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8 UNITED STATES DISTRICT COURT

9 DISTRICT OF NEVADA

10 PHASE II CHIN, LLC and LOVE &) CASE NO. 2:08-cv-162-JCM-GWF
11 MONEY, LLC, (formerly dba)
12 O.P.M.L.V., LLC,)
13 Plaintiffs,)
14 vs.)
15 FORUM SHOPS, LLC, FORUM) MOTION TO DISMISS THE
16 DEVELOPERS LIMITED) CAESARS DEFENDANTS
17 PARTNERSHIP, SIMON PROPERTY)
18 GROUP LIMITED PARTNERSHIP,)
SIMON PROPERTY GROUP, INC.,)
19 CAESARS PALACE CORP., and)
20 CAESARS PALACE REALTY CORP.,)
Defendants.

21 Defendants Caesars Palace Corp. and Caesars Palace Realty Corp.
22 ("the Caesars defendants") hereby move to dismiss the Complaint filed by
23 plaintiffs Phase II Chin, LLC and Love & Money, LLC, f/k/a O.P.M.L.V., LLC
24 ("plaintiffs" or, individually "plaintiff Chin" and "plaintiff OPM") for failure to
25 state a claim upon which relief can be granted. As grounds, the Caesars
26 defendants hereby join in and incorporate by reference the Motion to Dismiss
27 filed by defendants Forum Shops, LLC, Forum Developers Limited Partnership,

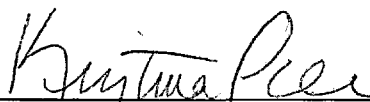
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1 Simon Property Group Limited Partnership, and Simon Property Group, Inc.
2 (collectively, "the Forum defendants") pursuant to Fed. R. Civ. P. 12(b)(6).

3 In seeking dismissal, the Caesars defendants also assert that, unlike
4 the Forum defendants, the Caesars defendants are not alleged to have any
5 contract with the plaintiffs. Of the eight "Causes of Action" in the Complaint,
6 only two or, possibly, three even arguably include the Caesars entities as
7 defendants: The Fifth Cause of Action, entitled "Violation of 42 U.S.C. § 1981";
8 the Seventh Cause of Action, entitled "Conspiracy"; and, possibly, the Eighth
9 Cause of Action, entitled "Breach of Implied Covenant of Good Faith and Fair
10 Dealing." With no alleged underlying contract, however, both the Fifth and
11 Eighth Causes of Action fail as to the Caesars defendants a matter of law. The
12 Caesars defendants thus assert as grounds for dismissal, in addition to those
13 developed in the Forum defendants' Motion to Dismiss, the lack of any alleged
14 underlying contract between any plaintiff and any Caesars defendant.

15 Finally, the Complaint contains wholly gratuitous, unsubstantiated
16 and scandalous allegations about race and racism unconnected to any fact in
17 issue in the lease dispute between the plaintiffs and the Forum defendants that is
18 at the core of this case. If any part of the Complaint survives motion practice,
19 these scurrilous and false allegations can and should be stricken under Fed. R.
20 Civ. P. 12(f).

21 MORRIS PICKERING & PETERSON

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23 By: 
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1 **POINTS AND AUTHORITIES**

2 **I. Introduction**

3 The Complaint includes eight Causes of Action. Of these, only two
4 or possibly three are stated against the Caesars defendants: The Fifth Cause of
5 Action, entitled "Violation of 42 U.S.C. § 1981"; the Seventh Cause of Action,
6 entitled "Conspiracy"; and, possibly, the Eighth Cause of Action, entitled "Breach
7 of Implied Covenant of Good Faith and Fair Dealing." These Causes of Action
8 fail for the reasons amply covered in the Forum defendants' Motion to Dismiss,
9 Docket No. 12, which is incorporated in full here. They fail *as well* for the reason
10 that – as is evidenced by the plaintiffs' exclusion of the Caesars defendants from
11 their straight breach of contract and related injunctive and declaratory relief
12 claims – the plaintiffs do not allege they have a contract with, or contract rights
13 against, either Caesars defendant. With no alleged contract, and no alleged
14 contract rights, plaintiffs' Fifth and Eighth Claims for Relief as to the Caesars
15 defendants fail as a matter of law.

16 **II. The Allegations against the Caesars Defendants.**

17 The gravamen of plaintiffs' complaint against the Caesars
18 defendants is that the Caesars defendants have asked plaintiffs to pay for the
19 extra security personnel required if, as plaintiffs have asked, Caesars leaves the
20 passageway open between its casino and the Forum defendants' adjoining mall
21 after midnight. Plaintiffs do not allege that they have a contract with either
22 Caesars defendant entitling them to have this after-hours access free of charge.¹
23

24 ¹ Plaintiffs' contract claims involve a "Lease" and "Lease Amendment,"
25 which are defined terms of art in the Complaint, ¶¶ 14 and 23, and are alleged to
26 be between the Forum Developer defendant and the Chin plaintiff and the Simon
27 and Forum defendants and the Chin and OPM plaintiffs, respectively. Neither
28 Caesars defendant is alleged to be a party to either the Lease or the Lease
Amendment. The Forum defendants attach as Exhibit C to their Motion to
Dismiss the "Lease Amendment." In it, plaintiffs agree with the Forum
defendants that "Tenant shall pay for all security . . . costs associated with the
Premises after normal Center hours should Landlord [the Forum Defendants]

1 As against the Caesars defendants – as distinguished from the Forum defendants
2 – plaintiffs' claims center instead on generalized – and largely time-barred –
3 complaints about security problems allegedly presented by Caesars' customers at
4 Pure nightclub, Com., ¶¶ 37 - 39, and in its casino and parking structure, *id.* ¶¶
5 51, 53 -55, 58, and plaintiffs' objection to the Caesars defendants' closing the
6 access way from the casino to the Forum Shops mall after midnight, *id.* ¶¶ 58 - 65,
7 unless plaintiffs, who admit they are the sole open tenant in the Forum Shops
8 mall at that hour, *id.* ¶ 60, pay for the after-hours security needed, *id.* ¶ 63.

9 Notably, plaintiffs do *not* allege that they have a contract-based right
10 to have patrons walk through Caesars after midnight to gain access to the Forum
11 Shops mall without paying for security. They do *not* allege that their patrons do
12 not have other means of after-midnight access to plaintiffs' establishment the
13 mall, *see id.* ¶ 60. They do *not* allege that the Caesars defendants' concern with
14 providing adequate security if after-midnight access is allowed is pretextual or
15 illegitimate. And they do *not* allege that Caesars unconditionally refuses to grant
16 after-midnight access through the casino to the Forum Shops mall. As against
17 the Caesars defendants, the complaint before the Court is this:

18 63. Caesars has stated it would be willing to keep the
19 door open only if O.P.M.L.V. paid the entire cost of
20 increased security near the doorway. O.P.M.L.V. is not
21 able to pay the cost of this additional security, and so
22 the door between the Casino and The Forum Shops
23 remains closed during OPM's peak hours of operation.

24 64. This door closure has caused OPM to suffer a
25 significant reduction in its normal average number of
26 patrons between its peak hours of 1 a.m. and 4 a.m.,
27 with a correspondingly substantial loss of income.

28 Furthermore, plaintiffs admit theirs is the only Forum Shops mall
establishment open after midnight. Thus, while their Complaint is long on
speculation and innuendo, plaintiffs cannot plausibly allege they were singled

incur any such charges." *Id.* ¶ 3.

1 out and treated differently from other similarly situated tenants, because they
2 admit there are no such other similarly situated tenants.

3 III. Discussion

4 A. *Plaintiffs' 42 § USC 1981 Claim Fails to State a Claim upon Which* 5 *Relief Can Be Granted*

6 Plaintiffs do not allege state action and thus base their Civil Rights
7 Act claim solely on 42 U.S.C. § 1981, which applies to purely private action.
8 Section 1981 "has a specific function: It protects the equal right of '[a]ll persons
9 with the jurisdiction of the United States' to 'make and enforce contracts' without
10 respect to race." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 474-75 (2006)
11 (internal citations are to 42 U.S.C. § 1981) (distinguished on other grounds). The
12 *sine qua non* of a section 1981 claim is "an impaired 'contractual relationship,' §
13 1981(b), under which the plaintiff has rights." *Id.* at 476. "Section 1981 plaintiffs
14 must allege injuries flowing from a racially motivated breach of their own
15 contractual relationship; not of someone else's." *Id.* at 480.

16 As against the Caesars defendants, plaintiffs' section 1981 claim fails
17 because they allege no contract made or attempted to be made between them
18 and the Caesars' defendants. Their allegations are specific: Defendants have
19 "discriminated against plaintiffs² in the making, performance, and attempted
20 termination of *the Lease and the Lease Amendment. . . .*" Com., ¶ 90 (emphasis
21 added). But the Caesars defendants are not alleged to be party to or involved in
22 the enforcement or attempted termination of either the Lease or the Lease
23 Amendment, which are correctly alleged as between plaintiffs *and the Forum*

24
25 ² As the Forum defendants develop in their Motion to Dismiss, this
26 allegation is problematic too, since plaintiffs are entities, not individuals, and are
27 not alleged to be themselves a protected racial class. The claim is that the race of
28 some of their patrons has subjected them to discrimination, which is insufficient,
Expansion of CBOCS beyond its stated precedent-driven limits is unwarranted.
See Gomez-Perez v. Potter, 128 S.Ct. 1931 (2008) (companion case to CBOCS).

1 *defendants. See note 1, supra.* As against the Caesars defendants, the plaintiffs'
2 Complaint is that, while willing to agree to allow after-midnight access of
3 plaintiffs' patrons through the casino to the otherwise dark Forum Shops mall,
4 the Caesars defendants ask to be reimbursed for the extra security required. By
5 plaintiffs' own reckoning -- they plead no direct contract claim against either
6 Caesars defendant -- this is *not* a contract claim, much less a claim under 42
7 U.S.C. § 1981.

8 The fact the Forum Shops Mall is deserted after midnight, with
9 plaintiffs' establishment the only one still open, also is fatal to their section 1981
10 claim. *See Benton v. Cousins Props., Inc.*, 230 F.Supp.2d 1351 (N.D. Ga. 2002)
11 (African-American plaintiff, who alleged that hotel defendants deprived her of
12 the enjoyment of all the benefits, privileges, terms, and conditions of the
13 contractual relationship that she had with hotel when she arranged to rent a
14 conference room from hotel for holiday bazaar, failed to establish prima facie
15 case under § 1981 since she failed to show that hotel defendants failed to
16 perform any contractual obligation that they undertook with regard to the
17 plaintiff or that they acted to deprive her of the enjoyment of any of the benefits,
18 privileges, terms, or conditions of that contractual relationship, and failed to
19 produce evidence of any similarly situated white exhibitor who was treated
20 differently than plaintiff with regard to the allegedly discriminatory acts;
21 plaintiff's allegations amounted, at most, to "poor service," and plaintiff was the
22 only person who had ever attempted to hold such an event at the hotel, and
23 therefore, no other person - white or black - had been treated as she was).

24 ***B. Plaintiffs' Cause of Action for Conspiracy Should Be Dismissed***
25 ***Because They Have Not Pled Sufficient Facts to Make the Claim***
26 ***Plausible.***

27 In Nevada "[a]n actionable civil conspiracy consists of a combination
28 of two or more persons who, by some concerted action, intend to accomplish an
unlawful objective for the purpose of harming another, and damage results from

1 the act or acts." *Consol. Generator-Nevada, Inc. v. Cummins Engine Co. Inc.* , 114
2 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998). Further, when considering this
3 standard in the context of a Rule 12(b)(6) motion to dismiss, the Plaintiffs must
4 state "enough facts to state a claim to relief that is plausible on its face," *Bell Atl. v.*
5 *Twombly*, 127 S.Ct. 1955, 1974 (2007), that the Caesars defendants conspired with
6 the Forum defendants to accomplish the unlawful objective of discriminating
7 against Plaintiffs in the matter of requiring payment for security required for
8 after-hours access through the casino to the mall.

9 Aside from the conclusory and self serving allegations contained in
10 the Seventh Cause of Action for "Conspiracy" that "defendants" have "acted in
11 concert. . ."intentionally disrupting the contractual relationships between Chinois
12 and O.P.M.L.V.", Com. ¶ 98, no other allegations of conspiracy exist. "[A]
13 plaintiff's obligation to provide the 'grounds' or his 'entitle[ment] to relief'
14 requires more than labels and conclusions, and a formulaic recitation of the
15 elements of a cause of action will not do." *Twombly*, 127 S.Ct. at 1964-65.

16 Allowing a cause of action for conspiracy to continue past Rule
17 12(b)(6) without sufficient specificity to make the claim plausible is inherently
18 expensive and wasteful. "[I]t is only by taking care to require allegations that
19 reach the level suggesting conspiracy that we can hope to avoid the potentially
20 enormous expense of discovery in cases with no 'reasonably founded hope that
21 the [discovery] process will reveal relevant evidence'" *Id.* at 1967. Without more
22 specific allegations of *facts* establishing the "conspiracy" conclusorily alleged to
23 exist, plaintiffs' cause of action for conspiracy must be dismissed.

24 **C. *Plaintiffs' Cause of Action for Breach of the Implied Covenant of***
25 ***Good Faith and Fair Dealing Should Be Dismissed Because There Is***
26 ***No Contract Between Plaintiffs and the Caesars Defendants***

27 Every contract entered into in the state of Nevada contains an
28 implied covenant of good faith and fair dealing. However, any liability under
this doctrine "aris[es] out of an underlying contractual relationship. ...When no

1 contractual relationship exists, no recovery for bad faith is allowed." *United Fire*
2 *Ins. v. McClelland*, 105 Nev. 504, 511, 780 P.2d 193, 197 (1989).

3 Simply put, plaintiffs have not alleged an existing contractual
4 relationship with the Caesars defendants that has been denied or terminated.
5 Each of plaintiffs' claims allege rights under the "Lease" or "Lease Amendment"
6 which they correctly allege is a contractual relationship between plaintiffs and
7 the Forum defendants, not the Caesars defendants. With no allegation of a
8 contractual relationship with either Caesars defendants, plaintiffs have wrongly
9 named the Caesars defendant in their Eighth Cause of action and the Caesars
10 defendants should be dismissed.

11 ***D. Plaintiffs' Complaint Includes Allegations that Should be Stricken***
12 ***Under Fed. R. Civ. P. 12(f)***

13 Rule 12(f) allows the Court to strike any immaterial, impertinent, or
14 scandalous matter from a pleading. The Caesars defendants acknowledge that
15 relief under Rule 12(f) is the exception not the rule and is generally disfavored. 5
16 C C. Wright & A. Miller, *Federal Practice and Procedure: Civil 3d* § 1382, p. 452
17 (West 2004). As the Caesars defendants have here shown, however, plaintiffs'
18 complaint against them comes down to a not-even-contract-based complaint
19 about not having after-midnight access for their patrons through Caesars to the
20 otherwise dark Forum Shops mall to reach their establishment without paying
21 for the extra security required to make such access safe. This core grievance is
22 not actionable and not made actionable by the scandalous and wholly irrelevant
23 series of accusations reprised in section II of this Motion, *supra*, p. 3-4. If any
24 part of the Complaint survives motion practice and is allowed to proceed
25 against any defendant -- even if, as should be ordered, the Caesars defendants
26 are dismissed -- the allegations in paragraphs 30, 34, 35, 37, 40, 42, 51 and 55
27 should be stricken under Fed. R. Civ. P. 12(f).

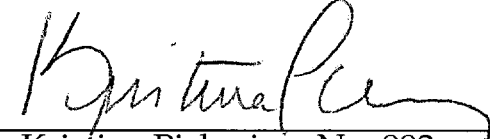
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CONCLUSION

For the foregoing reasons and for the additional reasons stated in the Forum defendants' Motion to Dismiss, the Caesars defendants ask for an order dismissing the Complaint for failure to state a claim against them upon which relief can be granted under federal or state law.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b) and Section IV of District of Nevada Electronic Filing Procedures, I certify that I am an employee of MORRIS PICKERING & PETERSON, and that the following documents were served via electronic service: **MOTION TO DISMISS THE CAESARS DEFENDANTS** TO:

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DATED this 18 day of July, 2008.

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