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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TONKAWA TRIBE OF INDIANS OF OKLAHOMA d/b/a TONKAWA ENTERPRISES; COW CREEK BAND OF UMPQUA TRIBE OF INDIANS; and UMPQUA INDIAN DEVELOPMENT CORPORATION, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

SCIENTIFIC GAMES CORPORATION, a Nevada corporation; BALLY TECHNOLOGIES, INC., a Nevada corporation; and BALLY GAMING, INC., a Nevada corporation,

Defendants.

Case No. 2:20-cv-01637-JCM-BNW

REPLY BRIEF IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT OR, IN THE ALTERNATIVE, COMPEL ARBITRATION OR TRANSFER

Defendants Scientific Games Corporation, Bally Technologies, Inc., and SG Gaming, Inc., f/k/a Bally Gaming Inc., (collectively, "Defendants"), by and through their undersigned counsel, hereby submit this reply brief in support of their Motion to Dismiss Plaintiffs' Second Amended Complaint or, in the Alternative, Compel Arbitration or Transfer. (ECF No. 49, the "Motion" or "Op. Br.") In their responsive brief (ECF No. 54, "Resp. Br."), Plaintiffs ignore the dispositive authority cited in Defendants' Motion, and fail to rebut the many arguments demonstrating that this case should be dismissed or, alternatively, removed to arbitration or transferred.

First, Plaintiffs attempt to circumvent the statute of limitations by arguing that Defendants fraudulently concealed their alleged misconduct, that Plaintiffs did not have inquiry notice of the accrual of their claims prior to 2016, and that the alleged antitrust violations continued past the start of the limitations period. Each of those arguments fails. Plaintiffs do not identify any affirmative acts of concealment beyond the alleged acts of fraud that form the basis of their *Walker Process* and sham litigation claims (as they must to survive this motion), they fail to rebut their constructive notice of their alleged injury long before the limitations period, and they identify no continuing antitrust violation within the limitations period. Even accepting as true the allegations in the Second Amended Complaint ("SAC"), Plaintiffs' claims are time-barred.

Second, Plaintiffs misrepresent the substance of the parties' agreements to arbitrate. It is undisputed that Plaintiffs leased automated card shufflers from Defendants pursuant to agreements requiring any disputes to be arbitrated. Plaintiffs seek to escape that commitment by relying on ***different*** provisions in those agreements, which purport to limit liability. Those liability clauses—and disputes regarding their enforceability—are wholly unrelated to the arbitrability of Plaintiffs' antitrust claims. In fact, the agreements include express severability clauses. Plaintiffs are also incorrect in asserting that claims based on purchases prior to the arbitration agreements are subject to the jurisdiction of the federal district courts; rather, their agreements to arbitrate their disputes encompass all claims arising from their lease of automatic card shufflers. And Plaintiffs' last resort to putative class members whose claims may not be subject to arbitration agreements is also an

insufficient basis to deny enforceability of the arbitration provisions. Regardless of other potential plaintiffs with claims against Defendants, the named Plaintiffs in this action should not be permitted to press their claims in federal district court given their agreements to arbitrate.

Finally, Plaintiffs fail to establish that, in the alternative, this action should not be transferred to the District Court for the Northern District of Illinois. There are two actions before that court that contain similar factual allegations, one of which has been pending for more than 20 months, and the other a consolidated putative class action brought by other customers. Close coordination of discovery in those actions, should they proceed on the merits, would plainly reduce all parties' litigation costs and reduce the burden on relevant witnesses.

As set forth below, the SAC should be dismissed, or, in the alternative, the Court should compel arbitration or transfer the action to the Northern District of Illinois.

I. PLAINTIFFS' CLAIMS ARE TIME-BARRED UNDER THE SHERMAN ACT.

Plaintiffs put forth three arguments to avoid the four-year statute of limitations for their antitrust claims: first, that Plaintiffs' conclusory allegations of Defendants' purported fraudulent concealment tolled the statute of limitations; second, that Plaintiffs plausibly allege that they lacked any constructive knowledge of the accrual of their claims; and third, that the alleged antitrust violation continued into the four-year limitations period. None of Plaintiffs' arguments provides a basis for them to avoid the statute of limitations applicable to their claims.

A. Plaintiffs Do Not Adequately Plead Fraudulent Concealment.

The Ninth Circuit has held that the statute of limitations may run in antitrust cases before a plaintiff has actual notice of its antitrust claims. (Op. Br. at 12.) Rather, "[u]nder controlling Supreme Court and Ninth Circuit authority, Plaintiffs' antitrust claims began to accrue at the time of injury." *In re Animation Workers Antitrust Litig.*, 87 F. Supp. 3d 1195, 1208-1209 (N.D. Cal. 2015) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971)); *Beneficial Standard Life Ins. Co. v. Madaraiga*, 851 F.2d 271, 274-75 (9th Cir. 1988). Plaintiffs attempt to rely on an exception to this rule—fraudulent concealment, which tolls a statute of limitations if a

defendant engaged in affirmative conduct to conceal its allegedly unlawful conduct. (Op. Br. at 12-13.) But Plaintiffs' argument fails for two reasons. ***First***, Plaintiffs fail to plead any affirmative acts of concealment by Defendants that prevented them from discovering the nature of their alleged injury, and ***second***, Plaintiffs fail to plausibly allege they had "neither actual nor constructive knowledge of the facts giving rise to [their] claim[s] despite [their] diligence in trying to uncover those facts." *Conmar Corp. v. Mitsui & Co.*, 858 F.2d 499, 502 (9th Cir. 1988).

1. Plaintiffs Do Not Plead Independent Acts of Fraudulent Concealment.

In order for fraudulent concealment to apply, the Plaintiffs must show that the Defendants have affirmatively misled them. *Conmar*, 858 F.2d at 502 (cited in Resp. Br. at 4). A statute of limitations can be tolled, for example, where defendants engage in "affirmative efforts to destroy evidence of [a] conspiracy," such as by "avoid[ing] memorializing conversations, and us[ing] secret codes to refer to coconspirators and topics," *In re Animation Workers Antitrust Litig.*, 87 F. Supp. 3d 1195, 1216 (N.D. Cal 2015) or by creating and using a network of leased phone lines so that "no telephone company record of the call would be made." *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 782 F. Supp. 487, 489-491 (C.D. Cal. 1991) (cited in Resp. Br. at 3). The Ninth Circuit requires a plaintiff to identify something more than allegedly "self-concealing" acts. *Conmar*, 858 F.2d at 505. Plaintiffs neither dispute nor meet this requirement. (Resp. Br. at 2-4.)

Plaintiffs premise their fraudulent concealment argument on several alleged acts by Defendants: that Defendants "conceal[ed] prior art" during patent prosecution, "misused fraudulent patents in sham or bad faith infringement actions," and "asserted patent validity to exclude competition." (Resp. Br. at 3.) But as Defendants explained in their opening brief, these alleged acts are part and parcel of Plaintiffs' underlying *Walker Process* and sham litigation claims, not independent acts of concealment. (Op. Br. at 13.) Regardless of whether these allegations "are plausibly alleged with particularity" (Resp. Br. at 3), they cannot toll the statute of limitations period. They are not—in the words of the Ninth Circuit—sufficient to show that the Defendants

"affirmatively misled" Plaintiffs. *Conmar*, 858 F.2d at 505. District Courts routinely reject fraudulent concealment where plaintiffs allege no acts beyond those constituting the alleged underlying antitrust violation. *See, e.g.*, *Garrison v. Oracle Corp.*, No. 14-cv-04592, 2015 WL 1849517, at *9 (N.D. Cal. Apr. 22, 2015); *Animation Workers*, 87 F. Supp. 3d at 1215; *Global Servs. v. Ikon Office Sols.*, No. 10-cv-05974, 2011 WL 6182425, at *4 (N.D. Cal. Dec. 13, 2011). None of the cases cited by Plaintiffs (Reps. Br. at 4) hold otherwise: in *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1416 (9th Cir. 1987), the court ***rejected*** fraudulent concealment on that basis, and in *Animation Workers*, 123 F. Supp. 3d at 1200-1204 and *E.W. French & Sons, Inc. v. Gen. Portland, Inc.*, 885 F.2d 1392, 1399 (9th Cir. 1989), the courts identified affirmative alleged acts taken with the express purpose to hide the conspiracies.

2. Plaintiffs Do Not Refute Inquiry Notice of Their Alleged Injuries.

Even if Plaintiffs had alleged any affirmative acts of concealment—which they have not—their attempt to toll the statute of limitations still fails because the antitrust allegations against Defendants for sham litigation and patent abuse have been in the public domain for nearly two decades, both reported in relevant law and industry publications and pled in multiple district court cases. (Op. Br. at 13-14.) Because the fraudulent concealment doctrine requires a lack of actual or constructive notice prior to the limitations period, *Conmar*, 858 F.2d at 502, Plaintiffs' claims should be dismissed as untimely. Plaintiffs allege that they "did not have sufficient information to warrant an investigation into Defendants' conduct until 2020." (Resp. at 4.) But this assertion is implausible. Indeed, the SAC expressly argues that this case is "closely related" to the *Shuffle Tech* litigation, which was commenced in 2015, and is "related to" a 2012 action litigated with DigiDeal for more than four years. (SAC at ¶¶ 58-62.) As far back as 2002 and continuing until 2015, the national media reported on accusations that Defendants had committed inequitable conduct in acquiring their patent portfolio and advanced sham litigations in an effort to monopolize the market for automatic shuffling machines. (*See* Op. Br. at 7-8.)

Plaintiffs argue that the allegations made public in the *DigiDeal* and *Shuffle Tech* actions

did not warrant a diligent investigation into their alleged "purchaser monopoly overcharge claims" because those cases were brought by Defendants' ***competitors***, rather than their ***customers***. (Resp. Br. at 5-6, 8-9.) That assertion is wholly inconsistent with Plaintiffs' arguments in support of their Motion for Partial Summary Judgment. Plaintiffs contend that Defendants should be estopped from contesting their antitrust liability because "the issues at stake here are identical to the issues decided in the *Shuffle Tech Litigation*."[1] (ECF No. 50, at 5.) Plaintiffs cannot simultaneously argue that their current claims are sufficiently related to those litigated in *Shuffle Tech* such that collateral estoppel applies, while also insisting that the *Shuffle Tech* litigation was sufficiently different such that it could not have provided inquiry notice of their purported antitrust injury.

Plaintiffs are equally mistaken in their assertion that they had "no reasonable basis to investigate the Defendants' behavior or suspect they were engaged in unlawful conduct ***until the final Shuffle Tech judgment was entered***." (Resp. Br. at 8 (emphasis added); *see also id.* at 11 (*Shuffle Tech* Complaint did not provide notice because "[i]t took four years of pretrial discovery through 2018 to try" the case).) The inquiry notice standard does not require allegations be proven in a court of law; rather, a "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 discovery of the fraud." *Pincay v. Andrews*, 238 F.3d 1106, 1110 (9th Cir. 2001) (quotation omitted). Well before the four-year period prior to Plaintiffs' Complaint, the substance of Plaintiffs' claims had been twice alleged in federal district court, reported in leading law and industry publications, and disclosed in Defendants' regulatory filings. "It is hard to imagine what would constitute 'enough information to warrant an investigation,'" *id.*, if well-pled allegations in two separate court cases, widespread press coverage since 2002, and pertinent 10-K and 10-Q disclosures, do not meet that standard. (*See* Op. Br. at 6-8, 13-15.) Plaintiffs cannot credibly argue that, once made aware of the accusations against Defendants, they had no duty to investigate whether they had suffered an

[1] Defendants dispute that the vacated jury verdict in *Shuffle Tech* has any preclusive effect, or that the issues in this action were actually litigated in that case. (*See* ECF No. 52 at 3.)

antitrust injury simply because Defendants denied those charges. (*Contra* Resp. Br. at 8.)

Plaintiffs also ask this Court to ignore the voluminous media reports of Defendants' alleged misconduct, arguing that such "extrinsic evidence" is not properly considered on a motion to dismiss. (Resp. Br. at 4-6.) Plaintiffs' reliance on *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) for the proposition that the Court should overlook the public allegations against Defendants is misplaced. In that case, a pertinent inquiry was whether the district court could properly notice "adjudicative facts" contained within a conference call transcript presented in a motion to dismiss. *Id.* The Ninth Circuit held that it would be permissible for a district court to "judicially notice[ ] that there was an investors' conference call . . . because that fact can be accurately and readily determined from the transcript," but that it was inappropriate to take judicial notice of the truth of the statements asserted therein. *Id.* at 999-1000. The news articles cited by Defendants clearly fall within the former classification; they are not offered in an attempt to prove the assertions therein (indeed, Defendants continue to deny the alleged antitrust violations), but to establish that, prior to the limitations period, those allegations were publicly known, and that a customer exercising reasonable diligence would have discovered its own purported injury. (Op. Br., Exs. B-G.) It is well-established that courts may consider extrinsic evidence at the Rule 12 stage to determine whether a plaintiff had constructive notice of its claims. (Op. Br. at 7.) "Courts may take judicial notice of publications introduced to indicate what was in the public realm at the time, not whether the contents of those articles were in fact true." *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) (internal quotation and citation omitted) (affirming dismissal of claims as time-barred).

Plaintiffs also repeatedly mischaracterize the publications as "obscure" without identifying them (Resp. Br. at 1, 4, 5, 6, 7, 9): in fact, the accusations against Defendants were reported in a leading international legal publication (Law360), a leading business law publication (Bloomberg Law), and a leading international business publication (Dow Jones Newswire). (Op. Br. at 7-8, Exs. B-G.) Similarly, Plaintiffs attempt to avoid the news reports on the basis that "Defendants

fail to establish or even assert that the Plaintiffs ever saw any of these specialty press accounts." (Resp. Br. at 6.) But Plaintiffs again misstate the controlling legal standards. The inquiry notice analysis is "objective," not subjective. *Benak ex rel. All. Premier Growth Fund v. All. Capital Mgmt. L.P.*, 435 F.3d 396, 401 n.15 (3d Cir. 2006). "***Whether [Plaintiffs] read the articles or were aware of them is immaterial***." *Id.* (Emphasis added.) The articles "serve only to indicate what was in the public realm at the time," and thus that an ***objectively reasonable plaintiff*** would have investigated its claims. *Id*. (Emphasis added.) It is beyond any reasonable dispute that the allegations against Defendants that form the basis of the SAC were "in the public realm" more than four years before Plaintiffs sued. Plaintiffs cannot justify their dilatory conduct in waiting until 2020 to bring suit merely by relying on their implausible allegations that they did not have "actual nor constructive notice of the facts giving rise to their antitrust injury and claims before 2020," and the Court need not accept such conclusory assertions as true. (*Contra* Resp. Br. at 7, quoting SAC at ¶¶ 58-62.)

In short, based on the allegations in Plaintiffs' SAC, they cannot establish that fraudulent concealment should apply to toll the applicable 4 year statute of limitations.

B. Plaintiffs Do Not Plead A Continuing Antitrust Violations.

Plaintiffs assert that if the statute of limitations is not tolled, their claims are still timely because of alleged continuing violations of the Sherman Act after 2016. (Resp. Br. 10-12.) Plaintiffs purport to establish a continuing violation based on (1) continued payment of allegedly supracompetitive lease rates; and (2) Defendants' bankruptcy filings against DigiDeal in 2018. Plaintiffs are misguided, as neither of these allegations constitutes a continuing violation.

In order to restart the statute of limitations, Plaintiffs must identify "a new and independent act that is not merely a reaffirmation of a previous act." *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 238 (9th Cir. 1987). (*See also* Op. Br. at 14-15 (collecting cases).) Courts have squarely rejected the continuing violation doctrine in the present context, where Plaintiffs allege only ***unilateral*** "continuing exclusionary conduct and monopoly overcharging" that began prior

to the limitations period and continued during it. (Resp. Br. at 11.) In such circumstances, "all of the harm occurred at the time of the initial violation." *Westlake Servs., LLC v. Credit Acceptance Corp.*, No. 15-cv-07490, 2017 WL 8948263, at *4 (C.D. Cal. Dec. 28, 2017). Conspiracy cases—which this case is not—are different. In the context of an alleged conspiracy, each sale may constitute a new act in furtherance of the conspiracy. (*See* Op. Br. at 14 n.7.)

Plaintiffs do not dispute, or even respond to, this well-established law. The lone case cited by Plaintiffs to support their continuing violation theory, *In re Glumetza Antitrust Litig.*, presented an alleged antitrust conspiracy, involving a reverse-payment scheme for generic pharmaceuticals; each sale thus constituted a new and distinct act in furtherance of the bilateral market allocation scheme. No. 19-cv-05822, 2020 WL 1066934, at *1, *5-6 (N.D. Cal. Mar. 5, 2020) (expressly limiting its application to "a conspiracy to violate antitrust laws"). As explained in Defendants' opening brief and above, for Plaintiffs' ***unilateral*** conduct claims (*Walker Process* and sham litigation), Defendants' further sales and leases of shufflers to Plaintiffs are not in furtherance of an alleged conspiracy and cannot constitute a continuing violation.

Plaintiffs next contend that Defendants' filing in DigiDeal's 2018 bankruptcy constitutes a new sham litigation, which establishes a "continuing monopolization violation" that could restart the statute of limitations. (Resp. Br. at 10-11.) But again, Plaintiffs misconstrue the facts and law. As Defendants explained, the filing was merely a motion to extend the bar date in bankruptcy to permit one of Defendants' predecessor entities (SHFL) to pursue a judgment from a 2012 infringement litigation against DigiDeal. It was not a new claim or "sham litigation," and "[f]or statute of limitations purposes, it is well established that the filing of a proof of claim is not the equivalent of a commencement of a civil case." (Op. Br. at 11-12 n.5 (collecting cases).) Plaintiffs are also incorrect in asserting that by the time of this filing, "the two patents at issue had been found years before to be fraudulent by (a) Patent Office reexamination and (b) Judge Navarro and the Federal Circuit." (Resp. Br. at 11.) Neither patent was held to be "fraudulent" at any time in the infringement litigation or the reexamination proceedings. In fact, both patents issued after

reexamination, and the question before Judge Navarro and the Federal Circuit was whether claim amendments entered during reissue extinguished SHFL's infringement claims. (*See* ECF No. 54-1 at 5; *SHFL Entertainment, Inc. v. DigiDeal Corp.*, 729 F. App'x 931, 932 (Fed. Cir. 2018).)

Lastly, Plaintiffs cannot escape dismissal by arguing that "the issue of whether the anticompetitive conduct continued into 2016 and beyond is a question of fact for the jury." (Resp. Br. at 11.) In order to raise a facially sufficient claim (let alone a jury question), Plaintiffs need to plausibly allege anticompetitive conduct during the limitations period, and they have not done so.

II. PLAINTIFFS' AGREEMENTS TO ARBITRATE THEIR CLAIMS CONTROL.

If the SAC is not dismissed—which it should be—then the Court should compel arbitration on all claims, as each Plaintiff is bound by its agreement to arbitrate all disputes with Defendants arising from their lease of automated shuffling machines. (Op. Br. at 16-19.) Plaintiffs do not dispute that they are required to arbitrate their claims on an individual, rather than class-wide basis, but attempt to avoid those prior agreements by contending that the arbitration clauses are not enforceable, and that certain claims are not arbitrable. (Resp. Br. at 12-16.) Plaintiffs are mistaken.

A. The Arbitration Clauses are Enforceable.

Plaintiffs apparently concede that their claims fall within the scope of their prior broad agreements to arbitrate. (*See* Op. Br. at 17-18.) However, Plaintiffs contend that the arbitration provisions are unenforceable because "Defendants improperly attempt to impose upon Plaintiffs broad and unenforceable waivers of the statutory right to treble damage antitrust remedy." (Resp. Br. at 14.) Plaintiffs argue that Defendants engaged in a concerted effort to skirt "looming, substantial antitrust exposure" starting in 2013—more than a year before the first antitrust action was filed by *Shuffle Tech*—by "requir[ing] unlawfully their casino customers to waive their treble damage remedy with binding arbitration provisions." (*Id.* at 13.) Such an assertion is unsupported by allegations or evidence. Moreover, the arbitration provisions at issue control the forum in which disputes may be raised—not the extent of Defendants' liability. Plaintiffs cannot avoid their agreement to arbitrate by disputing an unrelated portion of their contracts with Defendants.

Further, to the extent that the limitation of liability provisions are unenforceable, the appropriate remedy is to sever those provisions, not to find some ***other*** portion of the contracts unenforceable. The Agreements expressly state that any provision contrary to law "shall be stricken from this Agreement but shall not affect the intention of the parties or any other provision of this Agreement." (ECF No. 49-8 at 6; 49-9 at 7.) Plaintiffs' own cited authority makes clear that, under these circumstances, an unenforceable limitation of liability clause cannot provide grounds to escape arbitration. *See, e.g.*, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 13-cv-3349, 2014 WL 1395733, at *4 (N.D. Cal. Apr. 10, 2014) (compelling arbitration and severing limitation of liability clause from agreement); *Life Care Centers of Am., Inc. v. Estate of Deal*, No. 18-CV-187-MV, 2019 WL 1283006, at *8 (D.N.M. Mar. 20, 2019) (same).

B. All of Plaintiffs' Claims Are Subject to Arbitration.

Plaintiffs contend that even if the arbitration provisions are applicable, certain of their damages claims are not arbitrable because they accrued prior to the parties' agreement to arbitrate all disputes. (Resp. Br. at 15.) But Plaintiffs cite no authority in support of this proposition—because it is not the law. To the contrary, their later agreements to arbitrate encompass all disputes arising from the lease of automated card shufflers, regardless of when those claims arose. Each Plaintiff agreed that the controlling Agreement "contains the entire agreement between the parties and ***supersedes all prior agreements***, understandings and negotiations, whether oral or written, concerning the same subject matter." (ECF 49-8 at 6; 49-9 at 6 (emphasis added).) Under such circumstances, the arbitration clause in the later, superseding contract encompasses all claims arising under an earlier one. *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 723 (9th Cir. 1999). And if there were any doubt, the Supreme Court has noted, "[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Contrary to Plaintiffs' contentions, they lack any individual claims subject to federal district court litigation. (*Contra* Resp. Br. at 15-16.)

Plaintiffs next argue that even if ***their*** claims are subject to mandatory arbitration, this putative class action should proceed because other hypothetical plaintiffs' claims ***may*** not be subject to arbitration. (Resp. Br. at 15-16.) But a putative class action cannot proceed without a named plaintiff. *See, e.g.*, *Reyes v. Educ. Credit Mgmt. Corp.*, 773 F. App'x 989, 990 (9th Cir. 2019). Thus, putative class actions are properly compelled to arbitration where, as here, all named plaintiffs have agreed to arbitrate their claims. *See Posephny v. AMN Healthcare Inc.*, 2019 WL 452036, at *2, *6 (N.D. Cal. Feb. 5, 2019) (granting motion to compel arbitration and staying case when all representative plaintiffs were covered by arbitration clause). For this reason, Plaintiffs' reliance on *Flat Panel* is misplaced, because there, only one of three plaintiffs was bound to arbitrate its claims; the court entered a stay on the basis that "the bulk of the parties and claims in this case will not proceed through arbitration." 2014 WL 1395733, at *4 (N.D. Cal. Apr. 10, 2014). And finally, regardless of whether it would promote judicial economy for the Court to adjudicate issues of estoppel (*see* Resp. Br. at 16), as Plaintiffs contend, Plaintiffs simply are not entitled to have those arguments heard in federal district court.

III. IN THE ALTERNATIVE, THIS CASE SHOULD BE TRANSFERRED.

Even if Plaintiffs' claims were timely, or not subject to binding arbitration provisions, any district court litigation should be conducted in the Northern District of Illinois. There are already two antitrust actions pending before that court stemming from the same alleged underlying conduct.[2] (Op. Br. at 19-22.) One, filed in early 2018, has proceeded to statute of limitations-based discovery; the other a consolidated putative customer class action, is at a similar stage as the present litigation. If any of the cases proceeds to merits discovery, it would preserve the parties' resources and promote judicial economy for them to be adjudicated on the same timetable, and transfer to the Northern District of Illinois would facilitate streamlined discovery, reduce litigation

[2] Two putative class actions were consolidated after Plaintiffs' opening brief was filed. *See* ECF No. 22, *Giuliano v. Scientific Games Corp.*, No. 1:20-cv-05262 (N.D. Ill.).

costs, and limit the burden on relevant witnesses. (*See id.* at 20; *see also* ECF No. 5.)

Plaintiffs fail to posit any reason why this case belongs in the District of Nevada. First, Plaintiffs contend that one of the Illinois cases "is a competitor claim seeking recovery of lost profits, which remedy starkly contrasts and departs from the recovery sought by the Plaintiffs in this case, which is to recover damages for monopoly overcharging."[3] (Resp. Br. at 17.) But as described above, Plaintiffs' argument is entirely inconsistent with its position on estoppel in support of its Motion for Partial Summary Judgment. (ECF No. 50.) That argument—that this case is predicated on the same alleged antitrust violations as litigated in *Shuffle Tech* and the Illinois actions—weighs in favor of transfer—not against it. *See Schwartz v. Frito-Lay N. Am.*, No. C-12-02740, 2012 WL 8147135, at *5 (N.D. Cal. Sept. 12, 2012). Plaintiffs likewise fail to reckon with the authority, cited in Defendants' opening brief, suggesting their attempts at forum shopping for favorable case law by bringing this case in Nevada also weighs strongly in favor of transfer. *See Williams v. Bowman,* 157 F. Supp. 2d 1103, 1106 (N.D. Cal. 2001); *Cadenasso v. Metro. Life Ins. Co*., 2014 WL 1510853, at *5 (N.D. Cal. Apr. 15, 2014).

Plaintiffs also contend that even though transfer would facilitate consolidation of the issues and coordination of the parties in the event of merits discovery, "it could well be that there will be a much more speedy, less wasteful pretrial and trial in Nevada." (Resp. Br. at 18.) This assertion is based solely on Plaintiffs' pending Motion for Partial Summary Judgment, which is based on an improper, misguided view of the law of estoppel. In any event, if this case is transferred, Plaintiffs will be free to bring their summary judgment motion before the court in Illinois.

[3] Plaintiffs' arguments against the applicability of the "first-to-file" rule are likewise predicated on distinctions between customer and competitor plaintiffs that are inconsistent with their estoppel argument. (*Compare* Resp. Br. at 19, ECF No. 33 at 10-12, *with* ECF No. 50 at 3-8.)

IV. CONCLUSION

Thus, Plaintiffs' Second Amended Complaint should be dismissed or, in the alternative, the Court should compel arbitration or transfer this action to the Northern District of Illinois.

Dated: December 10, 2020

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the foregoing **Reply Brief in Further Support of Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint or, in the Alternative, Compel Arbitration or Transfer** was served on the 10th day of December, 2020 via the Court's CM/ECF electronic filing system addressed to all parties on the e-service list.

/s/ ***Philip R. Erwin***
An employee of Campbell & Williams