts surrounding those, it's not before you today. So really you can ignore, you don't have to focus on the bulk of the first amended complaint.

Counts Four through Eight rise from the 11:54:30 allegations that appear starting on page 36 of Caesars' first amended complaint and end on page 37. Those are paragraphs 134 to 141.

Those are the allegations that then (indiscernible) to support Counts Four through Eight 11:54:50 that were added to (telephonic audio drop). So that's

11:54:54 where briefing focused on, and that's where my argument here this morning will focus as well.

For our brief we went through each claim to describe why that claim can't survive 12(b)(5) 11:55:10 (telephonic audio drop) that pertain to Mr. Seibel and it pertains to Mr. Green with one exception. All of these newly asserted claims were brought against those two individuals.

Caesars strategically decided to sue those two 11:55:28 individuals for the bulk of these claims rather than other parties or other entities (telephonic audio drop) may or may not believe should be on the other side.

But so we are focused on the claims that Caesars has brought against those two entities, those 11:55:45 two individuals as well as the new claim that's been filed against the development entities. I'd like to highlight the arguments that we've made with regard to dismissal on each of those claims and then, of course, answering any questions that your Honor has.

11:56:03 So the first -- the first claim that Caesars added to their first amended complaint is for civil conspiracy.

Caesars alleges that Mr. Seibel, Mr. Green conspired to engage in what they dub commercial bribery 11:56:20 to Caesars' detriment. Now we point out in our reply

11:56:24 brief that as an aside (indiscernible) fact pattern here it's got a lot of cells. But it's really irrelevant. It's a legal conclusion. But even if you were to consider the definition of commercial bribery 11:56:35 in Nevada law, it just doesn't apply.

In any event, we had raised a doctrine that is appropriately brought before any court, your Honor, or any other judge on a motion to dismiss based on a civil conspiracy claim. That is what is known as the 11:56:54 intracorporate conspiracy doctrine.

We pointed out in our reply brief that Caesars has taken this very tact in the past when it has responded to a complaint alleging that one or more affiliates or subsidiaries of Caesars and its auditors 11:57:12 and directors has engaged in some sort of conspiracy. So we have filed before you today a motion to dismiss the conspiracy claims appearing in the first amended complaint based on the intracorporate conspiracy doctrine.

11:57:29 And that comes out of the Kollins case. Basically said if you have anything impacting the actual principles you can't then accuse that agency of engaging in some sort of conspiracy. The laws flowing from that doctrine is entities can only act (telephonic 11:57:47 audio drop).

11:57:48 We have here if you look at pages 36 and 37, amended complaint. The allegations that I mentioned that give rise to their claims, what we see is Caesars alleging that Mr. Seibel is acting on behalf of these
11:58:05 nonparties entities. The names specifically identified in paragraph 137 of the first amended complaint. And we have Caesars alleging that Mr. Green was acting on (telephonic audio drop) Mr. Seibel, who again acting on behalf of the nonparty entity.

11:58:24 So from the face of the complaint it is easy to see that Caesars is suing agents of an entity saying you engaged in a conspiracy. It falls smack within the contours and realm of the intracorporate conspiracy doctrine.

11:58:42 Caesars did not have to sue the unnamed entities. So as we pointed out in our reply, by making any sort of necessary indispensable argument, what we're saying is you can't sue the agents of the entities who you claim geared these rebates from the
11:59:03 vendors. Just doesn't work.

Under Nevada law, and recognize for extended period of time, the intracorporate conspiracy doctrine bars this exact claim.

Now, any opposition we see in the footnote
11:59:17 that maybe Mr. Green and Mr. Seibel were actually

11:59:22 acting from their individual would have been, we think that's how discovery is going to shake out.

Well, that's great, but discovery has already occurred. You claim discovery gave rise to new claims 11:59:35 in the first place. You can't come in here and take the position that, well, we think the evidence will bear that these two agents were actually acting for their individual advantage, not on behalf of the principles for whom they are working. We look at the 11:59:53 allegations here in the complaint. Readily admit that these rebates were secured and paid to those nonparty entities.

Final point is that, it's a point I'll raise in the other points here as well, is we don't have an 12:00:11 alter ego theory of liability being asserted by (telephonic audio drop) in the first amended complaint, and we see them allude to that in their opposition. But the focus is on this complaint, this operative document. There is nothing that requires this Court to 12:00:29 disregard the corporate form and assume that the money paid to these two nonparty entities should be treated as flowing directly to Mr. Seibel and Mr. Green.

We have no facts on which your Honor can take that leap. There's nothing to allow your Honor to 12:00:49 infer that. So as a result, nothing gets them around

12:00:51 the intracorporate conspiracy doctrine. So the conspiracy claim that is brought against these two agents for acts committed on behalf of the principals have to be dismissed.

12:01:05 The second claim that they've added, your Honor, which is Count Five, the most curious one to us, is a claim for the breach of the implied covenant of good faith and fair dealing. That the premise here is that the development entities had their agents forego

12:01:24 disclosing rebates on costs of goods sold to Caesars to Caesars' detriment.

Now we point out in the briefing, we don't have any allegations here from Caesars saying we would have paid less for this product. But setting that

12:01:39 aside, and I like to think (indiscernible) for us, and we raised it in the motion and reply, why this claim makes no sense as it pertains to the development entities, and I say that because the development entities are sharing in the profits from these

12:01:55 restaurants.

So if there's an ability for expenses to go down, that, of course, in turn, would drive up profit benefits the development entities.

So the only logic here would be that the

12:02:09 development entities did this out of spite. That, of

course, is not an inference that's fairly drawn in the first amended complaint.

Again, we have the Caesars parties alleging that these acts were done for the benefit of nonparty entities. So Caesars' allegations say that this was being done for other entities, not on behalf of the development entities.

So by definition, if the conduct is not being committed by the development, you can't come in here and say, Well, even though you didn't do this, we think you breached the implied covenant of good faith and fair dealing. That doesn't fit.

The only way to get around that is for your Honor to trace the acts committed by the nonparty entity as being acts committed by the development entities. Again, an alter ego theory where we would treat the development entities as being synonymous with the nonparty entities. But the acts committed on behalf of the nonparty entity should be attributed to and treated as acts that were admitted on behalf of the development entity.

But we can't do that. Your Honor shouldn't do that. The corporate forum, as we talk about in our reply, is respected here in Nevada. We don't have any allegation suggesting alter ego.

12:03:40 As an aside, I'm sure Mr. Ramsey's counsel, his client is 50/50 partners with Mr. Seibel on this GR Burger would take issue with having acts committed by these nonparty entities being attributed to GR Burger. 12:03:56 The point being is that these are separate entities. They're not alleged to be involved in the operations of the restaurant.

You can't attribute acts by other entities to the development entity. And without that, (telephonic 12:04:12 audio drop).

The third new claim, your Honor, is Caesars' claim for unjust enrichment. The allegation here is that Mr. Seibel and Mr. Green were unjustly enriched by the rebates received from the vendor.

12:04:28 Now, as a preliminary matter Caesars equivocates in terms of whether Mr. Green actually received any money from the vendors.

And I would point to paragraph 10 of the introductory to their operative pleading where they 12:04:46 say, Upon information and belief Mr. Green received some of the money. In other words we don't actually know, but we are going to sue him anyway. But if we actually get into the allegations that we see on paragraph -- on pages 36 and 37, Caesars says, These 12:05:04 rebates went to these entities.

12:05:07 Now, unjust enrichment, of course, is premised on the idea that someone received something which in equity and good conscious he should not retain. We know here from Caesars' operative pleading that the 12:05:21 money went to these nonparty entities. Not to Mr. Seibel. Not to Mr. Green. That that racks up any suggestion that Mr. Seibel and Mr. Green unjustly enriched by those rebates. I can't speak to why Caesars did not bring this claim against the nonparty. 12:05:42 They brought it against Mr. Seibel and Mr. Green.

These issues (indiscernible) beat a dead horse too much, but, again, you cannot treat Mr. Seibel and Mr. Green as being synonymous with the nonparty entity. The corporate forum needs to be respected. As a result 12:06:04 the allegations themselves show that neither Mr. Seibel nor Mr. Green were unjustly enriched. That those allegations, the unjust enrichment claim has to be (telephonic audio drop).

(Reporter clarification)

12:06:15 THE COURT: -- has to be dismissed.

MR. GILMORE: The fourth claim that Caesars has is a claim for intentional interference with contract. Caesars alleges that Mr. Seibel and Mr. Green interfered with the contract between Caesars 12:06:31 and the development entities. As we set forth in our

12:06:35 motion, your Honor, and then citing from additional case law in our reply, this claim falls squarely within what is called the stranger doctrine. It's a world recognized in a majority of jurisdictions that
12:06:51 basically tells us someone who may not be a signatory but who is still involved with the contract as a party cannot be accused of interfering in the contract of the parties' obligations under the contract.

In order to sue somebody, that person needs to
12:07:08 be a stranger to the economic relationship underlying the contract in order to be exposed to a tortious interference claim. That doctrine fits that fact pattern directly. We have Caesars accusing the contracts parties of breach and then accusing the
12:07:26 agents of those contracted parties of intentional interference with those contracts.

And as we point out in our reply in particular that theory would turn every breach of contract case into an intentional interference case. And the lies
12:07:42 would equally be true to the officers and directors of Caesar directed termination the contract at issue in this matter, and the conduct leading up to and following the decision.

That's not the rule that should be adopted or
12:08:01 followed here. It's not the rule that we recognize in

12:08:04 a majority of the jurisdictions, not a minority as was argued in the opposition.

Although it's not informally adopted to our knowledge here, given that it's the majority rule, we 12:08:18 believe it would be adopted if the Nevada Supreme Court is formally asked to do so.

As a practical matter in our eyes it would be the intracorporate conspiracy doctrine. It would be inconsistent to say that an employee could not conspire 12:08:33 with his principal to harm a third party, but that same employee could tortiously interfere with its principal's contract to harm that same third party. Because the intracorporate conspiracy doctrine is well recognized in Nevada, to the extent the Nevada Supreme 12:08:49 Court has not formally adopted the stranger doctrine, in all likelihood it would do so because it would be consistent with its jurisprudence dealing with these types of claims.

For that reason, your Honor, we believe and 12:09:01 we've argued that Count Seven should be dismissed.

The final count in Caesars' first amended complaint is for fraudulent concealment. Caesars alleges that Mr. Seibel and Mr. Green owed a duty to disclose these rebates to Caesars.

12:09:21 Now, the problem here is that Caesars' claim

presupposes that such a duty existed and was created by virtue of the contracts that were entered into between Caesars and the development entities.

And we know the Dow Chemical case that that duty to disclose is an essential element to this claim. And we argued either standard commercial contracts. They specifically say it's neither a partnership nor a joint venture that's being created between the parties.

Also your Honor is presented with a question. Is there a duty to disclose these facts that may be imparted upon Mr. Seibel and Mr. Green to support Caesars' fraudulent concealment claim.

The answer is no such duty arises. And that comes right out of the Dow Chemical case that we cite in our motion and our reply.

I want to point out in particular a quote from that case which I think is very apt and applies to exactly what we're dealing with here. We already had an existing contractual relationship between entities to various contracts, and Caesars is trying to impose a heightened duty rising from a special relationship they claim exists between principals of one side to the contract and the other contracting party.

In the Dow Chemical case the Nevada Supreme Court said even when the parties are dealing at arm's

length, a duty to disclose may arise from the existence of material facts peculiarly within the knowledge of parties sought to be (telephonic audio drop) and not within the fair and reasonable reach of the other party.

Now that quote is taken from a case from a Nevada Supreme Court decision issued back in 1954.

So it's been the law here quite some time. In that case, the Nevada Supreme Court said that rule about the information really being securely within the knowledge of one side may be heightened if there is a false impression that it's been deliberately created by the party ought to be charged. And that Nevada case is Villalon vs. Bowen, 70 Nevada 456, 273 P.2d 409.

So with those legal principles in mind, we look here at the first amended complaint and say, Do we have allegations from Caesars saying that this information was purely within the knowledge of Mr. Seibel and Mr. Green and not something within its fair and reasonable reach?

In other words was Caesars somehow precluded from speaking to its vendor finding out are we getting the best price for this product, or please disclose to us all the terms that may arise from or around our relationship and the product that we're buying to you.

12:12:24 We don't deal with allegations because it wouldn't be -- Caesars couldn't allege that they were at the mercy of Mr. Seibel and Mr. Green to negotiate with these vendors. These are vendors for Caesars. 12:12:37 They have a relationship with them.

Caesars is not in a position to say we are not able to speak to these vendors now if there are any terms of which we are not familiar.

Further, in going to that Villalon case, we 12:12:56 don't have allegations that Mr. Seibel or Mr. Green affirmatively mislead about rebates.

His claiming they're (telephonic audio drop) so, your Honor, without those allegations that would -- that would potentially support, at least perhaps at a 12:13:12 motion to dismiss stage, a duty to disclose arising from some sort of special relationship between Mr. Seibel and Mr. Green on one hand and Caesars on the other hand, you have no duty. And thus the fraudulent concealment claims survive without being an essential 12:13:33 element of (telephonic audio drop).

Your Honor, if you have nothing else, that's all for me.

THE COURT: Okay.

MR. GILMORE: -- respond to arguments.

12:13:40 THE COURT: I understand. I do have a couple

of questions for you. And understand this. This is a 12(b)(5) motion. And number one, as a trial judge I'm charged with liberally construing the pleadings. You understand that; right?

MR. GILMORE: Yes, your Honor.

THE COURT: Okay. And just as important too, a complaint will not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff could prove no set of facts, which, if accepted by the trier of fact, would entitle them to relief. You understand that too?

MR. GILMORE: I do, your Honor.

THE COURT: Okay. And so my question is this, and then after I ask -- after this question we can move on. I'll hear what Caesars has to say on this issue.

But we were talking about the intracorporate conspiracy doctrine in this matter. And I know they raise one issue and, I guess, it depends on who benefits. But when I look at paragraph 34 of the -- I'm sorry, paragraph 134 of the first amended complaint, and starting out at line 7, and this is on page 36, it provides as follows:

"but not limited to Innis and Gunn and Pat LaFrieda, meat purveyors, LaFrieda entered into an agreement whereby Innis and Gunn and

LaFrieda would pay a percentage to Mr. Green, Mr. Seibel, and/or Seibel affiliate entities for product Caesars purchased for various restaurants."

12:15:22 And the reason why I ask that question there and I framed it in such a way, if, for example, they were paying directly to Mr. Green, based upon a liberal construction of the pleading, the first amended complaint, under those facts, if he's acting in his own 12:15:45 pecuniary interest would the intracorporate conspiracy doctrine apply to the facts of this case?

MR. GILMORE: So the answer to that, your Honor, is paragraph 134. If that is all you were (telephonic audio drop) I could understand why it would 12:16:03 give you pause at the motion to dismiss stage, just based on that paragraph. But we have to look at the entirety of the pleading that is in front of you here today.

And I would draw your attention to, for 12:16:19 example, to paragraph N of the first amended complaint appears on page 4. The second line starts out with: "Upon information and belief, Mr. Green also receives sums from Caesars vendors." So there we're equivocating in a sense as opposed to definitively 12:16:38 alleging that this money was paid to him.

12:16:40 We then go back to the page 36 that you're looking. You see paragraph 137.

The kickbacks were set up to be paid to other entities owned by Mr. Seibel. Including, but not 12:16:53 limited to BR23 Venture LLC and Future Star Hospitality Consulting LLC. So I submit to your Honor that when we look at the entirety of the pleading that is in front of you, we have some very general language in paragraph 134 which we know to take with a grain of 12:17:16 salt based on paragraph 10. But then paragraph 137 is specific, answers the precise question that you're asking. How do I know where the money went? Caesars says BR23 Venture LLC, Future Star Hospitality Consulting LLC.

12:17:35 THE COURT: Well, here's my question. As a follow up, aren't you asking me to weigh and balance the allegations as set forth in the complaint? Because, for example, if you look at page 36, there's a leading paragraph, upper case E.

12:17:52 Which provides, this is the very top of the entry in this whole area. It says: "Mr. Seibel, Mr. Green, and the Seibel affiliated entities were engaged in a kickback scheme."

Right? And so when I look at that, I mean, I 12:18:12 don't -- I can't pick and choose which provisions of

the complaint I should rely upon. I rely upon all of them to come to some sort of determination as to -- after reviewing the complaint for failure to state a claim upon which relief can be granted. It appears beyond a doubt that plaintiff could not prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief.

My point is this. We don't know what the facts are right now as it relates to these specific allegations as set forth in the complaint.

You could be 100 percent right where there might be no evidence that, for example, Mr. Green or Mr. Seibel acted on their own pecuniary interest or received monies or some sort of benefit. It all went to the business entities. Then maybe that might be the appropriate way to rule based upon a summary judgment motion.

But for now --

MR. GILMORE: And I think -- sorry. Go ahead, your Honor.

THE COURT: No, go ahead.

MR. GILMORE: Your Honor, your comments are certainly well taken. And if your Honor is inclined to say, look, on the conspiracy claim because it's unclear based on the allegation that we have in front of me

where the money is going to, that I have to deny that (indiscernible) claim without prejudice until we actually see where the money goes.

The problem we would submit, though, is we, of course, are working from the documents that we have here. You know, this isn't a document that was filed at the outset before Caesars could say to you we were not able to do discovery to know. This claim was brought after discovery, after Caesars came to you and said we've done the discovery.

So with that, while this case is not in a position as it might normally be, we're here looking at a motion to dismiss brought within a couple of months after. So I certainly would respect whatever decision you make, your Honor. But I would submit here because Caesars has done the discovery and was far more specific in paragraph 137 they should be held to and bound by what they've alleged (telephonic audio drop.)

THE COURT: Okay. I get that. But once again, this is a 12(b)(5) motion. And, for example, as it relates to the covenant of good faith and fair dealing, on counts -- I think it's Count Five, I took a look at the complaint. And then I have paragraph 180 on page 43. What do I do with that? I don't want to read it entirely into the record, but it says --

12:20:49 specifically sets forth the allegation that there was a breach of the covenant of good faith and fair dealings based upon wrongfully soliciting, coercing, agreeing to accept, and accepting a benefit from vendors.

12:21:06 And my question is this: It seems to me under the Butch Lewis case, I can kind of get why potentially that claim for relief was set forth in the complaint. Because in any contract, you have a contractual duty or responsibility of good faith and fair dealings, which

12:21:30 is my understanding, and that's why I asked that.

And so I'm looking here. And at the end of the day my task is very simple. Based upon the complaint, does it meet the requirement of 12(b)(5)?

MR. GILMORE: Understood, your Honor. And the

12:21:47 response we have and the reason why we brought this motion is the way we see the allegations being plead using nonparty entities of soliciting and securing these debts. That's the end of it of the implied covenant claim. So your Honor's point to Caesars,

12:22:07 well, maybe it was actually done for and to the benefit to the development entities, then I certainly understand where you're coming from. We are working from the pleading which on its face appears to suggest that the money went to other entities.

12:22:23 And, again, logically it wouldn't -- at least

from our perspective, you can infer at this point why would the development entity divert money that would increase their profitability?

So you are correct that we are looking at this from the perspective of 12(b)(5). And our argument, we submit, your Honor, is these allegations you can come to the conclusion now that the money is going elsewhere and logically wouldn't benefit Seibel entities to engage in this alleged scheme that then factor the (indiscernible) is not a claim against the development.

THE COURT: Thank you, sir. Anything else?

MR. GILMORE: Nothing for me, your Honor, reserving the right to respond to argument.

THE COURT: Absolutely. We'll hear from Caesars.

MR. PISANELLI: Thank you. Good afternoon, your Honor. James Pisanelli for the Caesars entities.

Your Honor, I've learned a long time ago that it is a dangerous pursuit to talk your way out of a victory so to speak. And I hear a lot of your concerns. I share them. We, obviously, briefed them in the same manner your Honor has been pointing out.

So if your Honor is already prepared based upon what you've read, based upon what you've heard from counsel to deny this motion, I won't take up any

more of your time.

If you want to hear more debate, of course, I'm prepared to do that.

THE COURT: Well, and I understand that, Mr. Pisanelli. And my point is this: When I get 12(b)(5) motions, one of the -- one of my charge responsibilities would be essentially this: Not just review the points and authorities, but take -- I take a clear look at the pleadings as it relates to this case it would be the first amended complaint.

And then I accept the allegations as set forth in the complaint, you know, as being -- you know, I'm required to liberally construe them and essentially accept them as true, and say to myself under any set -- under any set of facts upon which this claim for relief could be granted. And that's about the end of it.

Because I can't weigh and balance. And as you are probably well aware, lawyers plead in the alternative all the time. You know, and so it -- inherently you have inconsistencies from time to time as far as general pleadings to set forth in the complaint is concerned because sometimes you just --

MR. PISANELLI: That's correct.

THE COURT: -- don't know what the facts are. And that was my point when I reviewed it just to make

12:25:06 sure I understood what was going on. And that's why I asked counsel questions.

But I don't want to -- I don't want to cut you off. Is there anything else you want to place on the 12:25:14 record? If not, we'll hear from the -- hear from the adverse party in this matter, the plaintiff. Then I'll make a decision.

MR. PISANELLI: Well, I assume you'd like to hear our point. Otherwise, you know, as I said I'll 12:25:30 shut up if your Honor is already prepared to rule having already heard from them. I let your Honor cut me off whenever you're heard enough. How about that?

So --

THE COURT: You can -- you can -- you can make 12:25:42 it brief.

MR. PISANELLI: I'll do my best.

So the challenge here, of course, in responding to this motion is twofold. One is to put our claims at issue in context with the actual history 12:26:00 of this case, not the rewritten by one Mr. Seibel and his counsel. And the allegation that attempt to hold Mr. Seibel and Mr. Green to account for, you know, what we already know from discovery and what we already know from the very words of his own lawyers add up to be the 12:26:19 facts from this case.

Now, the second charge, of course, is to conduct, as your Honor always does, a clinical analysis of the claims. Look at the standards for each claim. Filter the actual allegation through lens of the standards. And when we do both of those things, I think we see a very clear picture emerge here that Mr. Seibel has been playing his partners as fools for years until his past finally caught up with him. And his past has been exposed in this litigation. And now caught in that game in attempting to play this Court as well with alternative facts in order to dodge responsibility for the scams.

You know, to simply say casually, the jig is up. It's time for Mr. Seibel and Mr. Green to be held accountable to answer for what they've done.

So, you know, charge one, what is this? Well, what do we know about this? We know from the pleadings and the discovery that Mr. Seibel is a convicted felon having defrauded the United States government. You know, we know that he then defrauded Caesars by keeping his felony a secret before entering into these contracts, and certainly not disclosing them later. When he was exposed, we know that he tried to defraud Caesars again with fraudulent assignment and trusts that he and his wife and his lawyers control.

12:27:44 It's not the first time an unsuitable person tried that ruse with the gaming licensee. And now we know from some of the discovery and because of what his lawyers have said to your Honor in this Court, that 12:27:58 he's been defrauding Caesars and his other partner, Mr. Ramsey, with a secret kickback and extortion scheme with some of the vendors.

What we hear in this motion, if it is this dancing-between-raindrops approach from new counsel, 12:28:16 his sixth, is that he is excused from all of this bad behavior because he was laundering the money through an LLC.

I mean, when you really boil it all down to all of these different theories, that's what he's 12:28:34 actually arguing to your Honor despite the very clear allegations in the complaint that he personally was benefiting, that Mr. Green personally was benefiting, that they were personally conspiring with the vendors, personally conspiring with one another.

12:28:53 They fall back time and time again to say, Wait a minute. We have to honor the corporate entities because these guys laundered their money through an LLC, and, therefore, they are exempt from liability for all of these claims. Thankfully, nothing under the law 12:29:10 gives them a safe harbor that they try to argue for.

So that's what we know. We know what they were doing. They admitted that they're doing it. Their lawyer admitted what they were doing to you on the record in this case. And we know that the law provides no shelter because they used an LLC to filter, to funnel, and to launder the money that they were getting turning this kickback into a commercial bribery scheme.

So let's do the clinical analysis just for a few minutes. And first I feel compelled to have to clarify the terms we're using here.

Mr. Seibel and his counsel seem to take offense reference to the kickback and commercial bribery portion and they actually, you know, we -- we got a kick out of this one in our office. They've actually using the phrase of rebate program.

Now we know we go to Black's Law Dictionary or any case anywhere is going to tell us a rebate is a method of discount where money is given back to the payor, the payor. Mr. Seibel wasn't the payor. He wasn't getting a rebate. He was getting a kickback. He was getting a kickback for anything that us, Caesars, the development entities, were paying these vendors. They were secretly, through extortion of threats, getting a secret kickback that otherwise by

12:30:39 contract and law was supposed to be going to the development entities to reduce their costs.

So I don't think you were distracted or fooled for one minute by this, this phraseology of rebate, but 12:30:55 it's important for the record to show that the concept rebate has no place in this debate because Mr. Seibel was not a payor of the services. He was the extortioner of the services.

So what do we know? And these claims I'll be 12:31:10 as quick as I can. Intracorporate corporate conspiracy. In other words you can't conspire with yourself. This other case that talks about, you know, a person can't be claimed to have conspired with his arm that fired the weapon.

12:31:25 That concept has no place factually or legally in this debate. That is somewhat factual. Defendants ignore the complaint actual allegations. We don't say that Seibel conspired with his LLCs. We allege something very different. That he and Green were 12:31:44 personally conspiring with each other to the detriment of Caesars, and that they personally were conspiring with the vendors personally. Not through the entities, not through the LLCs, personally.

And your Honor has already hit upon some of 12:32:03 the most important allegations (indiscernible)

12:32:07 including paragraph 134. We cited, but you have picked up on it. Mr. Green and Mr. Seibel, we write, and the Seibel entities on the one hand and certain Caesars vendors on the other, including the entities that your 12:32:20 Honor has cited, enter into an agreement. These were the kickback agreements. This isn't an intracorporate conspiracy. These are guys, as we said in paragraph 138, Mr. Green acting on behalf of Mr. Seibel, not the development entities, not their 12:32:37 laundering LLCs. Mr. Seibel and Mr. Green promised the vendors they'd become preferred if they would give them kickbacks.

Paragraph 139, acting on behalf of Mr. Seibel, Mr. Green coerced Innis and Gunn to establish a 12:32:55 15 percent retroactive kickback.

Paragraph 140, Mr. Seibel admitted to secretly receiving a percentage, approximately 5 percent of the free sales to Caesars restaurants. I have pages and pages of additional allegations including 173 12:33:16 through -- 172 through 174 where we are very specific in our allegations that Mr. Seibel and Mr. Green "knowingly acted in concert with vendors". That's from paragraph 172. That's not an intracorporate conspiracy. That's not a person conspiring with their 12:33:37 arm that held the weapon.

12:33:39 These are two guys acting on their -- on behalf in an illegal scheme to take money from the venders that otherwise would have benefited Caesars. That's very clear. The intracorporate conspiracy
12:33:53 doctrine has no place in this debate.

The concept of the breach of the implied covenant of good faith and fair dealing, your Honor, has already hit the nail on the head. The obligation of good faith, of course, is the standard under the
12:34:11 law. So also as we have cited, a standard under the contracts of what they're obligated to do. So the fact that they claim that this could not apply to them is necessarily ignoring the allegations in particular paragraph 180 as you have described.

12:34:32 Now, the unjust enrichment claim we found very interesting. Again, this was Mr. Seibel hiding behind his own bad acts. This is -- this is where the concept really comes out and so (indiscernible). He says because I laundered my money through an LLC, you can't
12:34:56 hold me liable for unjust enrichment. And that's -- that's as absurd as anything I can imagine until both at paragraph -- page 10 of the reply brief.

And, again, this afternoon in the argument counsel doubles down and says that it makes no sense
12:35:16 for Mr. Seibel and Mr. Green to have received

12:35:20 personally kickbacks from these vendors because it was in their best interests as participants in the development agreement to make sure that the development agreement was as profitable as possible.

12:35:32 I'm stunned by that argument that Mr. Seibel would think that no one can see through how illogical it is. Did they really think this through? Mr. Seibel is getting 100 percent of the kickback, and they say it's illogical that he'd want to put the kickback into 12:35:49 the company where he would only get a fraction of that value.

Well, I don't understand how they think the common sense works on the (indiscernible). He is stealing money from the company. He's keeping 12:36:03 100 percent of it. When it goes through the company, he gets a fraction of it. That is his incentive.

It doesn't have to be spite. It has to be greed. And that's what it was. And that's what we've alleged. The unjust enrichment paragraphs in 12:36:18 paragraph -- allegations, excuse me -- paragraph 185 to 188 couldn't be clearer.

Paragraph 186 Mr. Green and Mr. Seibel accepted, appreciated, and retained those benefits. Period. That's the allegation. There isn't anything 12:36:35 in here that says that they -- that they were not

directing the kickback scheme and the fraud or doing anything in here that says that the LLC have been created to laundry their money at the heart of all this.

Simply because they were running the money through this didn't change who they were and what they were doing. They were working on their own personal behalf.

What counsel from Mr. Seibel seems to forget is that his predecessor counsel actually admitted to your Honor in open court when trying to oppose our motion for leave amend. You recall, your Honor, in February 12 Mr. Brooks specifically said to you that the documents show Mr. Seibel receiving 5 percent of the proceeds of the sale. He didn't talk about on Mr. Seibel's LLC or any intracorporate conspiracy doctrine, and that's a piece he specifically said "this would be total owed to Rowen Seibel per LaFrieda. $107,000-plus. Total paid to Rowen Seibel, he said, $57,000 and change."

Their own counsel on the record admitted that Mr. Seibel was personally benefiting. Yet, this new motion comes in with an entirely new theory as if none of us have been in this case and none of us know what the evidence already shows and what the lawyers have

12:38:07 already said.

And in connection with intentional interference, the stranger rule, again, this has -- another misplaced -- the stranger rule if it were 12:38:22 applied in Nevada, and it's not adopted in Nevada, but this is an important point. Even if it was, stranger rule is defined to have two parties with an executory contract, one of them -- you know, we'll use the law school example. One of them is supposed to sell White 12:38:41 Acre to the other. And he doesn't sell it. And so, you know, the other party to the contract says that you have interfered with my rights by not giving me White Acre. Well, no, that's not how the law works. You're both parties to the contract. It's a contract dispute.

12:38:56 That has nothing to do with what's going on. These are guys working in their personal interest to try to undermine agreements that Caesars already had. This isn't the stranger rule. They are worth -- because we have alleged -- and as I've just quoted, and 12:39:13 there is many more I can quote to you, including from paragraphs 192 through 196, because we have alleged that they are working in their individual personal interests against those of any party to a contract, the stranger rule has no place in this debate. And it 12:39:32 certainly, once again, offers no shelter to Mr. Seibel

12:39:37 or Mr. Green for their kickback scheme.

And on the fraudulent concealment, I'll just say this. We have alleged in paragraph 43 that they had contract obligations of disclosure. And in 12:39:53 paragraph 44, and these obligations were very specific. They were required to maintain high ethical standards in conducting business. They were required to update suitability disclosures which included what type of behavior they're involved in. And they had a 12:40:15 contractual obligation to ensure that all credits and rebates, if we're going to use their words, receive some sponsors and vendors, this is from the contract itself, in connection with the services shall be a credit against an operating expense.

12:40:30 It is incredible to hear Mr. Seibel say that while the contract specifically required disclosure, physically required to making sure financial credits remain, that they had no obligation to disclose that they could secretly get money from this operation 12:40:50 through kickbacks and through extortion and duress and had no duty to disclose. I invite that summary judgment motion when and if it comes. It certainly has no place in a debate now on Rule 12.

And, again, just for the record the 12:41:06 allegations about the duties to disclose, where they

12:41:10 come from, don't belong in a contract. Failures to disclose factually are found throughout paragraphs 200 to 204 and again in paragraphs 42 through 44.

I've taken more time than I should have. And 12:41:28 I apologize, your Honor. I kind of get on a role when I start talking about these things. But this has been an amazing exercise in dealing with the revolving door of counsel that have been in this action for Mr. Seibel.

12:41:42 We suspect every time, because we deal with every one of them on a one-on-one basis, that Mr. Seibel deceives his own lawyers. It's amazing how often we have to educate his lawyers on what the truth is because they come to the table with something short 12:41:58 of a full transparent exposure of what really happens here.

This motion suggests to us that, unfortunately, the sixth law firm isn't getting the full picture from Mr. Seibel either. And that's why, 12:42:08 you know, I take this moment to point out not only his bad behavior in dealing with Caesars but the admissions that we've got from his own lawyers on the record that Mr. Seibel now is trying to rewrite and erase from the history of this case.

12:42:26 This complaint hits upon every element of

every one of these complaints on multiple occasions. The arguments that have been offered to you in this motion are straw men respectfully that not consistent and what we're actually pleading, not consistent with what this case is really about, and so certainly having nothing to do with this fraudulent kickback and extortion scheme that Mr. Seibel is involved in that are at the heart of these new claims.

So we would ask your Honor to deny the motion in its entirety. And let's get back to work in finishing up the discovery in this case.

THE COURT: Thank you, sir.

MR. GILMORE: Your Honor.

THE COURT: Yes, sir.

MR. GILMORE: Thank you. Big picture point and I'll address some of just (telephonic audio drop). Sorry. At the end there, Mr. Pisanelli's reference to the revolving door of counsel. I think everybody is aware why the last firm had to withdraw. And that's the untimely death of lead counsel for Mr. Seibel. Unless the inference is going to go drawn that that is somehow caused by this case, and I don't think it is, that is certainly beyond everybody's (indiscernible) what I anticipated and certainly was not done in some way to then cause our firm (telephonic audio drop)

12:43:52 getting things or argue anything different.

Now, we hear a lot today and see in the brief it's certainly not short of rhetoric on Caesars part, which we know is necessary to try to drive the

12:44:07 narrative.

I wrote down the different phrases we heard here today: Kickback, extortion, bribery, illegal, stole, greed, and the newest one which we didn't see in the opposition, money laundering.

12:44:24 And if I didn't know, I'd think this is a criminal case. I'm arguing against the DA because we're hearing a lot of charges that illegal conduct, money laundering, extortion. This is a civil case. All of those legal conclusions mean nothing. They are

12:44:45 only intended to try to plague the decision. I know your Honor won't be. But, of course, I'm compelled to have to say something about them as we tried to say in the brief.

But that's certainly not new or unique to this

12:44:56 hearing. We've seen it as we're getting up to speed on this that it's something that permeates all of (indiscernible) that we see. And certainly no lack of the rhetoric. But the point is you can't use passion. I don't deny that Caesars is passionate about their

12:45:14 position. But that passion can't excuse some very

12:45:19 technical but significant fault with these claims.

The other big point I'd like to make is the story here, as they like to tell it, stops the day they terminated the contract. They like to talk about what
12:45:34 happened up until that. But that is not where the story ends. The story continues as we pointed out that Caesars continues to operate this restaurant, continues to thrive from restaurants that were conceived not by Caesars, but by the development entities.

12:45:51 And that, of course, is something that they never want to happen. They will at some point, but the point is this, the attempts here to use rhetoric and sell a larger story that is unrelated to these claims is improper.

12:46:09 Now, we heard a lot today, several times, referencing you to allegations that fall under specific counts. Yes, Caesars did a good job citing elements of each claim. But we know that doesn't carry the day even if you're looking at motion under the eighth --
12:46:31 Rule 8 standard rather than under Rule 9. That's why I pointed your Honor to paragraph 36 and 37 of the first amended complaint.

Those are the paragraphs that (indiscernible) not Caesars ability to follow the elements of each
12:46:50 claim and say, Well, yeah, we said what we're supposed

12:46:53 to say to get us passed the 12(b)(5) motion.

So the operative allegations come from pages 36 and 37, paragraph 134 to 144. And that's why my argument, your Honor, was focused on those 12:47:10 paragraphs, and what we derive and glean from those paragraphs.

Now just a couple of quick points, your Honor, on these -- on the claims themselves. We have several claims here brought by Caesars. And a couple of them, 12:47:26 well several, hearing in the argument today, Why are you to disregard the corporate veil? We heard Mr. Seibel is simply laundering money through these entities. That is argument of counsel. It is not supported by factual allegations from this complaint.

12:47:46 Caesars could have included those types of allegations. They didn't. They did not choose to plead an alter ego theory of liability. And that is particularly significant as it pertains to the development entities.

12:48:01 We're looking at Mr. Seibel and Mr. Green individually. We're looking at the development entities, and then we're looking at the nonparty entities that receive the rebates according to paragraph 137. And we cannot read them synonymously.

12:48:20 Now, your Honor said this and I agree.

12:48:21 Parties are allowed to plead alternative theories of liability. That's true. But parties can't plead alternate facts trying to then use discovery to figure out which fact pattern was accurate.

12:48:35 And then thinking about the comments, your Honor, that you made a little bit earlier. Looking again at paragraphs 134 to 144, what we have is alternate facts. We have Caesars pleading the money going every which way, and they did that so that they

12:48:54 can now say, Your Honor, we get all of these claims past the 12(b)(5) (telephonic audio drop) can't plead alternate facts especially after discovery has been conducted. And we hear it argued at length today. We've done the discovery. Got to do the discovery.

12:49:10 So as I mentioned earlier, we don't have a plaintiff in the position of saying, you know, Judge, this case is just getting started. I haven't even seen the disclosure. I don't know what the documents look like. That's not this case.

12:49:23 Mr. Seibel has been deposed. Mr. Green has been deposed. Documents have been exchanged. Either it is well equipped to know what the facts are so as to come in here and plead inconsistent facts to try to stick several claims related to these rebate as

12:49:41 improper. I would submit, your Honor, that even if you

have difficulty dismissing all of these claims, because they were required inconsistent fact patterns to survive, some have to go at the expense of others.

Now I'll say, for example, the fraudulent concealment claim. If we are going to allege that these entities breached the implied covenant of good faith and fair dealing, the development breached the implied covenant of good faith and fair dealing by not disclosing the rebates, well, that is not a fraud claim. And, again, anybody could make the argument. You have a disclosure obligation under the contract. So we're going to sue the contracting party for breach. And then we're going to sue the principal of that contracting party for fraudulent concealment.

Caesars argues without citing cases in their brief that they can do that. No, you can't. Again, every contract case would become a fraud case. So if your Honor looks and says, you know, the implied covenant claim, I have trouble at 12(b)(5) dismissing that, then perhaps this is benefit to the development. And we respectfully disagree but appreciate your reasoning behind it.

And I would submit the intentional interference claim can stand. And the same logic would be true, your Honor, on the unjust enrichment. For to

allege that the development entities are behind all of it, those -- that's what Caesars wants to stand by. Then to accuse these two individuals of unjust enrichment, based on argument that the money was laundered, something we don't even have in the complaint, then -- then fault perhaps as it is alleged lies with the development. It does not lie with these two individuals. Caesars can't plead inconsistent facts to try to get all of these claims at the 12(b)(5) motion.

Any other questions, your Honor? Otherwise I'll (telephonic audio drop.)

THE COURT: No other questions, sir. And thank you.

Anyway, I've had a chance to review the points and authorities on file herein. And I just want to remind everyone that this is a 12(b)(5) motion. It's not a summary judgment motion. I do understand what my role is as a trial judge under the present posture of the procedural nature of this matter.

And I'm going to rule after reviewing the complaint on file herein and the moving papers that the first amended complaint as it currently stands on file herein withstands a Rule 12(b)(5) challenge. And, consequently, I'm going to deny the motion to dismiss

12:52:38 the first amended complaint.

Just one final comment as far as that's concerned and understand I thought about this, and I listened to the argument of counsel. But I can't rule 12:52:46 as a matter of law, for example, that if the breach of the covenant of good faith and fair dealings as implied in all contracts in the state of Nevada would be mutually exclusive of a fraudulent concealment claim. You can't do that. You can potentially have a breach 12:53:03 of the covenant of good faith and fair dealing and fraud, fraudulent concealment.

And this case is unique in its nature in light of the fact that Caesars is a gaming entity. I understand that. When you conduct business with gaming 12:53:18 entities, there is different obligations and the like, and they have obligations also to protect their gaming license. I understand that aspect of it.

But at the end of the day, my decision is real simple. The first amended complaint as set forth and 12:53:34 on file in this matter shall stand its Rule 12(b)(5) challenge.

And, Mr. Pisanelli, can you prepare an order for me, sir?

MR. PISANELLI: Certainly will, your Honor.

12:53:45 THE COURT: And when you prepare it, you can

submit it to adverse counsel. If you can't agree, submit competing orders.

Everyone, enjoy your day and enjoy your lunch.

THE COURT: Oh, yeah, I'm sorry. We have one more --

MR. PISANELLI: Thank you.

THE COURT: Wait, wait. Hold it, hold it, hold it. We do have one more matter. And that's the -- let me make sure I get this -- status check, outstanding discovery other than depositions. Do we need to address that today or?

MS. MERCERA: Yes, your Honor. This is Magali Mercera on behalf of the Caesars entities. At the last time check the Court indicated that (indiscernible) and motion practice. We were unable to come it an agreement.

THE COURT: And, ma'am.

MS. MERCERA: I have --

THE COURT: Can you -- I don't want to hold you -- I don't want to stop you, but we don't have the visual cues. And my court reporter couldn't hear you. So can you go ahead and set forth that again for the record?

MS. MERCERA: Sure. Of course, can you hear me clearly?

12:54:48 THE COURT: We can hear you better now.

MS. MERCERA: Okay. Perfect. As I said my name is Magali Mercera on behalf of the Caesars parties.

12:54:57 During our last status check the Court directed us to meet and confer on some outstanding discovery issues that we brought to the Court's attention. We have conferred earlier this week, and we were -- we're still working through a few issues that

12:55:11 hopefully we can come to an agreement on without court intervention. But there are a few that we will be bringing via motion practice to this Court within short order.

THE COURT: Okay. Does anyone else want to

12:55:25 add to that?

MR. GILMORE: This is Joshua Gilmore, your Honor. Nothing to add to that. I want to follow up on your decision to deny the motion to amend.

We will go ahead, of course, and prepare an

12:55:39 omnibus answer on behalf of all the parties that we represent. Our preference too would be to include the counterclaim within that same operative pleading. From what we see there are several different pleadings outstanding. And, of course, counterclaims in the past

12:55:59 were permissive and they came in response to the

12:56:03 declaratory relief claims that Caesars filed at different points in time.

Our preference is to do an omnibus consolidated answer and counterclaim so that on our 12:56:14 side -- and I think it would be economic and makes sense for the other party, just have one operative pleading from which all the parties are working from.

So I again I want to raise that to your attention now and not (indiscernible) to the other 12:56:29 side.

And the other part of it and I want to, you know, hear your Honor's thoughts now. We can certainly address it after we file that document. Declaratory relief claims generally don't compel the filing of 12:56:46 compulsive counterclaim. Because it's at times an efficient means to come in and get guidance from the Court on what are the rights and obligations of the parties.

We may be in a position now that Caesars has 12:57:00 added affirmative claims for relief to be compelled to file what would have been permissive counterclaims before that may now be considered compulsory counterclaims. And so I want to bring that to your Honor's attention. Actually, I want to bring that to 12:57:15 everybody's attention now so it doesn't come as a

surprise. But in light of the decision filing affirmative claims for relief, we believe that may trigger now an obligation to file counterclaims that may not have been filed before.

MR. PISANELLI: So, your Honor, this is James Pisanelli. I'll say just two things. On the idea of an omnibus pleading it's hard to have an opinion in advance before I see it. Obviously, we are always in support of anything that will make the matter more efficient. But, you know, I'm only concerned about the clarity on who is asserting what claim, and what defense, and what response. But we'll take that up once we see the pleading.

I only say this. I don't have to agree or disagree with Mr. Gilmore about permissive counterclaims or compulsory that relate to declaratory judgments, but I don't think he's right. But today is not the day for that debate.

I do think that vetting up is an excuse for Mr. Seibel with new counsel to bring new claims into the case years into the case and now falling back on the excuse that they've only now just become compulsory. So we'll take that up when we see it.

If they're adding in new claims that are too late and beyond the cutoff for amendments, then we'll

bring that to your attention to either strike them or dismiss them, whatever the appropriate procedural mechanism will be. But I have a feeling that's what's afoot here and we'll wait to see this response before we take any action. I just don't want our silence to anything he just said to be taken as a concession that this is (indiscernible).

THE COURT: All right. Is there anything else? I'll leave this as my final comment. Do what you feel is in the best interests of your client.

MR. PISANELLI: Fair enough, your Honor. Thank you.

THE COURT: That's all I can do.

MS. MERCERA: Thank you, your Honor.

MR. GILMORE: Thank you, your Honor. Will do. Thank you so much, your Honor.

THE COURT: Okay. Everyone enjoy your lunch.

MR. PISANELLI: You as well.

(Proceedings were concluded.)

* * * * * * * * *

REPORTER'S CERTIFICATE

STATE OF NEVADA)
:SS
COUNTY OF CLARK)

I, PEGGY ISOM, CERTIFIED SHORTHAND REPORTER DO HEREBY CERTIFY THAT I TOOK DOWN IN STENOTYPE ALL OF THE TELEPHONIC PROCEEDINGS HAD IN THE BEFORE-ENTITLED MATTER AT THE TIME AND PLACE INDICATED, AND THAT THEREAFTER SAID STENOTYPE NOTES WERE TRANSCRIBED INTO TYPEWRITING AT AND UNDER MY DIRECTION AND SUPERVISION AND THE FOREGOING TRANSCRIPT CONSTITUTES A FULL, TRUE AND ACCURATE RECORD TO THE BEST OF MY ABILITY OF THE PROCEEDINGS HAD.

IN WITNESS WHEREOF, I HAVE HEREUNTO SUBSCRIBED MY NAME IN MY OFFICE IN THE COUNTY OF CLARK, STATE OF NEVADA.

_____
PEGGY ISOM, RMR, CCR 541

TAB 61

Electronically Filed
6/18/2020 2:22 PM
Steven D. Grierson
CLERK OF THE COURT

ARJT

DISTRICT COURT

CLARK COUNTY, NEVADA

ROWEN SEIBEL, an individual and citizen of New York, derivatively on behalf of Real Party in Interest GR BURGR LLC, a Delaware limited liability company, Plaintiff, -vs- PHWLV, LLC, a Nevada limited liability company; GORDON RAMSAY, an individual; DOES I through X; ROE CORPORATIONS I through X, Defendants. and GR BURGR LLC, a Delaware limited liability company, Nominal Plaintiff. AND ALL RELATED MATTERS	Case No. A-17-751759-B Dept No. XVI CONSOLIDATED WITH Case No.: A-17-760537-B

HEARING DATE(S) ENTERED IN ODYSSEY

6th AMENDED ORDER SETTING CIVIL JURY TRIAL, PRE-TRIAL, CALENDAR CALL, AND DEADLINES FOR MOTIONS; AMENDED DISCOVERY SCHEDULING ORDER CALL

Pursuant to the June 10, 2020 hearing on Craig Green's Motion to Extend Discovery Deadlines on OST, the Discovery Deadlines and Trial dates are hereby amended as follows:

IT IS HEREBY ORDERED that the parties will comply with the following deadlines:

Motions to amend pleadings or add parties	Closed
Close of Fact Discovery	Closed

Designation of experts pursuant to NRCP 16.1(a)(2)	Closed
Designation of rebuttal experts pursuant to NRCP 16.1(a)(2)	Closed
Discovery Cut Off	October 19, 2020
Dispositive Motions	November 18, 2020
Motions in Limine	January 4, 2021

IT IS HEREBY ORDERED THAT:

A. The above entitled case is set to be tried to a jury on a **five week stack** to begin **February 22, 2021 at 9:30 a.m.**

B. Pre-Trial Conference/Calendar Call will be held on **February 11, 2021 at 10:30 a.m.**

C. Parties are to appear on **November 4, 2020 at 9:00a.m.,** for a Status Check re Trial Readiness.

D. The Pre-Trial Memorandum must be filed no later than **Febarury 18, 2021,** with a courtesy copy delivered to Department XVI. All parties, (Attorneys and parties in proper person) **MUST** comply with **All REQUIREMENTS** of EDCR 2.67, 2.68 and 2.69. Counsel should include in the Memorandum an identification of orders on all motions in limine or motions for partial summary judgment previously made, a summary of any anticipated legal issues remaining, a brief summary of the opinions to be offered by any witness to be called to offer opinion testimony as well as any objections to the opinion testimony.

E. All motions in limine to exclude or admit evidence must be in writing and filed no later than **January 4, 2021. Orders shortening time will not be signed except in extreme emergencies**.

F. Unless otherwise directed by the court, all pretrial disclosures pursuant to N.R.C.P. 16.1(a)(3) must be made at least 30 days before trial.

G. All original depositions anticipated to be used in any manner during the trial must be delivered to the clerk prior to the firm trial date given at Calendar Call. If deposition testimony is anticipated to be used in lieu of live testimony, a designation (by page/line citation) of the portions of the testimony to be offered must be filed and served by facsimile or hand, two (2) judicial days prior to the firm trial date. Any objections or counterdesignations (by page/line citation) of testimony must be filed and served by facsimile or hand, one (1) judicial day prior to the firm trial date. Counsel shall advise the clerk prior to publication.

H. In accordance with EDCR 2.67, counsel shall meet, review, and discuss exhibits. All exhibits must comply with EDCR 2.27. Two (2) sets must be three-hole punched placed in three ring binders along with the exhibit list. The sets must be delivered to the clerk two days prior to the firm trial date. Any demonstrative exhibits including exemplars anticipated to be used must be disclosed prior to the calendar call. Pursuant to EDCR 2.68, counsel shall be prepared to stipulate or make specific objections to individual proposed exhibits. Unless otherwise agreed to by the parties, demonstrative exhibits are marked for identification but not admitted into evidence.

I. In accordance with EDCR 2.67, counsel shall meet, review, and discuss items to be included in the Jury Notebook. Pursuant to EDCR 2.68, counsel shall be prepared to stipulate or make specific objections to items to be included in the Jury Notebook.

J. In accordance with EDCR 2.67, counsel shall meet and discuss preinstructions to the jury, jury instructions, special interrogatories, if requested, and verdict forms. Each side shall provide the Court, two (2) judicial days prior to the firm trial date given at Calendar Call, an agreed set of jury instructions and proposed form of verdict along with any additional proposed jury instructions with an electronic copy in Word format.

Failure of the designated trial attorney or any party appearing in proper person to appear for any court appearances or to comply with this Order shall result in any of the following: (1) dismissal of the action (2) default judgment; (3) monetary sanctions; (4) vacation of trial date; and/or any other appropriate remedy or sanction.

Counsel is asked to notify the Court Reporter at least two (2) weeks in advance if they are going to require daily copies of the transcripts of this trial or real time court reporting. Failure to do so may result in a delay in the production of the transcripts or the availability of real time court reporting.

Counsel is required to advise the Court immediately when the case settles or is otherwise resolved prior to trial. A stipulation which terminates a case by dismissal shall also indicate whether a Scheduling Order has been filed and, if a trial date has been set, the date of that trial. A copy should be given to Chambers.

DATED: June 18, 2020.

Timothy C. Williams, District Court Judge

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CERTIFICATE OF SERVICE

I hereby certify that on the date filed, a copy of the foregoing Amended Order Setting Civil Jury Trial, Pre-Trial/Calendar Call was electronically served, pursuant to N.E.F.C.R. Rule 9, to all registered parties in the Eighth Judicial District Court Electronic Filing Program as follows:

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/s/ Lynn Berkheimer

Lynn Berkheimer, Judicial Executive Assistant

TAB 62

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants,

And

GR BURGR LLC, a Delaware limited liability company,

Nominal Plaintiffs.

AND ALL RELATED CLAIMS.

Case No. A-17-751759-B
Dept. No. XVI

Consolidated with A-17-760537-B

THE DEVELOPMENT ENTITIES, ROWEN SEIBEL, AND CRAIG GREEN'S ANSWER TO CAESARS' FIRST AMENDED COMPLAINT AND COUNTERCLAIMS

JURY TRIAL DEMANDED

ANSWER

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 ("RSG"), derivatively on behalf of DNT Acquisition LLC ("DNT") (collectively, the "Development Entities"); Rowen Seibel ("Seibel"); and Craig Green ("Green") hereby Answer the claims asserted by Desert Palace Inc. ("Caesars Palace"), Paris Las Vegas Operating Company, LLC ("Paris"), PHWLV, LLC ("Planet Hollywood"), and Boardwalk Regency Corporation d/b/a Caesars Atlantic City ("CAC") (collectively, "Caesars") in their First Amended Complaint filed on March 11, 2020 (the "FAC"), as follows:

PRELIMINARY STATEMENT

1. Answering paragraph 1, the Development Entities, Seibel, and Green admit that Caesars entered into multiple agreements with entities previously owned by, managed by or affiliated with Seibel, and that Caesars requested and received "Business Information Forms" from Seibel at the outset of the MOTI and DNT business relationships. The Development Entities, Seibel, and Green further state that the agreements and "Business Information Forms" speak for themselves; to the extent that the allegations contradict or are inconsistent with the agreements or "Business Information Forms," the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green deny any remaining allegations.

2. Answering paragraph 2, the Development Entities, Seibel, and Green deny the allegations.

3. Answering paragraph 3, the Development Entities, Seibel, and Green admit that on April 18, 2016, Seibel pled guilty to one count of a corrupt endeavor to obstruct and impede the due administration of the Internal Revenue Laws under 26 U.S.C. § 7212, which is a class E felony, and served one month in prison. The Development Entities, Seibel, and Green deny any remaining allegations.

4. Answering paragraph 4, the Development Entities, Seibel, and Green deny the allegations.

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5. Answering paragraph 5, the Development Entities, Seibel, and Green admit that Caesars wrongfully terminated the agreements. The Development Entities, Seibel, and Green further state that the agreements speak for themselves; to the extent that the allegations contradict or are inconsistent with the agreements, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that they are without knowledge or information sufficient to form a belief as to the truth of the allegation that "Caesars only learned about Mr. Seibel's felony conviction from press reports four months after he pleaded guilty." The Development Entities, Seibel, and Green deny any remaining allegations.

6. Answering paragraph 6, the Development Entities, Seibel, and Green admit that Caesars wrongfully terminated the agreements and that the Development Entities and Seibel have initiated legal proceedings relating to the termination of the agreements. The Development Entities, Seibel, and Green further state that paragraph 6 otherwise contains legal conclusions rather than factual allegations, and, therefore, the rest of paragraph 6 requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

7. Answering paragraph 7, the Development Entities, Seibel, and Green state that paragraph 7 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

8. Answering paragraph 8, the Development Entities, Seibel, and Green state that paragraph 8 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

9. Answering paragraph 9, the Development Entities, Seibel, and Green state that paragraph 9 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

10. Answering paragraph 10, the Development Entities, Seibel, and Green state that paragraph 10 contains legal conclusions rather than factual allegations, and, therefore, requires no

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response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

11. Answering paragraph 11, the Development Entities, Seibel, and Green state that paragraph 11 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

PARTIES, JURISDICTION, AND VENUE

12. Answering paragraph 12, the Development Entities, Seibel, and Green state they are without knowledge or information sufficient to form a belief as to the truth of the allegations.

13. Answering paragraph 13, the Development Entities, Seibel, and Green state they are without knowledge or information sufficient to form a belief as to the truth of the allegations.

14. Answering paragraph 14, the Development Entities, Seibel, and Green state they are without knowledge or information sufficient to form a belief as to the truth of the allegations.

15. Answering paragraph 15, the Development Entities, Seibel, and Green state they are without knowledge or information sufficient to form a belief as to the truth of the allegations.

16. Answering paragraph 16, the Development Entities, Seibel, and Green deny that Seibel regularly travels to and conducts business in Nevada. The Development Entities, Seibel, and Green admit any remaining allegations.

17. Answering paragraph 17, the Development Entities, Seibel, and Green deny that Green regularly travels to and conducts business in Nevada. The Development Entities, Seibel, and Green admit any remaining allegations.

18. Answering paragraph 18, the Development Entities, Seibel, and Green admit that MOTI is a New York limited liability company. The Development Entities, Seibel, and Green further state that the MOTI Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the MOTI Agreement, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green deny any remaining allegations.

19. Answering paragraph 19, the Development Entities, Seibel, and Green admit that MOTI 16 is a Delaware limited liability company and that the rights of MOTI under the MOTI

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Agreement were assigned to MOTI 16. The Development Entities, Seibel, and Green further state that the remaining allegations are legal conclusions rather than factual allegations, and, therefore, require no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

20. Answering paragraph 20, the Development Entities, Seibel, and Green admit that DNT is a Delaware limited liability company. The Development Entities, Seibel, and Green further state that the DNT Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the DNT Agreement, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green deny any remaining allegations.

21. Answering paragraph 21 the Development Entities, Seibel, and Green admit that TPOV is a New York limited liability company. The Development Entities, Seibel, and Green further state that the TPOV Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the TPOV Agreement, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green deny any remaining allegations.

22. Answering paragraph 22, the Development Entities, Seibel, and Green admit that TPOV 16 is a Delaware limited liability company and that the rights of TPOV under the TPOV Agreement were assigned to TPOV 16. The Development Entities, Seibel, and Green further state that the remaining allegations are legal conclusions rather than factual allegations, and, therefore, require no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

23. Answering paragraph 23, the Development Entities, Seibel, and Green admit that LLTQ is a Delaware limited liability company. The Development Entities, Seibel, and Green further state that the LLTQ Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the LLTQ Agreement, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green deny any remaining allegations.

24. Answering paragraph 24, the Development Entities, Seibel, and Green admit that LLTQ 16 is a Delaware limited liability company and that the rights of LLTQ under the LLTQ Agreement were assigned to LLTQ 16. The Development Entities, Seibel, and Green further state

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that the remaining allegations are legal conclusions rather than factual allegations, and, therefore, require no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

25. Answering paragraph 25, the Development Entities, Seibel, and Green admit that GR Burgr, LLC is a Delaware limited liability company. The Development Entities, Seibel, and Green further state that the GRB Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the GRB Agreement, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green deny any remaining allegations.

26. Answering paragraph 26, the Development Entities, Seibel, and Green admit that FERG is a Delaware limited liability company. The Development Entities, Seibel, and Green further state that the FERG Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the FERG Agreement, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green deny any remaining allegations.

27. Answering paragraph 27, the Development Entities, Seibel, and Green admit that FERG 16 is a Delaware limited liability company and that the rights of FERG under the FERG Agreement were assigned to FERG 16. The Development Entities, Seibel, and Green further state that the remaining allegations are legal conclusions rather than factual allegations, and, therefore, require no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

28. Answering paragraph 28, the Development Entities, Seibel, and Green state that the allegations are legal conclusions rather than factual allegations, and, therefore, require no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

STATEMENT OF FACTS

A. The Business Relationship Between Caesars and Mr. Seibel.

(a) The MOTI Agreement

29. Answering paragraph 29, the Development Entities, Seibel, and Green admit that Seibel is a restauranteur and that negotiations for a potential Serendipity restaurant at a Caesars

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property began in or around 2009. The Development Entities, Seibel, and Green deny any remaining allegations.

30. Answering paragraph 30, the Development Entities, Seibel, and Green admit that Seibel completed a "Business Information Form" in or around 2009. The Development Entities, Seibel, and Green further state that the "Business Information Form" speaks for itself; to the extent that the allegations contradict or are inconsistent with the "Business Information Form," the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green state they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations.

31. Answering paragraph 31, the Development Entities, Seibel, and Green state that the MOTI Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the MOTI Agreement, the Development Entities, Seibel, and Green deny the allegations.

32. Answering paragraph 32, the Development Entities, Seibel, and Green state that the MOTI Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the MOTI Agreement, the Development Entities, Seibel, and Green deny the allegations.

33. Answering paragraph 33, the Development Entities, Seibel, and Green state that the MOTI Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the MOTI Agreement, the Development Entities, Seibel, and Green deny the allegations.

34. Answering paragraph 34, the Development Entities, Seibel, and Green state that paragraph 34 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the MOTI Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the MOTI Agreement, the Development Entities, Seibel, and Green deny the allegations.

35. Answering paragraph 35, the Development Entities, Seibel, and Green state that paragraph 35 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the

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MOTI Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the MOTI Agreement, the Development Entities, Seibel, and Green deny the allegations.

36. Answering paragraph 36, the Development Entities, Seibel, and Green state that the MOTI Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the MOTI Agreement, the Development Entities, Seibel, and Green deny the allegations.

37. Answering paragraph 37, the Development Entities, Seibel, and Green state that paragraph 37 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the MOTI Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the MOTI Agreement, the Development Entities, Seibel, and Green deny the allegations.

38. Answering paragraph 38, the Development Entities, Seibel, and Green state that paragraph 38 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the MOTI Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the MOTI Agreement, the Development Entities, Seibel, and Green deny the allegations.

39. Answering paragraph 39, the Development Entities, Seibel, and Green admit that Caesars entered into five more agreements with entities owned and managed by Seibel. The Development Entities, Seibel, and Green state that the remaining allegations contain legal conclusions rather than factual allegations, and, therefore, require no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

(b) The DNT Agreement

40. Answering paragraph 40, the Development Entities, Seibel, and Green state that the DNT Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the DNT Agreement, the Development Entities, Seibel, and Green deny the allegations.

41. Answering paragraph 41, the Development Entities, Seibel, and Green admit that Seibel completed a "Business Information Form" in or around 2011. The Development Entities,

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Seibel, and Green further state that the "Business Information Form" speaks for itself; to the extent that the allegations contradict or are inconsistent with the "Business Information Form," the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green state they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations.

42. Answering paragraph 42, the Development Entities, Seibel, and Green state that the DNT Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the DNT Agreement, the Development Entities, Seibel, and Green deny the allegations.

43. Answering paragraph 43, the Development Entities, Seibel, and Green state that the DNT Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the DNT Agreement, the Development Entities, Seibel, and Green deny the allegations.

44. Answering paragraph 44, the Development Entities, Seibel, and Green state that the DNT Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the DNT Agreement, the Development Entities, Seibel, and Green deny the allegations.

45. Answering paragraph 45, the Development Entities, Seibel, and Green state that paragraph 45 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the DNT Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the DNT Agreement, the Development Entities, Seibel, and Green deny the allegations

46. Answering paragraph 46, the Development Entities, Seibel, and Green state that the DNT Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the DNT Agreement, the Development Entities, Seibel, and Green deny the allegations.

47. Answering paragraph 47, the Development Entities, Seibel, and Green state that the DNT Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the DNT Agreement, the Development Entities, Seibel, and Green deny the allegations.

48. Answering paragraph 48, the Development Entities, Seibel, and Green state that paragraph 48 contains legal conclusions rather than factual allegations, and, therefore, requires no

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response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the DNT Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the DNT Agreement, the Development Entities, Seibel, and Green deny the allegations

49. Answering paragraph 49, the Development Entities, Seibel, and Green state that paragraph 49 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the DNT Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the DNT Agreement, the Development Entities, Seibel, and Green deny the allegations.

(c) The TPOV Agreement

50. Answering paragraph 50, the Development Entities, Seibel, and Green state that the TPOV Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the TPOV Agreement, the Development Entities, Seibel, and Green deny the allegations.

51. Answering paragraph 51, the Development Entities, Seibel, and Green state that the TPOV Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the TPOV Agreement, the Development Entities, Seibel, and Green deny the allegations.

52. Answering paragraph 52, the Development Entities, Seibel, and Green state that the TPOV Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the TPOV Agreement, the Development Entities, Seibel, and Green deny the allegations.

53. Answering paragraph 53, the Development Entities, Seibel, and Green state that the TPOV Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the TPOV Agreement, the Development Entities, Seibel, and Green deny the allegations.

54. Answering paragraph 54, the Development Entities, Seibel, and Green state that paragraph 54 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the

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TPOV Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the TPOV Agreement, the Development Entities, Seibel, and Green deny the allegations.

55. Answering paragraph 55, the Development Entities, Seibel, and Green state that the TPOV Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the TPOV Agreement, the Development Entities, Seibel, and Green deny the allegations.

56. Answering paragraph 56, the Development Entities, Seibel, and Green state that the TPOV Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the TPOV Agreement, the Development Entities, Seibel, and Green deny the allegations.

57. Answering paragraph 57, the Development Entities, Seibel, and Green state that paragraph 57 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the TPOV Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the TPOV Agreement, the Development Entities, Seibel, and Green deny the allegations.

58. Answering paragraph 58, the Development Entities, Seibel, and Green state that paragraph 58 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the TPOV Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the TPOV Agreement, the Development Entities, Seibel, and Green deny the allegations.

59. Answering paragraph 59, the Development Entities, Seibel, and Green state that paragraph 59 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the TPOV Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the TPOV Agreement, the Development Entities, Seibel, and Green deny the allegations.

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(d) The LLTQ Agreement

60. Answering paragraph 60, the Development Entities, Seibel, and Green state that the LLTQ Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the LLTQ Agreement, the Development Entities, Seibel, and Green deny the allegations.

61. Answering paragraph 61, the Development Entities, Seibel, and Green state that the LLTQ Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the LLTQ Agreement, the Development Entities, Seibel, and Green deny the allegations.

62. Answering paragraph 62, the Development Entities, Seibel, and Green state that the LLTQ Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the LLTQ Agreement, the Development Entities, Seibel, and Green deny the allegations.

63. Answering paragraph 63, the Development Entities, Seibel, and Green state that the LLTQ Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the LLTQ Agreement, the Development Entities, Seibel, and Green deny the allegations.

64. Answering paragraph 64, the Development Entities, Seibel, and Green state that paragraph 64 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the LLTQ Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the LTTQ Agreement, the Development Entities, Seibel, and Green deny the allegations.

65. Answering paragraph 65, the Development Entities, Seibel, and Green state that the LLTQ Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the LLTQ Agreement, the Development Entities, Seibel, and Green deny the allegations.

66. Answering paragraph 66, the Development Entities, Seibel, and Green state that the LLTQ Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the LLTQ Agreement, the Development Entities, Seibel, and Green deny the allegations.

67. Answering paragraph 67, the Development Entities, Seibel, and Green state that paragraph 67 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and

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Green deny the allegations. The Development Entities, Seibel, and Green further state that the LLTQ Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the LTTQ Agreement, the Development Entities, Seibel, and Green deny the allegations.

68. Answering paragraph 68, the Development Entities, Seibel, and Green state that paragraph 68 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the LLTQ Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the LTTQ Agreement, the Development Entities, Seibel, and Green deny the allegations.

69. Answering paragraph 69, the Development Entities, Seibel, and Green state that paragraph 69 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the LLTQ Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the LTTQ Agreement, the Development Entities, Seibel, and Green deny the allegations.

70. Answering paragraph 70, the Development Entities, Seibel, and Green state that the LLTQ Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the LLTQ Agreement, the Development Entities, Seibel, and Green deny the allegations.

71. Answering paragraph 71, the Development Entities, Seibel, and Green state that paragraph 71 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the LLTQ Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the LTTQ Agreement, the Development Entities, Seibel, and Green deny the allegations.

(e) The GR Burgr Agreement

72. Answering paragraph 72, the Development Entities, Seibel, and Green state that the GRB Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the GRB Agreement, the Development Entities, Seibel, and Green deny the allegations.

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73. Answering paragraph 73, the Development Entities, Seibel, and Green state that the GRB Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the GRB Agreement, the Development Entities, Seibel, and Green deny the allegations.

74. Answering paragraph 74, the Development Entities, Seibel, and Green state that the GRB Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the GRB Agreement, the Development Entities, Seibel, and Green deny the allegations.

75. Answering paragraph 75, the Development Entities, Seibel, and Green state that the GRB Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the GRB Agreement, the Development Entities, Seibel, and Green deny the allegations.

76. Answering paragraph 76, the Development Entities, Seibel, and Green state that paragraph 76 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the GRB Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the GRB Agreement, the Development Entities, Seibel, and Green deny the allegations.

77. Answering paragraph 77, the Development Entities, Seibel, and Green state that the GRB Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the GRB Agreement, the Development Entities, Seibel, and Green deny the allegations.

78. Answering paragraph 78, the Development Entities, Seibel, and Green state that the GRB Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the GRB Agreement, the Development Entities, Seibel, and Green deny the allegations.

79. Answering paragraph 79, the Development Entities, Seibel, and Green state that paragraph 79 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the GRB Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the GRB Agreement, the Development Entities, Seibel, and Green deny the allegations.

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80. Answering paragraph 80, the Development Entities, Seibel, and Green state that paragraph 80 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the GRB Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the GRB Agreement, the Development Entities, Seibel, and Green deny the allegations.

81. Answering paragraph 81, the Development Entities, Seibel, and Green state that paragraph 81 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the GRB Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the GRB Agreement, the Development Entities, Seibel, and Green deny the allegations.

(f) The FERG Agreement

82. Answering paragraph 82, the Development Entities, Seibel, and Green state that the FERG Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the FERG Agreement, the Development Entities, Seibel, and Green deny the allegations.

83. Answering paragraph 83, the Development Entities, Seibel, and Green state that the FERG Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the FERG Agreement, the Development Entities, Seibel, and Green deny the allegations.

84. Answering paragraph 84, the Development Entities, Seibel, and Green state that the FERG Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the FERG Agreement, the Development Entities, Seibel, and Green deny the allegations.

85. Answering paragraph 85, the Development Entities, Seibel, and Green state that the FERG Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the FERG Agreement, the Development Entities, Seibel, and Green deny the allegations.

86. Answering paragraph 86, the Development Entities, Seibel, and Green state that paragraph 86 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and

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Green deny the allegations. The Development Entities, Seibel, and Green further state that the FERG Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the FERG Agreement, the Development Entities, Seibel, and Green deny the allegations.

87. Answering paragraph 87, the Development Entities, Seibel, and Green state that the FERG Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the FERG Agreement, the Development Entities, Seibel, and Green deny the allegations.

88. Answering paragraph 88, the Development Entities, Seibel, and Green state that the FERG Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the FERG Agreement, the Development Entities, Seibel, and Green deny the allegations.

89. Answering paragraph 89, the Development Entities, Seibel, and Green state that paragraph 89 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the FERG Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the FERG Agreement, the Development Entities, Seibel, and Green deny the allegations.

90. Answering paragraph 90, the Development Entities, Seibel, and Green state that paragraph 90 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the FERG Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the FERG Agreement, the Development Entities, Seibel, and Green deny the allegations.

91. Answering paragraph 91, the Development Entities, Seibel, and Green state that paragraph 91 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the FERG Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the FERG Agreement, the Development Entities, Seibel, and Green deny the allegations.

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92. Answering paragraph 92, the Development Entities, Seibel, and Green state that the FERG Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the FERG Agreement, the Development Entities, Seibel, and Green deny the allegations.

93. Answering paragraph 93, the Development Entities, Seibel, and Green state that paragraph 93 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the FERG Agreement speaks for itself; to the extent that the allegations contradict or are inconsistent with the FERG Agreement, the Development Entities, Seibel, and Green deny the allegations.

B. The Activities of Mr. Seibel and the Seibel-Affiliated Entities [Allegedly] Rendered Him Unsuitable Under the Seibel Agreements.

94. Answering paragraph 94, the Development Entities, Seibel, and Green deny the allegations.

(a) Mr. Seibel set up numbered UBS accounts in Switzerland and [allegedly] concealed them from the United States government.

95. Answering paragraph 95, the Development Entities, Seibel, and Green state that paragraph 95 concerns matters that were the subject of Seibel's guilty plea to one count of a corrupt endeavor to obstruct and impede the due administration of the Internal Revenue Laws under 26 U.S.C. § 7212, and refer to Seibel's guilty plea and related documents in that proceeding for the full and complete recitation of facts. The Development Entities, Seibel, and Green otherwise deny the allegations contained in paragraph 95.

96. Answering paragraph 96, the Development Entities, Seibel, and Green state that paragraph 96 concerns matters that were the subject of Seibel's guilty plea to one count of a corrupt endeavor to obstruct and impede the due administration of the Internal Revenue Laws under 26 U.S.C. § 7212, and refer to Seibel's guilty plea and related documents in that proceeding for the full and complete recitation of facts. The Development Entities, Seibel, and Green otherwise deny the allegations contained in paragraph 96.

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97. Answering paragraph 97, the Development Entities, Seibel, and Green state that paragraph 97 concerns matters that were the subject of Seibel's guilty plea to one count of a corrupt endeavor to obstruct and impede the due administration of the Internal Revenue Laws under 26 U.S.C. § 7212, and refer to Seibel's guilty plea and related documents in that proceeding for the full and complete recitation of facts. The Development Entities, Seibel, and Green otherwise deny the allegations contained in paragraph 97.

98. Answering paragraph 98, the Development Entities, Seibel, and Green state that paragraph 98 concerns matters that were the subject of Seibel's guilty plea to one count of a corrupt endeavor to obstruct and impede the due administration of the Internal Revenue Laws under 26 U.S.C. § 7212, and refer to Seibel's guilty plea and related documents in that proceeding for the full and complete recitation of facts. The Development Entities, Seibel, and Green otherwise deny the allegations contained in paragraph 98.

99. Answering paragraph 99, the Development Entities, Seibel, and Green state that paragraph 99 concerns matters that were the subject of Seibel's guilty plea to one count of a corrupt endeavor to obstruct and impede the due administration of the Internal Revenue Laws under 26 U.S.C. § 7212, and refer to Seibel's guilty plea and related documents in that proceeding for the full and complete recitation of facts. The Development Entities, Seibel, and Green otherwise deny the allegations contained in paragraph 99.

100. Answering paragraph 100, the Development Entities, Seibel, and Green state that paragraph 100 concerns matters that were the subject of Seibel's guilty plea to one count of a corrupt endeavor to obstruct and impede the due administration of the Internal Revenue Laws under 26 U.S.C. § 7212, and refer to Seibel's guilty plea and related documents in that proceeding for the full and complete recitation of facts. The Development Entities, Seibel, and Green otherwise deny the allegations contained in paragraph 100.

(b) In 2008, Mr. Seibel closed his UBS account and opened a new account.

101. Answering paragraph 101, the Development Entities, Seibel, and Green state that paragraph 101 concerns matters that were the subject of Seibel's guilty plea to one count of a corrupt endeavor to obstruct and impede the due administration of the Internal Revenue Laws under

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26 U.S.C. § 7212, and refer to Seibel's guilty plea and related documents in that proceeding for the full and complete recitation of facts. The Development Entities, Seibel, and Green otherwise deny the allegations contained in paragraph 101.

102. Answering paragraph 102, the Development Entities, Seibel, and Green state that paragraph 102 concerns matters that were the subject of Seibel's guilty plea to one count of a corrupt endeavor to obstruct and impede the due administration of the Internal Revenue Laws under 26 U.S.C. § 7212, and refer to Seibel's guilty plea and related documents in that proceeding for the full and complete recitation of facts. The Development Entities, Seibel, and Green otherwise deny the allegations contained in paragraph 102.

(c) Mr. Seibel [allegedly] filed incomplete and inaccurate tax returns.

103. Answering paragraph 103, the Development Entities, Seibel, and Green state that paragraph 103 concerns matters that were the subject of Seibel's guilty plea to one count of a corrupt endeavor to obstruct and impede the due administration of the Internal Revenue Laws under 26 U.S.C. § 7212, and refer to Seibel's guilty plea and related documents in that proceeding for the full and complete recitation of facts. The Development Entities, Seibel, and Green otherwise deny the allegations contained in paragraph 103.

104. Answering paragraph 104, the Development Entities, Seibel, and Green state that paragraph 104 concerns matters that were the subject of Seibel's guilty plea to one count of a corrupt endeavor to obstruct and impede the due administration of the Internal Revenue Laws under 26 U.S.C. § 7212, and refer to Seibel's guilty plea and related documents in that proceeding for the full and complete recitation of facts. The Development Entities, Seibel, and Green otherwise deny the allegations contained in paragraph 104.

105. Answering paragraph 105, the Development Entities, Seibel, and Green state that paragraph 105 concerns matters that were the subject of Seibel's guilty plea to one count of a corrupt endeavor to obstruct and impede the due administration of the Internal Revenue Laws under 26 U.S.C. § 7212, and refer to Seibel's guilty plea and related documents in that proceeding for the full and complete recitation of facts. The Development Entities, Seibel, and Green otherwise deny the allegations contained in paragraph 105.

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(d) Mr. Seibel [allegedly] provided false application [sic] to voluntary disclosure program.

106. Answering paragraph 106, the Development Entities, Seibel, and Green state that paragraph 106 concerns matters that were the subject of Seibel's guilty plea to one count of a corrupt endeavor to obstruct and impede the due administration of the Internal Revenue Laws under 26 U.S.C. § 7212, and refer to Seibel's guilty plea and related documents in that proceeding for the full and complete recitation of facts. The Development Entities, Seibel, and Green otherwise deny the allegations contained in paragraph 106.

107. Answering paragraph 107, the Development Entities, Seibel, and Green state that paragraph 107 concerns matters that were the subject of Seibel's guilty plea to one count of a corrupt endeavor to obstruct and impede the due administration of the Internal Revenue Laws under 26 U.S.C. § 7212, and refer to Seibel's guilty plea and related documents in that proceeding for the full and complete recitation of facts. The Development Entities, Seibel, and Green otherwise deny the allegations contained in paragraph 107.

108. Answering paragraph 108, the Development Entities, Seibel, and Green state that paragraph 108 concerns matters that were the subject of Seibel's guilty plea to one count of a corrupt endeavor to obstruct and impede the due administration of the Internal Revenue Laws under 26 U.S.C. § 7212, and refer to Seibel's guilty plea and related documents in that proceeding for the full and complete recitation of facts. The Development Entities, Seibel, and Green otherwise deny the allegations contained in paragraph 108.

109. Answering paragraph 109, the Development Entities, Seibel, and Green admit that on April 18, 2016, Seibel pled guilty to one count of a corrupt endeavor to obstruct and impede the due administration of the Internal Revenue Laws under 26 U.S.C. § 7212, which is a class E felony, and refer to the transcript from that plea for the full and complete contents of statements made by Seibel on that date. The Development Entities, Seibel, and Green deny any inconsistent or remaining allegations.

110. Answering paragraph 110, the Development Entities, Seibel, and Green admit the allegations.

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111. Answering paragraph 111, the Development Entities, Seibel, and Green state that the April 8, 2016, letter speaks for itself; to the extent that the allegations contradict or are inconsistent with the April 8, 2016 letter, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green deny any remaining allegations.

C. Caesars [Wrongfully] Exercises Its Sole Discretion to Terminate the Agreements with the Seibel-Affiliated Entities.

112. Answering paragraph 112, the Development Entities, Seibel, and Green deny the allegations.

(a) Termination of the MOTI Agreement.

113. Answering paragraph 113, the Development Entities, Seibel, and Green state that paragraph 113 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the September 2, 2016, letter speaks for itself; to the extent that the allegations contradict or are inconsistent with the September 2, 2016, letter, the Development Entities, Seibel, and Green deny the allegations.

(b) Termination of the DNT Agreement.

114. Answering paragraph 114, the Development Entities, Seibel, and Green state that paragraph 114 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the September 2, 2016, letter speaks for itself; to the extent that the allegations contradict or are inconsistent with the September 2, 2016, letter, the Development Entities, Seibel, and Green deny the allegations.

115. Answering paragraph 115, the Development Entities, Seibel, and Green deny the allegations.

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(c) Termination of the TPOV Agreement.

116. Answering paragraph 116, the Development Entities, Seibel, and Green state that paragraph 116 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the September 2, 2016, letter speaks for itself; to the extent that the allegations contradict or are inconsistent with the September 2, 2016, letter, the Development Entities, Seibel, and Green deny the allegations.

(d) Termination of the LLTQ Agreement.

117. Answering paragraph 117, the Development Entities, Seibel, and Green state that paragraph 117 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the September 2, 2016, letter speaks for itself; to the extent that the allegations contradict or are inconsistent with the September 2, 2016, letter, the Development Entities, Seibel, and Green deny the allegations.

(e) Termination of the GRB Agreement.

118. Answering paragraph 118, the Development Entities, Seibel, and Green state that paragraph 118 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the September 2, 2016, letter speaks for itself; to the extent that the allegations contradict or are inconsistent with the September 2, 2016, letter, the Development Entities, Seibel, and Green deny the allegations.

119. Answering paragraph 119, the Development Entities, Seibel, and Green deny the allegations.

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(f) Termination of the FERG Agreement.

120. Answering paragraph 120, the Development Entities, Seibel, and Green state that paragraph 120 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the September 2, 2016, letter speaks for itself; to the extent that the allegations contradict or are inconsistent with the September 2, 2016, letter, the Development Entities, Seibel, and Green deny the allegations.

(g) The Seibel-Affiliated Entities dispute the propriety of the termination of their agreements with Caesars.

121. Answering paragraph 121, the Development Entities, Seibel, and Green state that the letters referenced in paragraph 121 speak for themselves; to the extent that the allegations contradict or are inconsistent with the letters, the Development Entities, Seibel, and Green deny the allegations.

122. Answering paragraph 122, the Development Entities, Seibel, and Green state that paragraph 122 contains legal conclusions rather than factual allegations, and, therefore, require no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations. The Development Entities, Seibel, and Green further state that the September 12, 2016, letter speaks for itself; to the extent that the allegations contradict or are inconsistent with the September 12, 2016, letter, the Development Entities, Seibel, and Green deny the allegations.

D. Legal Proceedings Involving Caesars and the Defendants.

(a) Contested matters involving Caesars Palace, CAC, LLTQ, FERG, and MOTI.

123. Answering paragraph 123, the Development Entities, Seibel, and Green state that the bankruptcy filings speak for themselves; to the extent that the allegations contradict or are inconsistent with the bankruptcy filings, the Development Entities, Seibel, and Green deny the allegations.

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124. Answering paragraph 124, the Development Entities, Seibel, and Green state that the bankruptcy filings speak for themselves; to the extent that the allegations contradict or are inconsistent with the bankruptcy filings, the Development Entities, Seibel, and Green deny the allegations.

125. Answering paragraph 125, the Development Entities, Seibel, and Green state that the bankruptcy filings speak for themselves; to the extent that the allegations contradict or are inconsistent with the bankruptcy filings, the Development Entities, Seibel, and Green deny the allegations.

126. Answering paragraph 126, the Development Entities, Seibel, and Green state that the bankruptcy filings speak for themselves; to the extent that the allegations contradict or are inconsistent with the bankruptcy filings, the Development Entities, Seibel, and Green deny the allegations.

127. Answering paragraph 127, the Development Entities, Seibel, and Green state that the bankruptcy filings speak for themselves; to the extent that the allegations contradict or are inconsistent with the bankruptcy filings, the Development Entities, Seibel, and Green deny the allegations.

128. Answering paragraph 128, the Development Entities, Seibel, and Green state that the bankruptcy filings speak for themselves; to the extent that the allegations contradict or are inconsistent with the bankruptcy filings, the Development Entities, Seibel, and Green deny the allegations.

(b) Litigation involving GRB and Planet Hollywood.

129. Answering paragraph 129, the Development Entities, Seibel, and Green state that the filings speak for themselves; to the extent that the allegations contradict or are inconsistent with the filings, the Development Entities, Seibel, and Green deny the allegations.

130. Answering paragraph 130, the Development Entities, Seibel, and Green state that the court's order speaks for itself; to the extent that the allegations contradict or are inconsistent with the court's order, the Development Entities, Seibel, and Green deny the allegations.

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131. Answering paragraph 131, the Development Entities, Seibel, and Green state that the filings speak for themselves; to the extent that the allegations contradict or are inconsistent with the filings, the Development Entities, Seibel, and Green deny the allegations.

(c) Nevada Federal District Court litigation involving TPOV and Paris.

132. Answering paragraph 132, the Development Entities, Seibel, and Green state that the filings speak for themselves; to the extent that the allegations contradict or are inconsistent with the filings, the Development Entities, Seibel, and Green deny the allegations.

133. Answering paragraph 133, the Development Entities, Seibel, and Green state that the filings speak for themselves; to the extent that the allegations contradict or are inconsistent with the filings, the Development Entities, Seibel, and Green deny the allegations.

E. Mr. Seibel, Mr. Green, and the Seibel-Affiliated Entities Were [Allegedly] Engaged in a Kickback [sic] Scheme.

134. Answering paragraph 134, the Development Entities, Seibel, and Green deny the allegations.

135. Answering paragraph 135, the Development Entities, Seibel, and Green deny the allegations.

136. Answering paragraph 136, the Development Entities, Seibel, and Green deny the allegations.

137. Answering paragraph 137, the Development Entities, Seibel, and Green admit that BR 23 Venture, LLC, and Future Star Hospitality Consulting, LLC, received payments from vendors. The Development Entities, Seibel, and Green deny any remaining allegations.

138. Answering paragraph 138, the Development Entities, Seibel, and Green deny the allegations.

139. Answering paragraph 139, the Development Entities, Seibel, and Green deny the allegations.

140. Answering paragraph 140, the Development Entities, Seibel, and Green deny the allegations.

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141. Answering paragraph 141, the Development Entities, Seibel, and Green deny the allegations.

142. Answering paragraph 142, the Development Entities, Seibel, and Green deny the allegations.

143. Answering paragraph 143, the Development Entities, Seibel, and Green deny the allegations.

144. Answering paragraph 144, the Development Entities, Seibel, and Green deny the allegations.

COUNT I

(Declaratory Judgment Against All Defendants Declaring That Caesars Properly Terminated All of the Seibel Agreements)

145. Answering paragraph 145, the Development Entities, Seibel, and Green repeat and re-allege every response set forth above as if fully set forth herein.

146. Answering paragraph 146, the Development Entities, Seibel, and Green state that NRS 30.040(1) speaks for itself; to the extent that the allegations contradict or are inconsistent with NRS 30.040(1), the Development Entities, Seibel, and Green deny the allegations.

147. Answering paragraph 147, the Development Entities, Seibel, and Green admit that the parties dispute whether Caesars properly terminated the agreements. The Development Entities, Seibel, and Green state that the remaining allegations contain legal conclusions rather than factual allegations, and, therefore, require no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

148. Answering paragraph 148, the Development Entities, Seibel, and Green state that paragraph 148 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

149. Answering paragraph 149, the Development Entities, Seibel, and Green state that paragraph 149 contains legal conclusions rather than factual allegations, and, therefore, requires no

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response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

COUNT II

(Declaratory Judgment Against All Defendants Declaring That Caesars Does Not Have Any Current or Future Obligations to Defendants Under the Seibel Agreements)

150. Answering paragraph 150, the Development Entities, Seibel, and Green repeat and re-allege every response set forth above as if fully set forth herein.

151. Answering paragraph 151, the Development Entities, Seibel, and Green state that NRS 30.040(1) speaks for itself; to the extent that the allegations contradict or are inconsistent with NRS 30.040(1), the Development Entities, Seibel, and Green deny the allegations.

152. Answering paragraph 152, the Development Entities, Seibel, and Green admit that the parties dispute whether Caesars owes any current or future financial obligations or commitments to the Development Entities. The Development Entities, Seibel, and Green state that the remaining allegations contain legal conclusions rather than factual allegations, and, therefore, require no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

153. Answering paragraph 153, the Development Entities, Seibel, and Green state that paragraph 153 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

154. Answering paragraph 154, the Development Entities, Seibel, and Green state that paragraph 154 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

155. Answering paragraph 155, the Development Entities, Seibel, and Green state that paragraph 155 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

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156. Answering paragraph 156, the Development Entities, Seibel, and Green state that paragraph 156 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

157. Answering paragraph 157, the Development Entities, Seibel, and Green state that paragraph 157 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

158. Answering paragraph 158, the Development Entities, Seibel, and Green state that paragraph 158 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

159. Answering paragraph 159, the Development Entities, Seibel, and Green state that paragraph 159 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

160. Answering paragraph 160, the Development Entities, Seibel, and Green state that paragraph 160 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

COUNT III

(Declaratory Judgment Against All Defendants Declaring That Caesars Does Not Have Any Current or Future Obligations to Defendants Under the Seibel Agreements)

161. Answering paragraph 161, the Development Entities, Seibel, and Green repeat and re-allege every response set forth above as if fully set forth herein.

162. Answering paragraph 162, the Development Entities, Seibel, and Green state that NRS 30.040(1) speaks for itself; to the extent that the allegations contradict or are inconsistent with NRS 30.040(1), the Development Entities, Seibel, and Green deny the allegations.

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163. Answering paragraph 163, the Development Entities, Seibel, and Green admit that the parties dispute whether Section 13.22 of the LLTQ Agreement and Section 4.1 of the FERG Agreement are enforceable. The Development Entities, Seibel, and Green state that the remaining allegations contain legal conclusions rather than factual allegations, and, therefore, require no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

164. Answering paragraph 164, the Development Entities, Seibel, and Green state that paragraph 164 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

165. Answering paragraph 165, the Development Entities, Seibel, and Green state that paragraph 165 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

166. Answering paragraph 166, the Development Entities, Seibel, and Green state that paragraph 166 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

167. Answering paragraph 167, the Development Entities, Seibel, and Green state that paragraph 167 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

168. Answering paragraph 168, the Development Entities, Seibel, and Green state that paragraph 168 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

169. Answering paragraph 169, the Development Entities, Seibel, and Green state that paragraph 169 contains legal conclusions rather than factual allegations, and, therefore, requires no

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response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

170. Answering paragraph 170, the Development Entities, Seibel, and Green state that paragraph 170 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

COUNT IV

(Civil Conspiracy Against Mr. Seibel and Mr. Green)

171. Answering paragraph 171, the Development Entities, Seibel, and Green repeat and re-allege every response set forth above as if fully set forth herein.

172. Answering paragraph 172, the Development Entities, Seibel, and Green state that paragraph 172 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

173. Answering paragraph 173, the Development Entities, Seibel, and Green state that paragraph 173 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

174. Answering paragraph 174, the Development Entities, Seibel, and Green state that paragraph 174 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

175. Answering paragraph 175, the Development Entities, Seibel, and Green state that paragraph 175 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

176. Answering paragraph 176, the Development Entities, Seibel, and Green state that paragraph 176 contains legal conclusions rather than factual allegations, and, therefore, requires no

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response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

COUNT V

(Breaches of Implied Covenant of Good Faith and Fair Dealing Against MOTI, DNT, TPOV, LLTQ, GR BURGR, and FERG)

177. Answering paragraph 177, the Development Entities, Seibel, and Green repeat and re-allege every response set forth above as if fully set forth herein.

178. Answering paragraph 178, the Development Entities, Seibel, and Green admit the allegations.

179. Answering paragraph 179, the Development Entities, Seibel, and Green admit the allegations.

180. Answering paragraph 180, the Development Entities, Seibel, and Green state that paragraph 180 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

181. Answering paragraph 181, the Development Entities, Seibel, and Green state that paragraph 181 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

182. Answering paragraph 182, the Development Entities, Seibel, and Green state that paragraph 182 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

183. Answering paragraph 183, the Development Entities, Seibel, and Green state that paragraph 183 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

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COUNT VI

(Unjust Enrichment Against Mr. Seibel & Mr. Green)

184. Answering paragraph 184, the Development Entities, Seibel, and Green repeat and re-allege every response set forth above as if fully set forth herein.

185. Answering paragraph 185, the Development Entities, Seibel, and Green state that paragraph 185 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

186. Answering paragraph 186, the Development Entities, Seibel, and Green state that paragraph 186 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

187. Answering paragraph 187, the Development Entities, Seibel, and Green state that paragraph 187 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

188. Answering paragraph 188, the Development Entities, Seibel, and Green state that paragraph 188 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

189. Answering paragraph 189, the Development Entities, Seibel, and Green state that paragraph 189 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

190. Answering paragraph 190, the Development Entities, Seibel, and Green state that paragraph 190 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

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COUNT VII

(Intentional Interference with Contractual Relations Against Rowen Seibel and Craig Green)

191. Answering paragraph 191, the Development Entities, Seibel, and Green repeat and re-allege every response set forth above as if fully set forth herein.

192. Answering paragraph 192, the Development Entities, Seibel, and Green admit that the MOTI, DNT, TPOV, LLTQ, GR BURGR, and FERG Agreements were valid and binding agreements between Caesars and the Development Entities. The Development Entities, Seibel, and Green state that the remaining allegations contain legal conclusions rather than factual allegations, and, therefore, require no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

193. Answering paragraph 193, the Development Entities, Seibel, and Green state that paragraph 193 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

194. Answering paragraph 194, the Development Entities, Seibel, and Green state that paragraph 194 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

195. Answering paragraph 195, the Development Entities, Seibel, and Green state that paragraph 195 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

196. Answering paragraph 196, the Development Entities, Seibel, and Green state that paragraph 196 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

197. Answering paragraph 197, the Development Entities, Seibel, and Green state that paragraph 197 contains legal conclusions rather than factual allegations, and, therefore, requires no

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response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

198. Answering paragraph 198, the Development Entities, Seibel, and Green state that paragraph 198 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

COUNT VIII

(Fraudulent Concealment Against Rowen Seibel and Craig Green)

199. Answering paragraph 199, the Development Entities, Seibel, and Green repeat and re-allege every response set forth above as if fully set forth herein.

200. Answering paragraph 200, the Development Entities, Seibel, and Green state that paragraph 200 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

201. Answering paragraph 201, the Development Entities, Seibel, and Green state that paragraph 201 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

202. Answering paragraph 202, the Development Entities, Seibel, and Green state that paragraph 202 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

203. Answering paragraph 203, the Development Entities, Seibel, and Green state that paragraph 203 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

204. Answering paragraph 204, the Development Entities, Seibel, and Green state that paragraph 204 contains legal conclusions rather than factual allegations, and, therefore, requires no

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response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

205. Answering paragraph 205, the Development Entities, Seibel, and Green state that paragraph 205 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations.

206. Answering paragraph 206, the Development Entities, Seibel, and Green state that paragraph 206 contains legal conclusions rather than factual allegations, and, therefore, requires no response; to the extent the allegations require a response, the Development Entities, Seibel, and Green deny the allegations

The Development Entities, Seibel, and Green deny each and every remaining allegation set forth in Caesars' First Amended Complaint not expressly admitted above.

AFFIRMATIVE DEFENSES

And now, having answered Caesars' First Amended Complaint, the Development Entities, Seibel, and Green set forth their affirmative defenses as follows:

FIRST AFFIRMATIVE DEFENSE

Caesars' First Amended Complaint fails to set forth facts sufficient to state a claim upon which relief may be granted against the Development Entities, Seibel, and Green and further fails to entitle Caesars to the relief sought, or to any relief whatsoever from the Development Entities, Seibel, and Green.

SECOND AFFIRMATIVE DEFENSE

Caesars' claims are barred, in whole or in part, by the applicable statutes of limitation and/or statutes of repose.

THIRD AFFIRMATIVE DEFENSE

Caesars' claims are barred, in whole or in part, by the equitable doctrines of laches, waiver, estoppel, abandonment, unclean hands, acquiescence, and/or unjust enrichment.

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FOURTH AFFIRMATIVE DEFENSE

Caesars' damages, if any, were proximately caused by the independent, intervening, and/or superseding acts of persons and/or entities other than the Development Entities, Seibel, and Green, for which the Development Entities, Seibel, and Green cannot be held responsible.

FIFTH AFFIRMATIVE DEFENSE

Caesars' claims against the Development Entities and Seibel are barred, in whole or in part, by Caesars' own material breaches of the Development Agreements.

SIXTH AFFIRMATIVE DEFENSE

Caesars' claims against the Development Entities and Seibel are barred, in whole or in part, by Caesars' own material breach of the implied covenants of good faith and fair dealing underlying the Development Agreements.

SEVENTH AFFIRMATIVE DEFENSE

Caesars' claims against the Development Entities, Seibel, and Green are barred, in whole or in part, by Caesars' own intentional and/or negligent conduct.

EIGHTH AFFIRMATIVE DEFENSE

Caesars' claims against the Development Entities, Seibel, and Green are barred, in whole or in part, because, at all times and places mentioned in the First Amended Complaint, the Development Entities, Seibel, and Green's actions were justified and/or privileged.

NINTH AFFIRMATIVE DEFENSE

Caesars' claims against the Development Entities, Seibel, and Green are barred, in whole or in part, by the failure to join necessary and indispensable parties.

TENTH AFFIRMATIVE DEFENSE

Caesars' claim for fraudulent concealment is barred because neither Seibel nor Green owed a duty to disclose to Caesars with regard to the subject matter of Caesars' claim for fraudulent concealment.

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ELEVENTH AFFIRMATIVE DEFENSE

Caesars' claims against the Development Entities, Seibel, and Green are barred, in whole or in part, because they have failed to plead fraud with specificity and/or particularity pursuant to Nevada Rule of Civil Procedure 9(b).

TWELFTH AFFIRMATIVE DEFENSE

Caesars' claims for punitive damages are in violation of constitutional guarantees of due process, equal protection, and/or the prohibition on excessive fines.

THIRTEENTH AFFIRMATIVE DEFENSE

The Development Entities, Seibel, and Green deny any liability for any award of punitive damages because under the current rules governing discovery and trial practices, current evidentiary rules, and current vague substantive standards, such an award would violate their rights under Article I, Sections 8, 9, and 10 of the United States Constitution, the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article 1, Sections 6, 8, and 18 of the Nevada Constitution.

FOURTEENTH AFFIRMATIVE DEFENSE

Caesars' claims warrant dismissal under the first-to-file rule and due to forum shopping.

FIFTEENTH AFFIRMATIVE DEFENSE

Caesars' claims against the Development Entities, Seibel, and Green are barred, in whole or in part, because Caesars consented to the acts and omissions complained of.

SIXTEENTH AFFIRMATIVE DEFENSE

Caesars' claims have been waived, in whole or in part, as a result of the acts and the conduct of Caesars.

SEVENTEENTH AFFIRMATIVE DEFENSE

Caesars' claims are barred, in whole or in part, as a result of Caesars' decision to continue operating the restaurants underlying the Development Agreements.

EIGHTEENTH AFFIRMATIVE DEFENSE

The Development Entities expressly incorporate herein as affirmative defenses their allegations, claims, and defenses in: (a) *TPOV Enterprises 16, LLC v. Paris Las Vegas Operating*

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Company, LLC, Case No. 2:17-cv-00346-JCM-VCF, pending in the United States District Court for the District of Nevada; and (b) *In re: Caesars Entertainment Operating Company, Inc., et. al.*, Case No. 15-01145 (ABG), pending in the United States Bankruptcy Court for the Northern District of Illinois (Eastern Division), and all related matters and proceedings.

NINETEENTH AFFIRMATIVE DEFENSE

Seibel expressly incorporates herein as affirmative defenses his allegations, claims, and defenses in: (a) *TPOV Enterprises 16, LLC v. Paris Las Vegas Operating Company, LLC*, Case No. 2:17-cv-00346-JCM-VCF, pending in the United States District Court for the District of Nevada; (b) *Seibel v. PHWLV, LLC, et. al.*, Case No. A-17-751759-B, pending in the Eighth Judicial District Court for the State of Nevada, County of Clark; and (c) *In re: Caesars Entertainment Operating Company, Inc., et. al.*, Case No. 15-01145 (ABG), pending in the United States Bankruptcy Court for the Northern District of Illinois (Eastern Division), and all related matters and proceedings.

TWENTIETH AFFIRMATIVE DEFENSE

Pursuant to the Nevada Rules of Civil Procedure, the Development Entities, Seibel, and Green reserve the right to assert, and give notice that they intend to rely upon, any other affirmative defenses that may become available or appear during discovery proceedings or otherwise in this case, and reserve the right to amend their Answer to assert any such additional affirmative defenses.

WHEREFORE, the Development Entities, Seibel, and Green pray for judgment against Caesars as follows:

1. That Caesars' claims for relief be dismissed with prejudice and that Caesars take nothing thereby;

2. For an award of reasonable attorney's fees and costs as provided by the Development Agreements;

3. For an award of reasonable attorney's fees and costs on any other grounds authorized by law; and

4. For such other and further relief as the Court deems just and proper.

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COUNTERCLAIMS

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"); and R Squared Global Solutions, LLC ("RSG"), derivatively on behalf of DNT Acquisition LLC ("DNT") (collectively, the "Development Entities") complain against Desert Palace Inc. ("Caesars Palace"), Paris Las Vegas Operating Company, LLC ("Paris"), PHWLV, LLC ("Planet Hollywood"), and Boardwalk Regency Corporation d/b/a Caesars Atlantic City ("CAC") (collectively, "Caesars") as follows:

The Parties

1. MOTI is a New York limited liability company.

2. MOTI 16 is a Delaware limited liability company.

3. LLTQ is a Delaware limited liability company.

4. LLTQ 16 is a Delaware limited liability company.

5. TPOV is a New York limited liability company.

6. TPOV 16 is a Delaware limited liability company.

7. FERG is a Delaware limited liability company.

8. FERG 16 is a Delaware limited liability company.

9. DNT is a Delaware limited liability company; RSG is a Nevada limited liability company and owns 50 percent of the membership interest of DNT.

10. Caesars Palace is a Nevada Corporation that operates Caesars Palace resort and casino located at 3570 Las Vegas Boulevard South, Las Vegas, Nevada.

11. Paris is a Nevada limited liability company that operates the Paris Las Vegas Hotel and Casino located at 3655 Las Vegas Boulevard South, Las Vegas, Nevada.

12. Planet Hollywood is a Nevada limited liability company that operates the Planet Hollywood Las Vegas Resort and Casino located at 3667 Las Vegas Boulevard South, Las Vegas, Nevada.

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13. CAC is a Delaware limited liability company that operates the Caesars Atlantic City Hotel and Casino located at 2100 Pacific Ave, Atlantic City, New Jersey.

Jurisdiction and Venue

14. The Court has jurisdiction over this matter, and venue is proper in this District, because (i) the alleged wrongful acts at issue were committed by Caesars who are residents of Nevada and/or conduct business in Clark County, Nevada, and (ii) the damages suffered by the Development Entities arise out of actions occurring and committed by Caesars in Clark County, Nevada.

The Development Agreements

The MOTI Agreement

15. In or around 2005, MOTI acquired the license rights to operate Serendipity 3 restaurants anywhere in the world outside New York City.

16. Shortly thereafter, Rowen Seibel ("Seibel"), the then-manager of MOTI, began speaking with casino/resort executives and the food and beverage divisions of various Las Vegas casinos/resorts regarding opening a Serendipity 3 restaurant.

17. In 2009, MOTI and Caesars Palace entered into a Development, Operation and License Agreement (the "MOTI Agreement") for the development and operation of a Serendipity 3 restaurant at Caesars Palace.

18. Pursuant to the MOTI Agreement, MOTI and Caesars were each required to contribute fifty percent of the capital expenditures—with an initial capital contribution of $300,000 from each party—needed to design, construct, equip and maintain the Serendipity 3 restaurant.

19. Serendipity 3 proved to be very successful for many years until its closing in early January 2017.

The DNT Agreement

20. After entering into the MOTI Agreement, Caesars reached out to Seibel to inquire about bringing a New York City-based steakhouse to Caesars Palace to replace the non-branded restaurant that Caesars Palace had been operating.

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21. Seibel sought out the owners of the Old Homestead brand restaurant in New York City and formed a joint venture (through DNT) with them.

22. In or around 2011, DNT and Caesars Palace entered into a Development, Operation and License Agreement (the "DNT Agreement") pursuant to which DNT sub-licensed the Old Homestead brand to Caesars in exchange for license fees and a share of the profits generated at an Old Homestead Restaurant to be located in Caesars Palace.

23. The Old Homestead Restaurant at Caesars Palace proved to be a huge success and remains in operation.

The TPOV Agreement

24. In or around 2010, Gordon Ramsay ("Ramsay"), a celebrity chef, began to explore the possibility of creating and developing new themed restaurants with his name attached.

25. Seibel introduced Ramsay to, among others, key executives at Caesars, which, as detailed below, led to the development and creation of successful steak-themed restaurants, pub-themed restaurants, and a hamburger-themed restaurant (collectively, the "Ramsay Restaurants").

26. At the time, Caesars had limited capital available to develop the Ramsay Restaurants.

27. Due to Caesars' inability to commit capital to develop the Ramsay Restaurants, the parties decided that to the extent capital was needed for the Ramsay Restaurants, one or more entities managed by Seibel would contribute all necessary capital.

28. The parties anticipated that the initial Ramsay Restaurants were to be the primary restaurants of each brand and, over time, each concept would be expanded with additional restaurants located throughout the United States and globally.

29. The parties conceived the concept of a steakhouse known as Gordon Ramsay Steak (the "Steak Restaurant") to be located at the Paris.

30. In or around November 2011, TPOV entered into a Development and Operation Agreement (the "TPOV Agreement") with Paris to develop the Steak Restaurant at Paris.

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31. Simultaneously, in or around November 2011, Ramsay entered into his own development, operation and license agreement with Caesars providing for the payment of a royalty for the use of his name in connection with the Steak Restaurant (the "Ramsay Steak Agreement").

32. The TPOV Agreement and the Ramsay Steak Agreement were entered into at the same time—neither would have been entered into or carried out without the other, both agreements reference each other, and both expressly concern the Steak Restaurant; accordingly, they form a single integrated contract.

33. Under the terms of the TPOV Agreement, TPOV assisted in the initial design of the Steak Restaurant and contributed $1 million in capital needed to construct and equip the Steak Restaurant.

34. In return, TPOV was entitled to receive a capital payback and 50 percent (50%) of the profits from the Steak Restaurant after Paris obtained certain recoupments.

35. The Steak Restaurant proved to be a huge success and remains in operation.

The LLTQ Agreement

36. In or around early 2012, the parties conceived the concept of Gordon Ramsay Pub & Grill (the "Pub Restaurant") to be located at Caesars Palace.

37. In or around April 2012, LLTQ entered into a Development and Operation Agreement (the "LLTQ Agreement") with Caesars Palace to develop the Pub Restaurant.

38. Simultaneously, in or around April 2012, Ramsay entered into his own development, operation and license agreement with Caesars providing for the payment of a royalty for the use of his name in connection with the Pub Restaurant (the "Ramsay Pub Agreement").

39. The LLTQ Agreement and the Ramsay Pub Agreement were entered into at the same time—neither would have been entered or carried out without the other, both agreements reference each other, and both expressly concern the Pub Restaurant; accordingly, they form a single integrated contract.

40. Under the terms of the LLTQ Agreement, LLTQ assisted in the initial design of the Pub Restaurant and contributed $1 million in capital needed to construct and equip the Pub Restaurant.

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41. In return, LTTQ was entitled to receive a capital payback and 50 percent (50%) of the profits from the Pub Restaurant after Caesars Palace obtained certain recoupments.

42. Additionally, Section 13.22 of the LLTQ Agreement provided that if Caesars chose to pursue any additional venture in the nature of a pub, bar, cafe or tavern, the parties (or their affiliates) were required to enter into a new agreement that follows the same terms and conditions as contained in the LLTQ Agreement subject only to changes necessary to reflect the changes in location, a baseline amount, expenses and costs.

43. Section 13.22 of the LLTQ Agreement further referenced the TPOV Agreement and provided that if Caesars chose to pursue any additional venture in the nature of a steak restaurant, fine dining steakhouse, or chop house, the parties (or their affiliates) were required to enter into a new agreement that follows the same terms and conditions as contained in the TPOV Agreement subject only to changes necessary to reflect the changes in location, a baseline amount, expenses and costs.

44. The Pub Restaurant proved to be a huge success and remains in operation.

The FERG Agreement

45. In or around 2013, after seeing the enormous success of the Pub Restaurant in Las Vegas, Caesars sought to open an additional pub restaurant in Atlantic City.

46. As required by Section 13.22 of the LLTQ Agreement, Caesars understood that it could not develop a new pub restaurant without entering into a new agreement with LLTQ (or an affiliate of LLTQ).

47. Accordingly, Caesars approached LLTQ to enter into a new agreement concerning the proposed pub restaurant in Atlantic City.

48. In or around May 2014, FERG (an affiliate of LLTQ) entered into a Consulting Agreement (the "FERG Agreement") with CAC (an affiliate/subsidiary of Caesars) to develop the same Pub Restaurant at CAC.

49. Simultaneously, in or around May 2014, Ramsay entered into his own development, operation and license agreement with Caesars providing for the payment of a royalty to Ramsay for the use of his name in connection with the new Pub Restaurant (the "Ramsay CAC Agreement").

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50. The FERG Agreement and the Ramsay CAC Agreement were entered into at the same time—neither would have been entered into or carried out without the other, both agreements reference each other, and both expressly concern the Pub Restaurant; accordingly, they form a single integrated contract.

51. FERG was entitled to receive a percentage of the gross receipts from the Pub Restaurant in CAC.

52. Like the Pub Restaurant in Las Vegas, the Pub Restaurant in Atlantic City proved to be a huge success and remains in operation.

Caesars and Ramsay Seek to Oust the Development Entities

53. Beginning in or around 2013, Caesars and Ramsay began looking for ways to oust the Development Entities from the MOTI Agreement, the DNT Agreement, the LLTQ Agreement, the TPOV Agreement, and the FERG Agreement (collectively, the "Development Agreements") and future ventures.

54. Now that the Development Entities had introduced Caesars and Ramsay to the concept of developing restaurants using Ramsay's brand, Caesars and Ramsay believed that they did not need the Development Entities involved in the Ramsay Restaurants anymore and wanted more of the profits from those restaurants for themselves.

55. Caesars' executives were upset by the continuing payment obligations owed to the Development Entities under the terms of the Development Agreements.

Caesars' Bankruptcy

56. On January 15, 2015 each of several entities affiliated with Caesars filed voluntary petitions under Chapter 11 of the Bankruptcy Code in Illinois (collectively, the "Bankruptcy").

57. In the Bankruptcy, Caesars sought to reject the LLTQ Agreement but did not seek to reject the Ramsay Pub Agreement.

58. In the Bankruptcy, Caesars sought to reject the FERG Agreement but did not seek to reject the Ramsay CAC Agreement.

59. In the Bankruptcy, Caesars sought to enter into a new agreement involving the Old Homestead Restaurant in place of the DNT Agreement.

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60. In the Bankruptcy, Caesars sought to reject the MOTI Agreement.

61. In the Bankruptcy, MOTI, LLTQ, FERG, DNT, and RSG asserted claims against Caesars for monies owed under the MOTI, LLTG, FERG, and DNT Agreements, and those claims remain pending.

62. On August 7, 2019, the Bankruptcy Court entered an Order Granting Motion of the Reorganized Debtors to Stay or Abstain (the "Contested Matters Stay").

63. In the Contested Matters Stay, the Bankruptcy Court stayed all contested matters between the Development Entities and Caesars pending resolution of this matter.

64. The Development Entities reserve all rights to pursue their claims against Caesars in the Bankruptcy following the conclusion of this matter.

Caesars Excludes the Development Entities from New Ventures

65. Subsequent to entering into the LLTQ Agreement, Caesars created and operated new restaurants subject to Section 13.22 of the LLTQ Agreement, including: (a) Gordon Ramsay Fish & Chips at the LINQ; (b) Gordon Ramsay Steak in Baltimore, Maryland; (c) Gordon Ramsay Steak in Atlantic City, New Jersey;[1] and (d) Gordon Ramsay Steak in Kansas City, Missouri (collectively, the "New Pub/Steak Restaurants").

66. Caesars did not enter into new agreements (or seek to enter into new agreements) with respect to the New Pub/Steak Restaurants with LLTQ or TPOV (or an affiliate of LLTQ or TPOV) that follow the same terms and conditions as contained in the LTTQ and TPOV Agreements as required by Section 13.22 of the LLTQ Agreement.

[1] The Development Entities acknowledge that the Court previously denied LLTQ, LLTQ 16, MOTI, and MOTI 16's Motion to Amend their Answer, Affirmative Defenses, and Counterclaims (the "LLTQ/MOTI Answer & Counterclaims"), to include allegations relating to Gordon Ramsay Steak in Atlantic City, New Jersey. (*See* Order Denying Motion to Amend, filed on Nov. 25, 2019.) The Development Entities contend that LLTQ, LLTQ 16, MOTI, and MOTI 16's prior pleadings already enabled them—under the liberal pleading standard of NRCP 8(a)—to seek damages for Caesars' creation and operation Gordon Ramsay Steak in Atlantic City, New Jersey even though the restaurant was not specifically named in the LLTQ/MOTI Answer & Counterclaims. *See Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984) ("Because Nevada is a notice-pleading jurisdiction, our courts liberally construe pleadings to place into issue matters which are fairly noticed to the adverse party."). Regardless, given that Caesars sought and obtained leave to file its First Amended Complaint—which vastly expanded the scope of this litigation by adding coercive claims for relief and a new party—LLTQ, LLTQ 16, MOTI, and MOTI 16 are arguably compelled to assert all compulsory counterclaims against Caesars, which includes seeking damages for their claims related to Gordon Ramsay Steak in Atlantic City, New Jersey.

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67. On information and belief, the New Pub/Steak Restaurants have been very successful and remain in operation.

Seibel Divests His Interests in the Development Entities

68. On May 16, 2014, the parties entered into a written amendment (the "Amendment") with regard to the MOTI Agreement, the DNT Agreement, the TPOV Agreement, and the LLTQ Agreement, authorizing each of MOTI, DNT, TPOV, and LLTQ to sell, assign, or transfer its membership interests without written consent from Caesars, provided that the assignees are not competitors of Caesars and would be subject to Caesars' internal compliance department.

69. The Amendment further provided that any obligations to be performed by Seibel under the MOTI Agreement, the DNT Agreement, the TPOV Agreement, and the LLTQ Agreement could be delegated without written consent from Caesars so long as the person to whom such obligations were delegated is reasonably qualified to carry out those obligations.

70. In April 2016, Seibel divested his membership interests in and management rights for the Development Entities.

71. In April 2016, Seibel assigned his membership interests in MOTI, DNT (via RSG), TPOV, LLTQ, and FERG to the Seibel Family 2016 Trust (the "Trust"), an irrevocable trust of which he is neither a beneficiary nor a trustee.

72. MOTI, TPOV, LLTQ, and FERG (the "Initial Entities") assigned (the "Assignments") their interests in the Development Agreements to MOTI 16, TPOV 16, LLTQ 16, and FERG 16 (the "16-Entities"), respectively.

73. Seibel's obligations under the MOTI, TPOV, LLTQ, and FERG Agreements were delegated to others, such that Seibel has no continuing rights or responsibilities to the Initial Entities or the 16-Entities.

74. Caesars was notified of the Assignments, in writing, and, in acknowledgment and ratification of the Assignments, began making payments under the Development Agreements to the 16-Entities.

Caesars Weaponizes Seibel's Conviction to Terminate the Development Agreements

75. In April 2016, Seibel personally pled guilty to a tax offense.

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76. Caesars saw Seibel's plea as pretext for its pre-planned objective to terminate the Development Agreements and cease doing business with the Development Entities.

77. In September 2016, Caesars purported to terminate the Development Agreements, contending that it had determined that Seibel—who had no interest in either the Initial Entities or the 16-Entities—would be considered an "Unsuitable Person" by the Nevada Gaming Control Board.

78. Caesars then stated that it was, *post hac*, rejecting the Assignments that it had already ratified, contending that the Assignments were not valid and that it believed that the 16-Entities remained affiliated with Seibel.

79. The Development Entities sought Caesars' guidance and assistance to satisfy any of Caesars' alleged suitability concerns.

80. Caesars arbitrarily refused to provide any guidance or assistance to the Development Entities to cure Caesars' alleged suitability concerns.

81. Caesars did not allow (or offer to allow) the Development Entities an opportunity to sell their interests in the Development Agreements to a third party deemed suitable by Caesars.

82. Caesars did not purchase (or offer to purchase) the Development Entities' rights under the Development Agreements.

83. Caesars did not close the Ramsay Restaurants (or the Old Homestead Restaurant); nor did Caesars terminate any of its related agreements with Ramsay.

84. Caesars continued (and continues) to operate the Ramsay Restaurants (and the Old Homestead Restaurant) for a substantial profit.

85. Caesars has not made any payments to the Development Entities as required by the Development Agreements since terminating the Development Agreements.

86. Caesars wants the best of both worlds: receive the benefits of the Development Agreements (e.g., capital funding and development of the Restaurants) without the corresponding burdens (e.g., profit sharing with the Development Entities and repayment of the initial capital funding provided by the Development Entities).

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FIRST CAUSE OF ACTION

Breach of Contract

Development Entities v. Caesars

87. The Development Entities repeat and re-allege the above allegations as though fully set forth herein.

88. The Development Entities and Caesars entered into valid and binding contracts (the Development Agreements).

89. The Development Entities performed under the Development Agreements and/or were excused from performing.

90. Caesars materially breached the Development Agreements by, among other actions: (a) failing to pay the Development Entities monies owed under the Development Agreements; (b) wrongfully terminating the Development Agreements; (c) wrongfully rejecting the Assignments; (d) continuing to operate the Ramsay Restaurants (and the Old Homestead Restaurant) after its wrongful termination of the Development Agreements; and (e) creating and operating the New Pub/Steak Restaurants without entering into new agreements with LLTQ, TPOV, or an affiliate of LLTQ or TPOV.

91. As a result of Caesars' breaches, the Development Entities have been damaged in an amount in excess of $15,000.

92. As a result of Caesars' breaches, the Development Entities have been forced to incur attorneys' fees and legal expenses, which the Development Entities are entitled to recover under the terms of the Development Agreements and/or as may be allowed by law.

93. The Development Entities are entitled to an accounting pursuant to the terms of the Development Agreements and under principles of equity.

SECOND CAUSE OF ACTION

Breach of the Implied Covenant of Good Faith and Fair Dealing

Development Entities v. Caesars

94. The Development Entities repeat and re-allege the above allegations as though fully set forth herein.

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95. The Development Entities and Caesars entered into valid and binding contracts (the Development Agreements).

96. As a result of the Development Agreements, Caesars owed the Development Entities a duty of good faith and fair dealing, which prohibited Caesars from deliberately contravening the intention and spirit of the Development Agreements.

97. Caesars breached this duty by, among other actions: (a) failing to pay the Development Entities monies owed under the Development Agreements; (b) wrongfully terminating the Development Agreements; (c) wrongfully rejecting the Assignments; (d) continuing to operate the Ramsay Restaurants (and the Old Homestead Restaurant) after its wrongful termination of the Development Agreements; (e) creating and operating the New Pub/Steak Restaurants without entering into new agreements with LLTQ, TPOV, or an affiliate of LLTQ or TPOV; (f) failing to work with, assist, and provide guidance to the Development Entities to satisfy Caesars' alleged suitability concerns; (g) failing to allow (or offer to allow) the Development Entities to sell their interests in the Development Agreements to a third party deemed suitable by Caesars; and (h) failing to purchase (or offer to purchase) the Development Entities' rights under the Development Agreements.

98. Caesars' breaches of the implied covenant of good faith and fair dealing underlying the Development Agreements deprived the Development Entities of their justified expectations.

99. As a result of Caesars' breaches, the Development Entities have been damaged in an amount in excess of $15,000.

100. As a result of Caesars' breaches, the Development Entities have been forced to incur attorneys' fees and legal expenses, which the Development Entities are entitled to recover under the terms of the Development Agreements and/or as may be allowed by law.

101. The Development Entities are entitled to an accounting pursuant to the terms of the Development Agreements and under principles of equity.

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WHEREFORE, the Development Entities pray for relief as follows:

1. For permanent injunctive relief restraining Caesars from engaging in conduct in violation of the Development Agreements, including continuing to operate the Ramsay Restaurants (and the Old Homestead Restaurant) without remitting a share of the profits to the Development Entities;

2. For judgment for compensatory damages in excess of $15,000;

3. For judgment for punitive or exemplary damages according to proof;

4. For an award of interest and costs as provided by law;

5. For an award of reasonable attorneys' fees and costs as provided by the Development Agreements and/or as may be allowed by law; and

6. For such other and further relief as may be deemed just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Nevada Rule of Civil Procedure 38, the Development Entities, Seibel, and Green demand a trial by jury of all triable issues in the above-captioned action.

DATED this 19th day of June 2020.

BAILEY❖KENNEDY

By: /s/ John R. Bailey
JOHN R. BAILEY
DENNIS L. KENNEDY
JOSHUA P. GILMORE
PAUL C. WILLIAMS
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Attorneys for 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; and R Squared Global Solutions, LLC, Derivatively On Behalf of DNT Acquisition, LLC

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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 19th day of June, 2020, service of the foregoing was made by mandatory electronic service through the Eighth Judicial District Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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/s/ Paul C. Williams
Employee of BAILEY❖KENNEDY

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TAB 63

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Attorneys for Nominal Plaintiff
GR BURGR, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

ROWEN SEIBEL, an individual and citizen of New York, derivatively on behalf of Real Party in Interest GR BURGR, LLC, a Delaware limited liability company, Plaintiff, vs. PHWLV, LLC, a Nevada limited liability company; GORDON RAMSAY, an individual; DOES I through X; ROE CORPORATIONS I through X, Defendants, And GR BURGR, LLC, a Delaware limited liability company, Nominal Plaintiff. *AND ALL RELATED CLAIMS.*	CASE NO.: A-17-751759-B DEPT. NO.: XVI Consolidated with A-17-760537-B **NOMINAL PLAINTIFF, GR BURGR, LLC's ANSWER TO FIRST AMENDED COMPLAINT**

NOMINAL PLAINTIFF, GR BURGR LLC, ("GRB,"), by and through its attorneys of record, Aaron D. Lovaas, Esq. of the law firm of NEWMEYER & DILLION LLP, hereby answers the First Amended Complaint of DESERT PALACE, INC.; PARIS LAS VEGAS OPERATING COMPANY, LLC; PHWLV, LLC; and BOARDWALK REGENCY CORPORATION dba CAESARS ATLANTIC CITY, ("Caesars") as follows:

PRELIMINARY STATEMENT

1. The answering Nominal Plaintiff, GRB, answering paragraph 1 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of the allegations contained within this paragraph and therefore denies the same. As to allegations regarding the various terms and requirements of the referenced "six agreements," GRB affirmatively alleges that said agreements speak for themselves.

2. The answering Nominal Plaintiff, GRB, answering paragraph 2 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of the allegations contained within this paragraph and therefore denies the same.

3. This answering Nominal Plaintiff, GRB, answering paragraph 3 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of the allegations contained within this paragraph and therefore denies the same. As to matters of public record alleged in paragraph 3, GRB affirmatively alleges that said public records speak for themselves.

4. This answering Nominal Plaintiff, GRB, answering paragraph 4 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of the allegations contained within this paragraph and therefore denies the same.

5. This answering Nominal Plaintiff, GRB, answering paragraph 5 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of the allegations contained within this paragraph and therefore denies the same. As to allegations regarding the various terms and requirements of the referenced "agreements" among various parties, GRB affirmatively alleges that said agreements speak for themselves.

6. This answering Nominal Plaintiff, GRB, answering paragraph 6 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of the allegations contained within this paragraph and therefore denies the same. As to allegations regarding what the various parties to the present case may be "claiming" or "indicating," GRB affirmatively alleges that the papers and pleadings on file in this matter

speak for themselves.

7. This answering Nominal Plaintiff, GRB, answering paragraph 7 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of the allegations contained within this paragraph and therefore denies the same. As to specific allegations of fraudulent inducement attributed to GRB as one of the "Seibel-Affiliated Entities" (as that term is defined in the First Amended Complaint), GRB denies the same.

8. This answering Nominal Plaintiff, GRB, answering paragraph 8 of the First Amended Complaint, incorporates by reference the responses above.

9. This answering Nominal Plaintiff, GRB, answering paragraph 9 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of the allegations contained within this paragraph and therefore denies the same.

10. This answering Nominal Plaintiff, GRB, answering paragraph 10 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of the allegations contained within this paragraph and therefore denies the same.

11. This answering Nominal Plaintiff, GRB, answering paragraph 11 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of the allegations contained within this paragraph and therefore denies the same.

PARTIES, JURISDICTION, AND VENUE

12. This answering Nominal Plaintiff, GRB, answering paragraphs 12 - 17 of the First Amended Complaint, admits the allegations therein, based on information and belief.

13. This answering Nominal Plaintiff, GRB, answering paragraph 18 of the First Amended Complaint, admits the allegations therein as to the identification of the party, based on information and belief. As to the factual allegations regarding the negotiation of agreements, GRB is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. As to the allegations describing specific terms of the referenced agreements, GRB affirmatively alleges that said agreements speak for themselves.

14. This answering Nominal Plaintiff, GRB, answering paragraph 19 of the First Amended Complaint, admits the allegations therein as to the identification of the party, based on information and belief. As to the remaining factual allegations of paragraph 19, GRB is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same.

15. This answering Nominal Plaintiff, GRB, answering paragraph 20 of the First Amended Complaint, admits the allegations therein as to the identification of the party, based on information and belief. As to the factual allegations regarding the negotiation of agreements, GRB is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. As to the allegations describing specific terms of the referenced agreements, GRB affirmatively alleges that said agreements speak for themselves.

16. This answering Nominal Plaintiff, GRB, answering paragraph 21 of the First Amended Complaint, admits the allegations therein as to the identification of the party, based on information and belief. As to the factual allegations regarding the negotiation of agreements, GRB is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. As to the allegations describing specific terms of the referenced agreements, GRB affirmatively alleges that said agreements speak for themselves.

17. This answering Nominal Plaintiff, GRB, answering paragraph 22 of the First Amended Complaint, admits the allegations therein as to the identification of the party, based on information and belief. As to the remaining factual allegations of paragraph 22, GRB is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same.

18. This answering Nominal Plaintiff, GRB, answering paragraph 23 of the First Amended Complaint, admits the allegations therein as to the identification of the party, based on information and belief. As to the factual allegations regarding the negotiation of agreements, GRB is presently without sufficient information to form a belief as to the truth

of those allegations and therefore denies the same. As to the allegations describing specific terms of the referenced agreements, GRB affirmatively alleges that said agreements speak for themselves.

19. This answering Nominal Plaintiff, GRB, answering paragraph 24 of the First Amended Complaint, admits the allegations therein as to the identification of the party, based on information and belief. As to the remaining factual allegations of paragraph 24, GRB is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same.

20. This answering Nominal Plaintiff, GRB, answering paragraph 25 of the First Amended Complaint, admits the allegations therein as to the identification of GRB. As to the allegations describing specific terms of the GRB Agreement, GRB affirmatively alleges that said agreement speaks for itself.

21. This answering Nominal Plaintiff, GRB, answering paragraph 26 of the First Amended Complaint, admits the allegations therein as to the identification of the party, based on information and belief. As to the factual allegations regarding the negotiation of agreements, GRB is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. As to the allegations describing specific terms of the referenced agreements, GRB affirmatively alleges that said agreements speak for themselves.

22. This answering Nominal Plaintiff, GRB, answering paragraph 27 of the First Amended Complaint, admits the allegations therein as to the identification of the party, based on information and belief. As to the remaining factual allegations of paragraph 27, GRB is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same.

23. This answering Nominal Plaintiff, GRB, answering paragraph 28 of the First Amended Complaint, admits the allegations therein, based on information and belief.

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STATEMENT OF FACTS

A. The Business Relationship Between Caesars and Mr. Seibel.

(a) The MOTI Agreement.

24. This answering Nominal Plaintiff, GRB, answering paragraphs 29 - 30 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of the allegations and therefore denies the same.

25. This answering Nominal Plaintiff, GRB, answering paragraphs 31 - 37 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. As to the allegations describing specific terms of the referenced agreements, GRB affirmatively alleges that said agreements speak for themselves.

26. This answering Nominal Plaintiff, GRB, answering paragraphs 38 - 39 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same.

(b) The DNT Agreement.

27. This answering Nominal Plaintiff, GRB, answering paragraph 40 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. As to the allegations describing specific terms of the referenced agreements, GRB affirmatively alleges that said agreements speak for themselves.

28. This answering Nominal Plaintiff, GRB, answering paragraph 41 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same.

29. This answering Nominal Plaintiff, GRB, answering paragraphs 42 - 48 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. As to the allegations describing specific terms of the referenced agreements, GRB affirmatively alleges that said agreements speak for themselves.

30. This answering Nominal Plaintiff, GRB, answering paragraph 49 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same.

(c) The TPOV Agreement.

31. This answering Nominal Plaintiff, GRB, answering paragraph 50 - 57 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. As to the allegations describing specific terms of the referenced agreements, GRB affirmatively alleges that said agreements speak for themselves.

32. This answering Nominal Plaintiff, GRB, answering paragraph 58 - 59 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same.

(d) The LLTQ Agreement.

33. This answering Nominal Plaintiff, GRB, answering paragraph 60 - 67 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. As to the allegations describing specific terms of the referenced agreements, GRB affirmatively alleges that said agreements speak for themselves.

34. This answering Nominal Plaintiff, GRB, answering paragraph 68 - 69 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same.

35. This answering Nominal Plaintiff, GRB, answering paragraph 70 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. As to the allegations describing specific terms of the referenced agreements, GRB affirmatively alleges that said agreements speak for themselves.

36. This answering Nominal Plaintiff, GRB, answering paragraph 71 of the First Amended Complaint, is presently without sufficient information to form a belief as to the

truth of the allegations and therefore denies the same.

(e) The GR BURGR Agreement.

37. This answering Nominal Plaintiff, GRB, answering paragraphs 72 - 78 of the First Amended Complaint, admits the allegations therein, based on information and belief. As to the allegations describing specific terms of the referenced agreements, GRB affirmatively alleges that said agreements speak for themselves.

38. This answering Nominal Plaintiff, GRB, answering paragraph 79 of the First Amended Complaint, (a) affirmatively alleges that the terms of the agreements referenced therein speak for themselves; (b) has no capacity to answer on behalf of Mr. Seibel; and (c) has no capacity to admit or deny whether GRB was "obligated" as alleged under the terms of the referenced agreement as to do so calls for the expression of a legal conclusion.

39. This answering Nominal Plaintiff, GRB, answering paragraph 80 - 81 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of the allegations contained within this paragraph and therefore denies the same.

(f) The FERG Agreement.

40. This answering Nominal Plaintiff, GRB, answering paragraph 82 - 89 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. As to the allegations describing specific terms of the referenced agreements, GRB affirmatively alleges that said agreements speak for themselves.

41. This answering Nominal Plaintiff, GRB, answering paragraph 90 - 91 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same.

42. This answering Nominal Plaintiff, GRB, answering paragraph 92 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. As to the allegations describing specific terms of the referenced agreements, GRB affirmatively alleges that said

agreements speak for themselves.

43. This answering Nominal Plaintiff, GRB, answering paragraph 93 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. As to the allegations describing what Caesars "contends" and/or what FERG "has asserted," GRB affirmatively alleges that the papers and pleadings on file in this matter speak for themselves.

B. <u>The Activities of Mr. Seibel and the Seibel-Affiliated Entities Rendered Him Unsuitable Under the Seibel Agreements.</u>

44. This answering Nominal Plaintiff, GRB, answering paragraph 94 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of the allegations contained within this paragraph and therefore denies the same.

(a) Mr. Seibel set up numbered UBS accounts in Switzerland and concealed them from the United States government.

45. This answering Nominal Plaintiff, GRB, answering paragraphs 95 - 100 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of the allegations contained within this paragraph and therefore denies the same.

(b) In 2008, Mr. Seibel closed his UBS account and opened a new account.

46. This answering Nominal Plaintiff, GRB, answering paragraph 101 - 102 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of the allegations contained within this paragraph and therefore denies the same.

(c) Mr. Seibel filed incomplete and inaccurate tax returns.

47. This answering Nominal Plaintiff, GRB, answering paragraph 103 - 105 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those factual allegations and therefore denies the same. As to the allegations contained in those paragraphs describing various reporting and filing

obligations of United States citizens, GRB affirmatively alleges that the United States Internal Revenue Code and related regulations speak for themselves.

(d) Mr. Seibel provided false application to voluntary disclosure program.

48. This answering Nominal Plaintiff, GRB, answering paragraph 106 - 108 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of the allegations contained within this paragraph and therefore denies the same.

49. This answering Nominal Plaintiff, GRB, answering paragraph 109 - 110 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of the factual allegations therein and therefore denies the same. As to the allegations of those paragraphs describing matters of public record, GRB affirmatively alleges that said public records speak for themselves.

50. This answering Nominal Plaintiff, GRB, answering paragraph 111 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of the allegations contained within this paragraph and therefore denies the same.

C. <u>Caesars Exercises Its Sole Discretion to Terminate the Agreements with the Seibel-Affiliated Entities.</u>

51. This answering Nominal Plaintiff, GRB, answering paragraph 112 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of the allegations contained within this paragraph and therefore denies the same.

(a) Termination of the MOTI Agreement.

52. This answering Nominal Plaintiff, GRB, answering paragraph 113 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. As to the allegations describing specific terms of the referenced letter, GRB affirmatively alleges that said letter speaks for itself.

/ / /

(b) Termination of the DNT Agreement.

53. This answering Nominal Plaintiff, GRB, answering paragraph 114 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. As to the allegations describing specific terms of the referenced letter, GRB affirmatively alleges that said letter speaks for itself.

54. This answering Nominal Plaintiff, GRB, answering paragraph 115 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of the allegations contained within this paragraph and therefore denies the same.

(c) Termination of the TPOV Agreement.

55. This answering Nominal Plaintiff, GRB, answering paragraph 116 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. As to the allegations describing specific terms of the referenced letter, GRB affirmatively alleges that said letter speaks for itself.

(d) Termination of the LLTQ Agreement.

56. This answering Nominal Plaintiff, GRB, answering paragraph 117 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. As to the allegations describing specific terms of the referenced letter, GRB affirmatively alleges that said letter speaks for itself.

(e) Termination of the GRB Agreement.

57. This answering Nominal Plaintiff, GRB, answering paragraph 118 of the First Amended Complaint, admits it received the referenced letter from Caesars dated on or about September 2, 2016. GRB affirmatively alleges that said letter speaks for itself.

58. This answering Nominal Plaintiff, GRB, answering paragraph 119 of the First Amended Complaint, admits the GRB Agreement was terminated.

/ / /

(f) Termination of the FERG Agreement.

59. This answering Nominal Plaintiff, GRB, answering paragraph 120 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. As to the allegations describing specific terms of the referenced letter, GRB affirmatively alleges that said letter speaks for itself.

(g) The Seibel-Affiliated Entities dispute the propriety of the termination of their agreements with Caesars.

60. This answering Nominal Plaintiff, GRB, answering paragraphs 121 - 122 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. As to the allegations describing specific terms of the referenced letters, GRB affirmatively alleges that said letters speak for themselves.

D. <u>Legal Proceedings Involving Caesars and the Defendants.</u>

(a) Contested matters involving Caesars Palace, CAC, LLTQ, FERG, and MOTI.

61. This answering Nominal Plaintiff, GRB, answering paragraph 123 - 128 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. As to the allegations describing matters of public record, GRB affirmatively alleges that said public records speak for themselves.

(b) Litigation involving GRB and Planet Hollywood.

62. This answering Nominal Plaintiff, GRB, answering paragraph 129 - 131 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. As to the allegations describing matters of public record, GRB affirmatively alleges that said public records speak for themselves.

/ / /

(c) Nevada Federal District Court litigation involving TPOV and Paris.

63. This answering Nominal Plaintiff, GRB, answering paragraph 132 - 133 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. As to the allegations describing matters of public record, GRB affirmatively alleges that said public records speak for themselves.

E. Mr. Seibel, Mr. Green, and the Seibel-Affiliated Entities Were Engaged in a Kickback Scheme.

64. This answering Nominal Plaintiff, GRB, answering paragraph 134 - 143 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of the allegations contained within this paragraph and therefore denies the same.

65. This answering Nominal Plaintiff, GRB, answering paragraph 144 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of the allegations contained within this paragraph and therefore denies the same. To the extent said allegations are directed towards GRB as a "Seibel-Affiliated Entity," GRB denies the same.

COUNT I

(Declaratory Judgment Against All Defendants Declaring That Caesars Properly Terminated All of the Seibel Agreements)

66. This answering Nominal Plaintiff, GRB, answering paragraph 145 of the First Amended Complaint, incorporates by reference the responses above.

67. This answering Nominal Plaintiff, GRB, answering paragraph 146 of the First Amended Complaint, neither admits, nor denies said paragraph as the same is a mere recitation of NRS 30.040(1), which speaks for itself.

68. This answering Nominal Plaintiff, GRB, answering paragraph 147 of the First Amended Complaint, neither admits, nor denies said paragraph as the same is a mere

recitation that the parties hereto have a dispute, which is evident from the existence of this litigation, the papers and pleadings on file in which speak for themselves.

69. This answering Nominal Plaintiff, GRB, answering paragraph 148 of the First Amended Complaint, lacks the capacity to either admit or deny as the determination of whether Caesars "properly exercised" its discretion under the various alleged agreements calls for a legal conclusion.

70. This answering Nominal Plaintiff, GRB, answering paragraph 149 of the First Amended Complaint, neither admits nor denies the fact that Caesars requests any particular relief. GRB affirmatively alleges that the First Amended Complaint speaks for itself as to the relief sought by Caesars.

COUNT II

(Declaratory Judgment Against All Defendants Declaring That Caesars Does Not Have Any Current or Future Obligations to Defendants Under the Seibel Agreements)

71. This answering Nominal Plaintiff, GRB, answering paragraph 150 of the First Amended Complaint, incorporates by reference the responses above.

72. This answering Nominal Plaintiff, GRB, answering paragraph 151 of the First Amended Complaint, neither admits, nor denies said paragraph as the same is a mere recitation of NRS 30.040(1), which speaks for itself.

73. This answering Nominal Plaintiff, GRB, answering paragraph 152 of the First Amended Complaint, neither admits, nor denies said paragraph as the same is a mere recitation that the parties hereto have a dispute, which is evident from the existence of this litigation, the papers and pleadings on file in which speak for themselves.

74. This answering Nominal Plaintiff, GRB, answering paragraph 153 of the First Amended Complaint, lacks the capacity to either admit or deny as the determination of whether Caesars "ha[s] any current or future financial obligations or commitments to Mr. Seibel or the Seibel-Affiliated Entities" calls for a legal conclusion.

75. This answering Nominal Plaintiff, GRB, answering paragraph 154 of the First

Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. As to the allegations describing specific terms of the referenced agreements, GRB affirmatively alleges that said agreements speak for themselves.

76. This answering Nominal Plaintiff, GRB, answering paragraph 155 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. To the extent "fraudulent inducement" is alleged in this paragraph against GRB as one of the "Seibel-Affiliated Entities," GRB denies the same.

77. This answering Nominal Plaintiff, GRB, answering paragraph 156 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of the allegations contained within this paragraph and therefore denies the same.

78. This answering Nominal Plaintiff, GRB, answering paragraph 157 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. To the extent "fraudulent inducement" is alleged in this paragraph against GRB as one of the "Seibel-Affiliated Entities," GRB denies the same.

79. This answering Nominal Plaintiff, GRB, answering paragraph 158 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. To the extent a breach of the referenced agreements is alleged in this paragraph against GRB as one of the "Seibel-Affiliated Entities," GRB denies the same.

80. This answering Nominal Plaintiff, GRB, answering paragraph 159 – 160 of the First Amended Complaint, neither admits nor denies the fact that Caesars requests any particular relief. GRB affirmatively alleges that the First Amended Complaint speaks for itself as to the relief sought by Caesars.

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COUNT III

(Declaratory Judgment Against All Defendants Declaring that the Seibel Agreements Do Not Prohibit or Limit Existing or Future Restaurant Ventures Between Caesars and Gordon Ramsay)

81. This answering Nominal Plaintiff, GRB, answering paragraph 161 of the First Amended Complaint, incorporates by reference the responses above.

82. This answering Nominal Plaintiff, GRB, answering paragraph 162 of the First Amended Complaint, neither admits, nor denies said paragraph as the same is a mere recitation of NRS 30.040(1), which speaks for itself.

83. This answering Nominal Plaintiff, GRB, answering paragraph 163 of the First Amended Complaint, neither admits, nor denies said paragraph as the same is a mere recitation that the parties hereto have a dispute, which is evident from the existence of this litigation, the papers and pleadings on file in which speak for themselves.

84. This answering Nominal Plaintiff, GRB, answering paragraph 164 - 168 of the First Amended Complaint, lacks the capacity to either admit or deny as the determination of whether the terms of the referenced agreements are "unenforceable," "overbroad," "indefinite," "vague," and "ambiguous" calls for a legal conclusion.

85. This answering Nominal Plaintiff, GRB, answering paragraph 169 - 170 of the First Amended Complaint, neither admits nor denies the fact that Caesars requests any particular relief. GRB affirmatively alleges that the First Amended Complaint speaks for itself as to the relief sought by Caesars.

COUNT IV

(Civil Conspiracy Against Mr. Seibel and Mr. Green)

86. This answering Nominal Plaintiff, GRB, answering paragraph 171 of the First Amended Complaint, incorporates by reference the responses above.

87. This answering Nominal Plaintiff, GRB, answering paragraphs 172 - 176 of the First Amended Complaint, neither admits, nor denies said allegations as the same are specifically directed at parties other than GRB.

COUNT V

(Breaches of Implied Covenants of Good Faith and Fair Dealing Against MOTI, DNT, TPOV, LLTQ, GR BURGR, and FERG)

88. This answering Nominal Plaintiff, GRB, answering paragraph 177 of the First Amended Complaint, incorporates by reference the responses above.

89. This answering Nominal Plaintiff, GRB, answering paragraph 178 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations regarding the MOTI, DNT, TPOV, LLTQ, and FERG Agreements and therefore denies the same. Specifically with respect to the GR BURGR Agreement, GRB lacks the capacity to either admit or deny as the determination of whether the agreement constituted a "valid, binding, and enforceable" contract calls for a legal conclusion.

90. This answering Nominal Plaintiff, GRB, answering paragraph 179 of the First Amended Complaint neither admits, nor denies said paragraph as the same is a mere recitation of Nevada law, which speaks for itself.

91. This answering Nominal Plaintiff, GRB, answering paragraph 180 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of the allegations contained within this paragraph and therefore denies the same.

92. This answering Nominal Plaintiff, GRB, answering paragraph 181 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of the allegations contained within this paragraph and therefore denies the same.

93. This answering Nominal Plaintiff, GRB, answering paragraph 182 - 183 of the First Amended Complaint, is presently without sufficient information to form a belief as to the truth of those allegations and therefore denies the same. To the extent a breach of the implied covenant of good faith and fair dealing is alleged against GRB and/or damages sought from GRB specifically, GRB denies the same.

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COUNT VI

(Unjust Enrichment Against Mr. Seibel & Mr. Green)

94. This answering Nominal Plaintiff, GRB, answering paragraph 184 of the First Amended Complaint, incorporates by reference the responses above.

95. This answering Nominal Plaintiff, GRB, answering paragraph 185 - 190 of the First Amended Complaint, neither admits, nor denies said allegations as the same are specifically directed at parties other than GRB.

COUNT VII

(Intentional Interference with Contractual Relations Against Rowen Seibel and Craig Green)

96. This answering Nominal Plaintiff, GRB, answering paragraph 191 of the First Amended Complaint, incorporates by reference the responses above.

97. This answering Nominal Plaintiff, GRB, answering paragraph 192 - 198 of the First Amended Complaint, neither admits, nor denies said allegations as the same are specifically directed at parties other than GRB.

COUNT VIII

(Fraudulent Concealment Against Rowen Seibel and Craig Green)

98. This answering Nominal Plaintiff, GRB, answering paragraph 199 of the First Amended Complaint, incorporates by reference the responses above.

99. This answering Nominal Plaintiff, GRB, answering paragraph 200 - 206 of the First Amended Complaint, neither admits, nor denies said allegations as the same are specifically directed at parties other than GRB.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The First Amended Complaint on file herein fails to state a claim against GRB upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Caesars' claims are barred, in whole or in part, by the doctrine of waiver, estoppel,

and/or laches.

THIRD AFFIRMATIVE DEFENSE

Caesars' claims are barred, in whole or in part, by reason of the fact that if Caesars suffered any injury or damages, which is expressly and specifically denied, that any such injury or damage was caused in whole or in part by the acts, omissions and conduct of Caesars.

FOURTH AFFIRMATIVE DEFENSE

Caesars' claims are barred, in whole or in part, by reason of the fact that if Caesars suffered any injury or damages, which is expressly and specifically denied, that any such injury or damage was caused in whole or in part by the acts, omissions and conduct of other parties over which GRB had no supervision or control.

FIFTH AFFIRMATIVE DEFENSE

Caesars' claims are barred, in whole or in part, by Caesars' failure to mitigate damages.

SIXTH AFFIRMATIVE DEFENSE

Any conduct or omissions by GRB were not the cause in fact or proximate cause of any injury or damages alleged by Caesars.

SEVENTH AFFIRMATIVE DEFENSE

If GRB failed to perform any contractual obligation, which is expressly and specifically denied, GRB was prevented from such performance by the actions of Caesars.

EIGHTH AFFIRMATIVE DEFENSE

If GRB failed to perform any contractual obligation, which is expressly and specifically denied, GRB was prevented from such performance by the actions of other parties over which GRB had no supervision or control.

NINTH AFFIRMATIVE DEFENSE

GRB hereby incorporates by reference those affirmative defenses enumerated in NRCP 8 for the specific reason of not waiving the same.

/ / /

TENTH AFFIRMATIVE DEFENSE

GRB reserves the right to assert any additional affirmative defenses and matters in avoidance as may be disclosed during the course of additional investigation and discovery. Pursuant to NRCP 11, as amended, all possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not plead and are not available after reasonable inquiry upon the filing of GRB's Answer, and therefore GRB reserves the right to amend this Answer to allege additional affirmative defenses if so warranted.

PRAYER

WHEREFORE, NOMINAL PLAINTIFF, GR BURGR, LLC prays for judgment against DESERT PALACE, INC.; PARIS LAS VEGAS OPERATING COMPANY, LLC; PHWLV, LLC; and BOARDWALK REGENCY CORPORATION dba CAESARS ATLANTIC CITY, as follows:

1. That Plaintiff take nothing by way of this action;
2. For the cost of suit incurred herein;
3. For attorney's fees and costs; and
4. For such other and further relief as the Court deems just and proper.

Dated: this 19th day of June, 2020

NEWMEYER & DILLION LLP

By: _____

AARON D. LOVAAS, ESQ. SBN 5701
3800 Howard Hughes Pkwy, Suite 700
Las Vegas, Nevada 89169
Telephone: (702) 777-7500
Facsimile: (702) 777-7599

Attorneys for Nominal Plaintiff
GR BURGR, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of June, 2020, I served a true and correct copy of the foregoing **NOMINAL PLAINTIFF, GR BURGR, LLC's ANSWER TO FIRST AMENDED COMPLAINT** by electronic service to all parties listed on the master service list pursuant to Administrative Order 14-2 and Rule 9 of the NEFCR.

Yolanda Nance

An employee of Newmeyer & Dillion LLP

NEWMEYER DILLION

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

v.

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

Defendants,

and

GR BURGR LLC, a Delaware limited liability company,

Nominal Plaintiff.

AND ALL RELATED MATTERS

Case No.: A-17-751759-B
Dept. No.: XVI

Consolidated with A-17-760537-B

CAESARS' MOTION TO STRIKE THE SEIBEL-AFFILIATED ENTITIES' COUNTERCLAIMS, AND/OR IN THE ALTERNATIVE, MOTION TO DISMISS

[HEARING REQUESTED]

For nearly three years, Caesars,[1] Rowen Seibel ("Seibel"), and the Seibel-Affiliated Entities[2] have been engaged in protracted litigation surrounding one central issue: whether Caesars – as a gaming licensee in Nevada and other jurisdictions around the country – is required to continue to do business with a convicted felon who not only hid his crimes despite express suitability disclosure requirements, but actively deceived Caesars and his business partners. After wasting nearly a year before filing their responsive pleadings – and even then only under the threat of default – Caesars has attempted to actively litigate this matter to bring about a prompt resolution. But, as this Court knows, Caesars' efforts have been continually thwarted at every turn. Indeed, after over two years of litigation, certain Seibel-Affiliated Entities attempted to amend their counterclaims even though the deadline to amend pleadings had expired ***months*** prior. This Court rebuffed those efforts to delay this litigation and expressly denied the Seibel-Affiliated Entities' untimely motion to amend, as they had failed to show good cause why they had failed to meet this Court's deadlines.

Now, in express disregard of this Court's order, the Seibel-Affiliated Entities – with new counsel in tow – have unilaterally granted themselves the same relief denied by this Court only months ago, together with some entirely new claims that also should have been brought years ago. The law does not countenance such disregard for this Court's orders, rules, or scheduling orders. The Seibel-Affiliated Entities' counterclaims cannot proceed in this litigation and must be stricken and/or in the alternative dismissed.

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

[2] TPOV Enterprises, LLC ("TPOV"), TPOV Enterprises 16, LLC ("TPOV 16"), LLTQ Enterprises, LLC ("LLTQ"), LLTQ Enterprises 16, LLC ("LLTQ 16"), FERG, LLC ("FERG"), FERG 16, LLC ("FERG 16"), MOTI Partners, LLC ("MOTI"), MOTI Partners 16, LLC ("MOTI 16"), and DNT Acquisition, LLC ("DNT") are collectively referred to herein as the Seibel-Affiliated Entities. Seibel, Craig Green ("Green"), and the Seibel-Affiliated Entities' are collectively referred to herein as the Seibel Parties.

This Motion is based on NRCP 12 and 16 and is supported by the following Memorandum of Points and Authorities, the pleadings and papers on file in this action, and any and all oral argument allowed by this Court at the time of hearing on this matter.

DATED this 15th day of June 2020.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

After years of litigation, the Seibel Affiliated-Entities are once again choosing to ignore the orders, rules, and schedule of this Court in an effort to further delay this matter. Unilaterally declaring (incorrectly) that Caesars' First Amended Complaint grants them a "do-over," the Seibel-Affiliated Entities attempt to bring counterclaims that were already barred by this Court and counterclaims that seek to entirely reopen and expand the scope of this litigation well-beyond its current parameters. With just a few months left of discovery – and having previously failed in their efforts to amend their pleadings – the Seibel-Affiliated Entities cannot be rewarded for their dilatory and now brazen behavior.

II. STATEMENT OF FACTS AND RELEVANT PROCEDURAL HISTORY

A. The Procedural History of this Litigation.

Caesars filed its Complaint in this Action on August 25, 2017. (Compl., Aug. 25, 2017, on file.) The original complaint set forth three causes of action against Seibel and all of the Seibel-Affiliated Entities: (1) declaratory judgment declaring that Caesars properly terminated all of the Seibel Agreements;[3] (2) declaratory judgment declaring that Caesars does not have any current or

[3] The Seibel Agreements include:

- A Development, Operation and License Agreement between MOTI Partners, LLC and Desert Palace, Inc. dated March 2009 (the "MOTI Agreement");
- A Development, Operation and License Agreement between DNT Acquisition, LLC, the Original Homestead Restaurant, Inc., and Desert Palace, Inc., dated June 21, 2011, dated June 21, 2011 (the "DNT Agreement");
- A Development and Operation Agreement between TPOV and Paris dated November 2011 (the "TPOV Agreement");
- A Development and Operation Agreement between LLTQ Enterprises, LLC and Desert Palace, Inc. dated April 4, 2012 (the "LLTQ Agreement");
- A Development, Operation and License Agreement between PHW Las Vegas, LLC dba Planet Hollywood by its manager, PHW Manager, LLC, GR BURGR, LLC, and Gordon Ramsay, dated December 13, 2012 (the "GR Burgr Agreement"); and
- A Consulting Agreement between FERG, LLC and Boardwalk Regency Corporation dba Caesars Atlantic City, dated May 16, 2014 (the "FERG Agreement").

future obligations to Defendants under the Seibel Agreements; and (3) declaratory judgment declaring that the Seibel Agreements do not prohibit or limit existing or future restaurant ventures between Caesars and Gordon Ramsay. (*Id.* ¶¶ 131-56.) In short, all of the claims (and indeed, all of the allegations in the original complaint) unequivocally relate to Caesars' termination of the Seibel Agreements. (*See generally id.*)

Although the original complaint was filed in August 2017, as this Court will recall, Seibel and the Seibel-Affiliated Entities engaged in a nearly year-long campaign to avoid litigating this dispute in this Court. After multiple procedural maneuvers and intentional delays, Seibel and the Seibel-Affiliated Entities stubbornly continued to refuse to file responsive pleadings. Indeed, they refused to do so until Caesars was forced to file notices of intent to take default. (*See, e.g.*, Notice of Intent to Take Default, June 25, 2018, on file.) Over ten months after Caesars filed the complaint, the Seibel and the Seibel-Affiliated Entities ***finally*** filed their answers in July 2018. (*See, e.g.*, LLTQ/FERG Defs.' Answer & Affirmative Defenses to Pl.'s Compl. & Countercls., July 6, 2018, on file.)

Importantly, not all of the Seibel-Affiliated Entities chose to file counterclaims. Instead, only LLTQ, LLTQ 16, FERG, FERG 16, and DNT, derivatively by one of its members, R Squared Global Solutions, LLC, filed counterclaims against Caesars. (*See, e.g.*, LLTQ/FERG Defs.' Answer & Affirmative Defenses to Pl.'s Compl. & Countercls., July 6, 2018, on file; Def. DNT's Answer to Pl.'s Compl. & Coutnercls., July 6, 2018.) To be clear, ***TPOV, TPOV 16, MOTI, and MOTI 16 only filed answers in response to Caesars' original complaint***. (*See* MOTI Defs.' Answer & Affirmative Defenses to Pl.'s Compl., July 6, 2018; Defs. TPOV & TPOV 16's Answer to Pl.'s Compl., July 6, 2018, on file.)

After Seibel and the Seibel-Affiliated Entities filed their responsive pleadings, the Court held a Rule 16 conference on October 23, 2018, and issued a scheduling order setting the deadline to amend pleadings or add parties on February 4, 2019. (Business Court Scheduling Order Setting Civil Jury Trial & Pre-Trial Conference Calendar Call, Oct. 31, 2018, on file, at 2:3.) Although thereafter the parties entered into various stipulations to extend discovery and motion practice related to the same, none of the parties asked this Court to extend or otherwise modify

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the deadline to amend their pleadings past February 4, 2019. (*See, e.g.*, Mot. for an Extension of Disc. Deadlines on Order Shortening Time, at 9:6-15, Feb. 26, 2019, on file.)

B. The Seibel Parties Unsuccessfully Move to Amend their Counterclaims.

Nearly eight months after the expiration of the deadline to amend pleadings, on or about October 2, 2019, LLTQ, LLTQ 16, FERG, and FERG 16 (the "LLTQ/FERG Defendants") moved this Court for leave to amend their counterclaims. (Mot. to Amend LLTQ/FERG Defendants' Answer, Affirmative Defenses & Countercls., Oct. 2, 2019, on file.) The LLTQ/FERG Defendants sought to add allegations in their counterclaims related to a Gordon Ramsay Steak Restaurant located in Atlantic City as well as additional restaurants in the United States involving Gordon Ramsay and Caesars or its affiliates. (*See* Ex. 3 to Mot. to Amend LLTQ/FERG Defendants' Answer, Affirmative Defenses & Countercls., Oct. 2, 2019, on file.) Although the Gordon Ramsay Steak restaurant in Atlantic City was open before the LLTQ/FERG Defendants filed their original counterclaim and they admittedly knew about the restaurant, the LLTQ/FERG Defendants failed to include any counterclaims related to these issues in their original counterclaim. In their most recent counterclaims, the Seibel-Affiliated Entities incorrectly state that MOTI and MOTI 16 previously moved to amend their counterclaims. (The Development Entities, Rowen Seibel, & Craig Green's Answer to Caesars First Am. Compl. & Countercls., at 45 n.1.) This is incorrect. MOTI and MOTI 16 never moved to amend any counterclaims because, in fact, ***they never asserted any counterclaims in this matter***. (*See* MOTI Defs.' Answer & Defenses to Pl.'s Compl., July 6, 2018, on file.)

Following thorough motion practice related to the LLTQ/FERG Defendants' efforts to untimely amend their counterclaims, this Court denied their request finding that the LLTQ/FERG Defendants had failed to meet their "burden and ha[d] not demonstrated that good cause exists to permit amendment of their counterclaim." (Order Denying Mot. to Amend LLTQ/FERG Defs.' Answer, Affirmative Defenses, & Countercls., at 3:4-6, Nov. 25, 2019, on file.) Specifically, this Court found that "[t]he ***LLTQ/FERG Defendants were aware of the facts they sought to include in their amended counterclaim before the deadline to amend expired and they delayed seeking leave to amend their counterclaim***." (*Id.* at 3:6-8 (emphasis

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added).) Thereafter, the LLTQ/FERG Defendants did not request that this Court reconsider its order nor did they file a new action related to the claims they were barred from bringing in this litigation.

Following discovery and depositions, Caesars moved to amend its complaint on December 12, 2019. (*See* Caesars' Mot. for Leave to File 1st Am. Compl, Dec. 12, 2019, on file.) Caesars' new claims against Seibel, the Seibel-Affiliated Entities, and Green were narrowly tailored and pertained to the kickback scheme that Caesars uncovered during discovery in this litigation. (*See generally id.*) Specifically, as this Court will recall, during discovery, Seibel and the Seibel-Affiliated Entities produced documents that appeared to indicate that they were engaged in commercial bribery by soliciting/coercing kickbacks from vendors selling products to Caesars. In granting Caesars' motion to amend, this Court found that "Caesars demonstrated good cause [to permit amendment after the deadline to amend expired] because depositions had to be taken in order to understand the documents produced by the parties." (Order Granting Caesars' Mot. for Leave to File 1st Am. Compl., at 3:6-9, Mar. 10, 2020, on file.) Thereafter, Caesars filed its First Amended Complaint on March 11, 2020. (First Am. Compl. Mar. 11, 2020, on file.) Caesars asserted five new claims including (1) civil conspiracy against Seibel and Green, (2) breaches of the implied covenants of good faith and fair dealing against the Seibel-Affiliated Entities; (3) unjust enrichment against Seibel and Green, (4) intentional interference with contractual relations against Seibel and Green, and (5) fraudulent concealment against Seibel and Green. (*Id.* ¶¶ 171-206.) All of the claims were limited to the allegations regarding the kickback scheme as no changes were made to any of the claims or allegations surrounding Caesars termination of the Seibel Agreements due to Seibel's unsuitability. (*Id.*)

Following an unsuccessful motion to dismiss, Seibel, Green, and the Seibel-Affiliated Entities filed their Answer and the Seibel Affiliated Entities filed counterclaims. (The Development Entities, Seibel, & Green's Answer to Caesars' 1st Am. Compl. & Countercls., June 19, 2020, on file.) The Seibel-Affiliated Entities all but acknowledge the impropriety of their counterclaims by conceding that their efforts to amend were previously rejected by this Court.

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(*Id.* at 45 n.1.) Nevertheless, all of the Seibel-Affiliated Entities assert claims for breach of contract and breach of the implied covenant of good faith and fair dealing against Caesars. (*Id.* at 48:1-49:25.) These counterclaims do not relate to the kickback scheme, which is the basis for Caesars' first amended complaint, but instead pertain to allegations relating to the termination of the Seibel-Agreement ***which were initially brought three years ago***. (*See id.*) Specifically, the Seibel-Affiliated Entities at the eleventh hour plead claims based on Caesars' alleged breach of the Seibel Agreements for:

> (a) failing to pay the Development Entities monies owed under the Development Agreements; (b) wrongfully terminating the Development Agreements; (c) wrongfully rejecting the Assignments; (d) continuing to operate the Ramsay Restaurants (and the Old Homestead Restaurant) after its wrongful termination of the Development Agreements; and (e) creating and operating the New Pub/Steak Restaurants without entering into new agreements with LLTQ, TPOV, or an affiliate of LLTQ or TPOV.

(*Id.* at 48:10-16.) These claims are time-barred by the Court's prior scheduling order and the previous denial of the LLTQ/FERG Defendants' Motion to Amend. Caesars' first amended complaint did not open the for the Seibel-Affiliated Entities to expand the scope of the litigation beyond its current parameters. Thus, the Seibel-Affiliated Entities' new counterclaims must be stricken.

III. ARGUMENT

A. Rule 12 Standards.

Pursuant to NRCP 12(f), a "court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." (*See also Russell Rd. Food & Beverage, LLC v. Galam*, No. 2:13-CV-0776-JCM-NJK, 2013 WL 6684631, at *1 (D. Nev. Dec. 17, 2013)[4] ("A motion to strike material from a pleading is made pursuant to Rule 12(f), which allows courts to strike 'an insufficient defense or any redundant, immaterial, impertinent or scandalous matter.'") "The ***essential function of a Rule 12(f) motion is to 'avoid the expenditure of time and money that may arise from litigating spurious issues by dispensing with those***

[4] "Federal cases interpreting the Federal Rules of Civil Procedure 'are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.'" *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (quoting *Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990))

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issues prior to trial.'" *Russell Rd. Food & Beverage, LLC*, 2013 WL 6684631, at *1 (emphasis added) (quoting *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993)); *see also Bolick v. Pasionek*, No. 2:10-CV-00353-KJD, 2011 WL 742237, at *3 (D. Nev. Feb. 24, 2011) (emphasis added) (citations omitted) ("***The Court is cautious of transparent attempts to prolong litigation, open up spurious discovery issues, or that may unnecessarily waste time, expense, resources or cause undue prejudice***.") "In considering a motion to strike, 'the court views the pleadings in the light most favorable to the non-moving party, and resolves any doubt as to the relevance of the challenged allegations or sufficiency of a defense in [non-moving party's] favor.'" *Genlyte Thomas Grp., LLC v. Covelli*, No. 208CV01350KJDPAL, 2009 WL 10709254, at *4 (D. Nev. Aug. 7, 2009) (*quoting State of Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc.*, 217 F.Supp.2d 1028, 1033 (C.D. Cal. 2002)).

Moreover, under NRCP 12(b)(5), a court must dismiss a complaint that fails "to state a claim upon which relief can be granted." "Dismissal is appropriate only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Patush v. Las Vegas Bistro, LLC*, 135 Nev. 353, 354, 449 P.3d 467, 469 (2019) (internal quotations omitted). "Where the statute of limitations has run, dismissal is appropriate." *Id.* (*citing In re Amerco Derivative Litig.*, 127 Nev. 196, 228, 252 P.3d 681, 703 (2011).)

B. <u>Caesars' Amended Complaint Did Not Open the Door to Assert Claims that Should Have Been Previously Asserted.</u>

"***If every amendment, no matter how minor or substantive, allowed defendants to assert counterclaims or defenses as of right, claims that would otherwise be barred or precluded could be revived without cause. This would deprive the Court of its ability to effectively manage the litigation***." *E.E.O.C. v. Morgan Stanley & Co.*, 211 F.R.D. 225, 227 (S.D.N.Y. 2002) (emphasis added). Thus, "an amended response may be filed without leave only when the amended complaint changes the theory or scope of the case, and then, the breadth of the changes in the amended response must reflect the breadth of the changes in the amended complaint." *Elite Entm't, Inc. v. Khela Bros. Entm't*, 227 F.R.D. 444, 446 (E.D. Va. 2005). "[T]he requirement that an amended response reflect the change in theory or scope of the amended complaint is consistent

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with Rule 15's requirement that an amended pleading must 'plead in response' to the amended pleading." *Id.* at 446–47.

Here, the Seibel-Affiliated Entities' new counterclaims are not narrowly tailored to address the new claims Caesars asserted. Indeed, ***they are unrelated***. Even a cursory comparison between Caesars' original complaint and its first amended complaint illustrates that the new claims brought by Caesars relate ***solely*** to the kickback scheme concocted by Seibel, Green, and the Seibel-Affiliated Entities. By contrast, the new counterclaims brought by the Seibel Entities have no relation whatsoever to the kickback claims. Instead, all of the Seibel-Affiliated Entities' new counterclaims relate to Caesars' termination of the Seibel Agreements due to Seibel's unsuitability and Caesars' operation of restaurants with Gordon Ramsay. The issues about termination and Seibel's unsuitability have been the central focus of the litigation for years and, indeed, since the beginning of this litigation. It is unclear and entirely puzzling why suddenly — three years after the litigation commenced, a year and half after the deadline to amend pleadings expired, and months after their previous efforts to bring these claims were rejected — the Seibel-Affiliated Entities believe they are entitled to assert these counterclaims. They are not.

The Seibel-Affiliated Entities do not get to highjack the litigation because they were dilatory in their efforts in pursuing the litigation. Their efforts at a "do-over" are all the more egregious considering they've been on notice for months that the Court would not allow them to amend their counterclaims.

C. <u>The Seibel-Affiliated Entities' Counterclaims are Untimely and Must be Stricken and/or Dismissed.</u>

When considering amended counterclaims asserted without leave of Court and after the deadline has expired the Court will analyze the claims under Rule 16's "good cause" framework. *See IGT v. Aristocrat Techs., Inc.*, No. 215CV00473GMNGWF, 2016 WL 4367238, at *2 (D. Nev. Aug. 11, 2016). "Where a scheduling order has been entered, the lenient standard under Rule 15(a), which provides leave to amend 'shall be freely given,' must be balanced against the requirement under Rule 16(b) that the Court's scheduling order shall not be modified except upon a showing of good cause.'" *Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 285, 357 P.3d 966, 971

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(Nev. App. 2015) (*quoting Grochowski v. Phoenix Constr.*, 318 F.3d 80, 86 (2d Cir.2003)). If a party fails to show good cause, the untimely counterclaims are appropriately stricken. *IGT*, 2016 WL 4367238, at *2 (granting motion to strike where party filed amended counterclaims after the expiration of the deadline to amend pleadings).

Here, the Court has already conducted the "good cause" analysis (and found against the Seibel-Affiliated Entities) for claims related to restaurants that were open at the time the LLTQ/FERG Defendants filed their original counterclaims. (Order Denying Mot. to Amend LLTQ/FERG Defs.' Answer, Affirmative Defenses, & Countercls., Nov. 25, 2019, on file.) Now, more than five months later, that analysis has not changed, and indeed is all the more unfavorable to the Seibel-Affiliated Entities. They have not — because they cannot — show that good cause exists to add new counterclaims at this late stage of the litigation.

The analysis fares no better with respect to those counterclaims brought by MOTI, MOTI 16, and TPOV, and TPOV 16. Those entities did not file any counterclaims in the first place and simply answered Caesars' complaint. Now, two years later they seek to assert counterclaims against Caesars based on facts they've known since at least when Caesars initially filed its Complaint in August 2017. Without a showing of good cause — none exists here — the Seibel-Affiliated Entities cannot be permitted to assert long-delayed counterclaims.

Moreover, permitting the Seibel-Affiliated Entities to assert new counterclaims at this late stage would inevitably delay the trial in this matter as discovery would have to re-opened for depositions that have already occurred. The Parties have already taken the depositions of LLTQ, LLTQ 16, MOTI, TPOV, and TPOV 16. By allowing new counterclaims to proceed, the parties will have to re-open these depositions and potentially others to be able to conduct discovery related to the Seibel-Affiliated Entities' counterclaims. Permitting such counterclaims would thus make a mockery of this Court's scheduling order and ability to manage its docket. *Nutton*, 131 Nev. at 285–86, 357 P.3d at 971 (emphasis added) (*quoting Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir.1992)) ("***Disregard of the [scheduling] order would undermine the court's ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and the cavalier***.") The claims asserted by the Seibel-Affiliated Entities are

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time-barred for purposes of being asserted in this litigation. Accordingly, the counterclaims must be stricken and/or dismissed.

IV. CONCLUSION

Caesars respectfully requests that this Court strike the Seibel-Affiliated Entities Counterclaims. The Seibel-Affiliated Entities have failed to show good cause to permit any such claims at this late stage and this Court has already rejected their prior attempts to do so. The Seibel-Affiliated Entities' Counterclaims claims are appropriately stricken and/or dismissed.

DATED this 15th day of July 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC and that, on this 15th day of July 2020, I caused to be served via the Court's e-filing/e-service system a true and correct copy of the above and foregoing **CAESARS' MOTION TO STRIKE THE SEIBEL-AFFILIATED ENTITIES' COUNTERCLAIMS, AND/OR IN THE ALTERNATIVE, MOTION TO DISMISS** to the following:

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TAB 65

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants,

And

GR BURGR LLC, a Delaware limited liability company,

Nominal Plaintiff.

AND ALL RELATED CLAIMS.

Case No. A-17-751759-B
Dept. No. XVI

Consolidated with A-17-760537-B

THE DEVELOPMENT ENTITIES' OPPOSITION TO CAESARS' MOTION TO STRIKE COUNTERCLAIMS, AND/OR IN THE ALTERNATIVE, MOTION TO DISMISS

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

"Simply put, principles of fairness compel the court to conclude that if a plaintiff is permitted to expand the scope of the case by amending her complaint to add new theories of recovery, a defendant should be permitted to do the same by adding new counterclaims that also expand the scope of the case."[1] Caesars[2] decided to expand the scope of this litigation through its First Amended Complaint by adding, for the first time, coercive claims for relief, including against the Development Entities,[3] and a new party. The law and fairness dictate that the Development Entities may respond in kind without leave of court.

The linchpin of Caesars' argument is that the Development Entities' Amended Counterclaims are improper because they are *unrelated* to the new claims asserted by Caesars in its First Amended Complaint. According to Caesars, the Amended Counterclaims must relate to the alleged "kickbacks" that are the subject of the coercive claims for relief contained in Caesars' First Amended Complaint. Caesars is advocating for this Court to adopt the "narrow" approach to determine whether a party responding to amended claims must first seek leave of court to add or amend its counterclaims. Most courts hold that this approach, which had been applied by a small minority of courts, is no longer tenable and has been superseded by amendments to the Federal Rules of Civil Procedure—i.e., it is bad law.

Instead, under the "moderate" approach used by a majority of courts,[4] a defendant may add or amend its counterclaims in response to an amended complaint without leave of court so long as

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[1] *Uniroyal Chem. Co. v. Syngenta Crop Prot., Inc.*, No. 3:02-CV-02253 (AHN), 2005 WL 677806, at *3 (D. Conn. Mar. 23, 2005).

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

[3] 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") are collectively referred to as the "Development Entities."

[4] As explained below, a third approach labeled the "permissive" approach is applied by some courts and enables the defendant to plead any new or amended counterclaims in response to an amended complaint—without limitation.

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the amended counterclaims do not disproportionately increase the scope of the litigation when compared to the amended claims—irrespective of whether the counterclaims relate to the subject matter of the claims asserted in the amended complaint. Stated differently, while "the breadth of the changes in the amended [counterclaims] must reflect the breadth of the changes in the amended complaint," the "breadth requirement is one of proportionality and ***it does not require the changes to the response to be directly tied to the changes in the amended complaint***."[5]

As further detailed below, in its recent amendment, Caesars drastically increased the scope of this litigation by asserting—for the first time—coercive claims for relief (five new claims in total) and by adding a new party, Craig Green ("Green"). In contrast, the Amended Counterclaims are based on the same set of facts and legal theories previously asserted by the Development Entities. They are substantially similar to the Development Entities' prior Counterclaims and/or affirmative defenses concerning Caesars' declaratory relief claims. The parties have been conducting discovery in this matter, and other related matters, on the subject matter of the Amended Counterclaims for years. The Amended Counterclaims will not require substantial additional discovery. Regardless, Caesars cannot reasonably contend that the changes in the Amended Counterclaims are disproportionate when compared to its new claims for coercive relief. As a result, under the law, the Development Entities were authorized to assert their Amended Counterclaims without leave of court.

In the alternative, even if this Court finds that the Development Entities could not assert the Amended Counterclaims as a matter of right (which it should not), this Court should grant the Development Entities leave to file their Amended Counterclaims. As detailed below, because Caesars had initially only asserted claims for declaratory relief, the Development Entities were not required to assert counterclaims under NRCP 13(a). However, because Caesars asserted coercive claims for relief in its First Amended Complaint, the Development Entities are arguably required to assert all compulsory counterclaims pursuant to NRCP 13(a) or possibly risk losing them under

[5] *Va. Innovation Scis. Inc. v. Samsung Elecs. Co.*, 11 F. Supp. 3d 622, 633 (E.D. Va. 2014) (emphasis added) (citing *Elite Entm't, Inc. v. Khela Bros. Entm't*, 227 F.R.D. 444, 446 (E.D. Va. 2005)).

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principles of claim preclusion. Accordingly, good cause exists to grant leave to the Development Entities to file their Amended Counterclaims.

As a final note, Caesars complains of two primary changes in the Amended Counterclaims: (1) the assertion of counterclaims by TPOV, TPOV 16, Moti, and Moti 16 for the first time; and (2) the addition of allegations related to Gordon Ramsay Steak – Atlantic City ("GR Steak AC"). Even if this Court finds that the Development Entities could not assert their Amended Counterclaims without leave of court (which it should not) and, further, finds that good cause does not exist to grant leave to assert them (which it should not), this Court should only grant Caesars' Motion to Strike as to those two changes—not strike the Amended Counterclaims in their entirety.

Caesars elected to expand both the scope and theory of this litigation by adding coercive claims for relief and a new party. The law and equity dictate that the Development Entities may similarly (and in this instance, to a much lesser degree) amend their counterclaims without leave of court; and if leave is required, good cause exists to grant leave. This Court should deny the Motion to Strike in its entirety.

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II. RELEVANT PROCEDURAL HISTORY

A. Caesars' Initial Complaint (for Declaratory Relief *Only*) and the Development Entities' Answers/Initial Counterclaims.

On August 25, 2017, Caesars initiated Case No. A-17-760537-B (the "Caesars Action") by filing a Complaint (the "Caesars Complaint") seeking declaratory relief against Rowen Seibel ("Seibel"), the Development Entities, GR Burgr, LLC ("GRB"), and J. Jeffrey Frederick. (*See* Compl., No. A-17-760537-B ["Caesars Compl."].) The Caesars Complaint contained three claims for declaratory judgment; Caesars did not assert any claims for coercive relief (e.g., breach of contract, civil conspiracy, etc.). (*Id.* ¶¶ 131-56.)

On July 6, 2018, the Development Entities answered and certain of them counterclaimed against Caesars, as follows:

- LLTQ, LLTQ 16 (the "LLTQ Parties"), FERG, and FERG 16 (the "FERG Parties," and together with the LLTQ Parties, the "LLTQ/FERG Parties") filed an Answer and Counterclaims against Caesars Palace and CAC, asserting contract claims (*see*

LLTQ/FERG Defendants' Answer & Affirmative Defenses to Pls.' Compl. & Countercls., filed on July 6, 2018);

- RSG, derivatively on behalf of DNT, filed an Answer and Counterclaims against Caesars Palace, asserting contract claims (*see* DNT's Answer to Pls.' Compl. & Countercls., filed on July 6, 2018);
- Moti and Moti 16 (the "Moti Parties") filed an Answer (*see* Moti Defs.' Answer & Affirmative Defenses to Pls.' Compl., filed on July 6, 2018); and
- TPOV and TPOV 16 (the "TPOV Parties") filed an Answer (*see* Defs. TPOV Enterprises, LLC & TPOV Enterprises 16, LLC's Answer to Pls.' Compl., filed on July 6, 2018.)

B. The Court Denies LLTQ/FERG Parties Leave to Amend their Counterclaims to Include Allegations Concerning GR Steak AC.

In their initial Counterclaims, the LLTQ/FERG Parties specifically referenced Section 13.22 of the "LLTQ Agreement," which restricts Caesars from pursuing certain restaurant ventures with Gordon Ramsay ("Ramsay") absent the involvement of the LLTQ Parties, the TPOV Parties, or their affiliates. (*Id.* ¶ 16.) Without intending to be limiting in scope, the LLTQ/FERG Parties described two such restaurant ventures in which they had been wrongfully excluded—Fish & Chips at the Linq ("Fish & Chips") and Gordon Ramsay Steak in Baltimore ("GR Steak Baltimore"). (*Id.*, ¶¶ 61-70; *see also id.* ¶ 71 (stating that Ramsay intends to open other restaurants with Caesars that qualify as "Restricted Restaurant Venture[s]").)

Caesars opened GR Steak AC at or around the time of the filing of the LLTQ/FERG Parties' initial Counterclaims. Accordingly, the LLTQ/FERG Parties sought discovery concerning GR Steak AC. (Mot. to Amend LLTQ/FERG Defs.' Answer, Affirmative Defenses & Countercls., filed on Oct. 2019, at 4:6-12.) Caesars resisted such discovery, asserting that there were no specific allegations pled concerning GR Steak AC even though (i) LLTQ/FERG's initial Counterclaims expressly alleged that Caesars and Ramsay intended to open additional restaurant ventures and (ii) the LLTQ/FERG Parties' prayer for relief stated that they would seek damages for all ventures to

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which they were wrongfully excluded. (*Compare id.* at 4:12-15 *with* LLTQ/FERG Answer & Countercls. at 27, 30.)

Even though damages for GR Steak AC could have been sought based on Nevada's liberal pleading standards, the LLTQ/FERG Parties sought leave to amend their initial Counterclaims to add specific allegations concerning GR Steak AC. Caesars opposed such motion, contending that the LLTQ/FERG Parties were aware of the facts supporting their request and had not acted diligently in seeking leave to amend. (*See* Opp. to Motion to Amend LLTQ/FERG Defs. Answer, Affirmative Defenses & Countercls., filed on Oct. 14, 2019.)

On November 6, 2019, this Court denied the LLTQ/FERG Parties leave to file their proposed amended counterclaims, finding that they "were aware of the facts they sought to include in their amended counterclaim before the deadline to amend expired and they delayed seeking leave to amend their counterclaim." (Order Denying Mot. to Amend LLTQ/FERG Defendants' Answer, Affirmative Defenses and Counterclaims, filed on November 25, 2019, at 3:4-8.)

C. This Court Grants Caesars Leave to Amend its Complaint to Assert New Coercive Claims for Relief and to Add a New Party.

On December 12, 2019, Caesars filed its motion for leave to file its First Amended Complaint. Caesars sought leave to add a new party and assert—for the first time—coercive claims for relief against the Development Entities, Seibel, and Green. (*See* First Amended Complaint, filed on Mar. 3, 2020 ["FAC"], ¶¶ 171 – 206.) The new claims were based on alleged "kickbacks" received by the Development Entities, Seibel, and Green. (*Id.* ¶¶ 134-44.)

The Development Entities and Seibel opposed Caesars' motion, arguing that Caesars had been aware of the facts forming the basis of its new claims for at least one year based on documents that had been produced by the Development Entities and Seibel—noting the incongruence with Caesars' prior opposition to the LLTQ/FERG Parties' motion to amend.[6] (*See* Opp. to Caesars' Mot. for Leave to File First Am. Compl., filed on Dec. 23, 2019.)

[6] In reality, Caesars was aware of the alleged "kickbacks" as far back as 2013. Indeed, Caesars itself had filed a letter discussing the "kickbacks" well before it sought leave to amend. (*See* Planet Hollywood's Opp. to Pl.'s Mot. for Prelim. Inj., filed on March 17, 2017, Ex. G, Sept. 12, 2016, Letter from Kevin E. Gaut to Brian K. Ziegler, at 3.)

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On February 12, 2020, this Court granted Caesars leave to file its First Amended Complaint, finding that Caesars' untimeliness was excused "because depositions had to be taken in order to understand the documents produced by the parties." (Order Granting Caesars' Mot. for Leave to File First Am. Compl., filed on Mar. 10, 2020, at 3:6-9.)

On March 11, 2020, Caesars filed its First Amended Complaint. (*See generally* FAC.) Caesars asserted the following new claims for coercive relief: civil conspiracy, breach of the implied covenant of good faith and fair dealing, unjust enrichment, intentional interference with contractual relations, and fraudulent concealment. (*Id.* ¶¶ 171 – 206.) Caesars also named Green as an additional defendant. (*See generally id.*)

D. The Development Entities, Seibel, and Green Move to Dismiss the New Claims Asserted in Caesars' First Amended Complaint.

On April 8, 2020, the Development Entities, Seibel, and Green filed a motion to dismiss certain claims in Caesars' First Amended Complaint. (Rowen Seibel, the Development Entities, & Craig Green's Mot. to Dismiss Counts IV, V, VI, VII, & VIII of Caesars' First Am. Compl., filed on Apr. 8, 2020.) On May 20, 2020, this Court denied the motion. (Order Denying, Without Prejudice, Rowen Seibel, the Development Entities, & Craig Green's Mot. to Dismiss Counts IV, V, VI, VII, & VIII of Caesars' First Am. Compl., filed on May 29, 2020 ["Order Denying MTD FAC"].)

At the hearing on the Motion to Dismiss, counsel for the Development Entities, Seibel, and Green explained that the Development Entities would be amending their counterclaims in response to the First Amended Complaint:

> I want to follow up on your decision to deny the motion to amend.
>
> We will go ahead . . . and prepare an omnibus answer on behalf of all the parties that we represent. Our preference too would be to include the counterclaim within that same operative pleading. From what we see there are several different pleadings outstanding. And, of course, counterclaims in the past were permissive and they came in response to the declaratory relief claims that Caesars filed at different points in time.
>
> . . .
>
> Declaratory relief claims generally don't compel the filing of compuls[ory] counterclaim[s]. Because it's at times an efficient means

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> to come in and get guidance from the Court on what are the rights and obligations of the parties.
>
> We may be in a position now that Caesars has added affirmative claims for relief to be compelled to file what would have been permissive counterclaims before that may now be considered compulsory counterclaims. And so I want to bring that to your Honor's attention. ***Actually, I want to bring that to everybody's attention now so it doesn't come as a surprise***. But in light of the decision filing affirmative claims for relief, we believe that may trigger now an obligation to file counterclaims that may not have been filed before.

(*See* Tr., May 20, 2020, at 51:17 – 53:4 (emphasis added).)

E. The Development Entities File their Amended Counterclaims Against Caesars.

On June 19, 2020, the Development Entities, Seibel, and Green filed a consolidated Answer to Caesars' First Amended Complaint and the Development Entities further filed consolidated counterclaims against Caesars (the "Amended Counterclaims"). (*See* Development Entities, Rowen Seibel, & Craig Green's Answer to Caesars' First Am. Compl. & Countercls., filed on June 19, 2020 ["Amended Answer/Counterclaims"].)

In their Amended Counterclaims, the Development Entities asserted two causes of action: Breach of Contract; and Breach of the Implied Covenant of Good Faith and Fair Dealing. (*Id.* at 48-49, ¶¶ 87-101.) The Amended Counterclaims did not significantly expand the scope of this litigation—they reflect the same facts and legal theories that the Development Entities had previously asserted in this matter, whether in defense to Caesars' declaratory relief claims and/or as counterclaims. The primary differences from their prior pleadings are two-fold: (i) the TPOV Parties and the Moti Parties asserted counterclaims against Caesars for the first time; and (ii) the LLTQ/FERG Parties added allegations concerning GR Steak AC.

When filing the Amended Answer/Counterclaims, the Development Entities acknowledged this Court's prior ruling on the LLTQ/FERG Parties' motion to amend. (*See id.* at 45 n.1.) Nonetheless, they alleged that Caesars had "vastly expanded the scope of this litigation by adding coercive claims for relief and a new party" and, further, that they were arguably compelled to file all compulsory counterclaims against Caesars in response to its First Amended Complaint. (*See id.*) They did exactly what they believed that they needed to do—and what the law and equity entitled

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them to do— in this situation. (*Cf.* Tr., May 20, 2020, at 54:9-10 (Judge Williams: "I'll leave this as my final comment. Do what you feel is in the best interests of your client.").)

Alongside referencing Fish & Chips and GR Steak Baltimore (as they did before), the Development Entities referenced another restaurant that had been opened by Caesars and Ramsay to the exclusion of the TPOV Parties in violation of Section 13.22 of the LLTQ Agreement: Gordon Ramsay Steak in Kansas City ("GR Steak KC"). (Amended Answer/Counterclaims, ¶¶ 65-66.) Caesars did not object to the inclusion of GR Steak KC in its Motion to Strike (likely because GR Steak KC did not open to the public until in or around mid-November 2019).

III. ARGUMENT

A. Standard of Decision.

Motions to strike are "generally disfavored and rarely granted." *Ross v. Ada Cty.*, 730 F. Supp. 2d 1237, 1243 (D. Idaho 2010); *see also Student Loan Mktg. Ass'n v. Hanes*, 181 F.R.D. 629, 632 (S.D. Cal. 1998) (citing 5A Wright & Miller, *Federal Practice & Procedure*, § 1380 *et seq.*).[7] Courts will strike material from a complaint if—and only if—"the matter sought to be stricken could have no possible bearing on the subject matter of the litigation." *Rosales v. Citibank*, 133 F. Supp. 2d at 1180; *see also U.S. v. S. Cal. Edison Co.*, 300 F. Supp. 2d 964, 973 (E.D. Cal. 2004) (holding that motions to strike "should be granted only where it can be shown that none of the evidence in support of an allegation is admissible"). Further, the moving party must show prejudice absent granting the motion to strike. *Roadhouse v. Las Vegas Metro. Police Dep't*, 290 F.R.D. 535, 543 (D. Nev. 2013). "[I]f there is *any doubt* as to whether the allegations might be an issue in the action, courts will deny the motion." *In re 2TheMart.com, Inc. Secs. Litig.*, 114 F. Supp. 2d 955, 965 (C.D. Cal. 2000) (emphasis in original).

As this Court recently held in analyzing motions to dismiss under NRCP 12(b)(5), a "'complaint should be dismissed only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief.'" (Order Denying MTD FAC, at 2:17-19 (quoting *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008)).) Finally, in

[7] "Federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority," for interpreting the Nevada Rules of Civil Procedure. *Exec. Mgmt. Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002).

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ruling on a motion to dismiss, "the Court 'must construe the pleading liberally and draw every fair intendment in favor of'" the claimant. (*Id.* at 2:19-22 (quoting *Brown v. Kellar*, 97 Nev. 582, 583, 636 P.2d 874, 874 (1981)).)

B. The Development Entities Were Entitled to Amend Their Counterclaims, Without Leave of Court, Proportionally in Response to Caesars' First Amended Complaint, Which Significantly Expanded the Theory and Scope of this Litigation.

As discussed in a case relied upon by Caesars, under the predominant approach used by courts—labeled the "moderate" approach— a defendant may file amended counterclaims in response to an amended complaint *without leave of court* "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. v. Khela Bros. Entm't*, 227 F.R.D. 444, 446 (E.D. Va. 2005). "[I]f major changes are made to the complaint, then major changes may be made to the [counterclaims]." *Id.*

The great weight of authority is in accord. Courts hold that a defendant may assert new or amended counterclaims, in proportion, when responding to a plaintiff's amended complaint. *See id.* (noting the moderate approach is "predominant in the caselaw . . . ."); *Va. Innovation Scis. Inc. v. Samsung Elecs. Co.*, 11 F. Supp. 3d 622, 632-33 (E.D. Va. 2014) ("[W]hen a plaintiff's amended complaint changes the theory of the case, it would be inequitable to require leave of the court before the defendant could respond with appropriate counterclaims.") (*quoting Elite Entm't, Inc.*, 227 F.R.D. at 446-47); *Uniroyal Chem. Co. v. Syngenta Crop Prot., Inc.*, No. 3:02-CV-02253(AHN), 2005 WL 677806, at *1–3 (D. Conn. Mar. 23, 2005) ("Simply put, principles of fairness compel the court to conclude that if a plaintiff is permitted to expand the scope of the case by amending her complaint to add new theories of recovery, a defendant should be permitted to do the same by adding new counterclaims that also expand the scope of the case."); *Synermed Int'l, Inc. v. Lab. Corp. of Am. Holdings*, No. 1:97-CV-00966, 1999 WL 1939253, at *1 (M.D.N.C. Mar. 3, 1999) ("[B]ecause Synermed's second amended complaint expanded the theory or scope of its claims, the court finds that LabCorp had a right to assert its additional counterclaims without obtaining leave of the court."); *Tralon Corp. v. Cedarapids, Inc.*, 966 F. Supp. 812, 832 (N.D. Iowa

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1997) ("[I]t would be inequitable to entertain the Plaintiffs' Second Amended Complaint without permitting Cedarapids to completely plead anew. . . . Cedarapids did not act improperly in filing its new counterclaim without first seeking leave of the court to do so."); *Brown v. E.F. Hutton & Co.*, 610 F. Supp. 76, 78 (S.D. Fla. 1985) ("[W]hen a plaintiff files an amended complaint which changes the theory or scope of the case, the Defendant is allowed to plead anew as though it were the original complaint filed by the Plaintiff."); *Poly-Med, Inc. v. Novus Sci. Pte Ltd.*, Civil Action No. 8:15-cv-01964-JMC, 2017 U.S. Dist. LEXIS 103991, at *7 (D.S.C. July 6, 2017) ("Because the amendments in the amended counterclaims are proportional to the changes in the amended complaint, and because Defendants filed the response in a timely manner, the court concludes that Defendants did not require leave of the court to file the amended counterclaims.").

Another approach used by courts—labeled the "permissive" approach—allows a defendant to file new or amended counterclaims without leave of court in response to amended claims irrespective of proportionality (even if the amended claims did not change the scope or theory of the litigation). *See Joseph Bancroft & Sons Co. v. M. Lowenstein & Sons, Inc.*, 50 F.R.D. 415, 419 (D. Del. 1970) ("Since the amending pleader chooses to redo his original work, and receives the benefit of this *nunc pro tunc* treatment, he can hardly be heard to complain that claims filed against him are improper because they should have been asserted in response to his original pleading.").

The approach advocated by Caesars through its Motion to Strike—labeled the "narrow" approach—has previously been applied by a minority of courts and required any new counterclaims to relate to the subject matter of the amended claims. *See, e.g.*, *E.E.O.C. v. Morgan Stanley & Co.*, 211 F.R.D. 225, 226-27 (S.D.N.Y. 2002). However, courts hold that the 2009 amendments to the Federal Rules of Civil Procedure, which deleted Rule 13(f),[8] superseded this "narrow" approach. *See, e.g.*, *Va. Innovation Scis. Inc.*, 11 F. Supp. 3d at 631 (holding that the 2009 amendments to the Federal Rules of Civil Procedure superseded the "narrow" approach previously used by courts); *see also Sierra Dev. Co. v. Chartwell Advisory Grp. Ltd.*, No. 13-cv-602-BEN-VPC, 2016 U.S. Dist. LEXIS 160308, at *11 (D. Nev. Nov. 18, 2016). "This leaves the permissive approach and the

[8] The Nevada Supreme Court similarly deleted its analog of Rule 13(f) in its 2019 amendments to the Nevada Rules of Civil Procedure, indicative that it would not adopt the "narrow" approach.

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moderate approach as the remaining valid lines of case law on this issue." *Va. Innovation Scis. Inc.*, 11 F. Supp. 3d at 631.

Here, under either the "permissive" or "moderate" approach, the Development Entities were authorized to file their Amended Counterclaims without leave of court. Under the "permissive" approach, the Development Entities were allowed to file their Amended Counterclaims without concern for how (or if) the First Amended Complaint changed the scope or theory of this litigation; hence Caesars' Motion must be denied.

Under the "moderate" approach, the Development Entities were allowed to file their Amended Counterclaims without leave of court because the breadth of their changes are minor when compared with the breadth of the changes in Caesars' First Amended Complaint. Through its amendments to its complaint, Caesars substantially increased both the theory and scope of this litigation by asserting coercive claims for relief for the first time (five new claims in total) and adding a new party (Green). In contrast, the Amended Counterclaims are based on the same set of facts and legal theories previously asserted by the Development Entities, whether in their affirmative defenses to Caesars' declaratory relief claims and/or their initial Counterclaims. Unlike Caesars' First Amended Complaint—which requires substantially new and different discovery—the Amended Counterclaims will not require much additional discovery. The parties have been conducting discovery on Caesars' declaratory relief claims and the Development Entities' substantially similar affirmative defenses and/or counterclaims for years in this matter and related cases. Further, as detailed below, the Development Entities—including the TPOV Parties and the Moti Parties (who did not previously assert counterclaims in this matter)—are arguably required to assert all compulsory counterclaims based on Caesars' assertion of coercive claims for relief.

The crux of Caesars' argument is that the Development Entities were required to seek leave of court because their "new counterclaims . . . have no relation whatsoever to the kickback claims" asserted by Caesars in its First Amended Complaint—i.e., the "narrow" approach. (Mot. to Strike, at 10:3-15.) As explained above, this "narrow" approach is no longer good law, and was never set forth as the law in Nevada. Instead, under the "moderate" approach used by most courts, while "the breadth of the changes in the amended [counterclaims] must reflect the breadth of the changes in

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the amended complaint," the "breadth requirement is one of proportionality and ***it does <u>not</u> require the changes to the response to be directly tied to the changes in the amended complaint***." *Va. Innovation Scis. Inc.*, 11 F. Supp. 3d at 633 (emphasis added) (citing *Elite Entm't, Inc.*, 227 F.R.D. at 446); *accord Poly-Med, Inc.*, Civil Action No. 8:15-cv-01964-JMC, 2017 U.S. Dist. LEXIS 103991, at *6 (same); *UDAP Indus. v. Bushwacker Backpack & Supply Co.*, No. CV 16-27-BU-JCL, 2017 U.S. Dist. LEXIS 66803, at *6 (D. Mont. May 2, 2017) ("***There is no requirement under this approach that a defendant specifically tailor its answer to the amended complaint***, rather the court considers whether the defendant's answer affects the scope of the litigation in a manner proportional with the amended complaint.") (emphasis added) (internal quotation marks omitted). In other words, the Amended Counterclaims do not need to relate to the same subject matter as Caesars' new claims. Instead, the Amended Counterclaims are proper so long as they do not disproportionately impact the scope of this litigation. When compared to the drastic and substantial changes made by Caesars in its First Amended Complaint (*i.e.*, the addition of coercive claims for relief and a new party), the changes made in the Amended Counterclaims are insubstantial.

Notably, in a prior case before the United Stated District Court, District of Nevada—*Sierra Dev. Co.*, No. 13-cv-602-BEN-VPC, 2016 U.S. Dist. LEXIS 160308—both Caesars and other parties (specifically, affiliates of MGM) represented by Caesars' current counsel argued that they were allowed to file amended counterclaims without leave of court in response to amended claims. *Id.* at *10-12 (denying a motion to strike amended counterclaims pled in response to an amended complaint without leave of court after the deadline to amend had passed). In that case, affiliates of Caesars and affiliates of MGM represented by Caesars' counsel in this matter (among other parties) filed amended counterclaims—without leave of court—in response to amended claims asserted by another party in the litigation, Chartwell Advisory Group, Ltd. ("Chartwell"). *Id.* at *6 n.1. Chartwell moved to strike these new counterclaims, contending that they were improperly filed without leave of court. *Id.* at *7-8.

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Both Caesars and MGM advocated for the court to apply the "permissive" approach. Specifically, they argued they were allowed to file amended counterclaims without leave of court because Chartwell had amended its claims. For example, Caesars argued:

> In *Joseph Bancroft*, the district court allowed a plaintiff to file three new counterclaims without leave of court in response to the defendant's amended pleading even though the new counterclaims could have been brought earlier. The court specifically stated, "Since the amending pleader chooses to redo his original work, and receives the benefit of this nunc pro tunc treatment, he can hardly be heard to complain that claims filed against him are improper because they should have been asserted in response to his original pleading."
>
> . . .
>
> Using this same framework, the Non-BK Caesars Parties were not required to seek leave to amend prior to filing their Counterclaims against Chartwell. Chartwell made the decision to file the SAAC and, by law, the SAAC became the operative pleading in this matter. ***By choosing to redo its original work, Chartwell can hardly be heard to complain that the Non-BK Caesars Parties have now filed counterclaims in response to the operative pleading***. Thus, the Non-BK Caesars Parties did not require leave to amend to file their Counterclaims in their mandatory responsive pleading to the SAAC and Chartwell therefore has no basis for moving to strike the Non-BK Caesars Parties' Counterclaims.

(Ex. 1, Countercl. Defs. Harrah's Las Vegas, LLC, Harrah's Laughlin, LLC, & Rio Properties, LLC's Opposition to Chartwell Advisory Group, Ltd.'s Mot. to Strike Newly-Filed Countercls., filed on July 25, 2016, at 7:15 – 9:2 (citations omitted) (emphasis added) (quoting *Joseph Bancroft & Sons Co. v. M. Lowenstein & Sons, Inc.*, 50 F.R.D. 415, 419 (D. Del. 1970)).)

MGM (through current counsel representing Caesars in this matter) similarly argued that the court should adopt the "permissive" approach: "The permissive approach followed by courts strikes the proper balance. ***After all, it is Chartwell that elected to amend its claims late in the process, which under the law opened the door for the Counterclaims***." (Ex. 2, Countercl. Defs. MSE Investments, Inc., Newcastle, Inc., Ramparts, Inc. & Pioneer Hotel, Inc.'s Opposition to Chartwell Advisory Group Ltd.'s Mot. to Strike Newly Filed Countercls., filed on July 25, 2016, at 7:10-12 (citing *Adobe Sys. Inc. v. Coffee Cup Partners, Inc.*, No. C 11-2243 CW, 2012 WL 3877783, at *5 (N.C. Cal. Sept. 6, 2012).) Alternatively, MGM argued that it could assert its new counterclaims without leave of court under the "moderate" approach: "The moderate approach allows parties to amend their response if the amended claims change the theory. This is exactly what happened.

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Chartwell's claim that the theory must be changed with respect to each Counterclaiming Casino ***is actually the narrow approach***, which Chartwell acknowledges is not the approach most courts follow." (*Id.* at 7:21-24 (emphasis added).)

Ultimately, the court adopted the "moderate" approach and denied Chartwell's motion to strike. *See Sierra Dev. Co.*, No. 13-cv-602-BEN-VPC, 2016 U.S. Dist. LEXIS 160308, at *10-12. ***In doing so, the court rejected arguments made by Chartwell that are virtually identical to the arguments made by Caesars in its Motion to Strike***; namely: (i) that Caesars and MGM (and other counterclaiming parties) had "known about the basis for their newly-filed counter-counterclaims for months, if not years;" (ii) that the new counterclaims were unrelated to the new allegations raised by Chartwell; and (iii) that the parties would have to conduct additional discovery even though the discovery deadline had passed. *Id.* at *6-8.

Caesars cannot complain of any adverse impact, which is, at best, minimal through the filing of the Amended Counterclaims. It would challenge equity (and common sense) to allow Caesars to amend its claims to significantly expand both the theories and scope of this litigation while, at the same time, strike the Amended Counterclaims. *See Dig. Privacy, Inc. v. RSA Sec., Inc.*, 199 F. Supp. 2d 457, 459 n.2 (E.D. Va. 2002) ("RSA was entitled to include the five new counterclaims in its answer to the amended complaint. . . . Digital Privacy chose to amend its complaint six weeks before the scheduled trial date at its own peril."); *Elite Entm't, Inc.*, 227 F.R.D. at 447 ("[W]hen a plaintiff's amended complaint changes the theory of the case, it would be inequitable to require leave of the court before the defendant could respond with appropriate counterclaims.") (internal quotation marks omitted); *Uniroyal Chem. Co., Inc.*, No. 3:02-CV-02253(AHN), 2005 U.S. Dist. LEXIS 4545, at *5 ("The underlying premise to this approach is 'what is good for the goose is good for the gander.'").

Using Caesars' own words:

> [Caesars] made the decision to file the [First Amended Complaint], and, by law, the [First Amended Complaint] became the operative pleading in this matter. By choosing to redo its original work, [Caesars] can hardly be heard to complain that the [Development Parties] have now filed counterclaims in response to the operative pleading.

(Ex. 1, at 8:22-25.)

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In sum, because the Amended Counterclaims are, *minimally*, proportional to the breadth of changes made by Caesars in its First Amended Complaint, the Development Entities were entitled to assert the Amended Counterclaims without leave of court. *See Va. Innovation Scis. Inc.*, 11 F. Supp. 3d at 632-33 (E.D. Va. 2014); *Uniroyal Chem. Co. v. Syngenta Crop Prot., Inc.*, No. 3:02-CV-02253(AHN), 2005 WL 677806, at *1–3; *Synermed Int'l, Inc. v. Lab. Corp. of Am. Holdings*, No. 1:97-CV-00966, 1999 WL 1939253, at *1; *Tralon Corp. v. Cedarapids, Inc.*, 966 F. Supp. at 832; *Brown*, 610 F. Supp. at 78; *Poly-Med, Inc.*, Civil Action No. 8:15-cv-01964-JMC, 2017 U.S. Dist. LEXIS 103991, at *7; *Sierra Dev. Co.*, No. 13-cv-602-BEN-VPC, 2016 U.S. Dist. LEXIS 160308, at *10-12; *Dig. Privacy, Inc.*, 199 F. Supp. 2d at 459 n.2. Consequently, this Court should deny the Motion to Strike in its entirety.

C. Even if Leave of Court is Required, Good Cause Exists to Allow the Development Entities to File their Amended Counterclaims.

Assuming, *arguendo*, this Court finds that the Development Entities could not assert their Amended Counterclaims without leave of court (which the great weight of authority dictates that they were authorized to do), good cause exists for the assertion of such Amended Counterclaims because Caesars added coercive claims for relief for the first time in this litigation, which arguably requires the Development Entities to assert all compulsory counterclaims pursuant to NRCP 13(a). *See Elite Entm't, Inc*, 227 F.R.D. at 447 (applying a Rule 15(a) analysis to amended counterclaims after determining that the amended complaint did not expand the scope of the litigation and entitle defendant to assert new counterclaims without leave of court).

1. Good Cause Exists Under NRCP 16(b) to Extend the Deadline for Amending the Pleadings Because Caesars Asserted Coercive Claims for Relief for the First Time—Arguably Requiring the Development Entities to Assert Compulsory Counterclaims.

When "a party seeks to amend a pleading after the deadline previously set for seeking such amendment has expired, NRCP 16(b) requires a showing of 'good cause' for missing the deadline" in addition to the requirements set forth in NRCP 15(a). *Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 281, 357 P.3d 966, 968 (Nev. App. 2015). "In determining whether 'good cause' exists under Rule 16(b), the basic inquiry for the trial court is whether the filing deadline cannot reasonably be

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met despite the diligence of the party seeking the amendment." *Id.* at 286-87, 357 P.3d at 971. This Court considers: "(1) the explanation for the untimely conduct, (2) the importance of the requested untimely action, (3) the potential prejudice in allowing the untimely conduct, and (4) the availability of a continuance to cure such prejudice." *Id.* at 287, 357 P.3d at 971-72.

Here, good cause exists to allow the Development Entities to file their Amended Counterclaims even though the deadline to amend has passed. Prior to filing its First Amended Complaint, Caesars had not asserted any coercive claims for relief. Instead, Caesars had only asserted claims for declaratory relief.

Based on the "declaratory judgment exception" to the doctrine of claim preclusion—which the Nevada Supreme 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) ("A declaratory action is intended to provide a remedy that is simpler and less harsh than coercive relief . . . . It would frustrate that purpose were parties required to bring, as part of a declaratory judgment action, all conceivable claims and ***counterclaims*** on pain of preclusion … because what would have been a simple declaratory judgment action [likely would] blow[ ] up to involve all related claims for coercive relief.") (emphasis added) (internal quotation marks omitted) (citations omitted); *accord Allan Block Corp. v. Cty. Materials Corp.*, 512 F.3d 912, 915-17 (7th Cir. 2008); *Harborside Refrigerated Servs., Inc. v. Vogel*, 959 F.2d 368, 372-73 (2d Cir. 1992); *Stilwyn, Inc. v. Rokan Corp.*, 353 P.3d 1067, 1078-79 (Idaho 2015). 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—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) (holding a plaintiff who had only asserted a claim for declaratory relief was required to assert all "claims arising out of the same transaction or occurrence" when the defendant asserted a counterclaim for coercive relief).

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When Caesars filed its initial Complaint only seeking declaratory relief, the Development Entities were not required to assert counterclaims under NRCP 13(a). *See Marketplace Syndications Group, LLC*, 133 Nev. at 927, 407 P.3d at 765; *Allan Block Corp.*, 512 F.3d at 915-17. Now that Caesars has asserted coercive claims for relief, the Development Entities are arguably required to assert all compulsory counterclaims under NRCP 13(a). *See Duane Reade, Inc.*, 600 F.3d at 197. Accordingly, there is good cause to allow the Development Entities to file their Amended Counterclaims even though the deadline to amend has passed.

Moreover, Caesars will not face any prejudice if this Court allows the Development Entities to assert their Amended Counterclaims even though the deadline to amend has passed. The Amended Counterclaims concern the gravamen of this action—Caesars' actions surrounding termination of the Development Agreements.[9] The parties have been conducting discovery in this litigation, and other related matters, on that same subject for years. Nothing in the Amended Counterclaims requires substantial additional discovery, let alone an extension of the discovery deadlines. Indeed, Caesars cannot complain of the need for any additional discovery when it elected to assert new coercive claims for relief and added a new party to this litigation in its First Amended Complaint—which drastically increased both the scope and theories of this litigation, especially when compared to the Development Entities' Amended Counterclaims.

2. This Court Should Grant Leave to the Development Entities to File their Amended Counterclaims.

Under NRCP 15(a)(2), the "court should freely give leave [to amend] when justice so requires." In "the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant—the leave sought should be freely given." *Nutton*, 131 Nev. at 284, 357 P.3d at 970 (internal quotation marks omitted). "The liberality embodied in NRCP

[9] The primary issue in this case is not whether Caesars "is required to continue to do business with a convicted felon." (Mot. to Strike, at 2:1-5.) The primary issue is whether Caesars could terminate the Development Agreements while still keeping the restaurants open for business—without working with the Development Entities in good faith to cause them to sell their interests at fair market value to one or more third parties deemed suitable by Caesars. Stated more succinctly: ***Could Caesars steal the Development Entities' valuable interests in the Restaurants***? The answer: No. *See, e.g.*, *Bergstrom v. Estate of DeVoe*, 109 Nev. 575, 577, 854 P.2d 860, 861 (1993) (recognizing that a party "cannot at the same time affirm the contract by retaining its benefits and rescind it by repudiating its burdens") (quoting CORBIN ON CONTRACTS § 1114).

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15(a) requires courts to err on the side of caution and permit amendments that appear arguable or even borderline, because denial of a proposed pleading amendment amounts to denial of the opportunity to explore any potential merit it might have had." *Id.* at 292; 357 P.3d at 970.

Here, there is no undue delay, bad faith, or dilatory motive on the part of the Development Entities. As detailed above, the Development Entities were not required to assert compulsory counterclaims against Caesars in response to its initial Complaint, which only pled claims for declaratory relief. *See Marketplace Syndications Group, LLC*, 133 Nev. at 927, 407 P.3d at 765; *Allan Block Corp.*, 512 F.3d at 915-17. The Development Entities opposed the filing of Caesars' First Amended Complaint. Now that Caesars has filed it and asserted coercive claims for relief, the Development Entities are arguably required to file their Amended Counterclaims pursuant to NRCP 13(a). *See Duane Reade, Inc.*, 600 F.3d at 197.

Further, Caesars cannot meet its burden of demonstrating prejudice. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987) ("The party opposing amendment bears the burden of showing prejudice."). It begs repeating that the parties have been litigating the gravamen of this action—*i.e.*, Caesars' actions surrounding termination of the Development Agreements—for years. The Amended Counterclaims will not require a great of deal of new discovery and it will not be necessary to extend the discovery deadlines due to their filing. *Cf. Nevada Bank of Commerce v. Edgewater, Inc.*, 84 Nev. 651, 653, 446 P.2d 990, 992 (1968) (affirming district court's decision to allow defendant to assert an amended counterclaim at late stage of litigation where there was "no showing that appellant was prejudiced in his right to present a defense to the amended counterclaim."). Even assuming minimal additional discovery is needed, it would be insufficient to establish prejudice. *See U.S. For & on Behalf of Mar. Admin. v. Cont'l Illinois Nat. Bank & Tr. Co. of Chicago*, 889 F.2d 1248, 1255 (2d Cir. 1989) ("[T]he adverse party's burden of undertaking discovery, standing alone, does not suffice to warrant denial of a motion to amend a pleading."). As Caesars once aptly stated: "[Caesars] can hardly claim legitimate prejudice (or legitimately argue the need for further discovery), when the Counterclaims are based on evidence that was always within [Caesars'] knowledge and/or possession." (Ex. 1, at 13:3-5.)

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In sum, good cause exists to allow the Development Entities to assert their Amended Counterclaims. Caesars, at its own election, asserted coercive claims for relief for the first time in its First Amended Complaint. As a result, the Development Entities are arguably required to assert all compulsory counterclaims pursuant to NRCP 13(a) or potentially risk losing them altogether under principles of claim preclusion. The Motion to Strike must be denied.

D. If this Court Strikes or Dismisses the Amended Counterclaims (Which it Should Not), this Court Should Only Do So As To the TPOV Parties and the Moti Parties and for those Allegations Concerning GR Steak AC.

Caesars essentially complains of two changes in the Amended Counterclaims: (1) the assertion of counterclaims by the TPOV Parties and the Moti Parties for the first time; and (2) the addition of specific allegations related to GR Steak AC. However, it appears that Caesars is asking this Court to strike the Amended Counterclaims in their entirety. Such relief would go too far.

If this Court determines that the Development Entities could not assert their Amended Counterclaims without leave of court (which it should not) and, further, finds that good cause does not exist to grant leave to the Development Entities to assert their Amended Counterclaims (which it should not), this Court should use a scalpel instead of a sledgehammer; specifically, it should only grant Caesars' Motion to Strike as to the two changes of which Caesars complains. The remainder of the Amended Counterclaims must remain since they merely restate what was previously alleged by the Development Entities in response to Caesars' initial Complaint.

IV. CONCLUSION

The law and fairness dictate that the Development Entities were authorized to assert their Amended Counterclaims without leave of court. Caesars elected—at a late stage of this litigation—to file its First Amended Complaint adding coercive claims for relief, for the first time, and a new party. The Development Entities were allowed (and expected) to respond in kind—***the very same way that Caesars did in an unrelated action when faced with the same procedural fact pattern***. Caesars cannot complain that the Development Entities have made relatively minor additions through their Amended Counterclaims in comparison to the significant and expansive changes made by Caesars in its First Amended Complaint. Further, the Development Entities were arguably required to assert all compulsory counterclaims in response to Caesars' new coercive claims for

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relief or risk losing them under principles of claim preclusion, thereby establishing good cause for the filing of their Amended Counterclaims.

For these reasons, this Court should deny the Motion to Strike in its entirety.

DATED this 3rd day of August, 2020.

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By: /s/ John R. Bailey
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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 3rd day of August, 2020, service of the foregoing was made by mandatory electronic service through the Eighth Judicial District Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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Exhibit 1

Exhibit 1

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

SIERRA DEVELOPMENT CO. d/b/a/ CLUB CAL NEVA, Plaintiffs, vs. CHARTWELL ADVISORY GROUP, LTD., Defendant.	CASE NO. 3:13-cv-00602-RFB-VPC CONSOLIDATED WITH CASE NO.: 2:13-CV-002234-RFB-VPC **COUNTERCLAIM DEFENDANTS HARRAH'S LAS VEGAS, LLC, HARRAH'S LAUGHLIN, LLC, AND RIO PROPERTIES, LLC'S OPPOSITION TO CHARTWELL ADVISORY GROUP, LTD.'S MOTION TO STRIKE NEWLY-FILED COUNTERCLAIMS [ECF No. 460]**
CAESARS ENTERTAINMENT OPERATING COMPANY, INC., et al, Plaintiffs, v. CHARTWELL ADVISORY GROUP, LTD., Defendant.	

Plaintiffs/Counter-Defendants Harrah's Las Vegas, LLC ("Harrah's Las Vegas"), Harrah's Laughlin, LLC ("Harrah's Laughlin"), and Rio Properties, LLC ("Rio Properties," and collectively with Harrah's Las Vegas, and Harrah's Laughlin, the "Non-BK Caesars Parties"), by and through their counsel of record, the law firm of Dickinson Wright PLLC, hereby file their

opposition to Chartwell Advisory Group, Ltd.'s ("Chartwell") Motion to Strike Newly-Filed Counterclaims [ECF No. 460] (the "Motion to Strike").[1]

This Opposition is made and based upon the following Memorandum of Points and Authorities; the papers and pleadings already on file herein, incorporated by reference as if full set forth herein; and any argument of counsel that may be permitted at a hearing of this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Chartwell' Motion to Strike is an unfounded attempt to suppress viable[2] counterclaims which the Non-BK Caesars Parties promptly filed in response to Chartwell's recently-filed Second Amended Counterclaim, and which the Non-BK Caesars Parties could not have filed until after conducting the deposition of Chartwell's FRCP 30(b)(6) designee in this action confirming the evidentiary basis for the claims.[3]

Contrary to Chartwell's contention, and as discussed further herein, the Non-BK Caesars Parties did not require leave of Court to file their counterclaims. Moreover, even if leave was required despite the lack of an express rule or Ninth Circuit precedent, the Court should grant such leave as many other district courts within the Ninth Circuit have done in similar circumstances because: (1) the Non-BK Caesars Parties have good cause, both substantively and procedurally, for the filing of their counterclaims; and (2) the addition of these valid counterclaims will not prejudice Chartwell. Thus, the Court should deny Chartwell's reliance on

[1] Counter-Defendant Caesars Entertainment Corporation ("CEC") does not have and never had a contractual or quasi-contractual relationship with Chartwell., and as such it is not properly a party to Chartwell's claims for breach of contract, contractual breach of the implied covenant of good faith and fair dealing, and unjust enrichment. *See* ECF No. 405. Likewise, CEC is not a party to the counterclaims which Chartwell improperly seeks to strike. *See* ECF No. 439.

[2] Chartwell has raised no challenge to the substance of the counterclaims. Instead, it seeks to strike the Non-BK Caesars Parties' claims upon a procedural technicality with no basis in Ninth Circuit law or the local rules of this jurisdiction.

[3] As discussed further herein, while Chartwell contends the Non-BK Caesars Parties knew how Chartwell's FRCP 30(b)(6) designee had testified in a state court deposition in an action to which the Non-BK Caesars Parties are not parties, Chartwell conveniently overlooks its own efforts to disavow the state court testimony and argument that the testimony was not binding on Chartwell. ECF No. 344 at 11:22-26.

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a mere technicality at best, and permit the Non-BK Caesars Parties to pursue their well-founded counterclaims.[4]

II. FACTUAL BACKGROUND

On February 10, 2004, Rio Properties, Inc., Harrah's Laughlin, Inc., and Harrah's Las Vegas, Inc. – the predecessors in interest to the Non-BK Caesars Parties – entered into three separate Professional Services Agreements (the "Harrah's PSAs") with Chartwell. *See* Exhibits 5, 6, 9 to Chartwell's Second Amended Answer and Counterclaim (the "SAAC") [ECF No. 439]. Pursuant to the Harrah's PSAs, Chartwell agreed to use its best efforts to obtain refunds of overpaid sales and use taxes for complimentary patron and employee meals from the Nevada Department of Taxation (the "State") on behalf of the parties to the Harrah's PSAs.[5,6] *See id.* at Article 2(A). In exchange, the Non-BK Caesars Parties' predecessors-in-interest agreed to pay Chartwell a contingency fee if and when they received the proceeds of a "Total Refund," which Chartwell defined as "all refunded sales and use taxes, interest and penalties for complimentary food items filed as a result of the efforts of Chartwell." *See id.* at Articles 2(C) and 4(A), (B). If the Non-BK Caesars Parties failed to receive any refund proceeds, then Chartwell was not entitled to recover any contingency fee under the Harrah's PSAs. *See id.* at Article 2(B)

Between April of 2004 and December of 2006, Chartwell filed use tax refund requests with the State on behalf of Harrah's Las Vegas, Harrah's Laughlin, and Rio Properties. SAAC at ¶ 87. Ultimately, those use tax refund petitions, as well as use tax refund petitions prepared by

[4] While it seeks to strike the counterclaims, Chartwell does not seek to strike the Non-BK Caesars Parties' affirmative defenses asserted in the same operative pleading which are based, in part, upon the same underlying facts and discovery. Similarly, the same facts and discovery further support the Non-BK Caesars Parties' declaratory relief claims filed in 2013. Hence, Chartwell will not be prejudiced by allowing the counterclaims to remain in the case.

[5] Chartwell represented that its services would be provided in a "first class, high quality, and professional manner," and that Chartwell had the "background, expertise, and personnel necessary" to provide the services set forth in the Harrah's PSAs. *See* Exhibits 5, 6, 9 to Chartwell's SAAC.

[6] Pursuant to the Harrah's PSAs, Chartwell's duties to Harrah's Las Vegas, Harrah's Laughlin, and Rio Properties included reviewing financial records; substantiating any overpayment of sales and use taxes; preparing and filing petitions for refunds with the State; and representing Harrah's Las Vegas, Harrah's Laughlin, and Rio Properties at any administrative hearings in connection with the filed refund petitions. *See* Exhibits 5, 6, 9 to SAAC.

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Chartwell for other taxpayers, were not granted by the State.[7] *See* Exhibit 10 to SAAC. Chartwell alleges that because the use tax refund petitions it filed on behalf of various taxpayers involved many of the same facts and legal issues, Chartwell and the State agreed to use a single refund petition Chartwell filed on behalf of Sparks Nugget, Inc. as a test case in order to resolve the issue of whether complimentary employee and patron meals were properly subject to use tax, holding all other pending use tax refund petitions in abeyance during the pendency of the Sparks Nugget test case. SAAC at ¶ 35. As discussed further below, Chartwell's former President and CEO Stephen Deviney testified during his FRCP 30(b)(6) deposition that in agreeing to allow the single Sparks Nugget use tax refund petition to serve as a test case while all other refund petitions were held in abeyance, Chartwell and the State entered into an unwritten agreement that any decision in the Sparks Nugget test case would apply equally to all of the use tax refund petitions held in abeyance. See Exhibit 1-A at 647:10-18.

On March 27, 2008, the Nevada Supreme Court in *Sparks Nugget, Inc. v. State ex rel. Dep't of Taxation*, 124 Nev. 159, 179 P.3d 570 (2008) (per curiam), concluded that complimentary meals provided by casinos to patrons and employees were not subject to use tax. However, in a footnote, the Court stated, "we do not foreclose the possibility that complimentary meals such as the ones at issue in this case may be subject to sales tax where consideration is properly demonstrated." *Sparks Nugget*, 124 Nev. at 165, n. 15. Based upon the Supreme Court's footnote in *Sparks Nugget*, in March 2009 the State began issuing Deficiency Determination Notices in response to the refund petitions held in abeyance based on the alleged underreporting of sales tax on the retail value of the same complimentary employee and patron meals that were the subject of the use tax refund petitions. ECF No. 405 at ¶ 17. Harrah's Las Vegas, Harrah's Laughlin, and Rio Properties were assessed millions of dollars in deficiencies. *See id.*; *see also* Exhibit 1-A at 859-62. The only taxpayer that did not receive a deficiency

[7] On April 8, 2008, the Non-BK Caesars Parties terminated the Harrah's PSAs pursuant to Article 5 thereof. In their letter of termination, the Non-BK Caesars Parties reaffirmed that the only obligation to pay Chartwell a contingency fee for the use tax refund claims filed through August 31, 2006 would arise when (if ever) refund proceeds were received from the State. *See* SAAC at ¶ 88.

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notice, or the threat of a deficiency notice, was Sparks Nugget for the single refund petition litigated in the Sparks Nugget test case.[8] Exhibit 1-A at 326:14-21.

The State's assessment of sales tax liability on the same transactions subject to the pre-Sparks Nugget use tax refund petitions would have been legally foreclosed but for Chartwell's failure to reduce its agreement with the State to writing and/or its failure to enforce said agreement. However, because the State was not precluded from assessing sales tax (i.e., it was not precluded from "reneging" on its agreement with Chartwell), the Non-BK Caesars Parties faced a substantial sales tax liability, thus necessitating years of litigation which ultimately ended with a global settlement agreement with the State (the "Settlement Agreement") in May 2013. *See* Exhibit 1 to SAAC. Pursuant to the Settlement Agreement, all use tax refund requests were withdrawn in exchange for an agreement by the State to abate sales taxes on the same complimentary meals and the enactment of legislation abating future sales taxes on complimentary meals through 2019.[9] *See id.* at Sections 2.2 and 2.3.

In the span of ten years, the Non-BK Caesars Parties never received the proceeds of a refund for taxes paid on complimentary meals. Furthermore, as a result of the 2013 Settlement Agreement, the Non-BK Caesars Parties will not receive the proceeds of a tax refund.[10] In the absence of a refund, Chartwell is not entitled to the payment of a contingency fee from the Non-BK Caesars Parties. Nevertheless, on June 21, 2013, Chartwell issued contingency fee invoices to the Non-BK Caesars Parties. *See* Exhibit 9 to ECF No. 1-1 in Case No. 2:13-cv-02234-APG-GWF. The Non-BK Caesars Parties refused to pay these invoices, noting that they have never

[8] Not even Sparks Nugget received the full application of Chartwell's agreement with the State, as it also received deficiency notices on other use tax refund petitions it had filed but which were not part of the *Sparks Nugget* decision. *See* Exhibit 1-A at 650:1-9.

[9] In other words, aside from the limited refunds and credits actually issued to those entities listed in Exhibits B and C to the Settlement Agreement (which did not include the Non-BK Caesars Parties), the Settlement Agreement was a "walk-away" agreement between the taxpayers and the State. *See* Exhibit 1 to SAAC.

[10] Per the "clawback" provision of the Settlement Agreement, if tax abatement legislation is repealed, the Non-BK Caesars Parties will receive pro-rated damages, which arguably could entitle Chartwell to a contingency fee. To date, however, there has been no effort by the Nevada legislature to repeal the tax abatement. *See* Exhibit 1 to SAAC.

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received any refund proceeds from the State and therefore do not owe Chartwell anything pursuant to the PSAs. *See* Exhibit 10 to ECF No. 1-1 in Case No. 2:13-cv-02234-APG-GWF.

III. PROCEDURAL HISTORY

Rather than acceding to Chartwell's unfounded payment demand, the Non-BK Caesars Parties filed a complaint for declaratory relief in state court, asking for a declaration that by the express language of the Harrah's PSAs, Chartwell is not entitled to payment of a contingency fee.[11] *See* ECF No. 1-1 in Case No. 2:13-cv-02234-APG-GWF. Several weeks later, Chartwell improperly joined the Non-BK Caesars Parties as defendants to counterclaims filed against approximately 50 parties in a separate state court declaratory relief action initiated by Sierra Development Co. d/b/a Club Cal Neva and removed to this Court by Chartwell. *See* ECF No. 18. Chartwell then removed the Non-BK Caesars Parties' state court action, and the two declaratory relief actions were consolidated. *See* ECF No. 30.

On February 21, 2014, the Non-BK Caesars Parties filed a motion to dismiss Chartwell's counterclaims. ECF No. 108. The Non-BK Caesars Parties's motion to dismiss, as well as those filed by other counterdefendants, remained pending until May 26, 2015, when the Court entered its order denying the motions to dismiss. *See* ECF. No. 224.

Since discovery was stayed pending the ruling on the motions to dismiss [ECF No. 215], discovery did not materially commence in this matter until after the Court entered a scheduling order on July 20, 2015 [ECF No. 238]. Moreover, Chartwell did not produce copies of the documents referenced in its initial disclosures until November 2, 2015. Indeed, throughout the discovery period Chartwell has gone to great lengths to avoid disclosing relevant information and to obfuscate the fact that it failed to maintain and preserve discoverable evidence in its possession, custody, and control. *See, e.g.*, ECF Nos. 355, 376, 387. As a result, certain discoverable evidence – including the evidence affirming the Non-BK Caesars Parties

[11] As discussed further *infra*, Chartwell argues that it will be prejudiced if the Non-BK Caesars Parties' Counterclaims are not stricken. Chartwell, however, ignores the fact that the Non-BK Caesars Parties have maintained a declaratory relief claim since the inception of this action and have maintained affirmative defenses throughout the course of discovery to which the evidence forming the basis for their recent counterclaims is also relevant. Therefore, Chartwell will not be prejudiced at all.

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counterclaims now at issue – was not obtained until the Non-BK Caesars Parties conducted the deposition of Chartwell's FRCP 30(b)(6) designee on May 23 – 26, 2016.[12,13] In particular, Chartwell's Rule 30(b)(6) designee testified: (1) that the State's assessment of sales tax on the same complimentary meal transactions at issue in the previously-filed use tax refund petitions was "reneging" on the agreement Chartwell had reached with the State but failed to reduce to writing; and (2) Chartwell failed to take any action to enforce the terms of its purported agreement with the State and failed to advise the Non-BK Caesars Parties of the agreement and/or of their possible rights to enforce the purported agreement. *See* Exhibit 1-A at 487:20-24; 351:7-14 (testifying that Chartwell "felt that [the State] reneged on the deal.").

On June 7, 2016, less than two weeks after conducting the deposition of Chartwell's Rule 30(b)(6) designee and in response to the SAAC, the Non-BK Caesars Parties filed the counterclaims (the "Counterclaims") which Chartwell now seeks to strike. ECF No. 439. For the reasons discussed herein, the Motion to Strike should be denied.

II. LEGAL ARGUMENT

A. The Non-BK Caesars Parties Did Not Require Leave to File Counterclaims in Response to Chartwell's Second Amended Counterclaim

There is nothing express within FRCP 15, the Local Rules of the District of Nevada, nor, as recognized by Chartwell, has the Ninth Circuit adopted any particular standard governing the extent to which a party may add or amend counterclaims in response to an amended pleading without seeking leave of court.[14] The Non-BK Caesars Parties respectfully submit that the appropriate standard this Court should adopt is the one announced in *Joseph Bancroft & Sons Co. v. M. Lowenstein & Sons, Inc.*, 50 F.R.D. 415, 419 (D. Del. 1970), especially given that the Counterclaims are based upon recently discovered evidence. In *Joseph Bancroft*, the district

[12] The Non-BK Caesars Parties attempted to schedule depositions beginning in March 2016, but the depositions were not scheduled until May 2016. *See* ECF No. 364.

[13] For example, Chartwell failed to fully and/or accurately disclose a database system called Goldmine, upon which Chartwell's FRCP 30(b)(6) designee substantially relied in deposition preparation. *See* ECF Nos. 420, 444, 453, 470. This database was not fully disclosed by Chartwell until July 19, 2016. *See* ECF No. 480.

[14] Despite its acknowledgement that there is no Ninth Circuit precedent, Chartwell still argues that "the law" required the Non-BK Caesars Parties to seek leave prior to filing their counterclaims in response to the SAAC. ECF No. 460 at 9:10-12.

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court allowed a plaintiff to file three new counterclaims without leave of court in response to the defendant's amended pleading even though the new counterclaims could have been brought earlier. *Id.* at 419. The court specifically stated, "Since the amending pleader chooses to redo his original work, and receives the benefit of this nunc pro tunc treatment, he can hardly be heard to complain that claims filed against him are improper because they should have been asserted in response to his original pleading." *Id.*

The holding in *Joseph Bancroft* has been cited multiple times by district courts in the Ninth Circuit. *See, e.g., Spellbound Development Group, Inc. v. Pacific Handy Cutter, Inc.*, 2011 WL 1810961 (C.D. Cal. May 12, 2011); *Precision Replacement Parts Corp. v. Auto Glass Components, Inc.*, 2005 WL 2045837 (W.D. Wash. Aug. 25, 2005). In *Spellbound*, the court granted the plaintiff leave to file a third amended complaint which simply added a new defendant. *Spellbound*, 2011 WL 1810961, at *1. In response to this third amended complaint, the original defendant pled counterclaims against plaintiff for the first time without seeking leave to amend its reply. *Id.* The plaintiff objected and argued that the original defendant failed to seek leave to amend and failed to comply with the scheduling order's deadline by which parties needed to seek leave to amend their pleadings. *Id.* at *2. The court rejected defendant's arguments, citing *Joseph Bancroft* for the proposition that "it was reasonable for Defendants to assert a new counterclaim in their answer to the Third Amended Complaint" because although "the Third Amended Complaint did not change the complaint as related to [the original defendant], it nonetheless became the operative pleading." *Id.*

Using this same framework, the Non-BK Caesars Parties were not required to seek leave to amend prior to filing their Counterclaims against Chartwell. Chartwell made the decision to file the SAAC and, by law, the SAAC became the operative pleading in this matter. By choosing to redo its original work, Chartwell can hardly be heard to complain that the Non-BK Caesars Parties have now filed counterclaims in response to the operative pleading. Thus, the Non-BK Caesars Parties did not require leave to amend to file their Counterclaims in their mandatory responsive pleading to the SAAC and Chartwell therefore has no basis for moving to strike the

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Non-BK Caesars Parties' Counterclaims. Accordingly, Chartwell's Motion to Strike should be denied.

B. Even if the Non-BK Caesars Parties Required Leave to File Their Counterclaims, Good Cause Exists to Grant Them Such Leave[15]

A party seeking leave to amend following the deadline to amend pleadings must meet the requirements of both FRCP 15 and FRCP 16. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). First, the moving party must establish good cause to modify the scheduling order under FRCP 16. *Id.* Upon demonstrating good cause under FRCP 16, the Court then should examine whether the amendment is proper under FRCP 15's liberal standard. *Id.*

1. The Non-BK Caesars Parties Meet FRCP 16(b)'s Good Cause Standard

The Non-BK Caesars Parties have good cause for filing their Counterclaims after the deadline to amend pleadings had passed. A motion for leave to amend filed after the scheduling order's deadline is treated as a motion to amend the scheduling order. *Steward v. CMRE Financial Services, Inc.*, 2015 WL 6123202, *1 (D. Nev. Oct. 16, 2015). This type of motion is governed by the good cause standard outlined in FRCP 16(b). *Id.* The central inquiry under the good cause standard is whether the party was diligent in seeking the amendment. *Id.* (holding that the "focus of the inquiry is on the movant's reasons for seeking modification").

Here, the Non-BK Caesars Parties were diligent in attempting to uncover evidence sufficient to allege counterclaims for breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty against Chartwell based upon its agreement with the State, which was never documented, enforced, or fully disclosed to the Non-BK Caesars Parties. Indeed, Chartwell did not produce evidence regarding the full scope of its agreement with the State to the Non-BK Caesars Parties as part of its initial disclosures, in response to

[15] The Non-BK Caesars Parties will examine the factors relevant under FRCP 15 and the excusable neglect factors under Local Rule 26-4 jointly given their substantial overlap. *See, e.g., Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1223-24 (9th Cir. 2000) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 395 (1993)) (identifying that the Court should examine the following factors when determining whether there is excusable neglect: (1) prejudice to the opposing party; (2) the length of delay; (3) the reason for delay; and (4) whether the movant acted in good faith).

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written discovery requests, or in any supplemental document productions. As a result, it was not until the deposition of Chartwell's FRCP 30(b)(6) designee Stephen Deviney that the Non-BK Caesars Parties acquired the evidence necessary to assert these causes of action as counterclaims. The testimony elicited during this corporate representative deposition clearly debunks Chartwell's unsupported contention that the Non-BK Caesars Parties "do not identify any facts that have been developed since [November 2015] as a basis for a counterclaim." *See* Motion at 14:16-17. In the May 2016 deposition, Chartwell's corporate representative repeatedly testified that the state reneged on its agreement with Chartwell. *See* Exhibit 1-A at 351:7-14; 487:20-24. These are the facts upon which the Counterclaims are based and which were only testified to by Chartwell's corporate representative in the last week of May 2016.

While Chartwell is correct that Mr. Deviney testified in November 2015 regarding a potential agreement with the Department, Chartwell's argument on this point ignores two critical facts regarding this deposition. First, the November 2015 deposition was taken in a state court action to which the Non-BK Caesars Parties are not a party. Second, and perhaps more critical, is the fact that the November 2015 deposition was of Mr. Deviney in his *individual* capacity. This crucial distinction was highlighted *by Chartwell* in its reply in support of its motion for leave to file the SAAC. ECF No. 344 at 11:22-26. In attempting to rebut Station Casinos' argument relating to the November 2015 deposition, Chartwell unambiguously argued that "Mr. Deviney was testifying about his own views, not as Chartwell's corporate representative." *Id.* at 11:22. In fact, Chartwell went so far as to state that "Station cannot just ignore that distinction." *Id.* at 11:25-26. Yet, when it favors them, Chartwell seems quite content to ignore that critical distinction.

The FRCP 30(b)(6) deposition for Chartwell did not occur until the week of May 23, 2016. It was not until this deposition that Chartwell bound itself to the facts underlying the Non-BK Caesars Parties' Counterclaims. As such, the Non-BK Caesars Parties were diligent in filing their counterclaims on June 7, 2016 based on facts that were elicited during the FRCP 30(b)(6) deposition of Chartwell only two weeks earlier.

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2. FRCP 15's Liberal Standard Weighs in Favor of Granting Leave to Add the Counterclaims

Leave to amend shall be freely given when justice so requires. FRCP 15(a). In interpreting FRCP 15(a), the United States Supreme Court has held:

> In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.—the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178 (1962).

"Absent prejudice, or a strong showing of any of the remaining *Foman* factors, there exists a *presumption* under Rule 15(a) in favor of granting leave to amend." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (citing *Lowrey v. Tex. A & M Univ. Sys.*, 117 F.3d 242, 245 (5th Cir. 1997)) (emphasis in original).

a. There Was No Undue Delay, nor Do the Non-BK Caesars Parties Have any Dilatory Motive

The first and fourth *Foman* factors strongly suggest that, to the extent necessary, this Court should grant the Non-BK Caesars Parties leave to file their Counterclaims. The Non-BK Caesars Parties have not engaged in any undue delay, nor do they desire to delay this matter. This much was evident from day one when the Non-BK Caesars Parties filed their action for declaratory relief seeking to resolve the dispute between the parties arising out of the PSAs. Unfortunately, due to Chartwell's continued obstructionist discovery tactics, relevant information was not disclosed timely in this matter. Instead, the Non-BK Caesars Parties had to extract information in bits and pieces from Chartwell, with the majority of the information only being disclosed during depositions over the past two months.[16] The Non-BK Caesars Parties therefore could not have sought leave to amend prior to the deadline passing and their filing is not representative of any dilatory motive or undue delay.

[16] Notably, all of the depositions of Chartwell's representatives in this matter took place *after* the deadline to amend pleadings had passed.

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b. There were No Repeated Failures to Cure Deficiencies by Prior Amendment

The second *Foman* factor also weighs in favor of the Non-BK Caesars Parties because they have not repeatedly presented this Court with flawed pleadings requiring constant amendment to cure deficiencies. Instead, the counterclaims at issue were pled for the first time within two weeks after the deposition of Chartwell's FRCP 30(b)(6) designee and, as described below, do not suffer from any substantive deficiencies.

c. Chartwell Will Not Be Prejudiced if the Non-BK Caesars Parties are Allowed to File Counterclaims

The third *Foman* factor weighs in favor of granting the Non-BK Caesars Parties leave to amend because Chartwell cannot establish that it will be prejudiced by allowing the Non-BK Caesars Parties to pursue their well-founded Counterclaims.

The party opposing leave to amend bears the burden of establishing prejudice. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987) (citing *Beeck v. Aqua-slide 'N' Dive Corp.*, 562 F.2d 537, 540 (8th Cir. 1977)). A party cannot meet this burden merely by asserting, in a conclusory manner, that it will be prejudiced because some ambiguous additional discovery would be required if leave to add claims were granted. *See Hurn v. Retirement Fund Trust of Plumbing, Heating and Piping Industry of Southern California*, 648 F.2d 1252, 1254 (9th Cir. 1981). In *Hurn*, the party opposing leave to amend argued that amendment would be unduly prejudicial because factual issues relating to the new claim had not been "thoroughly examined through discovery" and would require more discovery. *Id.* The court rejected this argument, noting that the party's conclusory argument "fail[ed] to point to any specific shortcomings in discovery" presented by the new claim. *Id.* Furthermore, the Court identified that the operative facts of the case remained unchanged by the amendment and thus the parties should be prepared to litigate the issues of the new claim. *Id.*

Here, similar to the party in *Hurn*, Chartwell makes unsubstantiated, conclusory claims that more discovery will be needed and trial will be delayed if the Non-BK Caesars Parties are allowed to pursue their Counterclaims. This is the exact type of argument the Ninth Circuit has previously rejected. The Non-BK Caesars Parties' Counterclaims do not change the operative

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facts of the case and the parties have already conducted discovery relating to the allegations underlying the Non-BK Caesars Parties' Counterclaims.

Chartwell can hardly claim legitimate prejudice (or legitimately argue the need for further discovery), when the Counterclaims are based on evidence that was always within Chartwell's knowledge and/or possession. Quite simply, the Counterclaims are based upon the testimony of Chartwell's FRCP 30(b)(6) designee, and the Non-BK Caesars Parties are at a loss as to what additional discovery Chartwell would conduct of its own designee. Moreover, rather than using the two months of discovery that remained after the Counterclaims were filed to conduct discovery relating to the Counterclaims (including the depositions of the Non-BK Caesars Parties FRCP 30(b)(6) designees, conducted July 8 and 12, 2016: more than a month after the filing of the Counterclaims), Chartwell requested a stay of discovery on the issue. Thus, to the extent Chartwell was somehow prejudiced, it was due to its own litigation strategy.

Furthermore, Chartwell's argument regarding prejudice loses credibility given that counterdefendants Pioneer and the MGM Parties filed similar counterclaims and were entitled to do so as a matter of right since they had not filed a prior responsive pleading. Since Chartwell has to deal with these claims in any event, there is no prejudice since the facts and discovery relating to Pioneer and the MGM Parties' counterclaims are the same for the Non-BK Caesars Parties.[17]

(1) Chartwell has not challenged the Non-BK Caesars Parties' amended affirmative defenses based upon the same facts and evidence.

In their amended pleading, in addition to adding the Counterclaims at issue in the Motion to Strike, the Non-BK Caesars Parties also amended their thirteenth affirmative defense. ECF No. 439. Previously, the Non-BK Caesars Parties' thirteenth affirmative defense stated that Chartwell's claims were barred due to its own wrongful conduct. ECF No. 291. In light of the recently-discovered evidence, the affirmative defense was clarified to state:

[17] Additionally, it should be noted that judicial economy favors trying counterclaims at the same time as related matters. *Daou v. Abelson*, 2012 WL 1292475 (D. Nev. 2012) (denying motion to strike pleading even though Defendant failed to seek leave prior to filing new counterclaim in response to an amended pleading and the discovery period would have to be extended).

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> Chartwell's claims are barred, in whole or in part, by virtue of Chartwell's own wrongful conduct in violation of the terms of the applicable PSAs, including but not limited to the conduct detailed further in the Counterclaim of Harrah's Las Vegas, Harrah's Laughlin, and Rio Properties, *infra*, which is incorporated by reference as if fully set forth herein.

ECF No. 439.

Despite this amendment — incorporating the same issues raised in the Non-BK Caesars Parties' Counterclaims — Chartwell has not made an argument relating to the Non-BK Caesars Parties' amended affirmative defense. This omission is quite telling for two reasons. First, it indicates that Chartwell realizes there is a substantive factual basis supporting the Non-BK Caesars Parties' Counterclaims. Second, Chartwell's silence is a tacit admission that it will not be prejudiced since the same facts and evidence will be used to support the Non-BK Caesars Parties' affirmative defense as well as their original claim seeking a declaration that no money is owed to Chartwell.

The only difference between (a) the Non-BK Caesars Parties' Counterclaims which Chartwell has moved to strike and (b) the Non-BK Caesars Parties' declaratory relief claim filed in 2013 and affirmative defenses filed by the Non-BK Caesars Parties in their initial pleading and recently amended to reflect the newly-discovered evidence, neither of which are the subject of Chartwell's Motion to Strike, is that the Counterclaims entitle the Non-BK Parties to recover damages for Chartwell's breaches.[18] It would be patently unfair to preclude the Non-BK Caesars Parties from pursuing damages when the underlying factual basis for the Counterclaims was only recently discovered, particularly when the same facts will be presented at trial to support the Non-BK Caesars Parties' affirmative defenses and claim for declaratory relief.[19]

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[18] Damages which are calculable based upon use tax refund petitions which have been in Chartwell's possession since before the commencement of this action, and which therefore should not require additional discovery.

[19] In effect, the Non-BK Caesars Parties have simply amended their pleading to conform to newly-discovered evidence in response to Chartwell's SAAC. *See* FRCP 15(b)(2); *see also Gray v. Golden Gate Nat. Rec. Area*, 866 F.Supp.2d 1129, 1141 (N.D. Cal. 2011) (citing *Galindo v. Stoody Co.*, 793 F.2d 1502, 1512-13 (9th Cir. 1986)) ("Leave to amend is freely granted, even as late as during trial to conform to proof.").

d. The Proposed Counterclaims are Not Futile

The last factor under the *Foman* analysis also weighs heavily in favor of granting the Non-BK Caesars Parties leave to file their Counterclaims, to the extent that leave is necessary. Noticeably absent from Chartwell's Motion is any notion that the Counterclaims are futile. Chartwell's silence on this factor speaks volumes. Chartwell recognizes that discovery has revealed a factual basis for the Counterclaims the Non-BK Caesars Parties seek to pursue in this matter and thus this factor, like all of the other factors, favors granting the Non-BK Caesars leave to file their Counterclaims.

III. CONCLUSION

Based on the foregoing, the Non-BK Caesars Parties respectfully request that the Court find that the Non-BK Caesars Parties were allowed to file their Counterclaims without leave because Chartwell filed its SAAC. Alternatively, if the Court believes the Non-BK Caesars Parties were required to obtain leave prior to filing their Counterclaims, they respectfully request that this Court grant such leave and allow them to maintain their meritorious Counterclaims against Chartwell.

DATED this 25th day of July 2016.

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/s/ Michael N. Feder

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CERTIFICATE OF SERVICE

The undersigned, an employee of Dickinson Wright PLLC, hereby certify that on the 25th day of July 2016, I electronically served the above foregoing ***COUNTERCLAIM DEFENDANTS' CAESARS ENTERTAINMENT CORPORATION, HARRAH'S LAS VEGAS, LLC, HARRAH'S LAUGHLIN, LLC, AND RIO PROPERTIES, LLC OPPOSITION TO CHARTWELL ADVISORY GROUP, LTD.'S MOTION TO STRIKE NEWLY- FILED COUNTERCLAIMS [ECF No. 460]*** upon the following:

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/s/ Kathryn Koehm
An employee of Dickinson Wright PLLC

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Exhibit 2

Exhibit 2

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

SIERRA DEVELOPMENT CO. d/b/a CLUB CAL NEVA, Plaintiff, v. CHARTWELL ADVISORY GROUP, LTD. Defendant.	CASE NO. 3:13-cv-00602-RFB-VPC **COUNTERCLAIM DEFENDANTS MSE INVESTMENTS, INC., GOLDSTRIKE INVESTMENTS, INC., NEWCASTLE, INC., RAMPARTS, INC. AND PIONEER HOTEL, INC.'S OPPOSITION TO CHARTWELL ADVISORY GROUP LTD.'S MOTION TO STRIKE NEWLY FILED COUNTERCLAIMS**
CHARTWELL ADVISORY GROUP, LTD., Counterclaim Plaintiff, v. SIERRA DEVELOPMENT CO., *et al.*, Counterclaim Defendants.	

I. INTRODUCTION

Chartwell seeks to strike valid counterclaims that directly undercut its claims in this matter, it seeks to do so on an undecided issue of law, one that is even misapplied by Chartwell. To make matters worse, Chartwell applies this incorrect theory to the MGM Parties[1] and Pioneer Hotel, Inc.

[1] For purposes of this Opposition, the MGM Parties are collectively: MSE Investments, Inc., Gold Strike Investments, Inc., Newcastle Corp., and Ramparts, Inc. MGM Resorts

("Pioneer") even though Chartwell acknowledges that the MGM Parties and Pioneer are not amending anything. Even if Chartwell's application were correct and the MGM Parties and Pioneer were amending a pleading, the Court should still permit the counterclaims, as good cause exists under Rules 15 and 16. Chartwell's attempts to demonstrate otherwise fall flat.

In an effort to pretend prejudice, Chartwell engages in double speak by denying when inconvenient and embracing when beneficial, the testimony of Stephen Deviney. Chartwell then attempts to manufacture some kind of prejudice by ignoring and seeking to stay discovery on the newly filed counterclaims. In truth, no true prejudice exists as Chartwell already has and would have to engage in discovery on these claims regardless of whether they remain in this case. Moreover, there will be no delay and to the extent there were, they are the result of Chartwell's own lack of candor in discovery, failing to produce volumes of documents. Chartwell knows what the evidence has and will show with respect to these claims. Because these counterclaims defeat Chartwell's affirmative claims, it seeks to strike them rather than respond. Regardless of Chartwell's doublespeak and procedural maneuvering, judicial economy demands that the newly filed counterclaims be heard with all other claims between these parties.

II. FACTUAL BACKGROUND

A. Procedural Background Leading to Chartwell's Motion to Strike.

Chartwell's Motion to Strike arises primarily as a result of Chartwell's desire to amend its theories in this case in the face of deposition testimony from its principal, Stephen Deviney, which potentially doomed its claims against Station Casinos, Inc. In response to this testimony and a forthcoming Motion for Summary Judgment from Station Casinos, Inc., Chartwell filed its Motion for Leave to File Second Amended Answer, Affirmative Defenses and Counterclaims on December 30, 2015 (ECF No. 319) (the "Motion to Amend"). Station Casinos, Inc. opposed Chartwell's Motion to Amend on January 19, 2016 (ECF No. 331) based in part on the fact that the proposed amendment would be futile in light of the deposition testimony of Mr. Deviney taken in

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International, Inc. is not an MGM Party for purposes of this Opposition as it did not file a Counterclaim against Chartwell.

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a parallel state court proceeding between Station Casinos, LLC and Chartwell. *See e.g* ECF No. 331, pp. 6:12-7:22. Not one to be deterred by bad facts, Chartwell distanced itself from Mr. Deviney's testimony in its Reply Memorandum in Support of Its Motion for Leave to File Second Amended Answer, Affirmative Defenses, and Counterclaims (ECF No. 334) (the "Reply"). Specifically, Chartwell asserted that:

> Mr. Deviney was testifying about his own views, not as Chartwell's corporate representative. In fact, during his deposition, Mr. Deviney specifically reminded Station's counsel that he was testifying as to his own opinion, not as to Chartwell's position. (internal citation omitted). Station cannot just ignore that distinction.

See ECF No. 334, p. 12:21-26. This is despite the fact that Deviney was effectively the sole witness designated by Chartwell and was in fact the Rule 30(b)(6) designee in testifying during discovery in this action. For obvious reasons, Chartwell's attempt to avoid Deviney's testimony is doomed.

On May 4, 2016, this Court entered an order denying Station's Motion for Summary Judgment and granting Chartwell's Motion to Amend (ECF No. 396). Following this Order, Chartwell filed its Second Amended Answer, Affirmative Defenses, and Counterclaim on May 13, 2016 (ECF No. 405) (the "Chartwell's Second Amended Counterclaim"). On May 31, 2016, the parties stipulated to extend the deadline to respond to Chartwell's Second Amended Counterclaim to June 7, 2016 (ECF No. 419). The Court granted this stipulation on June 1, 2016 (ECF No. 421). The remaining Counterclaim Defendants all filed their responsive pleadings on June 7, 2016. The MGM Parties, Pioneer, the Caesars Parties[2] and the Golden Nugget Parties[3] (collectively the "Counterclaiming Casinos") filed counterclaims (the "Casino Counterclaims") the same day. In response, Chartwell filed this Motion to Strike Newly Filed Counterclaims (ECF No. 460) (the "Motion to Strike").

[2] For purposes of this Opposition, the Caesars parties are collectively: Harrah's Las Vegas, LLC, Harrah's Laughlin, LLC and Rio Properties, LLC.

[3] For purposes of this Opposition, the Golden Nugget Parties are collectively: Golden Nugget, Inc., GNLV Corp. and Golden Nugget Hotels and Casinos.

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B. The Factual Basis for the Counterclaims.

In November 2015, Mr. Deviney was deposed by Station Casinos, LLC, a non-party to this case at the time, in a related state court proceeding more commonly known as *Station Casinos, LLC v. Chartwell Advisory Group, Ltd. And John Bartlett, Esq.*; Case No. A-13-692673-C, pending in the Eighth Judicial District Court for the State of Nevada (the "Station State Court Action").[4] During his deposition, Mr. Deviney revealed for the first time that Chartwell had reached an agreement with the Attorney General's Office on behalf of the State of Nevada's Department of Taxation that in essence would hold all pending refund petitions for use tax paid on complimentary and employee meals in abeyance, pending the outcome of a "lead case" prosecuted by Sparks Nugget. *See* Deposition of Stephen Deviney, taken 11/4/2015, attached hereto as **Exhibit 1**, pp. 101:12-104:14. According to Mr. Deviney, the cases held in abeyance would receive the same treatment as Sparks Nugget, under the agreement with the state. *Id.* Despite this agreement, the state did not treat all cases held in abeyance the same, instead the state supposedly reneged on the agreement. *Id.* at p. 111:13-24.

Notably, this testimony was taken by Station Casinos, LLC, in the State Court Action and none of the Counterclaiming Casinos were present to ask questions or follow-up on these issues on their own behalf. These parties did not get a chance to fully investigate this issue until the deposition of Mr. Deviney as the 30(b)(6) designee of Chartwell on May 23, 24, 25 and 26, 2016. *See* Joinder to Amended Notice of Taking Videotaped Deposition of Stephen Deviney, attached hereto as **Exhibit 2**. In fact, as set forth above, Chartwell had already specifically disputed the impact and imputation of this prior testimony by Mr. Deviney in the Station State Court Action on Chartwell because Mr. Deviney was not deposed as the 30(b)(6) designee.

[4] The deposition was originally scheduled for August 24, 2015. But Deviney flatly failed to appear at the properly-noticed deposition. Thereafter, Chartwell engaged in various procedural maneuverings, trying to avoid Deviney's deposition, going so far as to petition the Nevada Supreme Court to stop Deviney's deposition from occurring. The Nevada Supreme Court refused to do so. When Deviney finally appeared months later, it became obvious why Chartwell had engaged in repeated maneuverings hoping to avoid his deposition: It completely contradicted much of what Chartwell has claimed throughout this case.

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As a result, on May 23, 24, 25 and 26, the Counterclaiming Casinos, among others, all attended and participated in the deposition of Mr. Deviney as the 30(b)(6) designee of Chartwell. During this testimony, Mr. Deviney, as the 30(b)(6) designee of Chartwell again discussed the Sparks Nugget case, Sparks Nugget's receipt of a refund, the deal struck with the State of Nevada and the State's refusal to honor that deal. *See* Deposition of Stephen Deviney, Vol. II, pp. 349:19-351:17, attached hereto as **Exhibit 3**; *see also* Deposition of Stephen Deviney, Vol. III, pp. 647:10-651:2; 846:22 – 849:3, attached hereto as **Exhibit 4**. Indeed, collectively, all counsel inquired as to the nature of the deal struck with the State and Mr. Deviney provides similar testimony, this time as the 30(b)(6) for Chartwell (a critical distinction, according to Chartwell). Mr. Deviney's for Chartwell testimony acknowledged the agreement and indicated the State reneged on that agreement. Thus, less than two weeks after Chartwell's testimony, the Counterclaiming Casinos all filed counterclaims.

III. ARGUMENT

Chartwell's Motion to Strike is premised on an undecided legal issue, and even then incorrectly applied to the MGM Parties and Pioneer, along with a discovery strategy that led to Chartwell's manufactured theory of prejudice. Indeed, Chartwell cites a series of unpublished opinions for the proposition that the Counterclaiming Casinos were required to seek leave to amend. However, Chartwell ignores the fact that the majority of the cases it cites also demonstrate that even when the Court found the amendment improper, the Court still allowed the amendment. Plus, Chartwell acknowledges that the MGM Parties and Pioneer did not amend anything, yet Chartwell provides absolutely no analysis of this problem. Chartwell then somehow claims that Rule 16 precludes these amendments, even though the evidence for these claims was discovered after the deadline to amend pleadings passed. Finally, Chartwell makes unsupported allegations that it would suffer prejudice by the resulting delay additional discovery on these claims would require, when Chartwell itself sought to delay and avoid discovery on these very issues. Indeed, Chartwell has only now provided the electronically stored database that pertains to all of these cases, something that it has steadfastly refused to provide until ultimately being forced to do so by the Magistrate Judge. If there is any delay in this case, it has been due to Chartwell's own maneuvering.

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A. Chartwell Amended its Counterclaims and its Theory of Recovery.

Contrary to Chartwell's assertion, the law does not require Counterclaiming Casinos to seek leave to amend prior to bringing the Casino Counterclaims. Instead, as Chartwell acknowledges, the Ninth Circuit has not yet ruled on this specific issue. In fact, as several courts have recognized, the law on this issue is unclear and the case law "is all over the map" *See Wagner v. Choice Home* Lending, 266 F.R.D 354 (D. Az. 2009) (*quoting* Pereira *v. Cogan,* 2002 WL 1822928, *2 (S.D.N.Y.2002)). Indeed, Chartwell does not even point to a single published opinion on this issue.

The *Adobe Systems* Court summarizes the history of this issue by laying out that courts across the country have adopted three different approaches: 1) the permissive approach; 2) the narrow approach; and 3) the moderate approach. *Adobe Sys. Inc. v. Coffee Cup Partners, Inc.*, No. C 11-2243 CW, 2012 WL 3877783, at *5. The permissive approach provides that once a party receives leave to amend his or her pleading that party opens the door to any additional amendments the other party wishes to bring as of right in response, regardless of whether they technically relate to the newly-filed pleading. *Id.* (citing *Uniroyal Chem. Co., Inc. v. Syngenta Crop Prot., Inc.*, 2005 WL 677806, at *2 (D.Conn.) (quoting *Am. Home Prod. Corp. v. Johnson & Johnson*, 111 F.R.D. 448, 453 (S.D.N.Y.1986)). The narrow approach requires any amended response to strictly respond only to the amendments brought by the other party. *Id.* (citing *New England Telephone Co., 2007 WL 521162, at* *2 (internal citations omitted)). The moderate approach "permits the defendant to respond to an amended complaint that changes the theory or scope of the case by adding counterclaims that similarly change the theory or scope of the case." *Id.* (quoting *Uniroyal*, 2005 WL 677806, at *2).

Chartwell claims that it is relying on the moderate approach, but it is plainly attempting to have this Court employ the narrow approach, something which few courts do. Yet, consistent with the liberal rules of pleading, the permissive approach provides the easiest method for ensuring that "[u]nder the rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). Although the Supreme Court in *Gibbs* was addressing issues with joinder

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of state law claims in a federal question case, the same impulse the U.S. Supreme Court found in the rules of civil procedure there exists here. The permissive approach permits parties to bring claims that may have been omitted and ensures that judicial economy is served. Chartwell started this case, claiming that it was entitled in the name of judicial economy to force all Counterdefendants to proceed together in one case. *See* Chartwell's Opposition to Golden Nugget's Motion to Sever Counterclaim (ECF No. 168) at p. 2:13-14 (arguing that "there are substantial efficiencies from maintaining all of Chartwell's claims in one proceeding."). Now that such efficiency would negatively impact Chartwell, it seeks to strike claims from this case and force the parties to proceed with those claims in another forum.[5] This would only serve to further delay the full resolution of all issues between the parties. The permissive approach followed by courts strikes the proper balance. After all, it is Chartwell that elected to amend its claims late in the process, which under the law opened the door for the Counterclaims.

That approach clearly sets out that an amendment that changes the theory or scope of the case can be responded to with similar amendments that change the theory or scope. *See Adobe Sys. Inc.* 2012 WL 3877783 at *5 (internal citations omitted). Here, Chartwell's Second Amended Counterclaim changed the theory of liability against several parties that had filed for bankruptcy, adding a theory of implied assumption of a prior contractual relationship against others. *See generally* Chartwell's Motion to Amend (ECF No. 319). Chartwell admits it sought to change its theory, but claims Counterclaiming Casinos cannot change their responses. This is not the moderate approach courts follow.

The moderate approach allows parties to amend their response if the amended claims change the theory. This is exactly what happened. Chartwell's claim that the theory must be changed with respect to each Counterclaiming Casino is actually the narrow approach, which Chartwell acknowledges is not the approach most courts follow. Chartwell already sought to have all of these

[5] Indeed, Chartwell makes no argument that these claims are prohibited by any statute of limitations, laches or other meritorious defenses in its Motion to Strike. Chartwell does not even argue futility. Chartwell's silence on those issues speaks volumes as Chartwell knows that even if these claims are stricken, the parties could still bring them in a separate action, which would force the parties to litigate substantially related claims in a separate forum. Chartwell vigorously opposed such an outcome when convenient for Chartwell.

Counterclaiming Casinos in one case because the issues were substantially related. Yet now, Chartwell seeks to limit the scope of that substantial relationship by stating they are all separately situated and should be treated separately when Chartwell amends to change its theory of recovery. Chartwell's commitment to its position has remained as steadfast as the wind. It shifts whenever it is in Chartwell's self-interest.

Instead, the Court must acknowledge that all Counterclaiming Casinos are involved in one case at Chartwell's behest. Chartwell cannot now run away from this outcome it fought to protect by claiming there are distinct theories against certain parties that warrant different treatment. Chartwell fundamentally changed the nature of several of its claims. Even under the moderate approach, Counterclaiming Casinos are permitted to do the same in response. In sum, Chartwell already changed the theory of the case, Counterclaiming Casinos are allowed to change their response.

B. Chartwell Provides No Analysis or Authority of any Nature Demonstrating that the MGM Parties and Pioneer are Not Entitled to Bring Counterclaims as of Right in their Initial Pleading.

Although Chartwell admits "[f]or reason that are unclear, neither Pioneer nor the MGM Parties ever answered the Amended Counterclaim," *See* Chartwell's Motion to Strike (ECF No. 460) at p. 7:20-22. Chartwell fails to analyze what effect this has on the rights of the MGM Parties and Pioneer to assert their counterclaims. Chartwell's lack of analysis is no accident.

Rule 13 of the Federal Rules of Civil Procedure specifically authorizes a party to bring a counterclaim in its initial pleading. The only caveat contained in Rule 13 is that it does not expand the right to assert a claim or counterclaim against the United States or officers of the United States. Fed. R. Civ. P. 13(d). In fact, when a Court has jurisdiction over a permissive counterclaim, it has no choice but to consider it. *See Koch Engineering Co. Inc. v. Williams,* 1970 WL 10125 (9th Cir. 1970) (determining that when a federal court has jurisdiction over a permissive counterclaim under Rule 13(b), it must entertain the counterclaim). Chartwell points to no authority that prohibits a party from bringing a counterclaim as of right in its initial pleading. The entirety of Chartwell's analysis focuses on amendments to pleadings. As the MGM Parties and Pioneer amended nothing,

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Chartwell's analysis is inapplicable to them and Chartwell's Motion to Strike the MGM Parties and Pioneer's counterclaims must be denied.

C. Even if the Court Determines Leave to Amend was Required, Good Cause Exists to Permit the Counterclaims.

Leave to amend should be "freely given when justice so requires" and this policy should be applied with "extraordinary liberality." *Morongo Band of Mission Indians v. Rose,* 893 F.2d 1074, 1079 (9th Cir.1990). The granting of leave to amend lies within the sound discretion of the trial court, and will be reversed only for abuse of discretion. *International Ass'n of Machinists & Aerospace Workers v. Republic Airlines,* 761 F.2d 1386, 1390 (9th Cir.1985). The Supreme Court has identified four factors that a district court should consider when evaluating whether to deny leave to amend. *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 230 9 L.Ed.2d 222 (1962). These factors include undue delay, bad faith or dilatory motive, futility of amendment, and prejudice to the opposing party. *Id. See also DCD Programs, Ltd. v. Leighton,* 833 F.2d 183, 186 (9th Cir.1987). "In making this determination, the Ninth Circuit has opined that 'a court must be guided by the underlying purpose of Rule 15 to facilitate decision on the merits, rather than on pleadings or technicalities.'" *Wilson v. Greater Las Vegas Ass'n of Realtors,* No. 2:14-cv-00362-APG-NJK, 2015 WL 5310716, at *1 (quoting *United States v. Webb,* 655 F.2d 977, 979 (9th Cir.1981)). The party opposing the amendment bears the burden of showing amendment is not warranted. *Id.* (citing *Desert Protective Council v. U.S. Dept. Of the Interior,* 927 F.Supp.2d 949, 962 (S.D.Cal.2013)).

Additionally, when an amendment is sought after the deadline to amend pleadings set forth in the scheduling order has passed, good cause and excusable neglect must be shown by the party seeking amendment. *See Johnson v. Mammoth Recreations, Inc.,* 975 F.2d 604, 608-09 (9th Cir.1992). Rule 16(b) and Local Rules 6-1 and 26-4 require a showing of "good cause" before modifying a scheduling order. *Id.* 975 F.2d at 608–09; Fed.R.Civ.P. 16(b); LR 6-1; LR 26-4. Once good cause to modify the scheduling order under Rule 16 is shown, the court considers whether amendment is proper under Rule 15. *See* Johnson, 975 F.2d at 609. Thus, a two-step inquiry exists when determining whether amendment is proper when a party seeks to amend after the deadline to amend has passed. First, the party must establish good cause and excusable neglect under Rule 16

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to amend the prior scheduling order. Then, the party must show good cause under Rule 15(a). Here, good cause exists under both analyses.

1. Good cause exists under Rule 16 to permit the Counterclaiming Casinos to amend the scheduling order to introduce the Casino Counterclaims because the information establishing the basis for the claims was discovered after the April deadline.

Chartwell goes to great lengths to try and establish that the Counterclaiming Casinos supposedly knew of the basis for their counterclaims in November 2015 after the deposition of Mr. Deviney in the Station State Court Action. Of course, Chartwell completely ignores the fact that none of the Counterclaiming Casinos were parties to the Station State Court Action. Instead, all of them obtained the information from that deposition after the fact. None of them were able to inquire further into the issue until the deposition of Mr. Deviney in this action, which occurred near the end of May, over a month after the April Deadline in this Court's Scheduling Order had passed. This certainly constitutes good cause to amend. *See e.g. Navarro v. Eskanos & Adler*, 2006 WL 3533039 (N.D.Cal.2006) (citing *Zivkovic v. S. Cal. Edison Corp.*, 302 F.3d 1080, 1087-88 (9th Cir.2002) for its holding that diligence existed when an amendment was made two weeks after the information was discovered).

Besides that, Chartwell completely fails to inform this Court about its own position regarding Mr. Deviney's admissions. Until Deviney made essentially the same admissions on behalf of Chartwell – just two weeks before the Counterclaims were filed – Chartwell ***insisted*** that Mr. Deviney's testimony in the State Court Action was not binding upon Chartwell. In fact, Chartwell made that very representation to the Magistrate Judge in this action, seeking to avoid the consequences of Mr. Deviney's testimony. Thus, according to Chartwell, the current parties to this case – who are not parties to the State Court action – should be bound to Mr. Deviney's testimony while Chartwell simultaneously insisted to this Court that Mr. Deviney did not speak on behalf of Chartwell and that his testimony had no bearing upon Chartwell. Chartwell's ever changing theories cannot stand. As Chartwell applies the rule, the testimony of Mr. Deviney only matters when it is beneficial to Chartwell. Otherwise, the testimony can be ignored as Chartwell sees fit. Unfortunately (for Chartwell), this is not the rule. Chartwell put itself in this position by distancing

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itself from Mr. Deviney's testimony in its Reply. In response, to fully establish the basis for the claims, the Counterclaiming Casinos took Mr. Deviney's deposition in this action as the 30(b)(6) and then proceeded with the Counterclaims. There is nothing careless about such an approach.

Moreover, the Counterclaiming Casinos anticipated an amended pleading from Chartwell, which would require an amended response. Although Chartwell claims this is of no consequence as the Counterclaiming Casinos could have sought leave like Chartwell, this had the potential impact of causing a confusing record and duplicative pleadings. If the Court had granted all Motions, then the Counterclaiming Casinos would have had to file their amended pleading simultaneously with Chartwell's, then would have had to file a virtually identical amended pleading in response. This would result in a confusing record. Additionally, Counterclaiming Casinos relied on the fact that the law on amending pleadings to change theories is uncertain in this circuit. Therefore, Counterclaiming Casinos rightfully relied on the fact that the amended pleading Chartwell sough to file would authorize their own amended response. In fact, none of the Counterclaiming Casinos opposed Chartwell's proposed amendment.

Finally, from the outset of this litigation, Chartwell has maintained the position that it only has to produce what it intends to use at trial, not all documents that are relevant to any party's claims or defenses. *See* Joint Case Management Report (ECF No. 376) at p. 3:6-24 (arguing that the plain language of Fed. R. Civ. P. 26(a) does not require Chartwell to produce everything it has that may be relevant, only what Chartwell intends to rely upon). Chartwell continues this gamesmanship today. *See* Chartwell Advisory Group LTD.s' Case Management Report (ECF No. 471) at pp. 10:22-11:3 (again claiming that Chartwell has no obligation to produce documents that it does not intend to use, which may include documents harmful to its case). In essence, Chartwell maintains the position that it only has to produce what it wants to use and the Counterclaiming Casinos must then guess what Chartwell is not producing. This of course has resulted in a game of cat and mouse where Chartwell produces rolling sets of documents that the parties slowly discover as depositions unfold.

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The Counterclaiming Casinos have only recently been granted access to Chartwell's Goldmine database. The parties discovered the existence of Goldmine during the deposition of Mr. Deviney. Immediately upon discovering this database, the Counterclaiming Casinos demanded access to the database. *See* Counterclaim Defendants' Joint Case Management Report (ECF No. 420) at pp. 9:9-10:13. At the following Case Management Conference, Magistrate Judge Cook ordered Chartwell to make the Goldmine database available to the Counterclaiming Casinos. *See* Chartwell Advisory Group's Case Management Report (ECF No. 444) at p. 3:21-22. However, instead of provide access to the database, Chartwell attempted to generate reports and produce those instead. *Id.* at pp. 9:23-10:4. The reports Chartwell produced were incomplete as Chartwell generated reports for only the remaining parties, not for every party involved in the Nevada Food Comp cases, which again required the Counterclaiming Casinos to demand more information from Chartwell. *See* Counterdefendants' Joint Case Management Report (ECF No. 453) at pp. 2:26-5:7. Indeed, it was not until ***July 1, 2016*** that all of the Goldmine reports were actually produced. *See* Case Management Report of Chartwell Advisory Group, LTD. (ECF No. 459). Following a review of these reports, the Counterclaiming Casinos again found them to be incomplete and inconsistent and as a result, they met and conferred with Chartwell, who finally agreed to provide access to the Goldmine database to all Counterclaiming Casinos, something the Magistrate Judge had directed long ago. *See* Counterdefendants' Joint Case Management Report (ECF No. 470) at pp. 5:18-7:1. Full access to the Goldmine database was not produced until very recently, on July 19, 2016. *See* Chartwell Advisory Group's Case Management Report (ECF No. 480) at p. 2:8-10.

In sum, Chartwell created the very situation the parties now find themselves. Chartwell claimed Mr. Deviney's deposition in the Station State Court Action provided nothing, so Counterclaiming Casinos waited for the 30(b)(6) deposition in this case. Chartwell decided that it only has to produce what it wants to use, not what may be relevant, leading to the discovery chess match the Counterclaiming Casinos have been forced to play to obtain relevant information. None of this points to any dilatory action on the part of Counterclaiming Casinos. It was simply the result of Chartwell's decisions.

2. Good cause exists under Rule 15 to permit the Counterclaiming Casinos to amend to introduce the Casino Counterclaims because there was no undue delay and Chartwell would suffer no prejudice.

As set forth above, the United States Supreme Court has made it clear that leave to amend must be freely given when justice requires, while the Ninth Circuit has gone further and stated that this doctrine should be applied with extraordinary liberality. Under this standard, amendment is proper in this matter as the Counterclaiming Casinos acted diligently in bringing the Casino Counterclaims once the full basis for the claims was fleshed out. Moreover, there would be no true prejudice to Chartwell.

a. Counterclaiming Casinos have not unduly delayed in bringing the amendments.

While "[u]ndue delay is a valid reason for denying leave to amend," *Contact Lumber Co. v. P.T. Moges Shipping Co. Ltd.*, 918 F.2d 1446, 1454 (9th Cir.1990), delay is usually not sufficient alone to deny a motion to amend. *Morongo*, 893 F.2d at 1079. Chartwell claims that the Counterclaiming Casinos knew in November of 2015 of the basis for the counterclaims and that they unduly delayed in bringing them in June of 2016. Again, Chartwell latches on to testimony from Mr. Deviney that it previously rejected as not relevant and binding on Chartwell. This issue has already been addressed at length and will not be reiterated here. Suffice it to say that the Counterclaiming Casinos did not even get an opportunity to depose Chartwell on these issues until May of 2016, let alone fully flesh out the claims through additional discovery. As such, Chartwell's reliance on the Ninth Circuit's decision in *Jackson v. Bank of Hawaii* is misplaced as, contrary to Chartwell's argument, the Counterclaiming Casinos here did conduct additional discovery to ferret out these claims in the May 2016 deposition. 902 F.2d 1385, 1388 (9th Cir. 1990). In fact, the May 2016 deposition of Mr. Deviney as Chartwell's 30(b)(6) confirmed the existence of these claims for each of the Counterclaiming Casinos. A period of less than two weeks from establishing the basis for the Casino Counterclaims and bringing the Casino Counterclaims simply does not constitute undue delay.

In fact, the Counterclaiming Casinos conducted additional discovery on these claims after Mr. Deviney's deposition. Specifically, during the deposition of John Bartlett, the Counterclaiming

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Casinos reviewed two separate letters that formed the basis of the agreement between Chartwell and the State. First, the Counterclaiming Casinos showed Mr. Bartlett his letter, dated February 18, 2004, to the Attorney General's office, setting forth the terms of the agreement between Chartwell and the Department of Taxation on using Sparks Nugget as a test case (i.e. the agreement which serves as the basis for the Casino Counterclaims). *See* Deposition of John Bartlett, Vol. II, pp. 274:8-276:2, attached hereto as **Exhibit 5**; *see also* Letter from John Bartlett to Henna Rasul, Deputy Attorney General for the State of Nevada, dated February 18, 2004, bearing bates Bartlett021264 and Deposition Exhibit No. 23, attached hereto as **Exhibit 6**. Next, the Counterclaiming Casinos showed Mr. Bartlett the response letter from the Attorney General's Office, agreeing to Mr. Bartlett's proposal. *See* **Exhibit 5** at pp. 282:18-283:8; *see also* Letter from Henna Rasul, Deputy Attorney General, to John Bartlett, dated February 19, 2004, bearing bates Bartlett021192 and Deposition Exhibit No. 24, attached hereto as **Exhibit 7**. Mr. Bartlett even confirmed during this review and testimony that there was an additional term to this agreement that was not included in the letters. *See* **Exhibit 5** at pp. 283:9-284:1. The absence of this term in the agreement with the State serves as the primary basis for each counterclaim. Thus, contrary to what Chartwell claims, the Counterclaiming Casinos conducted and discovered considerable additional evidence leading to and strengthening their counterclaims.

b. <u>There would be no prejudice to Chartwell in allowing the amendments.</u>

Chartwell's decision to not engage in additional discovery on the Casino Counterclaims ironically serves as its basis for claiming it would be unduly prejudiced if the amendment were allowed. Chartwell cannot manufacture its own alleged prejudice and then rely on that prejudice to gain an advantage. Moreover, other than blanket assertions that Chartwell would have to conduct additional discovery that may delay this case, Chartwell offers no evidence to meet their burden of establishing prejudice.

The resulting prejudice to the opposing party is by far the most important and most common reason for upholding a district court's decision to deny leave to amend. *See Missouri Hous. Dev. Comm'n v. Brice*, 919 F.2d 1306, 1316 (8th Cir.1990); *Jackson v. Bank of Hawaii*, 902 F.2d 1385,

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1387 (9th Cir.1990); *Howey v. United States,* 481 F.2d 1187, 1190 (9th Cir.1973). The opposing party has the burden of demonstrating prejudice and the prejudice must be substantial. *Morongo Band,* 893 F.2d at 1079. The need for additional discovery is insufficient by itself to establish prejudice sufficient to deny a proposed amended pleading. *United States v. Continental Ill. Nat'l Bank & Trust,* 889 F.2d 1248, 1255 (2d Cir.1989).

Here, Chartwell claims it would suffer prejudice because it would have to conduct additional discovery, which would cause a delay in the proceedings. However, Chartwell offers no evidence that it would need to conduct additional discovery. It offers simply unsupported statements that it would have to conduct additional electronic discovery through additional search terms. Chartwell does not identify these additional search terms. Nevertheless, a close review of the search terms already used demonstrates that Chartwell has already cast a wide net. Specifically, with respect to the MGM Parties and Pioneer, Chartwell sought all documents including such broad terms and phrases as: Deviney, Bartlett, Chartwell, Comp and Meal and Spark and Nugget. *See* Letter from Joshua Wolson to Todd Bice, regarding ESI Search Terms for the MGM Parties, dated December 2, 2015, attached hereto as **Exhibit 8;** *see also* Letter from Joshua Wolson to Todd Bice, regarding ESI Search Terms for Pioneer, dated January 26, 2016, attached hereto as **Exhibit 9**. Chartwell provides no analysis of what additional terms it would need and how they would not already be covered by these broad searches.

Next, Chartwell claims it would have to conduct additional depositions in this case. However, the first deposition Chartwell took was after the Counterclaiming Casinos had already filed their counterclaims. Chartwell's strategic decision not to ask questions during those depositions about the Casino Counterclaims certainly cannot be said to cause prejudice. Chartwell had the opportunity to discuss the counterclaims with each 30(b)(6).[6] Chartwell simply refused to

[6] The MGM Parties acknowledge that Chartwell took the 30(b)(6) deposition of Shawn Sani on behalf of the MGM Parties on June 8, 2016, the day after the Casino Counterclaims and as such may not have had adequate time to prepare. However, Chartwell never once asked the MGM Parties if they would permit another deposition of Mr. Sani on these issues at a later date in response to this. Much like it did with all other parties, Chartwell simply decided to not conduct discovery on these claims.

take that opportunity. Chartwell even had the opportunity to depose Mr. Bartlett and the 30(b)(6) for the Department of Taxation about these issues, an opportunity the Counterclaiming Casinos took advantage of with respect to Mr. Bartlett.[7] Again, Chartwell decided not to ask the questions.

In fact, instead of work with the Counterclaiming Casinos to conduct any discovery on the Casino Counterclaims, Chartwell simply requested that the Court stay any discovery as to those claims pending this upcoming Motion practice. *See* Case Management Report of Chartwell Advisory Group, Ltd., dated 6/15/16 (ECF No. 444); *see also* Case Management Report of Chartwell Advisory Group, Ltd., dated 6/23/16 (ECF No. 456). Instead of using the depositions of the 30(b)(6) deponents to conduct discovery on those claims, Chartwell sought a stay. Instead of request additional searches for potentially responsive documents from the Counterclaiming Casinos, Chartwell sought a stay. Instead of add the issue to the deposition topics of the 30(b)(6) for the State of Nevada, Department of Taxation, Chartwell sought a stay. Even as Chartwell began settling with various parties and opening up time in the discovery schedule, Chartwell sought a stay. In short, instead of conducting discovery on the claims, Chartwell ignored them in an effort to manufacture some prejudice that would allow it to avoid addressing the claims on their merits. Chartwell's tactics should not be rewarded.

After ignoring the claims and preventing discovery on them, Chartwell now complains that its own conduct would require it to duplicate discovery efforts that could delay this matter. Chartwell recognized that having to conduct additional discovery is not alone sufficient to find substantial prejudice. Indeed, conducting additional discovery would not even be prejudicial as Chartwell will be forced to defend these claims regardless of whether they are struck in this proceeding as Chartwell has not even argued futility because Chartwell cannot. The Counterclaiming Casinos would be entitled to bring these claims in a separate action. In such situations, courts have not found prejudice. *See Mitchell v. Felker*, No. CIV S–08–1196 JAM EFB, 2011 WL 4458784 (E.D. Cal. 2011) (finding no prejudice in allowing additional plaintiffs to be

[7] As discussed below, the Counterclaiming Casinos did not discuss these issues with the 30(b)(6) of the Department of Taxation because Magistrate Judge Cook stayed discovery on the Casino Counterclaims pending the outcome of this Motion, at Chartwell's urging.

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added to a case when the practical impact of not allowing it would still require defendants to defend the claims in a separate proceeding).

As Chartwell knows it is not prejudiced by additional discovery it may have to conduct regardless, it manufactured a delay by seeking a stay despite having sufficient time and opportunity to conduct discovery on the counterclaims during the discovery period remaining in this case. The Court should not countenance Chartwell's behavior. Thus, the Court should deny Chartwell's Motion to Strike.

IV. CONCLUSION

Chartwell's Motion to Strike lacks any real substance. It dances around an undecided issue of law in an effort to obfuscate its true intent of seeking to avoid hearing valid claims that cut against Chartwell's own theory of the case in the same forum. This would allow Chartwell to present a theory of benefit that existed in large part because of Chartwell's own failures to properly document the original agreement with the State of Nevada, Department of Taxation in the first place. Chartwell's efforts to profit further off of its own ineptitude must be played out in one place. Thus, Chartwell's Motion to Strike must be denied.

DATED this 25th day of July, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice, PLLC, and that on this 25th day of July, 2016, I caused to be served the foregoing **COUNTERCLAIM DEFENDANTS MSE INVESTMENTS, INC., GOLDSTRIKE INVESTMENTS, INC., NEWCASTLE, INC., RAMPARTS, INC. AND PIONEER HOTEL, INC.'S OPPOSITION TO CHARTWELL ADVISORY GROUP LTD.'S MOTION TO STRIKE NEWLY FILED COUNTERCLAIMS** via electronic mail through the U.S. District Court's CM/ECF system.

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/s/ Kimberly Peets
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

v.

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

Defendants,

and

GR BURGR LLC, a Delaware limited liability company,

Nominal Plaintiff.

AND ALL RELATED MATTERS

Case No.: A-17-751759-B
Dept. No.: XVI

Consolidated with A-17-760537-B

CAESARS' REPLY IN SUPPORT OF MOTION TO STRIKE THE SEIBEL-AFFILIATED ENTITIES' COUNTERCLAIMS, AND/OR IN THE ALTERNATIVE, MOTION TO DISMISS

Hearing Date: August 19, 2020

Hearing Time: 9:00 a.m.

In an effort to circumvent this Court's order denying the LLTQ/FERG Defendants' Motion to Amend their Answer, Affirmative Defenses, and Counterclaims, the Seibel-Affiliated Entities[1] now brazenly claim that Caesars'[2] March 11, 2020 First Amended Complaint *necessitated* the filing of long overdue and previously unasserted counterclaims. The Seibel-Affiliated Entities' "gotcha" argument, however, does not save their tardy counterclaims. Because the counterclaims are not commensurate with the changes to Caesars' original complaint, the Seibel-Affiliated Entities were required to seek leave to file their counterclaims. The Seibel-Affiliated Entities did not do that because they *knew* how the Court would rule based on their previous unsuccessful motion practice and inordinate delay in seeking the relief—i.e., denial. The counterclaims are untimely, unwarranted, and would unnecessarily further delay a final resolution of this matter. Respectfully, this Court should grant Caesars' Motion to Strike and strike the Seibel-Affiliated Entities' counterclaims filed on June 19, 2020.

I. THE SEIBEL-AFFILIATED ENTITIES GLOSS OVER THE PERTINENT CASE HISTORY AND THEIR REPEATED, UNSUCCESFFUL ATTEMPTS TO IGNORE AND DELAY THIS LITIGATION.

Ironically, the Seibel-Affiliated Entities evoke "law and fairness" in the opening of their opposition, claiming that Caesars' First Amended Complaint "dictate[s]" them to "respond in kind . . . ." and allows them to file their counterclaims without first seeking leave of court. (The Development Entities' Opp'n to Caesars' Mot. To Strike Countercls., and/or in the Alternative, Mot. To Dismiss, Aug. 3, 2020 (the "Opp'n"), 2:8-9.) Not only is the Seibel-Affiliated Entities' statement procedurally incorrect, "law and fairness" dictate that this Court grant Caesars' Motion to Strike and put an end to the Seibel-Affiliated Entities' latest attempt to pervert this litigation.

[1] TPOV Enterprises, LLC ("TPOV"), TPOV Enterprises 16, LLC ("TPOV 16"), LLTQ Enterprises, LLC ("LLTQ"), LLTQ Enterprises 16, LLC ("LLTQ 16"), FERG, LLC ("FERG"), FERG 16, LLC ("FERG 16"), MOTI Partners, LLC ("MOTI"), MOTI Partners 16, LLC ("MOTI 16"), and DNT Acquisition, LLC ("DNT") are collectively referred to herein as the Seibel-Affiliated Entities. Rowen Seibel ("Seibel"), Craig Green ("Green"), and the Seibel-Affiliated Entities are collectively referred to herein as the Seibel Parties.

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

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In short, the Seibel-Affiliated Entities asserted their claims and defenses in response to Caesars' August 2017 complaint. In July 2018, LLTQ, LLTQ 16, FERG, FERG 16, and DNT filed their counterclaims against Caesars. (*See* LLTQ/FERG Defs.' Answer & Affirmative Defenses to Pl.'s Compl. & Countercls., July 6, 2018; *see also* DNT's Answer to Pls.' Compl. & Countercls., July 6, 2018.) Of note – and a point that the Seibel-Affiliated Entities cannot and do not dispute – TPOV, TPOV 16, MOTI, and MOTI 16 elected to "plead in response" to the original complaint by filing answers *only* and not assert counterclaims. (MOTI Defs.' Answer & Affirmative Defenses to Pl.'s Compl., July 6, 2018; Defs. TPOV & TPOV 16's Answer to Pl.'s Compl., July 6, 2018.) The deadline to amend pleadings or add parties passed on February 4, 2019, without any attempt by the Seibel-Affiliated Entities to extend the deadline. (*See* Business Court Scheduling Order Setting Civil Jury Trial & Pre-Trial Conference Calendar Call, Oct. 31, 2018, at 2:3 (deadline); *see also generally* Docket.)

While the LLTQ/FERG Defendants[3] never sought reconsideration of their late and ill-fated October 2, 2019 motion for leave to amend their counterclaims, in opposition to the instant Motion, they now take the opportunity to criticize the Court's decision. Indeed, they take the opportunity to perhaps foreshadow their plan to try to circumvent the Court's order, by stating that an amendment was not necessary for them to seek damages for GR Steak in Atlantic City in this action. (Opp'n 6:3-5.) While it should be needless to say, Caesars disagrees. The order guides this case as well as the conduct of the Seibel Parties in this case. And, as has been the storied history of this case, Caesars will continue to fight against each and every attempt by the Seibel Parties to ignore, avoid, disregard, or try to circumvent this Court's orders.

The Seibel-Affiliated Entities also use their opposition as a platform to criticize the Court's decision to grant Caesars leave to file its First Amended Complaint. Of course, the good cause analysis under *Nutton* is not "tit for tat." (*See* Feb. 12, 2020 Hr'g Tr. 9:18-23.) The Court properly assessed the facts and circumstances pertinent to Caesars' request and the LLTQ/FERG Defendants' request. "Caesars demonstrated good cause [exists to permit amendment of their complaint]

[3] The "LLTQ/FERG Defendants" refers to LLTQ, LLTQ 16, FERG, and FERG 16, collectively.

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because depositions had to be taken in order to understand the documents produced by the parties," upon which Caesars' then-proposed First Amended Complaint was based upon, *i.e.*, documents related to a ***secret***, illegal, and improper kickback scheme. (Order Granting Caesars' Mot. for Leave to File 1st Am. Compl., at 3:6-9, Mar. 10, 2020.) In contrast, the LLTQ/FERG Defendants did not demonstrate "that good cause exists to permit amendment of their counterclaim" because they "were aware of the facts they sought to include in their amended counterclaim [related to Gordon Ramsay Steak in Atlantic City] before the deadline to amend expired and they delayed seeking leave to amend their counterclaim," which amendments relate to the termination of a Seibel-Agreement.[4] (Order Denying Mot. to Amend LLTQ/FERG Defs.' Answer, Affirmative Defenses, & Countercls., at 3:4-8, Nov. 25, 2019.)

To try to excuse the filing of their rogue counterclaims on June 19, 2020, the Seibel-Affiliated Entities highlight that during the hearing on their failed Motion to Dismiss, they informed the Court and Caesars that they would be filing an omnibus answer and asserting new claims. (*See* Opp'n 7:19-8:7 (quoting the hearing transcript, including counsel's statement that "[I]n light of the decision filing affirmative claims for relief, we believe that may trigger now an obligation to file counterclaims that may not have been filed before.").) The Seibel-Affiliated Entities ignore that so, too, did Caesars foreshadow its position:

> [MR. PISANELLI:] I do think that [s]etting up is an excuse for Mr. Seibel with new counsel to bring new claims into the case years into the case and now falling back on the excuse that they've only now just become compulsory. So we'll take that up when we see it.
>
> If they're adding in new claims that are too late and beyond the cutoff for amendments, then we'll bring that to your attention to either strike them or dismiss them . . . . But I have a feeling that's what's afoot here . . .

(May 20, 2020 Hr'g Tr. 53:19-54:4.)

The Seibel-Affiliated Entities also conveniently omit that on June 10, 2020, a mere ***nine days*** before they filed their counterclaims, the parties were before the Court addressing discovery and trial. Caesars' counsel specifically asked about the pleading deadline, and the Court responded that the deadline would *not* be modified absent a motion:

[4] (*See* Mot. 4 n.3 (defining the Seibel Agreements).)

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> MS. MERCERA: Your Honor, . . . One brief question. You mentioned the amendment of the pleading deadline.
>
> THE COURT: Yes.
>
> MS. MERCERA: That deadline closed last year –
>
> THE COURT: Okay.
>
> MS. MERCERA: -- February of 201[9], and then there's been no request to reopen that deadline. So is your Honor suggesting that they be reopened as well?
>
> THE COURT: ***No. I'm not going to open anything up unless requested. That will have to be – . . . – a separate motion for that.***

(June 10, 2020 Hr'g Tr. 40:20-41:8 (emphasis added).)

The Seibel-Affiliated Entities did not comment on the amendment deadline, nor did they voice any disagreement or seek clarification from the Court regarding its statement that a separate motion would be required in order to reopen the amendment of the pleading deadline. (*See generally* June 10, 2020 Hr'g Tr.) Yet, days later, they filed the counterclaims at issue here. Now, they attempt to justify their rogue filing by arguing that: (1) it was permitted under various, ***non-controlling*** standards governing amendments, and even if it was not, then (2) there is good cause for the filing. Neither argument is availing. This Court should strike the new and rogue counterclaims or, in the alternative, dismiss them.

II. THE COUNTERCLAIMS DO NOT RESPOND TO THE CHANGES IN CAESARS' FIRST AMENDED COMPLAINT AND THEREFORE MUST BE STRICKEN OR DISMISSED.

The Siebel-Affiliated Entities spend in excess of six pages of their opposition discussing unresolved case law addressing a party's ability to file amended counterclaims in response to an amended complaint without leave of court. (Opp'n 10:4-16:10.)[5] In so doing, the Seibel-Affiliated Entities misconstrue Caesars' position concerning amended counterclaims and attempt to unnecessarily complicate the Court's analysis.

[5] The Seibel-Affiliated Entities highlight arguments advanced by Caesars (through different counsel) and Pisanelli Bice (representing different clients) in an action before the United States District Court, District of Nevada in July 2016. Arguments advanced by Caesars or its counsel in an unrelated and factually distinguishable case has no place here.

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There is no Nevada case law directly addressing whether a defendant may file amended counterclaims in response to an amended complaint without leave of court. And, the Seibel-Affiliated Entities do not claim that there are any directly applicable Nevada authorities. Therefore, all parties have turned to federal case law addressing the analogous Federal Rules of Civil Procedure, specifically Rule 15. To be clear, ***under either the narrow or moderate approach,*** the Seibel-Affiliated Entities' counterclaims ***must be stricken*** or, in the alternative, dismissed. The permissive approach has been ***widely*** rejected by courts across jurisdictions and does not apply here.

A. <u>This Court Should Reject the Permissive Approach.</u>

The permissive approach should not control the Court's analysis here. Under the permissive approach, "'once a plaintiff amends a complaint, the defendant always has the right to amend to bring new counterclaims, without regard to the scope of the amendments.'" *Cieutat v. HPCSP Invs., LLC*, No. CV 20-0012-WS-B, 2020 WL 4004806, at *3 (S.D. Ala. July 15, 2020) (quoting *Bern Unlimited, Inc. v. Burton Corp.*, 25 F. Supp. 3d 170, 178 (D. Mass. 2014)). This approach has been widely rejected as running contrary to the Rules of Civil Procedure. The very 2016 decision from the United States District Court, District of Nevada, cited by the Seibel-Affiliated Entities, *Sierra Development Co. v. Chartwell Advisory Group, Ltd.*, rejected the permissive approach, as it "deprives the Court of the ability to effectively manage litigation." Case No. 13cv603 BEN (VPC), 2016 WL 6828200, *2 (D. Nev. Nov. 18, 2016); *see also, e.g., E.E.O.C. v. Morgan Stanley & Co.*, 211 F.R.D. 225, 227 (S.D.N.Y. 2002) ("If every amendment, no matter now minor or substantive, allowed defendants to assert counterclaims or defenses as of right, claims that would otherwise be barred or precluded could be revived without cause. This would deprive the Court of its ability to effectively manage the litigation."); *see also, e.g., Cieutat*, 2020 WL 4004806, at *4 ("The practical weaknesses of the permissive approach have been laid bare in other opinions, and the Court can find no textual support in Rule 15 for that approach; certainly the defendants by their silence have suggested none. The permissive approach appears to have gained few adherents, especially over the past decade, while numerous courts have embraced the moderate or uniform approach over the same time frame." (footnotes omitted)).

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Citing the 1970 *Joseph Bancroft & Sons Co. v. M. Lowenstein & Sons, Inc.* decision from the United States District Court for the District of Delaware, the Seibel-Affiliated Entities argue that under the permissive approach, they "were allowed to file their Amended Counterclaims without concern for how (or if) the First Amended Complaint changed the scope or theory of this litigation; hence Caesars' Motion must be denied." (Opp'n 12:4-7.) Just as the majority of courts have rejected the permissive approach, so, too, should this Court.

The Seibel-Affiliated Entities' new counterclaims relate to Caesars' termination of the Seibel Agreements due to Seibel's unsuitability and Caesars' operation of restaurants with Gordon Ramsay, among others. The Seibel-Affiliated Entities (but for the LLTQ/FERG Defendants and DNT) elected not to pursue *any* counterclaims *years earlier* in this litigation, and the deadline to amend pleadings has long expired. Moreover, this Court ***already rejected*** the LLTQ/FERG Defendants' efforts to amend their counterclaims. There is no reason for a different outcome now. To allow the Seibel-Affiliated Entities to assert the new counterclaims "as of right, when it would cause undue delay, cause undue prejudice, . . . and runs contrary to the spirit of Rule 15 . . . ." *Cieutat*, 2020 WL 4004806, at *4.

B. <u>The Moderate Approach Does Not Permit the New Counterclaims.</u>

The Seibel-Affiliated Entities advocate for the application of the moderate approach, and argue that Caesars' Motion begs for the application of the narrow approach. But, just as the Seibel-Affiliated Entities not only took great license with the Motion and are wrong in their interpretation, they also took great license with the law and are wrong in their interpretation of the moderate approach.

Indeed, the two decisions Caesars cites in its Motion both support applying the ***moderate approach***, meaning that "an amended response may be filed without leave only when the amended complaint changes the theory or scope of the case, and then, the breadth of the changes in the amended response must reflect the breadth of the changes in the amended complaint." *Elite Entm't, Inc. v. Khela Bros. Entm't*, 227 F.R.D. 444, 446 (E.D. Va. 2005); *see also, e.g.*, *Bibb Cnty. Sch. Dist. v. Dallemand*, Civil Action No. 5:26-cv-549, 2019 WL 1519299 (M.D. GA Apr. 8, 2019) ("Put another way, [under the moderate approach] a defendant may bring a counterclaim as a matter

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of course if the amended complaint broadened the scope or theory of the case and the counterclaim was proportional to that amendment." (citation omitted)). As the Eastern District of Virginia explained in *Elite Entertainment, Inc. v. Khela Brothers Entertainment*, "the requirement that an amended response reflect the change in theory or scope of the amended complaint is consistent with Rule 15's requirement that an amended pleading must ***'plead in response'*** to the amended pleading." *Id.* at 446–47 (emphasis added).[6] The Seibel-Affiliated Entities did not "plead in response" to the First Amended Complaint. Instead, they took the filing as an opportunity to assert claims that they could have – but did not – assert ***years ago***, and to assert claims that the Court has already determined cannot be added to this case.

Contrary to the Seibel-Affiliated Entities' contention that the "plead in response" requirement utilizes the possibly unviable "narrow approach"[7] to counterclaims, courts, including the United States District Court, District of Nevada, reveal otherwise. These cases, like *Composite Resources, Inc. v. Recon Medical, LLC*, applying the moderate approach, look to see whether the substantive changes to the defendant's response reference the amended complaint and, if they do not, then strike the response. 2:17-cv-01755-MMD-VCF, 2018 WL 5886530, at *2 (D. Nev. Nov. 9, 2018) ("Notably absent from Defendant's justification for the changes is any reference to the second amended complaint. Defendant treated its answer to the second amended complaint as an entirely new pleading, without any regard for the answer to the first amended complaint. This approach is not supported by the caselaw within the Ninth Circuit."; the court goes on to note that

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[6] The Seibel-Affiliated Entities cite various cases for the proposition that as long as the amendments to the counterclaims complaint are proportional to the amendments to the complaint, the changes to the counterclaims do not need to be directly tied to the amended complaint. (*See* Opp'n 12:27-13:15.) Respectfully, that version of the moderate approach should not be employed by this Court. Such an approach would excuse and condone the Seibel-Affiliated Entities' much delayed assertion of counterclaims, *even after* this Court already declined to afford the LLTQ/FERG Defendants the same relief.

[7] Under the narrow approach, "counterclaims as of right are allowed only if they are 'strictly confined to the new issues raised by the amended complaint.'" *Bibb Cnty. School*, 2019 WL 1519299, at *3 n.6 (quoting *S. New England Tel. Co v. Glob. NAPS, Inc.*, Civil Action No. 3:04–cv–2075 (JCH), 2007 WL 521162, at *2-3 (D. Con. Feb. 14, 2007). Because the narrow approach relied upon the interplay between Rules 13(f) and 15, some courts, including the United States District Court, District of Nevada, have concluded that "[t]he abrogation of Rule 13(f) in 2009, superseded those cases following the narrow approach." *Sierra Dev. Co.*, 2016 WL 6828200, *2.

"at least some of the substantive changes made to Defendant's answer do not reflect the breadth of the changes in Plaintiff's second amended complaint. . . .").[8]

In *Bibb County School District v. Dallemand*, although the United States District Court, Middle District of Georgia, ultimately elected to utilize the "uniform" approach discussed below, it nevertheless conducted the counterclaim analysis under the moderate approach. In that case, similar to this one, "the salient issue is whether a defendant may assert a counterclaim that should have been asserted earlier in response to an amended complaint without seeking leave to amend." 2019 WL 1519299, at *2. The court explained that "[b]uttressing allegations and adding new Defendants does not by itself allow the Pinnacle Defendants to assert an omitted counterclaim as of right. If they could, then the 'moderate' approach would become almost identical to the 'permissive' approach in that a defendant could bring any new, unrelated counterclaim, or one that could have been asserted earlier without leave, any time the amended complaint expands – even minimally – the scope of the case." *Id.* at *4. The court then reasoned that:

> ***[E]ven assuming the changes*** in the second amended complaint ***are proportional*** to the counterclaim, again, ***the point is that the Pinnacle Defendants could have asserted their counterclaim in response to BCSD's initial or first amended complaint. But instead, they waited until after the filing of the second amended complaint to assert their counterclaim***. Consistent with the general purpose of Rule 15(a), therefore, just as BCSD had to seek leave to bring its second amended complaint, so too must the Pinnacle Defendants seek leave to bring their counterclaim and explain why they failed to assert it earlier.

Id. (emphasis added).[9]

The Seibel-Affiliated Entities could have, but elected not to, assert their new counterclaims in response to Caesars' initial complaint. Instead, they waited until after the deadline to amend

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[8] In *Composite Resources*, ultimately the court granted the defendant an opportunity to amend its answer. However, the court cautioned that "[t]he breadth of the changes in the amended answer must reflect the breadth of the changes in the second amended complaint. Should Defendant seek to make additional changes ***outside the scope of the changes to the second amended complaint***, Defendant may file a motion to amend under Federal Rule of Civil Procedure 15." *Id.* (emphasis added).

[9] The court noted, however, that "if an amended complaint asserted a claim arising from a transaction *different* from the transaction alleged in the earlier complaint, a defendant's counterclaim *arising from the new transaction* almost certainly could be asserted in the defendant's answer to the amended complaint without leave of court." *Id* at n.7 (emphasis added).

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pleadings had long passed. And, when they did assert their new counterclaims, they were not in response to Caesars' First Amended Complaint (*i.e.*, the kickback scheme); rather the new claims relate to Caesars' termination of the Seibel Agreements, the central focus of this litigation since its inception. This responsive pleading ***is not permitted under the moderate approach*** because the breadth of the changes in the new counterclaims do not reflect the breadth of the changes to the First Amended Complaint.

C. The Uniform Approach Does Not Permit the Seibel-Affiliated Entities' New Counterclaims.

Briefly, the uniform approach to amendments to counterclaims is straightforward. Under this approach, the court is to "simply apply the Rule 15 standard equally to amended complaints and amended (or new) counterclaims." *Bern Unlimited, Inc. v. Burton Corp.*, 25 F. Supp. 3d 170, 179 (D. Mass. 2014).[10] As discussed *infra*, the deadline to amend pleadings has long passed, thereby implicating the balance of NRCP 15(a)'s lenient amendment standard against NRCP 16(b)'s requirement that the Court's scheduling order "shall not be modified except upon a showing of good cause." *Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 285, 357 P.3d 966, 971 (Nev. App. 2015) (quotation marks and citation omitted). Because the Seibel-Affiliated Entities have not and cannot establish that good cause exists to permit the new counterclaims, the counterclaims must be stricken or in the alternative dismissed.

III. THERE IS NO GOOD CAUSE THAT WOULD ALLOW THE SEIBEL-AFFILIATED ENTITIES TO FILE THE NEW COUNTERCLAIMS.

The Seibel-Affiliated Entities argue that because Caesars' First Amended Complaint added non-declaratory relief claims, good cause exists to allow their new counterclaims. (*See* Opp'n 17:18:7.) They claim that Caesars' addition of "coercive claims for relief" necessitated the filing of all compulsory counterclaims, otherwise their claims would be barred by the doctrine of claim

[10] The *Bern* Court explained that the uniform approach "appears to require the least contortion of the language of Rule 15(a), and is the most consistent with its purpose. A new or different counterclaim asserted after an amendment of the complaint is a 'pleading' governed by Rule 15(a), but does not fall into either category of 15(a)(1). It therefore must fall under Rule 15(a)(2), which states that 'the court's leave' (or the opponent's consent) is required '[i]n all other cases' before amending a pleading." (quoting FRCP 15(a)(2)). *Id.*

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preclusion in a subsequent action. (*See generally id.*) While Caesars recognizes the "declaratory judgment exception" to the doctrine of claim preclusion as stated in *Boca Park Martketplace Syndications Group, LLC v. Higco, Inc.*, it does not save the Seibel-Affiliated Entities from its previous failures and decisions. Specifically, while Caesars asserted a declaratory relief claim, some of ***the Seibel-Affiliated Entities asserted claims for coercive relief***, and some of them chose to just answer. And ***their actions*** rendered themselves vulnerable to claim preclusion arguments in the future; not Caesars.

To be clear, the Nevada Supreme Court in *Boca Park* states that the declaratory relief exception to claim preclusion applies when the "first ***suit*** only sought declaratory relief." *Boca Park Martketplace Syndications Grp., LLC v. Higco, Inc.*, 133 Nev. 923, 923, 407 P.3d 761, 762 (2017) (emphasis added). The Nevada Supreme Court describes the exception as follows:

> Ordinarily, claim preclusion bars a second suit seeking to vindicate claims that ***were or could have been*** asserted in the first suit. But the claim-preclusion doctrine makes an exception for declaratory judgment actions, which are designed to give parties an efficient way to obtain a judicial declaration of their legal rights before positions become entrenched and irreversible damage to relationships occurs. While a party may join claims for declaratory relief and damages in a single suit, the law does not require it. ***So long as the first suit only sought declaratory relief, a second suit for contract damages may follow.***

Id. (emphasis added).

Consistent with the purpose behind Nevada's Declaratory Judgment Act, parties are entitled to seek judicial relief to adjudicate and declare parties' rights under certain agreements separate from claims for coercive or monetary relief. The judicial creation of a declaratory relief exception to the preclusion doctrines recognizes the benefit of a true declaratory relief action that comes from a relatively swift adjudication of those actions so that the parties can avoid a breach or avoid or limit damages. This is not the case here, and the Seibel-Affiliated Entities know that. This new argument is simply yet another try to retroactively snooze the alarm clock on the long passed deadline to amend pleadings.

As the Seibel Parties well know, by their own actions this suit has involved more than claims for declaratory relief since July 2018. Indeed, in July 2018, more than two years ago, the

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LLTQ/FERG Defendants, as well as DNT, filed counterclaims, asserting breach of contract claims and accounting claims. The other Seibel-Affiliated Entities – represented by the same counsel, with the same client representatives, and with full knowledge of the facts – answered. Then ***the Seibel Parties missed the deadline*** to add or amend their counterclaims. ***Their delay*** tactics and actions made them miss the boat. And ***their actions*** (or inactions) render them vulnerable to claim preclusion in any future action they may desire to bring for claims that "were or could have been" asserted in the first suit; not Caesars.

But there is more. The Seibel-Affiliated Entities rely heavily on the declaratory relief exception to the claim preclusion doctrine, but they ignore the important fact that "a declaratory judgment does have issue-preclusive effect as to 'any issues actually litigated by [the parties] and determined in the action.'" *Boca Park*, 133 Nev. at 926 n.1, 407 P.3d at 764 n.1. The Seibel Parties would be hard pressed to argue (in good faith) that the issues that underlie the declaratory relief claims as well as the counterclaims and defenses they timely asserted will not have been determined in this action. In other words, the Seibel-Affiliated Entities' claim that they will only now be precluded from asserting claims in a subsequent matter is hardly meritorious.

As to the LLTQ/FERG Defendants' claims, good cause does not exist (nor do the Seibel-Affiliated Entities suggest that it does) for the Court to now allow the very same counterclaims it rejected mere months ago.

With regard to the new counterclaims brought by MOTI, MOTI 16, TPOV, and TPOV 16, but for the declaratory judgment exception argument (which does not apply given the coercive claims in this suit), the Seibel-Affiliated Entities again do not provide *any* explanation for the years' long delay in asserting counterclaims founded upon information that has been available to them for years. Because the Seibel-Affiliated Entities were "not diligent in at least attempting to comply with the deadline [to amend and/or assert counterclaims], 'the [good cause] inquiry should end.'" *Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 285, 357 P.3d 966, 971 (Nev. App. 2015) (quoting *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992)). Similarly, the same "undue delay" cuts against providing leave to amend under NRCP 15(a)(2).

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Caesars will be prejudiced if the Seibel-Affiliated Entities' counterclaims are not stricken and/or dismissed. As Caesars previously explained, these new claims will necessitate re-noticing depositions that have already occurred, as well as potentially others. This additional discovery will have a cascading effect, likely necessitating an extension of the expert disclosure deadlines, the close of discovery, summary judgment, as well as trial. Simply because the Seibel-Affiliated Entities do not want or need to conduct discovery based upon their counterclaims, or, in their unilateral assessment determine that any such discovery will be "minimal," does not mean that Caesars should be deprived of the ability to conduct comprehensive discovery related to its defenses to the new affirmative claims.

In sum, the time to assert new or amended counterclaims has long passed, and the Seibel-Affiliated Entities have provided no reason for this Court to excuse their inordinate delay and failure to meet their good cause burden. The counterclaims should therefore be stricken and/or dismissed.[11]

IV. CONCLUSION

This Court should strike the Seibel-Affiliated Entities' counterclaims. The Seibel-Affiliated Entities were required to obtain leave prior to filing their new counterclaims but elected not to do so because they knew that the Court would reject their request, as the Court had had done a few months earlier. Instead, the Seibel-Affiliated Entities boldly filed the counterclaims, attempting to obtain a "do-over." The law does not give them a pleading "do-over" simply because Caesars elected to amend its complaint to reflect the kickback scheme uncovered during discovery.

/ / /

[11] Caesars objects to the Seibel-Affiliated Entities' counterclaims, in their entirety, filed on June 19, 2020. The order granting Caesars' Motion should include a directive that the Seibel-Affiliated Entities file a responsive pleading consistent with the order (as well as any and all applicable prior orders).

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Moreover, because the Seibel-Affiliated Entities have not – and cannot – show good cause exists to allow the counterclaims, the counterclaims should be stricken and/or dismissed.

DATED this 12th day of August 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC and that, on this 12th day of August 2020, I caused to be served via the Court's e-filing/e-service system a true and correct copy of the above and foregoing **CAESARS' REPLY IN SUPPORT OF MOTION TO STRIKE THE SEIBEL-AFFILIATED ENTITIES' COUNTERCLAIMS, AND/OR IN THE ALTERNATIVE, MOTION TO DISMISS** to the following:

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