UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re: Cielo Vista Hospitality, LLC,

Debtor. Case No. 20-10877-j11

CIELO VISTA HOSPITALITY LLC,
GATEWAY HOSPITALITY LLC,
YARBROUGH HOSPITALITY LLC,
New Mexico limited-liability companies,

Plaintiffs,

v. Adv. No. 20-1054

CPLG TX Properties, LLC,
a Delaware limited-liability company, and
STEWART TITLE GUARANTY COMPANY,
Defendants.

CPLG TX Properties, LLC,
a Delaware limited-liability company,

Third-Party Plaintiff,

v.

HITENDRA BHAKTA,
Third-Party Defendant.

MEMORANDUM OPINION AND ORDER ON MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

BEFORE the Court is Defendant CPLG, TX Properties, LLC's ("CPLG's") Motion to Dismiss (the "Motion to Dismiss") for lack of standing a complaint filed by Plaintiffs Cielo Vista Hospitality, LLC ("Cielo Vista"), Gateway Hospitality, LLC ("Gateway"), and Yarbrough Hospitality, LLC ("Yarbrough") (collectively, "Plaintiffs"). Plaintiffs responded to the Motion to Dismiss and requested permission to conduct additional discovery into jurisdictional facts. The

Court heard oral argument on April 8, 2021 and permitted the parties to file limited supplemental briefing. The Court will grant Plaintiffs' request for limited discovery.

DISCUSSION REGARDING FINDINGS OF FACT WHEN DECIDING A MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

CPLG attacks the basis for this Court's subject-matter jurisdiction by going beyond the facts alleged in Plaintiffs' complaint and challenging other facts upon which subject-matter jurisdiction is based. "When reviewing a factual attack on subject-matter jurisdiction, a court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). The Court may also consider materials appended to the parties' briefs. *Ingram v. Faruque*, 728 F.3d 1239, 1242 (10th Cir. 2013); *Herrera v. Las Cruces Pub. Sch.,* 695 F. App'x 361, 367 (10th Cir. 2017) (unpublished).

For the purpose of ruling on the Motion to Dismiss or Plaintiffs' request for additional discovery on jurisdictional facts before the Court rules on the Motion to Dismiss, the Court has made findings of fact. In making its findings of fact for that limited purpose, the Court considered an affidavit by Hitendra Bhakta filed July 21, 2020; a supplemental affidavit by Mr. Bhakta filed November 30, 2020; the complaint filed in this case (the "Complaint") and pleadings and documents referenced in the Complaint; the Motion to Dismiss, Plaintiffs' response, and CPLG's reply, including attachments thereto; and the Purchase Agreements and the Assignment Documents, as defined below. The Court also has taken judicial notice of certain facts related to the COVID-19 pandemic. The Court's findings of fact, based on limited evidence, are not binding for any purposes other than ruling on this Court's subject matter jurisdiction in this adversary proceeding. *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir.

1994) ("Where the court takes evidence for a limited purpose of ruling on jurisdiction, the preclusive effect of such findings is limited to the issue decided.").

FINDINGS of FACT[1]

Plaintiffs are limited-liability companies that were formed in January 2020 in New Mexico as special purpose entities. Each is the debtor in a pending voluntary Chapter 11 bankruptcy case commenced in April 2020. *See* Bankruptcy Cases Nos. 20-10877 (Cielo Vista), 20-10879 (Gateway) and 20-10881 (Yarbrough). Mr. Bhakta is the sole owner and managing member of each of the Plaintiffs. Defendant/Third Party Plaintiff CPLG is a Delaware limited-liability company with its principal place of business in Texas.

The present dispute arises from transactions in which CPLG, as seller, and Mr. Bhakta, as buyer, executed three agreements (the "Purchase Agreements") in February 2020 to transfer three La Quinta hotels (the "Hotels") from CPLG to Mr. Bhakta. Specifically, the Hotels include 1) the La Quinta Inn El Paso Cielo Vista, 9215 Gateway West; 2) the La Quinta Inn El Paso–Airport, 6140 Gateway I-10; and 3) the La Quinta Inn & Suites El Paso East, 7944 Gateway East. Each hotel is in the State of Texas and the Purchase Agreements were executed in the State of Texas. On or around February 5, 2020, Mr. Bhakta wired $900,000 ($300,000 for each hotel purchase) (the "Deposits") to Stewart Title, the escrow agent, as required by the Purchase Agreements. Each sale closing date was set for May 5, 2020.

[1] The Court enters its findings of fact and conclusions of law in this Memorandum Opinion and Order in accordance with Fed. R. Bankr. P. 9014 and Fed. R. Bankr. P. 7052. To avoid repetition, the Court intentionally made some findings of fact relating to the contents of the Purchase Agreements and Assignment Documents and certain other findings in the Discussion section rather than in the Findings of Fact section. To the extent the Findings of Fact section of this Memorandum Opinion and Order includes conclusions of law, such conclusions are incorporated by reference into the Discussion section, and to the extent the Discussion section contains findings of fact, such findings are incorporated by reference into the Findings of Fact section.

When the three Purchase Agreements were made, the parties contemplated that Mr. Bhakta would assign each Purchase Agreement to one of three separate special purpose entities formed or to be formed to acquire one of the hotels. A few days after executing the Purchase Agreements, on February 9, 2020, Mr. Bhakta executed three documents titled "Assignment of Contract for Purchase of Real Estate" (the "Assignment Documents"), each as assignor, assigning or purporting to assign his rights under one of the three Purchase Agreements to Cielo Vista, Gateway, and Yarbrough. On the Gateway assignment document, Mr. Bhakta signed an acceptance of assignment on behalf of Gateway, as assignee. Neither Cielo Vista nor Yarbrough signed either of the other two Assignment Documents or a separate document accepting the assignments. Mr. Bhakta did not obtain CPLG's written consent to assign his rights or obligations under any of the Purchase Agreements.

After executing the Assignment Documents, Mr. Bhakta told Stewart Title and Wyndham Hotels and Resorts, Inc. ("Wyndham"), the hotel franchisor, that Plaintiffs were the purchasers of the Hotels and sought to have title insurance commitments and franchise agreements issued in Plaintiffs' names. In the following weeks, Mr. Bhakta communicated by email with Stewart Title and Wyndham; some of those emails referred to the purported assignments[2] of the Purchase Agreements to Plaintiffs. In some cases, copies of these emails were sent to a real estate broker working with CPLG, Tyler Bean at Coldwell Banker Richard Ellis ("CBRE"), and CPLG's attorneys at Akin, Gump, Strauss, Hauer & Feld, LLP.

[2] "The word 'assignment' is sometimes used to refer to the act of the owner of a right (the obligee or assignor) purporting to transfer it, sometimes to the resulting change in legal relations, sometimes to a document evidencing the act or change." Restatement (Second) of Contracts § 317 (1981). Here, the question at issue is whether the Assignment Documents effectively assigned Mr. Bhakta's rights under the Purchase Agreement to Plaintiffs. Hence, to avoid ambiguity, the Court will use the word "assignment" to refer to an effective assignment and the term "purported assignment" to refer to an assignment by Mr. Bhakta, which the Court has not yet determined was effective or ineffective.

On March 13, 2020, the President of the United States "declared a national emergency due to the COVID-19 pandemic." *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 337 (Bankr. S.D. Fla. 2020); *see* The White House Briefing Room, Notice on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/24/notice-on-the-continuation-of-the-national-emergency-concerning-the-coronavirus-disease-2019-covid-19-pandemic/ (last visited May 17, 2021).[3]

After the COVID-19 pandemic began in the United States, Mr. Bhakta and/or Plaintiffs[4] were not able to obtain financing for the purchase of the Hotels. On April 29, 2020, Plaintiffs filed petitions for bankruptcy relief under subchapter V of chapter 11 of the Bankruptcy Code.[5] On the closing date of May 5, 2020, neither Mr. Bhakta nor Plaintiffs met the requirements set forth in the Purchase Agreements for closing of the sales and the sales did not close.

Approximately three months later, by a letter dated August 5, 2020,[6] CPLG, citing Article 12 of the Purchase Agreements, stated that "Mr. Bhakta's failure to remit the Purchase Price and make the applicable Closing Deliveries on the Closing Date . . . constitutes a material default" and "[a]ccordingly," CLPG (1) terminated each of the Purchase Agreements and (2)

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[3] The Court takes judicial notice of the declaration of an emergency. The Court may sua sponte take judicial notice of facts that can accurately and readily be determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b), (c).

[4] Whether Mr. Bhakta or Plaintiffs were responsible for obtaining financing and closing the sales depends on whether the Assignment Documents effectuated valid assignments of the Purchase Agreements. This issue is the crux of this Memorandum Opinion. The parties agree that financing was not obtained and that the sales did not close.

[5] All future references to "Code," "Section," and "§" are to the Bankruptcy Code, Title 11 of the United States Code, unless otherwise indicated.

[6] *See* letter from John Bain terminating the Purchase Agreements and demanding the Deposits from Stewart Title, Case No. 20-10877, Doc. 25-1. The letter terminating the Purchase Agreements was not admitted into evidence at the oral argument. However, Plaintiffs incorporated the letter into the Complaint by referring in the Complaint to Court-ordered briefing on the issue of the COVID-19 pandemic and the contract doctrines of impossibility and impracticability. The termination letter from Mr. Bain is attached to Cielo Vista's reply brief addressing those issues.

demanded that Stewart Title release each Deposit directly to CPLG. The letter terminating the Purchase Agreements did not mention purported assignments or attempted assignments as a reason for termination. CPLG apparently withdrew the demand on Stewart Title for the Deposits made in the letter.[7]

Section 12.1(a) of each of the Purchase Agreements provides that CPLG may terminate the Purchase Agreements if "there is a material breach or default by [Mr. Bhakta] in the performance of any of its obligations under th[e Purchase A]greement[s]." Section 12.1(c) provides, "in the event [CPLG] terminates this Agreement as a result of a breach or default by [the buyer] in any of its obligations under this Agreement, [Stewart Title] shall immediately disburse the [D]eposit to [CPLG] . . . ." That sentence concludes, "upon such disbursement [CPLG] and [the buyer] shall have no further obligations under [the Purchase] Agreement, except those which expressly survive such termination."[8]

Under Section 12.2, the Deposits must be returned to the buyer if the buyer terminates the Purchase Agreements for the same reasons that CPLG may terminate as stated in Section 12.1. Section 2.3(a) also states that "[t]he Deposit shall be nonrefundable to [the buyer] except as otherwise expressly provided in this [Purchase] Agreement." Neither Mr. Bhakta nor Plaintiffs terminated any of the Purchase Agreements in writing.

PROCEDURAL HISTORY AND ARGUMENTS

In the Complaint, Plaintiffs seek an order 1) excusing Plaintiffs and CPLG from further obligation under the Purchase Agreements pursuant to the doctrines of impossibility and impracticability; 2) enjoining CPLG from efforts to obtain the Deposits; and 3) ordering Stewart

[7] See Complaint, ¶ 20; Reply, pg. 6 (discussing a withdrawal letter that is not attached).

[8] Although Sections 12.1 and 12.2 are written in all capital letters, the Court quoted those sections using sentence case by capitalizing only the first word of each sentence and terms defined in the Agreement.

Title to turn over the Deposits to Plaintiffs, as well as compensatory damages based on the costs of pursuing this adversary proceeding.

CPLG answered Plaintiff's Complaint and asserted a counterclaim against Mr. Bhakta for breach of contract based on Mr. Bhakta's failure to close the sale of the Hotels. CPLG argues that it is entitled to the Deposits under Section 12.1 of the Purchase Agreements because Mr. Bhakta breached the Purchase Agreements when the sales did not close on May 5, 2020.

CPLG also moved to dismiss the adversary proceeding, arguing that Plaintiffs do not have Article III standing[9] to seek the Deposits because the Assignment Documents did not effectively assign Mr. Bhakta's rights to Plaintiffs. *See* Fed. R. Civ. P. 12(b)(1) (made applicable to this proceeding by Fed. R. Bankr. P. 7012). CPLG also argued that Plaintiffs have failed to state a claim that they should be excused from performance of the Purchase Agreements on the doctrines of impossibility or impracticability under Texas law. *See* Fed. R. Civ. P. 12(b)(6) (made applicable to this proceeding by Fed. R. Bankr. P. 7012). The Court, with the consent of the parties, stayed this adversary proceeding except for filings relating to CPLG's Motion to Dismiss and heard oral argument on April 8, 2021 on the issue of Plaintiffs' standing to bring the Complaint. Because standing is a threshold issue, the Court will address only that issue in this Memorandum Opinion and Order. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998) (stating that establishment of the Court's jurisdiction is a "threshold matter").

[9] "Article III standing" refers to the limitation in Article III of the United States Constitution of the power of the courts to hear only suits involving "cases" or "controversies." Art. III, § 2, cl. 1. The parties have not posed any arguments as to related doctrines of prudential or statutory standing. *See In re Kearney*, 615 B.R. 488, 491 (Bankr. D.N.M. 2020) (discussing Article III, prudential, and statutory standing).

DISCUSSION

Plaintiffs assert claims to the Deposits as assignees of Mr. Bhakta's rights under the Purchase Agreements. In the Motion to Dismiss, CPLG alleges that Plaintiffs do not have standing to assert claims to the Deposits based on the Purchase Agreements because Mr. Bhakta did not validly assign his rights under the Purchase Agreements to Plaintiffs and, therefore, Plaintiffs do not have a cognizable interest in the Deposits. CPLG argues that, consequently, this Court does not have subject-matter jurisdiction over Plaintiffs' claims because standing is jurisdictional. More specifically, CPLG alleges the Assignment Documents did not validly assign any rights to Plaintiffs because (1) the Assignment Documents do not reference the Purchase Agreements and (2) Plaintiffs failed to satisfy the conditions for assignment in Section 14.7 of the Purchase Agreements, which rendered the assignments void. CPLG argues further that void assignments are not subject to ratification.

Plaintiffs argue that CPLG ratified Mr. Bhakta's assignment of the Purchase Agreements to Plaintiffs. In the alternative, Plaintiffs argue that they satisfied the conditions for valid assignments of the Purchase Agreements.

The Court will first review the law on subject-matter jurisdiction, standing, taking evidence of jurisdictional facts to decide a motion to dismiss predicated on lack of subject-matter jurisdiction, and whether the Motion to Dismiss should be converted to a motion for summary judgment. Next, the Court will address whether errors in the Assignment Documents render the Assignment Documents invalid; whether the assignments or purported assignments are susceptible to ratification; and whether Plaintiffs have shown that they fulfilled the conditions for valid assignments or that discovery on this issue is warranted.

I. Subject Matter Jurisdiction, Standing, and Taking Evidence

"Absent Article III standing, a federal court does not have subject-matter jurisdiction to address a plaintiff's claims, and they must be dismissed." *Taliaferro v. Darby Twp. Zoning Bd.*, 458 F.3d 181, 188 (3d Cir. 2006). To demonstrate Article III standing to sue, a plaintiff must "have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Baker v. USD 229 Blue Valley*, 979 F.3d 866, 871 (10th Cir. 2020) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016)). Because they invoked federal jurisdiction by filing the Complaint, Plaintiffs bear the burden of establishing standing and must prove jurisdictional facts by a preponderance of the evidence. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014); *Lindstrom v. United States*, 510 F.3d 1191, 1193 (10th Cir. 2007) ("The litigant asserting jurisdiction must carry the burden of proving it by a preponderance of the evidence."). More specifically, Plaintiffs must show that they are assignees of the Purchase Agreements and, therefore, are entitled to the Deposits if they establish that the Deposits should be disbursed to the buyer. That is the only element of standing at issue.

"[A] party may move to dismiss a claim for lack of subject-matter jurisdiction, mounting either a facial or factual attack. A facial attack assumes the allegations in the complaint are true and argues they fail to establish jurisdiction." *Baker*, 979 F.3d at 872. "A factual attack goes beyond the allegations in the complaint and adduces evidence to contest jurisdiction." *Id.* When a factual attack is lodged, plaintiffs must meet the factual challenge with evidence establishing that the Court has subject-matter jurisdiction over their claims. *Michelson v. Enrich Intern, Inc.*, 6 F. App'x 712, 716 (10th Cir. 2001) (unpublished). To do so, plaintiffs may request, and the court generally should permit, discovery on the facts underlying jurisdiction. *Sizova v. Nat. Inst. of Standards & Tech.*, 282 F.3d 1320, 1326 (10th Cir. 2002) ("When a defendant moves to dismiss

for lack of jurisdiction, either party should be allowed discovery on the factual issues raised by that motion." (quoting *Budde v. Ling–Temco Vought, Inc.,* 511 F.2d 1033, 1035 (10th Cir.1975)). While a district court's discretion to allow evidence is broad, a court abuses its discretion when it denies discovery if "pertinent facts bearing on the question of jurisdiction are controverted [] or where a more satisfactory showing of the facts is necessary." *Sizova*, 282 F.3d at 1326 (quoting *Wells Fargo & Co. v. Wells Fargo Express Co.,* 556 F.2d 406, 430 n.24 (9th Cir.1977)).

A court's consideration of evidence does not "convert a Rule 12(b)(1) motion into a summary judgment motion unless 'resolution of the jurisdictional question is intertwined with the merits.'" *Sizova*, 282 F.3d at 1326 (quoting *Holt*, 46 F.3d at 1003). Whether jurisdiction is intertwined with the merits depends on "whether resolution of the jurisdictional question requires resolution of an aspect of the substantive claim." *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1296 (10th Cir. 2003) (quoting *Sizova,* 282 F.3d at 1324).

Here, the jurisdictional question, which hinges on whether Mr. Bhakta's rights under the Purchase Agreements were effectively assigned to Plaintiffs, does not require resolution of any aspect of the parties' substantive claims. In the Complaint, Debtors argue that they should be excused from performance under the Purchase Agreements due to impossibility or impracticability of performance and that, once they are excused from performance, they are entitled to return of the Deposits. In CPLG's Counterclaim, it asserts that Mr. Bhakta breached his obligation under the Purchase Agreements to close on the sale of the Hotels. Resolution of these claims does not depend on the facts or law related to the purported assignments of the Purchase Agreements to Plaintiffs. Therefore, the Court's consideration of evidence relevant to Plaintiffs' standing does not require conversion of CPLG's motion to dismiss into a motion for summary judgment. *Sizova*, 282 F.3d at 1324.

II. Errors in Each Assignment Document in Describing the Purchase Agreement to be Assigned Are Not Fatal to an Effective Assignment

CPLG argues that the Assignment Documents are ineffective because they do not even purport to assign an interest in any of the Purchase Agreements. Each Assignment Document refers to an assignment of a contract between CPLG, as seller, and the assignee, as purchaser, not to an agreement between CPLG, as seller, and Mr. Bhakta, as assignor. The Purchase Agreements are agreements between CPLG and Mr. Bhakta. In addition, the Purchase Agreements are dated February 5, 2020 whereas the Assignment Documents reference contracts dated February 9, 2020. Each one-page Assignment Document contains a paragraph similar in substance to the following:

> For value received I, HITENDRA BHAKTA as assignor, hereby transfer and assign to GATEWAY HOSPITALITY LLC., as assignee, his heirs and assigns, all rights and interest in *that contract between CPLG TX PROPERTIES, LLC, seller, and assignee GATEWAY HOSPITALITY, LLC, as purchaser* dated the 9TH day of FEB. 2020 for the sale of premises known as LA Quinta #507 more particularly described in said contract subject to the covenants, conditions, and payments contained in said contract.

(emphasis added.) CPLG argues these errors in the Assignment Documents mean that there were no effective assignments of the Purchase Agreements to any of the Plaintiffs.

Section 14.13 of the Purchase Agreements provides that they are "governed by, interpreted under, and construed and enforced in accordance with, the laws of the state in which the property is located." Section 14.13. The Hotels are located in Texas. At the oral argument, the parties stipulated that Texas law applies for purposes of deciding the Motion to Dismiss.

Applying Texas law, the Court concludes that the errant references to contracts between the seller and assignee, instead of the seller and assignor, and the mistake regarding the dates of the Purchase Agreements, are not fatal to the purported assignments. In *Fischer v. CTMI, L.L.C.*, the Supreme Court of Texas stated that "a contract must at least be sufficiently definite to

confirm that both parties actually intended to be contractually bound" and that "the agreement's terms must also be sufficiently definite to 'enable a court to understand the parties' obligations,' and to give 'an appropriate remedy' if they are breached . . . ." 479 S.W.3d 231, 237 (Tex. 2016) (first quoting *Fort Worth Indep. Sch. Dist. v. City of Fort Worth,* 22 S.W.3d 831, 846 (Tex.2000), then quoting Restatement (Second) of Contracts § 33(2) (1981)). When analyzing a contract's definiteness, courts rely on several principles. First, "because the law disfavors forfeitures, we conclude terms are sufficiently definite whenever the language is reasonably susceptible to that interpretation . . . ." *Houston Cmty. Coll. Sys. v. HV BTW, LP*, 589 S.W.3d 204, 213 (Tex. App. 2019). Second, "when construing an agreement to avoid forfeiture, we may imply terms that reasonably can be implied." *Id.* Third, "partial performance may remove uncertainty and establish that a contract enforceable as a bargain has been formed, even when some terms are missing or left to be agreed upon . . . ." *Id.* (citing *Fischer*, 479 S.W.3d at 237).

It is clear from the language of the Assignment Documents, when considered in context of the circumstances surrounding their execution, that Mr. Bhakta, acting as assignor, intended to reference the Purchase Agreements in the Assignment Documents. *See In re Hughes*, 513 S.W.3d 28, 31 (Tex. App. 2016) ("In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument." (quoting *Moayedi v. Interstate 35/Chisam Rd., L.P.*, 438 S.W.3d 1, 7 (Tex.2014)). The Assignment Documents reference by hotel number the specific hotels that are the subject of the Purchase Agreements. The Purchase Agreements were made between CPLG and Mr. Bhakta; there are no purchase agreements made between CPLG and Plaintiffs for the purchase and sale of the Hotels. The Assignment Documents were completed within four days of the date of the Purchase Agreements. The Purchase Agreements themselves contemplate assignment of the Purchase

Agreements by the buyer (Mr. Bhakta) to another entity. Further, it would make no sense for an assignee to assign its interest in a contract to itself, and the language doing so obviously was a mistake. Additionally, Mr. Bhakta, relying on the Assignment Documents, took action to obtain approval of Plaintiffs as franchisees and to obtain title commitments on behalf of Plaintiffs. Stewart Title also relied on the Assignment Documents to issue title commitments to Plaintiffs consistent with Section 8.2(b) of the Purchase Agreements, which states that CPLG "shall cause [Stewart Title] to furnish [the buyer] a title insurance commitment."

Under these facts, the Court interprets the Assignment Documents to refer to assignment of the Purchase Agreements. *See Bendalin v. Delgado,* 406 S.W.2d 897, 900 (Tex.1966) ("Expressions that at first appear incomplete or uncertain are often readily made clear and plain by the aid of . . . reasonable implications of fact."). The language of the Assignment Documents, considered in context, is sufficiently definite to identify the Purchase Agreements as the contracts being assigned.

III. Facially Valid Assignments of the Purchase Agreements Executed Without Meeting the Conditions for Assignment in Section 14.7 Are Not Subject to Ratification Because Such Assignments Are Void

CPLG next argues that even if the Assignment Documents are facially valid, the purported assignments are void under the terms of Section 14.7 of the Purchase Agreements, which provides that the Purchase Agreements "shall not be assigned or transferred by [Mr. Bhakta] without the prior written consent of [CPLG]" unless four conditions are satisfied. Section 14.7 further states that "[a]ny assignment or transfer, or attempted assignment or transfer, in violation of this Section 14.7 shall be null and void and shall constitute a default by Buyer hereunder." It is undisputed neither Mr. Bhakta nor any of the Plaintiffs obtained CPLG's written consent to assignment. CPLG asserts that Plaintiffs also failed to satisfy Section 14.7's conditions for assignment.

In their Response, Plaintiffs argue that, even if they did not satisfy Section 14.7's conditions for assignment, CPLG ratified the purported assignments. At the oral argument, Plaintiffs conceded—and the Court agrees—that the doctrine of ratification does not apply if the purported assignments are void under Section 14.7 because "a 'void' act 'is one which is entirely null, not binding on either party, and not susceptible of ratification.'" *Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542, 547 (Tex. 2016) (quoting *Cummings v. Powell,* 8 Tex. 80, 85 (1852)). "In comparison, 'a voidable act is one which . . . may be subsequently ratified or confirmed.'" *Id.* (quoting *Cummings,* 8 Tex. at 85).

Having conceded that a void assignment may not be ratified, Plaintiffs argued that the purported assignments are voidable, not void. Plaintiffs contend that the provision in Section 14.7 stating that an assignment made without satisfying Section 14.7's conditions is void is unenforceable as a matter of law because only transactions or contracts that are illegal or contrary to public policy are void. In support of this argument, Plaintiffs rely on *Swain v. Wiley College*, in which the Court of Appeals of Texas, Texarkana stated that "[a] contract is only void if it violates a specific statute or is against public policy . . . ." 74 S.W.3d 143, 146 (Tex. App. 2002). Because the governing document at issue in that case—Wiley College's bylaws—set forth procedures for board meetings but did not specify whether a failure to follow the procedures rendered the board's actions void or voidable, the issue before the court was whether an action taken by an "improperly summoned board" was void or voidable. *Id*. at 146-47. Unlike the *Swain* bylaws, here the Purchase Agreements state that non-compliant assignments are null and void. This fact readily distinguishes *Swain* from this case.

Contract provisions prohibiting or limiting assignments, including those providing that an attempted assignment where certain conditions not met is void, are enforceable under Texas law:

"As with any other contract term, parties to a contract can agree their rights in a particular agreement are not assignable. These 'anti-assignment' clauses are enforceable in Texas unless rendered ineffective by a statute." *Pagosa Oil & Gas, L.L.C. v. Marrs & Smith P'ship*, 323 S.W.3d 203, 211 (Tex. App. 2010); *see Banco Popular, N. Am. v. Kanning*, 638 F. App'x 328, 339 (5th Cir. 2016) (unpublished) (discussing Texas law on enforceability of clauses prohibiting assignment or limiting the right or power to assign).[10] Thus, where the parties have agreed that an assignment shall be void if it does not comply with specified conditions, the courts will enforce that agreement even if the assignment is not contrary to a statute or public policy. *See, e.g.*, *Texas Dev. Co. v. Exxon Mobil Corp.*, 119 S.W.3d 875, 880 (Tex. App. 2003) ("In Texas, anti-assignment clauses are enforceable unless rendered ineffective by an applicable statute."); *Texas Farmers Ins. Co. v. Gerdes By & Through Griffin Chiropractic Clinic*, 880 S.W.2d 215, 218 (Tex. App. 1994), *writ denied* (Dec. 1, 1994) ("Non-assignment clauses have been consistently enforced by Texas courts . . . ."). Here, unless Plaintiffs satisfied the conditions for assignment in Section 14.7, any assignment, even if facially valid, would be void, not voidable. Hence, Plaintiffs' arguments resting on the doctrine of ratification are not applicable here.

IV. Discovery of Jurisdictional Facts Related to Whether Plaintiffs Complied with Section 14.7's Conditions is Warranted

In the alternative, Plaintiffs asserted at the oral argument that the purported assignments are not void because Plaintiffs complied with Section 14.7's conditions. Plaintiffs also argued

[10] Texas cases use the terms "anti-assignment clause" and "non-assignment clause" to refer to clauses that prohibit assignment or limit the right or power to assign. *See, e.g.*, *Texas Farmers Ins. Co. v. Gerdes By & Through Griffin Chiropractic Clinic*, 880 S.W.2d 215, 218 (Tex. App. 1994) (describing a clause providing, "Your rights and duties under this policy may not be assigned without our written consent" as a "non-assignment clause"); *Pagosa Oil & Gas, L.L.C.*, 323 S.W.3d at 211 (describing a clause that set conditions for assignment of a contract as an "anti-assignment clause"). *See also Banco Popular, N. Am.*, 638 F. App'x at 336 (stating that "a review of Texas precedent does not provide a singular definition of what constitutes an anti-assignment clause . . . .").

that, if the facts presently before the Court are insufficient to demonstrate that Mr. Bhakta assigned his rights under the Purchase Agreements in accordance with Section 14.7, they should be permitted to conduct discovery on this issue.

Section 14.7 of each Purchase Agreement provides that, "[n]otwithstanding the foregoing, [Mr. Bhakta] may assign this [Purchase] Agreement upon [four] conditions[.]" The four conditions for assignment are:

> (a) the assignee of [Mr. Bhakta] must be a wholly owned entity or an entity controlling, controlled by, or under common control with [Mr. Bhakta],
>
> (b) the assignee of [Mr. Bhakta] shall assume all obligations of [Mr. Bhakta] hereunder and shall make certain representations regarding such assignee's formation and existence, and such assignee's power and authority to enter into and consummate the transactions contemplated by this [Purchase] Agreement, but [Mr. Bhakta] shall continue to remain liable for the performance of [Mr. Bhakta]'s obligations and shall not be released from any obligations hereunder,
>
> (c) a copy of the form of the assignment and assumption agreement identifying the assignee shall be delivered to [CPLG] at least ten (10) Business Days prior to Closing, and
>
> (d) a copy of the fully executed and enforceable written assignment and assumption agreement shall be delivered to [CPLG] at least seven (7) Business Days prior to Closing.

The Court will address each condition in Section 14.7 and whether discovery is warranted under the circumstances.

> **Condition (a): "[T]he assignee of [Mr. Bhakta] must be a wholly owned entity or an entity controlling, controlled by, or under common control with [Mr. Bhakta]"**

Mr. Bhakta is the sole owner and managing member of Plaintiffs. There is no requirement in Section 14.7 that this information be conveyed to CPLG. Absent such a requirement, the Court finds that Plaintiffs met this condition.

Condition (b):

Condition (b) consists of two distinct parts: An assumption of Mr. Bhakta's obligations under the Purchase Agreement and representations as to the assignee's formation and authority.

Condition (b) Part 1: "[T]he assignee of [Mr. Bhakta] shall assume all obligations of [Mr. Bhakta] hereunder . . . ."

The Gateway Assignment Document includes the following paragraph, which Mr. Bhakta signed on behalf of Gateway:

> Acceptance by Assignee
>
> I, GATEWAY HOSPITALITY, LLC., accept the above assignment of that contract made the 9TH day or FEB 2020. I agree to perform all obligations to be performed by assignor under the contract, and to indemnify assignor against any liability arising from the performance or nonperformance of such obligations.

Hence, the first part of Condition (b) is satisfied as to Gateway. However, there is no similar statement of assumption in the Cielo Vista Assignment Document or Yarbrough Assignment Document. At the oral argument, Plaintiffs argued that a sentence in the Cielo Vista and Yarbrough Assignment Documents constitutes an assumption of obligations. That sentence states:

> I authorize and empower assignee on his performance of all the above[-]mentioned covenants, conditions and payments to demand and receive of seller the deed covenanted to be given in the contract hereby assigned in the same manner and with the same affect [sic] as I could have done had this assignment not been made.

Plaintiffs argued that this sentence means that Cielo Vista and Yarbrough may receive the deed to the Hotels only on satisfaction of the "covenants, conditions, and payments", i.e., Mr. Bhakta's obligations, in the Purchase Agreements. That sentence, however, is an authorization by Mr. Bhakta, not an assumption of obligations by Cielo Vista and Yarbrough. There is nothing in that sentence suggesting that the *assignees* agreed to assume any obligations; nor did Cielo Vista or Yarbrough, as assignees or otherwise, even sign an Assignment Document.

Plaintiffs also argue that Mr. Bhakta, as the managing member and sole owner of Cielo Vista and Yarbrough, could testify as to those entities' intent to assume the obligations in the Purchase Agreements and/or that additional discovery is necessary to establish that this condition was met. But Section 14.7 requires that the assumption of obligations be reduced to writing so that it can be delivered to CPLG pursuant to Conditions (c) and (d) in Section 14.7. Thus, whether Mr. Bhakta could testify that Cielo Vista and Yarbrough assumed the obligations is immaterial if the assumptions were never reduced to writing. In addition, if the assumptions of obligations were reduced to writing, such evidence should be in Plaintiffs' possession or control, which appears to render discovery on this issue unnecessary. Nevertheless, the Court will allow discovery relating to whether the Cielo Vista and Yarbrough Assignment Documents resulted in a valid assignment. That discovery will not create a material burden on CPLG because the Court will allow discovery relating to whether the Gateway Assignment Document resulted in a valid assignment. The Court will defer ruling on the Motion to Dismiss as to the Cielo Vista and Yarbrough claims until after discovery is completed.

> **Condition (b) Part 2: "The assignee of [Mr. Bhakta] shall make certain representations regarding such assignee's formation and existence, and such assignee's power and authority to enter into and consummate the transactions contemplated by this [Purchase] Agreement."**

Plaintiffs argue that the second part of Condition (b), which requires the assignee to make representations about its formation and its power to consummate the transactions contemplated by the Purchase Agreements, was met when Mr. Bhakta sent Plaintiffs' "corporate documents" to Mr. Bean because either Mr. Bean was acting as CPLG's agent or Mr. Bean forwarded the documents to CPLG. This assertion raises two questions: Did the "corporate documents" constitute representations about Plaintiffs' formation and power to consummate the transactions contemplated in the Purchase Agreements? If so, were the representations in the corporate

documents made to CPLG or its agent authorized to receive such communications on CPLG's behalf?

As to the first question, it is not clear what information was sent to Mr. Bean by Mr. Bhakta. Mr. Bhakta prepared an operating agreement for Plaintiffs and obtained certificates of organization, to which the articles of incorporation appear to have been attached, from the New Mexico Secretary of State. Neither the operating agreements nor the certificates of organization are before the Court. It is possible the language in the Assignment Documents quoted above regarding the assignees' authority and power coupled with the operating agreements or articles of incorporation for Plaintiffs satisfied the power and authority representation specified in Condition (b), if transmitted to Mr. Bean or by Mr. Bean to CPLG.[11]

It is also not clear from the evidence before the Court whether Mr. Bean acted as CPLG's agent and, if so, the scope of the agency. An agency relationship may be implied from the conduct of parties and may be established by circumstantial evidence. *See Orozco v. Sander*, 824 S.W.2d 555, 556 (Tex. 1992) ("An agency relationship does not depend upon express appointment or assent by the principal; rather, it may be implied from the conduct of parties under the circumstances."); *In re Hardee*, No. 11-60242, 2013 WL 1084494, at *8 (Bankr. E.D. Tex. Mar. 14, 2013) ("The existence of an agency relationship may be established by circumstantial evidence based upon proof of all the facts and circumstances that shows the relationship of the parties and throws light upon the character of such relations." (applying Texas law)).

[11] *Cf.* NMSA 1978, § 53-19-8 (stating that articles of organization must include statements addressing whether "management of the limited[-]liability company is vested to any extent in a manager" and whether "the limited[-]liability company may carry on its business and affairs as a single member limited[-]liability company").

Mr. Bhakta asserted in his affidavit that Mr. Bean "represent[ed] CPLG." In the Purchase Agreements, "Broker" is defined as "CBRE," but the Purchase Agreements do not state whether the Broker was acting as CPLG's agent or define the scope of the Broker's role vis á vis CPLG or the Purchase Agreements.[12] There is no other evidence before the Court on the scope of Mr. Bean's contractual relationship with CPLG. However, email exchanges in the record suggest that Mr. Bean was involved with several transactions related to the sale of the Hotels. For instance, Mr. Bean corresponded with a representative of Wyndham about Plaintiffs' franchise applications and was copied on email from Stewart Title regarding title commitments.

Discovery is warranted to determine (a) whether Mr. Bean acted as CPLG's agent and, if so, the scope of the agency, (b) whether Mr. Bean forwarded certificates of organization, articles of incorporation, operating agreements, the Assignment Documents, or other documents to CPLG, (c) the name of the person to whom the documents were sent, and (d) what CPLG did, if anything, with the information. *See Health Grades, Inc. v. Decatur Mem'l Hosp.*, 190 F. App'x 586, 589 (10th Cir. 2006) (holding that discovery should have been granted where the plaintiff presented evidence of certain actions by an individual and the only remaining question bearing on personal jurisdiction was whether that person was acting as the defendant's agent); *GCIU-Emp. Ret. Fund v. Coleridge Fine Arts*, 700 F. App'x 865, 871 (10th Cir. 2017) (holding that the district court abused its discretion when it denied discovery into jurisdictional facts where the plaintiff demonstrated that facts bearing on jurisdiction were controverted).

[12] In contrast, in Section 14.5(c), the "parties acknowledge[d] that Escrow Agent [defined as Stewart Title] is acting solely as a stakeholder at their request and for their convenience [and] that Escrow Agent shall not be deemed to be the agent of either of the parties . . . ."

> **Conditions (c) and (d): "[A] copy of the form of the assignment and assumption agreement identifying the assignee shall be delivered to [CPLG] at least ten (10) Business Days prior to Closing [and] a copy of the fully executed and enforceable written assignment and assumption agreement shall be delivered to [CPLG] at least seven (7) Business Days prior to Closing."**

The terms "Closing" and "Closing Date" are defined terms in the Purchase Agreement. In Section 2.4, the "Closing" is defined as the "closing of the sale and purchase" of the Hotels and the "Closing Date" is a date ninety days after February 5, 2020, which is May 5, 2020. Section 14.7 did not require the Assignment Documents to be submitted to CPLG until ten days before the Closing. Plaintiffs contend that the Assignment Documents were submitted to Mr. Bean in March 2020, well ahead of this deadline. Which documents were forwarded to Mr. Bean, whether they fulfill the requirements under Condition (b), and what CPLG did, if anything, with those documents goes to whether the purported assignments were valid. Discovery on these jurisdictional facts is, therefore, warranted.

CONCLUSION

For the foregoing reasons, the Court will grant Plaintiffs' request to conduct discovery into jurisdictional facts limited to whether Plaintiffs satisfied the conditions for effective assignment under Section 14.7. In light of this ruling, the Court will defer ruling on the merits of CPLG's Motion to Dismiss at this time.

WHEREFORE, IT IS ORDERED:

1. Discovery. Plaintiffs may conduct discovery into jurisdictional facts related to whether Plaintiffs satisfied the conditions for effective assignment under Section 14.7. Discovery shall be governed by Federal Rules of Bankruptcy Procedure 26-37, as applicable.

2. Discovery Completion Date. The Court fixes a deadline of **August 13, 2021** for completion of discovery. This means that responses to written discovery must be due before the discovery completion date, and notices of deposition must schedule depositions to occur before the discovery completion date.

3. Status Conference. The Court will hold a status conference on **August 18, 2021 at 9:30 a.m**. in the Gila Courtroom, 5th Floor, Pete V. Domenici United States Courthouse, 333

Lomas Blvd. NW, Albuquerque, New Mexico. Parties and/or counsel may appear at the status conference by telephone by contacting Judge Jacobvitz's chambers (505-600-4650 or jacobvitzstaff@nmb.uscourts.gov) at least one business day before the status conference. Parties and/or counsel appearing by telephone must use the Court's conference call number: 1-877-336-1839, access code 5733344#.

4. Stay. With the exception of matters relating to the Motion to Dismiss for lack of subject-matter jurisdiction, including discovery permitted by this Memorandum Opinion and Order, the stay of this Adversary Proceeding shall remain in effect pending the Court's ruling on whether it has subject-matter jurisdiction. *See* Doc. 14.

Robert H. Jacobvitz
United States Bankruptcy Judge

Date Entered on Docket: May 18, 2021

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