IN THE SUPREME COURT OF NEVADA

MCGUIRE HOLDINGS LTD., Appellant, v. BETFRED INTERNATIONAL HOLDINGS, LTD., Respondent.	Supreme Court No. 83638 District Court Case No. A827937

APPEAL

Appeal From the Judgment Entered by the Eighth Judicial District Court
The Honorable Nancy Allf, District Judge
District Court Case No. A-21-827937-B

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record for the Appellant/Plaintiff, McGuire Holdings, Ltd., a limited company ("McGuire"), certifies that this Disclosure Statement contains the names of the persons and entities that need to be disclosed pursuant to the requirements of NRAP 26.1(a). These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

The Plaintiff, McGuire, is a Bahamas limited company duly organized under the laws of Bahamas with a principal place of business in Florida. Plaintiff does not have a parent corporation and there is not a publicly held company that owns ten percent (10%) or more of its stock.

The Plaintiff was represented in the proceedings below and in this appeal by Ariel E. Stern, Esq., of the law firm of Akerman, LLP and Damien H. Prosser, Esq., of the law firm of Morgan & Morgan, P.A.

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STATEMENT OF JURISDICTION

NRAP 3A(b)(1) provides that an appeal may be taken if a final judgment is entered in an action or proceeding commenced in the court in which the judgment is rendered. In this case, on September 16, 2021, the Eighth Judicial District Court, through the Honorable Judge Nancy Allf, entered a final judgment of a dismissal with prejudice. 1 App. 180–88.

The Notice of Appeal was timely filed. The written Notice of Entry of the final Order or Judgment was entered on September 16, 2021, (1 App. 180–88) and the Notice of Appeal was filed on October 13, 2021, (1 App. 189–91) well within the 30-day filing requirement as set forth in NRAP 4(a)(1).

This matter qualifies as an appeal from a final order of judgment pursuant to the requirements of NRAP 3A(b)(1) since the Order of Dismissal entered on September 16, 2021, is a final judgment with no further proceedings to be contemplated in the district court. Accordingly, jurisdiction is properly vested in either the Nevada Supreme Court or the Nevada Court of Appeals.

ROUTING STATEMENT

This case should be retained by the Nevada Supreme Court pursuant to NRAP 17(a)(9) because this case originated in business court.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. In deciding a defendant's motion to dismiss, does the district court err by not resolving factual disputes in plaintiff's favor when plaintiff submits sufficient proffers of evidence?

2. Can a Nevada court exercise personal jurisdiction over the Respondent in this case where the Plaintiff is a victim of a breach of contract involving a casino in Las Vegas?

3. Does a district court err by dismissing a complaint "with prejudice" based on an alleged lack of personal jurisdiction over the defendants?

I. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, McGuire Holdings, Ltd. ("McGuire"), filed this lawsuit for breach of contract, quantum meruit/implied contract, and promissory estoppel against Betfred International Holdings, Ltd. ("Betfred"). 1 App. 1–15.

This case arises from a well-known foreign corporation taking advantage of McGuire's relationships and hard work. Betfred is a bookmaker based in the United Kingdom that operates brick and mortar betting shops and online casinos. 1 App. 94. Anxious to expand its business in the United States, Betfred wanted to become the sportsbook operator for casinos owned or operated by the Mohegan Tribe. 1 App. 71. Lacking connections with the Mohegan Tribe, Betfred contracted with McGuire for assistance. 1 App. 71–72. The parties entered into a written agreement that created binding obligations on them, including the obligation to enter into a full form agreement to share revenue, wherein Betfred would pay ten percent (10%) of the gross revenues it received from the Mohegan Tribe casinos if McGuire could help Betfred become the sportsbook operator for ***any*** of the Mohegan Tribe's casinos (the "Mohegan Tribe Deal"). 1 App. 72, 77–79. After McGuire spent more than a year dutifully fulfilling its obligations by connecting Betfred with high ranking members of the Mohegan Tribe, Betfred informed McGuire that any deal with the Mohegan Tribe was dead. 1 App. 73–74.

Understandably, McGuire was stunned when it later learned that Betfred became the sportsbook operator for the new Virgin Hotels Casino in Las Vegas—a casino operated by none other than the Mohegan Tribe. 1 App. 74–75. Without McGuire's efforts, Betfred would never have been able to secure the Virgin Hotels Casino sportsbook deal with the Mohegan Tribe. 1 App. 75. Yet, when the time for Betfred's performance arose, it refused to compensate McGuire in accordance with the agreement. 1 App. 76. So, McGuire sued Betfred in Nevada.

On March 15, 2021, Betfred filed a Motion to Dismiss McGuire's First Amended Complaint for an alleged lack of personal jurisdiction. 1 App. 19–49. McGuire timely responded (1 App. 50–138) and Betfred replied (1 App. 139–56). Both parties attached affidavits. 1 App. 35–39; 71–76.

After a hearing in open court on May 12, 2021, the court took the matter under advisement. On September 16, 2021, the district court entered a written Order dismissing the case. 1 App. 180–88. Although the parties' affidavits conflicted, the district court refused to resolve factual disputes in McGuire's favor—instead it accepted Betfred's version of the facts as true—and entirely ignored the personal jurisdictional analysis in dismissing the entirety of McGuire's First Amended Complaint "with prejudice" pursuant to NRCP 12(b)(2). 1 App. 180–88.

II. STATEMENT OF FACTS

1. Betfred, founded in North England, owns and operates more than 1,500 betting shops in the United Kingdom and bills itself as a best in class online casino and betting product in the United Kingdom and Spain. 1 App. 94.

2. Betfred claims to be a subsidiary of Betfred Group Limited ("Betfred Group"). 1 App. 35.

3. Betfred is currently a licensed sportsbook operator in Iowa, Pennsylvania, and Colorado. At the time of filing the lawsuit, Betfred's Nevada license was currently pending regulatory approval. 1 App. 93–94.

4. McGuire was founded by Peter Hutchinson ("Hutchinson"). Hutchinson had connections with Betfred, including Betfred's Chief Executive Officer Mark Stebbings ("Stebbings") and Betfred's Trading Director Craig Reid ("Reid"). 1 App. 71.

5. As a result of his connections with Betfred, Hutchinson understood that Betfred was seeking to expand its operations in the United States and was looking for inroads with casino operators, including the Mohegan Tribe. 1 App. 71.

6. Betfred, however, did not have the necessary contacts with the Mohegan Tribe to successfully pursue the Mohegan Tribe Deal. McGuire, on the other hand, did have the requisite relationships with the Mohegan Tribe to help

Betfred become the sportsbook operator for casinos owned or operated by the Mohegan Tribe. 1 App. 71.

7. One of Hutchinson's longtime associates and friends is Sherman Brown ("Brown"). Brown is a successful businessman who mostly works with current and former NBA players to find and negotiate promising investments. 1 App. 4, 71.

8. Brown has connections with the Mohegan Tribe, including the former Chairman of the Mohegan Tribe Council, Kevin Brown ("Kevin Brown"), the Chief Marketing Officer, David Martinelli ("Martinelli"), and its Vice President of Interactive Gaming, Aviram Alroy ("Alroy"). 1 App. 71.

9. In June of 2017, McGuire approached Betfred to see if it would be interested in becoming the sportsbook betting and wagering operator for any of the Mohegan Tribe casinos. 1 App. 71.

10. In exchange for helping Betfred become the sportsbook operator for the Mohegan Tribe casinos, Betfred and McGuire agreed to enter into a full form agreement customary for a share of Betfred's revenue with McGuire, wherein Betfred would pay McGuire ten percent (10%) of the gross revenues Betfred received from any sportsbook it operated for the Mohegan Tribe. 1 App. 71–72.

11. On July 10, 2018, Betfred and McGuire entered into a Letter of Intent (the "Agreement") to memorialize the parties' agreement. As set forth in Clause

1.2, the terms set forth in Clauses 3 through 8 of the Agreement were intended to create binding obligations on the parties. 1 App. 72, 77–79.

12. Additionally, the Agreement is expressly intended to apply to the "*Parties group and/or associated companies*." 1 App. 77–79 (emphasis added).

13. The plain meaning of this term is that the Agreement obligates and binds Betfred, Betfred Group, and any of its subsidiaries. 1 App. 72.

14. McGuire's initial efforts centered on Betfred operating the Mohegan Tribe's sportsbook in Connecticut. 1 App. 72.

15. The Agreement, however, is not limited to the sportsbook of a specific Mohegan Sun casino, but rather expressly encompasses "sports book betting and wagering services to the US gambling operator Mohegan Sun" (the "Mohegan Sportsbook Services"). 1 App. 78.

16. The parties engaged in numerous email communications reflecting their intent that the Agreement applies to all Mohegan Sun Casinos in the United States. 1 App. 72–73. For example, on June 25, 2018, Stebbings, on behalf of Betfred, emailed McGuire stating:

> Just so we are clear your consultancy company which is going to source opportunities in the US for Betfred will be paid 10% of the gross revenue percentage we receive (in this case Mohegan Sun).

1 App. 80–81.

17. On July 16, 2018, Brown emailed Hutchinson, Stebbings, and Reid, stating in part:

> I'm highly optimistic we'll win [the Connecticut bid]. But if we don't, it's not a failure or ending by any means. In fact, we're just beginning . . .

1 App. 83–86.

18. On August 27, 2018, Stebbings, on behalf of Betfred, emailed McGuire stating:

> As discussed on our call on Friday, well done you have done a great job in using your influence with Chairman Brown to give us the opportunity of becoming the tribe's partner of choice.

1 App. 87–88.

19. McGuire spent more than a year fulfilling its obligations under the Agreement, including (a) introducing Betfred to the Mohegan Tribe via email, (b) engaging in email and phone call correspondence to facilitate a Betfred and Mohegan Tribe partnership, (c) facilitating multiple in-person meetings between Stebbings, Reid, Kevin Brown, Martinelli, and Alroy in Connecticut and Nevada; and (d) attending the meetings in Connecticut and Nevada with representatives from Betfred and the Mohegan Tribe. 1 App. 73.

20. Specifically, in October of 2018, McGuire, through Hutchinson's direct efforts, secured a meeting in Las Vegas, Nevada between Betfred and the Mohegan Tribe (the "Vegas Meeting") to discuss Betfred obtaining the Mohegan

Sportsbook Services not only in Connecticut, but also in other Mohegan Tribe casinos in the United States. 1 App. 74.

21. Hutchinson (on behalf of McGuire), Stebbings and Reid (on behalf of Betfred), and Alroy (on behalf of the Mohegan Tribe) attended the Vegas Meeting. 1 App. 74.

22. During this meeting, Alroy informed McGuire and Betfred that Betfred would not be the sportsbook operator for the Mohegan Tribe's Connecticut casino, but that there were opportunities for Betfred to operate in other Mohegan Tribe casinos. 1 App. 74.

23. After the Vegas Meeting, Betfred represented to McGuire that negotiations had stalled between Betfred and the Mohegan Tribe. 1 App. 74.

24. Thus, after the Vegas Meeting, McGuire understood Betfred may not be continuing in its pursuit to become the sportsbook operator for the Mohegan Tribe. 1 App. 74.

25. If Betfred wished to continue pursuing that opportunity, it was obligated under the Agreement to use McGuire's services. 1 App. 74.

26. Specifically, the Agreement contains a binding exclusivity clause that prohibited Betfred from using any other third-party consultant other than McGuire to obtain the Mohegan Sportsbook Services. 1 App. 79.

27. Contrary to its representations and obligations under the Agreement, and unbeknownst to McGuire, Betfred continued to negotiate a deal with the Mohegan Tribe and obtained a third-party consultant, other than McGuire, to obtain the Mohegan Sportsbook Services. 1 App. 74.

28. Specifically, in violation of the Agreement's exclusivity clause, Betfred "made a deliberate decision" to obtain a third-party consultant other than McGuire to obtain the Mohegan Sportsbook Services. 1 App. 38.

29. Thereafter, Betfred formed a wholly-owned subsidiary, Betfred USA Sports LLC, a Nevada limited liability company ("Betfred USA"). 1 App. 38–39, 75, 94.

30. In total, from 2019 to 2020, Betfred formed sixteen (16) Nevada based wholly-owned subsidiaries (the "Subsidiaries"), including:

1) Betfred Sports (Arizona) LLC
2) Betfred Sports (Colorado) LLC
3) Betfred Sports (Indiana), LLC
4) Betfred Sports (Iowa) LLC
5) Betfred Sports (Louisiana) LLC
6) Betfred Sports (Minnesota) LLC
7) Betfred Sports (Nevada) LLC
8) Betfred Sports (Ohio), LLC
9) Betfred Sports (Oregon) LLC
10) Betfred Sports (Pennsylvania) LLC
11) Betfred Sports (South Dakota) LLC
12) Betfred Sports (Virginia), LLC
13) Betfred Sports (Washington), LLC
14) Betfred USA (IP) LLC
15) Betfred USA Sports (Two) LLC
16) Betfred USA Sports LLC

1 App. 46–49.

31. For each of the Subsidiaries, Stebbings and Nicola Barr ("Barr") are both listed as the Managers with an address in Las Vegas, Nevada. 1 App. 75, 95–131.

32. Stebbings and Barr are directors of both Betfred and Betfred Group. 1 App. 38–39, 75, 132–36.

33. Betfred created the Subsidiaries in order to further Betfred's business in the United States, more specifically, to obtain the Mohegan Sportsbook Services. 1 App. 38–39.

34. Betfred USA's website advertises that it was created by Betfred Group and conducts the same sportsbook services as its parent company. 1 App. 94. At the time the lawsuit was filed, Betfred USA's website further stated that it was pending regulatory approval to operate in Nevada. 1 App. 94.

35. Betfred's representations to McGuire turned out to be false, as Betfred subsequently became the sportsbook operator for the new Virgin Hotel Casino in Las Vegas (the "Virgin Hotel Casino"), which is operated by the Mohegan Tribe. 1 App. 75.

36. On July 17, 2020, Brown received a text message from Kevin Brown, the former Chairman of the Mohegan Tribe Council, congratulating Brown and

McGuire for securing the sportsbook services for Betfred at the Virgin Hotel Casino. 1 App. 75, 137–38.

37. This was the first time McGuire learned that Betfred would become the sportsbook operator for the Virgin Hotel Casino and that Betfred had cut McGuire out of the deal in breach of the Agreement. 1 App. 75.

38. Betfred claims its wholly owned subsidiary Betfred Sports (Nevada) LLC ("Betfred Nevada") obtained the Mohegan Sportsbook Services at the Virgin Hotel Casino. 1 App. 39.

39. Betfred would not have been able to secure the Mohegan Sportsbook Services at the Virgin Hotel Casino without McGuire's efforts to introduce and facilitate the Betfred and Mohegan Tribe partnership. 1 App. 75.

40. After becoming the sportsbook service provider for the Virgin Hotel Casino, Betfred failed to enter into good faith negotiations with McGuire for a full form agreement containing such terms and conditions as are customary for a share of Betfred's revenue with McGuire. 1 App. 76.

Based on the totality of the aforementioned facts, McGuire submits that it demonstrated to the district court sufficient "minimum contacts" to justify haling Betfred into a Nevada Court to remedy McGuire's damages.

III. STANDARD OF REVIEW

This Court should review every issue presented in this case "de novo." In *Baker v. Eight Judicial District Court*, the Nevada Supreme Court held that de novo review is the appropriate standard of review when reviewing whether a district court can exercise personal jurisdiction over a defendant. *Baker v. Eight Judicial District Court*, 116 Nev. 527, 531, 999 P.2d 1020, 1023 (2000). Similarly, in *Slade v. Caesar's Equipment Corp.*, the Nevada Supreme Court held that a dismissal on the merits would be subject to an even more rigorous standard of "de novo review." *Slade v. Caesar's Equipment Corp.*, 132 Nev. 374, 379, 373 P.3d 74, 78 (2016).

IV. SUMMARY OF LEGAL ARGUMENT

The most obvious and egregious error is the district court's decision to eschew well-established precedent and resolve factual disputes in Betfred's favor—not McGuire's—in a proceeding that challenges personal jurisdiction. Indeed, the district court's order is odd in that nearly all of its findings center on its erroneous factual determination that the Agreement was "terminat[ed], in June [of] 2019." This is a disputed fact that has nothing to do with personal jurisdiction. The district court's task was to determine whether McGuire had made a prima facie case for jurisdiction and not base its ruling on the underlying facts of the case.

While it was obvious error for the court to resolve factual disputes in favor of Betfred, the district court's refusal to undertake an analysis of whether Betfred is subject to personal jurisdiction in Nevada is most egregious. Indeed, the district court summarily dismissed the case without any consideration of personal jurisdiction. McGuire established multiple grounds for exercising personal jurisdiction over Betfred in a case where McGuire is a victim of a breach of contract involving a Las Vegas casino. In short, McGuire made a prima facie showing of personal jurisdiction over Betfred due to (a) its own forum-directed activities, (b) through the contacts of Betfred's agents; or (c) through Betfred's alter egos. The district court ducked any review of whether McGuire made a prima facie showing of personal jurisdiction. There is simply no excuse for the court's failure to examine jurisdiction.

Finally, the district court inexplicably dismissed this case with prejudice, meaning that it adjudicated the merits of McGuire's First Amended Complaint, even though the court decided that it had no jurisdiction over Betfred. If the district court did not have jurisdiction over Betfred, then it surely was without jurisdiction to decide the merits of the case.

V. LEGAL ARGUMENT

A. The district court erred by not resolving factual disputes in McGuire's favor when McGuire submitted sufficient proffers of evidence.

Since the last century, Nevada courts have followed well-established precedent about resolving factual disputes: "[W]hen factual disputes arise in a proceeding that challenges personal jurisdiction, those disputes must be resolved in favor of the plaintiff." *Levinson v. Second Jud. Dist. Ct. of State In & For Washoe Cty.*, 103 Nev. 404, 407, 742 P.2d 1024, 1026 (1987); *see also Tricarichi v. Coop. Rabobank, U.A.*, 135 Nev. 87, 91, 440 P.3d 645, 649 (2019) ("The court may consider evidence presented through affidavits and must accept properly supported proffers as true and resolve factual disputes in the plaintiff's favor.").

Here, the district court did not adhere to such precedent. Although the parties' affidavits conflicted, the district court refused to resolve factual disputes in McGuire's favor—and, instead, accepted Betfred's version of the facts as true while ignoring personal jurisdiction entirely.

a. The district court erroneously resolved factual disputes in Betfred's favor by finding that the parties did not come to Las Vegas to negotiate at G2E with regard to the contract at issue and that their meeting regarding the Connecticut Sportsbook was merely incidental to the trip.

The parties' affidavits conflicted as to whether the October of 2018 Las Vegas meeting was planned. McGuire's affidavit provided that McGuire secured a meeting in Las Vegas between Betfred and the Mohegan Tribe:

> Specifically, in October of 2018, McGuire, through my [Peter Hutchinson's] direct efforts, secured a meeting in Las Vegas, Nevada between Betfred and the Mohegan Tribe (the "Vegas Meeting"). I engaged in email communication with Alroy, of the Mohegan Tribe, to coordinate the Vegas Meeting. For example on October 7, 2018, I emailed Alroy "confirming our meeting at 4:30 at the betfred stand on Tuesday."

1 App. 74.

Betfred's affidavit, by contrast, represented the Nevada location of the October 2018 meeting as simply a fortuitous by-product of its other commitments:

> In October 2018, Reid and I [Peter Stebbings] were due to be in the US to attend Global Gaming Expo ("G2E") held in Las Vegas, Nevada. Based on my assumption that this event is regularly attended by representative and executives of the gaming industry, I hoped to use the opportunity to try and get a definitive answer regarding the Connecticut sportsbook bid and to meet Kevin Brown for the first time. Accordingly, I requested to meet with Alroy, both Browns, and Hutchinson at G2E to discuss the Connecticut RFP. That the meeting would occur in Nevada was simply a product of the fact that G2E was occurring in Las Vegas. Nevada had nothing to do with the LOI or our meeting.

1 App. 37.

The district court erred by resolving a factual dispute in Betfred's favor—not McGuire's—when it accepted Betfred's characterization of the Las Vegas Meeting as fortuitous:

> While at G2E, Betfred Int'l and McGuire met with a member of the Mohegan Sun and both were informed that Betfred Int'l failed to obtain the Mohegan Sun Connecticut sportsbook. There is no connection between the LOI and the State of Nevada. This meeting occurred simply because these parties were all in the same location at the same time.
> …
> The parties did not come to Las Vegas to negotiate at G2E with regard to this contract. The parties came to G2E to attend the conference and the fortuitous meeting regarding the Connecticut Sportsbook was merely incidental to the trip.

1 App. 184, 185.

The district court also improperly weighed the evidence in favor of Betfred when it erroneously inferred that both parties understood that the terms of the Agreement would not be met and, thus, it was terminated:

> Both parties appeared to understand that the terms of the LOI would not be met. An email from McGuire's Owner, Peter Hutchinson, confirmed the parties' mutual understanding when he said "[Betfred Int'l] will be a success in USA [I] know, I'm just gutted [I] will not be along to see it." There is no further evidence in the record that the parties continued working together following the October 2018 G2E meeting.

1 App. 184.

If the district court had appropriately sought to resolve factual disputes in McGuire's favor, it would have arrived at the logical, reasonable inference that the

parties ceased working together following the October 2018 G2E meeting because Betfred wanted to cut McGuire out of the deal and refrain from paying McGuire its duly earned compensation in clear violation of the Agreement. In any event, it was error for the district court to resolve this dispute for Betfred at this stage of the case.

b. The district court erroneously resolved factual disputes in Betfred's favor by finding that the Agreement terminated in June of 2019.

Rather than engage in the substantive analysis of whether Betfred is subject to personal jurisdiction in Nevada, the district court seemingly based its dismissal of the case on its factual determination that the Agreement (the LOI) terminated in June of 2019. 1 App. 184. Setting aside that any factual resolution of the Agreement's enforceability is entirely inappropriate where McGuire has pled a valid and enforceable Agreement, the district court's finding that the Agreement was terminated is simply wrong and is reversible error.

The court found that "the Mohegan Sun Connecticut Sportsbook Service publicly announced that it awarded the contract to Kimba" and then went on to cite Section 7.1—the Term and Termination—provision of the Agreement to conclude that "the [Agreement] terminat[ed] in June 2019." 1 App. 184. Not only is such a sweeping factual determination inappropriate for a motion to dismiss, but it is rebutted by well-pled allegations and the plain language of the Agreement. The

First Amended Complaint plainly alleges and the Agreement is clear on its face that "the Agreement . . . is not limited to the sports book of a specific Mohegan Sun casino, but rather expressly encompasses 'sports book betting and wagering services to the US gambling operator Mohegan Sun. '" 1 App. 1–15. In addition, the emails between the parties are specific that there were more opportunities aside from the Mohegan Sun in Connecticut. 1 App. 72–73. Thus, the district court was simply wrong to conclude that the Agreement terminated when the Mohegan Sun Connecticut Sportsbook was awarded to Kimba. The First Amended Complaint alleges, and the Agreement and communications expressly provide, that Agreement is not limited to the Mohegan Sun Connecticut, but rather "the US gambling operator Mohegan Sun." 1 App. 1– 15, 72–73. The district court was not at liberty to discard these well-pled allegations and resolve such a factual issue at this stage of the case.

As explained below, the district court appears to have used its erroneous factual findings to circumvent any review of whether there is sufficient jurisdiction over Betfred. In so finding, the district court eschewed well-established precedent by not resolving factual disputes in McGuire's favor in a proceeding that arose out of a challenge to personal jurisdiction. This Court should reverse the district court's ruling and hold that there is personal jurisdiction over Betfred in Nevada.

B. The district court erred by not exercising personal jurisdiction over Betfred in a case where McGuire is a victim of a breach of contract involving a Las Vegas casino.

The Order dismissing the case is vacant of any meaningful consideration of whether Betfred is subject to personal jurisdiction in Nevada. The district court made no substantive findings regarding whether the state's long arm statute was satisfied or if due process would be offended by the exercise of jurisdiction. 1 App. 180–88. Instead, it summarily dismissed the case. It was error for the district court to fail to analyze whether Betfred is subject to personal jurisdiction in Nevada.

To defeat Betfred's Motion to Dismiss, McGuire only needed to "make a prima facie showing of personal jurisdiction." *Trump v. Eighth Judicial Dist. Court of State of Nev. In & For County of Clark*, 109 Nev. 687, 692, 857 P.2d 740, 743 (1993). In determining whether a prima facie showing has been made, the district court, as discussed earlier, should accept properly supported proffers of evidence by a plaintiff as true and must resolve factual disputes in plaintiff's favor. *Trump*, 857 P.2d at 744; *see also Tricarichi*, 440 P.3d at 649 ("The court may consider evidence presented through affidavits and must accept properly supported proffers as true and resolve factual disputes in the plaintiff's favor."). Thus, when the plaintiff presents "some competent evidence of essential facts which establish a

prima facie showing that personal jurisdiction exists," the district court should deny defendant's motion to dismiss. *Trump*, 857 P.2d at 743–44.

To make a prima facie showing of personal jurisdiction, "a plaintiff must show (1) that the requirements of the state's long arm statute have been satisfied, and (2) that due process is not offended by the exercise of jurisdiction." *Arbella Mut. Ins. Co. v. Eighth Judicial Dist. Court ex rel. County of Clark*, 122 Nev. 509, 512, 134 P.3d 710, 712 (2006) (internal quotations omitted). Nevada's long-arm statute, NRS 14.065(1), permits the exercise of personal jurisdiction on any basis not inconsistent with the United States Constitution. Thus, the constitutional inquiry is whether the exercise of personal jurisdiction satisfies due process. *See Arbella*, 122 Nev. at 512.

Due process is satisfied if the nonresident defendant's contacts are sufficient to obtain either (1) general jurisdiction, or (2) specific personal jurisdiction, and it is reasonable to subject the nonresident defendant to suit in Nevada. *Viega GmbH v. Eighth Jud. Dist. Ct.*, 130 Nev. 368, 375, 328 P.3d 1152, 1156 (2014).

When a court exercises general jurisdiction, a defendant is held to answer in a forum for causes of action unrelated to the defendant's forum activities. *Trump*, 857 P.2d at 748. General jurisdiction "is appropriate where the defendant's forum activities are so 'substantial' or 'continuous and systematic' that it may be deemed present in the forum." *Id.* Specific personal jurisdiction, however, arises when (1)

the defendant purposefully enters the forum's market or establishes contacts in the forum and affirmatively directs conduct there, and (2) the claims arise from that purposeful contact or conduct. *Viega*, 130 Nev. at 375.

In Nevada, a plaintiff may establish personal jurisdiction over a non-resident defendant by imputing a subsidiary's contacts to the parent company under an "alter ego" theory or "agency" theory. *Id.* at 376.

As discussed below and ignored by the district court entirely, McGuire made a prima facie showing of personal jurisdiction over Betfred due to (a) its own forum-directed activities, (b) through the contacts of Betfred's agents; or (c) through Betfred's alter egos. Additionally, Betfred failed to meet its burden of showing that the exercise of jurisdiction would be unreasonable. Therefore, this Court should reverse the district court's ruling and hold that there is personal jurisdiction over Betfred in Nevada.

a. The district court erred by holding that Betfred did not purposefully avail itself of, or have sufficient minimum contacts with, the forum in Nevada.

In evaluating specific personal jurisdiction, courts consider two factors: (1) whether the defendant purposefully availed itself of the privilege of acting in the forum state or purposefully directed its conduct towards the forum state, and (2) whether the cause of action arose from the defendant's purposeful contact or activities in connection with the forum state, such that it is reasonable to exercise

personal jurisdiction. *Tricarichi*, 440 P.3d at 650. While the contacts cannot be "random" or "fortuitous" it is the quality of these contacts, and not the quantity that confers personal jurisdiction over a defendant. *Trump*, 857 P.2d 740, 749. In fact, "[e]ven a single contact with or activity in the forum state may satisfy the constitutional test for minimum contacts where the claim for relief arises therefrom." *Mirage Casino-Hotel v. Caram*, 762 F. Supp. 286, 288 (D. Nev. 1991).

Here, McGuire made a prima facie showing of specific personal jurisdiction over Betfred in Nevada. Betfred purposefully availed itself of the privilege of acting in Nevada by (1) meeting with McGuire and the Mohegan Tribe in Las Vegas, Nevada in connection with the Agreement in October of 2018, (2) forming sixteen (16) wholly owned Nevada subsidiaries in an effort to avoid its obligations under the Agreement, and (3) using McGuire's connections to obtain the Mohegan Sportsbook Services at the Virgin Hotel Casino in Las Vegas, Nevada.

As made clear in the Hutchinson Declaration, McGuire, Betfred and the Mohegan Tribe met in Las Vegas to discuss Betfred obtaining the Mohegan Sportsbook Services not just in Connecticut, but also in other Mohegan Tribe casinos in the United States. 1 App. 74. This Vegas Meeting was indisputably related to the Agreement. 1 App. 74.

Further, the plain language of the Agreement does not limit its application to a specific Mohegan Tribe casino, but rather expressly encompasses "sports book betting and wagering services to the US gambling operator Mohegan Sun[.]" 1 App. 78. McGuire proffered overwhelming evidence of the parties' intent that the Agreement apply to casinos across the United States, including Nevada. 1 App. 72–73, 80–90. As set forth above, McGuire's evidence must be accepted as true, and any factual disputes must be resolved in McGuire's favor. *See Tricarichi*, 135 Nev. at 90–91.

Additionally, Betfred formed sixteen (16) wholly owned Nevada based Subsidiaries. 1 App. 46–49. Betfred admittedly formed the Subsidiaries for the sole purpose of having them pursue the Mohegan Sportsbook Services. 1 App. 38–39. In other words, Betfred intentionally formed the Subsidiaries to avoid its obligations under the Agreement. Betfred fails to appreciate, however, that the Agreement expressly applies to the "Parties group and/or associated companies." 1 App. 72, 77–79. The plain meaning of this term is the Agreement obligates Betfred, Betfred Group, and any of its subsidiaries. *Ringle v. Bruton*, 120 Nev. 82, 93, 86 P.3d 1032, 1039 (2004) ("when a contract is clear, unambiguous, and complete, its terms must be given their plain meaning and the contract must be enforced as written").

Ultimately, Betfred obtained the Mohegan Sportsbook Services at the Virgin Hotel Casino in Las Vegas. 1 App. 75. Betfred, however, would not have been able to secure the Mohegan Sportsbook Services at the Virgin Hotel Casino without McGuire's efforts to introduce and facilitate the Betfred and Mohegan Tribe partnership. 1 App. 75. In short, Betfred cut McGuire out of this deal in breach of the Agreement. 1 App. 75.

In the end, Betfred met with McGuire and the Mohegan Tribe in Las Vegas in connection with the Agreement; Betfred formed sixteen (16) wholly owned Nevada subsidiaries to obtain the Mohegan Sportsbook Services; and obtained the Mohegan Sportsbook Services at the Virgin Hotel Casio as a result of McGuire's efforts in facilitating the Betfred and Mohgan Tribe partnership. Far from random or fortuitous, these contacts show (1) Betfred purposefully directed its conduct towards Nevada, and (2) McGuire's causes of action directly arose from Betfred's activities in Nevada. Accordingly, McGuire established that the district court has specific personal jurisdiction over Betfred. *Tricarichi*, 135 Nev. at 91; *Trump*, 857 P.2d at 749; *Mirage Casino-Hotel*, 762 F. Supp. at 288.

By making an inappropriate factual finding on the termination of the Agreement, the district court avoided the minimum contacts analysis altogether and ignored substantial contacts sufficient to exercise jurisdiction. The district court blundered by resolving a factual dispute rather than personal jurisdiction.

Thus, this Court should reverse the district court's ruling and hold that there is personal jurisdiction over Betfred in Nevada.

b. The district court erred by rejecting specific personal jurisdiction over Betfred under agency theory.

Under agency theory, the parent company "'is held for the acts of the [subsidiary] agent' because the subsidiary was acting on the parent's behalf." *Viega*, 130 Nev. at 376; *see also Trump*, 857 P.2d at 745 n.3 ("The contacts of an agent are attributable to the principal in determining whether personal jurisdiction exists."). Under agency theory, a prima facie showing of personal jurisdiction over the foreign parent corporation can be established by evidence demonstrating "agency or control" by the parent corporations over their local subsidiary. *Viega*, 130 Nev. at 377. The requisite control exists "where the local entity as agent essentially exists only to further the business of the foreign entity, and but for the domestic entity's existence, the foreign entity would be performing those functions in the forum itself." *Viega*, 130 Nev. at 379. Thus, the agency theory supports specific jurisdiction "when the local subsidiary performs a function that is compatible with, and assists the parent in the pursuit of, the parent's own business." *Id*.; *see also Daimler AG v. Bauman*, 134 S.Ct. 746, 759 n.13 (2014) (indicating that an agency relationship may be used to establish specific jurisdiction when a corporate entity purposefully directs its agent to engage in activities in the forum).

Here, Betfred claims Betfred USA created Betfred Nevada to obtain the Mohegan Sportsbook Services at the Virgin Hotel Casino. 1 App. 38–39. Under agency theory, Betfred can be subject to specific personal jurisdiction based on the acts of Betfred USA and Betfred Nevada because they are subsidiaries acting on Betfred's behalf. *Viega*, 130 Nev. at 376; *Trump*, 857 P.2d at 745 n.3. McGuire made a prima facie showing of personal jurisdiction over Betfred under an agency theory by evidence demonstrating Betfred's control over their wholly owned Nevada subsidiaries Betfred USA and Betfred Nevada.

First, the subsidiaries share common features of ownership with Betfred, as Stebbings and Barr are both directors of Betfred and Betfred Group and managers of Betfred USA and Betfred Nevada. 1 App. 35, 38–39, 75, 95–136. Furthermore, Betfred admittedly created these Nevada subsidiaries solely to further Betfred's U.S. business opportunities and to obtain the Mohegan Sportsbook Services. 1 App. 38–39. But for the subsidiaries existence, Betfred would be performing these functions in Nevada itself. *Viega*, 130 Nev. at 379. The fact the subsidiaries did not exist at the time of the Agreement only supports McGuire's position, as it shows they were intentionally created to obtain the Mohegan Sportsbook Services in an effort to avoid Betfred's obligations under the Agreement.

Given that Betfred USA and Betfred Nevada were admittedly created to obtain sportsbook bids for Betfred, it is also indisputable they perform functions

compatible with, and assist Betfred in pursuit of Betfred's own business. *See Viega*, 130 Nev. at 379. For example, the website for Betfred USA shows it is a wholly owned subsidiary engaged in the same sportsbook business as Betfred and is obtaining a license to operate in Nevada. 1 App. 93–94. Simply put, Betfred and its subsidiaries all engage in the same business in the gaming industry. Betfred's subsidiaries do not perform any function or business different or separate from Betfred—they are merely agents created to further Betfred's own business. Under these facts, McGuire has made a prima facie showing of personal jurisdiction over Betfred under an agency theory.

Notably, Nevada courts have found an agency relationship sufficient to exercise personal jurisdiction under similar facts. In *NML Capital*, the court found a law firm and its Nevada based independent contractor had an agency relationship because the firm had the right to control the contractor by directing its daily business activities; the companies shared common features of ownership, such as directors; and the contractor performed a function compatible with and assisted the firm in the pursuit of its business. For example, the firm's website advertised services in Nevada, which referred to the services of the contractor. *NML Capital, Ltd. v. Republic of Argentina*, 2015 WL 1186548, at *12 (D. Nev. Mar. 16, 2015). Under these facts, the court found an agency relationship that permitted the court to attribute jurisdictional contacts to the firm and exercise specific personal

jurisdiction. *Id*. at 13; *see also Hosp. Corp. of Am. v. Second Judicial Dist. Court In & For County of Washoe*, 112 Nev. 1159, 1160, 924 P.2d 725, 725 (1996) (holding that plaintiffs adduced sufficient evidence of agency or control by the parent corporations to establish a prima facie showing of personal jurisdiction).

Similar to *NML Capital*, McGuire made a prima facie showing of specific personal jurisdiction over Betfred under an agency theory through evidence of control, common features of ownership, and based on the fact that the subsidiaries were merely created to further Betfred's own business. Thus, this Court should reverse the district court's ruling and hold that there is personal jurisdiction over Betfred in Nevada.

c. The district court erred by rejecting specific personal jurisdiction over Betfred under alter ego theory.

The aforementioned facts also support specific jurisdiction under an alter ego theory. To support jurisdiction under an alter ego theory, the plaintiff must show (1) such unity of interest and ownership between parent and subsidiary that the separate personalities of the two entities no longer exist and (2) the failure to disregard the separate entities would result in fraud or injustice. *Iconlab, Inc. v. Bausch Health Companies, Inc*., 828 Fed. Appx. 363, 364 (9th Cir. 2020); *see also NML Capital, Ltd.*, 2015 WL 1186548, at *11. The rationale behind this theory is that "the alter ego subsidiary is the same entity as its parent, and thus, the

jurisdictional contacts of the subsidiary are also the jurisdictional contacts of the parent." *Viega*, 130 Nev. at 376.

In *NML Capital*, the court found the independent contractor was the law firm's alter ego for jurisdictional purposes because both companies shared a unity of interest and ownership and the failure to disregard the separate entities would result in fraud or injustice. *NML Capital*, 2015 WL 1186548, at *13. Specifically the court found a "unity of interest" based on their joint ownership and indistinguishable business ventures:

> M.F. Corporate Services exist to achieve Mossack Fonseca & Co.'s goals, and in so doing relies on Mossack Fonseca & Co. It provides M.F. Corporate Services with human-resources and information-technology services and advertises M.F. Corporate Services as part of Mossack Fonseca & Co. on its website. This demonstrates that M.F. Corporate Services would not exist without Mossack Fonseca & Co. and that M.F. Corporate Services "is so organized and controlled, and its affairs are so conduct that it is in fact a mere instrumentality" of Mossack Fonseca & Co.

NML Capital, 2015 WL 1186548, at *13. The court found these facts sufficient to exercise general jurisdiction over the firm because it was "essentially at home" in Nevada by virtue of its domination of its contractor. *Id*. at 14.

Similar to *NML Capital*, Betfred and its subsidiaries indisputably share a unity of interest and ownership. Stebbings and Barr are both directors of Betfred and Betfred Group and managers of Betfred USA and Betfred Nevada. 1 App. 35,

38–39, 75, 95–136. Betfred admittedly created these Nevada subsidiaries solely to further Betfred's business opportunities in the U.S. and to obtain the Mohegan Sportsbook Services. 1 App. 38–39. Additionally, Betfred, Betfred USA and Betfred Nevada all engage in the same business in the gaming industry. For example, the website for Betfred USA shows it is a wholly owned subsidiary engaged in the same sportsbook business as Betfred and is obtaining a license to operate in Nevada. 1 App. 93–94.

Additionally, the failure to disregard the separate entities would result in fraud or injustice to McGuire. The evidence shows McGuire expended significant efforts to facilitate a Betfred and Mohegan Tribe partnership in performance of its obligations under the Agreement, including organizing a meeting that occurred in Las Vegas. 1 App. 72–74. Betfred then represented to McGuire that negotiations with the Mohegan Tribe had stalled and that Betfred was not continuing in its pursuit of the Mohegan Sportsbook Services. 1 App. 74.

Unbeknownst to McGuire, however, Betfred formed sixteen (16) Nevada subsidiaries, obtained a consultant other than McGuire in violation of the Agreement, and was ultimately successful in obtaining the Mohegan Sportsbook Services at the Virgin Hotel Casino. 1 App. 74–75. Betfred simply would not have been able to secure the Mohegan Sportsbook Services at the Virgin Hotel Casino without McGuire's efforts to introduce and facilitate the Betfred and

Mohegan Tribe partnership. 1 App. 75. Because Betfred was successful in obtaining the Mohegan Sportsbook Services, Betfred was obligated by the Agreement to enter into a full form agreement customary for share of Betfred's revenue with McGuire, wherein Betfred would pay McGuire ten percent (10%) of the gross revenues Betfred received from any sportsbook it operated for the Mohegan Tribe. 1 App. 72. Betfred's breach of the Agreement has caused McGuire significant damages. 1 App. 76.

Betfred should not be permitted to hide behind the corporate fictions it intentionally formed to avoid personal jurisdiction in Nevada and its obligations under the Agreement. Accordingly, McGuire established personal jurisdiction over Betfred under an alter-ego theory. Therefore, this Court should reverse the district court's ruling and hold that there is personal jurisdiction over Betfred in Nevada.

d. The district court erroneously found that the contract included a forum selection clause and it is otherwise reasonable to exercise jurisdiction over Betfred in Nevada.

Once the plaintiff demonstrates the defendant purposefully availed itself of the forum's benefits, the exercise of jurisdiction is presumptively reasonable. *See Trump*, 857 P.2d at 749. To rebut this presumption, it is Betfred's burden to present a "compelling case" that the presence of some other considerations would render jurisdiction unreasonable. *Id.*; *see also Sinatra v. Nat'l Enquirer, Inc.*, 86-

6527, 1988 WL 86524 (9th Cir. 1988) ("defendant bears the burden of ultimately proving that the exercise of jurisdiction is unreasonable."). Nevada Courts measure the reasonableness of exercising jurisdiction against five factors:

> (1) "the burden on the defendant" of defending an action in the foreign forum, (2) "the forum state's interest in adjudicating the dispute," (3) "the plaintiff's interest in obtaining convenient and effective relief," (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and (5) the "shared interest of the several States in furthering fundamental substantive social policies.

Emeterio v. Clint Hurt & Associates, Inc., 114 Nev. 1031, 1036–37, 967 P.2d 432, 436 (1998) (citing *World–Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 292, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)). In this case, although Betfred failed to show jurisdiction in Nevada was unreasonable and consideration of the factors weighed in McGuire's favor, the district court erroneously held that it could not exercise personal jurisdiction over Betfred. The district court's erroneous conclusion was in part due to its mistaken finding that the Agreement contained a forum selection clause:

> The contract was negotiated at arm's length, and included a forum selection clause.

1 App. 185.

The district court's error was egregious because the Agreement plainly contains a choice of law clause—not a forum selection clause:

> Any disputes arising out of or in connection with the LOI which cannot be settled amicably shall be resolved by a court of competent jurisdiction in accordance with the laws of England and Wales excluding conflict of law principles.

1 App. 79.

On its face, this clause is not a forum section clause. No venue is specified. It is merely a choice of law clause. Although the parties could have easily provided for venue in the United Kingdom, they did not do so. It was plain error for the district court to conclude that this was a forum selection clause. *See Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 741, 359 P.3d 105, 107 (2015) ("[W]here venue is specified [in a forum selection clause] with mandatory or obligatory language, the clause will be enforced; where only jurisdiction is specified [in a forum selection clause], the clause will generally not be enforced unless there is some further language indicating the parties' intent to make venue exclusive.").

Betfred, moreover, did not identify any conflict of law that would make it unreasonable for a Nevada court to resolve this dispute. Furthermore, the issue of whether another reasonable forum exists only arises when the forum state is shown to be unreasonable. *Sinatra* 854 F.2d at 1201. Here, Betfred simply failed to demonstrate that Nevada is an unreasonable forum and the district court made no such finding.

In fact, unless the inconvenience of litigating this matter in Nevada is "so great as to constitute a deprivation of due process, it will not overcome clear justifications for the exercise of jurisdiction." *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1323 (9th Cir. 1998). In this era of internet, email, and video-conferencing, requiring a defendant to litigate in Nevada is not unreasonable. *See Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1115 (9th Cir. 2002) (recognizing the expense and inconvenience for defendants to litigate in forum, but noting that "[m]odern advances in communications and transportation have significantly reduced the burden of litigating in another country.").

As set forth above, Betfred has already subjected itself to the jurisdiction of Nevada courts by purposefully directing its conduct towards Nevada. Moreover, Betfred's wholly owned subsidiaries are based in Nevada and are Betfred's agents and alter egos. 1 App. 95–136. Additionally, Betfred shares directors and managers with its Nevada subsidiaries. 1 App. 95–136. Indeed, Betfred's director traveled to Nevada on at least one occasion that is directly related to the events giving rise to this action. 1 App. 74. In other words, litigating this action in Nevada would not place any undue burden on Betfred because it already conducts business in Nevada. *See Dole Food*, 303 F.3d at 1115.

McGuire, moreover, proffered evidence that Betfred intentionally breached the Agreement by cutting McGuire out of the deal when it obtained the Mohegan

Sportsbook Services at the Virgin Hotel Casino. In similar cases, where the alleged injury is the result of intentional rather than negligent conduct, courts find the defendant purposefully interjected itself into the state. *Pocahontas First Corp. v. Venture Planning Group, Inc.*, 572 F. Supp. 503, 507–08 (D. Nev. 1983) ("Where the alleged injury is the result of intentional, rather than negligent, conduct, the defendant has purposefully interjected itself into the state."); *Falen v. Cervi Livestock Co.*, 581 F. Supp. 885, 888 (D. Nev. 1984) (Defendant's "own affirmative act served to interject him into the Nevada transaction.").

Additionally, it will be far more efficient to litigate this case in Nevada than to bring suit against Betfred in the United Kingdom for breaching an Agreement concerning a Las Vegas casino and Betfred's wholly owned Nevada subsidiaries. As the gambling center of the United States and the home of the Virgin Hotel Casino, Nevada has a strong interest in adjudicating McGuire's claims—and with its expertise resolving disputes involving gambling entities, Nevada can most efficiently resolve this dispute. *Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1021 (9th Cir. 2002) (Nevada has strong interest and expertise in resolving disputes involving gambling and casinos). Simply, Nevada—not the United Kingdom—is the most appropriate forum to resolve a dispute concerning a Las Vegas casino.

Finally, the fact that the parties are non-residents is irrelevant. As stated by the Nevada Supreme Court, the state has an interest in protecting out-of-state residents and providing a forum to resolve disputes related to Nevada:

> Nevada law should afford some protection to the out-of-state residents which Nevada hails to trade shows in order to boost Nevada business. As petitioners argue, the state has an interest in protecting its visitors from commercial predation and in providing a forum for the resolution of disputes having their origin here. We refuse to allow businesses to come to Nevada and enter into contracts free from any threat of litigation in this forum.

Firouzabadi v. First Judicial Dist. Court In & For Carson City, 110 Nev. 1348, 1356–57, 885 P.2d 616, 621–22 (1994) (holding that the exercise of personal jurisdiction was reasonable when a nonresident defendant entered into a contract with a nonresident plaintiff while attending a trade show in Nevada).

In the end, Betfred failed to present the district court with any legitimate reason, let alone a compelling one, that it would be unreasonable to exercise personal jurisdiction. Rather, the facts clearly demonstrate that the exercise of personal jurisdiction over Betfred would be reasonable. As a result, this Court should reverse the district court's ruling and hold that there is personal jurisdiction over Betfred in Nevada.

C. The district court in holding that it had no personal jurisdiction over Betfred erred when it exercised jurisdiction over the merits of McGuire's claims by dismissing McGuire's First Amended Complaint with prejudice.

When the district court dismissed this case pursuant to NRCP 12(b)(2)—lack of personal jurisdiction—it should have confined its dismissal to the sole issue of jurisdiction. Instead, the district court exceeded its alleged lack of authority by wading into the merits and dismissing McGuire's First Amended Complaint "with prejudice." 1 App. 185–86. Logically speaking, if a district court lacks jurisdiction to hear the case, it must also lack jurisdiction to adjudicate the merits of the case. *See Landreth v. Malik*, 127 Nev. 176, 251 P.3d 163 (2011); *Mack-Manley v. Manley*, 122 Nev. 849, 138 P.3d 525 (2006); *see also Fritz Hanson A-S v. Eight Judicial District Court*, 116 Nev. 650, 6 P.3d 982 (2000).

In *Bank of America v. Jorjorian*, the court explained that the words "with prejudice" signified a final adjudication resulting in res judicata of all issues which might have been litigated in the suit:

> This depends upon the meaning of the words "with prejudice" as defined by the courts. In *Union Indemnity Co. v. Benton County Lumber Co.* (citations omitted) the court held that these words had a well recognized legal import and are "as conclusive of the rights of the parties as if the suit had been prosecuted to a final adjudication adverse to the plaintiff." This was followed in *Lake v. Wilson* (citations omitted) holding that a "dismissal with prejudice" is res judicata of all questions which might have been litigated in the suit."

Bank of America v. Jorjorian, 24 N.E.2d 896, 897 (Ill. App. 1940).

One unpublished decision illustrates the difference between a dismissal with prejudice and a dismissal without prejudice: *Azzarelo v. Humbolt River Ranch*, 132 Nev. 941, 2016 WL 6072420, Docket No. 68147 (Oct. 14, 2016). In *Azzarelo*, the Nevada Supreme Court held that the defendant could not claim the status of a prevailing party for the purposes of seeking attorneys' fees where a case was dismissed without prejudice, because the merits of the case were never adjudicated. *Id.*

In short, a dismissal with prejudice adjudicates the merits of a case. Pursuant to NRCP 41(b), a dismissal for lack of personal jurisdiction, however, does not operate as adjudication on the merits. *See also Guidry v. U.S. Tobacco Co.*, 188 F.3d 619, 623 n.2 (5th Cir. 1999) (providing dismissal pursuant to federal Rule 12(b)(2) is without prejudice); *Kendall v. Overseas Dev. Corp.*, 700 F.2d 536, 539 (9th Cir. 1983) ("[A] dismissal for lack of *in personam* jurisdiction is not *res judicata* as to the merits of the claim."). Therefore, when granting a motion to dismiss for lack of personal jurisdiction, a district court must not classify the dismissal as "with prejudice" as that improperly implies adjudication on the merits.

Here, the district court concluded that it could not exercise jurisdiction over Betfred and dismissed McGuire's First Amended Complaint pursuant to NRCP 12(b)(2) with prejudice. 1 App. 185–86. But, by rule, a dismissal for lack of jurisdiction cannot operate as adjudication on the merits, so it must be without

prejudice. *See* Nev. R. Civ. P. 41(b). Therefore, the district court erred when it dismissed McGuire's claims with prejudice. As a result, this Court should remand this matter to the district court with instructions to strike the "with prejudice" language from its dismissal order if this Court decides not to reverse the district court's lack of personal jurisdiction ruling.

VI. CONCLUSION

In its rush to a factual judgment, the district court made a multitude of egregious errors not least of which included dismissing McGuire's First Amended Complaint for lack of personal jurisdiction. In determining whether it could exercise personal jurisdiction over Betfred, the district court inexplicably and erroneously went against well-established precedent resolving factual disputes in Defendant's favor—not McGuire's—even though McGuire submitted sufficient proffers of evidence.

After improperly resolving factual disputes, the district court eschewed any substantive review of whether Betfred is subject to personal jurisdiction in Nevada. This was error.

Lastly, the district court compounded its erroneous personal jurisdiction finding by dismissing McGuire's claims with prejudice even though the law is clear that a dismissal for lack of jurisdiction does not operate as adjudication on the merits; thus, such a dismissal should be without prejudice.

As a result, the District Court's Order of Dismissal should be vacated in its entirety, with a remand to the court requiring Defendant to proceed with answering McGuire's First Amended Complaint and completing the litigation that has been filed in Nevada. In the alternative, this Court should remand this matter to the district court with instructions to strike the "with prejudice" language from its dismissal order.

DATED this 15th day of February, 2022.

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CERTIFICATION OF COMPLIANCE

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 proportionally space typeface using Microsoft Word 2010 with 14 point, double-spaced Times New Roman font.

2. I further certify that this 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 proportionally spaced, as a typeface of 14 points or more and contains 8,642 words.

3. I also hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose.

4. 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 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.

5. I understand that I may 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.

DATED this 15th day of February, 2022.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on 15th day of February, the foregoing **APPELLANT'S OPENING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the Court's electronic file and serve system. I further certify that all parties of record to this appeal are either registered with the Court's electronic filing system or have consented to electronic service and that electronic service shall be made upon and in accordance with the Court's Master Service List.

I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

/s/ Carla Llarena
An employee of Akerman LLP