Case No. 82102

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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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JOSHUA RAMOS, aka ERNESTO JOSHUA RAMOS, an individual,

Appellant,

v.

DANA WHITE, an individual; UFC HOLDINGS, LLC, a Delaware limited liability company; ZUFFA, LLC, a Nevada limited liability company, dba ULTIMATE FIGHTING CHAMPIONSHIP; DOES I through X, inclusive; and ROE CORPORATIONS I through V, inclusive

Respondents.

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ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT
CASE NO. A-20-813230-C

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# RESPONDENTS' ANSWERING BRIEF

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## RULE 26.1 DISCLOSURE

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

Respondent Dana White is an individual. Respondents UFC Holdings, LLC and Zuffa, LLC are owned by Endeavor Group Holdings, Inc., which is a publicly-traded company on the New York Stock Exchange under the ticker symbol EDR.

Respondents have been represented in the proceedings below by Donald J. Campbell, J. Colby Williams, and Philip R. Erwin of Campbell & Williams.

DATED this 20th day of August, 2021.

CAMPBELL & WILLIAMS

By /s/ *J. Colby Williams*
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## RESPONSE TO ROUTING STATEMENT

Though Respondents do not acquiesce in the arguments contained in Appellant's Routing Statement, they have no objection to this matter being assigned to the Supreme Court.

## COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Did the district court err by granting Respondents' motion to dismiss pursuant to NRCP 12(b)(5) where the detailed allegations in Appellant's complaint—which are considered judicial admissions—established beyond doubt that there was no acceptance or meeting of the minds to support the existence of an enforceable contract such that Appellant's causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing failed to state a claim upon which relief could be granted?

2. Did the district court err by dismissing Appellant's unjust enrichment claim pursuant to NRCP 12(b)(5) where the detailed allegations in Appellant's complaint as well as judicially noticeable facts and incorporated court filings from Appellant's federal criminal proceedings established beyond doubt that the benefit Appellant claimed to confer on Respondents was actually attributable to Appellant's performance of his own legal obligations and/or was the product of acts taken to protect his own interests and, thus, could not support a claim for unjust enrichment?

3. Did the district court abuse its discretion by dismissing Appellant's complaint with prejudice on futility grounds where the detailed allegations contained therein as well as judicially noticeable facts and incorporated court filings from Appellant's federal criminal proceedings established that Appellant could not amend his pleading to state viable contract and quasi-contract claims without contradicting the allegations contained in his original complaint?

Respondents respectfully submit the answer to each question is no.

## COUNTERSTATEMENT OF THE CASE

Appellant Joshua Ramos ("Ramos") is a convicted felon who continues to antagonize Respondent Dana White ("White") and the latter's employer, Respondent Zuffa, LLC ("Zuffa"), which does business as the Ultimate Fighting Championship® ("UFC®"). After pleading guilty to using a facility of interstate commerce (*i.e.*, a cellular telephone) in an attempt to extort White and spending nearly a year in federal prison, Ramos filed the underlying civil action against Respondents based on an unsuccessful mediation in which the parties tried to reach terms for a non-disclosure agreement that would bind Ramos following the conclusion of his criminal case. The complaint below wove a detailed narrative designed to recast Ramos as the true victim of the sordid events leading to his conviction. That detailed narrative, however, actually proved to be Ramos's undoing under NRCP 12(b)(5).

It is well settled that a party is bound by what it states in its pleadings. This Court, like federal courts across the country, has recognized that concessions in pleadings are judicial admissions. A party can thus plead itself out of court by alleging facts that show it has no claim even though it was not required to allege those facts. That is exactly what Ramos did here.

Ramos alleged claims for breach of contract, contractual breach of the implied covenant of good faith and fair dealing, tortious breach of the implied covenant of good faith and fair dealing, and unjust enrichment.[1] Respondents moved to dismiss under NRCP 12(b)(5), arguing that the allegations in the complaint—accepting them as true—demonstrated the absence of an enforceable contract because there had been no meeting of the minds when the parties' mediation and subsequent negotiations admittedly ended without any agreement on compensation for a post-criminal proceeding non-disclosure agreement.

Insofar as Ramos argued Respondents engaged in bad faith by not offering Ramos any money on the day of the mediation, Respondents pointed out that Nevada law does not recognize preliminary agreements to negotiate in good faith. More importantly, Ramos's complaint went on to allege that Respondents *did* offer him a six-figure settlement in the weeks following the mediation, but he rejected it, thereby

[1] Because Ramos does not contest the dismissal of his claim for tortious breach of the implied covenant (*see* OB at 2 n.1), Respondents will not address it further.

confirming the absence of any acceptance or meeting of the minds. Without an enforceable contract, Ramos's claims for breach of contract and breach of the implied covenant necessarily failed.

Ramos alternatively claimed Respondents had been unjustly enriched because he conferred a benefit on them by remaining silent during his criminal proceedings and not publicly outing White as the victim of his criminal conduct. Incredibly, Ramos alleged that he was entitled to the difference between the UFC®'s $4.2 billion sales price (announced in July 2016) and the allegedly lower price the promotion would have sold for had Ramos spoken out. Again, however, Ramos repeatedly alleged in his complaint that his silence during the criminal proceedings was compelled by a protective order entered in that action, which lasted through "the close of the case." Respondents argued that longstanding principles set forth in the Restatement (First) of Restitution and other authorities establish that simply performing legally required obligations or acts to protect one's own interests will not support an unjust enrichment claim.

The district court heard the motion to dismiss on October 7, 2020. After considering extensive oral argument, the Honorable David Jones granted Respondents' motion in its entirety, and instructed Respondents to prepare an order with findings of fact and conclusions of law. The district court signed the order on October 19, 2020, and entered the same on October 20, 2021. This appeal followed.

## COUNTERSTATEMENT OF FACTS

### A. The Parties.

Ramos is an individual residing in Clark County, Nevada. *See* 1 App. 1 (Compl. ¶ 1). White is Zuffa's President. 1 App. 2 (Compl. ¶ 2). Zuffa is a Nevada limited liability company and, through the UFC® brand, is the leading promoter of professional mixed martial arts contests in the world. 1 App. 2 (Compl. ¶ 3). In July 2016, it was announced that WME Endeavor was acquiring the UFC® promotion and related assets for $4.2 billion. 1 App. 4, 10, 13 (Compl. ¶¶ 23, 89, 114).[2]

### B. White Reports Ramos's Criminal Conduct to Law Enforcement, the FBI Investigates, and Ramos Pleads Guilty to a Felony.

Beginning in or about November 2014 and continuing into early 2015, Ramos contacted White on multiple occasions using the parties' cellular telephones. 1 App. 3 (Compl. ¶¶ 14-17). During these communications, Ramos conveyed information to White both in writing and video format that caused White to contact legal counsel. 1 App. 3-4 (Compl. ¶¶ 16-18). White and his counsel thereafter arranged a meeting with federal law enforcement officials for the purpose of reporting what they believed was potential criminal conduct by Ramos, namely his attempted extortion

[2] Ramos also named UFC Holdings, LLC as a defendant below. 1 App. 2 (Compl. ¶ 2). UFC Holdings, LLC is a Delaware limited liability company that was not even formed until July 27, 2016, well after the events alleged in the Complaint. 2 App. 34. Ramos, accordingly, agreed that this entity could be dismissed without prejudice. 2 App. 63:22-26.

of White by threatening to release a video designed to expose secrets and/or impute disgrace to White. 1 App. 4 (Compl. ¶¶ 18-20, 26). Special agents from the Federal Bureau of Investigation opened a case file and proceeded to monitor Ramos's continued contacts with White. 1 App. 5 (Compl. ¶¶ 35-36).

In or about early January 2015, Ramos ultimately demanded that White pay him $200,000 in cash in exchange for Ramos's agreement not to release the subject videotape and to provide White with all copies thereof. 1 App. 6 (Compl. ¶¶ 43-47). FBI agents continued to monitor Ramos's communications with White, and received court-approval to conduct electronic surveillance of scheduled in-person meetings between Ramos and White. *See id.* Ramos and White met in early January 2015 during which Ramos accepted $200,000 in cash per his prior demands, and provided White with a copy of the videotape. *See id.* Special Agent James Mollica arrested Ramos shortly after he left the meeting with White. *See id.*

The United States Attorney's Office for the District of Nevada, through the sitting grand jury, indicted Ramos on September 22, 2015 for use of an interstate facility (*i.e.*, a cellular telephone) with the intent to carry on extortion. 1 App. 7 (Compl. ¶ 55).[3] Ramos, through criminal defense counsel, and Assistant United

[3] *See also* 2 App. 35-47 (Criminal Docket Sheet for *United States v. Ramos*, Case No. 2:15-cr-00267-GMN-CWH). The district court took judicial notice of this document pursuant to *Baxter v. Dignity Health*, 131 Nev. 759, 764, 357 P.3d 927, 930 (2015) (courts can consider matters incorporated by reference in the complaint), *Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009) (courts can take

States Attorney (now Magistrate Judge) Carla Higginbotham entered into a stipulated protective order whereby the parties agreed to keep the victim's name and related information confidential. 1 App. 7 (Compl. ¶¶ 49-50, 52, 56-57).[4] Former Magistrate Judge Hoffman entered the order on October 5, 2015. 2 App. 52-53. According to Ramos, the protective order was only for the duration of the criminal proceedings, after which he would be free to speak publicly. 1 App. 7-9 (Compl. ¶¶ 57, 62, 64, 76).

Ramos, however, claims for the first time on appeal that the Protective Order *did not* prohibit him from publicly disclosing White's identity, and now contends it only restrained the government and defense counsel. *See* OB at 25-26. This newly-minted position flatly contradicts multiple allegations in the complaint, Ramos's

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judicial notice of related criminal proceedings when appropriate), and *Breliant v. Preferred Equities Corp.,* 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993) (courts can take judicial notice of public records). *See* 4 App. 107-09 (Order at 2-3 and n.1).

[4] *See also* 2 App. 48-53 (Stipulation and Order for Protective Order Pursuant to Fed. R. Crim. Pro. 16(d)(1) and 18 U.S.C. § 3771). The district court took judicial notice of this document as well. 4 App. 109 (Order at n.2). Ramos did not object to the district court's consideration of these public records below. Nor does he meaningfully contest on appeal the court's discretionary determination to take judicial notice of the same. *See* OB at 8-9 and n.4 (instead arguing the exhibits were not sufficient to override the complaint's allegations); *cf. Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) (district court's decision to admit or exclude evidence is reviewed for an abuse of discretion, but failure to object precludes appellate review unless the decision amounts to plain error).

arguments in his opposition brief below, and those of his counsel at the motion to dismiss hearing:

| SOURCE | ALLEGATION |
|---|---|
| Compl. ¶ 49 (1 App. 7) | "The US Attorney drafted and had counsel for Ramos execute a protective order effective only during the prosecution ***which prevented disclosure of the name of White***. . . ." (emphasis added). |
| Compl. ¶ 52 (1 App. 7) | "After the court entered a protective order which was only effective during the pendency of the criminal proceedings. . . ." |
| Compl. ¶ 56 (1 App. 7) | "The US Attorney concealed White's name." |
| Compl. ¶ 57 (1 App. 7) | "Pursuant to the stipulation for a protective order Whites [sic] identity was only concealed through the close of the case ***after which Ramos was free to talk***." (emphasis added). |
| Compl. ¶ 62 (1 App. 8) | "The protective order by its terms expired at the close of the prosecution, then set for early 2016." |
| Compl. ¶ 64 (1 App. 8) | "***After sentencing closing the case the protective order would no longer bind Ramos*** and White offered to pay Ramos for his silence as ***after sentencing Ramos he [sic] would be freed from the protective order***." (emphases added). |
| Compl. ¶ 76 (1 App. 9) | "[N]othing in the plea agreement or, the protective order or the terms of supervised release as directed by the court constrained in any way Ramos from disclosing the events at issue or White's activities ***subsequent to completion of his sentence*** or earlier." (emphasis added). |

| | |
|---|---|
| Compl. ¶ 85 (1 App. 10) | "[T]he guilty plea's ultimate effect would be ***to free Ramos from the terms of the protective order after sentencing (close of the case)***." (emphasis added). |
| Opp'n at 8:23-26 (2 App. 61) | "Upon his arrest, ***a gag order was a condition of Ramos' release*** by the Magistrate. This order was the [sic] only operative until the indictment when a stipulation for a protective order was entered. ***That protective order only was effective through the close of the case***." (emphases added). |
| Hr'g Tr. at 29:6-9 (4 App. 147) | "[Ramos] could have brought a motion to remove the ***gag order***. . . . He could have violated the ***gag order***." (emphasis added). |

In other words, the reason 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," OB at 25, is because that is exactly what Ramos alleged on the face of his complaint (and elsewhere), repeatedly.

On October 27, 2015, Ramos and the United States Attorney's Office notified the district court they had reached a plea agreement. 2 App. 42-43. On November 3, 2015, Ramos—after being sworn and canvassed by Chief Judge Gloria Navarro for the United States District Court—plead guilty to Count 1 in the Indictment. 1 App. 7, 9 (Compl. ¶¶ 55, 73-75); 2 App. 43.

**C. White and Ramos Participate in an Unsuccessful Mediation.**

White and Ramos, through counsel, agreed to participate in a mediation prior to Ramos's sentencing to determine whether the parties could reach agreement on a

potential non-disclosure agreement whereby Ramos would continue to maintain confidentiality regarding White's identity as the victim of Ramos's criminal conduct *after* the conclusion of the criminal proceeding. 1 App. 8 (Compl. ¶¶ 61, 63-65 ("After the sentencing closing the case the protective order would no longer bind Ramos[,] and White offered to pay Ramos for his silence as after sentencing Ramos he [sic] would be freed from the protective order.")). The parties agreed on the date of the mediation (April 5, 2016), the manner of the mediation (the parties would participate from different locations), and the identity of the mediator (Peter S. Christiansen). 1 App. 8 (Compl. ¶¶ 66, 67, 69).

Ramos alleges he had a subjective understanding from his counsel—which he admits may have been incorrect—that White would pay him an amount approaching or exceeding one million dollars for a non-disclosure agreement. 1 App. 8 (Compl. ¶ 68). The mediation occurred on April 5, 2016. 1 App. 8-9 (Compl. ¶¶ 66, 69, 77). White did not offer Ramos any amount of money at the mediation, but did offer $30,000 to Jane Doe (Ramos's then-girlfriend) who was also participating therein. 1 App. 9, 11, 13 (Compl. ¶¶ 78, 91, 113). The mediation ended unsuccessfully as "***no figure was agreed upon***." 2 App. 13 (Compl. ¶ 111) (emphasis added). Ramos acknowledged below that Respondents "performed pursuant to the mediation agreement in all respect [sic]," but claimed their failure to offer anything to Ramos

on the day in question constituted bad faith. 2 App. 58 (Opp'n at 5:17-18); 1 App. 11 (Compl. ¶ 99).

That, however, was not the end of the matter as the parties continued to negotiate after the mediation. Ramos alleged that after April 2016, White "offered to pay a combined total amount of $450,000 to [Jane] Doe and Ramos." 1 App. 12 (Compl. ¶ 101); *see also* 2 App. 58 (Opp'n at 5:18-20 ("In the next three months[,] Defendants offered as much as $450,000.00 to Ramos and Ms. Doe.")). When asked by the district court what would have happened had his client accepted the $450,000 offer, Ramos's counsel candidly responded: "Then we wouldn't be here today. But it wasn't --" 4 App. 139 (Hr'g Tr. at 21:14-17).

### D. Ramos Unsuccessfully Attempts to Withdraw His Guilty Plea, and is Sentenced to Approximately One Year in Federal Prison.

In late June 2016, Ramos filed an emergency motion to continue his sentencing so that he could substitute in new counsel and withdraw his guilty plea. 1 App. 9 (Compl. ¶ 79); 2 App. 44 (ECF Nos. 53-54). Chief Judge Navarro denied Ramos' motion, and sentenced him to 366 days in prison. *See id.*; *see also* 2 App. 44-45 (ECF Nos. 56-60, 62). Ramos filed an appeal challenging the denial of his desire to change his plea, which was ultimately dismissed by the United States Court of Appeals for the Ninth Circuit in early-March 2017. 2 App. 45-46 (ECF Nos. 65, 72, 77-79). Ramos self-surrendered to start serving his sentence on March 28, 2017. 2 App. 46 (ECF No. 76). After completing a period of supervised release, Ramos

filed the underlying action on April 3, 2020—nearly four years from the date of the parties' failed mediation.

## SUMMARY OF ARGUMENT

Just because the dismissal standards applicable to NRCP 12(b)(5) undoubtedly favor plaintiffs (or pleaders), that does not mean every complaint automatically clears the Rule's deferential hurdle. Where, for example, the face of a pleading provides unnecessary details that negate purported causes of action by showing beyond doubt that a party can prove no set of facts entitling it to relief, Rule 12(b)(5) compels dismissal. Ramos's complaint falls squarely into this category.

Allegations in a complaint are judicial admissions. *See Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 127 Nev. 331, 343, 255 P.3d 268, 278 (2011) ("concessions in pleadings are judicial admissions"); *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) (factual assertions in pleadings are considered judicial admissions conclusively binding on the party who made them). Hence, "a plaintiff can plead himself out of court by alleging facts which show that he has no claim, even though he was not required to allege those facts." *Soo Line R. Co. v. St. Louis Sw. Ry. Co.*, 125 F.3d 481, 483 (7th Cir. 1997); *see also Sprewell v. Golden State Warriors*, 266 F.3d 979, 988-89 (9th Cir. 2001)

(same).[5] When the NRCP 12(b)(5) standards and these related principles are applied to Ramos's allegations, it is clear the district court properly dismissed this action.

The breach of contract claim, which is the heart of Ramos's complaint, is premised on the allegation that Respondents breached a contract to mediate. Incongruously, the complaint contains multiple judicial admissions confirming the parties had, in fact, engaged in a mediation at the appointed time, at the appointed place, and with the agreed-upon mediator. The gist of Ramos's argument below was that Respondents breached the mediation agreement by failing to negotiate in good faith because they did not offer Ramos any money on the day of the mediation, thus rendering it unsuccessful. These allegations, taken as true from the face of the complaint, confirm beyond doubt that Ramos can prove no set of facts that would entitle him to relief for breach of contract or breach of the implied covenant of good faith and fair dealing.

First, to the extent an agreement to attend a mediation can be considered an enforceable contract, as opposed to merely an agreement to try and reach a future definitive agreement, Ramos's allegations confirm the parties performed. Next,

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[5] Notably, the *Soo Line* and *Sprewell* courts articulated this "well-settled rule" when the more lenient pre-*Iqbal/Twombly* standards applied to dismissal motions under FRCP 12(b)(6). Those standards formerly provided, in part, that "a complaint should not be dismissed unless it appears beyond doubt that a plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Sprewell*, 266 F.2d at 988. That, of course, is consistent with Nevada's current standards under NRCP 12(b)(5). *See* Point I, *infra*.

insofar as Ramos complains about the lack of an offer on the day of the mediation (notwithstanding that negotiations admittedly continued thereafter), Nevada law does not recognize a so-called duty to negotiate in good faith as that, too, is akin to an unenforceable agreement to agree. *See Bond Mfg. Co, Inc. v. Ashley Furniture Indus., Inc.,* 2018 WL 1511717, at *6 (D. Nev. Mar. 27, 2018) (citing *City of Reno v. Silver State Flying Serv., Inc.*, 84 Nev. 170, 438 P.2d 257 (1968)); *see also Barbara Ann Hollier Tr. v. Shack*, 131 Nev. 582, 587 n.1, 356 P.3d 1085, 1088 n.1 (2015) ("The implied covenant of good faith and fair dealing [ ] does not apply during the negotiation or formation phase of a contract.").

Lastly, given the admitted unsuccessful mediation (as well as the admitted unsuccessful later negotiations during which Ramos rejected a six-figure offer) the complaint undisputedly establishes the lack of acceptance and/or meeting of the minds required to support an enforceable contract arising from the mediation and related negotiations. *See May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005) (identifying required elements for a valid contract). Without an enforceable contract, there can be no breach of contract or the implied covenant of good faith and fair dealing. *See Greenstein v. Wells Fargo Bank, N.A.*, 2017 WL1173916, at *1 (D. Nev. Mar. 29, 2017).

The dismissal of Ramos's alternative claim for unjust enrichment was likewise appropriate. The complaint's allegations demonstrate that the benefit

Ramos claimed to confer on Respondents—his silence during his criminal proceeding—was simply a court-ordered obligation imposed by the federal judges in that action. Though Ramos chastises Judge Jones's dismissal of this claim on several grounds, none are meritorious.

First, Ramos contends the district court erroneously "found Ramos was under a 'gag order' or 'nondissemination order' without any express evidence thereof and instead apparently reading the protective order far more than it was." OB at 12. This statement borders on a violation of counsel's duty of candor to the court. *See* RPC 3.3(a)(1) (providing that "[a] lawyer shall not knowingly [m]ake a false statement of fact or law to a tribunal"). After all, it was Ramos who specifically used the term "gag order" when describing his non-disclosure obligations during the criminal case. *See* 2 App. 61 (Opp'n at 8:23-25 ("Upon his arrest, a gag order was a condition of Ramos' release by the Magistrate.")); 4 App. 147 (Tr. at 29:6-8 ("[Ramos] could have violated the gag order[.]")). Even if Ramos's criticism of the district court for simply accepting Ramos's own allegations as true had a shred of merit, which it does not, Ramos cannot be heard to complain as he invited the alleged error.

Indeed, Ramos repeatedly alleged (*i.e.*, admitted) in his complaint that the formal protective order entered in his criminal case (which replaced the initial "gag order") precluded him from disclosing White's identity as the victim of his crime until after the close of that case. *See supra* at 8-9. Ramos's new and contradictory

assertion on appeal that the protective order only bound the government and his defense counsel is patently improper as "parties may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below." *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 437, 245 P.3d 542, 544 (2010) (quotations omitted). The new assertion is also false as the plain language of the protective order expressly applied to "all parties," not just counsel. 2 App. 53 (Protective Order at 5:4-11).

Second, Ramos complains that Judge Jones relied on his own personal opinion of what Judge Navarro would have done in the criminal case when he dismissed the unjust enrichment claim. *See* OB at 3, 9, 12. The record shows otherwise. The subject discussion during the hearing below was focused on whether Ramos's complaint about the failed mediation would have constituted sufficient grounds to set aside his plea agreement in the criminal case. 4 App. 130-31 (Hr'g Tr. 12:1-13:19). It was an academic aside that had nothing to do with the district court's dismissal of the unjust enrichment claim. Indeed, the written order (which controls) never mentions the subject in connection with this claim. 4 App. 115-17 (Order 10:1-12:15).

Third, Ramos contends the dismissal of his unjust enrichment claim is based on an error of law because it was premised, in part, on the Restatement (First) of Restitution, which has been "superseded" in Nevada by the Restatement (Third) of

Restitution and Unjust Enrichment. *See* OB at 23-24. This is nonsense. The Restatements of the Law are treatises published by the American Law Institute that set forth general principles of law in a given field. While a particular principle of law may be superseded over time, Restatements are not superseded *in toto* by subsequent versions. On that point, the Nevada Supreme Court, sitting *en banc*, recently reaffirmed that "Nevada jurisprudence relies on the First ***and*** Third Restatements of Restitution and Unjust Enrichment for guidance." *Korte Constr. Co. v. Bd. of Regents*, 137 Nev. Adv. Op. 37, --- P.3d ----, ----, 2021 WL 3237198, at *3 (Nev. July 29, 2021) (emphasis added). Ramos has identified nothing in the Third Restatement to suggest the district court's reliance on certain principles from the First Restatement has been undermined in any way.

## ARGUMENT

### I. THE STANDARD OF REVIEW ON THE DISMISSAL RULING IS DE NOVO.

Respondents agree the Court conducts de novo review of a district court's ruling on a motion to dismiss. *See* OB at 10. Under that standard, all factual allegations in the complaint are deemed true and inferences are drawn in favor of the nonmovant. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). Additionally, a "complaint should be dismissed only if it appears beyond doubt that [the nonmovant] could prove no set of facts, which, if true, would entitle it to relief." *Id.*

While Ramos argues the district court failed to apply the proper standards under NRCP 12(b)(5), *see* OB at 8, the record below demonstrates that Judge Jones did exactly what the rule requires—he accepted Ramos's factual allegations as true. At the time of hearing, for example, the court stated:

> ***You [Ramos] brought those facts in front of this Court, and this Court is accepting them as true***. [Defendants] just admitted for this motion they are true. So after the date of the mediation, ***according to you***, money was offered. So they agreed to the time, the place, the mediator, they attended, and then within a short period thereafter, they actually offered money – not at the mediation, but shortly thereafter[.]

4 App. 133-34 (Hr'g Tr. 15:22-16:3) (emphases added); *see also id.* at 139 (Hr'g Tr. 21:8-10 ("But ***your facts are*** that we – ***you have brought before this Court*** is someone on behalf of Mr. White then went forward and at least attempted to negotiate with your client.") (emphases added).

The district court's written order likewise confirms that Judge Jones accepted Ramos's factual allegations as true and drew every inference in his favor. *See, e.g.*, 4 App. 111, 116 (Order at 6:1-3, 11:3-4). Ramos's argument that the Order "does not adequately or properly reflect the findings at the hearing to dismiss," *see* OB at 10, is both wrong and runs headfirst into the longstanding principle that "[t]he formal written order signed by the court . . . must be taken as the best evidence of the court's decision." *Mortimer v. Pacific States Savings & Loan*, 62 Nev. 142, 153, 145 P.2d 733, 735-36 (1944). His related criticism that the district court should not have delegated the Order's preparation to Respondents' counsel is equally unavailing.

*See id.* at 153, 145 P.2d at 736 ("The fact that [the order] was prepared by appellant is of no consequence. A court is presumed to read and know what it signs. The practice of preparing entries for the court to sign and enter of record, is proper.").

## II. RAMOS'S COMPLAINT FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

Ramos challenges the dismissal of his claims for (1) breach of contract, (2) contractual breach of the implied covenant of good faith and fair dealing, and (3) unjust enrichment. The district court's ruling was correct on all counts.

### A. Breach of Contract.

Ramos alleged that he and White orally agreed to attend a mediation, that all parties "understood" White would pay Ramos a "substantial" amount of compensation in exchange for a post-criminal proceeding non-disclosure agreement, and that White breached the parties' agreement by not offering to pay Ramos anything at the mediation. *See* 1 App. 10-11 (Compl. ¶¶ 81-93). Properly treating Ramos's factual allegations as true and drawing every reasonable inference in Ramos's favor, the district court nonetheless determined that Ramos had not stated a claim for breach of contract as the allegations of the complaint expressly pleaded Ramos out of any viable contract claim. 4 App. 111 (citing *Sprewell*, 266 F.3d at 988-89). This ruling should be affirmed as (i) no enforceable agreement arose from the parties' mediation, and (ii) a party's negotiating positions during a mediation cannot give rise to an independent breach claim under Nevada law.

### 1. There was no breach arising from the agreement to mediate.

The elements of a breach of contract claim are "(1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach." *Stuhmer v. Talmer W. Bank*, 133 Nev. 1080, 404 P.3d 412, 2017 WL 4950062, at *1 (2017) (unpub. disp.) (quoting *Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 919-20 (D. Nev. 2006)). An enforceable contract requires "an offer and acceptance, meeting of the minds, and consideration." *May*, 121 Nev. at 672, 119 P.3d at 1257. A meeting of the minds exists when the parties have agreed upon the contract's essential terms. *Roth v. Scott*, 112 Nev. 1078, 1083, 921 P.2d 1262, 1265 (1996). "With respect to contract formation, preliminary negotiations do not constitute a binding contract unless the parties have agreed to all material terms." *May*, 121 Nev. at 672, 119 P.3d at 1257. "A valid contract cannot exist when material terms are lacking or are insufficiently certain and definite" as "[t]he court must be able to ascertain what is required of the respective parties." *Id.* "A breach of contract claim that fails to allege facts sufficient to show that an enforceable contract existed between the parties is subject to dismissal." *Abu Dhabi Commercial Bank v. Morgan Stanley & Co., Inc.*, 651 F. Supp. 2d 155, 173 (S.D.N.Y. 2009).

Ramos alleged multiple times that White never offered him any amount of money at the mediation in exchange for a potential non-disclosure agreement. 1 App. 9, 11, 13 (Compl. ¶¶ 78, 91, 113). The mediation, thus, ended unsuccessfully as "***no***

***figure was agreed upon***." 1 App. 13 (Compl. ¶ 111) (emphasis added). These binding judicial admissions, *see Reyburn Lawn*, 127 Nev. at 343, 255 P.3d at 278, establish beyond doubt that the parties never had a meeting of the minds on the essential contract term of price. *See, e.g., Nevada Power Co. v. Public Util. Comm'n*, 122 Nev. 821, 839-40, 138 P.3d 486, 489-90 (2006) ("When essential terms such as [price] have yet to be agreed upon by the parties, a contract cannot be formed"); *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 378-79, 283 P.3d 250, 255 (2012) (affirming district court's conclusion that no enforceable contract existed where the parties had not agreed to price and scope of work terms); *Roth*, 112 Nev. at 1083, 921 P.2d at 1265 (where parties had not agreed to essential terms of the high-low bracket amounts, there was no contract for binding arbitration).

The lack of material terms in Ramos's alleged contract renders it impossible for any court "to ascertain what is required of the respective parties." *May*, 121 Nev. at 672, 119 P.3d at 1257. To begin, Ramos repeatedly alleged the parties never agreed on a payment amount. That Ramos had a subjective belief the payment would be "substantial" does not constitute a meeting of the minds. "Contractual intent is determined by the objective meaning of the words and conduct of the parties under the circumstances, not any secret or unexpressed intention or understanding of one or more parties to the contract." Nev. J.I. 13.7 (Formation; Contractual Intent). Nor is there

any way for a court to ascertain what is meant by "substantial" as this word obviously can have different meanings to different people.

Assuming, *arguendo*, White had offered a payment amount on the day of the mediation, it is pure guesswork as to whether Ramos would have accepted any such offer. Indeed, Ramos alleged that White offered Ramos and Jane Doe a combined $450,000 for a nondisclosure agreement in the period following the mediation. 1 App. 12 (Compl. ¶ 101). At the hearing below, Ramos's counsel confirmed that had his client accepted the $450,000 offer, "we wouldn't be here," but he didn't. 4 App. 139. This admission confirms the absence of at least two required elements for an enforceable contract, acceptance and a meeting of the minds. *See May*, 121 Nev. at 672, 119 P.3d at 1257; *see also Gottwals v. Rencher*, 60 Nev. 35, 52, 9 P.2d 481, 484 (1939) (an attorney has authority to make admissions of fact that bind the client). Nor is there any way to ascertain other essential terms of a would-be contract arising from the mediation or the parties' subsequent negotiations such as the timing of the payment, its form (*e.g.*, lump sum or paid in installments over time), the terms of Ramos's non-disclosure obligations, *et cetera*. The speculation and uncertainty are endless.

Ramos tries to overcome these deficiencies by arguing that *Certified Fire* "adopts the general view that where goods and services are received failure to agree on compensation does not preclude relief." OB at 13-15. Not exactly. After affirming the district court's finding that no express contract existed given the

parties' failure to agree on price, the *Certified Fire* court explained that quantum meruit can sometimes act as a gap-filler to supply a missing term where the parties intended to contract, exchanged promises, and their respective obligations are clear. 128 Nev. at 379-80; 283 P.3d at 256. The Court nonetheless affirmed the absence of an implied-in-fact contract because there were "simply too many gaps to fill in the asserted contract for quantum meruit to take hold." *Id.* at 380, 283 P.3d at 256. So, too, here.

As an initial matter, Ramos never sought recovery in quantum meruit for an implied-in-fact contract. He sought restitution for unjust enrichment, which is a distinct theory. *See Certified Fire*, 128 Nev. at 380-81, 283 P.3d at 256-57. Regardless, the complaint's allegations confirm the lack of any intent to contract when the post-mediation negotiations ended, the lack of any exchanged promises beyond agreeing to attend the mediation in the first place, and the lack of any resulting obligations. Insofar as Ramos now characterizes his "silence through the date of mediation" as conduct that supports an implied contract, *see* OB at 14-15, that conduct was the product of a pre-existing obligation imposed by the United States District Court that would not constitute the type of bargained-for consideration required to support a new contract for a post-criminal proceeding non-disclosure agreement. *Cf. Cain v. Price*, 134 Nev. 193, 195, 415 P.3d 25, 28 (2018) ("A party's affirmation of a preexisting duty is generally not adequate consideration

to support a new agreement."). We further address this issue in the context of Ramos's unjust enrichment claim. *See* Point II(c), *infra*.

At best, Ramos alleged the parties had an agreement to agree—*i.e.*, the parties agreed to attend a mediation at which they would try to reach agreement on the price for and terms of a post-criminal proceeding non-disclosure agreement. Agreements to agree are, however, unenforceable in Nevada. *See Silver State Flying Serv.*, 84 Nev. at 176, 438 P.2d at 261 ("An agreement to agree at a future time is nothing and will not support an action for damages."). The district court properly found that Ramos could prove no set of facts to state a claim for breach of contract arising from the unsuccessful mediation and dismissed the complaint. *See Stockheimer v. State, Dep't of Corr.*, 126 Nev. 592, 598-99, 245 P.3d 1198, 1202 (2010) ("Dismissal is proper where the allegations [in the complaint] are insufficient to establish the elements of a claim for relief.").

**2. There was no breach of a so-called obligation to negotiate in good faith during the mediation.**

According to Ramos, the elements of a mediation agreement are "[t]he parties agree to the time, manner, mediator, location and payment of the cost of the mediation." 2 App. 54 (Opp'n at 3:4-5). Ramos further argues that "[t]he outcome of the mediation, including whether an agreement will be reached, is not an element of the mediation agreement." 2 App. 54 (Opp'n at 3:2-4). Assuming *arguendo* Ramos is correct, the allegations in the complaint show that Respondents fully

performed. The parties agreed (i) on a time for the mediation (*i.e.,* April 5, 2016), (ii) the manner of the mediation (*i.e.*, the parties would participate from different locations), (iii) the identity of a mediator (*i.e.*, Mr. Christiansen), and the location (*i.e.*, White participated from UFC's offices). 1 App. 8-9 (Compl. ¶¶ 66-67, 69, 71). Ramos confirmed that Respondents performed the foregoing elements of a mediation agreement. 2 App. 58, 60 (Opp'n at 5:17-20, 7:4-6); 4 App. 132 (Hr'g Tr. 14:14-21 ("The Court: Did they, in fact, do all those things, counselor? Mr. Christopherson: Yes, they did.")).[6]

Ramos's claim was instead premised on the allegation that Respondents breached the mediation agreement not because the parties failed to reach a resolution but, rather, because Respondents did not offer Ramos any money on the day of the mediation. 1 App. 11 (Compl. ¶ 91). Ramos essentially alleged that Respondents had a duty to negotiate in good faith, and breached the same by offering Ramos nothing (at least on that day). 2 App. 55-56, 60, 64 (Opp'n at 2:23-24, 3:1-2, 7:9-11, 11:17-19). Whether Ramos's opposition was reformulating or simply clarifying

[6] "Statements of fact contained in a brief *may* be considered admissions of the party in the discretion of the district court." *Am. Title Ins. Co.*, 861 F.2d at 226-27 (emphasis in original); *Reyburn Lawn*, 127 Nev. at 343, 255 P.3d at 276 ("Judicial admissions are defined as clear, unequivocal statements by a party about a concrete fact within that party's knowledge."); *see also Gottwals*, 60 Nev. at 52, 9 P.2d at 484.

the basis for his breach claim, the district court properly found it was still subject to dismissal.

That is because Nevada courts have repeatedly refused to recognize purported contracts to negotiate in good faith. In *Verifone, Inc. v. A Cab, L.L.C.*, for example, the federal district court dismissed a breach of contract claim premised on a written contract providing that the parties "shall negotiate in good faith to enter into [a subsequent] agreement" upon the expiration of the underlying written agreement. 2017 WL 2960519, at *3 (D. Nev. July 7, 2017). The court found that the language requiring the parties to negotiate in good faith was simply an agreement to agree and, thus, unenforceable under Nevada law in an action for damages. *Id.* at *4 (citing *Kohlmoos Enterprises v. Pines, LLC*, 129 Nev. 1131, 2013 WL 5476860, at *1 (Nev. Sept. 26, 2013) (unpub. disp.) ("Nevada abides by traditional jurisprudence that agreements to agree are generally too indefinite to enforce as final agreements" and declining to recognize "the enforceability of a preliminary agreement that requires the parties to negotiate in good faith.")).[7] Chief Judge Navarro concluded with the observation that "[s]eemingly, A Cab's [ ] breach of contract claim is motivated by A Cab not receiving its desired result from negotiations rather than the negotiations

[7] Respondents recognize that NRAP 36(b)(3) precludes the citation to unpublished opinions pre-dating January 1, 2016. They include *Kohlmoos* here for completeness as it was relied upon in *Verifone*, *Bond Mfg.*, and the district court's order. 4 App. 112.

themselves." *Verifone,* 2017 WL 2960519, at *4. The same observation applies here.

Also instructive is *Bond Mfg. Co., Inc. v. Ashley Furniture Indus., Inc.*, which involved a breach of contract claim asserted by a furniture manufacturer against a retailer regarding the failure to agree on the price for an exclusive line of furniture products. 2018 WL 1511717 (D. Nev. Mar. 27, 2018). The subject agreement provided "that the parties would negotiate in good faith over the price to [defendant] for such products." *Id.* at *1; 5. After the parties could not agree on price, the retailer began making the furniture products itself, and the manufacturer sued. *Id.* at *2. Like Respondents here, the retailer moved to dismiss the contract claim on grounds there had been no meeting of the minds on price, and the manufacturer (like Ramos) argued that price was not an essential term because the contract only governed "the pre-sale negotiation process." *Id.* at *6. The Honorable James Mahan relied on *Verifone*, *Kohlmoos,* and *Silver State Flying Serv.* when determining the agreement to negotiate in good faith was nothing more than an unenforceable agreement to agree. *Id.*

Drawing all inferences in his favor, Ramos and Respondents had a preliminary agreement to attend a mediation at which they would negotiate over the price to be paid for a post-criminal proceeding non-disclosure agreement. The parties performed the preliminary agreement by attending the mediation, but it ended

without a resolution. Obviously disappointed he did not achieve his desired result, Ramos sought to manufacture a breach claim premised on the way Respondents negotiated during the mediation. Nevada, however, does not recognize the enforceability of preliminary agreements requiring the parties to negotiate in good faith. That approach makes sense.

While Ramos may be disappointed that Respondents did not offer him anything during the mediation on April 5, 2016, parties in Respondents' shoes could be just as disappointed with what they view to be unreasonably high monetary demands of a plaintiff. Arguably extreme positions taken by parties on the opposite sides of issues occur in mediations every day in Nevada and around the country. If such differences in viewpoint and negotiating style gave rise to independent causes of action for breaching a mediation agreement, no one would ever agree to mediate. Such a perverse outcome would undermine the entire purpose of alternative dispute resolution and overburden an already-taxed judicial system.

Moreover, the reality is that many initial mediations are unsuccessful and require the parties to engage in subsequent negotiations. Ramos alleges that is exactly what happened here: "Defendants continued to negotiate after that [mediation] date, and eventually offered a total amount to Ramos and Doe of $450,000." 2 App. 60 (Opp'n at 7:17-18); 1 App. 12 (Compl. ¶ 101). That Ramos rejected this offer only reinforces there was no acceptance and no meeting of the

minds between the parties and, accordingly, no enforceable contract to be breached. *See Brady v. State*, 965 P.2d 1, 9 (Alaska 1998) ("a court can never enforce an agreement to negotiate so as to bind one party to the ultimate agreement that the parties sought, but failed, to negotiate.").

**B. Breach of the Implied Covenant of Good Faith and Fair Dealing.**

Ramos's cause of action for contractual breach of the implied covenant of good faith and fair dealing cannot survive in the absence of a viable contract. *See* Nev. J.I. 13.43 (requiring "[t]hat the plaintiff and the defendant entered into a valid contract" as the first element of a claim for contractual breach of the implied covenant). Ramos conceded this point in his opposition below. 2 App. 68 (Opp'n at 15:2-5). Without a valid contract, Ramos's derivative claim for breach of the implied covenant was properly dismissed. *See, e.g.*, *Greenstein v. Wells Fargo Bank, N.A.*, 2017 WL 1173916, at *1 (D. Nev. Mar. 29, 2017) ("[w]ithout a contract, Greenstein's claims for breach of contract and breach of the implied covenant fail."); *Walker v. Venetian Casino Resort*, LLC, 2012 WL 4794149, at *11 (D. Nev. Oct. 9, 2012) ("[s]ince Plaintiffs have not demonstrated that an enforceable [ ] contract existed . . . [they] cannot maintain their claim for breach of the implied covenant of good faith and fair dealing.").

Ramos nevertheless asks the Court to impose a covenant of good faith and fair dealing in voluntary mediations akin to the statutory good faith requirements that apply

to mandated mediations in the construction defect and mortgage foreclosure settings. *See* OB at 18-19 (citing NRS 40.680 and NRS 107.086). Notwithstanding the obvious distinction that we are in neither the construction defect nor mortgage foreclosure setting, a finding that a party failed to comply with the cited statutory good faith requirements does not give rise to independent causes of action for breach as Ramos requests here. They instead allow for the possible imposition of sanctions or the admissibility of such a finding in later proceedings on the original underlying claim. *See* NRS 107.086(6); 40.680(8).

As explained above, *see* Point II(A), *supra*, the parties' voluntary agreement to attend a mediation simply provided a non-statutory setting during which they would attempt to negotiate a definitive contract for a post-criminal proceeding non-disclosure agreement. Nevada law already establishes that the implied covenant does not apply in that type of formative, pre-contract stage. *See Barbara Ann Hollier Tr.*, 131 Nev. at 587 n.1, 356 P.3d at 1088, n.1 ("[t]he implied covenant of good faith and fair dealing [ ] does not apply during the negotiation or formation phase of a contract.") (citing Restatement (Second) of Contracts § 205 cmt. c (1981)). That should be the final word on the matter.

**C. Unjust Enrichment.**

Ramos alleged his silence regarding the events surrounding his criminal conduct enabled the UFC® to be sold in July 2016 for more than $4 billion. 1 App. 13-14

(Compl. ¶¶ 114-18). Ramos alleged Respondents were unjustly enriched because they "obtained" his silence and "enjoyed and retained" the benefit thereof by virtue of the company's sale or the sale price not being affected by potential negative publicity. *Id.* Incredibly, Ramos sought damages in an amount attributable to "the value of the UFC at the time of the sale enhanced by the non-disclosure." 1 App. 14 (Compl., Demand ¶ 3). The district court properly determined that this claim failed for multiple reasons.

"Unjust enrichment is the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." *Topaz Mut. Co. v. Marsh*, 108 Nev. 845, 856, 839 P.2d 606, 613 (1992) (quoting *Nevada Industrial Dev. v. Benedetti,* 103 Nev. 360, 363 n.2, 741 P.2d 802, 804 n.2 (1987)). The essential elements of unjust enrichment exist when "the plaintiff confers a benefit on the defendant, the defendant appreciates such benefit, and there is acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof." *Certified Fire*, 128 Nev. at 381, 283 P.3d at 257.

As a threshold matter, Ramos did not allege that any Respondent retained "money or property ***of another*** against the fundamental principles of equity and good conscience." *Topaz,* 108 Nev. at 856, 839 P.2d at 613 (emphasis added). That is because the value of the UFC®—regardless of any allegation about an "enhanced"

sales price due to non-disclosure—has never belonged to Ramos. *See State, Dep't of Taxation v. Chrysler Grp. LLC*, 129 Nev. 274, 281 n.4, 300 P.3d 713, 717 n.4 (2013) ("We also reject Chrysler's unjust enrichment argument because the sales tax paid to the State never belonged to Chrysler."). Thus, insofar as Ramos sought unjust enrichment damages "based on the value of the UFC at the time of sale," 1 App. 14 (Compl., Demand ¶ 3), his request is both outlandish and legally untenable.

That left Ramos trying to plead a claim for unjust enrichment based on Respondents' alleged "unjust retention of a benefit to the loss of another." *Topaz,* 108 Nev. at 856, 839 P.2d at 613. The alleged benefit was Ramos's silence. 1 App. 14 (Compl. ¶ 117). But Ramos's allegations indisputably establish that his silence during the criminal proceedings—from October 5, 2015 through at least June 30, 2016 when he was sentenced (if not through March 2017 when his appeal was dismissed)—stemmed directly from a protective order entered by Magistrate Judge Hoffman in that case, not from any services or benefits requested by Respondents. 1 App. 7-9 (Compl. ¶¶ 49-50, 52, 57, 62, 64, 76); *see also* 2 App. 53.

Given Ramos's allegations, the district court properly dismissed this claim based on the well-settled principle that "a person is not entitled to restitution through unjust enrichment by simply performing an independent legal obligation." 4 App. 116 (citing 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.") and *id.* § 106 (instructing that "a person who incidentally to the performance of his own duty or to the protection or improvement of his own things, has conferred a benefit upon another, is not thereby entitled to contribution.")).

Ramos claims the district court erred because it misread the scope of the protective order in the criminal case by finding it imposed non-disclosure obligations on Ramos instead of just the government and defense counsel. *See* OB at 12; 24-25. The district court did not err; it simply accepted Ramos's own allegations as true. Because Ramos repeatedly alleged in his complaint that he was bound by the protective order for the duration of his criminal case, 1 App. 7-9 (Compl. ¶¶ 49-50, 52, 57, 62, 64, 76), he is foreclosed from changing positions on appeal. *Schuck*, 126 Nev. at 437, 245 P.3d at 544. Relatedly, pursuant to the "invited error" doctrine, Ramos cannot "be heard to complain on appeal of errors which he himself induced or provoked the court [ ] to commit." *Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345-46 (1994). Regardless, there is no error here because the protective order *did* impose non-disclosure obligations on Ramos, 2 App. 53, a point he repeatedly admitted below.

Ramos further contends the district court erred by relying on the Restatement (First) of Restitution, which he argues had been superseded by the Restatement (Third) of Restitution and Unjust Enrichment. *See* OB at 23-24. But this Court has

recently confirmed that Nevada jurisprudence continues to rely on both the First Restatement and the Third Restatement of Restitution and Unjust Enrichment. *See Korte Constr. Co.*, 137 Nev. Adv. Op. 37, --- P.3d at ----, 2021 WL 3237198, at *3 (citing *Certified Fire*, 128 Nev. at 381-82, 283 P.3d at 256-57). Ramos also ignores that the district court cited multiple cases from the modern era that dismissed (or affirmed dismissals of) unjust enrichment claims based on the subject principles from the First Restatement.[8] Finally, Ramos has not identified anything from the Third Restatement that undermines Sections 60 and 106 of the First Restatement. That is likely because the principles embodied therein have been reaffirmed in the Third Restatement. *See, e.g., Hartford Cas. Ins. Co. v. J.R. Marketing, L.L.C.*, 353 P.3d 319, 327 (Cal. 2015) ("When a person acts simply as she would have done in

[8] 4 App. 116-17 (citing *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 446-48 (3d Cir. 2000) (affirming dismissal of unjust enrichment claim where plaintiff hospitals had an independent legal obligation to provide healthcare to nonpaying patients such that any benefit to defendant tobacco companies was incidental to the hospitals' own duty); *Oregon Laborers-Employers Health & Welfare Tr. Fund v. Philip Morris, Inc.*, 185 F.3d 957, 968-69 (9th Cir. 1999) ("because plaintiffs had an independent obligation to pay the smokers' medical expenses, they cannot maintain an action for unjust enrichment against defendants just because defendants were incidentally benefitted."); *Chem-Nuclear Sys., Inc. v. Arivee Chemicals, Inc.*, 978 F. Supp. 1105, 1110-11 (N.D. Ga. 1997) (plaintiff under an administrative order to remediate property could not pursue unjust enrichment claim against defendant who would incidentally benefit from the clean-up); *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 840 F. Supp. 2d 1013, 1036-37 (S.D. Ohio 2011) (dismissing unjust enrichment claim where settlement agreement imposed obligation on plaintiff to remediate site such that any benefit to defendant accrued by virtue of plaintiff's performance of its own legal duty).

any event, out of duty or self-interest, she cannot equitably claim compensation from anyone who merely happens to benefit as a result.") (citing Restatement (Third) of Restitution and Unjust Enrichment § 30, cmt. b (2011)).

Though he tries to reverse course on appeal, Ramos repeatedly alleged below that he was subject to a court order requiring him to maintain confidentiality regarding the identity of his victim for the duration of the criminal proceeding. Because he had an independent obligation not to disclose this information, any alleged benefit to Respondents during that time period was incidental to Ramos's performance of his own legal duty.[9] The parties' failed negotiations over a non-disclosure agreement that would have applied *after* the criminal proceedings concluded has no impact on this issue as it never came to fruition for reasons already explained. The unjust enrichment claim, accordingly, fails as a matter of law.

[9] At the hearing below, Ramos's counsel suggested that Ramos refrained from taking several actions during the criminal proceedings that benefitted Respondents such as not moving to withdraw his guilty plea earlier, not bringing a motion to remove the gag order, or not violating the gag order. 4 App. 146-48, 157-58 (Hr'g Tr. 28:5-30:8, 39:13-40:14). Assuming all these facts are true, that does not mean Respondents were unjustly enriched as Ramos plainly acted in his own interests hoping to secure a lucrative contract for a post-criminal proceeding non-disclosure agreement. *See Burton Imaging Grp. v. Toys "R" Us, Inc.*, 502 F. Supp. 2d 434, 440-41 (E.D. Pa. 2007) ("A benefit conferred is not unjustly retained if a party confers the benefit with the hope of obtaining a contract.") (citing multiple authorities).

## III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DISMISSING THE COMPLAINT WITH PREJUDICE.

"A district court's decision not to grant leave to amend will not be disturbed absent an abuse of discretion." *Allum v. Valley Bank of Nevada*, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993). The *Allum* court relied on *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296-97 (9th Cir. 1990) when concluding "[i]t is not an abuse of discretion to deny leave to amend when any proposed amendment would be futile." *Id.* *Reddy*, in turn, denied leave to amend where it would have been impossible for the party to amend its complaint to allege a new injury that would confer standing to sue without contradicting the allegations in the original complaint. 912 F.2d at 296-97. "Although leave to amend should be liberally granted, the amended complaint may only allege other facts consistent with the challenged pleading." *Id*. (quotation omitted). The foregoing principle confirms the district court's ruling was proper.

Ramos's complaint provided abundant detail regarding the parties' failed attempt to negotiate a post-criminal proceeding non-disclosure agreement. It would be impossible for Ramos to amend his complaint to allege an enforceable contract arising out of the subject events without contradicting the allegations in his original complaint that there was no acceptance or meeting of the minds. The same goes for his unjust enrichment claim as the allegations in Ramos's original complaint and the incorporated/judicially noticeable documents from the criminal proceeding confirm

that Ramos's silence during the criminal case was a court-ordered obligation. Ramos has already tried to contradict these allegations on appeal, which is obviously improper and strong indicia of Ramos's likely (and equally improper) stratagem had he been given leave to amend. The district court did not abuse its discretion when denying leave to amend on futility grounds. *See, e.g., Smith v. Walgreens Boots Alliance, Inc.*, 2021 WL 391308, at *6 (N.D. Cal. Feb. 3, 2021) (denying leave to amend under *Reddy* standard "because for Plaintiff to allege discriminatory opioids policy at Costco, she would necessarily contradict her original allegation that Costco does not sell opioids to anyone.").

## CONCLUSION

Based on the foregoing, Respondents respectfully submit the district court's judgment should be affirmed.

DATED this 20th day of August, 2021.

CAMPBELL & WILLIAMS

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this Answering 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 pt., double spaced, Times New Roman.

I further certify that this Answering Brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 9,393 words.

I further certify that I have read this Answering Brief, and to the best of my knowledge, information, and belief, it is neither frivolous nor interposed for any improper purpose. I further certify that the foregoing brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the briefs regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the subject briefs do not conform with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 20th day of August, 2021.

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## CERTIFICATE OF SERVICE

I certify that I am an employee of Campbell & Williams and that I did, pursuant to NRAP 25(c), electronically file the foregoing **Respondents' Answering Brief** with the Clerk of the Court by using its electronic filing system on the 20th day of August, 2021. I further certify that the following participants in the case are registered electronic filing system users, and will be served electronically:

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