

1 LIONEL SAWYER & COLLINS
 Samuel S. Lionel (NSB #1766)
 2 slionel@lionelsawyer.com
 Charles H. McCrea, Jr. (NSB #104)
 3 cmccrea@lionelsawyer.com
 Jing Zhao (NSB #11487)
 4 jzahao@lionelsawyer.com
 5 1700 Bank of America Plaza
 300 South Fourth Street
 6 Las Vegas, Nevada 89101
 7 Tel (702) 383-8888
 Fax (702) 383-8845

8 Attorneys for FORUM SHOPS, LLC,
 9 FORUM DEVELOPERS LIMITED
 PARTNERSHIP, SIMON PROPERTY
 10 GROUP LIMITED PARTNERSHIP and
 11 SIMON PROPERTY GROUP, INC.

12 UNITED STATES DISTRICT COURT
 13 DISTRICT OF NEVADA

15 PHASE II CHIN, LLC and LOVE &
 16 MONEY, LLC (formerly dba O.P.M.L.V.,
 LLC),
 17
 18 Plaintiffs,
 19 v.
 20 FORUM SHOPS, LLC, FORUM
 DEVELOPERS LIMITED PARTNERSHIP,
 21 SIMON PROPERTY GROUP LIMITED
 PARTNERSHIP, SIMON PROPERTY
 22 GROUP, INC., CAESARS PALACE CORP.,
 and CAESARS PALACE REALTY CORP.
 23
 24 Defendants,
 25
 26 AND RELATED ACTIONS.

Case No. 2:08-cv-00162-JCM-GWF

**FORUM DEFENDANTS' MOTION
 TO STRIKE JURY DEMAND**

27 Defendants FORUM SHOPS, LLC, FORUM DEVELOPERS LIMITED
 28 PARTNERSHIP, SIMON PROPERTY GROUP LIMITED PARTNERSHIP and SIMON

1 PROPERTY GROUP, INC. (collectively "Forum Defendants") move the Court to strike the jury
2 demand contained in the Complaint filed January 8, 2008 (Doc. 1) by Plaintiffs PHASE II CHIN,
3 LLC and LOVE & MONEY, LLC. This Motion is made and based on FED. R. CIV. P. 12(f) and
4 39(a)(2), the pleadings and papers on file herein, the Memorandum of Points and Authorities that
5 follows and exhibits attached thereto and any oral argument permitted by the Court at a hearing
6 on this Motion.
7

8 MEMORANDUM OF POINTS AND AUTHORITIES

9 I. PRELIMINARY STATEMENT

10 Plaintiffs have filed a demand for jury trial ("Jury Demand") in this matter as part of their
11 Complaint ("Complaint"). The Jury Demand should be stricken because Plaintiffs contractually
12 agreed to waive all rights to a jury trial with respect to all of the claims asserted in the
13 Complaint.
14

15 II. STATEMENT OF FACTS

16 In 1990, Caesar's Palace Realty Corp., as lessor, and Forum Developers Limited
17 Partnership ("Forum Developers"), as lessee, entered into a ground lease on the property
18 underlying the high-end retail mall now known as the Forum Shops at Caesar's Palace (the
19 "Forum Shops").

20 On March 18, 1997, Forum Developers entered into a lease (the "Lease") with GGH
21 Restaurant, LLC ("GGH") of premises in the Forum Shops to be used for the operation of a
22 restaurant (the "Premises").¹ A copy of the Lease is attached as Exhibit 1 hereto. The Lease
23 contains a "Waiver of Trial by Jury" clause, which states:
24

25 To the extent permitted by applicable law, Tenant hereby waives
26 trial by jury in any action, proceeding or counterclaim brought by

27 ¹ Plaintiff Phase II Chin, LLC succeeded to all of the rights and obligations of GGH
28 under the Lease and Forum Shops, LLC succeeded to all of the rights and obligations of Forum
Developers Limited Partnership. See Complaint, ¶ 14 (Doc. 1).

1 either party against the other on any matter whatsoever arising out
2 of or in any way connected with this Lease, the relationship of
3 Landlord and Tenant created hereby, Tenant's use or occupancy of
4 the Premises or any claim or injury or damage.

5 Lease, p. 25, § 18.5.

6 On June 20, 2002 Plaintiff Phase II Chin, LLC ("Chinois") entered into a "Management
7 Agreement" with Plaintiff O.P.M.L.V., LLC, now known as Love & Money, LLC ("L&M"),
8 granting L&M the right to use approximately 10,000 square feet on the second floor of the
9 leasehold premises (the "Premises") as an after-hours club to be operated Wednesday through
10 Sunday from 10:00 PM to 6:00 AM the following day. A copy of the Management Agreement is
11 attached as Exhibit 2 hereto. Under the Management Agreement, L&M agreed to be bound by
12 the terms of the Lease. Section 39 of the Management Agreement states:

13 Manager [L&M] acknowledges that Owner [Chinois] has delivered to
14 Manager a full and complete copy of the Lease. This Agreement and all of the
15 rights of the parties hereto are subject and subordinate to the Lease.

16 On January 8, 2008, Chinois and L&M commenced the instant action in the Eighth
17 Judicial District Court, Clark County, Nevada. On February 7, 2008, Defendants Caesars Palace
18 Corp. and Caesars Palace Realty Corp. filed a Notice of Removal (Doc. 1) removing the action
19 to this Court. Forum Defendants filed a Consent to Removal (Doc. 5) on February 8, 2008.

20 The Complaint filed by Chinois and L&M purports to set forth eight causes of action: (1)
21 Declaratory Relief, (2) Interference with Contractual Relations, (3) Interference with Prospective
22 Business Advantage, (4) Injunctive Relief, (5) Violation of 42 U.S.C. §1981, (6) Breach of the
23 Lease, (7) Conspiracy and (8) Breach of Implied Covenant of Good Faith and Fair Dealing. All
24 of these claims arise out of or are in some way connected with the Lease, the relationship of
25 landlord and tenant created by the Lease, or Chinois' use or occupancy of the Premises and fall
26 squarely within the scope of the jury waiver provision in the Lease.

27

28

1 **III. LEGAL DISCUSSION**

2 **A. Federal Law Allows Parties to Contractually Waive Their Right to a Jury**
3 **Trial.**

4 The right to a jury trial in federal court is a matter of federal law. Simler v. Conner, 372
5 U.S. 221, 222 (1963); Phoenix Leasing Inc. v. Sure Broad., Inc., 843 F.Supp. 1379, 1384 (D.
6 Nev. 1994). Although the right to jury trial in civil cases tried before federal courts is a
7 constitutionally protected right, a contract knowingly and voluntarily executed may waive that
8 right. Phoenix Leasing Inc., 843 F.Supp. at 1384 (citing Okura & Co. (America), Inc. v. Careau
9 Group, 783 F.Supp. 482, 488 (C.D.Cal.1991)). See also Gem Acquisitionco, LLC v. Sorenson
10 Group Holdings, LLC, 2009 WL 3246747 at *4 (N.D. Cal. October 8, 2009) (citing Great Earth
11 Int'l Franchising Corp. v. Milks Dev., 311 F.Supp.2d 419, 436-38 (S.D.N.Y. 2004); Okura, 783
12 F.Supp. 482, 488-89 (C.D. Cal. 1991)) (“Under Federal Rule of Civil Procedure 39(a), a Court
13 may strike a jury demand where the parties have executed a waiver of their right to a jury trial”).
14

15 There is no abstract public policy that disfavors or limits contractual waivers of the right
16 to civil jury trial. Phoenix Leasing Inc., 843 F.Supp. at 1384 (citing Okura, 783 F.Supp. at 488).
17 To determine the validity of a contractual waiver of the right to jury trial, the court will look at
18 whether the waiver was knowing, voluntary and intelligent. Id. (citing Standard Wire & Cable
19 Co. v. AmeriTrust Corp., 697 F.Supp. 368, 375 (C.D. Cal. 1988); Okura, 783 F.Supp. at 488-89).
20

21 Some of the factors used to determine whether a waiver was knowing and intelligent include:
22 “(1) whether there was a gross disparity in bargaining power between the parties; (2) the
23 business or professional experience of the party opposing the waiver; (3) whether the opposing
24 party had an opportunity to negotiate contract terms; and (4) whether the clause containing the
25 waiver was inconspicuous.” Id. (citing Hydramar, Inc. v. General Dynamics Corp., No. 85-1788,
26 1989 WL 159267 (E.D.Pa. December 29, 1989)).
27

28

1 **B. Plaintiffs Waived Their Right to a Jury Trial.**

2 A jury waiver in a contract that is knowingly and voluntarily executed is valid and where,
3 as here, the parties involved are sophisticated business entities, courts are especially inclined to
4 uphold such waivers. For example, in Phoenix Leasing Inc., this Court (Judge Edward C. Reed,
5 Jr.) upheld a jury waiver where the party opposing the waiver was “not a novice but was in fact
6 experienced, professional and sophisticated in business dealings.” 843 F.Supp. at 1385. See
7 also, Charlotte Commercial Group, Inc. v. Fleet National Bank, 288 B.R. 715 (Bankr. M.D. N.C.
8 2003) (jury waiver enforced where contract containing it was negotiated by experienced
9 businessmen represented by counsel); Leasing Services Corp. v. Crane, 804 F.2d 828, 833 (4th
10 Cir. 1986) (enforcing a jury waiver provision and a case that this Court turned to for guidance in
11 Phoenix Leasing, Inc.).

12 In the present case, Plaintiffs -- both represented by competent counsel -- knowingly and
13 voluntarily executed the Lease and Management Agreement. Moreover, the facts in this case
14 satisfy all Hydramar factors. There was no gross disparity in bargaining power between the
15 parties. All parties are sophisticated business entities represented by counsel. All parties also
16 had the opportunity to negotiate contract terms. And the clause containing the jury waiver was
17 not inconspicuous; it was neither printed in a finer text than other provisions nor buried inside
18 another clause. Thus, consistent with the holdings in Phoenix Leasing Inc., Charlotte
19 Commercial Group, Inc. and Leasing Services Corp., the jury waiver should be enforced.

20 **C. Plaintiffs' Claims are Within the Scope of the Jury Waiver.**

21 The jury waiver provision in the Lease expressly applies to “any matter whatsoever
22 arising out of or in any way connected with this Lease, the relationship of Landlord and Tenant
23 created hereby, Tenant’s use or occupancy of the Premises or any claim or injury or damage.”
24 All of the claims asserted in the Complaint filed by Chinois and L&M clearly fall within its
25

1 scope.

2 Where the claims are within the scope of a valid jury waiver, the jury waiver is
3 enforceable against those claims. Phoenix Leasing, Inc., 843 F.Supp. at 1390. See also Gem
4 Acquisitionco, LLC, 2009 WL at * 6 (finding that jury waiver was enforceable with respect to
5 claims for breach of fiduciary duty and unjust enrichment because they “necessarily relate to the
6 interpretation of the Agreement,” and to the determination of the claim of declaratory judgment,
7 which “will necessarily involve interpretation of relevant provisions of the Agreement”).


9 **IV. CONCLUSION**

10 Plaintiffs are sophisticated business entities who were represented by counsel when they
11 executed the contracts at issue in this case. They knowingly and voluntarily entered into those
12 contracts. In doing so, they bound themselves to honor the jury waiver, which is valid and
13 enforceable and should be enforced. Accordingly, the Demand for Jury Trial should be stricken.

14 DATED this 5th day of November 2009.

15 Respectfully submitted,

16 LIONEL SAWYER & COLLINS

17 By: 
18 Samuel S. Lionel (NSB #1766)
19 Charles H. McCrea, Jr. (NSB #104)
20 Jing Zhao (NSB #11487)

21 Attorneys for Defendants FORUM SHOPS,
22 LLC, FORUM DEVELOPERS LIMITED
23 PARTNERSHIP, SIMON PROPERTY
24 GROUP LIMITED PARTNERSHIP, AND
25 SIMON PROPERTY GROUP, INC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of November 2009, I deposited in the United States Mail at Las Vegas, Nevada, a true and correct copy of the foregoing FORUM DEFENDANTS' MOTION TO STRIKE JURY DEMAND enclosed in a sealed envelope upon which first class postage was paid, addressed as follows:

HUNTERTON & ASSOCIATES
C. Stanley Hunterton (NSB #1891)
333 So. Sixth St.
Las Vegas, Nevada 89101

GORENCE & OLIVEROS, P.C.
Louren Oliveros (Pro Hac Vice)
201 12th Street NW
Albuquerque, New Mexico 87102

Counsel for Plaintiffs Phase II Chin, LLC
LLC and Love & Money, LLC

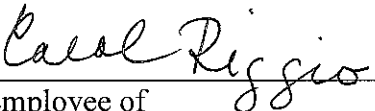
Counsel for Plaintiff Love & Money,

BOWLES & CROW
Robert Jason Bowles (Pro Hac Vice)
P. O. Box 25186
Albuquerque, New Mexico 87125

MORRIS & PETERSON
Steve Morris (NSB #1543)
300 South Fourth Street, Suite 1700
Las Vegas, Nevada 89101

Counsel for Plaintiff Phase II Chin, LLC

Counsel for Defendants Caesars
Palace Corp. and Caesars Palace
Realty Corp.


An Employee of
LIONEL SAWYER & COLLINS