In the Supreme Court of the State of Nevada

IN THE MATTER OF JOSHUA RAMOS, AKA ERNESTO JOSHUA RAMOS, an individual
Appellant

vs.

DANA WHITE, an individual; UFC HOLDINGS, LLC, ZUFFA, LLC, doing business as the ULTIMATE FIGHTING CHAMPIONSHIP, a Nevada limited liability company; DOES I through X inclusive; and ROE CORPORATIONS I through V, inclusive;
Respondent.

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Supreme Court No.:82102
Eighth Judicial District
District Court Case No.: A-20-813230-C
Hon. David M. Jones, presiding

APPELLANT'S OPENING BRIEF

Prepared by:

/s/ Ian Christopherson
IAN CHRISTOPHERSON, ESQ.
Nevada Bar No.: 3701
CHRISTOPHERSON LAW OFFICE
600 South Third Street
Las Vegas, NV 89101
(702) 372-9649
icLaw44@gmail.com
Attorney for Appellant,
Joshua Ramos

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Appellant Joshua Ramos, an individual, is a resident of the State of Nevada and has been represented by Ian Christopherson, Esq., of Christopherson Law Office in District Court in the matter below. Respondent, Dana White, an individual, is a resident of the State of Nevada, and has been represented by Donald Campbell, Esq., of Campbell & Williams in District Court matter below. Respondents UFC Holdings, LLC, ZUFFA, LLC, doing business as the Ultimate Fighting Championship, is a Nevada limited liability company. DOES I through X and ROE Corporations I through V are unknown corporate entities.

Judge Silver has previously voluntarily recused on the district court for cause on a matter after suggestion of recusal was filed by Ian Christopherson and that is appropriate here under NRS 1.230 and NCJC 2.11.

/s/ Ian Christopherson
IAN CHRISTOPHERSON, ESQ.
Attorney for Appellant

NRAP 28.2 ATTORNEY CERTIFICATE

1. I hereby certify that this Opening brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman and is double-spaced.

2. I further certify that this Opening brief complies with the page-or type-volume limitations of NRAP 32(a)(7)(i)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is: Proportionately spaced, has a typeface of 12 points or more, and contains 6301 words.

3. Finally, I hereby certify that I have read this Opening Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

/s/ Ian Christopherson
IAN CHRISTOPHERSON, ESQ.
Attorney for Appellant

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I. JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction over this matter as it is an appeal from the District Court's October 19, 2020, final order resolving all claims between all parties dismissing all Appellant's claims with prejudice. The notice of entry of order was served on October 20, 2020 and the notice of appeal was timely filed on November 10, 2020, pursuant to NRAP 4(a).

II. ROUTING STATEMENT

Appellant respectfully submits that this appeal is appropriate for resolution/decision in the Supreme Court, pursuant to NRAP 17(a)(11)(12): Cases involving matters of public interest and first impression; and pursuant to NRAP 17(b)(6): cases with over $75,000 in controversy.

III. STATEMENT OF ISSUES ON APPEAL

a. Whether the district court followed the applicable standard in granting Respondent's motion to dismiss.

b. Appellant's complaint pled claims for breach of contract, contractual breach of the implied covenant of good faith and fair dealing and unjust enrichment.

c. Whether the court erred in failing to allow Appellants to Amend the complaint before dismissing with prejudice.

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IV. STATEMENT OF THE CASE

This appeal is from an order dismissing Appellant Ramos's claims in case number A-20-813230-C by the District Court (the "Order") with prejudice.

This is a case where a remedy exists at law or in equity for the benefit of the Non-Disclosure Agreement (hereinafter, "NDA") requested by White for the benefit of Respondents. Respondents requested and indicated they would pay for an NDA from Ramos from early November 2015 through July 5, 2016 On July 5th, 2016 Respondents withdrew the request for a NDA and indicated they would not pay Ramos for the NDA benefit already received, only four days before the announced sale of the UFC for $4.2 billion.

The 14-page Complaint filed on April 3, 2020 (ROA 001-014), alleged (1) Breach of Contract; (2) Contractual Breach of the Implied Covenant of Good Faith and Fair Dealing; (3) Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing; and (4) Unjust Enrichment.[1]

In response to the complaint, Respondents, filed a motion to dismiss on August 31, 2020. At hearing on October 7, 2020, the motion was orally granted. The Court's minute order indicated only the unjust enrichment claims was dismissed. (ROA 088) On October 19, 2020 the Court issued a written order dismissing the

[1] Appellant concedes that his claims for tortious breach of the covenant of good faith and fair dealing does not apply and its dismissal is not appealed.

entire complaint with prejudice and did not grant the requested leave to amend (ROA 089-101).

The district court's stated reasons for its decision at hearing did not apply the proper standard for dismissal, were erroneous, and based on improper finding of facts contrary to the allegations in the complaint. The written Order prepared and submitted by Respondents' counsel did not fully reflect the Court's decision and reasoning at hearing.

The district court made factual findings, not set forth in the Order as such, but stated on the record at hearing, essentially holding that while Ramos had stated claims based on those factual findings held no relief could be granted. Those factual findings are contrary to those pled by Ramos, were adverse to Ramos, and speculative in applying the Judge's personal opinion of the law and relying on personal interpretations of what another judge would have done in Ramos's criminal proceeding. The dismissal of unjust enrichment was premised on superseded authority that Respondents represented to the court as current authority, which the district court relied on to hold that Ramos could not prevail on his claims.

Appellant appeals the premature dismissal of claims properly pled and supported by the allegations in the complaint and the denial of an opportunity to correct any deficiencies by amending the complaint.

The Court denied Ramos the opportunity to amend the complaint without finding futility, despite it's query on the record that facts appeared to need to be "fleshed out" (ROA 155-156, TR 37:25-38:1).

The notice of entry of order was e-served on October 20, 2020. Appellant then filed his notice of appeal timely on November 10, 2020.

V. STATEMENT OF RELEVANT FACTS

Though the parties put different spins on the underlying facts and they require the further inquiry provided by discovery the basic facts are not in dispute. On a Motion to Dismiss the facts as pled are the facts that this court reviews de novo. Following is a brief recap of those facts setting the context of this case.

Respondent White had taken an interest in Ramos's live-in girlfriend, the mother of a child of Ramos's ("Ms. Doe" or "Doe"), after meeting her while she worked as an entertainer at Spearmint Rhino gentlemen's club, which White frequented. White, in October 2014, then president of the UFC, solicited Doe and traveled to Brazil with Ms. Doe for a UFC fight and engaged in sexual conduct with Doe. (ROA 014, ¶3)

At the time White solicited her, Doe did not have a passport, so the UFC obtained a one-day expedited passport for her. The UFC also provided her a first-class air ticket, lodging, and paid ground expenses in Brazil.

While in Brazil, White and Doe engaged in sexual relations, which Doe recorded on her phone and provided to Ramos. Upon return, White had the UFC Security Chief deliver $10,000.00 in Spearmint Rhino "chips" to Doe at the Spearmint Rhino strip club, of which management pocketed $2,000.00.

White continued to have contact with Doe after returning to Las Vegas. Ramos, being upset, contacted White through White's "off the books phone" seeking to meet and discuss the situation. No other demands were made at that time. However, because White ignored Ramos – and to establish his connection to Ms. Doe – Ramos sent a video clip of White's sexual encounter to White on or about Dec 7, 2014.

White then used his substantial influence to set up a meeting with The U.S. Attorney's office and the FBI to have Ramos prosecuted for extortion.[2] Despite admitting to the FBI that he committed a felony violation of the Mann Act (*see Id.*), White and his counsel succeeded in getting the FBI to commence an investigation. The goal was to entrap Ramos for extortion by getting him to request payment for the video recordings.

[2] It should be noted that Extortion is a *state* offense, with which Ramos was never charged. Eventually, he pled guilty to use of his phone to commit extortion, a Federal crime, even though the demand for payment – the alleged extortion – was made in person.

After his arrest in January 2015, Ramos was released on bail with standard conditions, including a "no contact" condition. As and as the case proceeded toward indictment and plea, the government and Ramos's attorney stipulated to a protective order in October 2015 (the "Protective Order," ROA 52 to 53). The Protective Order was pursuant to the Crime Victims' Rights Act of 2004 (18 U.S.C. § 3771) and provided White's identity was not to be disclosed by the *government or defense counsel* during the court proceeding. (See, e.g. ROA 039 to 040.) The only personal restraints in the Protective Order on Ramos were 1) that he was unable to have or view discovery materials outside the presence of Defense Counsel of Record; and 2) that he could only refer to White as "Victim 1" during proceedings in the criminal case. (*Id*.) Notably, there was no other restraint on Ramos, which Respondent's attorneys realized, and which prompted the request for the Non-Disclosure Agreement, hereinafter "NDA."

Shortly before Ramos was to plead guilty in early November 2015 – and roughly a month after the protective order was entered – Hunter Campbell, Esq., contacted, unsolicited, Ramos's attorney, Gabriel Grasso Esq. Mr. Campbell requested that Ramos an "NDA" with White after Ramos pled guilty. (ROA 008, ¶61)

No offer of payment for Ramos's silence was made at that time, White instead requested a mediation after the scheduled sentencing date, some 5 months later, for

the purpose of determining compensation for the NDA. Ramos agreed to a mediation to set the amount of compensation and maintained his silence and did not disclose White's identity (despite substantial public interest) during the five months from the call until the April 2016 mediation.

At the scheduled mediation White failed to offer any compensation for the NDA he had enjoyed the benefit of for 5 months (ROA 009, ¶78), effectively telling Ramos to "pound sand" and terminating the mediation.

After the mediation, White and the remaining Respondents recognized that the sale of the UFC was not yet final and that the Protective Order only required the video be destroyed after the delayed *sentencing*. White through counsel continued to engage with Ramos regarding payments and thereafter dangled up to $450,000.00 in front of Ramos and Doe to induce their continuing silence. (Opp'n at 7:17-18; Compl., ROA #101, ¶12) White clearly in bad faith made no *genuine* effort to negotiate and finalize a payment for the NDA in the 3 months following the failed mediation, instead biding his time while the sale of the UFC headed to a closing.

On June 30, 2016, Ramos was sentenced by Judge Navarro – who, in open court, stated she had no issue with White and Ramos reaching an agreement (NDA) through counsel – to one year in federal custody.[3] On July 5, 2016, after nine months

[3] Judge Navarro rejected Ramos's attempt to withdraw his plea. This was later upheld on appeal. Appellant is not seeking to overturn the criminal conviction in this appeal.

of enjoying the full benefit of his requested NDA and without paying Ramos a penny, White's attorney, Mr. Campbell again called Mr. Grasso and unilaterally terminated negotiations and withdrew any offers for the NDA.

On July 9, 2016, four days after withdrawing the request for an NDA and terminating negotiations, the sale of the UFC to IMG Entertainment was announced for 4.2 billion dollars. White and Respondents by then had realized the full benefit of the NDA: White kept his job as UFC president and went off to enjoy his portion of the bounty (reportedly 9% of the sale price).

VI. SUMMARY OF ARGUMENT

The district court erred when it failed to apply the proper standard in granting Respondent's motion to dismiss. The district court looked to sources and evidence outside of the face of the complaint and failed to take all factual allegations in the complaint as true. Instead the court made factual findings adverse to Appellant's claims and factual allegations in the Amended Complaint and accepted Respondent's view of the facts – a clear violation of the well-established standard of review for a motion to dismiss.

Judge Navarro said, "I understand that there might be some communication with the victim through counsel. And so I'll permit that. Although, again, it's not my responsibility to try to negotiate any kind of civil issues. So that's up to you." (ROA 63)

An example of this is the court indicating it had looked to the underlying criminal matter (beyond those exhibits to the pleadings) and interpreted what Judge Navarro **would have done, not what she did**, in reaching the incorrect dismissal of the unjust enrichment claim. (ROA 160 L. 7-10) The court concluded that Ramos was personally restrained from identifying White **based on its own personal speculation of what Judge Navarro would have done, not based on the facts, and not on the face of the Protective Order itself.**

Had the district court properly stayed within the face of the complaint,[4] it would have been forced to deny Respondents' motion to dismiss. Ramos presented facts in the complaint that would entitle a finder of fact to find in his favor for his causes of action of breach of contract and/or unjust enrichment. The additional documents before the court did not provide any basis to reject the allegations in the complaint.

Appellant pled breach of contract, bad faith in contract and unjust enrichment with more than sufficient supporting facts under notice pleading. Both Respondents' Motion to Dismiss and the courts' Order and comments at hearing recognize the sufficiency thereof. And despite this, the court dismissed Ramos's complaint and

[4] The additional documents attached to the briefs neither correct the Motion for a Summary Judgement nor provide facts sufficient to override the Complaint's allegations.

failed to provide him leave to amend his complaint without regard to the "futility test" (as stated in *Allum v. Valley Bank*) that will be discussed below.

Finally, the Order does not adequately or properly reflect the findings at the hearing on the motion to dismiss, nor does it apply applicable law. Instead, it is a basic regurgitation of Respondent's reply to the opposition to their motion to dismiss. Put simply, the district court should not have delegated its duty to prepare an order on a dispositive motion to Respondent.

VII. ARGUMENT

1. ISSUE 1: Standard of Review for a Granted Motion to Dismiss.

This is an appeal from a trial-court order granting respondent's motion to dismiss. The court reviews a grant of a motion to dismiss de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28 (2008). Reversal of the Order of Dismissal upon de novo review is clearly mandated when the allegations in the Complaint are accepted as true.

On appeal, a motion to dismiss "is subject to a rigorous standard of review." *Id.* at *227*. All factual allegations in the complaint are recognized as true and all inferences are drawn in the plaintiff's favor. *Id.* at *228*. A complaint should only be dismissed if it appears beyond a doubt that plaintiff could prove no set of facts, which, if true would entitle it to relief. *Id*. The standard is not intended to prematurely end cases before discovery occurs, which may prove or disprove a claim.

NRAP 32(a)(7)(C)

In *Chowdhry* the court held that, in ruling on a motion to dismiss, the court must accept the plaintiff's evidence as true and draw all permissible inferences in the plaintiff's favor, and may not assess the credibility of witnesses or the weight of the evidence. *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 482, 851 P.2d 459, 461 (1993). A court must take all factual allegations in the complaint as true and not delve into matters asserted defensively that are not apparent from the face of the complaint. *See Buzz Stew, LLC* at 227-28.

The trial court failed to abide by these standards. Instead, it rendered factual determinations, misinterpreted and applied superseded authority, and then applied the law based on its own views, independent research, and opinion and did not accept the allegations of the complaint as true. This is especially egregious when Ramos never had the opportunity to conduct discovery to support the allegations in the complaint. There is no issue as to whether the complaint satisfied notice pleading standards as both Respondents and the court understood the claims, as demonstrated by the record of the proceedings. The claims herein were clearly articulated and are supported by the pled facts; dismissing these claims before discovery is error.

The Court's failure to abide by the proper standard, while pervasive through the hearing and in the Order, is explicit in its finding there was no contract to breach and that Ramos was legally restrained from identifying White. Even if the Court's

adverse factual conclusions eventually were proven correct, they are factual findings adverse to the Appellants claims as pled and therefore not appropriate for determinations on a motion to dismiss.

A review of three pages of the hearing transcript demonstrates the failure to follow the proper standard.

At pages 37 and 38 (ROA 152-153) of the hearing transcript the Court indicated it was troubled by the close timing of the withdrawal of the request for the NDA 3 days before the sale of the UFC was announce, particularly in light of the Court's skepticism that the UFC had no reputation to protect by a NDA. Rather than let Ramos "flesh this out" the Court dismissed its' legitimate concerns and dismissed the complaint.

On page 43 of the transcript (ROA 160) the Court found that Ramos was under a "gag order" or "nondissemination order" without any express evidence thereof and instead apparently reading the protective order as more than it was. (ROA 160, L.1-3.) Then to bolster this finding which served as the factual basis to dismiss the unjust enrichment claim, the Court expressed its personal opinion of what Judge Navarro's position was. This conclusion that Navarro was adamant in preserving White's identity is suspect when the sentencing transcript excerpt is reviewed where Judge Navarro indicated counsel for the parties were free to negotiate an NDA. (RAO 076, L.1-5) Implicit in allowing those negotiations is that Ramos was not prevented from

disclosing White's identity. The court's factual conclusion in this regard is clearly adverse to Ramos' incorrect and reversible error.

Following is a summary outline of the factual allegations in the Amended Complaint and the basics of the law regarding those claims, which is what the court should have restricted its inquiry to and will mandate reversal.

2. **ISSUE 2: The claims are pled and supported by the facts articulated in the Amended Complaint.**

The standard of review is de novo and the Court's review should be directed not to the error's resulting in the dismissal below but whether the Complaint pled claims upon which Ramos can prevail.

A review of the complaint's factual allegations taken in the most favorable light satisfies the pleading standard for a complaint to survive a motion to dismiss as stated below.

a. Breach of Contract

To be enforceable contract only requires "offer and acceptance, meeting of the minds, and consideration." *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005).

In *Certified Fire*, the court held that it could be found that a valid "implied-in-fact" contract was entered into as "manifested by conduct." *Certified Fire Prot. Inc. v. Precision Constr. Inc.*, 128 Nev. 371, 380, 283 P.3d 250, 256 (2012), citations

omitted. A fact finder must conclude that the parties intended to contract and that promises were exchanged, and that the general obligations were sufficiently clear. *Id*. at 380. Missing payment terms could be determined by quantum meruit. *Id*.

To survive a Motion to dismiss on a breach of contract claim, Ramos had to plead a contract and a breach, which he did. Proving a contract is not required and as stated in *Certified Fire*, the existence of a contract is left to the fact finder.

Amended Complaint Paragraphs 61, 64-71, 81-93 (ROA 8-9, 10-11) all set forth factual allegations of an agreement to mediate to determine payment for an NDA. The mediation occurred, which the court correctly recognized as an agreement.[5] Taken in the most favorable light to Appellant, the contract alleged in the Amended Complaint was breached.

Ramos clearly pled his understanding of the contract to mediate, which the Court was bound to accept. Respondents requested the NDA from Ramos in exchange for mediation to determine the amount of compensation for Ramos's silence. The Amended Complaint stated that Ramos accepted when he agreed to keep silent, kept silent, and finally appeared at mediation on April 5, 2016 to discuss compensation. Ramos's silence through the date of mediation (and thereafter)

[5] Judge Navarro said, "At best, (there was) a preliminary agreement to attend a mediation." (ROA 113 L.1-3)

indicates he performed under the contract. The contract here was manifested and confirmed by conduct.

Despite the district court's concession that a contract was pled when it stated "at best" a contract to mediate was pled, the court dismissed the breach of contract claim by making factual findings in the light most favorable to the *Respondents*. The court made a factual determination that there was no consideration when it concluded that there could be no contract until the amount of compensation for the NDA was reached, stating there was merely an agreement to negotiate. (ROA 113 L.7-8). *Certified Fire, supra,* adopts the general view that where goods or services are received failure to agree on compensation does not preclude relief.

The Amended Complaint clearly states that Ramos gave substantial benefit and also consideration for acceptance of the offer to be paid for an NDA by his continuing silence – the sole object of the NDA. He conferred the requested benefit in consideration of a promise of a mediation where his compensation for his services would be determined and the complaint articulated that all the elements of a contract were present. The Amended Complaint further articulated that the Respondents breached the agreement when White, in clear bad faith, offered nothing at the mediation.

Despite articulating a prima facie case for breach of contract, the Order states, without factual findings by the court and without hearing evidence, that "[w]ith no

enforceable contract, the breach of contract claim fails." Order, pg. 8. (ROA 89-101, 102-118) Under a motion to dismiss the court should not have prematurely found that contract (whether partially or fully performed) did not exist when it was morally pled.[6]

Making that determination does not follow the standard for granting a motion to dismiss. Clearly, the court made factual inferences in the *least* favorable light to Appellant when concluding there had been no contract which was subject to breach. The Amended Complaint alleged a contract and its breach by Respondents. (ROA 1-14) The clear error is obvious and, accordingly, this Court need inquire no further as to whether the motion to dismiss the breach of contract claim must be reversed – it must be reversed.

b. Bad faith in Contract

In paragraphs 77 78 (ROA 9-10) and 95-101 (ROA 11-12) the elements of bad faith are set forth supplementing the complaints other factual allegations.

To survive a motion to dismiss a contractual bad faith claim a complaint must allege a contract and bad faith conduct. As set forth above the contract was alleged in the complaint and the bad faith conduct is set forth in pargraphs 95-101.

[6] If it is later found that there was no breach of contract, a finder of fact may still determine Respondents were unjustly enriched.

If a cause of action for bad faith in contract exists it does here, based on the allegations in the Amended Complaint. Respondent's actions in soliciting an NDA and enjoying a benefit thereof while it was of benefit to them, they declined to pay for the benefit the requested and received premised on the assertion they would pay for it.

An equitable remedy, contractual bad faith is broad in scope. Despite the court's conclusion there was no enforceable contract there was clearly an offer accepted by Ramos to mediate regarding the amount of compensation to be paid for a requested NDA. The original offer was not tied to a mediation but later set months later which resulted in White obtaining the benefit of the NDA for 5 of the 8 months he apparently needed it. Then in April 2016, White flatly refused to pay for that benefit.

Respondents obtaining the full benefit of the requested NDA entire period of time they desired it is contractual bad faith or unjust enrichment or both. Respondents clearly received the benefit of the bargain by their bad faith actions and did not pay for it and there must be a remedy in equity even if a contract breach is not found.

Even when it has been judicially determined that a party did not breach a contract with the other party, the aggrieved party may still be able to recover damages for breach of the implied covenant of good faith and fair dealing that is part

of every contract. *Hilton Hotels Corp. v. Butch Lewis Prods.*, 107 Nev. 226, 232, 808 P.2d 919, 922 (1991). Where the terms of a contract are literally complied with but one party to the contract deliberately countervenes the intention and spirit of the contract, that party can incur liability for breach of the implied covenant of good faith and fair dealing. *Id.* at 922-923.

The issue of to what extent an agreement to mediate includes an implied covenant of good faith is one of first impression when there is no controlling statute, written agreement or agreement with the mediation service.

NRS 107.086 and 107.0865 both codify the duty of good faith with respect to foreclosure mediation. Nev. Rev. Stat. §§ 107.086-865. NRS 40.680 requires mediation in construction defect claims. *Id*. at § 40.680. It further states that evidence of failure to mediate in good faith is admissible in future proceedings. *Id*. at §40.680(8). By requesting mediation, a party represents its good faith to resolve the dispute and receives in return an agreement that the other party will attempt to resolve the dispute and defer its litigation, at least temporarily. To find otherwise is to sanction the use of mediation as a tool to delay resolution of the dispute.

Where parties set aside, at least temporarily, their litigation or beginning suit and enter into an agreement to mediate they do so with the understanding and expectations that the parties will mediate in good faith. Where a party solicits a party to mediate a dispute and delay other actions temporarily and does so either with the

intention to offer nothing, make a paltry offer, or renew a rejected offer as their only position there is a breach of the implied agreement of good faith.

The Complaint alleges, and the court found ("at best") a contract to engage in mediation**.** Instead of participating in good faith, White told Ramos at mediation five months after requesting an NDA to "pound sand," and thereafter strung Ramos along for approximately eight months total. Finally, in July 2016, after successfully concealing White's identity until it could not affect the sale of the UFC, Respondents threw Ramos to the gutter without giving him a penny. This is bad faith.

Ramos pled the existence of a contract, and Respondents' duty to participate in good faith. If the contract to mediate was not reached in good faith the covenant was breached. The claim for contractual breach of the covenant of good faith was pled sufficiently to withstand a motion to dismiss.

c. Unjust enrichment

Unjust enrichment exists when (1) the plaintiff confers a benefit on the defendant, (2) the defendant appreciates the benefit, and (3) there is acceptance and retention by the defendant of the benefit under circumstances where it would be inequitable for him to retain it without payment. *Certified Fire,* 128 Nev. at 381. Nevada jurisprudence now relies on the Third Restatement of Unjust Enrichment for guidance. *Id*. at 380. "Where unjust enrichment is found, the law implies a quasi-

contract which requires the defendant to pay to plaintiff the *value of the benefit conferred*." *Id.* at 381, emphasis added.

Additionally, the Nevada Supreme Court has held that in a case where an appellant's right to damages is the outgrowth of the alleged deceit practiced upon it by respondents, resulting in their unjust enrichment, the validity or invalidity of appellant's contract does not affect that right. *San Diego Prestressed Concrete Co. v. Chicago Title Ins. Corp.,* 92 Nev. 569, 574 (1976). "Accepting appellant's allegation to be true the pleadings state a claim upon which relief could be granted." *Id*.

What is important to note is that to plead a claim for unjust enrichment, only those elements articulated above must be met. Unjust enrichment does not require enhanced pleading.

In paragraphs 116-118 (ROA 1-14) the elements of unjust enrichment are pled clearly. In paragraphs 103-115 (ROA 1-14) the factual allegations supporting that claim are presented with more than adequate detail. The UFC recognized the benefit that would result from an NDA by their request therefore, accepted the benefit for the desired duration (until the sale) and obtained and retained that benefit. (The issue of the measure of damages is not before the court on a motion to dismiss.)

Ramos alleged both unjust enrichment and White's deceit. Specifically, Ramos's allegations are that White was unjustly enriched because he kept his job as

UFC President and received his cut of the purchase price, and the other entities were similarly unjustly enriched because they were purchased for over 4 billion dollars a mere four days after White cut off negotiations with Ramos. The entire time, Ramos kept silent in good faith.

White deceitfully continued stringing Ramos along until he no longer needed an NDA. Instead of offering a monetary amount, White had promised a mediation – 5 months later – to discuss the price of Ramos's silence. This is undisputed. At mediation in April 2016, White told Ramos to pound sand. This is undisputed. Shortly thereafter White again engaged Ramos to settle on a price for the NDA and ultimately strung Ramos along until July 5, 2016. This is undisputed.

Then, conveniently on July 9, 2016 the sale of the UFC to IMG Entertainment was announced for 4.2 billion dollars. This is undisputed. A mere four days after cutting off negotiations, White and Respondents realized the full benefit of the NDA: White kept his job as UFC president and went off to enjoy his portion of the bounty, the Respondents received their portion, and Ramos went to prison all the while keeping White's identity secret. This is undisputed. This is a prima facie case of unjust enrichment – obtaining performance without paying for it.

The court's recognition of the troubling proximity of the withdrawal of the request for an NDA coupled with its earlier rejection of White having a reputation to protect (ROA trans at) must not be seen as supporting its conclusion that Ramos

failed to plead a claim for unjust enrichment on which he could prevail. As the court questioned, Respondents request for an NDA was only terminated 4 days before Respondents announced sale of the UFC for 4.2 billion dollars.[7] That question of whether Respondents retained a benefit conferred by Ramos for which Ramos deserved compensation is enough for the court to deny the motion, see *Certified Fire*, supra at p 257. However the Court made factual findings adverse and unsupported by the record under the proper standard. It further applied inapplicable, overridden, and superseded law to dismiss Ramos's unjust enrichment claims, as discussed later in more detail.

The court's above recognition of the timing does more than give an inference of what was the desired benefit of the NDA – to conceal White's contact with Doe and White's improper use of the UFC through his position as its president. While that can and will be elaborated on, the court in recognizing the timing of the withdrawal of the NDA a request and his opinion of White's reputation mandate the inference for the purposes of a motion to dismiss that the benefit provided by the silence of Ramos was to not hamper the sale of the UFC or White's retention as its president and not to protect White's dubious reputation.

The court's comment that the timing issue needs to be "fleshed out in discovery" (*see* fn. 7) is, by itself, a ground for reversal. Moreover, whether the sale

[7] ROA 37-38, L. 22 and 14.

price would have been lower had the public and/or the purchaser known about White using the UFC to pander and solicit prostitution is not properly determined on a motion to dismiss; they are questions of fact.

The Order was premised on an error of law misrepresented by Respondents to the Court.

In their Motion to Dismiss, Respondents materially misrepresented the law of unjust enrichment as follows:

> "It has been settled law for more than eight decades that a person is not entitled to restitution through unjust enrichment by simply performing acts the law requires of him. See Restatement (First) of Restitution§ 60 cmt. a (1937) ("If a person does an act which it is his legal duty to do, whether such duty is enforceable at law or in equity, he is not entitled to restitution, irrespective of the cause of the act.") (updated through June 2020)." (ROA 26 L. 18-24)

Having taken the time to "update" the First Restatement failure to note it being superseded by the Third Restatement is difficult to understand as being less than candid with the Court.

The First restatement of Restitution is not the settled law for 80 years and this court now recognizes and follows the Third Restatement (2011)[8] which materially changes the analysis and approach to unjust enrichment. The parenthetical statement "(updated through June 2020)" suggests the contrary and that the 80-year-old authority is still current. The Court concluded at hearing that Ramos relying

[8] As articulated in *Certified Fire*, 128 Nev. at 380.

primarily on that misrepresentation and its unsupported factual conclusions that Ramos had no claim for unjust enrichment because he was legally prohibited from disclosing White's identity by virtue of the Protective Order. (see ROA 160 L. 1-3)

A review of the Third Restatement of Restitution, consistent with the current basis for unjust enrichment, provides no support for the continued relevance of Section 60 of the First Restatement of Restitution that Respondents argue applies here.

Neither the Protective Order which was entered pursuant to statute nor Judge Navarro ever restrained Ramos. The record is devoid of any basis for the court to make such a finding in violation of the mandate to make factual inferences in plaintiff's favor.

As held in *Certified Fire*, at p 257, one who requests and receives a benefit is presumed to agree to pay for that benefit. White is estopped from even raising the issue that Ramos was prevented from disclosing White's identity by the Protective Order as White initiated the discussion of the NDA only *after* the protective order was issued. His counsel surely understood the effect of the protective order in November 2015 yet requested an NDA despite, or more likely because of, it. Other than not having direct contact with White Ramos was only required and directed to forfeit the video recording and was not restrained from disclosing White's identity.

The protective order did not restrict Ramos's first amendment right and prior restraint is an exception seldom given. The protective Order restrains the government and by stipulation defense counsel only. At the time in question, after entry of his plea the record is devoid of any restraint on Ramos's speech. More importantly, White requested Ramos's silence in requesting the NDA indicating he understood that Ramos could speak if he chose to. Making a factual determination based on the court's improper review of the whole record (ROA) and a Protective Order which does not support the conclusion that Ramos was under a duty enforceable at law to remain silent was improper.

The court held that Ramos was under a gag order and could not have disclosed White's identity because of the Protective Order in the criminal matter. (Order, pg. 12, ROA 43.)

Although the Protective Order was made pursuant to the federal Victims' Rights Act which prohibited counsel from disclosing White's identity in the criminal matter (Document 40, case 2:15-cr-067-GMN-CWH), it is not an unconstitutional prior restraint on Ramos. In fact, the only thing the Protective Order prohibited Ramos from doing was having or accessing evidence without counsel present. *Id*.

The court blatantly ignored the fact that Judge Navarro stated continued discussion about the NDA was proper (ROA 63), and instead erroneously made a factual determination as to what she *would* do. (ROA 160 L. 5-8) The conclusion

that Ramos had an independent legal duty, based on the Protective Order (and what Judge Navarro *would* do), to not disclose White's name that prevented him from recovering on his unjust enrichment claim is a finding of fact and is grounds to reverse the order granting dismissal.

The Protective Order was made pursuant to the federal Victims' Rights Act, which prohibited *counsel* from disclosing White's identity in the criminal matter. Document 40, case 2:15-cr-00267-GMN-CWH. It is not an unconstitutional prior restraint on Ramos, and the only thing the Protective Order prohibited Ramos from doing was having or accessing evidence without counsel present. *Id*.

Dismissal of the unjust enrichment claim was error based on the combination of applying superseded authority and factual finding contrary to the pled facts and not supported by the record before the court.

3. **ISSUE 3: The Court erred in dismissal with prejudice without leave to Amend.**

In order to deny a motion for leave to amend, Nevada relies on the "futility test" set forth in *Allum v. Valley Bank*. The futility test states that it is error to deny a motion for leave to amend if such amendment would not be futile. *Allum v. Valley Bank*, 109 Nev. 280, 287, 849 P.2d 297, 305 (1993).

Appellant did in fact request leave to amend in his opposition to Respondents' motion to dismiss, but it was denied by the district court when the motion was

granted outright. The court's fact-based dismissal without leave to amend before any discovery occurred is error. The allegations in the complaint – taken as true – meet the futility test. Discovery could further substantiate the facts as alleged. The district court did not address Ramos's motion for leave to amend, which is grounds for reversal.

The dismissal was clearly based on factual findings adverse to Appellant who was denied the opportunity by the dismissal to conduct discovery which would, or at a minimum could, support Appellants factual allegations and result in a judgment in his favor.

Thus, if this Court is to find that there are deficiencies in the complaint which support dismissal, it is error to resolve factual and legal disputes against Appellant and not provide an opportunity to remedy any deficiency by amendment – unless such amendment would be futile. However, that is unlikely here, where (as in *Certified Fire*) the mere allegation of quantum meruit and unjust enrichment would enhance if required the contract claim for example. The denial of leave to amend must be reversed.

VIII. CONCLUSION

It is clear that dismissal of Appellant's Amended Complaint was based on improper factual determinations by the court and the Amended Complaint had set forth claims upon which it could prevail which the court expressly recognized in

both the Order of dismissal ("at best there was an agreement to mediate," ROA 113 L.7-8) and hearing (proximity of sale to termination of negotiations discussed at ROA 152-153).

Though premature on the matter now before the court, a contract to mediate can exist and be breached subject to good faith and unjust enrichment can occur when a party induces performance and secures a benefit therefrom.

For the foregoing reasons, Appellant Ramos respectfully requests this Court vacate the district court's order.

DATED this 30th day of June 2021.

By:

/s/ Ian Christopherson
IAN CHRISTOPHERSON, ESQ.
Nevada Bar No.: 3701
CHRISTOPHERSON LAW OFFICE
600 South Third Street
Las Vegas, NV 89101
(702) 372-9649
icLaw44@gmail.com
Attorney for Appellant,
Joshua Ramos

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June, 2021, service of the foregoing APPELLANT'S OPENING BRIEF was made by submission to the electronic filing service for the Nevada Supreme Court upon all the parties registered to the Supreme Court Electronic Filing Program.

Don Campbell
CAMPBELL & WILLIAMS
710 South Seventh Street
Las Vegas, Nevada 89101
Telephone: (702) 382-5222
Facsimile: (702) 382-0540
Attorneys for Respondent

/s/ Peggy Glover
FOR THE FIRM