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.

Electronically Filed
Oct 20 2021 12:00 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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

APPELLANT'S REPLY BRIEF

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I. STATEMENT OF ISSUES ON APPEAL

Appellant relies upon the Statement of Issues as stated in his Opening Brief and clarifies them below in response to Respondents' Answering Brief ("AB"). The AB introduces a new issue on appeal which should not be addressed on appeal.

1. Did the Complaint state facts upon which it could prevail for breach of contract, bad faith in contract or alternatively unjust enrichment?
2. Were Defendants unjustly enriched by obtaining the full benefit of the requested performance so as to not hamper the sale of the UFC and retention of White as its president without paying for the performance?
3. Was it error to dismiss the Complaint without leave to amend?
4. Whether Respondents' "judicial admission" argument must be ignored as a new issue on appeal.

II. STATEMENT OF THE CASE

Appellant relies upon his Statement of the Case in his Opening Brief. The Respondents' Answering Brief is imprecise, inaccurate, and continues to argue the facts as if the appeal was from a summary judgement ruling and not a motion to dismiss, ignoring that the Complaint clearly states facts supporting the claims upon which Ramos could prevail.

Respondents asked this Court to uphold the dismissal based on their misstated version of plaintiffs claim and then argued that as they stated Plaintiff's claims they

must be dismissed – the classic straw man defense. Until and unless factual issues are resolved against Appellant, dismissal is error.

On a motion to dismiss the court must consider the plaintiff's Complaint in the light most favorable to the plaintiff and eliminate the possible grounds upon which a plaintiff could prevail. The court here did the opposite and viewed possible defenses in the light most favorable to the defendants.

Appellant stated claims in the Complaint which if proven he can prevail on which is all that is required to defeat a motion to dismiss. As pointed out herein the defenses raised by defenses involve substantial, dispositive and disputed issues of fact and law that go well beyond the limited inquiry of a court on a motion to dismiss.

The facts pled in the Complaint establish that Respondents requested a nondisclosure agreement ("NDA") from Ramos in late October or early November 2015 from Ramos which was accepted by performance on the representation he would be compensated for the NDA. It is undisputed that Ramos accepted that offer by performance and silence.

The parties then confirmed the agreement to pay Ramos for the NDA by agreeing to mediate the issue of compensation. Those are two separate bases to confirm the formation of a contract.

In April 2016, Respondents breached that agreement by reneging on their offer to pay anything for the NDA which Ramos had performed and continued to perform.

Respondents, recognizing the NDA still had substantial value, offered up to $450,000 in continuing negotiations for performance of the NDA between April 5, 2016, and July 5, 2016. (Order, pg. 5:3-5.). Whether those continuing negotiations ever rose to the level of a contract is a separate and distinct issue, but it is clear there was an unequivocal offer by White to pay Ramos for an NDA made in 2015, accepted by performance to which the parties further agreed to mediate compensation for, pled in the Complaint.

After enjoying the full benefit of the NDA *Respondents requested for the entire period it had value to them,* apparently so as not to interfere with the pending sale of the UFC, on July 5, 2016, Respondents' counsel advised they would not pay for the benefit they had received nor discuss payment further.

The request, timing, and the ultimate date of revocation/termination of the request and offer to pay therefore constitutes a prima facie case of unjust enrichment under *Certified Fire Prot. Inc. v. Precision Constr. Inc.*, 128 Nev. 371, 283 P.3d 250, (2012).

Appellant's Complaint was sufficient to have the district court note factual issues regarding the above noted timing of the sale and cessation of negotiations for

the NDA.[1] and the Court's incredulity of the need for a NDA to protect White's suspect reputation.

It is clear the district court committed error in resolving the factual questions the court had noted in Respondents favor and dismissing the case.

Appellant has been denied the opportunity to discover, bolster and prove his case as set forth clearly in the Complaint. Respondents confirm the Court's error in granting the motion to dismiss despite noting facts in dispute as Respondents answering brief is premised on factual defenses enquiring factual disputes being resolved in their favor,

The Court's denial of leave to amend is facially an improper deprivation of an opportunity to have his day in Court without the opportunity to discover additional facts which would prove his case.

In its erroneous Order, the court merely stated at page 12:18-19, "[g]iven the concessions made in the Complaint and the judicially noticed facts identified herein, the dismissal is with prejudice." RAMOS104.

It is clear that the Court thus improperly resolved factual disputes in Respondents favor while denying both leave to amend or the opportunity to conduct discovery.

[1] The Court: "Were they, in fact, trying to suppress this release up until the time of sale, if Mr. White's big concern was I don't want my wife to find out, that's why I'm doing all this, versus, Hey, I don't want it to effect my sale." RAMOS156:5-8, reproduced here as in the original transcript.

During the pendency of this appeal additional facts have been discovered of White's conduct as a sexual predator with the knowledge of and supported by the UFC entity underscoring the sound policy disfavoring weighing facts on a motion to dismiss and deciding the merits of claims without allowing discovery.

III. STATEMENT OF FACTS

Appellant relies upon his Statement of Facts in his Opening Brief. Respondent's statement of facts, in which they misstate Appellant's facts and claims to support their defenses, must not be accepted as the inquiry of this court must be limited to the face of the Complaint and facts therein. The supplemental documents at best create issue of fact which must be resolved in favor of Appellant.

The review of facts on a motion to dismiss is not to resolve questions of fact but solely to determines if the Complaint states a cause of action and facts upon which the plaintiff can prevail applying the appropriate "notice" standard.

The Respondents' version of facts in their Answering Brief demonstrates Respondents concerted efforts to have the courts try the case on a motion to dismiss and deny Ramos his opportunity to prove his allegations through discovery, which Respondents clearly seek to avoid. The District Court resolved questions of fact contrary to those as set forth in Appellant's Complaint in erroneously granting Respondents' motion to dismiss.

The Respondents' Answering Brief ("AB") spends over five pages describing the "gag order" that Ramos was under pursuant to the criminal matter, and how such "gag order" was described in the Complaint. (AB, pgs. 5-9.) The "gag order" referred to in the Complaint was not a gag order silencing Ramos but rather it was a stipulated protective order pursuant to Fed. R. Crim Pro. 16(d)(1) and 18 U.S.C. § 3771. Respondents do not discuss the language of the protective Order, which only governs the government and the counsel in the case.

The issue of the "gag order" having silenced Ramos, beyond being a question of fact, also involves issues of constitutional law.[2] The U.S. Supreme Court has limited courts' ability to impose prior restraint on criminal defendants as a violation of the First Amendment[3] while balancing Sixth Amendment[4] rights. The claim that the protective Order was a "gag order" compelling Ramos's silence is contrary to the holdings of the US Supreme court. Without engaging in full briefing herein on that issue, which would go beyond the issues before this court on a motion to dismiss, the holdings of the Supreme Court disfavor any prior restraint absent threats of violence and where speech may interfere with a fair trial. See generally, *Near v.*

[2] The First Amendment to the United States Constitution prohibits Congress from making any law abridging the right to freedom of speech. U.S. Const. amend. I.
[3] *Id.*
[4] The Sixth Amendment guarantees, *inter alia*, the right of the accused to confront witnesses against them. U.S. Const. amend. VI.

Minnesota, 283 US 697 (1931); *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991); and *Nebraska Press Assoc. v. State*, 427 US 539 (1976).

The Victims' Rights Act was drafted cognizant of the limitation that there can constitutionally be no prior restraint of a criminal defendants right to speak freely. The argument and apparent conclusion of the court below that there was a constitutional prior restraint on Ramos constitutes an unconstitutional reading of the Protective Order.

Respondents note several paragraphs of the Complaint in their AB which reference the Protective Order, alleging Appellant concedes in the Complaint he was gagged by a protective order.

Paragraph 76 of the Complaint is dispositive of the issue of whether the Complaint "conceded" that Ramos was "gagged" by the Protective Order and Respondent's entire argument dissolves:

> ***Nothing 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.) *Id. at* ¶ 76 (1 App. 9).[5] The bolded words in the Complaint explicitly rebut Respondents claim.

[5] It should be noted that in their AB, Respondents highlighted the "subsequent to completion" clause of this paragraph in order to support their position that Ramos made a "judicial admission" that he could not disclose White's identity. Although the judicial admission argument must be ignored on appeal, such interpretation is clearly erroneous when taking the paragraph (and Complaint) as a whole.

The Complaint clearly alleged that Ramos had the ability to identify White, and then did not pursuant to Respondents' request for an NDA and the continued "negotiations." Even more compelling on this issue is the excerpt of the sentencing hearing of Ramos where Judge Navarro, when asked if an agreement was permissible, indicated a White-Ramos agreement was permissible and only indicated the parties should do so through counsel. RAMOS063:7-8.

When comparing the timeline of the criminal matter to the sale of the UFC, it is clear that there was an undisclosed, understood, and compelling reason for Respondents to request a nondisclosure agreement ("NDA.") In November 2015.The Respondents were in the process of selling the UFC and could not have the information about White get out. At the time of the originally scheduled sentencing, set for February 2016, the sale of the UFC had still not been finalized.

At the April 2016 mediation, even though the sale was not final, White told Ramos to effectively "pound sand." Yet immediately following that breach of the agreement to pay for the NDA which by then had been performed for 5 months, the UFC continued to string Ramos along by making offers coupled with terms they included and knew were both 1) inconsequential to them; and 2) unacceptable to Ramos. This "negotiation" continued until July 5, 2016.

On July 5, 2016, with the sale set to be announced and the Respondents having received the benefit of Ramos's silence, Respondents cut off talks with Ramos. The sale of the UFC was disclosed on or about July 9, 2016.

The withdrawal of the offer for an NDA in July 2016 underscores the facetious reason originally set forth by White that he wanted to protect his reputation and keep the incident quiet. It is clear that he co-opted the US government for his private purposes. As stated in the Complaint, White's counsel, in November 2015, understood that Ramos *could* disclose the identity of White if he so chose after the protective Order was issued and thus requested the NDA. Compl., ¶ 61.

Respondents argue on appeal that the Protective Order prohibited Ramos from publicly disclosing White's identity (AB, pg. 7). They again put forth pre-Tobacco settlement cases and Restatement of Restitution Third which are either factually distinct or were substantively rejected by the Tobacco settlement on the very premise on which they were cited for.[6]

IV. ARGUMENT

A. The facts alleged in the Complaint support Counts I, II and IV of the Complaint, either together or in the alternative.

[6] In those cases, the courts denied unjust enrichment claims against Tobacco for medical expenses caused by smoking to states that paid those additional expenses. This was contrary to the subsequent settlements of the Tobacco litigation and more recently the Opioid Cases. The other EPA cases did not allow unjust enrichment of party under unjust enrichment to obtain contribution when they were directly liable.

The issue of whether there was a contract, bad faith and unjust enrichment all are sufficiently pled to give notice to the Respondents, confirmed by their responses, and factual issues subject to discovery must be resolved before concluding that Appellant could not prevail.

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. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 (2008). Disputed issues of fact must be resolved in favor of a Plaintiff on a motion to dismiss. *Id.* Denial of the opportunity to amend only underscores the error.[7]

Though there are three claims on appeal,[8] The contract, bad faith and unjust enrichment claims are pled clearly, factually undisputed, and reversal is mandated. Though their arguments fail even if Respondents view of the facts ultimately prevail, their spin on the facts does not meet the standards on a motion to dismiss.

1. The Breach of Contract and Contractual Breach of the Covenant of Good Faith and Fair Dealing are sufficiently pled.

To establish a contract there must be an offer and acceptance. In general, an offer is defined as "the manifestation of willingness to enter into a bargain, so made

[7] 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.

[8] The causes of action on appeal are breach of contract, bad faith in contract, and unjust enrichment. Appellant is not appealing the dismissal of his claim for tortious breach of the implied covenant of good faith and fair dealing.

as to justify another person in understanding that his assent to that bargain is invited and will conclude it.” Restatement (Second) of Contracts § 24 (1981). "Where an offer invites an offeree to accept by rendering a performance ... [a] contract is created when the offeree tenders or begins the invited performance." *Id.* § 45.

Respondents offered to pay for a NDA and Ramos accepted the offer by his performance and the parties confirmed the agreement by agreeing to mediate the compensation for the NDA months after the performance commenced. Whether there were one or more contracts or modifications thereof is an open question, but its resolution based on conjecture by the Court on a motion to dismiss is error.

As is clear from the Complaint, Plaintiff-Appellant’s claims are based on a breached contract (or alternatively, unjust enrichment, as previously discussed in Appellant’s opening brief and further discussed infra). Respondents’ sole basis to contest the contract actions is a premised on the assertion that the offer to pay for an NDA without specifying a payment was not an offer. Whether it was an offer is a mixed question of fact and law. It is clear that Ramos viewed it as an offer and that Ramos performed the NDA that Respondents requested.

The offer was accepted by performance creating a contract and the contract was then confirmed by the agreement to mediate compensation. The contract was breached when White in bad faith **failed to offer any compensation.** The agreement

to mediate was not "an agreement to agree" it was an agreement to determine the amount of compensation for a contract already performed for over 5 months.

White breached that agreement when he told Ramos to effectively "pound sand." after five (5) months of Ramos performing the Respondent requested NDA. In agreeing to the mediation White confirmed that there was no question as to the offer to pay for an NDA. The Complaint's allegation that Respondents made an offer to pay for an NDA stands as fact on a motion to dismiss. Compl. ¶ 82.

The parties agreed to mediate the amount of compensation to be paid pursuant to the NDA. *Id*. at ¶ 86. This mediation was not to determine Ramos's performance of the NDA, which clearly called for him to not disclose White's identity and confirmed the acceptance of White's offer.

There was an alleged breach when White failed to make any offer of payment for the NDA he had enjoyed for five months as of April 2016. *Id*. at ¶ 91. If this is not a direct breach of contract, it is at the very least a breach of the covenant of good faith and fair dealing.

The Complaint alleges that Respondents then reaffirmed their request for a NDA by making further offer of payment to Ramos over the next three months, though July 5th 2016. The facts as pled in the Complaint allege facts and give notice of both a claim for breach of contract and contractual bad faith. The trier of fact could find a breach at any time between November 2015 and July 2016. The district

court committed clear error when it granted Respondents' motion to dismiss, and such error must be reversed.

2. Unjust enrichment is clearly plead.

Unjust enrichment exists when, as stated in *Certified Fire Protection,*

> "… 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 Prot. Inc. v. Precision Constr. Inc., 128 Nev. 371, 381, 283 P.3d 250, 257 (2012), citing *Unionamerica Mtg. v. McDonald*, 97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981), internal quotation marks omitted.

Respondents attempt to confuse this Court by a partial quote from *Topaz Mutual Co. v. Marsh*, by quoting only the first sentence of the paragraph stating what constitutes unjust enrichment, spotlighting property "of another" as the basis of unjust enrichment. *Topaz Mutual Co. v. Marsh*, 108 Nev. 845, 856 (1992).

Respondents partial quote of Topaz is contrary to the import of the full paragraph therein and the language of *Certified Fire Protection*, supra, and the *Restatement of Restitution Third,* § 1, n. (d) "… the benefit that is the basis of a restitution claim take any form, direct or indirect.".

While the performance of the requested NDA without compensations establishes a case of unjust enrichment in addition to the breach of contract and bad faith.

In order for this court to conclude the dismissal was proper, it must conclude – contrary to the Complaint itself – that the Complaint failed to allege there was an offer made to pay Ramos for an NDA.

A review of the Complaint shows that Ramos stated, "After the court entered a protective order which was only effective during the pendency of the criminal proceedings did White through his counsel contact counsel for Ramos to offer to pay Ramos for a NDA after Ramos pled guilty." Compl., ¶ 52. White apparently recognized in 2015 the protective order had not gagged Ramos!

White continued to offer to pay Ramos for his silence even after the breached mediation as after sentencing Ramos he would be freed from the protective order. See also Id. at ¶ 65 (That Ramos accepted this offer and agreed to mediation to determine the amount of compensation he and Doe were to receive.) See also Id. at ¶ 82 (White and the UFC through counsel offered to pay Ramos for a nondisclosure agreement subsequent to his entry of a guilty plea.) *See also Id*. at ¶ 113 (At [the April 5, 2016 mediation] White and the UFC offered Ramos nothing.)

The facts necessary to deny the motion to dismiss and support the claim are simple, undeniable and in the Complaint. Instead, the district court made factual determinations in granting Respondents' motion to dismiss. If Ramos's Complaint failed to articulate a breach of contract (it did), it alternatively pled a cause of action for unjust enrichment. Specifically, that the Respondents enjoyed the benefits of

Appellants continued silence, which they requested, through the date of the sale of the UFC for four billion dollars. By granting the motion to dismiss, the trial court made a factual determination that the elements of unjust enrichment were not met, despite their being pled and there being issues of fact.

The *Restatement of Restitution Third,* § 1 encompasses performance of an NDA as a "benefit conferred" supporting a claim for unjust enrichment.

Looking again at the face of the Complaint there are allegations and facts, when they are taken as true (which is appropriate for evaluating a motion to dismiss), would be sufficient for Ramos to prevail on unjust enrichment. The Complaint alleges that Hunter Campbell requested that Ramos not disclose White's identity after entering a plea and that he would be compensated for it. Compl., ¶ 61.

White's identity was not disclosed from the time of the request through the time Hunter Campbell indicated his client(s) would no longer be willing to pay for Ramos's continuing silence in on or about July 5, 2016. (It is noted that this fact is not in the Complaint, but it was discussed during the hearing on the motion to dismiss and is another reason to allow Appellant to amend his Complaint.)

Even Judge Jones was struck by the proximate withdrawal of the offer and the sale of the UFC. That is circumstantial evidence by itself of the reason for the request and the realization of the benefit conferred by Ramos on Respondents that would

defeat a motion for summary judgement – and before this Court is a motion to dismiss, which is not supposed to evaluate facts.

As discussed above, the Complaint specifically averred that Ramos was not constrained from disclosing White's identity by the Courts, there is nothing before the Court to the contrary to paragraphs 76's averment sufficient to uphold the dismissal based on a "gag order" and Judge Jones even conceded that his conclusion was based on his personal opinion at pages 41 and 42 of the district court hearing transcript (RAMOS146-47). Paragraph 76 is diametrically opposed to that conclusion when it states the following:

"[***Nothing 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) *Id. at* ¶ 76.

In summary the Complaint states claims and facts precluding dismissal as follows.

Paragraph 76 of the Complaint resolves the issue of the gag order.

The Complaint alleges that Respondents requested a nondisclosure agreement ("NDA") from Ramos in late October or early November 2015 from Ramos which was accepted by performance on the representation he would be compensated for the NDA.

In April 2016, Respondents breached that agreement by reneging on their offer to pay anything for the NDA which Ramos had performed and continued to perform.

Respondents, recognizing the NDA still had substantial value, offered up to $450,000 in continuing negotiations for performance of the NDA between April 5, 2016, and July 5, 2016. (Order, pg. 5:3-5.). Whether the negotiations ever rose to the level of a contract is a separate and distinct issue, but it is clear there was an unequivocal offer by White to pay Ramos for an NDA made in 2015, accepted by performance to which the parties agreed to mediate compensation for pled in the Complaint.

After enjoying the full benefit of the NDA requested by Respondents – *for the entire period during which the sale of the UFC was pending* – on July 5, 2016, Respondents' counsel advised they would not pay for the benefit they had received nor discuss payment further.

The request, timing, and the ultimate date of revocation/termination of the request and offer to pay therefore constitutes a prima facie case of unjust enrichment under *Certified Fire Protection* and the Third Restatement of Restitution.

Appellant's Complaint was sufficient to have the district court note factual issues regarding the above noted timing of the sale and cessation of negotiations for

the NDA.[9] and the Court's incredulity of the need for a NDA to protect White's suspect reputation.

It is clear the district court committed error in resolving the factual questions the court had noted in Respondents favor and dismissing the Complaint.

B. Under the Third Restatement of Restitution, an intangible benefit can be the basis for a claim of unjust enrichment.

Respondents in response to Appellant's objection to the incorrect and improper reliance on the First Restatement of Restitution quote dicta from Judge Herndon's recent opinion in *Korte*. *Korte Const. Co. v. State of Nevada, ex rel Bd. of Regents*, 137 Nev. Adv. Op. 37 (2021).

Judge Herndon correctly stated that Nevada **followed** the First Restatement of Restitution and now follows Third Restatement of Restitution. The Third Restatement is substantively different from the First Restatement and supersedes it, it does not supplement it.

The American Law Institute, which publishes the Restatements, instructs Librarians to remove from circulation the superseded Restatements. A Restatement indicates the current status of the law. The Third Restatement reflects substantial changes in the approach to unjust enrichment.

[9] The Court: "Were they, in fact, trying to suppress this release up until the time of sale, if Mr. White's big concern was I don't want my wife to find out, that's why I'm doing all this, versus, Hey, I don't want it to effect my sale." RAMOS156:5-8, reproduced here as in the original transcript.

One example of this is the nature of benefits conferred. which now is clarified that benefits other than money, property, or work are recognized by the Third Restatement of Restitution in Section 1, note (d). The nature of damages which now include disgorgement as indicated in sections 49 and 51 is reflective of the evolution of the law of unjust enrichment. This Court recently recognized the Third Restatement's new measure of damages of disgorgement in *Lathigee v. British Columbia Sec. Comm.*, 139 Nev. Adv. Op. 79, 477 P.3d 352 (2020).

Respondents AB and failure to comprehend Appellant's unjust enrichment claim indicates they are still relying on the First Restatement and ignoring the Third.

As to the First Restatement, they fail to note Section 109 (2) which states the proposition that one who requests performance is expected to pay for it. They fail to note that the duties discussed and are the example discussed in Section 60 of the First Restatement cover performance of "duties" such as mistakenly paying debts owed et cetera and other contractual duties otherwise owed.

The Tobacco settlements which reject the premise of the cases cited below by Respondents demonstrate the evolving nature of the law and underscore the superseding of the First Restatement by the Third. This appeal is not dependent on resolution of these legal issues on a motion to dismiss they are not briefed further at this time.

The facts as pled and as recognized at least in part by the Court below support claim that Respondents received the requested benefit of Ramos's silence so as to not derail the UFC sale, did not pay for it, and dismissal of the unjust enrichment claim was error.

C. Leave to Amend the Complaint is Proper.

The court denied Appellant the leave to amend to remedy what it believed were factual deficiencies in the Complaint despite its weighing of the facts at the hearing in the record, stating without clarification or a finding of futility that this was based on "concession made in the Complaint and judicially noticeable facts".

The failure to make adequate findings of fact and conclusions of law in support of that finding alone is a basis to reverse.

What are the concessions or judicially noticed facts and how do they render amendment of the Complaint a futility? The shorthand denial of leave to amend fails and must be reversed.

Where there are issues of fact, especially in an unverified Complaint, which the Court finds inadequate to support the claims therein the Court must allow leave to amend to clarify the Complaint to rectify, clarify and satisfy those concerns. White's identity was not disclosed from the time of the request through the time Hunter Campbell indicated his client(s) would no longer be willing to pay for Ramos's continuing silence in July 2016. As stated above, the fact that Respondents

withdrew their offer and ceased negotiations days before the sale of the UFC was announced is not in the Complaint, but it was discussed during the hearing on the motion to dismiss. At that hearing, Judge Jones was struck by the proximate withdrawal of the offer and the sale of the UFC and is another reason to allow Appellant to amend his Complaint.

The Order is bereft of any facts, conclusions of law or other findings as to why leave was not granted. The questions and issues of fact the court raised in its argument with counsel serve as the grounds for either denial of the motion to dismiss and permitting discovery or granting leave to amend.

The district court's failure to do so is error and must be summarily reversed.

D. Respondents, for the first time on appeal, raise the issue of "judicial admissions," which must be rejected.

1. Judicial Admission is a new issue on appeal

The issue of "judicial admission" is a new legal issue and should not be considered by the court. *See Diamond Enters., Inc. v. Lau*, 113 Nev. 1376, 1378, 951 P.2d 73, 74 (1997) (stating that "[i]t is well established that arguments raised for the first time on appeal need not be considered by this court").

For the first time on appeal Respondents now assert that Ramos has made a "judicial admission" that he was under a gag order at all times. As noted above and as pled in the Complaint there was only a protective order binding the government

and counsel under the victims of crime act in place which constitutionally could not serve as prior restraint on Ramos.

Ramos will aver that his silence at the relevant times was directly motivated by the offer of compensation for an NDA.

Again, Respondents seek to have this Court resolve a question of fact against Ramos contrary to the averments in the Complaint without having conducted discovery.

2. There is no judicial admission

In their answering Brief Respondents assert quote from the argument at hearing, out of context, and claim that is a "judicial admission".

Statements ***in pleadings*** 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 are considered judicial admissions conclusively binding on the party who made them). Under NRCP 7, the only pleading is the Complaint filed in the district court.

The Complaint is the "pleading" which the court could review for purposes of a motion to dismiss. "Pleadings" is not synonymous with statements, arguments, points and authorities, or motions. (See NRCP 7, generally.) Despite Respondents'

contention, no statement by counsel at hearing, or Appellant's opposition to the motion to dismiss, are "pleadings" that could be considered judicial admissions.

As stated above, Appellant's pleading alleged the facts necessary to survive a motion to dismiss in paragraph 76. The statements Respondents cite in their AB on pages 8 and 9 can (and must) be interpreted in favor of Appellant for purposes of a motion to dismiss.

To elevate arguments of counsel in a heated argument at hearing to the status of a judicial admission would have a chilling effect on counsel at argument and expand judicial admissions to encompass any statement.

CONCLUSION

The District Court failed to apply the proper standard in deciding the Motion to dismiss. Rather than determine if the claims in the Complaint stated facts and claims (taken in the light most favorable to Plaintiff) upon which the Plaintiff could prevail, it instead followed the Respondents' factual arguments for defenses and weighed the facts in the most favorable light for Respondents.

The Complaint alleges a solicitation, which was an offer from Respondents to pay Ramos for his continuing silence. Ramos clearly accepted the offer by his performance and was never compensated for it. After July 5, 2016, Respondents refused to even discuss further their tendered offer of compensation.

The timing of that withdrawal of the request and offer to compensate Ramos for the NDA a handful of days before Respondents announced the sale of the UFC is compelling circumstantial evidence the Respondents as of that date had fully benefited from the silence of Ramos and thus were unjustly enriched.

If there were deficiencies in the Complaint, leave to amend should have been granted. It was not adequately considered, nor addressed by the court, nor are there any findings, reasons, or conclusions of law in the Order of dismissal for its denial.

The Order granting the motion to dismiss must be reversed with Respondents ordered to answer the Complaint, and the matter must be allowed to proceed to discovery.

Dated this 20th day of October 2021.

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NRAP 28.2 ATTORNEY CERTIFICATE

1. I hereby certify that this 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 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 14 points or more, and contains 5265 words and does not exceed 30 pages.

3. Finally, I hereby certify that I have read this Reply to Respondents' Answering 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

CERTIFICATE OF SERVICE

I certify that I did, pursuant to NRAP 25(c), electronically file the foregoing Appellant's Reply to Respondents' Answering Brief with the Clerk of the Court by using its electronic filing system on the 20th day of October 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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