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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

SIERRA DEVELOPMENT CO.
Plaintiff,

CASE NO. 13cv602 BEN (VPC)

vs.

**ORDER GRANTING IN PART
MOTION FOR SUMMARY
JUDGMENT FOR MGM
COUNTERCLAIM DEFENDANTS,
AGAINST CHARTWELL
ADVISORY GROUP, LTD,
COUNTERCLAIMANT**

[Dkt. # 531]

CHARTWELL ADVISORY GROUP,
LTD.
Defendant.

**ORDER GRANTING
CHARTWELL'S MOTION TO
FILE A THIRD AMENDED
ANSWER AND COUNTERCLAIMS
TO ADD MANDALAY RESORTS
GROUP AS A COUNTERCLAIM
DEFENDANT AND SHORTENING
THE TIME FOR SERVICE AND
RESPONSES**

CHARTWELL ADVISORY GROUP,
LTD.
Counterclaimant,

[Dkt. # 553]

vs.
SIERRA DEVELOPMENT CO., et
al.,
Counterdefendants.

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3 Now before the Court is the Motion for Summary Judgment of the MGM
4 entities, including Counterclaim Defendant MGM Resorts International, Goldstrike
5 Investments, Inc., MSE Investments, Inc., New Castle Corp., and Ramparts, Inc.
6 (the “MGM entities”).

7 Chartwell asserts three counterclaims against the MGM entities in its Second
8 Amended Answer and Counterclaim: (1) breach of contract (nineteenth claim), (2)
9 breach of the duty of good faith and fair dealing (twentieth claim), and (3) unjust
10 enrichment (twenty-first claim). The Court finds there are no genuine issues of
11 material fact as to the first two claims and grants summary judgment to the
12 counterclaim defendants. As to the unjust enrichment claim, however, genuine
13 issues of material fact exist as to the MGM entities.

14 **Background**

15 This case concerns taxes owed to the State of Nevada when a gaming casino
16 or restaurant provides a meal to a patron or an employee on a complimentary basis.
17 Apparently, gaming makes people hungry, because tax refund requests for use
18 taxes¹ paid on those complimentary meals for just the years 2001 through 2008
19 totaled 233 million dollars. Chartwell, an accounting firm, saw a way early on to
20 argue for refunds of the use tax collected on complimentary meals. So, Chartwell
21 approached these Counterclaim defendants and many other Nevada casinos with a
22 proposition: “Let us pursue a use tax refund for you and if we succeed, you pay us a
23 percentage of the tax refund.” Form contracts (titled Professional Services
24 Agreement) were drafted by Chartwell and signed by casino clients. Chartwell went
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26 ¹See e.g., N.R.S. 372.185 (“1. An excise tax is hereby imposed on the storage,
27 use or other consumption in this State of tangible personal property purchased from any
28 retailer on or after July 1, 1955, for storage, use or other consumption in this State at
the rate of 2 percent of the sales price of the property.
2. The tax is imposed with respect to all property which was acquired out of state in a
transaction that would have been a taxable sale if it had occurred within this State.”).

1 to work. Numerous use tax refund requests were submitted to the Nevada
2 Department of Taxation. Lawsuits were filed to test the refund theory. In 2008, the
3 Nevada Supreme Court ruled that the State of Nevada could not lawfully impose a
4 use tax on complimentary meals. *See Sparks Nugget Inc. v. State of Nevada ex rel.*
5 *Dep't. of Taxation*, 179 P.3d 570 (Nev. 2008). Chartwell cheered.

6 However, while closing the window on the collection of use taxes, the
7 Nevada Supreme Court opened a door for the collection of sales taxes on these same
8 complimentary meals. *Id.* at n.15 (“Still, we do not foreclose the possibility that
9 complimentary meals such as the ones at issue in this case may be subject to sales
10 tax where consideration is properly demonstrated.”). The State pushed through the
11 new doorway. The Nevada Department of Taxation began assessing deficiency
12 amounts for unpaid sales tax.² Because the use tax was computed on the wholesale
13 value of the meal, while sales tax is computed on the retail value of the meal, a
14 casino or restaurant faced an even larger sales tax liability. Chartwell did not
15 anticipate that tax twist. Neither did the PSA contracts. More litigation followed
16 with varying results. In 2013, a grand industry-wide settlement was reached.
17 Chartwell did not see that coming either. *See Deviney Deposition*, at 154-155, Exh.
18 1A to Caesars entities Motion for Summary Judgment (“To jump to the chase, we
19 never expected a settlement would take place. . . . We never envisioned that at this
20 point in time. . . . We thought the state would ultimately agree with us or we would
21 lose and we were wrong.”). In essence, the casinos agreed to withdraw their use tax
22 refund requests and the Nevada Department of Taxation agreed to withdraw its sales
23 tax deficiencies, in expectation that the Nevada legislature would pass legislation
24 creating a sales tax moratorium on complimentary meals through the year 2019. It

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26 ² The use tax / sales tax dichotomy can be thought of as two sides of the same tax
27 coin. “The Nevada use tax is complementary to the sales tax imposed on retail
28 purchases made in this state.” *Harrah’s Operating Co. v. State, Dep’t of Taxation*,
321 P.3d 850, 852 (Nev. 2014).

1 was a “walk away” agreement. Legislation was passed. For the MGM entities, it
2 was now clear sailing ahead until at least 2019. Chartwell invoiced its clients. The
3 MGM entities declined to pay the professional services fee. All of this is essentially
4 undisputed by the parties.

5 Legal Standards

6 Summary judgment is appropriate when “there is no genuine dispute as to any
7 material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
8 Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48
9 (1986). “Credibility determinations, the weighing of the evidence, and the drawing
10 of legitimate inferences from the facts are jury functions, not those of a judge
11 The evidence of the non-movant is to be believed, and all justifiable inferences are
12 to be drawn in his favor.” *Anderson*, 477 U.S. at 255 (citing *Adickes v. S.H. Kress*
13 *& Co.*, 398 U.S. 144, 157 (1970)). However, the inferences that may be drawn are
14 not limitless. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626,
15 632 (9th Cir. 1987). Inferences must be based on specific facts and only “‘rational’
16 and ‘reasonable’” inferences may be drawn. *Id.*; *United Steelworkers of Am. v.*
17 *Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir. 1989).

18 A moving party bears the initial burden of showing there are no genuine
19 issues of material fact. *Horphag Research Ltd. v. Garcia*, 475 F.3d 1029, 1035 (9th
20 Cir. 2007) (citing *T.W. Elec. Serv., Inc.*, 809 F.2d at 630). The moving party can do
21 so by negating an essential element of the non-moving party’s case, or by showing
22 that the non-moving party failed to make a showing sufficient to establish an
23 element essential to that party’s case, and on which the party will bear the burden of
24 proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986). As this is the
25 motion of the Counterclaim defendants, this is the approach the movants take here.

26 “Only disputes over facts that might affect the outcome of the suit under the
27 governing law will properly preclude the entry of summary judgment. Factual
28 disputes that are irrelevant or unnecessary will not be counted.” *Anderson*, 477 U.S.

1 at 248. As a general rule, the “mere existence of a scintilla of evidence” will be
2 insufficient to raise a genuine issue of material fact; there must be evidence on
3 which the jury could reasonably find for the non-moving party. *Id.* at 252.
4 “Summary judgment procedure is properly regarded not as a disfavored procedural
5 shortcut, but rather as an integral part of the Federal Rules as a whole, which are
6 designed ‘to secure the just, speedy and inexpensive determination of every
7 action.’” *Celotex Corp.*, 477 U.S. 327 (quoting Fed. R. Civ. P. 1).

8 **Choice of Law – Nevada State Law**

9 To determine the applicable substantive law, a federal court sitting in
10 diversity must apply the choice-of-law rules of the forum. *Narayan v. EGL, Inc.*,
11 616 F.3d 895, 898 (9th Cir. 2010). Nevada’s choice-of-law principles allow parties
12 “within broad limits to choose the law that will determine the validity and effect of
13 their contract” so long as the fixed situs has a substantial relation with the
14 transaction and is not contrary to the public policy of the forum. *Progressive Gulf*
15 *Ins. Co. v. Faehnrich*, 752 F.3d 746, 751 (9th Cir. 2014).³ There are no contracts
16 with the MGM entities. However, applying the substantial relationship test, the
17 Court finds that Nevada law applies.

18 **MGM Entities’ Motion for Summary Judgment**

19 ***a. the contract claims***

20 The MGM entities move for summary judgment based on evidence that none
21 of the entities entered into a contract with Chartwell Advisory Group, Ltd. The only
22 entity contracting with Chartwell was Mandalay Resort Group. *See* Tab A, Exh. 59,
23 Chartwell’s Combined Index, contract dated September 29, 2003. Mandalay Resort
24 Group, however, is not named in the Second Amended Answer and Counterclaim

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26 ³In the absence of a contract provision, Nevada courts apply the “substantial
27 relationship” test. *Consol. Generator–Nev., Inc. v. Cummins Engine Co.*, 971 P.2d
28 1251, 1253 (Nev. 1998). To determine whether a state has a substantial relationship
with a contract, a court considers the following five factors: (1) the place of
contracting; (2) the place of negotiation of the contract; (3) the place of performance;
(4) the location of the subject matter of the contract; and (5) the domicile, residence,
nationality, place of incorporation, and place of business of the parties. *Id.* at 1253–54.

1 although the MGM entities assert that the entity continues to exist. Chartwell has
2 not pointed to admissible evidence that the MGM entities have any contractual
3 relationship with Chartwell. As such, its claims for breach of contract and breach of
4 the duty of good faith and fair dealing that is a part of every contract has no basis.
5 The motion for summary judgment is granted in favor of the MGM entities on the
6 contract-based claims.

7 ***b. the unjust enrichment claim***

8 Unjust enrichment occurs when one party confers a benefit on a second party
9 which accepts and retains the benefit under circumstances such that it would be
10 inequitable to retain the benefit without paying for its value. *Certified Fire Prot.*
11 *Inc. v. Precision Constr.*, 283 P.3d 250, 257 (Nev. 2012) (“Unjust enrichment exists
12 when the plaintiff confers a benefit on the defendant, the defendant appreciates such
13 benefit, and there is acceptance and retention by the defendant of such benefit under
14 circumstances such that it would be inequitable for him to retain the benefit without
15 payment of the value thereof.”). It reaches beyond retention of money. *Id.* (The
16 benefit “can include services beneficial to or at the request of the other, denotes any
17 form of advantage, and is not confined to retention of money or property.”). “The
18 doctrine of unjust enrichment or recovery in quasi contract applies to situations
19 where there is no legal contract but where the person sought to be charged is in
20 possession of money or property which in good conscience and justice he should
21 not retain but should deliver to another or should pay for.” *Leasepartners Corp. v.*
22 *Robert L. Brooks Trust Dated Nov. 12, 1975*, 942 P.2d 182, 187 (Nev. 1997)
23 (quoting 66 Am. Jur. 2d *Restitution* § 11 (1973)). Here, there is evidence that the
24 tax moratorium is a valuable benefit enjoyed by the MGM entities, conferred upon
25 them at least in part by Chartwell’s work in pursuing use tax refunds industry wide,
26 pursuing litigation favorable to casinos, and assisting the State of Nevada in
27 structuring a global settlement and persuading the manifold casinos with refund
28 claims to accept the settlement.

1 The MGM entities argue, in the alternative, that if there were an contract
2 Chartwell cannot pursue the unjust enrichment claim as a matter of law where there
3 is also an existing contract. *McKesson HBOC, Inc. v. New York State Common Ret.*
4 *Fund, Inc.*, 339 F.3d 1087, 1091 (9th Cir. 2003) (a party cannot seek recovery under
5 an unjust enrichment theory if a contract is the measure of the plaintiff’s right);
6 *Leasepartners Corp.*, 942 P.2d at 187 (action based on theory of unjust enrichment
7 not available where there is an express, written contract, because no agreement can
8 be implied when the agreement is express). Of course, if there is no contract with
9 the MGM entities, the argument is irrelevant. If the Mandalay Resorts Group
10 contract were to apply, the law would still permit an unjust enrichment claims where
11 the contract has expired or where the benefit conferred was different from the
12 benefit for which the contract was formed. Here, it appears Nevada law would
13 permit an unjust enrichment claim since the benefit conferred (the industry-wide
14 pursuit of tax relief, the facilitation of a global settlement agreement, and the
15 resulting multi-year tax moratorium) was vastly different in scope and kind from the
16 contracted-for benefit of a tax refund for Mandalay Resort Group.

17 Chartwell has identified evidence that it has conferred a substantial benefit
18 for which it should be compensated by the MGM entities. That evidence is slim;
19 barely more than a scintilla of evidence. It is the declaration of Mr. Deviney, ¶18.
20 See Tab B, Chartwell’s Combined Index. Deviney states, “Chartwell prepared and
21 submitted to the Department at least eight refund petitions pursuant to the MGM
22 PSA seeking a total of \$7,562,940.00.” Nevertheless, the evidence is sufficient to
23 create a genuine issue of material fact on Chartwell’s Counterclaim for unjust
24 enrichment against the MGM entities. The evidence is enough to create a genuine
25 issue of material fact concerning whether the MGM entities received a valuable
26 benefit in the form of the State settlement agreement and tax moratorium conferred
27 upon them by the efforts of Chartwell and for which it would be unjust to retain
28 without payment to Chartwell. The motion for summary judgment is denied on the

1 unjust enrichment claim against the MGM entities.

2 **Chartwell’s Motion to Add Mandalay Resorts Group**

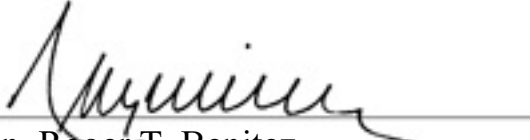
3 In view of the position of the MGM entities that they never contracted with
4 Chartwell, Chartwell seeks leave to add Mandalay Resorts Group (the entity named
5 in their contract) as a Counterclaim defendant. The Court has considered the factors
6 of undue delay, bad faith or dilatory motive, futility of amendment, and prejudice.
7 *Forman v. Davis*, 371 U.S. 178 (1962) (setting out factors). It has considered the
8 extremely liberal policy of freely giving leave to amend when justice requires.
9 *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990). In
10 view of the litigation history, which need not be repeated here, the motion is granted
11 in the interests of justice and in the interests of deciding cases on the merits.

12 **Conclusion**

13 Summary judgment is granted in favor of the Counterclaim defendants MGM
14 entities on the Nineteenth and Twentieth Counterclaims based on contract.
15 Summary judgment is denied on the Twenty-First Counterclaim based on unjust
16 enrichment. Chartwell’s motion to file a third amended answer and counterclaim is
17 granted.

18 Chartwell shall file and serve its amended answer and counterclaims within
19 seven days of this order. Mandalay Resorts Group shall file its answer or otherwise
20 plead within seven days of being served (shortening the time from Rule 12's 21
21 days).

22 DATED: December 14, 2016

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24 Hon. Roger T. Benitez
25 United States District Judge
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