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

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I. INTRODUCTION

Caesars asks this Court to affirm summary judgment on the Termination Claims and the Marketing Claims.[1] To get there, Caesars espouses its skewed version of events and draws unreasonable inferences in its favor despite being the *moving party* for purposes of NRCP 56(a)—all in a transparent effort to justify a windfall exceeding [redacted].

Starting with the Termination Claims, Caesars argues that summary judgment was proper because (i) Caesars had the "express and unequivocal right to terminate" the Agreements regardless of the implied covenant of good faith and fair dealing, (ii) the Agreements did not afford the Development Entities "an opportunity to cure" or, regardless, the Development Entities were prevented from invoking their cure rights, (iii) the Development Entities acted in bad faith by "attempt[ing] to defraud Caesars," and (iv) the Future Restaurants Clauses are unenforceable. These arguments fail because (i) Caesars' (improper) exercise of its termination rights is a question of fact, (ii) each Agreement contains express cure rights and Caesars could not unilaterally abolish the Development Entities' cure rights given that it (Caesars) continued operating the Restaurants, (iii) the Development Entities' good faith related to Seibel's suitability is a question of fact,

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

and (iv) Caesars already admitted, in writing, that the Future Restaurants Clauses are enforceable (and its public policy argument is pure fiction).

Turning to the Marketing Claims, Caesars argues that summary judgment was proper because (i) Green was never Seibel's employee and acted on his own behalf, (ii) Green benefited from the alleged "scheme" with Seibel to solicit "kickbacks" from vendors, (iii) Green's and Seibel's conduct gives rise to tort-based claims, and (iv) the Development Entities contravened the intent and spirit of the Agreements by condoning Seibel's relationships with Caesars' vendors. These arguments fail because (i) Green was Seibel's agent for purposes of the intra-corporate conspiracy doctrine and acted at Seibel's request, (ii) Green did not benefit from any payments made by vendors to companies owned or controlled by Seibel for legitimate marketing services (e.g., introducing these vendors to Caesars), (iii) Green and Seibel could not legally interfere with the Agreements and neither owed a fraud-based duty to Caesars, and (iv) the Development Entities had nothing to do with—and did not benefit from—Seibel's relationships with Caesars' vendors.

Caesars' rhetoric aside, genuine issues of material fact remain to be decided at trial on the Termination Claims and the Marketing Claims. The district court erred by taking these claims away from the jury.

Upon remanding this matter for a jury trial, this Court should further direct the district court to allow the Development Entities to file their Amended Counterclaims. The issue presented is not, as Caesars argues, whether the Development Entities met NRCP 15's and NRCP 16's requirements but rather, whether the changes in their Amended Counterclaims were comparable in breadth to the changes in Caesars' First Amended Complaint. In short, they were comparable, if not less drastic. And, contrary to Caesars' other argument, the analysis is not driven by comparing the *subject matter* of the amended claims to the *subject matter* of the amended counterclaims—that is the narrow approach that has been squarely rejected by a majority of federal courts deciding this issue. Because the Development Entities satisfied the moderate approach's requirements, the district court erred by striking their Amended Counterclaims.

Finally, although Caesars refuses to admit it, because the judge will have a difficult time putting aside its prior findings about this case, including its views of Seibel's and Green's credibility, reassignment is warranted.

II. ARGUMENT

Caesars presents various arguments to support the district court's MSJ Orders and earlier order striking the Amended Counterclaims. Caesars also opposes the Development Parties' reassignment request. Each of Caesars' arguments is without merit as shown below.

A. The District Court Disregarded NRCP 56's Standards.

In their Opening Brief, the Development Parties demonstrated how the district court, in deciding the MSJs, (i) drew inferences and resolved factual disputes in Caesars' favor and (ii) weighed the evidence and made credibility findings. (Op. Br. 27-31.) In its Answering Brief, Caesars did not argue that the Development Parties are wrong on those points. Instead, Caesars recounts its misleading factual narrative under the guise of "common sense and human experience." (Ans. Br. 4-21, 23-25, 31, 45.) That concept is not a license for a court to adopt *the moving party's* version of events under NRCP 56(a).

Nevertheless, when discussing the Termination Claims, Caesars says that Seibel engaged in a "scheme" to defraud Caesars. (Ans. Br. 1-3, 17-19, 33 n.15.) When it comes to suitability disclosures, Caesars says that its BIF required Seibel to disclose the criminal investigation,[2] that Seibel "actively and intentionally" concealed the investigation from Caesars, and that Caesars executives denied learning about the investigation from Seibel. (*Id.* at 8, 11, 17-20, 35.)

This Court cannot accept those characterizations of the facts when reviewing the Initial MSJ Order. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026,

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[2] The BIF says no such thing. (14 AA2773 at Question 7.)

1029 (2005). Instead, this Court accepts Seibel's testimony, as substantiated by various documents or other testimonial evidence, indicating:

(i) That he told Frederick (and others at Caesars) about the investigation (24 AA4981-83, 5002-03; 28 AA5907, 5923-24; 29 AA6026-27, 6033-35; 30 AA6185-89, 6393 at ¶16);

(ii) That he formed the Trust for legitimate purposes (29 AA6024-25, 6052-53; 30 AA6190-92, 6218);

(iii) That the Trust forbids income derived from the Restaurants from being distributed to *anyone* who Caesars says is unsuitable (25 AA5067-68 at Art. XXIV; *see also* 25 AA5170-71; 30 AA6245-53); and

(iv) That he attempted in good faith to timely dissociate from the Development Entities, but Caesars would not allow it (21 AA4260, 4266-70, 4272-73, 4345-46; 25 AA5170-71; 30 AA6399 at ¶¶13-14, 6403-04 at ¶¶16-20).

Had such evidence been considered, *see Sawyer v. Sugarless Shops Inc.*, 106 Nev. 265, 267-68, 792 P.2d 14, 15-16 (1990) ("All of the non-movant's statements must be accepted as true…."), it would have left unresolved genuine issues of material fact, such as (i) whether Caesars acted in good faith by refusing to work with the Development Entities to permit them to dissociate from Seibel and (ii) whether Seibel, in fact, concealed the investigation from Caesars.

Similarly, when discussing the Marketing Claims, Caesars says that Seibel and Green engaged in a "scheme" to cause different vendors to pay them "kickbacks." (Ans. Br. 3, 23-24, 45.) Caesars further says that it was kept "in the dark" about Seibel's relationships with vendors. (*Id.* at 24.)

This Court cannot accept any of those characterizations of the facts when reviewing the Subsequent MSJ Order. *Wood*, 121 Nev. at 729, 121 P.3d at 1029. Instead, this Court accepts Seibel's testimony, as substantiated by various documents or other testimonial evidence, indicating:

(i) That Caesars was aware of his relationships with vendors (38 AA8161 at ¶6; *see also* 38 AA8164, 8209-11, 8214-16; 39 AA8285-87, 8295, 8393-96),

(ii) That the Agreements did not contain non-circumvention clauses prohibiting a party from pursuing related business opportunities without involving the other party (*see, e.g.*, 34 AA7264-96); and

(iii) That Seibel introduced and promoted these vendors to Caesars so that they could sell their products to Caesars (38 AA8160-61 at ¶¶4-5, 8205-06, 8228, 8234-40, 8243, 8252, 8268-69; 39 AA8290, 8331; 42 AA9135).

So, too, this Court accepts Green's testimony, as substantiated by various documents or other testimonial evidence, indicating:

(i) That he communicated with vendors at Seibel's request (35 AA7425-26, 7432, 7436; 38 AA8175, 8271; 43 AA9125-26 at ¶¶5-7, 9135, 9148, 9152-57),

(ii) That he understood that Seibel's relationships with vendors were proper and known by Caesars (35 AA7427; 38 AA8188, 8192-93, 8268, 8271-72; 39 AA8315, AA8320 at ¶5, 8334-44; 43 AA9126 at ¶¶8-9, 9150-51); and

(iii) That these vendors were paying for marketing (38 AA8188, 8267; *see also* 38 AA8215; 39 AA8290).

Had the district court properly credited such evidence—as the law required it to do—it would have found unresolved issues of material fact, such as (i) whether Caesars knew of Seibel's relationships with vendors and (ii) whether Seibel marketed for these vendors.

"***This is a classic 'he said, she said' (in this case 'he said, he said') situation in which summary judgment is inappropriate because the facts are in diametric opposition***." *Jones v. Tozzi*, 1:05-cv-0148 OWW DLB, 2007 WL 433116, at *11 (E.D. Cal. Feb. 7, 2007) (emphasis added). Indeed, the evidentiary conflicts presented in this case are "first-order determinations" that jurors make at trial. *United States v. Harrison*, 585 F.3d 1155, 1164 (9th Cir. 2009) (Bybee, C.J., concurring in part and dissenting in part). "That is why we have the jury." *Id.*

Because the district court did not decide the MSJs consistent with NRCP 56's standards, this Court should vacate the MSJ Orders. *See Thurston v. City of N. Las Vegas Police Dept.*, 552 F. App'x 640, 642 (9th Cir. 2014).

B. Caesars Continues to Rely on *Inadmissible* Evidence.

As shown in the Opening Brief, the district court relied on inadmissible evidence when deciding the MSJs. Caesars disagrees, arguing that the evidence was admissible. (Ans. Br. 21, 40, 42-43.) Caesars is wrong.

Starting with the Initial MSJ, Exhibit 24 (the Sentencing Submission) is not a public record or a report of official proceedings—it is a legal brief arguing for the imposition of a certain sentence for Seibel and contains attachments that, themselves, constitute inadmissible hearsay. As a result, the brief "is not evidence." *McKenna v. State*, 114 Nev. 1044, 1053, 968 P.2d 739, 745 (1998).

Turning to Exhibits 40-41 (the communications between Caesars and Nevada gaming regulators), these letters contain out-of-court statements that are being offered for the truth of the matters asserted. NRS 51.035; NRS 51.065(1). They also contain information outside the personal knowledge of each author. *Frias v. Valle*, 101 Nev. 219, 221-22, 698 P.2d 875, 876-77 (1985).

More importantly, Caesars prevented the Development Entities from questioning these authors about their letters by asserting the gaming privilege. Because Caesars foreclosed questioning about these letters in discovery, it

"relinquishe[d] the ability to use [them] in its favor at trial."[3] *See Manning v. Buchan*, 357 F. Supp. 2d 1036, 1048 (N.D. Ill. 2004); *see also SNK Corp. of Am. v. Atlus Dream Entm't Co., Ltd.*, 188 F.R.D. 566, 571 (N.D. Cal. 1999). In short, these letters were unfairly prejudicial, and thus, inadmissible. NRS 48.035(1).

As to the Subsequent MSJ, Exhibits 29 and 34 (Caesars' supplemental NRCP 16.1 disclosures and interrogatory responses), Caesars does not explain how its counsel's "breakdown of the damages" is evidentiary in nature or identify the "underlying documents" that corroborate its conclusory responses to written discovery. (*See* Ans. Br. 42.) Absent a proper foundation for these exhibits, they were inadmissible. *Frias*, 101 Nev. at 221-22, 698 P.2d at 876-77.

Notably, Caesars relied on such inadmissible evidence to support the entry of summary judgment (*see* Ans. Br. 15-17, 21)—proof that without these exhibits, the district court should have denied the MSJs. *Schneider v. Cont'l Assur. Co.*, 110 Nev. 1270, 1274, 885 P.2d 572, 575 (1994).

C. The District Court Erred by Deciding the Termination Claims on Summary Judgment.

As set forth in the Opening Brief, Seibel and the Development Entities demonstrated through competent, admissible evidence and supporting legal

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[3] This Court has held that a privilege cannot be used "both as a sword and a shield, to waive when it inures to [a party's] advantage, and wield when it does not." *State v. Depoister*, 21 Nev. 107, 25 P. 1000, 1003 (1891).

authority, that genuine issues of material fact prevented summary judgment on the Termination Claims. (Op. Br. 33-49.) In its Answering Brief, Caesars argues that summary judgment was proper because (i) the implied covenant of good faith and fair dealing did not restrict Caesars' termination rights, (ii) either the Development Entities did not have cure rights or Caesars was allowed to deny them their cure rights due to their alleged prior breaches of the Agreements, (iii) the Development Entities acted in bad faith, and (iv) the Future Restaurants Clauses are unenforceable, either because they violate public policy or are merely agreements to agree. (Ans. Br. 2-3, 8-9, 11-15, 20-21, 32-39.) These arguments fail in turn.

1. Caesars' Literal Compliance with the Agreements is Irrelevant.

According to Caesars, the implied covenant could not be invoked by the Development Entities as a means to prevent Caesars from exercising its termination rights. (Ans. Br. 34.) The argument is legally and factually flawed.

Under Nevada law, damages are recoverable for an implied covenant claim even if the defendant "did not breach its contract"; literal compliance with the contract is irrelevant. *Hilton Hotels Corp. v. Butch Lewis Prods*., 107 Nev. 226, 232, 808 P.2d 919, 922 (1991). As other courts have recognized, an implied covenant claim "does not require a breach of any express provision of the contract." *Jones v. Mississippi Institutions of Higher Learning*, 264 So. 3d 9, 20 (Miss. Ct. App. 2018); *see also Beaudry v. Ins. Co. of the W.*, 50 P.3d 836, 841

(Ariz. Ct. App. 2002). Instead, what matters is whether the party acted in a manner that is "unfaithful to the purpose of the contract." *Hilton Hotels Corp.*, 107 Nev. at 234, 808 P.2d at 923-24.

With that in mind, ***summary judgment did not rise and fall on Caesars' ability to show that it had the unilateral, unfettered discretion to terminate the Agreements after finding that Seibel was unsuitable***. Rather, Caesars had to show that it exercised its termination rights in good faith. *See Club Specialists Int'l LLC v. Keeneland Ass'n*, No. 5:16-cv-345-KKC, 2017 WL 522945, at *5 (E.D. Ky. Feb. 8, 2017) ("In considering whether a party acted in good faith, the issue is not whether [the party] exercised its rights under the [] Agreement, but *how* [the party] exercised its right to terminate the agreement.") (emphasis in original). Whether Caesars did so is a question of fact. *See Consol. Generator-Nevada v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998).

Importantly, an implied covenant claim provides necessary protection where a party exercises its unilateral discretion under a contract "in a way inconsistent with [the other] party's reasonable expectations and by acting in ways not expressly excluded by the contract's terms but which nevertheless bear adversely on the [other] party's reasonably expected benefits of the bargain." *Bike Fashion Corp. v. Kramer*, 46 P.3d 431, 435 (Ariz. Ct. App. 2002). "[T]he covenant has been held … to permit inquiry into a party's exercise of discretion expressly

granted by a contract's terms." *Seidenberg v. Summit Bank*, 791 A.2d 1068, 1076 (N.J. App. Div. 2002). This includes where a party has the power to terminate a contract in its sole and absolute discretion. *Sons of Thunder v. Borden, Inc.*, 690 A.2d 575, 588 (N.J. 1997). Bad faith occurs where a party abuses "a power" granted to it under a contract. RESTATEMENT (SECOND) CONTRACTS § 205 cmt. d (1981); *see United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 511, 780 P.2d 193, 197 (1989) ("Liability for bad faith is strictly tied to the implied-in-law covenant of good faith and fair dealing arising out of an underlying contractual relationship.").

Here, the Agreements do not contemplate their automatic termination if a Development Entity's associate becomes unsuitable. ***Rather, each says that the Development Entity*** [redacted] ***."*** (14 AA2757 at §9.2, 2804 at §11.2, 2847 at §10.2, 2882 at §10.2; 15 AA3004-05 at §11.2, 3071-72 at §11.2.) Thus, the Development Entities reasonably and justifiably expected that they could avoid losing their right to continue receiving fees or a share of the Restaurants' profits even if one of their associates became unsuitable. *MMAWC, LLC v. Zion Wood Obi Wan Tr.*, 135 Nev. 275, 279, 448 P.3d 568, 572 (2019). Like Caesars' motives in exercising its termination rights, the Development Entities' intentions with respect to their cure rights "present a question of fact." *Anvui, LLC v. GL Dragon, LLC*, 123 Nev. 25, 215-16, 163 P.3d 405, 407 (2007).

Moreover, a means existed to cure each Development Entity's affiliation with Seibel so that its Agreement could remain in full force and effect—subject to Caesars' good faith cooperation in the process given that Caesars also retained the unilateral discretion to reject any proposed assignee of Seibel's interests. (*See, e.g.*, 14 AA2849 at §10.2; *see also* 28 AA5720.) But, Caesars rebuffed all efforts to find a suitable third party to acquire Seibel's interests in order to advance its own interests.[4] (21 AA4266-70, 4272-73; 25 AA5170-71; 28 AA5708, 5732, 5736, 5743, 5759, 5763, 5769, 5892; *see also* 25 AA5125.)

Duffield v. First Interstate Bank of Denver, N.A. is instructive. There, a bank exercised discretionary assignment rights granted to it under a borrower's loan documents in response to the borrower's default. 13 F.3d 1403, 1404-05 (10th Cir. 199). As a result, the borrower lost his business. *Id.* at 1405. The borrower sued, alleging that the bank breached the implied covenant of good faith and fair dealing by not affording him any cure rights. *Id.* At trial, the borrower proved that he could have cured his default "had the bank allowed him adequate time to cure." *Id.* at 1406. The jury found—a finding that was affirmed on appeal

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[4] As discussed in the Opening Brief, Seibel's interests could have been sold to a disinterested third party (*see* 25 AA5170-70; 30 AA6232-33) or purchased by Caesars (21 AA4189-95). Either way, Caesars' suitability concerns would have disappeared. (30 AA6231-33 ([redacted] .)

by the Tenth Circuit—that although technically allowed under the loan documents, the bank breached the implied covenant by invoking its assignment rights "without reasonable prior notice and without a good faith basis for doing so." *Id.*

The same logic applies here: The Development Entities lost their interests in the Restaurants (and New Ventures) simply because Caesars chose to terminate the Agreements in lieu of affording the Development Entities their express cure rights. [redacted]. (28 AA5705, 5708-09, 5722, 5727-28, 5732-33, 5743, 5750, 5759-60, 5769.)

Seibel was ready, willing, and able to sell his interests to a disinterested third party that was suitable to Caesars. But again, it was a joint effort given that any proposed assignee had to meet Caesars' suitability requirements. Caesars understood that Seibel would assign his interests and represented to its regulators that [redacted] (16 AA3297-99; *see also* 16 AA3277 (indicating that [redacted]).) Because Caesars arbitrarily prevented the Development Entities from dissociating from Seibel, Caesars denied them their reasonable, justified expectations under the Agreements – *i.e.*, Caesars breached the implied covenant of good faith and fair dealing. (28 AA5765.)

As a last-ditch effort to justify its actions, Caesars says that it had to terminate the Agreements lest it risked jeopardizing its gaming licenses. (Ans. Br. 4-5, 34.) Sayre, who has first-hand experience as a Nevada gaming regulator, dispensed with such fear mongering in his expert report. (28 AA5736-37.)

For these reasons, genuine issues of material fact remain regarding whether Caesars acted in good faith under the Agreements. *Consol. Generator-Nevada*, 114 Nev. at 1312, 971 P.2d at 1256.

2. Caesars Abused its Discretion by Denying the Development Entities Their Cure Rights.

Arguing in the alternative, Caesars argues that it was "not required to provide an opportunity to cure." (Ans. Br. 35.) Caesars wants to "have [its] cake and eat it too." *Ruppert v. Edwards*, 67 Nev. 200, 227, 216 P.2d 616, 629 (1950).

According to Caesars, it could divest the Development Entities of their express cure rights because they were the first to breach the Agreements, thus preventing them from demanding continued compliance on Caesars' part. (Ans. Br. 36.) However, whether the Development Entities allegedly breached the Agreements is a question of fact. *Hoffman v. Eighth Jud. Dist. Ct.*, 90 Nev. 267, 270, 523 P.2d 848, 850 (1974).

That aside, there is a well-recognized exception to Caesars' "first to breach" argument. That is, "[s]eeking to benefit from [a] contract after [a] breach operates

as a conclusive choice depriving the non-breaching party of an excuse for his own non-performance." *Henry v. Masson*, 333 S.W.3d 825, 841 (Tex. App. 2010).

When a party breaches a contract, the non-breaching party has two choices: (i) continue the contract and sue for damages; or (ii) suspend the contract and sue for damages. *See, e.g.*, *Maverick Benefit Advisors, LLC v. Bostrom*, 382 P.3d 753, 758 (Wyo. 2016). The non-breaching party cannot do both, i.e., retain the benefits of the contract and repudiate its burdens. *Bergstrom v. Estate of DeVoe*, 109 Nev. 575, 577, 854 P.2d 860, 861 (1993). By continuing to accept a contract's benefits, the non-breaching party may waive its right to assert breach as a bar to its own performance. *See, e.g.*, *Randy Kinder Excavating, Inc. v. J.A. Manning Constr. Co., Inc.*, 899 F.3d 511, 516 (8th Cir. 2018); *Madden Phillips Const., Inc. v. GGAT Dev. Corp.*, 315 S.W.3d 800, 813 (Tenn. Ct. App. 2009).

Here, Caesars continues to operate the Restaurants (except Serendipity 3) and the New Ventures, despite no longer paying fees to, or sharing in any profits with, the Development Entities. (30 AA6402-03 at ¶¶6-13.) ***Because Caesars continued reaping the benefits of the Agreements, it could not avoid complying with their attendant burdens*** – e.g., affording the Development Entities their express cure rights in dissociating from Seibel so that they could preserve their business relationships with Caesars outside of Seibel. *Bank of Am. Nat'l Trust & Sav. Ass'n v. Smith*, 336 F.2d 528, 529 (9th Cir. 1964) ("If he receives the benefits

he must adopt the burdens.") (citation omitted); *see also Scaffidi v. United Nissan*, 425 F. Supp. 2d 1172, 1183 (D. Nev. 2005). Whether Caesars did so is a question of fact. *Consol. Generator-Nevada*, 114 Nev. at 1312, 971 P.2d at 1256.

3. The District Court Could Not Decide Whether the Development Entities Acted in Good Faith on Summary Judgment.

Further arguing in the alternative, Caesars argues that the Development Entities acted in bad faith, thus preventing them from complaining about Caesars' bad faith. (Ans. Br. 36.) Caesars overlooks that the Development Entities' good faith, like Caesars', is a question of fact. *Consol. Generator-Nevada*, 114 Nev. at 1312, 971 P.2d at 1256.

As noted above, the Development Entities presented evidence showing that Seibel discussed the criminal investigation with Frederick (and others at Caesars). They also presented evidence explaining why Seibel formed the Trust and describing how he tried, multiple times, to speak with Caesars about dissociating from the Development Entities. Although Caesars presented a competing account of the facts, Caesars simply proved that resolving this case requires making credibility determinations—determinations that are exclusively reserved for the jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

In sum, Caesars could not secure summary judgment by creating an issue of fact (i.e., the Development Entities' good faith)—the antithesis of NRCP 56(a).

4. The Future Restaurants Clauses are Enforceable.

Caesars argues that it did not have to involve the Development Entities in the New Ventures because the Future Restaurants Clauses are unenforceable either because they violate public policy or are mere agreements to agree. (Ans. Br. 36-39.) The first argument is entirely of Caesars' creation and the second argument is belied by the record.

Starting with the public policy argument, it is premised on the assumption that each Development Entity sought to preserve Seibel's membership interest. That is not now, nor has it been any Development Entity's position in this case. If Caesars had worked in good faith with the Development Entities to cause them to dissociate from Seibel—as Sayre said that Caesars should have done under these circumstances—then Caesars would have remained under contract with the Development Entities without any continuing or ongoing suitability concerns. Going forward, Caesars could enter into future agreements with the Development Entities or their affiliates because Seibel would no longer be involved. The public policy concern is non-existent.

Turning to the agreement-to-agree argument, Caesars overlooks its own emails acknowledging the enforceability of the Future Restaurants Clauses.[5] (21 AA4222, 4224, 4227; 24 AA4959-60, 4962, 4994-96; 25 AA5168.) In Caesars' words, the existing Agreements, which contain all material terms, served as a "template" for future agreements. (29 AA5969.)

Ultimately, the existence of a contract "is a question of fact." *Anderson v. Sanchez*, 132 Nev. 357, 360, 373 P.3d 860, 863 (2016); *see also Ultracuts Ltd. v. Wal-Mart Stores*, 16 S.W.3d 265, 270 (Ark. Ct. App. 2000). So, too, whether an allegedly omitted term is material or immaterial is a question of fact. *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 378, 283 P.3d 250, 255 (2012).

For these reasons, this Court should find that the Future Restaurants Clauses' enforceability is a question of fact to be decided by the jury. *Svoboda v. Bowers Distillery, Inc.*, 745 F.2d 528, 531 (8th Cir. 1984).

D. The District Court Erred by Deciding the Marketing Claims on Summary Judgment.

As set forth in the Opening Brief, the Development Parties demonstrated through competent, admissible evidence and supporting legal authority, that

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[5] This Court will not have to decide whether the Future Restaurants Clauses are "agreements to agree" if it finds that Caesars may not continue to operate the Restaurants and New Ventures without sharing in their profits with the Development Entities.

genuine issues of material fact prevented summary judgment on the Marketing Claims. (Op. Br. 49-58.) In its Answering Brief, Caesars argues that summary judgment was proper because (i) the intra-corporate conspiracy doctrine did not shield Seibel and Green, who allegedly acted for their own interests, (ii) Seibel and Green benefited from the relationships, (iii) Seibel and Green engaged in illegal conduct and owed fraud-based duties to Caesars, and (iv) the Development Entities allowed Seibel and Green to market for vendors in violation of the implied covenant of good faith and fair dealing. (Ans. Br. 3-4, 23-25, 43-50.) None of these arguments holds water.

1. The Intra-Corporate Conspiracy Doctrine Applies to "Agents"; Regardless, Seibel and Green Did Not Conspire Against Caesars.

Caesars argues that Green (i) was not Seibel's "employee" for purposes of the intra-corporate conspiracy doctrine, and (ii) conspired with Seibel in furtherance of their own interests. (Ans. Br. 43-45.) The first argument defies Nevada law and the second argument ignores competing evidence in the record.

As noted in the Opening Brief, the intra-corporate conspiracy doctrine applies to "[a]gents and employees." *Collins v. Union Fed. Savs. & Loan Ass'n*, 99 Nev. 284, 303, 662 P.2d 610, 622 (1983). An agent is someone's "representative." *Dezzani v. Kern & Associates, Ltd.*, 134 Nev. 61, 67, 412 P.3d

56, 61 (2018). Although Green was not Seibel's employee, he was his agent.[6] (43 AA9125 at ¶¶ 5-6.)

Green's agency aside, he denies acting to advance his interests when speaking with vendors. As shown below, Green worked *for* Seibel; Green did *not* receive a payment from any vendor; and Green was *not* compensated for his services based on maintaining Seibel's relationships with vendors. (38 AA8175; *see also* 35 AA7448; 43 AA9126 at ¶¶10-11.)

Further, Green denies agreeing with Seibel to harm Caesars. To the contrary, Green understood that Caesars was aware of the relationships and that they are common in the industry.[7] (38 AA8192-93; 43 AA9126 at ¶¶8-9.)

Lastly, Green denies that Caesars was harmed by the relationships. To that end, Caesars did not show that the vendors would have charged less for their products, absent paying a marketing fee; or, that the vendors charged more for their products because they were paying marketing fees. Caesars wants this Court to

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[6] Because Green was Seibel's agent, the claim fails because Seibel could not conspire with himself. *Cole v. Univ. of Hartford*, 391 F. Supp. 888, 892 (D. Conn. 1975).

[7] Seibel and Green presented evidence showing that Seibel marketed for different vendors. (38 AA8160 at ¶¶4-5, 8178-81, 8205-06, 8209, 8228-29, 8234, 8243, 8252.) The absence of a formal marketing plan does not mean that Seibel provided no value to these vendors by introducing them to Caesars.

assume that it was harmed, which is improper. *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 424, 851 P.2d 423, 425 (1993).

For these reasons, questions of fact remain to be decided on Caesars' conspiracy claim. *United States v. Crosby*, 294 F.2d 928, 945 (2d Cir. 1961).

2. Green Worked for Seibel Who Marketed for Vendors.

Caesars argues that Seibel and Green benefited from the relationships with vendors because (i) the money paid Green's health insurance and (ii) Seibel reported the profits on his tax returns. (Ans. Br. 46.) Caesars failed to show the absence of a genuine issue of material fact underlying its unjust enrichment claim.

Starting with Green, there is no evidence in the record tying the amounts paid by vendors to payments for Green's health insurance. Equally true, there is no evidence in the record permitting this Court to disregard the corporate fiction and treat Green as interchangeable with the entity that paid his health insurance.

Turning to Seibel, Caesars fails to show why he was precluded from having relationships with vendors. As argued below, the Agreements did not foreclose such relationships. In effect, Caesars used its unjust enrichment claim to impermissibly rewrite the Agreements, which is improper. *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776, 121 P.3d 599, 603 (2005).

Ultimately, because the facts are disputed, the district court erred by deciding Caesars' unjust enrichment claim as a matter of law. *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 381, 283 P.3d 250, 257 (2012).

3. Seibel's and Green's Actions Were Not Wrongful and Neither of Them Owed a Fraud-Based Duty to Caesars.

For purposes of its intentional interference claim, alongside arguing that Green acted for his own interests (discussed above), Caesars argues that Seibel and Green committed "illegal" conduct, thereby losing the privilege granted to an agent from being exposed to a claim for intentional interference with his company's contracts. (Ans. Br. 47-48.) For purposes of its fraud claim, Caesars argues that Seibel and Green each owed a fraud-based duty to Caesars.[8] (Ans. Br. 48-49.) Both arguments are hampered by genuine issues of material fact.

Beginning with the intentional interference claim, Caesars does not explain *how* Seibel and Green engaged in illegal conduct; Caesars merely declares it. As discussed above, Seibel marketed for these vendors consistent with his view of what was permitted by the Agreements. (*See also* 38 AA8161 at ¶7.)

[8] Caesars does not deny that its tort claims are thinly disguised contract claims. (Op. Br. 53-54, 55-56.)

Further, there is no evidence in this record showing that Seibel or Green ever threatened any vendor. Despite having the opportunity to do so, Caesars did not submit an affidavit from any vendor saying that it was threatened.

Turning to the fraud claim, it is a question of fact whether information about the relationships was "peculiarly within the knowledge" of Seibel and Green. *Villalon v. Bowen*, 70 Nev. 456, 467-68, 273 P.2d 409, 414-15 (1954). In fact, there is evidence indicating that Caesars was aware of the relationships (38 AA8164); regardless, Caesars did not explain why it was unable to discover the relationships through an "ordinary investigation." *Id.* at 468, 273 P.2d at 415.

So, too, it is a question of fact whether Seibel and Green created a "false impression" about the relationships with vendors. *Id.* Importantly, there is an absence of evidence in this record showing that Caesars was unaware of the relationships – e.g., Caesars did not provide an affidavit from *anyone* within its organization attesting to its purported unawareness of the relationships.

For these reasons, summary judgment was improper on the intentional interference and fraud claims. *Epperson v. Roloff*, 102 Nev. 206, 210-11, 719 P.2d 799, 802 (1986); *Collins*, 99 Nev. at 300, 662 P.2d at 620.

4. Caesars' Implied Covenant Claim is Nonsensical.

Caesars argues that the Development Entities solicited money from Caesars' vendors in violation of the implied covenant of good faith and fair dealing. (Ans. Br. 49-50.) The argument is detached from reality.

As shown below, the Development Entities did not receive any marketing fees paid by vendors. (38 AA8161 at ¶5; 43 AA9126 at ¶10.) By definition, they did not benefit from these relationships.

Practically speaking, the claim makes no sense. According to Caesars, the money should have been remitted to Caesars and credited toward the Restaurants' operating expenses, which, in turn, would have increased the Restaurants' net profits. The Development Entities were sharing in those profits; thus, any money lost by Caesars was equally lost by the Development Entities.

Moreover, it begs repeating that none of the Agreements forbids Seibel from pursuing business opportunities with the Restaurants' vendors. Absent non-circumvention clauses, it is questionable whether the Development Entities had to bring the relationships to Caesars' attention.

In sum, genuine issues of material fact prevented the grant of summary judgment on Caesars' implied covenant claim. *Hilton Hotels Corp.*, 107 Nev. at, 233, 808 P.2d at 923.

E. The Development Entities Followed the Moderate Approach When Filing Their Amended Counterclaims, as a Matter of Right, in Direct Response to Caesars' First Amended Complaint.

As set forth in the Opening Brief, the Development Entities followed the "moderate approach" under federal law when they filed their Amended Counterclaims. (Op. Br. 58-66.) In its Answering Brief, Caesars argues that the district court correctly struck the Amended Counterclaims because (i) the Development Entities did not comply with NRCP 15(a)'s and NRCP 16(b)'s requirements[9] and (ii) the subject matter of the new claims in the Amended Counterclaims differed from the subject matter of the new claims in the First Amended Complaint. (Ans. Br. 51-57.) Both arguments fall flat.

Preliminarily, Caesars failed to address another argument set forth in the Opening Brief about the propriety of the Amended Counterclaims—*i.e.*, that the Development Entities were required to file them once Caesars was no longer limiting itself to seeking declaratory relief. (Op. Br. 63-64.) Because Caesars

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[9] After improperly reframing the issue to require compliance with NRCP 15 and 16, Caesars argues that this Court should review the district court's decision to strike the Amended Counterclaims for an abuse of discretion. (Ans. Br. 51.) Not quite—this Court reviews *de novo* whether the district court correctly interpreted and applied the Rules of Civil Procedure. *Moseley v. Eighth Jud. Dist. Ct.*, 124 Nev. 654, 662, 188 P.3d 1136, 1142 (2008). Still, the outcome would be the same even if an abuse of discretion standard of review applies because the district court abused its discretion when it misapplied the law. *Walker v. Second Jud. Dist. Ct.*, 136 Nev. 678, 680, 476 P.3d 1194, 1197 (2020).

failed to address this argument, this Court should find that the Development Entities properly asserted their Amended Counterclaims once Caesars sought additional forms of relief. *Polk v. State*, 126 Nev. 180, 185, 233 P.3d 357, 360 (2010) (noting that a party "confess[es] error when [its] answering brief" fails to "address a significant issue raised in the appeal").

1. NRCP 15(a) and NRCP 16(b) Do Not Apply Where a Defendant Files its Amended Counterclaims in Direct Response to a Plaintiff's Amended Complaint That Expands the Theory or Scope of the Case.

Caesars asks this Court to decide whether the district court correctly applied NRCP 15(a) and 16(b) when striking the Amended Counterclaims. (Ans. Br. 51-55.) However, the Rules of Civil Procedure "do not directly address the question of whether a defendant is entitled as a matter of right to assert [amended] counterclaims in answer to an amended complaint, or whether a defendant must first seek leave of court." *UDAP Indus., Inc. v. Bushwacker Backpack & Supply Co.*, CV 16-27-BU-JCL, 2017 WL 1653260, at *2 (D. Mont. May 2, 2017).

Moreover, in filing the Amended Counterclaims, the Development Entities were not seeking to either modify the district court's scheduling order pursuant to NRCP 16(b) or requesting leave to file their Amended Counterclaims pursuant to NRCP 15(a). Rather, they were pleading in direct response to Caesars' First Amended Complaint. The distinction is crucial.

Because the Development Entities were pleading in direct response to Caesars' First Amended Complaint, they were not required to either seek leave to file them or ask the district court to modify its scheduling order before they did.[10] *See, e.g.*, *Poly-Med, Inc. v. Novus Sci. Pte Ltd.*, 8:15-CV-01964-JMC, 2017 WL 2874715, at *2 (D.S.C. July 6, 2017); *Sierra Dev. Co. Plaintiff, v. Chartwell Advisory Group, Ltd. Defendant. Chartwell Advisory Group, Ltd.*, 13CV602 BEN (VPC), 2016 WL 6828200, at *2 (D. Nev. Nov. 18, 2016); *Hydro Eng'g, Inc. v. Petter Investments, Inc.*, 2:11-CV-00139-RJS, 2013 WL 1194732, at *4 (D. Utah Mar. 22, 2013); *Spellbound Dev. Group, Inc. v. Pac. Handy Cutter, Inc.*, SACV 09-951 DOC ANX, 2011 WL 1810961, at *2 (C.D. Cal. May 12, 2011).

2. The Moderate Approach Requires Comparing the Breadth of the Changes in Each Pleading—Without Regard for Subject Matter.

Caesars argues that the Development Entities did not follow the moderate approach when filing their Amended Counterclaims. (Ans. Br. 55-57.) According to Caesars, the new claims in its First Amended Complaint involved different facts from those underlying the claims in its initial Complaint, whereas the new claims in the Development Entities' Amended Counterclaims involved the same facts

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[10] For the same reason, whether certain Development Entities, earlier in the case, presented good cause for amending their counterclaims is irrelevant. The error that is the subject of this appeal occurred when the district court prevented the Development Entities from filing their Amended Counterclaims, as a matter of right, in direct response to Caesars' First Amended Complaint.

underlying the claims in their initial Counterclaims; thus, the Development Entities were allegedly without a right to file them.[11] (*Id.*)

The Development Entities preemptively addressed this argument in their Opening Brief: The moderate approach's proportionality requirement "does not require the changes to [the amended counterclaims] to be directly tied to the changes in the amended complaint." *Va. Innovation Scis. Inc. v. Samsung Elecs. Co.*, 11 F. Supp. 3d 622, 632-33 (E.D. Va. 2014); *see also UDAP Indus.*, 2017 WL1653260, at *3 (indicating that the moderate approach does not require a defendant to "specifically tailor its answer to the amended complaint" (quotation marks and citation omitted)). Rather, a defendant need only show that 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). If "major changes are made to the complaint, then major changes may be made to the response." *Id.*

Here, the changes in the Amended Counterclaims were minimal when compared to the changes in the First Amended Complaint. Through the First Amended Complaint, Caesars asserted five new claims for coercive relief—

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[11] Without saying so, Caesars is arguing the narrow approach. *UDAP Indus.*, 2017 WL1653260, at *2 ("Under the narrow approach, counterclaims as of right are permissible only if they directly relate to the changes in the amended complaint.") (quotation marks and citation omitted).

including an implied covenant claim against the Development Entities—that were based on entirely new legal theories. (5 AA1101-47.) By comparison, although the Development Entities added additional contract-based claims, these claims were based on the same legal theories underlying their existing contract-based claims. (6 AA1231-81.) And, unlike Caesars, the Development Entities did not add any new parties.

Applying the moderate approach, because the changes in the Amended Counterclaims were less drastic than the changes in the First Amended Complaint, the Development Entities were permitted to file them, as a matter of right, in direct response to Caesars' First Amended Complaint. *See Brown v. E.F. Hutton & Co.*, 610 F. Supp. 76, 78 (S.D. Fla. 1985).

F. Reassignment is Warranted.

In their Opening Brief, the Development Parties requested random reassignment of this case on remand. (Op. Br. 66-67.) In its Answering Brief, Caesars argues that reassignment is unwarranted. (Ans Br. 57-58.) The argument is primarily based on convincing this Court that summary judgment was proper. As shown above, it was not.

Due to the number of improper factual findings made and legal conclusions drawn by the district court, random reassignment is warranted. *Wickliffe v. Sunrise*

Hosp., Inc., 104 Nev. 777, 783, 766 P.2d 1322, 1327 (1988); *see also Roe v. Roe*, 139 Nev. Adv. Op. 21, 535 P.3d 274, 292 (Ct. App. 2023).

III. CONCLUSION

The MSJs require resolving genuine issues of material fact due to competing accounts of relevant events by different fact witnesses and competing opinions about the practical consequences of Caesars' actions by different expert witnesses. To overcome this hurdle and grant Caesars' summary judgment motions, the district court decided that "one set of facts is more believable than another." *Nelson v. City of Davis*, 571 F.3d 924, 929 (9th Cir. 2009). That was wrong, and this Court should therefore reverse the MSJ Orders.

Before summary judgment, the Development Entities did what persuasive federal case law said that they could do—*i.e.*, file their Amended Counterclaims in direct response to Caesars' First Amended Complaint. To overcome this hurdle and strike the Amended Counterclaims at Caesars' behest, the district court applied the narrow approach. *UDAP Indus., Inc.*, 2017 WL 1653260, at *3 (explaining how "the narrow approach is no longer viable"). That was wrong, and this Court should therefore reverse the Order striking the Amended Counterclaims.

If this Court agrees and remands for further proceedings, it should also randomly reassign it to a different Department because the judge made unfair credibility determinations about Seibel and Green in deciding this case.

DATED this 26th day of February, 2024.

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NRAP 28.2 CERTIFICATE OF COMPLIANCE

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

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

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

[x] Proportionally spaced, has a typeface of 14 points or more, and contains 6,984 words.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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

EXECUTED on this 26th day of February, 2024.

/s/ Joshua P. Gilmore
JOSHUA P. GILMORE

CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 26th day of February, 2024, service of the Reply Brief was made by electronic service through the Nevada Supreme Court's electronic filing system, electronic service through the Eighth Judicial District Court's electronic filing system, hand delivery, and/or by email as agreed by the parties, and addressed to the following at their last known email address:

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