IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 86462

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,

v.

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

Respondents.

District Court Case No. A-17-760537-B;
Consolidated with District Court Case No. A-17-751759-B

RESPONDENTS' ANSWERING BRIEF

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RULE 26.1 DISCLOSURE

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

Respondents are Desert Palace, Inc., Paris Las Vegas Operating Company, LLC, PHWLV, LLC, and Boardwalk Regency, LLC d/b/a Caesars Atlantic City.

A. Desert Palace, Inc. is a former Nevada corporation that was converted to Desert Palace LLC, a Nevada Limited Liability Company. Its ownership structure is as follows:

    a. Desert Palace LLC is wholly owned by Caesars Palace LLC – a Delaware Limited Liability Company, which is wholly owned by:

        i. Caesars World LLC – a Florida Limited Liability Company, which is wholly owned by:

            1. CEOC, LLC – a Delaware Limited Liability Company, which is wholly owned by:

                a. Caesars Resort Collection LLC – a Delaware Limited Liability Company which is wholly owned by:

                    i. Caesars Growth Partners, LLC– a Delaware Limited Liability Company which is wholly owned by:

                        1. Caesars Holdings, Inc. – a Delaware corporation which is wholly owned by:

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

B. Paris Las Vegas Operating Company, LLC is a Nevada Limited Liability Company. Its ownership structure is as follows:

a. Paris Las Vegas Operating Company, LLC is wholly owned by Caesars Nevada Newco, LLC – a Nevada Limited Liability Company, which is owned by:

i. Caesars Palace LLC – a Delaware Limited Liability Company, which is wholly owned by:

1. Caesars World LLC – a Florida Limited Liability Company, which is wholly owned by:

a. CEOC, LLC – a Delaware Limited Liability Company, which is wholly owned by:

i. Caesars Resort Collection LLC – a Delaware Limited Liability Company which is wholly owned by:

ii. Caesars Growth Partners, LLC– a Delaware Limited Liability Company which is wholly owned by:

1. Caesars Holdings, Inc. – a Delaware corporation which is wholly owned by:

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

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

a. PHWLV, LLC is wholly owned by Caesars Growth PH, LLC – a Delaware Limited Liability Company, which is wholly owned by:

i. Caesars Nevada Newco, LLC – a Nevada Limited Liability Company, which is owned by:

1. Caesars Palace LLC – a Delaware Limited Liability Company, which is wholly owned by:

a. Caesars World LLC – a Florida Limited Liability Company, which is wholly owned by:

i. CEOC, LLC – a Delaware Limited Liability Company, which is wholly owned by:

1. Caesars Resort Collection LLC – a Delaware Limited Liability Company which is wholly owned by:

a. Caesars Growth Partners, LLC– a Delaware Limited Liability Company which is wholly owned by:

i. Caesars Holdings, Inc. – a Delaware corporation which is wholly owned by:

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

D. Boardwalk Regency, LLC is a Nevada Limited Liability Company. Its ownership structure is as follows:

a. Boardwalk Regency, LLC is wholly owned by Caesars New Jersey, LLC – a New Jersey Limited Liability Company, which is wholly owned by:

i. Caesars World LLC– a Florida Limited Liability Company, which is wholly owned by:

a. CEOC, LLC – a Delaware Limited Liability Company, which is wholly owned by:

i. Caesars Resort Collection LLC – a Delaware Limited Liability Company which is wholly owned by:

1. Caesars Growth Partners, LLC– a Delaware Limited Liability Company which is wholly owned by:

    a. Caesars Holdings, Inc. – a Delaware corporation which is wholly owned by:

        i. Caesars Entertainment, Inc., a publicly traded corporation.

Pisanelli Bice PLLC is the only law firm whose attorneys are expected to appear for Respodents. Previously, attorneys from Kirkland and Ellis also appeared for Respondents in the underlying district court action.

DATED this 21st day of December 2023.

PISANELLI BICE PLLC

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ISSUES PRESENTED FOR REVIEW

1. Whether the district court correctly granted summary judgment in favor of PHWLV, LLC ("Planet Hollywood"), Desert Palace, Inc. ("Caesars Palace"), Paris Las Vegas Operating Company, LLC ("Paris"), Boardwalk Regency Corporation d/b/a Caesars Atlantic City ("CAC") (collectively "Caesars" or "Respondents") because (a) Rowen Seibel ("Seibel") and the Seibel-Affiliated Entities failed to disclose Seibel's criminal behavior and conviction to Caesars, and instead (b) attempted to defraud Caesars with assistance from his counsel and others to transfer his interests to a family trust to avoid termination of the agreements with Caesars; (c) Caesars had an express and unequivocal right to terminate the agreements to due to the Seibel-Affiliated Entities' or its associates' unsuitability; and (d) Section 13.22 of the LLTQ Agreement and Section 4.1 of the FERG Agreement are unenforceable agreements to agree and enforcement of the same would violate public policy.

2. Whether the district court correctly granted summary judgment in favor of Caesars, and against Appellants, on Caesars' claims pertaining to Appellants' admitted receipt of kickbacks.

3. Whether the district court abused its discretion when it struck untimely and futile counterclaims asserted by LLTQ, LLTQ 16, FERG, and FERG 16 (the

"LLTQ/FERG Defendants"), which the LLTQ/FERG Defendants asserted after the deadline to amend pleadings had long since expired.

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

Caesars entered into several agreements with entities affiliated with the Seibel-Affiliated Entities,[1] to develop restaurants in Las Vegas and Atlantic City. In light of Caesars' status as a gaming licensee, each and every agreement contained extensive and strict suitability disclosure requirements to ensure that Caesars was not jeopardizing its gaming licenses by doing business with an unsuitable party.

However, as this Court learned in its recent related published decision, *Seibel v. Eighth Judicial District Court*, 138 Nev. Adv. Op. 73, 520 P.3d 350 (2022), the Seibel-Affiliated Entities' associate and principal, Seibel, was secretly unsuitable from the outset of the parties' contractual relationship. As Caesars and the world would later learn, though public news reports no less, Seibel was convicted of a tax crime. For years, Seibel hid his criminal conduct, investigation, plea, and conviction from his business associates, including Caesars, despite express obligations to disclose such conduct. Egregiously, instead of disclosing his criminal conduct to

[1] The Seibel-Affiliated Entities refer to GR Burgr, LLC, ("GRB"), LLTQ Enterprises, LLC ("LLTQ"), FERG, LLC ("FERG"), MOTI Partners, LLC ("MOTI"), TPOV Enterprises, LLC ("TPOV"), and DNT Acquisition, LLC, appearing derivatively by one of its two members, R Squared Global Solutions, LLC ("DNT").

Caesars, Seibel engaged in a scheme with his lawyers to hide his unsuitability so he could continue to enjoy the financial benefits of an ongoing relationship with Caesars despite his unsuitability under all of the agreements with Caesars.

Once the truth came to light, Seibel was forced to face the consequences of his non-disclosure as Caesars terminated each and every agreement it had with the Seibel-Affiliated Entities. This termination was not taken lightly [redacted] once Seibel's criminal conduct came to light. As a result, the district court correctly determined that Caesars acted within its discretion when it terminated its agreements with the Seibel-Affiliated Entities after learning from public reports about Seibel's felonious conduct and related guilty plea.

As if Seibel's criminal conduct in defrauding the IRS were not egregious enough, discovery in the underlying litigation revealed further misconduct by Appellants that further rendered them unsuitable to do business with a gaming licensee. Discovery revealed that Seibel and his associate, Craig Green ("Green"), solicited and obtained kickbacks from Caesars' vendors, at times with threats, behind Caesars' back. Notably, Seibel and Green brazenly admitted this conduct. Specifically, Seibel and Green admitted to seeking payments from Caesars' vendors for products Caesars purchased for the associated restaurants. While Seibel and Green attempted to spin the kickbacks as "marketing," the district court examined

the overwhelming evidence before it, applied the law, and appropriately used common sense to find that there was no genuine issue of material fact that Seibel and Green engaged in the kickback scheme. Accordingly, the district court properly granted summary judgment in Caesars' favor. There is simply no basis to vacate the district court's grant of summary judgment and there is certainly no basis to remand this matter with a reassignment to a different judge. The district court findings of fact and conclusions of law should be affirmed.

II. STATEMENT OF FACTS AND CASE

A. Caesars, a Gaming Licensee, Enters into Various Agreements with the Seibel-Affiliated Entities.

Caesars and its affiliates hold gaming licenses in various jurisdictions across the United States. As all Nevada courts know, gaming licenses are not a right. NRS 463.0129(2) (emphasis added) ("***No applicant for a license*** or other affirmative Commission or Board approval ***has any right to a license or the granting of the approval sought***.") Instead, gaming licenses are a privilege that every licensee, including Caesars, must not just initially earn, but continually show it remains suitable to hold. *See* NRS 463.0129(2) ("Any license issued or other Commission or Board approval granted pursuant to the provisions of this chapter . . .is a revocable privilege, and no holder acquires any vested right therein or thereunder."); *see also* NRS 463.0129(1)(c) ("Public confidence and trust can only be maintained by strict

regulation of all persons, locations, practices, associations and activities related to the operation of licensed gaming establishments[.]")

Nevada's gaming regulations state that a gaming license will not be awarded unless the Nevada Gaming Commission is satisfied that the gaming license applicant (a) is "of ***good character, honesty, and integrity***" (b) with "background, reputation and associations [that] will not result in adverse publicity for the State of Nevada and its gaming industry; and" (c) someone who "[h]as adequate business competence and experience for the role or position for which application is made." Nev. Gaming Regulation 3.090(1) (emphasis added). [redacted]. (17 AA03514).[2]

As required of Nevada gaming licensees, Caesars maintains an Ethics and Compliance Program (the "Compliance Plan"). (*See generally* 15 AA03021-47.). The Compliance Plan is unequivocal in its mandate: [redacted] (15 AA03023). Pursuant to the Compliance Plan, [redacted]

[2] "AA" refers to Appellants' Appendix and "SA" refers to Respodents' Supplemental Appendix. The parties attempted to agree on a joint appendix but could not reach an agreement. Accordingly, Respondents submit their supplemental appendix.

[redacted] (15 AA03036). In furtherance of the Compliance Plan, [redacted]. (15 AA03033).[3]

Importantly, Caesars' Compliance Plan [redacted] (15 AA03036). [redacted]. (*Id.*). [redacted]. (18 AA03785).

[3] To be clear, the Compliance Plan explicitly states that "[b]ribes, influence payments or kickbacks may never be provided to or accepted from any Person, including in the form of gifts, hospitality, or similar benefits." (15 AA03032).

To ensure compliance with gaming regulations, obligations, and its own Compliance Plan, [redacted] (*See, e.g.*, 14 AA02847) [redacted][4] The contracts between Caesars and the Seibel-Affiliated Entities were no exception.[5]

B. Caesars Enters into Six Agreements with the Seibel-Affiliated Entities.

In 2009, Caesars began entering into contracts with Seibel and his related entities for the development, creation, and operation of different restaurants at Caesars' properties in Las Vegas, Nevada and Atlantic City, New Jersey. (*See, e.g.*, 14 AA02746-68). The first contract related to the Serendipity 3 restaurant in Las Vegas and was entered between Caesars Palace and MOTI (the "MOTI Agreement"). (*See generally id.*). The MOTI Agreement contained language

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[4] Caesars is not unique as a gaming licensee in having such provisions in its contracts; similar requirements are common and found throughout the gaming industry. (18 AA03756).

[5] (14 AA02847; 14 AA02757; 14 AA02881; 15 AA03071; 14 AA02803-04; 15 AA03004).

(14 AA02757). (*Id.*). To . (*Id.*). (*Id.*). (*Id.*).

In accordance with the MOTI Agreement, Seibel and MOTI submitted a Business Information Form ("BIF"). (14 AA02737-44). . (14 AA02739).

[redacted]. (14 AA02757 [redacted] In other words, MOTI was bound by its disclosure obligations and as discussed *infra*, so too were all of the Seibel-Affiliated Entities. (*See id.*)

[redacted]. (*See, e.g.*, 17 AA03537). [redacted] (*See, e.g.*, 17 AA03538). [redacted] (17 AA03466-83).

Following the MOTI Agreement, Seibel and Caesars Palace entered into negotiations regarding another restaurant, this time involving a third party, The Old Homestead Restaurant, Inc. (14 AA02778-823). In 2011, the parties ultimately entered into a contract related to The Old Homestead Restaurant at Caesars Palace (the "DNT Agreement"). (*See generally id.*). Similar to the MOTI Agreement, the

DNT Agreement [redacted] " (14 AA02804). Similarly, the DNT Agreement [redacted] s. (*Id.*). Therefore, the DNT Agreement [redacted]. (*See id.*). For the avoidance of doubt, the DNT Agreement [redacted]

[redacted]

[redacted]

(14 AA02787 (emphasis added)).

On behalf of DNT, Seibel submitted another BIF to Caesars. (14 AA02770-76). Just as with the MOTI BIF, [redacted]. (*See id.*). [redacted]. (17 AA03464-65).

Following the DNT Agreement, Seibel and his affiliated entities entered into four additional contracts with Caesars, all relating to various restaurants under the Gordon Ramsay ("Ramsay") brand. The first agreement was entered into on or around November 2011 between Paris and TPOV for the development of the Gordon Ramsay Steak restaurant at Paris (the "TPOV Agreement"). (14 AA02825-57). The second agreement was executed on or around April 2012 between Caesars Palace and LLTQ for the development of the Gordon Ramsay Pub & Grill at Caesars Palace (the "LLTQ Agreement"). (14 AA02859-93). The third agreement was entered into on or around December 2012 between Planet Hollywood and GRB for the development of the GR Burgr restaurant at Planet Hollywood (the "GRB Agreement"). (15 AA02976-3019). The fourth and final agreement was entered into

between Boardwalk Regency Corporation d/b/a Caesars Atlantic City and FERG in or around May 2014 related to the development of the Gordon Ramsay Pub & Grill at Caesars Atlantic City (the "FERG Agreement"). (15 AA03049-87).

Similar to the previous agreements Seibel and his affiliated entities entered into with Caesars, all [redacted] (*See, e.g.*, 14 AA02847). [redacted]

[redacted]

[redacted]

(*See, e.g.*, *id.* (emphasis added)). [redacted]. (*See, e.g.*, 14 AA02834). In other words, neither Seibel nor the Seibel-Affiliated Entities could complain that the definition of Unsuitable Person under *any* of the agreements was somehow unclear.

Further, each of the agreements (collectively the "Seibel Agreements") [redacted][6] [redacted].[7] [redacted]

[6] (14 AA02757; 14 AA2803-04; 14 AA02847; 14 AA02881; 15 AA03004; 15 AA03071).

[7] (14 AA02757 (emphasis added); 14 AA2803-04 (emphasis added); 14 AA02847 (emphasis added); 14 AA02881 (emphasis added); 15 AA03004 (emphasis added); 15 AA03071 (emphasis added)).

[redacted].[8]

Again, because of the strict self-policing and suitability requirements imposed on gaming licensees, any termination of the Seibel Agreements by Caesars because of unsuitability issues would become effective immediately. (*See e.g.*, 14 AA02838) [redacted] Notably, per the express language of the Seibel Agreements, [redacted]. (*See e.g.*, 14 AA02847) [redacted] (See, e.g., 15 AA02902). [redacted]. (*See id.*). Nevertheless, [redacted]

[8] (14 AA02748; 14 AA02791; 14 AA02837; 14 AA02871; 15 AA02989; 15 AA03061).

[redacted]. (17 AA03445).

C. Seibel Conceals his Criminal Conduct and Conviction from Caesars.

Unbeknownst to Caesars, from the outset of the parties' relationship, Seibel was an Unsuitable Person, as that term is defined in the Seibel Agreements. [redacted]. (16 AA03199). [redacted] (*Id.*). [redacted] (16 AA03199-200). [redacted] (*Id.*). [redacted] (16 AA03201).

[redacted]

[redacted]. (16 AA03202-03). [redacted] (16 AA03201-02). [redacted] (16 AA03201). [redacted] (16 AA03202). [redacted]. (*Id.*).

Ironically, [redacted] (16 AA03204). [redacted]

[redacted] (16 AA03203-05).

[redacted]. (*See, e.g.*, 15 AA03089-90). [redacted] (15 AA03092) (emphasis added)). [redacted]. (15 AA03095).

[redacted]. (16 AA03162). [redacted] (16 AA03185). ("[redacted]. Prior to his guilty plea, Seibel continued down the path of dishonesty and concealment. Instead of notifying Caesars of his impending criminal conviction, [redacted]

[redacted]. (*See, e.g.*, 16 AA03134).

After the entities were created, Seibel sent letters to Caesars [redacted] (16 AA03139-48). In each of those letters, [redacted]. (*Id.*). Further, Seibel represented that, "[redacted]. (*Id.* (emphasis added)).

During discovery in the underlying litigation, [redacted] (18 AA03735-36). Therefore, [redacted]. (16 AA03104-32). [redacted]

[redacted]

[redacted]

[redacted].

(16 AA03109-10 (emphasis added)). Further, [redacted] (16 AA03112).

[redacted]. (*See, e.g.*, 16 AA03139). [redacted]

[9] Seibel's refusal to disclose relevant communications related to this arrangement were the subject of a motion to compel. (1 SA 001-40).

[redacted]

[redacted]

[redacted]" (16 AA03110).

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] (16 AA03268). [redacted]

[redacted]

[redacted] (18 AA03719-21).[10]

D. Caesars Discovers Seibel's Unsuitability and Terminates the Seibel Agreements.

Following Seibel's sentencing, news of his criminal conduct and conviction hit the news. (16 AA03274). [redacted]

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[10] In their Opening Brief, Appellants falsely state that Seibel verbally informed Caesars' executives. (Opening Br. 17). However, Caesars' executives testified under oath that no such disclosure was ever made. (17 AA03455). More importantly, ***Seibel himself admitted no such disclosure was made*** to Caesars. *See* (18 AA03719) (emphasis added) ("***Seibel admits that he 'did not inform, notify, and/or otherwise disclose to Caesars, that in April 2016, the United States Attorney filed an Information charging [Seibel] with one count of corrupt endeavor to obstruct and impede the due administration of the Internal Revenue' [Service.]***"); *see also* (18 AA03720) (emphasis added) ("***Seibel admits that he 'did not inform, notify, and/or otherwise disclose to Caesars, that in April 2016, [Seibel] pled guilty to one count of a corrupt endeavor to obstruct and impede the due administration of the Internal Revenue Laws, 26 U.S.C. § 7212[.]***'")

[redacted]. (16 AA03277-79). [redacted]. (16 AA03277). [redacted]. (*Id.*). [redacted]. (16 AA03297-98).

As expressly permitted by the Seibel Agreements, Caesars terminated the agreements due to Seibel's unsuitability and failure to disclose the same. (16 AA03286-95; 18 AA03792). [redacted] (16 AA03277-79). [redacted]. (17 AA03342). [redacted]. (17 AA03412).[11] Shortly thereafter, litigation ensued.

[11] [redacted] (17 AA03427-38). Appellants have never disclosed a response from the NGCB.

E. The Seibel Parties Belatedly Move to Amend their Counterclaims.

Caesars filed its Complaint on August 25, 2017. (1 AA0128-67). In response, some but not all Seibel-Affiliated Entities chose to file counterclaims against Caesars. (2 AA00283-339). 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 id.*) while TPOV, TPOV 16, MOTI, and MOTI 16 only filed answers in response to Caesars' original complaint. (2 AA00246-82).

Nearly eight months after the expiration of the deadline to amend pleadings in the scheduling order issued by the district court, the LLTQ/FERG Defendants sought leave to amend their counterclaims. (3 AA00488-95). Specifically, 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. (3 AA00492-93). 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. (*Compare* 2 AA00333 *with* 3 AA00566)

Following motion practice related to the LLTQ/FERG Defendants' efforts to untimely amend their counterclaims, the district 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." (4 AA00759-62). Specifically, this district 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***." (4 AA00761) (emphasis added). Thereafter, the LLTQ/FERG Defendants did not request that the district court reconsider its order, nor did they file a new action related to the claims they were barred from bringing in the pending litigation.

F. In discovery, Caesars Finds That Seibel, Green, and the Seibel-Affiliated Entities Were Engaged in a Kickback Scheme.

After several delay tactics by the Seibel Parties, the Seibel-Affiliated Entities produced documents and the parties began scheduling and taking depositions. (4 AA00850). In preparing for depositions, Caesars discovered emails that [redacted] (*See, e.g.*, 4 AA00854-56).

Unbeknownst to Caesars at the time, [redacted] (*See, e.g.*, 36 AA07782-85). [redacted]

[redacted]. (*Id.*). [redacted] (36 AA07782-83). [redacted]. (37 AA07813) [redacted] The Seibel Parties do not dispute that these arrangements took place. Instead, [redacted] (35 AA07499-500). However, the "marketing" claim wilted under even the slightest scrutiny. (*See, e.g.*, 36 AA07782-83). [redacted] (*Id.*). To be clear, [redacted] (*See, e.g.*, 37 AA07820). Indeed, [redacted] s. (*Id.*). Egregiously, [redacted] (37 AA07847-48; 37 AA07862; 37 AA07874-75).

Once discovery revealed that Seibel was engaged in further criminal activity, Caesars moved to amend its complaint. (4 AA00770-86). The district court found that there was good cause to allow Caesars to amend its complaint and granted Caesars' motion to amend. (5 AA1098). Unlike LLTQ/FERG Defendants' prior attempt to amend, Caesars did not know these facts beforehand. Caesars' First Amended Complaint added five claims all related to the kickback scheme that Caesars uncovered in discovery. (5 AA01101-47). Specifically, Caesars asserted claims for (1) civil conspiracy against Seibel and Green; (2) breaches of the implied covenant of good faith and fair dealing against MOTI, DNT, TPOV, LLTQ, GR Burgr, LLC, and FERG; (3) unjust enrichment against Seibel and Green; (4) intentional interference with contractual relations against Seibel and Green; (5) fraudulent concealment against Seibel and Green. (5 AA01142-45). Importantly, Caesars did not make changes to the original claims it brought in August 2017 relating to Seibel's suitability issues and termination of the Seibel Agreements. (*Compare* 1 AA00128-67 *with* 5 AA01101-47).

G. The District Court Rejects the Seibel Parties' Efforts to Assert Untimely Claims.[12]

After unsuccessfully attempting to dismiss Caesars' new claims, Appellants filed an omnibus answer to Caesars' First Amended Complaint. (6 AA01231-81). Together with their answer, ***all*** of the Seibel-Affiliated Entities filed counterclaims against Caesars, including those who had not previously asserted counterclaims in the first instance. (*Id.*). The counterclaims – for breach of contract and breach of the implied covenant of good faith and fair dealing – all related to Caesars' termination of the Seibel Agreements. (*Id.*). In other words, they all related to facts they were aware of ***before*** the litigation commenced in 2017. (*See id.*).

Given the impropriety of the eleventh-hour claims, Caesars moved to strike and/or dismiss the newly asserted counterclaims. (6 AA01303-15). The district court granted Caesars' motion. (13 AA02643-53). In ruling on Caesars' motion, the district court considered not only the Nevada Rules of Civil Procedure, but also the federal case law addressing this issue. (13 AA02648-51). The district court recognized that under federal law, there were generally three recognized approaches: the narrow, permissive, and moderate approaches. (13 AA02649). After analyzing each approach, the district court determined they were inapplicable. (13 AA02649-50).

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[12] This matter was previously before the court on an unsuccessful writ petition. *See MOTI Partners, LLC, et al. v. v. Eighth Judicial District Court*, Case No. 82448.

Ultimately the district court determined that NRCP 16 was applicable, and it would be guided by Rule 16's mandate requiring "a showing of good cause to amend the pleadings after the time for doing so set forth in the court's scheduling order has expired." (13 AA02650). The district court made clear that "Caesars' First Amended Complaint did not open the door for [Petitioners] to expand the scope of the litigation beyond its current parameters" and Petitioners amended counterclaims were "time-barred by [the district court's] prior scheduling order and the previous denial of the LLTQ/FERG Defendants' Motion to Amend." (13 AA02651).

H. The District Court Grants Summary Judgment in Favor of Caesars on All of its Claims.

After the close of the discovery, Caesars filed motions for summary judgment, first pertaining to the suitability claims and counterclaims. (13 AA02701-26). Once those motions for summary judgment were fully briefed, the Court considered the argument of counsel and further took the motions under advisement and granted both of Caesars' summary judgment motions in their entirety. (34 AA07052-71). The order granting Caesars' first motion for summary judgment resolved the first three causes of action all pertaining to the suitability issues in Caesars' First Amended Complaint along with all of the counterclaims asserted by the Seibel-Affiliated

Entities. (*Id.*).[13] The only claims outstanding thereafter in the litigation were Counts IV through VIII of Caesars' First Amended Complaint all relating to the Seibel Parties' improper solicitation and receipt of kickbacks. (34 AA07064-65).

Subsequently, on June 17, 2022, Green filed a Motion for Summary Judgment ("Green Motion for Summary Judgment"). (34 AA07174-88). On July 14, 2022, Caesars filed its Counter-Motion for Summary Judgment against Green ("Counter-Motion for Summary Judgment") and its Cross-Motion for Summary Judgment against Seibel and the Seibel-Affiliated Entities ("Cross-Motion for Summary Judgment") on the kickback claims. (35 AA07450-75). Once the motions for summary judgment were fully briefed, the Court once again considered the argument of counsel, further took the motions under advisement, and granted Caesars' Cross-Motion for Summary Judgment and Counter-Motion for Summary Judgment, and denied Green's Motion for Summary Judgment. (42 AA09066-80). Thus, all claims and counterclaims have been resolved in favor of Caesars. This appeal followed.

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[13] The district court's grant of summary judgment in the consolidated action is also pending before this Court. *See* Case No. 84934.

III. ARGUMENT

A. The District Court Properly Granted Summary Judgment

1. Standard of Review

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

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

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

"A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Wood*, 121 Nev. at 731, 121 P.3d at 1031. "The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant." *Id.* at 731, 121 P.3d at 1031.

2. A District Court May Apply Common Sense at Summary Judgment

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

Importantly, "at summary judgment, ***a court need not draw all possible inferences in plaintiff's favor, but only all reasonable ones***, and a reasonable inference is one based on more than mere speculation, conjecture, or fantasy." *Li v.*

Cnty. of Los Angeles, 223 F. App'x 619, 620 (9th Cir. 2007) (emphasis added) (citing *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 n.10 (9th Cir. 2002). Thus, "***where a party opposing summary judgment fails to produce "substantial factual evidence to combat summary judgment and there is 'overwhelming evidence' favoring the moving party, it may be unreasonable to draw an inference contrary to the movant's interpretation of the facts***, and therefore a summary judgment would be appropriate[.]" *United States v. 1980 Red Ferrari, VIN No. 9A0034335, Oregon License No. GPN 835*, 827 F.2d 477, 479 (9th Cir. 1987) (emphasis added) (quoting *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 681 (9th Cir. 1985)).

3. The District Court Properly Granted Summary Judgment Because Caesars Had the Express and Absolute Right to Terminate the Seibel Agreements.

Appellants do not, and cannot, argue that the termination provisions of the Seibel Agreements are in any way ambiguous. And, as this Court knows, "[i]n the absence of ambiguity or other factual complexities, contract interpretation presents a question of law that the district court may decide on summary judgment." *Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 309, 301 P.3d 364, 366 (2013) (citations omitted). "As a general rule, [courts] construe unambiguous contracts . . . according to their plain language." *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 487–88, 117 P.3d 219, 223–24 (2005); *Ringle v. Bruton*, 120 Nev. 82, 93, 86 P.3d 1032, 1039 (2004) ("[W]hen a contract is clear, unambiguous, and complete, its

terms must be given their plain meaning and the contract must be enforced as written."); *Dickenson v. State, Dep't of Wildlife*, 110 Nev. 934, 937, 877 P.2d 1059, 1061 (1994) ("[I]f no ambiguity exists, the words of the contract must be taken in their usual and ordinary signification.").

As discussed *supra*, [redacted].

Here, Seibel cannot, and did not, dispute that he is a convicted felon. Further, Seibel cannot, and did not, dispute that being a convicted felon placed him under the [redacted]. And Seibel cannot, and did not, dispute that he failed to provide written disclosure[14] of his criminal conduct and unsuitability.[15] Moreover, Seibel cannot legitimately

[14] Notably, while Seibel claims he verbally informed certain Caesars' executives, they dispute his account (17 AA03455) and, most importantly, Seibel himself he never disclosed his criminal investigation, conduct, or conviction to Caesars. See (18 AA03719-20).

[15] Instead, [redacted] the

dispute that his conduct – once it came to light – forced Caesars' hand as gaming regulators even began questioning the relationship.

Instead, Seibel tries to distract this Court by claiming that the termination was in bad faith because Caesars failed to give the Seibel-Affiliated Entities any opportunity to cure. But, "one generally cannot base a claim for breach of the implied covenant on conduct authorized by the terms of the agreement." *Miller v. FiberLight, LLC*, 808 S.E.2d 75, 87 (Ga. App. Ct. 2017) (quoting *Dunlap v. State Farm Fire & Cas. Co*., 878 A.2d 434, 441 (C) (Del. 2005)); *see also Vitek v. Bank of Am., N.A.*, No. 8:13-CV-816-JLS ANX, 2014 WL 1042397, at *5 (C.D. Cal. Jan. 23, 2014) (citation omitted) ("In general, acting in accordance with an express contractual provision does not amount to bad faith."). "In other words, 'a party does not act in bad faith by relying on contract provisions for which that party bargained where doing so simply limits advantages to another party.'" *Miller*, 808 S.E.2d at 87 (quoting *Alpha Balanced Fund, LLLP v. Irongate Performance Fund, LLC*, 802 S.E.2d 357 (Ga. 2017)).

Importantly, a claim of "bad faith" does not preclude summary judgment. In fact, "when there is no factual basis for concluding that a defendant acted in bad

[redacted]. (16 AA03109-10).

faith, a court may determine the issue of bad faith as a matter of law." *Tennier v. Wells Fargo Bank, N.A.*, No. 3:14-CV-0035-LRH-VPC, 2015 WL 128672, at *7 (D. Nev. Jan. 8, 2015) (*quoting Andrew v. Century Sur. Co.*, No. 2:12–cv–0978, 2014 WL 1764740, at *10 (D. Nev. Apr. 29, 2014)).

Here, the language of the Seibel Agreements [redacted]. (*See, e.g.*, 14 AA02838, 02847). Moreover, the overwhelming evidence considered by the district court showed that the only parties acting in bad faith were Appellants. Seibel admitted that he did not inform Caesars of his felony, related criminal conduct, or guilty plea. Importantly, Caesars did not terminate the Seibel Agreements because of some minor or inconsequential transgression. Instead, Caesars terminated the Seibel Agreements because Seibel engaged in felonious criminal activity, pled guilty, and was convicted of one count of corrupt endeavor to obstruct and impede the due administration of the Internal Revenue Laws, for which he served time in a federal prison. He concealed all of this from Caesars and actively and intentionally tried to conceal the relevant information so that Caesars would unknowingly continue to do business with him despite his unsuitable status.

Even if the Seibel Agreements required Caesars to provide an opportunity to cure – they did not – Seibel's own conduct in hiding his criminal matter and lying to Caesars foreclosed any opportunity to cure. *See Bart St. III v. ACC Enters., LLC*, No. 217CV00083GMNVCF, 2020 WL 1638329, at *4 (D. Nev. Apr. 1, 2020) (quoting *Bradley v. Nev.-Cal.-Or. Ry.*, 42 Nev. 411, 178 P. 906, 908 (Nev. 1919)). ("Nevada law provides, 'the party who commits the first breach of the contract cannot maintain an action against the other for a subsequent failure to perform.'") Indeed, the ***"implied promise of good faith and fair dealing is 'reciprocal,' a 'two-way street' which demands mutual compliance from the contracting parties***." *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 791 F.2d 1356, 1361 (9th Cir. 1986) (citation omitted) (emphasis added). There is "no justice in permitting a plaintiff to complain of unfair dealing in a [t]ransaction when he himself has not fulfilled in good faith his contractual obligations with regard to that transaction." *Id.* at 1362 (citation omitted). Appellants' arguments that Caesars did not act in good faith when it terminated the Seibel Agreements – [redacted] – are completely destroyed by Seibel and Seibel-Affiliated Entities' fraud perpetrated against Caesars.

4. The District Court Properly Granted Summary Judgment Because Section 13.22 of the LLTQ Agreement and Section 4.1

of the FERG Agreement Constitute Agreements to Agree and Are Unenforceable as a Matter of Public Policy.

Appellants argue that whether Caesars could continue to operate restaurants is a genuine issue of material fact, which therefore precluded the district court entrance of summary judgment. (Opening Br. 43-46). But, the district court here properly determined that Sections 13.22 of the LLTQ Agreement and Section 4.1 of the FERG Agreement were not only agreements to agree, but unenforceable as a matter of public policy.

Under Nevada law, contract terms must be interpreted to give meaning to all terms and to avoid creating a nullity. *Musser v. Bank of Am.*, 114 Nev. 945, 949, 964 P.2d 51, 54 (1998) (quoting *Royal Indem. Co. v. Special Serv.*, 82 Nev. 148, 150, 413 P.2d 500, 502 (1966) ("A basic rule of contract interpretation is that '[e]very word must be given effect if at all possible.'"); *see also Phillips v. Mercer*, 94 Nev. 279, 282, 579 P.2d 174, 176 (1978) ("A court should not interpret a contract so as to make meaningless its provisions.") Likewise, contracts must be interpreted so as to avoid absurd results. *Reno Club v. Young Inv. Co.*, 64 Nev. 312, 325, 182 P.2d 1011, 1017 (1947) ("A contract should not be construed so as to lead to an absurd result.")

Here, Sections 13.22 of the LLTQ Agreement and Section 4.1 of the FERG Agreement, like all other terms of the Seibel Agreements, were subject to Appellants' obligation to maintain suitability. This is an unwavering requirement in doing business with a gaming licensee. Any other interpretation renders the suitability

provisions of the Siebel Agreements a nullity, which is not only contrary to basic rules of contract interpretation, but also to the very regulations Caesars is subject to as a gaming licensee. *See Gaston v. Drake*, 14 Nev. 175, 181 (1879) (emphasis added) ("It cannot be doubted at this day, nor is it denied, that a contract will not be enforced if it is against public policy, or that, if a part of the consideration of an entire contract is illegal as against public policy or sound morals, the whole contract is void."); *see also Martinez v. Johnson*, 61 Nev. 125, 119 P.2d 880 (1941) ("The general rule is that an act done, or contract made, in disobedience of the law, creates no right of action which a court of justice will enforce.") Stated simply, it would be against public policy to require Caesars, or any gaming licensee, to continue to engage in business with an unsuitable person as such an obligation would defeat the very self-policing obligations and suitability mandates imposed on all gaming licensees.

Moreover, the district court properly found that, even if not barred by public policy, Sections 13.22 of the LLTQ Agreement and Section 4.1 of the FERG Agreement are not enforceable because they constitute agreements to agree. (34 AA07064). Indeed, the law is clear, "***[a]n agreement to agree at a future time is nothing and will not support an action for damages***." *City of Reno v. Silver State Flying Serv., Inc.*, 84 Nev. 170, 176, 438 P.2d 257, 261 (1968) (emphasis added) (quoting *Salomon v. Cooper*, 98 Cal. App. 2d 521, 220 P.2d 774 (1950)); *see also*

US W. Commc'ns v. MFS Intelenet, Inc., 193 F.3d 1112, 1125 (9th Cir. 1999) (citing *Kapetan v. Kelso*, 4 Wash. App. 312, 481 P.2d 24, 25 n.17 (1971)) ("Generally, an agreement to agree in the future is not enforceable.").

"There is no dispute that neither law nor equity provides a remedy for breach of an agreement to agree in the future." *Autry v. Republic Prods.*, 30 Cal. 2d 144, 151, 180 P.2d 888, 893 (1947). Indeed, "[s]uch a contract cannot be made the basis of a cause of action." *Id.*, 180 P.2d at 893 (citations omitted). "Basic contract principles require, for an enforceable contract, an offer and acceptance, meeting of the minds, and consideration." *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). "With respect to contract formation, preliminary negotiations do not constitute a binding contract unless the parties have agreed to all material terms." *Id.*, 119 P.3d at 1257. Here, Sections 13.22 of the LLTQ Agreement and Section 4.1 of the FERG Agreement specifically referenced that key financial provisions were left to be agreed upon, which could arguably change based on each location and project. (*See, e.g.*, 14 AA02890). Thus, the district court properly found these provisions on their face to be agreements to agree and thus enforceable.

5. The District Court Did Not Consider Inadmissible Evidence.

A district court's "decision to admit or exclude evidence" is reviewed for abuse of discretion. *M.C. Multi-Fam. Dev., L.L.C. v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008). "The trial court is vested with broad discretion in

determining the admissibility of evidence." *Sheehan & Sheehan*, 121 Nev. at 492, 117 P.3d at 226 (internal quotations omitted). This Court "will not interfere with the district court's exercise of its discretion absent a showing of palpable abuse." *M.C. Multi-Fam. Dev., L.L.C.*, 124 Nev. at 913, 193 P.3d at 544 (citation omitted). Here, Appellants' complaints about purported inadmissible evidence (Opening Br. 32-33) are baseless.

First, Exhibit 24 to Caesars' initial motion for summary judgment, was authenticated because it was produced by Appellants themselves. (16 AA03197-245). As such, the Sentencing Submission is deemed authentic. *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 777 (9th Cir. 2002) (citations omitted) ("[D]ocuments produced by a party in discovery were deemed authentic when offered by the party-opponent[.]"); *see also* NRS 52.085(1) ("Evidence that [a] writing authorized by law to be recorded or filed and in fact recorded or filed in a public office … is sufficient to authenticate the writing.") Further, the Sentencing Submission is not inadmissible hearsay as it is a public record or report. *See* NRS 51.155 ("Records, reports, statements or data compilations, in any form, of public officials or agencies are not inadmissible under the hearsay rule if they set forth (1) [t]he activities of the official or agency; [or] (2) [m]atters observed pursuant to duty imposed by law . . . unless the sources of information or the method or circumstances of the investigation indicate lack of trustworthiness.")

Appellants next take issue with Caesars' reliance on exchanges with Nevada gaming regulators. (Opening Br. 32-33.) First, Appellants complain that Exhibit 40 is unfairly prejudicial. (*Id.* at 32). However, this is a letter [redacted] (17 AA03342-45). Under Nevada law, "unfair prejudice" is defined as an appeal to "the emotional and sympathetic tendencies of a jury, rather than the jury's intellectual ability to evaluate evidence." *State v. Dist. Ct. (Armstrong)*, 127 Nev. 927, 933, 267 P.3d 777, 781 (2011) (internal quotations omitted). [redacted]. Similarly, Exhibit 41 is a letter [redacted]. (17 AA03412). [redacted]. *See, e.g.*, *Emmons v. State*, 107 Nev. 53, 57, 807 P.2d 718, 721 (1991), *overruled on other grounds by Harte v. State*, 116 Nev. 1054, 1072, 13 P.3d 420, 432 (2000) (admitting opinions

of a disinterested third party under the general exception). [redacted]

Finally, Appellants object to the district court's consideration of Exhibits 29 and 34 to Caesars' Counter-Motion for Summary Judgment and Cross-Motion for Summary Judgment. Exhibit 29, which is Caesars' Sixteenth Supplemental NRCP 16.1 Disclosure, was properly admitted by the district court as the evidence was not used for the truth of the matters asserted, thus, the hearsay rule did not apply. *See* NRS 51.035 (defining hearsay as "a statement offered in evidence to prove the truth of the matter asserted"). Instead, this document merely provided a breakdown of the damages sought by Caesars, which were supported by other exhibits attached to the briefing. Finally, Appellants' complaint that Exhibit 34 was improperly considered because Caesars did not produce the underlying documents is further misplaced because Caesars provided the district court with Appellants' interrogatory responses (37 AA07928-40). which provided the amounts of kickbacks received. *Firefly Partners, LLC v. Reimann*, 133 Nev. 1008, 404 P.3d 413 (2017) (citing 23 Am. Jur. 2d Depositions and Discovery § 131 (2012) ("interrogatory answers are admissible

against the answering party"). Thus, these documents were also properly considered by the district court.

6. The District Court Properly Granted Summary Judgment Because the Overwhelming Evidence – Including Appellants' Own Admissions – Demonstrates that Appellants Improperly Sought Kickbacks.

a. The Intra-Corporate Conspiracy Doctrine is Inapplicable.

Under Nevada law, "[a]n actionable civil conspiracy is a combination of two or more persons who, by some concerted action, intend to accomplish some unlawful objective for the purpose of harming another which results in damage." *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 303, 662 P.2d 610, 622 (1983) (citations omitted). "[A] plaintiff must provide evidence of an explicit or tacit agreement between the alleged conspirators." *Guilfoyle v. Olde Monmouth Stock Transfer Co.*, 130 Nev. 801, 813, 335 P.3d 190, 198 (2014). Generally, "[a]gents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage." *Collins*, 99 Nev. at 303, 662 P.2d at 622 (citations omitted). "This limitation, known as the intracorporate conspiracy doctrine, prevents a finding of liability for conspiracy between co-employees without a showing that the employees were acting as individuals and for their individual advantage." *U-Haul Co. of Nev. v. United States*, No. 2:08 CV-729-KJD-RJJ, 2012

WL 3042908, at *2 (D. Nev. July 25, 2012) (citing *Collins*, 99 Nev. at 303, 662 P.2d at 622). However, "employees of a corporation may be deemed to be conspirators with their employer corporation when they act 'as individuals for their individual advantage.'" *Loc. Ad Link, Inc. v. AdzZoo, LLC*, No. 209CV01564RCJLRL, 2009 WL 10694069, at *9 (D. Nev. Dec. 15, 2009) (quoting *Collins*, 99 Nev. at 303, 662 P.2d at 622). Importantly, the intracorporate conspiracy doctrine does not apply to criminal activity. *United States v. Hughes Aircraft Co.*, 20 F.3d 974, 979 (9th Cir. 1994), as amended (Apr. 28, 1994) (emphasis added) ("If we applied the intracorporate conspiracy doctrine to this case, no corporation acting on its own behalf by and through its employees could be found guilty of conspiracy. This result is illogical.")

The intra-corporate conspiracy doctrine does not shield Green because, [redacted] (40 AA08530-31). Instead, [redacted]. (40 AA08530-31, 08532-33). Green, in fact, [redacted] (37 AA07890) and [redacted]. (35 AA07497-98). This argument is thus inapplicable.

Here, the undisputed evidence considered by the district court demonstrated that Seibel and Green entered into agreements with different Caesars' vendors to

obtain a percentage kickback of the amounts sold to, or purchased by, Caesars. On their face, the documents illustrate and prove the kickback scheme. While Seibel and Green attempted to "spin" the emails at marketing, this argument would have required the district court to ignore not only common sense, but Seibel's own admissions that no marketing obligations existed or were required. Indeed, despite multiple opportunities to present any evidence of marketing, the record is completely devoid of any marketing deliverables whatsoever. Seibel and Green failed to present a marketing contract, a campaign, a promotion, or even a social media post. (42 AA08916). As a result, to say that the evidence overwhelmingly shows the kickback scheme – not a marketing agreement – is an understatement.[16] The evidence demonstrated without a doubt that S [redacted] (*See, e.g.*, 37 AA07813). [redacted] (*Id.*) By actively pursuing such arrangements Green and Seibel engaged in civil conspiracy.

[16] (37 AA07813 [redacted] 37 AA07816 [redacted] 36 AA07782-83 [redacted]; 40 AA08471 [redacted]); and 40 AA08481 [redacted]

b. Seibel and Green Benefitted from The Kickback Scheme.

Under Nevada law, "unjust enrichment occurs 'when ever [sic] a person has and retains a benefit which in equity and good conscience belongs to another.'" *Leasepartners Corp. v. Robert L. Brooks Tr. Dated Nov. 12, 1975*, 113 Nev. 747, 755, 942 P.2d 182, 187 (1997) (quoting *Unionamerica Mtg. v. McDonald*, 97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981)). "***[B]enefit in the unjust enrichment context*** can include services beneficial to or at the request of the other, denotes any form of advantage, and ***is not confined to retention of money or property***." *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 382, 283 P.3d 250, 257 (2012) (internal quotations omitted) (emphasis added). Despite the district court's findings to the contrary, Seibel and Green continue to argue that they did not benefit from the kickback scheme. This argument – again – ignores the ample evidence demonstrating the benefits they received. By his own testimony, Green admitted that [redacted] (37 AA07911, 07988). [redacted]. (40 AA08567). The district court's unjust enrichment and kickback findings are well-supported.

c. The District Court Properly Found that Seibel and Green Intentionally Interfered.

Under Nevada law, to prove a claim for intentional interference with contractual relations, "a plaintiff must establish (1) a valid and existing contract; (2) the defendant's knowledge of the contract; (3) intentional acts intended or designed to disrupt the contractual relationship; (4) actual disruption of the contract; and (5) resulting damage." *J.J. Indus., LLC v. Bennett*, 119 Nev. 269, 274, 71 P.3d 1264, 1267 (2003) (citations omitted). "[I]n Nevada, a party cannot, as a matter of law, tortiously interfere with his own contract." *Klein v. Freedom Strategic Partners, LLC*, 595 F. Supp. 2d 1152, 1163 (D. Nev. 2009) (internal quotations omitted).

[redacted]. (37 AA07890). [redacted] (40 AA08530-31, 08532-33). However, even if he were to be considered an employee of Seibel or the Seibel-Affiliated Entities, the law makes clear that an "***agent may be an interfering third party*** if the agent was ***acting outside the scope of the agency***, was ***not acting in the principal's interest***, or was ***motivated by malice towards one or both of the contracting parties***." *From the Future, LLC v. Flowers*, No. 206CV00203PMPRJJ, 2009 WL 10709083, at *8 (D. Nev. Apr. 20, 2009).

Here, Seibel and Green solicited kickbacks from Caesars' vendors. The very nature of this conduct is outside the scope of any employment as it is improper and, in fact, illegal. *From the Future, LLC*, 2009 WL 10709083, at *3 (quoting

Restatement (Third) of Agency § 7.01 cmt. e) (emphasis added) ("[A]n agent who advises a principal not to deal with a third party is not subject to liability for interfering with the principal's contract or prospective contractual relations with the third party ***unless the agent acts*** to serve the agent's own interests or ***for another wrongful purpose***.") Caesars never argued that Green or Seibel could not engage in *appropriate* relationships with vendors, but threatening vendors to pay a percentage of their sales retroactively without Caesars' knowledge for product that Caesars purchased is not only improper but prohibited conduct of individuals associated with a gaming licensee. (*See, e.g.*, 37 AA07813).

d. The District Court Properly Found that Seibel and Green Intentionally Concealed their Kickback Scheme from Caesars.

Under Nevada law, "[n]ondisclosure will become the equivalent of fraudulent concealment when it becomes the duty of a person to speak in order that the party with whom he is dealing may be placed on an equal footing with him." *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1486, 970 P.2d 98, 110 (1998), *abrogated by GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P.3d 11 (2001) (quoting *Mackintosh v. Jack Matthews & Co.*, 109 Nev. 628, 634-35, 855 P.2d 549, 553 (1993)). In *Villalon v. Bowen*, this Court was clear in its holding:

> [E]ven in absence of a fiduciary or confidential relationship and where the parties are dealing at arm's length, ***an obligation to speak can arise from the existence of material facts peculiarly within the knowledge***

> ***of the party sought to be charged and not within the fair and reasonable reach of the other party***.

70 Nev. 456, 467–68, 273 P.2d 409, 414–15 (1954) (emphasis added). "Under such circumstances the general rule is that a deliberate failure to correct an apparent misapprehension or delusion may constitute fraud." *Id.* at 468, 273 P.2d at 415. This is "***particularly so where the false impression deliberately has been created by the party sought to be charged***." *Id.* at 468, 273 P.2d at 415 (emphasis added). As the parties soliciting kickbacks – [redacted] – Seibel and Green had exclusive knowledge that they were required to disclose. (42 AA09076-77). Yet, they did not. (42 AA09077). They cannot claim that there was no such obligation when they were the only ones with knowledge. (*Id.*)

e. The District Court Properly Granted Summary Judgment on its Claim for Breach of the Implied Covenant of Good Faith and Fair Dealings Against the Seibel Affiliated Entities.

As this Court knows, "[a] breach of the [implied] covenant [of good faith and fair dealing] occurs '[w]here the terms of a contract are literally complied with but one party to the contract deliberately contravenes the intention and spirit of the contract. . . . '" *Gamboa v. World Sav. Bank*, FSB, No. 3:10-CV-454-ECR-VPC, 2010 WL 5071166, at *2 (D. Nev. Dec. 6, 2010) (quoting *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 107 Nev. 226, 232, 808 P.2d 919, 922-23 (1991)). "When

one party performs a contract in a manner that is unfaithful to the purpose of the contract and the justified expectations of the other party are thus denied, damages may be awarded against the party who does not act in good faith." *Hilton*, 107 Nev. at 234, 808 P.2d at 923 (emphasis added).

To this day, Appellants continue to argue that there could be no breach of the implied covenant because the Seibel Agreement do not prevent them from "doing business with persons involved" with the Caesars' restaurants. (Opening Br. 57). This argument is a less than honest characterization of the conduct undertaken by Appellants. Caesars did not and does not challenge their ability to engage in legitimate business ventures as appropriate. But coercing kickbacks from vendors is not a legitimate business and is entirely contrary to the spirit of the Seibel Agreements.

In fact, every Seibel Agreement put the Seibel-Affiliated Entities on notice [redacted] By soliciting thousands of dollars in kickbacks from Caesars' vendors, the Seibel-Affiliated Entities unquestionably breached the covenant of good faith and fair dealing and the district court did not err when it made this determination.

B. The District Court Did Not Err in Striking the LLTQ/FERG Defendants' Untimely Counterclaims.

1. Standard of Review

"A motion for leave to amend pursuant to NRCP 15(a) is addressed to the sound discretion of the trial court, and its action in denying such a motion will not be held to be error in the absence of a showing of abuse of discretion." *Connell v. Carl's Air Conditioning*, 97 Nev. 436, 439, 634 P.2d 673, 675 (1981); *see also Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 286, 357 P.3d 966, 971 (Nev. App. 2015) (quoting *Riofrio Anda v. Ralston Purina Co.*, 959 F.2d 1149, 1154–55 (1st Cir. 1992) ("The district court did not abuse its discretion by adhering to its scheduling order and refusing to allow plaintiffs to amend their complaint. Under the facts here, the allowance of an amendment would have nullified the purpose of rule 16[.]") "A motion for leave to amend is addressed to the sound discretion of the trial court and its action in denying the motion should not be held to be error unless that discretion has been abused." *Stephens v. S. Nev. Music Co.*, 89 Nev. 104, 105, 507 P.2d 138, 139 (1973) (citations omitted).

2. The LLTQ/FERG Defendants' Were Required to Show Good Cause to Amend their Counterclaims After the Deadline Expired and Failed to Do So.

"After a responsive pleading is filed, a party may amend his or her pleading 'only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.'" *Kantor v. Kantor*, 116 Nev. 886, 891, 8 P.3d

825, 828 (2000) (quoting NRCP 15(a)). "This does not, however, mean that a trial judge may not, in a proper case, deny a motion to amend. If that were the intent, leave of court would not be required." *Stephens*, 89 Nev. at 105, 507 P.2d at 139. "Sufficient reasons to deny a motion to amend a pleading include undue delay, bad faith or dilatory motives on the part of the movant." *Kantor*, 116 Nev. at 891, 8 P.3d at 828.

The Nevada Rules of Civil Procedure mandate require the district court "after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, case conference, telephone conference, or other suitable means, ***enter a scheduling order***." NRCP 16(b)(1) (emphasis added). Among other things, "[t]he ***scheduling order must limit the time to join other parties, amend the pleadings***, complete discovery, and file motions." NRCP 16(b)(3)(A) (emphasis added). "***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***." *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)).

After the scheduling order is entered, the rules make clear that the scheduling order may only "be modified by the court for good cause." NRCP 16(b)(4). "[T]he purpose of NRCP 16(b) is 'to offer a measure of certainty in pretrial proceedings,

ensuring that at some point both the parties and the pleadings will be fixed.'" *Nutton*, 131 Nev. at 285, 357 P.3d at 971 (quoting *Parker v. Columbia Pictures Indus.,* 204 F.3d 326, 339–40 (2d Cir. 2000)). "Unlike Rule 15(a)'s liberal amendment policy which focuses on the bad faith of the party seeking to interpose an amendment and the prejudice to the opposing party, Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the amendment.'" *Id.* at 286, 357 P.3d at 971 (quoting *Johnson.*, 975 F.2d at 610). These well-known rules foster the overarching concept that parties must be diligent in pursuing their actions. *See* NRCP 1 ("[The rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.")

"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 met despite the diligence of the party seeking the amendment." *Nutton*, 131 Nev. at 286–87, 357 P.3d at 971 (citation omitted). The district court may look at the following four factors "in assessing whether a party exercised diligence in attempting, but failing, to meet the deadline: (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 (citations omitted). "However, the four

factors are nonexclusive and need not be considered in every case because, ultimately, if the moving party was not diligent in at least attempting to comply with the deadline, the inquiry should end." *Id.* at 287, 357 P.3d at 972 (internal quotations omitted). "[O]f the four factors, the first (the movant's explanation for missing the deadline) is by far the most important and may in many cases be decisive by itself." *Id.* at 287, 357 P.3d at 972 (citations omitted).

The district court did not abuse its discretion when it denied leave to amend to the LLTQ/FERG Defendants under the standard Rule 16 analysis. They were given more than one opportunity to demonstrate good cause to amend their counterclaims. The LLTQ/FERG Defendants were unable or perhaps unwilling to do so. The district court appropriately found that, despite being aware of their claims at the outset of the litigation, the LLTQ/FERG Defendants waited until after the deadline had expired to amend their pleadings to assert claims. The district court specifically 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." (4 AA00761). Because they failed to timely assert their claims before the scheduling order deadline expired, they were required to show "good cause." But, considering the circumstances of the case, the district court found that the LLTQ/FERG Defendants

failed to meet their burden and did not demonstrate "that good cause exists to permit amendment of their counterclaim."

When they were unable to show good cause, the LLTQ/FERG Defendants attempted to obtain a do-over and instead of seeking leave from the district court, simply filed their failed counterclaims in response to Caesars' First Amended Complaint. Notably, the district court did not strike or dismiss the newly asserted counterclaims outright, but instead, once again, conducted a good cause analysis. And, once again, the LLTQ/FERG Defendants failed to show that good cause existed to amend their counterclaims at the late stage of the litigation.

Dissatisfied with the district court's holdings, Appellants advocate that this court adopt a "moderate approach" found in federal case law. However, even the moderate approach offers them no safe harbor. Under the moderate approach, "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 Ent., Inc. v. Khela Bros. Ent.*, 227 F.R.D. 444, 446 (E.D. Va. 2005). The moderate approach, while predominant in the federal caselaw, nevertheless requires "that an amended response reflect the change in theory or scope of the amended complaint [and] is consistent with Rule 15's requirement that an amended pleading must 'plead in response' to the amended pleading." *Id.* at 446–47 (citations

omitted); *see also Bibb Cty. Sch. Dist. v. Dallemand*, No. 5:16-CV-549 (MTT), 2019 WL 1519299, at *3 (M.D. Ga. Apr. 8, 2019) (quoting *Poly-Med, Inc. v. Novus Scientific Pte Ltd.*, 2017 WL 2874715, *2 (D.S.C. July 6, 2017) ("Under this [moderate] approach, a counterclaim may be filed without leave 'only when the amended complaint changes the theory or scope of the case,' and the breadth of the changes in the counterclaim must 'reflect the breadth of the changes in the amended complaint.'"). This Court has not adopted the "moderate approach" and there is no reason to deviate from Nevada's present law in this case because it does not change the outcome.

Appellants argue they should have been permitted to file their amended counterclaims "as a matter of right because the breadth of their changes was *minor* when compared with the breadth" of Caesars' First Amended Complaint. (Opening Br. 62) (emphasis in original). That is not what the moderate approach requires. Instead, "moderate courts attempt to discern whether the defendant's answer *affects the scope of the litigation in a manner commensurate with* the amended complaint." *Virginia Innovation Scis., Inc. v. Samsung Elecs. Co.*, 11 F. Supp. 3d 622, 633 (E.D. Va. 2014) (citations omitted) (emphasis in original). Caesars' First Amended Complaint asserted claims related solely to the kickback scheme that it uncovered in litigation. Although Caesars added five additional claims, they all related to the

discrete issue of Appellants' improper solicitation, coercion, and receipt of kickbacks from Caesars' vendors.

By contrast, the amended counterclaims that Appellants sought to file, would have added claims related to purported breaches of two additional contracts and add allegations of additional purported breaches of the contracts already at issue and for which litigation had been ongoing for years. Indeed, Appellants admit that their counterclaims were based on the "same facts and legal theories previously asserted by them." (Opening Br. 62). And, in the end, there was simply no excuse, good or otherwise, why Appellants delayed in filing claims they were aware of for years' prior and after the deadline to amend pleadings had expired.

C. Despite Appellants' Repeated Requests, there is no Basis to Re-Assign this Matter.

Unsurprisingly, Appellants final request to this Court is to ask (again)[17] that this case be reassigned if remanded. Appellants tried this maneuver in its failed crime-fraud exception writ proceeding. However, just as with every other request for re-assignment they have made, this request is legally flawed. Appellants' reassignment request is effectively akin to a request to disqualify. But "[a] judge is presumed to be unbiased." *Millen v. Eighth Jud. Dist. ex rel. Cnty. of Clark*, 122 Nev. 1245, 1254–55, 148 P.3d 694, 701 (2006). "Moreover, rulings and actions of a

[17] Seibel has made a similar request is Case No. 84934.

judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification." *Matter of Dunleavy*, 104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988) (citation omitted). Instead, "[t]he personal bias necessary to disqualify ***must 'stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case***.'" *Matter of Dunleavy*, 104 Nev. 784, 790, 769 P.2d 1271, 1275 (1988) (quoting *United States v. Beneke*, 449 F.2d 1259, 1260–61 (8th Cir. 1971)) (emphasis added).

The record in this matter reveals that the district court judge's rulings were based solely on the overwhelming evidence and governing legal principles. There is not a whiff of bias or favoritism. Appellants' dissatisfaction with losing the litigation does not provide a basis to re-assign this matter. A reversal (and there should not be one here) does not automatically lead to reassignment and judicial forum shopping. Such an outcome would lead to significant waste of judicial resources and duplication of effort to get a new judge up to speed on this long-running matter. Thus, even if remanded, this case should not be re-assigned.

IV. CONCLUSION

Based on the foregoing, there is no basis to reverse the district court's (a) Findings of Fact, Conclusions of Law, and Order Graning Caesars' Motion for Summary Judgment No. 1; (b) Findings of Fact, Conclusions of Law, and Order: (1)

Denying Craig Green's Motion for Summary Judgment; (2) Granting Caesars' Counter-Motion for Summary Judgment Against Craig Green; and (3) Granting Caesars' Crossmotion for Summary Judgment Against Rowen Seibel and the Seibel-Affiliated Entities (Related to Counts IV-VIII of the First Amended Complaint); or (c) Findings of Fact, Conclusions of Law, and Order Granting Caesars' Motion to Strike the Seibel-Affiliated Entities' Counterclaims, and/or In The Alternative, Motion to Dismiss.

DATED this 21st day of December 2023.

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CERTIFICATE OF COMPLIANCE

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

I further certify that I have read this brief and that it complies with the page or type-volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and 13,997 words.

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

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 21st day of December 2023.

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I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC and that, on this 21st day of December 2023, I electronically filed and served a true and correct copy of the above and foregoing **RESPONDENTS' ANSWERING BRIEF** properly addressed to the following:

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