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7 **IN THE UNITED STATES DISTRICT COURT**
FOR THE DISTRICT OF NEVADA

8 Tonkawa Tribe of Indians of) Case No. 2:20-cv-01637-JCM-BNW
9 Oklahoma d/b/a Tonkawa)
Enterprises; Cow Creek Band of)
10 Umpqua Tribe of Indians; and)
Umpqua Indian Development)
11 Corporation)
on behalf of themselves and others)
12 similarly situated,)
Plaintiff,)
13 vs.)
14 Scientific Games Corporation,)
15 Bally Technologies, Inc., and Bally)
Gaming, Inc.,)
16 Defendants.)

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18 **RESPONSE TO MOTION TO DISMISS**
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1 Plaintiffs respectfully submit that the Motion to Dismiss (ECF No. 49) should be denied in
2 all respects. *First*, the Second Amended Complaint (“SAC”) (ECF No. 39) plausibly alleges with
3 particularity the fraudulent concealment necessary to toll the statute of limitation. *Second*, there is
4 no basis to find as a matter of law and in contravention of particular, plausible pleading, Plaintiffs’
5 constructive or actual notice of accrual of their unlawful antitrust price injury as purchasers before
6 2020 because (a) Defendants may not rely on a handful of specialty, obscure press accounts, all
7 extrinsic to the complaint (and not even asserted to have been seen by Plaintiffs); (b) particular,
8 plausible allegation of notice triggering claim investigation in 2020 is assumed true; and (c) even
9 if countenanced, the extrinsic evidence offered does not create any plausible constructive notice
10 triggering reasonable investigation of the merits of complex, intertwined patent, infringement and
11 antitrust law by purchasers. *Third*, tolling allegation poses questions of fact for the jury as to when
12 Plaintiffs reasonably became aware of the accrual of their antitrust price injury.

13 As to Defendants’ arbitration assertion, *first*, with looming, very substantial, and near-term
14 antitrust exposure, and their absolute dominance over the shuffler relevant market with a 100%
15 market share, Defendants’ attempt to impose arbitration provisions that putatively waive their
16 customers’ right to seek treble damages as an antitrust remedy should not be well taken. It is well-
17 established as a matter of law and policy that these provisions are unenforceable as waivers of
18 statutory remedy for federal antitrust violations. *Second*, even if Defendants’ illicit arbitration
19 waivers could be enforced, there are several years of the Plaintiffs’ and alleged class members’
20 monopoly overcharge claims that relate to injuries suffered before Defendants’ specious arbitration
21 agreements were in place. Accordingly, under any analysis of the arbitration clauses, it is beyond
22 reasonable argument that there are several years of Plaintiff and class member damages that should
23 proceed in this Court. *Third*, two individual Plaintiff arbitrations among the hundreds of casinos in
24 the national class should be stayed while this Court addresses other broad, individual and class

1 issues.

2 Finally, this matter should not be transferred to the Northern District of Illinois as per
3 argument previously presented to this Court by Plaintiffs. (ECF No. 33).

4 TOLLING ARGUMENT

5 **I. The Complaint Plausibly Alleges with Particularity the Fraudulent** 6 **Concealment Necessary to Toll the Statute of Limitation**

7 Facts supporting a claim of fraudulent concealment must be pled with particularity under Fed. R.
8 Civ. P. 9(b). 389 *Orange Street Partners v. Arnold*, 179 F.3d 656, 662 (9th Cir.1999); *see also*
9 *Wasco Products, Inc. v. Southwall Technologies, Inc.*, 435 F.3d 989, 991 (9th Cir. 2006).

10 A district court is to presume as true plausibly-alleged facts, that is, detailed evidentiary
11 facts that go beyond bare, conclusory or general assertion. *Bell Atl. Corp. v. Twombly*, 550 U.S.
12 544, 555-56 (2007). “Factual allegations must be enough to raise a right to relief above the
13 speculative level.” *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1159 (9th Cir. 2012); *Bell*
14 *Atl. Corp.*, 550 U.S. at 555. The court must accept “all factual allegations in the complaint as true
15 and construe the pleadings in the light most favorable to the nonmoving party.” *Rowe v. Educ.*
16 *Credit Mgmt. Corp.*, 559 F.3d 1028, 1029–30 (9th Cir. 2009). A district court should not weigh
17 the persuasiveness of the facts alleged, nor dismiss a complaint if it does not present a more
18 compelling set of facts than that argued by defendants. *Swanson v. Citibank, N.A.*, 614 F.3d 400,
19 404 (7th Cir. 2010). To do so “turns the standard for considering a Federal Rule of Civil Procedure
20 12(b)(6) motion on its head.” *Renfro v. Nationstar Mortg., LLC*, 822 F.3d 1241, 1245 (11th Cir.
21 2016).

22 The three Plaintiff casinos detail the circumstances demonstrating Defendants’ fraudulent
23 concealment. SAC ¶¶ 18-50. Even at the summary judgment, let alone dismissal, stage “... a
24 defendant has an extremely difficult burden to show that [fraudulent concealment allegations are]

1 barred as a matter of law” because of controverted factual issues. *In re Coordinated Pretrial*
 2 *Proceedings in Petroleum Prods. Antitrust Litig.*, 782 F. Supp. 487, 489 (C.D. Cal. 1991).

3 A statute of limitation may be tolled if the defendant fraudulently concealed the existence
 4 of a cause of action in such a way that the plaintiff, acting as a reasonable person, did not know of
 5 its existence. *Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055, 1060 (9th Cir. 2012). Tolling
 6 “simply stops the clock until the occurrence of a later event that permits the statute to resume
 7 running.” *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1195 (9th Cir. 2001) (en banc) (emphasis in the
 8 original). “The Ninth Circuit has interpreted Rule 9(b) to mean that the pleader must state the time,
 9 place, and specific content of the false representations as well as the identities of the parties to the
 10 misrepresentation.” *Donovan v. Flamingo Palms Villas, LLC*, No. 2:08-cv-01675, 2009 WL
 11 10693815 at *14 (D. Nev., filed Dec. 15, 2009) (Jones, J.) (internal quotation and citation omitted).

12 The SAC is replete with plausible and detailed allegations of the Defendants’ patten of
 13 long-term and multiple fraudulent concealments of prior art in the examination and reexamination
 14 of the ‘982 and ‘935 patents between 2002 and 2009 before the United States Patent Office. SAC
 15 ¶¶ 34-49. Further, it specifically alleges that Defendants’ misused fraudulent patents in sham or
 16 bad faith infringement actions before this and other federal district courts between 2009 and 2018
 17 where Defendants concealed their fraud by asserting patent validity to exclude competition. SAC
 18 ¶¶ 25-33, 50. All this is sufficient for tolling, and furthermore, these allegations are substantiated
 19 by the verdict entered upon an eleven-day jury trial in the United States District Court for the
 20 Northern District of Illinois. Plaintiffs contend that re-litigation of this conduct is precluded here.
 21 See Plaintiffs’ Motion and Supporting Mem. for Partial Summary Judgment under Estoppel
 22 Doctrine (ECF No. 50). The parties perpetrating the fraud are the Defendants. SAC ¶¶ 8-10. Thus
 23 the “times, places, and specific content” of the fraudulent concealment and misuse of patents
 24 through sham litigation concealing patent fraud are plausibly alleged with particularity.

II. There Is No Basis to Find as a Matter of Law, and in Contravention of Particular, Plausible Pleading, Plaintiffs’ Constructive or Actual Notice of Their Unlawful Antitrust Price Injury Before 2020

A plaintiff must show that it had “neither actual nor constructive knowledge of the facts giving rise to its claim despite its diligence in trying to uncover those facts.” *Conmar Corp. v. Mitsui & Co. (U.S.A.), Inc.*, 858 F.2d 499, 502 (9th Cir. 1988). “The plaintiff is deemed to have had constructive knowledge if it had enough information to warrant an investigation which, if reasonably diligent, would have led to the discovery of the fraud.” *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 275 (9th Cir. 1988).

The specific plausible facts alleged in the SAC that must be assumed true as a matter of law, demonstrate that the three tribal casinos did not have sufficient information to warrant an investigation into Defendants’ conduct until 2020. SAC ¶¶ 58-62; *infra* at 6-7. In an antitrust action, the concealment can be intertwined with the underlying conduct giving rise to the violation, which in this case is the Defendants’ concealment of prior art before the United States Patent Office and their misuse of fraudulent patents through sham infringement actions. *In re Animation Workers Antitrust Litigation* 123 F. Supp. 3d 1175, 1196-97 (N.D. Cal. 2015) citing *Conmar*, 858 F.2d at 499-501; *E.W. French & Sons, Inc. v. Gen. Portland, Inc.*, 885 F.2d 1392, 1394-95, 1399 (9th Cir. 1989); *Volk*, 816 F.2d at 1415-16.

A. Defendants May Not Rely on Assertion Extrinsic to the Complaint

The SAC alleges that the first notice of the possible accrual of antitrust price injury was in 2020 and derived from the final judgment in the *Shuffle Tech* Litigation. SAC ¶¶ 58-62; *infra* at 6-7. The exceptionally thin reeds upon which Defendants rely are extrinsic to the complaint and fall woefully short of their burden to defeat Plaintiff’s tolling allegations as a matter of law. Defendants’ proffer only a scant few financial and law specialty press accounts. Def. Mem. at Exs. B--G. As a matter of law, these relatively obscure articles cannot rebut or contravene the Plaintiffs’

1 particular and express pleading to the contrary. Defendants' reliance upon such a scant and shaky
 2 extrinsic offer of proof is sorely misplaced.

3 Aside from the complaint, district courts have discretion to examine documents
 4 incorporated by reference, *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1160 (9th
 5 Cir.2012); affirmative defenses based on the complaint's allegations, *Sams v. Yahoo! Inc.*,
 713 F.3d 1175, 1179 (9th Cir.2013); and proper subjects of judicial notice, *W. Radio Servs.*
Co. v. Qwest Corp., 678 F.3d 970, 976 (9th Cir.2012).

6 *Alsup v. U.S. Bancorp*, No. 2:14-cv-01515, 2015 WL 6163453 at *3 (E.D. Calif., filed Oct. 19,
 7 2015).

8 The overuse and improper application of judicial notice and the incorporation-by-reference
 9 doctrine, however, can lead to unintended and harmful results. Defendants face an alluring
 10 temptation to pile on numerous documents to their motions to dismiss to undermine the
 11 complaint, and hopefully dismiss the case at an early stage. Yet the unscrupulous use of
 extrinsic documents to resolve competing theories against the complaint risks premature
 dismissals of plausible claims that may turn out to be valid after discovery.

12 *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018). This is particularly the
 13 case here where there is a heightened pleading standard. *See id.*

14 Judicial notice under Rule 201 permits a court to notice an adjudicative fact if it is "not
 15 subject to reasonable dispute." Fed. R. Evid. 201(b). A fact is "not subject to reasonable
 dispute" if it is "generally known," or "can be accurately and readily determined from
 sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(1)–(2).

16 *Id.* at 999.

17 In *Khoja*, the Ninth Circuit found that the district court abused its discretion by dismissing
 18 complaint based on an extrinsic press release, finding that it was not incorporated by reference by
 19 the complaint and "[n]othing in the Complaint connects this information with this press release."

20 *Id.* at 1007.

21 Defendants present obscure, specialty press accounts not referenced by the SAC to support
 22 the proposition that the Plaintiffs had constructive notice "for years" that Defendants had
 23 committed fraudulent concealment before the Patent Office, and engaged in sham or bad faith
 24

1 infringement actions asserting invalid, fraudulently-obtained patents. Def. Mem. at 13-14. They
 2 do *not* claim, as they cannot, that any of the press accounts constituted notice of accrued,
 3 purchaser monopoly overcharge claims. The obscure press accounts relate to infringement
 4 defenses to Defendants' assertions of patents claimed to be valid, and mere *competitor allegation*
 5 of *different* damage remedy. *Infra* at 9-10. Also, Defendants have no answer as to how Plaintiffs
 6 reasonably had notice of the accrual of "monopoly" overcharge claims during the years of these
 7 press accounts when the monopolization at issue was not determined until August 2018 with the
 8 final judgment in the complex *Shuffle Tech Litigation*. Just as importantly, Defendants fail to
 9 establish or even assert that the Plaintiffs ever saw any of these specialty press accounts. And
 10 there is nothing in the complaint to suggest otherwise.

11 Defendants seek to use these obscure press accounts to show Plaintiffs' state of mind and
 12 awareness of injury accrual. That is, as they would have it, Plaintiffs must have seen these
 13 scattered, specialty press accounts (apparently through ethereal, undocumented transmission) and
 14 they must have triggered conscious, constructive notice of purchaser overcharge claims *not*
 15 *asserted by any person*. Surely, Defendants' naked assertions concerning the Plaintiffs' state of
 16 mind and awareness, in contravention of the plausible allegations set forth in the SAC, are
 17 manifestly "subject to reasonable dispute." Fed. R. Evid. 201(b). These facts are not "generally
 18 known," and cannot "be accurately and readily determined." *Khoja*, 899 F.3d at 999.

19 **B. Particular, Plausible Allegation of Notice Triggering**
 20 **Claim Investigation in 2020 Is Assumed True**

21 The three casino Plaintiffs have made detailed and plausible allegations in the SAC
 22 concerning when they were put on notice of the accrual of purchaser antitrust price injury due to
 23 the Defendants' unlawful monopolization behavior:
 24

TOLLING

58. Because of Defendants’ fraudulent patent concealment before the United States PTO beginning in April 2009, and the concealed, sham nature of their litigations (relying on the fraudulent patents) to force multiple competitors from the relevant market, casino Plaintiffs here, as purchasers in the relevant market from the Defendants, were unaware they were suffering actionable, long-term antitrust price injury due to monopolization until June 26, 2020 in the case of the *Tonkawa* Plaintiff, and September 17, 2020 in the case of the *Cow Pen* Plaintiffs, when the record and judgment in *SHFL* was brought to their attention by antitrust counsel Berry Law PLLC.

59. Prior to these times the long-term actionable antitrust price injury and denial of consumer choice suffered by them were unknown to them, and their long-term tribal counsel who represent them here.

60. Upon the notice from antitrust counsel, the tribal counsel diligently and immediately conducted investigations, apprised their tribal Boards, retained antitrust counsel, and brought these matters.

61. The Plaintiff casino purchasers acting as reasonable buyers did not have actual nor constructive knowledge of the facts giving rise to their antitrust injury and claims before 2020. Upon notice by antitrust counsel the casinos exercised due and immediate diligence to uncover the facts alleged here. Only then did they determine that their long-term antitrust injury from the monopolization had become ascertainable.

62. Thus the earliest the statute of limitation began to run in this matter is June 26, 2020, the date of antitrust notice to the *Tonkawa* Plaintiff.

SAC ¶¶ 58-62.

These allegations as to discovery and tolling are “enough to raise a right to relief above the speculative level.” *Bell Atl. Corp.*, 550 U.S. at 555. Further, a district court must assume “all [such] factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party.” *Rowe*, 559 F.3d at 1029–30. A necessary, favorable inference here is that Plaintiffs never saw the extrinsic specialty press articles, even if these articles were capable of triggering purchaser constructive notice.

C. Even If Countenanced, the Extrinsic Evidence Is Not Sufficient Notice Triggering Investigation of the Merits of Complex and Intertwined Patent, Infringement, and Antitrust Law

Even if countenanced, the extrinsic assertion of a handful of obscure articles in law and

1 finance publications did not create constructive notice reasonably warranting an expansive and
2 expensive tribal investigation into the merits of the complex intersection of patent, infringement
3 and antitrust law and the accrual of purchaser claims.

4 *First*, and definitively, Defendants do not assert in their Motion to Dismiss that Plaintiffs
5 ever saw the specialty law and finance articles. *Second*, unlike Defendants' competitors put out of
6 business by the unlawful conduct, and with incentive to begin long-term, expensive antitrust
7 discovery, purchasers like Plaintiffs were not in a position to observe first-hand the merits of the
8 competitor claims. The Defendants carefully concealed their unlawful conduct for over a decade,
9 and it only came to light with the final judgment in the *Shuffle Tech Litigation*. The Plaintiffs had
10 no reasonable basis to investigate the Defendants' behavior or suspect they were engaged in
11 unlawful conduct until the final *Shuffle Tech* judgment was entered, at which time the Plaintiffs
12 first discovered the long-term accrual of purchaser antitrust injury. Even if the statute began to run
13 in August 2018, when the final judgment was entered, Plaintiffs have commenced this litigation
14 years before the statute expires.

15 *Third*, even if Plaintiffs saw the accounts describing competitor antitrust allegations and
16 investigated these allegations, they would have simultaneously become aware that the Defendants'
17 were engaged in a pattern of repetitive and highly-aggressive lawsuits in which they maintained
18 their long-term assertions that the patents at issue *were valid*, and that their competitors were
19 unlawful infringers unable to compete lawfully.

20 As set out above, the detailed and plausible allegations, which include precise dates that
21 Plaintiffs were placed on notice, are alleged to have occurred no earlier than 2020. SAC ¶¶ 58. After
22 the possible availability of purchaser remedy was brought to light by undersigned antitrust counsel,
23 the investigations of long-term tribal counsel, (also appearing here) promptly began, and the claims
24 were filed within months. SAC ¶¶ 58-61. As a consequence, the antitrust statute was tolled until

1 Plaintiffs' discovery in 2020, allowing claims by Plaintiffs and the alleged national casino class
2 for monopoly overcharging from 2009 to the present.

3 *Fourth*, the obscure press accounts, even if seen, do not provide sufficient or detailed facts
4 that could reasonably provide constructive notice to the Plaintiffs of Defendants' purchaser
5 monopoly overcharging. The early *Vending Data* accounts in 2002-2008 offered by Defendants
6 relate to counterclaims by a Defendant in a suit alleging patent infringement by a competitor and
7 did not sound in antitrust. Rather, the press accounts discussed a competitor's alleged "breach of
8 contract, violation of Uniform Trade Secrets Act, conversion, breach of duty to U.S. Patent and
9 Trademark Office, and fraud." Def. Mem. Ex. B. Even if the Plaintiffs were aware of these
10 financial wires, the wires fail to contain information sufficient to put any potential claimants on
11 notice of the accrual of purchaser antitrust price injury due to unproven monopolization under the
12 Sherman Act, 15 U.S.C. § 2.

13 Nor do the early accounts of the competitor claims in the *Shuffle-Tech Litigation* provide
14 constructive notice, if seen. It took four years of pretrial discovery through 2018 to try these
15 different competitor, lost-profit claims and establish the monopolization. Indeed, one of these
16 articles parrots Defendants with a headline claiming that even these different claims were "sunk."
17 Def. Mem. Ex. E. Another account reports that most of these competitor claims were dismissed
18 (leaving only the competitor's claim for sham, bad faith infringement litigation). Def. Mem. Ex.
19 G. The Plaintiffs had not been subject to sham or bad faith infringement actions and their
20 anticompetitive reasons, and such litigation against Defendant competitors does not bring to mind
21 purchaser overcharging even if seen.

22 Not only must the plausible tolling allegations be assumed true and be construed in a light
23 most favorable to the Plaintiffs, it is well settled that the persuasiveness of such facts alleged should
24 not be weighed for purposes of a motion to dismiss. *Twombly*, 550 U.S. at 555-56. Defendants'

request to dismiss Plaintiffs’ allegations on the threadbare, extraneous and ambiguous articles attached to their motion “turns the standard for considering a Federal Rule of Civil Procedure 12(b)(6) motion on its head.” *Renfro*, 822 F.3d at 1245.

III. Whether There Is Tolling Is a Question of Fact for the Jury

Finally, “[o]rdinarily, [this Circuit] leave[s] the question of whether a plaintiff knew or should have become aware of a fraud to the jury.” *Beneficial Standard*, 851 F.2d at 275. Even under a summary judgment standard, much less the more stringent Rule 12(b)(6) standard, the determinations of (a) whether a plaintiff knew or should have known of a cause of action, and (b) when plaintiffs reasonably had constructive knowledge of their claims sufficiently early to render those claims untimely, are factual determinations for the jury to decide. *Volk*, 816 F.2d at 1417; *Petroleum Prods.*, 782 F. Supp. at 489, 498 (denying summary judgment on fraudulent concealment where issues such as whether plaintiffs should have known of their claims, and plaintiffs’ diligence, are for the jury).

IV. Even If the Statute Began to Run in 2016, the Claims Are Timely

Defendants also contend that, if tolling is defeated here as a matter of law and factual issues as to discovery are taken from the jury, the statute began to run on these monopoly overcharge claims in 2016, and they are not timely because there is no “continuing monopolization violation” during this abbreviated damage period. Def. Mem. at 14.

Defendants improperly ignore Plaintiffs’ allegations of the Defendants’ exclusionary conduct and the fact that this conduct continued from 2016 through at least mid-2018. Plaintiffs allege, for example, that Judge Navarro entered summary judgment in 2016 against Defendants’ infringement claims brought against competitor Digideal, a ruling affirmed by the Federal Circuit. SAC ¶¶ 32-33; Ex. C hereto. Years later Defendants took these manifestly bad faith, bogus infringement claims to the Eastern District of Washington and filed a sham reorganization petition

1 on June 13, 2018 seeking to seize competitor Digideal's assets, and impose additional litigation
 2 costs. This *reorganization petition* was wholly independent of the *infringement litigation* in this
 3 Court. It was removed *by two years* from the conclusion of that matter, and lodged *in yet another*
 4 *district court*. *Id.* Given Judge Navarro's ruling completely adverse to the Defendants, the petition
 5 certainly did *not* rely upon her ruling in the Eastern District and perforce was independent of it.
 6 By June 2018 the two patents at issue had been found years before to be fraudulent by (a) Patent
 7 Office reexamination and (b) Judge Navarro and the Federal Circuit. As alleged, and assumed true,
 8 this new sham petition was certainly aimed to harm competitor Digideal with litigation expense
 9 and asset loss. *Id.* ¶ 33.

10 Further, at best, the issue of whether the anticompetitive conduct continued into 2016 and
 11 beyond, is a question of fact for the jury, and Plaintiffs' well-pled allegations of Defendants'
 12 continuing violations and continuing monopoly pricing should be accepted as true.

13 Finally, and just as importantly, the *Shuffle Tech* jury necessarily found that the whole
 14 range of Defendants' exclusionary conduct of patent fraud and sham or bad faith litigation
 15 continued to August 2018. It found that Defendants had been harming competition by
 16 monopolization in the national market for sale to the Plaintiffs and other casinos by inflicting
 17 overcharge damages on their purchases as of that date, and by denial of competitive choice.
 18 Statement of Material Facts at Issue as to Which There Is No Genuine Dispute ¶¶ 3-5 (ECF No.
 19 51). This is two years into even a truncated damage period. The jury did not find that the
 20 continuing exclusionary conduct and monopoly overcharging stopped by 2016.

21 Where, as here, the anticompetitive conduct taken to cause competitive harm continues
 22 well into the four-year statutory period, "[e]ach continuing violation (i.e., each new sale) ...
 23 trigger[s] the statute of limitations anew for that act." *In Re Glumetza Antitrust Litigation*, No.
 24 C 19-05822 at *6 (N.D. Cal., filed March 3, 2020) (Alsup, J.) (emphasis supplied) citing in part

1 *Oliver v. SD-3C LLC*, 751 F.3d, 1081, 1086 (9th Cir. 2014).

2 The SAC alleges antitrust price injury since April 2009, including 2016 to the present, on
3 each machine sale, and each sale triggers the running of the statute anew given the continuing
4 violation after 2016. This secondary timeliness argument by Defendants must fail as well.

5 **ARBITRATION ARGUMENT**

6 **V. With Looming Antitrust Exposure, the Arbitration Clauses Imposed by** 7 **Defendants (as the Only Sellers of the Shuffle Machines) Are Not** 8 **Enforceable as Waivers of Treble-Damage Remedy**

9 Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a), mandates that a private antitrust
10 plaintiff “*shall* recover threefold the damages” sustained. (emphasis supplied). Arbitration
11 provisions that purport to waive this statutory treble-damage remedy are not enforceable. *Kristian*
12 *v. Comcast Corp.*, 446 F.3d 25, 47–48 (1st Cir.2006); *In Re: TFT–LCD (Flat Panel) Antitrust*
13 *Litigation*, No. 13–cv–3349, 2014 WL 1395733 at *4 (N.D. Cal., filed April 10, 2014). *See also*
14 *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 235–36 (2013); *Mitsubishi Motors Corp. v.*
15 *Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) (if a contractual agreement had
16 operated “as a prospective waiver of a party’s right to pursue statutory remedies for antitrust
17 violations, we would have little hesitation in condemning the agreement as against public policy”);
18 *Life Care Centers of America, Inc. v. Estate of Deal*, No. 18–cv–187, 2019 WL 1283006 at * 8
(D.N.M., filed March 20, 2019).

19 In January 2014 the United States Patent Office began reexamination of the Defendants’
20 two patents at issue. This proceeding led to findings that the patents were invalid as fraudulent.
21 Thereupon in 2015 Judge Navarro entered summary judgment against Defendants’ infringement
22 claims against competitor Digideal. Order, *SHFL Entertainment, Inc. v. Digideal Corp.*, No. 2:12–
23 cv–01782 (filed March 30, 2016) (Ex. A hereto). Digideal’s successor and other Defendant
24 competitors filed the *Shuffle Tech Litigation* in April, 2015 leading to the \$315 million treble-

1 damage final judgment. SAC ¶ 1; Statement of Material Facts at Issue as to Which There Is No
 2 Genuine Dispute (ECF No. 51), Berry Decl. Ex. B (ECF No. 1).

3 At the end of 2013, just before the Patent Office began the reexamination proceeding in
 4 January 2014, Defendant Bally Technologies, as the only seller of the card shuffling machines
 5 nationally with absolute dominance in the relevant market, began to require the Plaintiffs (and
 6 presumably at least some other casinos in the alleged national class) to accept new binding
 7 arbitration clauses in their leases which had not been previously required. *Infra* at 15. By this time
 8 Defendants could not have missed that they had looming, substantial antitrust exposure. Against
 9 law and public policy, they set about using their absolute market dominance to require unlawfully
 10 their casino customers to waive their treble damage remedy with binding arbitration provisions.

11 In section 7.1 of the December 5, 2013 Tonkawa master lease agreement, Defendants
 12 commit to “**comply with all federal, state, county, and municipal laws...pertaining to its rights**
 13 **and obligations under this Agreement** at its own cost and expense.” Declaration of R. Stephen
 14 Berry Ex. B hereto Ex.1 (filed under seal) (emphasis supplied).

15 Section 7.13 (“**Limitation of Liability**”) also provides:

16 (b) Save for the negligent actions or omissions of Bally, in no event shall Bally’s **liability**
 17 **for any claim related to or arising out of Equipment leased under this Agreement** or
 18 the operation, design, or performance of such leased equipment **exceed an amount**
equal to lease payments, which amount shall not exceed one year’s lease payments.

19 (c) Save for the negligent actions or omissions of Bally, **in no event shall Bally** or any of
 20 its affiliates, subsidiaries, representatives or agents **be liable for any direct, indirect,**
special, incidental, or consequential damages, including loss of use or revenue.
 (emphasis supplied).

21 Section 6.1 of the April 25, 2015 Umpqua lease agreement also has the Defendant
 22 commitment to obey federal law. Berry Decl. Ex. 5. Section 6.14 (“**Limitation of Liability**”) also
 23 provides:

24 (a) Save for Bally’s gross negligence or willful misconduct, in no event shall Bally’s

liability for any claim related to or arising out of Equipment leased under an order to this Agreement or the operation, design, or performance of such leased equipment *exceed an amount equal to one (1) year's lease payments actually paid by Customer to Bally for such Equipment.*

(b) ***IN NO EVENT SHALL BALLY OR ANY OF ITS AFFILIATES, SUBSIDIARIES, REPRESENTATIVES, OR AGENTS BE LIABLE FOR ANY INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, INCLUDING LOSS OF USE OR REVENUE.***” (capitalization in the original; emphasis supplied)

Thus Defendants improperly attempt to impose upon Plaintiffs broad and unenforceable waivers of the statutory right to treble damage antitrust remedy, whether it is considered direct, indirect, special, incidental, or consequential damages. *Flat Panel Antitrust Litigation*, 2014 WL 1395733 at *8 (arbitration provision waiving antitrust treble damages as “*special damages*” is unenforceable).

There is no ambiguity as to these broad waivers, but even if there were, the Defendants’ form agreement should be construed against them as the drafters under the Nevada choice of law provisions in the lease agreements (Berry Decl. Ex. 1 § 8.4; Ex. 5 § 6.6(d)), and in light of the “surrounding circumstances” demonstrating that Defendants had powerful motivation to seek to evade looming treble-damage remedy. Also, as evidenced by the fact Defendant Bally was the ***only*** seller of the shuffle machines, the Plaintiffs did not have anything approaching “equal bargaining power,” which provides further justification to construe any contractual ambiguities in Plaintiffs’ favor and against the Defendants.

Construction of a contractual term is a question of law, which we review de novo. In interpreting a contract, the court shall effectuate the intent of the parties, which may be determined in light of the surrounding circumstances if not clear from the contract itself. A contract is ambiguous when it is subject to more than one reasonable interpretation. Any ambiguity, moreover, should be construed against the drafter. The parties’ intentions regarding a contractual provision present a question of fact.

Anvui, LLC v. G.L. Dragon, LLC, 163 P. 3d 405, 407 (Nev. 2007) (internal citations and quotations

omitted).¹ Further, at the very least, if the Court cannot resolve any unlikely ambiguity as a matter of law here, the issue as to the “parties’ intention” is a question of fact for the jury.

VI. Several Years of Plaintiffs’ Leasing Overcharge Claims Are Not Covered by Any Arbitration Agreement

With tolling, the Plaintiffs’ and class members’ accrual of antitrust price injury is alleged to have begun in April of 2009. SAC ¶¶ 58-62. The Defendants’ card shuffling business was carried on by Shuffle Master before it was acquired by Bally Technologies in 2013. SAC ¶ 17. The Tonkawa Native Lights Casino leased Shuffle Master machines from September 5, 2007 through December 5, 2013, before Shuffle Master was acquired, and pursuant to lease agreements that had no arbitration provisions. Berry Decl. Exs. 2-4. Thus this Court is the appropriate forum to adjudicate the Plaintiff’s individual and class monopoly overcharge claims for 2009, the beginning of the tolled damage period, through late 2013. Even in the unlikely event that the arbitration clauses above are enforceable, only later years in the tolled damage period would be covered.

Likewise, the Seven Feathers Casino operated by the Umpqua Plaintiffs leased the shuffling machines under Shuffle Master leases between March 2004 through January 2013 without arbitration clauses. Berry Decl. Exs. 6-7. Here as well this Court is the appropriate forum to adjudicate this Plaintiff’s individual and class monopoly overcharge claims for 2009 through early 2013.

VII. Any Enforceable Arbitration of Two Partial, Individual Damage Claims Should Be Stayed While the Court Addresses Other Individual and Class Damage Claims

¹ The Bally form lease seeks to evade such construction. Berry Decl. Ex. 1 § 7.12; Ex. 5 § 6.13. As a matter of Nevada law, Bally should not be successful should the Court find any ambiguity in the waivers, and after considering the “surrounding circumstances” and the unequal bargaining power of the parties (or leave these issues to the jury).

Plaintiffs' claims are not subject to arbitration for the reasons set forth above. Even if the Court were to find the most recent portion of Plaintiffs' individual, treble damage claims are subject to enforceable arbitration, however, this proceeding should continue with respect to Plaintiffs' individual and class claims, as these claims are not subject to arbitration under any analysis. Given the breadth of these class proceedings, a delay waiting for the arbitration of two individual damage claims (and only for portions of those claims) would be of little benefit here, and resolution of individual and class issues may make these two individual arbitrations unnecessary, or at least dramatically streamline them. For example, the grant of partial summary judgment as to monopolization estoppel (ECF Nos. 50, 51) would be of material aid in arbitrations sitting on the Plaintiffs' two individual, later claims, should they prove necessary. *Flat Panel Antitrust Litigation*, 2014 WL 1395733 at *5 (a stay to allow arbitration for only two plaintiffs, and only for a partial damage period, "would have little benefit" for MDL class proceedings given the "breadth and scope" of these proceedings) (whether to stay proceedings is at this Court's discretion).

TRANSFER ARGUMENT

VIII. Transfer Is Not Warranted

Defendants rely on argument in support of transfer to the Northern District of Illinois pursuant to 28 U.S.C. § 1404(a) put forth by non-parties (ECF No. 5). Def. Mem. at 19. In response, Plaintiffs have presented the Court with facts and law why transfer is not appropriate that eclipse Defendants' conclusory assertions devoid of factual analysis. Apparently, Defendants are unwilling or unable to join issue with this prior Plaintiff argument, which is incorporated by reference herein. Memorandum of Law in Opposition to Non-Parties' Motion to Transfer (ECF No. 31) ("Pltf. Transfer Oppos.").

They rely on the non-parties' deficient contention that there are three related cases in

1 Illinois with “substantially the same factual allegations” which, Defendants’ argue, provides a
2 sufficient basis to compel transfer. Def. Mem. at 20. Two of these cases relied upon by Defendants,
3 however, are merely tag-along matters filed on behalf of two defunct casinos after this case at bar
4 was filed, and the Defendants fail to enlighten factually why the mere pendency of these matters
5 demonstrate how moving this case to Illinois over Plaintiffs’ objections would facilitate “ease of
6 access to proof, costs of litigation, and the availability of compulsory process.” Def. Mem. at 20.
7 To the contrary, the facts and law strongly favor Nevada. Pltf. Transfer Oppos. at 4-10.

8 The third and final pending matter relied upon by Defendants is a competitor claim seeking
9 recovery of lost profits, which remedy starkly contrasts and departs from the recovery sought by
10 the Plaintiffs in this case, which is to recover damages for monopoly overcharging. Contrary to
11 Defendants’ assertions, the conflicts raised by these inapposite remedies would not facilitate the
12 instant action being tried with the competitor’s Illinois action. *Id.* at 10-11. Once again, Defendants
13 fail to provide facts as to how or why ease of access to proof, lower costs of litigation, and the
14 availability of compulsory process (Def. Mem. at 20) stem from the mere pendency of this third
15 matter as well.

16 Plaintiffs have demonstrated that the three Oklahoma and Oregon casinos’ choice of forum,
17 where all Defendants are headquartered, is entitled to great weight. *Id.* at 4-6. Defendants assert
18 that this choice is entitled to “less” weight in a class action. Def. Mem. at 21. Even so, in transfer
19 factual balancing, this choice manifestly has substantial weight, particularly because the center of
20 gravity of this litigation is in Nevada. Pltf. Transfer Oppos. at 4-6. *First*, the antitrust violation at
21 issue occurred in, or was directed from, Las Vegas. *Id.* at 5. *Second*, the “paramount consideration
22 in determining whether to transfer venue [is] convenience to material witnesses.” *Chen v. Pioneer*
23 *Oil, LLC*, No. 20-CV-03330, 2020 WL 401676 at *4 (N.D. Cal., filed July 16, 2020). All
24 Defendants are headquartered in Las Vegas and the senior officers, including the general counsel,

1 directed the patent fraud on the United States Patent Office, and multiple sham or bad faith
2 litigations in aid of monopolization, from this location. *Id.* at 5-6. *Third*, the monopoly pricing
3 inflicting antitrust price injury and damages harming the three casinos and members of the alleged
4 national class for well over a decade was likely set here, and initial class discovery will focus on
5 the Defendants' cost and margin records here to show class-wide damages. *Id.*

6 As to factor six in the teachings of *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99
7 (9th Cir. 2000) ("the differences in the costs of litigation in the two forums"), the Defendants'
8 argument is also deficient. *Id.* at 5-9. They do not have any factual support for the notion that
9 litigation costs will be less in Illinois. Def. Mem. at 20. Quite the opposite, it could well be that
10 there will be a much more speedy, less wasteful pretrial and trial in Nevada. This matter is the only
11 casino purchaser action (or competitor action for that matter) alleging collateral estoppel as to the
12 monopolization violation (Pltf. Transfer Oppos. at 5-9) and this issue is now before this Court.
13 Plaintiffs' Motion and Supporting Mem. for Partial Summary Judgment under Estoppel Doctrine
14 (ECF No. 50). As a consequence, at trial of this matter, class casino purchasers of Defendants'
15 card shuffling machines may need only show that they have suffered antitrust price injury in their
16 business or property materially caused by Defendants' monopolization because they paid
17 Defendants' illegal monopoly pricing, as well as their actual damages. *Id.* at 9. Because courts
18 compare (a) the differences in the costs of litigation in the two forums when determining whether
19 to transfer venue for convenience, *Jones*, 211 F.3d at 498-99, and (b) the time of trial in each
20 forum, *Barnes & Noble*, 823 F. Supp. 2d 980, 992-93 (N.D. Cal. 2011), these considerations
21 strongly weigh against transfer.

22 As to *Jones* factors four (contacts with Nevada) and five (contacts relating to the
23 monopolization violation) the center of gravity of this litigation is also Las Vegas, not Chicago.
24 *Id.* at 5-6. By virtue of their corporate headquarters in Las Vegas, the Defendants have numerous

1 contacts in Nevada and, as seen above, directed the monopolization from Nevada over several
2 years. These factors strongly weigh against transfer, particularly since the Defendants have not
3 taken the opportunity to carry their *factual* burden to contest these issues. Def, Mem. at 20-21.

4 Defendants also fail to carry their burden to show whether Nevada or Illinois has an
5 advantage for the exercise of compulsory process. This factor does not weigh in favor of transfer.
6 Pltf. Transfer Oppos. at 9.

7 Since great or substantial weight is given to Plaintiffs' choice of forum, especially when
8 there are strong contacts generally, as well as to the violation, the interests in justice and fairness
9 warrant denial of transfer, particularly given the possible benefit of issue preclusion for a speedy
10 pretrial and trial in Nevada.

11 Finally, the first-filed doctrine does not get the Defendants where they want to go. The
12 doctrine "is to be applied when a complaint involving the *same parties and issues* has *already been*
13 *filed* in another district. Thus, a court analyzes three factors: chronology of the lawsuits, similarity
14 of the parties, and similarity of the issues." *Kutob v. L.A. Insurance Agency Franchising, LLC*, No.
15 2:18-cv-01505, 2018 WL 4286171 at *1 (D. Nev., filed Sept. 7, 2018) (emphasis supplied)
16 (internal quotations and citation omitted) quoting *Kohn Law Grp., Inc. v. Auto Parts Mfg. Miss.,*
17 *Inc.*, 787 F.3d 1237, 1240 (9th Cir. 2015) (internal quotation omitted). Plaintiffs have previously
18 demonstrated that none of the three factors supporting transfer are met here. Pltf. Transfer Oppos.
19 at 10-12.

20 **CONCLUSION**

21 For the foregoing reasons the Motion to Dismiss should be denied as a matter of law in all
22 respects.
23
24

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served via this Court's CM/ECF system and via email on the party listed below this 3rd day of December, 2020.

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