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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CHAD ELIE,

Plaintiff,

vs.

IFRAH PLLC, a Professional Limited Liability Company, ALAIN JEFFERY IFRAH a/k/a JEFF IFRAH, individually, DOE individuals I through XX, and ROE CORPORATIONS I through XX,

Defendants.

CASE NO. 2:13-cv-00888-JCM-VCF

MOTION TO DISMISS AMENDED COMPLAINT

ORAL ARGUMENT REQUESTED

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MOTION TO DISMISS AMENDED COMPLAINT

The statements Plaintiff CHAD ELIE offered under oath to a federal judge last year when pleading guilty to conspiring to commit bank fraud and operate an illegal gambling business make it impossible for relief to be granted for Plaintiff's final seven (out of eight) claims for relief. Likewise, his first (and only other) claim for relief is not only meritless, but fatally unripe. For the reasons set forth in more detail in Defendants' attached memorandum of points and authorities, Defendants IFRAH PLLC and ALAIN JEFF IFRAH a/k/a JEFF IFRAH (incorrectly named ALAIN JEFFERY IFRAH in the complaint) respectfully move this Court to dismiss Plaintiff's Amended Complaint ("Complaint") under Fed. R. Civ. P. 12(b)(6).

DATED this 1st day of June, 2013

THORNDAL, ARMSTRONG, DELK,
BALKENBUSH & EISINGER

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MEMORANDUM OF POINTS AND AUTHORITIES

On March 26, 2012, Plaintiff CHAD ELIE pleaded guilty to conspiring to commit bank fraud and operate an illegal gambling business based upon his conduct of payment processing with Fifth Third Bank for online poker companies from 2008 through 2011. Prior to his guilty plea, Plaintiff asserted he did so based on opinions from several lawyers regarding the legality of this business. Importantly, the lawyers on whose opinions Plaintiff claimed to have relied did not include Defendants IFRAH PLLC and ALAIN JEFF IFRAH a/k/a JEFF IFRAH. This makes sense: Plaintiff processed payments for online poker businesses for nearly two years before his first contact with Defendants. Of equal import, in his plea allocution, Plaintiff specifically stated he knew his conduct was illegal while he was committing the crime for which he was pleading guilty and he had not, in fact, relied upon the advice of any attorney in choosing to engage in such conduct.

The allegations in this lawsuit are directly contradicted by this clear and unambiguous denial that Plaintiff's criminal conduct was based upon the advice of counsel. Although Plaintiff has never before included Defendants among the attorneys from whom he previously claimed to have obtained legal opinions, and although his payment processing with Fifth Third Bank predated his first contacts with Defendants, seven of Plaintiff's eight claims rest upon the allegation he relied upon advice from Defendants in choosing to engage in that payment processing relationship. Plaintiff's statements—offered under oath to a United States District Judge—make it impossible for relief to be granted for these seven claims for relief as a matter of judicial estoppel. Plaintiff's guilty plea also precludes him from making the claim of causation required for his causes of action. Plaintiff's only remaining

claim, which alleges legal malpractice in a pending case in which Plaintiff has suffered no injury or damages, is not only meritless but unripe. For these reasons, this Court should dismiss Plaintiff's Amended Complaint in its entirety.

Plaintiff's Complaint is a string of dishonest attacks offered by a confirmed liar who admitted under oath to willfully lying to banks for pecuniary gain for years. Apparently, the remorse Plaintiff expressed to the criminal court for his dishonesty was a sham, because he continues to lie with impunity in his present Complaint. Nearly everything negative Plaintiff alleges about Defendants in his Complaint is a fabrication. It brings Defendants no pleasure to use such strong language in a judicial proceeding, but the deplorable mendacity of Plaintiff's Complaint warrants such a response.

One day soon, Plaintiff will face legal consequences for his fraudulent attempt to destroy Defendants' excellent professional reputation. This Court, fortunately, does not need to address this issue because Plaintiff's case is presently ripe for dismissal on other grounds. Plaintiff's allocution under oath last year, of which this Court may take judicial notice, belies and repels key allegations which make it impossible for Plaintiff to satisfy the necessary elements of his causes of action for his second claim for professional malpractice, breach of contract, breach of covenant of good faith and fair dealing, intentional misrepresentation, racketeering, piercing the corporate veil, and civil conspiracy, even if each remaining libelous averment were true (which they are not).

Likewise, Plaintiff's first cause of action for professional malpractice (arising out of the *Partner Weekly vs. Viable Marketing Corp.* litigation) is fatally unripe. Therefore, under Fed.

R. Civ. P. 12(b)(6), Plaintiff's complaint must be dismissed in its entirety for failure to state a claim upon which relief can be granted.

FACTS

Defendants could exhaust volumes rebutting the false allegations in Plaintiff's Amended Complaint ("Complaint").[1] However, Defendants understand when considering a motion to dismiss under Rule 12(b)(6), this Court accepts as true all factual allegations in the complaint no matter how scurrilous and false they may be. *See Nev. ex rel. Hager v. Countrywide Home Loans Servicing, L.P.*, 812 F. Supp. 2d 1211, 1214 (D. Nev. 2011) (citing *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1150, n. 2 (9th Cir. 2000)). It is worth noting that Plaintiff provides no details regarding the ugly accusations in his Complaint: in no instance has he identified a specific email, text, phone call, or meeting (nor any specific dates) in which Defendants made the alleged statements which form the basis for his claims. Nor has Plaintiff provided the date of any checks sent or of commissions allegedly received, or any quoted language from the supposed legal opinions Defendants offered to Plaintiff.

But none of this is surprising. Nearly all of Plaintiff's factual assertions are directly contradicted by the sworn statements he made during his allocution in connection with his guilty plea to conspiracy to commit bank fraud and operate an illegal gambling business. (*See*

[1] Plaintiff's blatantly fraudulent and defamatory allegations include, among other things, that Defendants received commissions for payment processing; received payments from poker providers for procuring bank relationships; induced Plaintiff to enter relationships with banks for poker payment processing, induced Plaintiff to continue poker payment processing; were paid $4,000,000 by Plaintiff in attorney fees and commissions; cooperated with law enforcement against Plaintiff's and other clients' interests; failed to disclose conflicts of interest; hid legal memoranda from him; breached rules of professional responsibility; as well as many other false claims too plentiful be specifically enumerated.

Plea Hearing Transcript, attached as Exhibit "A"). Even accepting the truth of those few allegations not contradicted by Plaintiff's plea allocution, none of Plaintiff's claims survive scrutiny.

A. Plaintiff Admitted Under Oath He Committed Bank Fraud and Was Aware His Internet Poker Processing Activities Were Illegal.

This lawsuit arises out of Plaintiff's criminal prosecution in *U.S. v. Scheinberg, et. al.*, Case No. 10 Cr. 336 (LAK) (the source of the well-known "Black Friday" internet poker indictments), for operating businesses which processed bank transactions for internet gambling activities he was aware were illegal and for lying to banks about the nature of those transactions. Plaintiff pleaded guilty to conspiring to commit bank fraud and operate an illegal gambling business, in violation of federal law, on March 26, 2012 in the U.S. District Court for the Southern District of New York. (*See* Ex. A at 1; *see also* Am. Comp. at ¶ 90). Plaintiff now claims his illegal acts were perpetrated in reliance upon legal advice from Defendants. (*See, e.g.*, Am. Comp. at ¶¶ 34–39, 50, 62, 89–90). Plaintiff's second through eighth claims for relief are derived from such allegations. (*See id.* at ¶¶ 99–163). Such allegations, however, are belied by Plaintiff's own statements under oath to the Hon. Lewis A. Kaplan during his plea hearing. (*See* Ex. A).

Plaintiff pleaded guilty to a Superseding Information filed on March 26, 2012. (*See* Ex. A at 2; *see also* Superseding Information, p. 1, attached as Exhibit "B"). As part of that guilty plea, Plaintiff was thoroughly canvassed under oath by the district court. (*See* Ex. A at 2:25–3:4, *see also* 7:21–25:13). During his allocution, Plaintiff admitted from May, 2008

through April 14, 2011, he served as a third-party payment processor for, at various times, various internet poker companies ("Poker Companies"). (Ex. A at 16:4–9; Ex. B at ¶ 2).

In 2008, Plaintiff assisted Australian poker processor Intabill in disguising poker payment transactions, including by establishing a bank account that Plaintiff represented would be used to process payments for "payday loans" but that, in truth and in fact, was used to process poker transactions. (Ex. B at ¶ 2; Ex. A at 16:10–17). In the summer of 2009, Plaintiff established a bank account at Fifth Third Bank he "claimed would be used to process payments for various internet membership clubs, but that, in truth and in fact, [he] used to process millions of dollars in payments for Poker Companies." (Ex. B at ¶ 2; Ex. A at 16:18–24). Beginning in the fall of 2009, and continuing through early 2011, Plaintiff "offered to invest millions of dollars in three failing banks, including SunFirst Bank, all of which have since been ordered closed by bank regulators, in return for processing internet poker transactions." (Ex. B at ¶ 2; Ex. A at 16:25–17:5). In doing so, Plaintiff willfully and knowingly conspired to violate 18 U.S.C. §§ 1344 and 1955 by "processing financial transactions for internet poker and lying to banks to induce them to process these transactions." (Ex. B at ¶ 3 (emphasis added); *see also* Ex. A at 17:13–20:11).

During his allocution, Plaintiff admitted he understood that because of his fraud, banks agreed to process transactions they would not have processed had they understood the transactions related to poker. (Ex. A at 17:13–19:1). Plaintiff also admitted he fully understood that internet poker was considered illegal "gambling" by the United States:

> THE COURT: Was it a further part and an object of the conspiracy, Mr. Elie, that you and others would and did

> conduct, finance, manage, supervise, direct, and own all and part of illegal gambling businesses . . . .
> MR. BERKE: . . . . [Mr. Elie] certainly knew that poker was gambling. He certainly knew that the government had taken the position that Internet poker was illegal gambling under the statute.
>
> THE COURT: Do you adopt your attorney's statement, Mr. Elie?
>
> THE DEFENDANT: Yes, your honor.

(*Id.* at 19:13–20:11).

The district court's thorough canvass of Plaintiff did not end there, however. The court, fully aware of the risk Plaintiff would try to deflect blame for his willful and knowing illegal conduct on others, canvassed Plaintiff in great detail regarding his reliance upon counsel.

> THE COURT: In a super abundance of caution, it occurs to me to say to you, Mr. Elie, do you understand that by entering this plea you are surrendering any claim that you did not act with criminal intent because you relied on the advice of counsel? Do you understand that?
> . . . .
> In order to do that, he has to satisfy me that he is admitting that he had the requisite criminal intent, and reliance on counsel in some circumstances is not consistent with that event. I want a flat-out statement from him to be perfectly frank that he is here admitting that he acted with criminal intent in committing this conspiracy.
>
> MR. BERKE: Absolutely, your Honor . . . . Mr. Elie is obviously admitting to bank fraud and the conspiracy that charges bank fraud as well as a separate object, operating an illegal gambling business. The only point I was make something, there was he certainly understood that he was involved in transacting a business for poker. He is not relying on any reliance-on-counsel defense in connection with this case or otherwise, and he is prepared to say that, your Honor.
>
> THE COURT: Let's hear it from you, Mr. Elie.
> . . . .

> THE DEFENDANT: Yes, your Honor. I am not relying on advice of counsel and I am pleading guilty to the conspiracy.
>
> THE COURT: You are acknowledging that in committing this conspiracy you acted with criminal intent. Is that right?
>
> THE DEFENDANT: Yes, sir.

(*Id.* at 21:8–12, 22:8–14, 22:17–23:10 (emphasis added)).

One reason Judge Kaplan placed great emphasis on making clear Plaintiff was not relying on advice of counsel was because Plaintiff intended to raise the issue at trial. (*See* Defs.' Reply to the Govt.'s Mot. *in Limine* Regarding the Relevance of Skill and Requisite *Mens Rea*, pp. 6–7, attached as Exhibit "C"; *see also* Govt.'s Mot. *in Limine* Regarding the Relevance of Skill and Requisite *Mens Rea*, pp. 6–10 (file stamp pp. 10–14), attached as Exhibit "D"). Notably, in his reply to the U.S. Government's motion, Plaintiff claimed to have relied upon the advice of several different attorneys—but never once claimed to have received any legal advice from Defendants. (*See* Ex. C at 6–7). In fact, with respect to Plaintiff's interactions with Fifth Third Bank that formed the basis for his guilty plea and conviction, Plaintiff specifically identified attorney Ian Imrich—and not Jeff Ifrah or Ifrah PLLC—as the source of the legal advice upon which he allegedly relied. (*See id.*).

At the time Mr. Imrich provided advice to Plaintiff, Plaintiff was the defendant in civil fraud litigation in *Intabill, Inc. v. Elie*, Case No. 8:09-cv-834-T-23TGW, in the United States District Court for the Middle District of Florida. Mr. Ifrah represented the Intabill trustee in that case in its attempt to recover $4 Million stolen by Plaintiff from accounts holding poker funds belonging to customers of a variety of poker companies. Plaintiff cannot possibly argue Defendants provided legal advice or even referred him to another to

provide legal advice regarding the legality of poker processing during this period of time, and indeed he does not.[2]

During his allocution, Plaintiff admitted "he worked with others to establish an account at Fifth Third Bank to process transactions for certain online poker companies." (*Id.* at 23:20–24:7). He admitted he "did not tell the bank that the account would be used for poker transactions." (*Id.*). He admitted "when the bank became suspicious about the transactions, [he] denied that the account was being used for gaming transactions." (*Id.* at 24). He knew his "conduct was wrong." (*Id.*).

In sum, Plaintiff pleaded guilty to the Superseding Information—and he stated he was pleading guilty because he was, in fact, guilty. (*Id.* at 24:25–25:5). Beyond admitting to bank fraud, he acknowledged he understood, at the time of his acts, that he was aware internet poker was considered illegal gambling, and his processing of internet poker payments, regardless of whether the banks were fully apprised of it or not, was illegal. (*See id.* at 20:5–11). He further admitted he knew at the time of his acts he was guilty of operating an illegal gambling business and was "not relying on any reliance-on-counsel defense in connection with this case or otherwise . . . ." (*See id.* at 21:23–23:10).

B. Plaintiff Falsely Claims Alleged Misrepresentations by Defendants Led Him to Believe His Internet Poker Processing Activities Were Legal.

Plaintiff now tries to smear Defendants' professional reputations and affect their livelihoods by falsely accusing them of misleading him into believing his poker processing

[2] Ifrah contacted the United States Attorney's Office for the Southern District of New York regarding the *Intabill, Inc. v. Elie* case. It was in regards to this case that the same office later contacted Ifrah as a potential witness.

activities were legal for their own pecuniary gain, even though Plaintiff stated under oath he knew his poker processing activities were illegal all along. Defendant ALAIN JEFF IFRAH a/k/a JEFF IFRAH is a well-respected attorney practicing in the District of Columbia. (*See* Am. Comp. at ¶¶ 9–13). He is the founding member of Defendant IFRAH PLLC. (*See id.* at ¶¶ 3, 6). Defendants have represented Plaintiff in several discrete cases, although the nature of that representation is nothing like Plaintiff's description in the Complaint.

Plaintiff claims Defendants "knowingly misrepresented the facts and the law to him" and "hid critical documentation" from him.[3] (*Id.* at ¶ 15, 69–71). Plaintiff claims "that had said documentation been disclosed" to Plaintiff, he "would have never continued to process poker." (*Id.* at ¶ 15). Plaintiff claims Defendants intentionally gave him wrong advice that internet poker processing was lawful so Defendants' other clients would benefit and for Defendants' own pecuniary interests. (*See id.* at ¶¶ 17, 34, 61). (Of course, Plaintiff contradicts his own claims by stating that Defendants "continuously recommended that [Plaintiff] also retain other experts and obtain legal opinions as to the legalities of third party processing . . . ."). (*Id.* at ¶ 66). Plaintiff claims he relied upon Defendants' counsel in commencing internet poker processing at SunFirst Bank in Utah. (*Id.* at ¶ 36–41). Plaintiff claims that after a run-in with U.S. Government investigators in 2010, he "made a conscious decision to retreat from the internet poker processing business" and "was no longer interested in processing poker payments" but continued to do so in reliance upon

[3] The so-called critical information allegedly withheld is a one-page memo penned in 2010 that the government introduced during pre-trial motions that asserts the Department of Justice has taken the position poker processing is illegal. Such information could not have been a surprise to Plaintiff who had been told so by FBI agents who seized his accounts at Fifth Third Bank in October of 2009.

Defendants' alleged advice that internet poker transactions were lawful. (*Id.* at ¶¶ 43–56; *see also* ¶¶ 89–90).

Plaintiff also alleges Defendants provided information about Plaintiff to the U.S. Attorney's Office for the Southern District of New York and provided testimony and information against Plaintiff, leading to Plaintiff's indictment. (*Id.* at ¶¶ 18, 82). Plaintiff asserts even after SunFirst Bank was closed by government regulators, he continued to process internet poker payments based in reliance upon Defendants' legal advice. (*Id.* at ¶¶ 89–90). Plaintiff claims as a "result of Defendant's false and misleading advice," he "was facing up to eighty years in jail, forcing him to accept a deal to plead guilty to one count of Felony Bank Fraud." (*Id.* at ¶ 90). He "was sentenced to five (5) months in prison for same, was required to forfeit millions of dollars, lost his payment processing business and . . . will forever be saddled with a felony conviction." (*Id.* at ¶ 91).

C. The Underlying *Partner Weekly, LLC v. Viable Marketing Corp.* Lawsuit for Which Plaintiff Has Wrongfully Sued Defendants for Professional Malpractice is Still Pending in Federal Court and Remains Unresolved.

Plaintiff also defames Defendants' work on his behalf in the *Partner Weekly, LLC v. Viable Marketing Corp. et al.* case in the U.S. District Court, District of Nevada, Case No. 2:09-cv-02120-PMP-VCF. Plaintiff's first claim for relief for professional malpractice arises from a set of facts distinct from Plaintiff's other seven claims, which each arise from Plaintiff's conviction for bank fraud and illegal poker processing. Plaintiff alleges Defendants breached professional duties of care they owed to Mr. Elie in the *Partner Weekly* lawsuit, where Defendants were retained to represent Viable Marketing Corp. and Plaintiff Weekly, LLC. (*See* Am. Comp. at ¶¶ 6, 20–24, 92–98).

Plaintiff's claim that Defendants breached their duty of care is meritless. But even if it had merit, Plaintiff's involvement in the lawsuit is still ongoing and his professional malpractice claim is thus unripe. This Court can take judicial notice of the ongoing proceedings in *Partner Weekly, LLC v. Viable Marketing Corp. et al.* (*See* Docket Report for Case No. 2:09-cv-02120, attached as Exhibit "E").[4] In fact, on May 31, 2013, only a few days before the filing of this present motion, Plaintiff filed a motion to dismiss the claims against him. (*See* Def. Chad Edward Elie's Mot. to Dismiss, attached as Exhibit "F"). This Court can take judicial notice that Plaintiff's motion remains unresolved. (*See* Ex. E).

ARGUMENT

A. Standard of Review.

Each of Plaintiff's eight causes of action is ripe for dismissal under Fed. R. Civ. P. 12(b)(6). "The analysis and purpose of a Rule 12(b)(6) motion to dismiss for failure to state a claim is to test the legal sufficiency of a complaint." *Nev. ex rel. Hager v. Countrywide Home Loans Servicing, L.P.*, 812 F. Supp. 2d 1211, 1215 (D. Nev. 2011) (citing *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)). "When considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court must accept as true all factual allegations in the complaint as well as all reasonable inferences that may be drawn from such allegations." *Nev. ex rel. Hager v. Countrywide Home Loans Servicing, L.P.*, 812 F. Supp. 2d 1211, 1214 (D. Nev. 2011) (citing *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1150, n. 2 (9th Cir. 2000)). Although the court must accept alleged facts as true, this Court need not "assume the truth of legal conclusions

[4] The docket report erroneously states the *Partner Weekly* case closed on April 9, 2012. (*See* Docket Report for Case No. 2:09-cv-02120, attached as Exhibit "E"). The docket entries themselves, however, show this is a clerical error and that litigation remains ongoing.

merely because they are cast in the form of factual allegations." *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.1981).

"To avoid a Rule 12(b)(6) dismissal, a complaint . . . must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* at 1215 (quoting *Clemens v. Daimler Chrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir.2008)); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 129 S.Ct. 1937, 1949 (2009) (holding that a "claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged"). Although "a complaint does not need 'detailed factual allegations' to pass muster under 12(b)(6) consideration, the factual allegations 'must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact).'" *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1965 (2007)).

Importantly, "'[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Iqbal*, 556 U.S. at 678, 129 S.Ct. at 1949) (modification added). "'Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancements." *Id.* (quoting *Iqbal*, 556 U.S. at 678, 129 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 557, 127 S.Ct. at 1966)). Accordingly, this Court "is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004) (internal quotations omitted). Nor is this Court "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Id.*

Furthermore, and of great significance, in deciding whether dismissal under Rule 12(b)(6) is warranted, this Court may consider documents . . . referred to in the complaint whose authenticity no party questions." *Hagar*, 812 F. Supp. at 1214 (citing *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000); *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir.1987)). On a motion to dismiss, this Court "may take judicial notice of matters of public record outside the pleadings." *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986); *see also* Fed. R. Evid. 201(b)(2); *Wailea Partners, LP v. HSBC Bank USA, N.A.*, Case No. 11-cv-3544 SC, 2011 U.S. Dist. LEXIS 144441, n. 3, 2011 WL 6294476, n. 3 (N.D. Cal. Dec. 15, 2011) (taking judicial notice of plea hearing transcript and its contents).

In this case, Plaintiff acknowledges that on March 26, 2012, he pleaded guilty to conspiring to commit bank fraud and operate an illegal gambling business. (*See* Am. Comp. at ¶ 90; *see also* Ex. A at 7:21–2, 24:25–25:5; Ex. B). This Court may properly take judicial notice of the attached plea hearing transcript and the superseding information to which Plaintiff pleaded guilty. Furthermore, Plaintiff cannot reasonably dispute the authenticity of these documents because they are matters of public record and Plaintiff was physically present at the hearing. Likewise, this Court may take judicial notice of the docket and filings in *Partner Weekly, LLC v. Viable Marketing Corp. et al.*, Case No. 2:09-cv-02120-PMP-VCF. (*See* Ex. C; Ex. D).

Nevada law governs each of Plaintiff's eight causes of action. "When a district court sits in diversity . . . . the court applies state substantive law to the state law claims." *Mason & Dixon Intermodal, Inc. v. Lapmaster Int'l LLC*, 632 F.3d 1056, 1060 (9th Cir. 2011). In diversity suits, "federal district courts should apply state law to substantive issues, and

federal law to procedural issues." *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 512 (9th Cir. 1988).

B. Plaintiff is Judicially Estopped from Claiming His Conviction for Bank Fraud and Operating an Illegal Gambling Business—and Any of Its Consequences—is a Result of Alleged Reliance Upon Defendants' Advice and Counsel.

Plaintiffs' second through eighth claims for relief are each predicated upon Plaintiffs' allegations he relied upon legal advice from Defendants, causing him to believe internet poker processing was legal, resulting in his conviction for bank fraud and operating an illegal gambling business, and causing him loss. This Court must reject these allegations, all of which are foundational to his second through eighth claims for relief. Plaintiff is barred by the doctrine of judicial estoppel from making factual representations that are at odds with his representations under oath to the Hon. Lewis A. Kaplan of the United States District Court for the Southern District of New York. He knew his internet poker processing activities were illegal, he possessed the requisite criminal intent in committing those acts, and, most importantly, his illegal acts were not in reliance upon counsel.

1. Judicial Estoppel Prevents Parties From Making Factual Assertions in a Legal Proceeding Which Directly Contradict Earlier Sworn Assertions Made in a Prior Proceeding.

"The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process." *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990) (internal quotations omitted) (reversing a trial court's dismissal of a petition for habeas

corpus and applying the doctrine of judicial estoppel to bar the state from taking inconsistent positions). Whether judicial estoppel applies is a question of law. *NOLM, LLC v. County of Clark*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004). "The primary purpose of judicial estoppel is to protect the judiciary's integrity, and a court may invoke the doctrine at its discretion." *Id.* (internal citations omitted). Judicial estoppel is warranted when "a party's inconsistent position arises from intentional wrongdoing . . . an attempt to obtain an unfair advantage" or when a party attempts to "sabotage the judicial process." *Id.* (internal quotations and modifications omitted).

"The policies underlying preclusion of inconsistent positions are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings." *Russell*, 893 F.2d at 1037 (internal quotations and modifications omitted). "Judicial estoppel is intended to protect against a litigant playing 'fast and loose with the courts.'" *Id.* (internal quotations omitted). "Judicial estoppel is most commonly applied to bar a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in . . . a prior one." *Id.* (emphasis added).

"The doctrine should apply when (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." *NOLM*, 120 Nev. at 743, 100 P.3d at 663.

2. Plaintiff's Factual Assertions in This Case Directly Contradict His Assertions to the District Court During His Plea Hearing.

This Court should apply the doctrine of judicial estoppel to Plaintiff's claims for relief in this case. Plaintiff's second claim for relief of professional malpractice, his claim of breach of contract, his claim of breach of covenant of good faith and fair dealing, his claim of intentional misrepresentation, his claim for racketeering, his claim for piercing the corporate veil, and his claim of civil conspiracy are each predicated on the allegation he relied upon legal advice from Defendants, causing him, to his detriment, to believe internet poker processing was legal, resulting in his conviction for bank fraud and operating an illegal gambling business, causing him loss.

Plaintiff must be estopped from asserting these claims. Plaintiff's factual representations under oath in his plea hearing contradict the factual assertions he offers in this case. Plaintiff stated under oath during his plea hearing he knowingly committed bank fraud by telling banks his payment processing activities were not related to illegal internet gambling. (*See* Ex. A at 16:10–24, 23:20–24:7). He stated under oath he knew the internet poker payment processing activities in which he engaged were considered illegal by the United States and he was operating an illegal gambling business. (*Id.* at 19:13–20:11; 21:8–12, 22:8–14, 22:17–23:10). He stated under oath he was admitting to bank fraud and operating an illegal gambling business during the time period relevant to this case, he knew it was illegal, he possessed the requisite criminal intent, and he was "not relying on any reliance-of-counsel defense in connection with this case or otherwise . . . ." and he responded affirmatively to Judge Kaplan's statement that he understood that by entering

the plea, he was surrendering any claim he did not act with criminal intent because of reliance on the advice of counsel. (*Id.* at 16:4–9, 19:13–20:11, 21:8–12, 22:8–14, 22:17–23:10, 24:10–16) (emphasis added).

Plaintiff's allocution under oath directly contradicts his statements in this case where he claims but for Defendants' advice or failure to provide advice, Plaintiff "would have never continued to process poker" (Am. Comp. at ¶ 15); that he relied upon Defendants' counsel (*Id.* at ¶ 36); that he had decided to retreat from internet poker processing but was induced by Defendants to continue processing (*Id.* at ¶¶ 43–89); that he re-engaged in payment processing "[a]s a result of Defendant's misrepresentations and false and misleading legal advice" (*Id.* at ¶ 89); and that as a "result of Defendant's false and misleading advice," Plaintiff was "forced" to plead guilty to conspiring to commit bank fraud and operate an illegal gambling business, was sentenced to five months in prison, "was required to forfeit millions of dollars, lost his payment processing business . . . and will forever be saddled with a felony conviction." Plaintiff cannot be allowed to assert such claims because they directly contradict what he told Judge Kaplan under oath.

Plaintiff's Complaint is the paradigmatic poster-child for the application of the doctrine of judicial estoppel. His two positions are directly and totally inconsistent; they were both taken in judicial proceedings; and he successfully asserted his first position and thereby obtained the benefit of his plea deal. Moreover, given Judge Kaplan's thorough canvass of Plaintiff during his hearing and the availability of legal counsel to Plaintiff, his first position was clearly "not taken as a result of ignorance, fraud, or mistake." Plaintiff must be barred from saying whatever necessary to obtain the benefit of his plea deal in his

criminal case, only to take an entirely different position in this case in an attempt to extract a monetary award from Defendants. Plaintiff's allegations in this case epitomize the sort of conduct the doctrine of judicial estoppel should preclude. Accordingly, the doctrine should apply and, as a result, Plaintiff's second through eight claims for relief should be dismissed.

C. Plaintiff's Second Claim for Relief for Professional Malpractice Should Be Dismissed Because Plaintiff's Plea Allocution Makes it Impossible for Him To Prove the Necessary Causation Element.

Plaintiff's admissions under oath to Judge Kaplan make it impossible for him to satisfy the essential causation element of his second professional malpractice claim. (*See* Am. Comp. at ¶¶ 99–108). In order to prevail on a legal malpractice claim, a plaintiff must prove the following elements: (1) an attorney-client relationship; (2) a duty owed by the attorney to the client "to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity possess in exercising and performing the tasks which they undertake"; (3) a breach of that duty; (4) "the breach being the proximate cause of the client's damages"; and (5) that the plaintiff suffered actual loss or damage as a result of the negligence. *Day v. Zubel*, 112 Nev. 972, 922 P.2d 536, 538 (Nev. 1996) (emphasis added). Even if the allegations not contradicted by Plaintiff's allocution under oath during his plea hearing were true, Plaintiff cannot establish the required causation element.

The Nevada Supreme Court affirmed a trial court's dismissal of a legal malpractice action brought by a criminal defendant against his privately retained defense counsel for want of causation. The court held that "to state a claim for legal malpractice against private criminal defense counsel, the plaintiff must assert a basis for claiming that the plaintiff's conviction or sentence was caused by something other than the plaintiff's own conduct."

M*organo v. Smith*, 110 Nev. 1025, 1028–1029, 879 P.2d 735, 737 (1994) (emphasis added). Although the factual context of *Morgano* is different than this case, this holding is directly applicable here. Plaintiff admitted in open court he knew he was committing bank fraud and he knew he was operating an illegal gambling business. By his own admission, Plaintiff was not convicted for ignorantly relying upon Defendants' alleged legal advice, advice which, in point of fact, was never given; rather, he was convicted because he knowingly engaged in criminal activity. As a result of his admissions, even if each of his allegations against Defendants were true, it is impossible for him to establish Defendants' alleged malpractice caused his conviction. His knowing and willful criminal acts caused his conviction.

Likewise, a New Jersey appellate court affirmed a grant of summary judgment in favor of attorneys under factual circumstances similar to this case. *Alampi v. Russo*, 345 N.J. Super. 360, 361, 785 A.2d 65, 66 (N.J. App. 2001). In *Alampi*, an accountant was indicted for federal tax violations. *Id.* at 362–363, 785 A.2d at 67. He pleaded guilty to failure to provide information to the IRS and was thoroughly canvassed by the district court judge. *Id.* at 364–365, 785 A.2d at 68–69. He never challenged his guilty plea. *Id.* He sued his criminal defense attorney for professional negligence. *Id.* at 365, 785 A.2d at 69. The trial court granted summary judgment in favor of his attorneys. *Id.* at 361, 785 A.2d at 66.

The appellate court affirmed summary judgment. *Id.* at 370–371, 785 A.2d at 72. The court declined "to allow plaintiff here to go behind his federal guilty plea." *Id.* at 371, 785 A.2d at 72. Where the plaintiff had "clearly and unconditionally pled guilty to a criminal offense" he could not argue his criminal defense attorney's negligence prevented him from achieving an outcome of non-prosecution. *Id.* This holding should apply to the

circumstances of this case, where Plaintiff's thorough plea colloquy established that Plaintiff was convicted not because of advice-of-counsel, but because of knowing and willful illegal activity. For these reasons, Plaintiff's second cause of action for professional malpractice arising out of the *U.S. v. Scheinberg et al.* case, Case No. 10 Cr. 336, must be dismissed.

D. Plaintiff's Claims for Relief for Alleged Breach of Contract; Breach of Covenant of Good Faith and Fair Dealing; and Intentional Misrepresentation Must Fail Because Plaintiff Cannot Establish That Defendants' Alleged Acts Caused the Damages of Which He Complains.

Likewise, Plaintiff cannot satisfy the elements of his third claim for breach of contract, his fourth claim for breach of covenant of good faith and fair dealing, and his fifth claim for fraud and intentional misrepresentation, each of which is likewise predicated on Defendants' allegedly harmful advice to Plaintiff and Plaintiff's allegedly resulting conviction. (*See* Am. Comp. at ¶ 109–131). "An essential element of a breach of contract claim is a showing that defendant's alleged breach caused damages to the plaintiff." *Keife v. Metro. Life Ins. Co.*, 797 F. Supp. 2d 1072, 1077 (D. Nev. 2011). For the same reasons discussed previously, Plaintiff cannot sufficiently plead a breach of contract claim.

Plaintiff's claim for breach of an implied covenant of good faith and fair dealing also must fail. A breach of the implied covenant of good faith and fair dealing "forbids arbitrary, unfair acts by one party that disadvantage the other." *J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 286, 89 P.3d 1009, 1015 (2004). In this case, even if Plaintiff's allegations were true, he was not materially disadvantaged by Defendants' allegedly misleading advice because his plea allocution established the basis for his conviction was

entirely independent of advice of counsel. Accordingly, Plaintiffs third and fourth claims for relief should be dismissed.

Plaintiff's claim in his fifth cause of action for intentional misrepresentation (fraud), alleging Defendants made numerous false and misleading written oral representations to Plaintiff's detriment, also must fail. (*See* Am. Comp. at ¶¶ 123–131). A plaintiff bears the burden to prove each element of fraud by clear and convincing evidence. *Lubbe v. Barba*, 91 Nev. 596, 598, 540 P.2d 115, 117 (1975). More on point, under Fed. R. Civ. P. 9(b), "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *See also G.K. Las Vegas Ltd. P'ship v. Simon Prop. Group, Inc.*, 460 F. Supp. 2d 1222, 1238 (D. Nev. 2006). Rule 9(b) requires pleading facts that pertain to "the who, what, when, where, and how" of the misconduct charged. *Id.* (internal quotations omitted). Plaintiff fails to do so.

The elements required to prove fraud are: (1) a false representation made by the defendant; (2) the defendant's knowledge or belief that the representation is false (or an insufficient basis for making the representation); (3) the defendant's intent to induce the plaintiff to act or to refrain from acting in reliance upon the misrepresentation; (4) the plaintiff's "justifiable reliance upon the misrepresentation"; and (5) "[d]amage to the plaintiff resulting from such reliance." *See Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992) (emphasis added). Similarly, "[i]ntentional misrepresentation is established by three factors: (1) a false representation that is made with either knowledge or belief that it is false or without a sufficient foundation, (2) an intent to induce another's

reliance, and (3) damages that result from this reliance." *Nelson v. Heer*, 123 Nev. 217, 225, 163 P.3d 420, 426 (2007) (emphasis added).

Plaintiff's Complaint fails for two reasons. First, he fails to allege sufficient facts to avoid dismissal under Fed. R. Civ. P. 9(b) and 12(b)(6), as well as the Court's standards set forth in *Iqbal* and *Twombly*. Second, Plaintiff cannot satisfy all requisite elements where he cannot reasonably claim he justifiably relied upon Defendants' representations that internet poker processing was legal when he admitted under oath he was believed it was illegal. This is especially true when Plaintiff's own Complaint states that Defendants "continuously recommended that [Plaintiff] also retain other experts and obtain legal opinions as to the legalities of third party processing . . . ."). (*Id.* at ¶ 66). Plaintiff's fourth, fifth, and sixth causes of action must be dismissed.

E. Plaintiff's Cause of Action for Racketeering Fails Because The Injury to Business and Property of Which He Complains Was Not Proximately Caused by Defendant's Alleged Predicate Acts.

Plaintiff also seeks the recovery of punitive damages through a racketeering claim against Defendants. Plaintiff, however, through his own admissions under oath, cannot state a racketeering claim for which relief may be granted. Plaintiff has no standing to bring a racketeering claim against Defendants because his alleged injuries to business and property were caused by his own willful and knowing illegal acts, not by his reliance upon any representations on the part of Defendants.

"Nevada's anti-racketeering statutes [NEV. REV. STAT § 207.350 through § 207.520], inclusive . . . are patterned after the federal Racketeer Influenced and Corrupt Organizations, or 'RICO,' statutes [18 U.S.C. §§ 1961–1968]." *Hale v. Burkhardt*, 104 Nev.

632, 634, 764 P.2d 866, 868 (1988). "Like their federal counterparts, Nevada's anti-racketeering statutes provide for a civil cause of action for injuries resulting from racketeering activities under which a plaintiff may recover treble damages, attorney's fees and litigation costs." *Id.* (citing NEV. REV. STAT 207.470).

"It is well-settled that to have standing as a RICO plaintiff, one's injury must flow from the violation of a predicate RICO act." *Allum v. Valley Bank*, 109 Nev. 280, 283, 849 P.2d 297, 299 (1993). More importantly for this case, "not only must the plaintiff's injury flow from a predicate act, but the plaintiff must show that the defendant's RICO violation proximately caused the plaintiff's injury." *Allum*, 109 Nev. at 284, 849 P.2d at 300 (emphasis added).

In this case, the harm to business and property Plaintiff alleges in his racketeering cause-of-action is derivative of the consequences of his criminal conviction for bank fraud and operating an illegal gambling business. (Am. Comp. at ¶¶ 132–153). Plaintiff alleges in his racketeering cause of action through Defendants' alleged acts of offering false evidence to the U.S. Attorney's Office in the investigation leading up to Black Friday (*id.* at ¶ 139); in providing Plaintiff with false information regarding the legalities of internet poker processing (*id.* at ¶ 144); and fraudulently inducing Plaintiff into engaging in poker processing, Plaintiff has been injured in his "business or property" under NEV. REV. STAT. § 207.470(1). (*Id.* at ¶ 134).

For the same reasons discussed previously, Plaintiff cannot reasonably plead that the "injury" to Plaintiff's "business or property" resulting from his conviction for conspiring to commit bank fraud and operate an illegal gambling business was proximately caused by

Defendants' falsely alleged predicate acts. As a preliminary matter, Plaintiff's allegations of the predicate facts supporting his racketeering claim are sufficiently vague and conclusory as to not pass muster under *Iqbal* and *Twombly*. Second, Plaintiff's argument that any alleged injury" to Plaintiff's "business or property" was caused by Defendants must fail where Plaintiff stated under oath during his plea hearing that he knowingly committed bank fraud; where he confirmed he was aware the internet poker payment processing activities in which he was engaged were considered illegal by the United States Government; and where he stated under oath that he was waiving any reliance-of-counsel defense.

Additionally, Plaintiff's punitive damages claim under his sixth cause of action, as well as any other cause of action, are not actionable in this case because, for the reasons discussed, none of his underlying causes of action are viable. *See Wolf v. Bonanza Inv. Co.*, 77 Nev. 138, 143, 360 P.2d 360, 362 (1961) (holding "in the absence of a judgment for actual damages, there could not have been a valid judgment for exemplary damages").

F. Plaintiff's Claim for Civil Conspiracy Fails for Want of Causation.

Plaintiff's claim for civil conspiracy fails for the same reasons as all of the other claims for relief. "An actionable civil conspiracy is a combination of two or more persons who, by some concerted action, intend to accomplish some unlawful objective for the purpose of harming another which results in damage." *Collins v. Union Fed. S&L Ass'n*, 99 Nev. 284, 303, 662 P.2d 610, 622 (1983) (emphasis added). In order to prevail on a claim for civil conspiracy, a plaintiff must prove the following elements: (1) a conspiracy agreement; (2) an overt act; and (3) "resulting damages to the plaintiff." *Jordan v. State ex rel. DMV & Pub. Safety*, 121 Nev. 44, 74–75, 110 P.3d 30, 51 (2005), overruled on other

grounds, *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008). Plaintiff's cause of action for conspiracy suffers the same causation deficiency as Plaintiff's other causes of action and likewise must be dismissed.

G. Plaintiff's First Cause of Action for Professional Malpractice Is Fatally Unripe Because the Underlying Litigation is Still Ongoing Against Plaintiff.

Plaintiff falsely alleges that Defendants breached their professional duties to Plaintiff in *Partner Weekly, LLC v. Viable Marketing Corp. et al.*, Case No. 2:09-02120-PMP-VCF in the United States District Court for the District of Nevada. (*See* Am. Comp. ¶¶ 3, 22–24, 92–98). Defendants need not waste this Court's time explaining why Plaintiff's assertions are false; however, where Plaintiff's attorney claims that Plaintiff has suffered damages while she is, at the same time, arguing to this Court in the underlying case that her client should be dismissed, Plaintiff demonstrates yet another allegation in the Complaint that is blatantly contradicted by judicial records. The lack of merit of Plaintiff's professional negligence claim need not be addressed because Plaintiff's claim is premature under well-established Nevada law, and therefore must be dismissed.

1. Malpractice Actions Must Be Dismissed When the Underlying Case Giving Rise to the Alleged Malpractice is Still Pending.

"An action for professional malpractice does not accrue until the plaintiffs know, or should know, all facts material to the elements of the cause of action and damage has been sustained." *Jewett v. Patt*, 95 Nev. 246, 247, 591 P.2d 1151, 1152 (1979). In *Jewett*, the Nevada Supreme Court affirmed the district court's dismissal of an attorney malpractice action "on the grounds that it was premature." *Id.* at 248, 591 P.2d at 1152. "[W]here damage has not been sustained or where it is too early to know whether damage has been sustained, a legal

malpractice action is premature and should be dismissed." *Semenza v. Nevada Medical Liab. Ins. Co.*, 104 Nev. 666, 668, 765 P.2d 184, 186 (1988) (citing *Jewett*, 95 Nev. at 247–248, 591 P.2d at 1152; *see also Boulder City v. Miles*, 85 Nev. 46, 49, 449 P.2d 1003, 1005 (1969) (holding "no one has a claim against another without having incurred damages")).

"[I]t follows that a legal malpractice action does not accrue until the plaintiff's damages are certain and not contingent upon the outcome of an appeal." *Semenza*, 104 Nev. at 668, 765 P.2d at 186 (citing *Amfac Distribution Corp. v. Miller*, 138 Ariz. 155, 156–157, 673 P.2d 795, 796 (Ariz. App. 1983)). "Specifically, '[w]here there has been no final adjudication of the client's case in which the malpractice allegedly occurred, the element of injury or damage remains speculative and remote, thereby making premature the cause of action for professional negligence.'" *Id.* (quoting *Amfac*, 138 Ariz. at 156, 673 P.2d at 796). "Therefore, it is only after the underlying case has been affirmed on appeal that it is appropriate to assert injury and maintain a legal malpractice cause of action for damages." *Semenza*, 104 Nev. at 668, 765 P.2d at 186. In *Semenza*, the Nevada Supreme Court reversed a jury verdict against an attorney sued for malpractice, holding that where the underlying case was still pending, the legal malpractice claim was premature. *Id.* at 668–669, 765 P.2d at 186.

Thus, under Nevada law, if there is an allegation legal malpractice has been "committed in the representation of a party to a lawsuit, damages do not begin to accrue until the underlying legal action has been resolved." *Hewitt v. Allen*, 118 Nev. 216, 221, 43 P.3d 345, 348 (2002).

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2. *Partner Weekly, LLC v. Viable Marketing Corp. et al.* Is Still Pending and Thus Plaintiff's First Claim for Relief in this Case Must Therefore Be Dismissed.

This Court should take judicial notice that the underlying lawsuit giving rise to Plaintiff's first cause of action for professional malpractice is still pending in the United States District Court for the District of Nevada. In fact, on May 31, 2013, only several days before the filing of this motion, Plaintiff—represented by the same attorney representing him in this present case—filed a motion to dismiss the claims against him. (*See* Ex. F at 1). Thus, even assuming, *arguendo*, that Plaintiff's professional malpractice claim is viable, which it is not, Plaintiff's claim is nonetheless premature. Plaintiff's damages, if any, are uncertain and thus remain speculative and remote. The underlying legal action has not been resolved. Therefore, under Nevada law, Plaintiff's first cause of action for professional malpractice must be dismissed.

H. <u>Where None of Plaintiff's Underlying Claims Are Actionable, Plaintiff Cannot Pierce the Corporate Veil</u>.

As discussed, each of Plaintiff's other seven causes of action must fail, as a matter of law, under Fed. R. Civ. P. 12(b)(6). Accordingly, Plaintiff's claim for piercing Defendants' corporate veil, which is purely derivative of Plaintiff's seven other claims, must be dismissed. "A request to pierce the corporate veil is only a means of imposing liability for an underlying cause of action and is not a cause of action in and of itself." *Local 159 v. Nor-Cal Plumbing, Inc.*, 185 F.3d 978, 985 (9th Cir. 1999). Plaintiff's other causes of action must fail. Therefore, so must Plaintiff's seventh cause of action to pierce the corporate veil.

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CONCLUSION

For the foregoing reasons, Defendants IFRAH PLLC and ALAIN JEFF IFRAH a/k/a JEFF IFRAH respectfully move this Court to dismiss Plaintiff's Amended Complaint in its entirety under Fed. R. Civ. P. 12(b)(6).

DATED this 1st day of June, 2013

THORNDAL, ARMSTRONG, DELK,
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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5, I hereby certify that I am an employee of the law firm of THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER, a Professional Corporation, and that on this 1st day of June, 2013, I duly deposited for mailing at Las Vegas, Nevada, a true and correct copy of the above and foregoing MOTION TO DISMISS AMENDED COMPLAINT, postage prepaid, addressed to:

NAME	TEL, FAX, AND EMAIL	PARTY REPRESENTING
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