BRIAN K. TERRY, ESQ.
Nevada Bar No. 3171
bkt@thorndal.com
KENNETH R. LUND, ESQ.
Nevada Bar No. 10133
krl@thorndal.com
THORNDAL, ARMSTRONG, DELK,
BALKENBUSH & EISINGER
1100 Bridger Avenue
Las Vegas, Nevada 89101
TEL: (702) 366-0622
FAX: (702) 366-0327
Attorneys for Defendants,
IFRAH PLLC and ALAIN JEFF IFRAH
(incorrectly captioned as ALAIN JEFFERY IFRAH)

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 **REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT**

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff provides all the information this Court needs to properly dismiss Plaintiff's lawsuit. Plaintiff's admissions in his amended complaint (#1-3), during his plea hearing in his underlying criminal case (Ex. A to Mot. (#7)), and now in his opposition (#12) defeat his claims under the doctrines of judicial estoppel, collateral estoppel, *in pari delicto*, as well as

under public policy considerations and due to a lack of legal causation. Plaintiff's opposition, like his allocution and complaint, contain admissions fatal to his case. Although Plaintiff continues to offer numerous false allegations about Defendants, Plaintiff offers admissions which validate the arguments in Defendants' motion to dismiss (#6) and eradicate Plaintiff's arguments against dismissal.

Defendants' motion to dismiss focuses primarily on one indisputable fact: Plaintiff pleaded guilty to knowingly conspiring to commit bank fraud and to operate an illegal gambling business in violation of federal law. (*See* Ex. A to Mot. to Dismiss (#6-1) at 7:21–25; 16:4–20:11).[1] He admitted under oath he alone was responsible for his willful criminal conduct and he admitted this willful conduct was independent of the advice of counsel. (*Id.* at 21:8–12, 22:8–14, 22:17–23:10). Admitting these facts under oath to a federal judge estops Plaintiff's newfound assertion that his claimed damages were the result of alleged misconduct by Defendants. Even when assuming the truth of Plaintiff's brazen lies about Defendants, this Court must dismiss Plaintiff's second through eighth claims for relief. Plaintiff's own statements establish Defendants' alleged conduct was not the proximate cause of the self-inflicted injuries Plaintiff suffered as a result of his knowing and willful

[1] As required by Fed. R. Civ. P. 12(b)(6) and interpreting case law, Defendants have accepted as true Plaintiff's allegations. Plaintiff implies in his opposition that Defendants' failure to deny certain allegations is an admission of their truth. (*See* Opp. at 28:16–18). This contention is misplaced. Although a substantial portion of Plaintiff's allegations are reprehensibly false and Plaintiff's opposition is replete with false information, the purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of a claim, not to assess the veracity of Plaintiff's claims.

participation in activities he admitted he knew were illegal, nor is Plaintiff entitled to relief from Defendants under the law.

Faced with this compelling argument, Plaintiff first resorts to misrepresenting what he said during his plea hearing, thus creating a straw man argument upon which his entire opposition is predicated. When confronted with what he said, Plaintiff's entire opposition collapses. Plaintiff dedicates the remainder of his opposition to doubling down on his attacks on Defendants' alleged conduct. The arguments in Plaintiff's opposition are misplaced, however, because even if they were true, Plaintiff's second through eighth causes of action would nonetheless be barred by the doctrines of judicial estoppel, collateral estoppel, *in pari delicto*, as well as by public policy considerations and a lack of proximate causation. This is especially true where Plaintiff admits Defendants "continuously recommended" Plaintiff obtain additional independent opinions about the legalities of third party poker processing.

Moreover, even if Plaintiff's characterization of the scope of his plea hearing were accepted as true, the relief he seeks violates public policy and is incredibly offensive to the United States justice system: Plaintiff asserts had he not followed Defendants' alleged legal advice, he would have gotten away with a federal crime he admits he committed and with which he admits Defendants had no involvement. This Court should reject this dodge.

Additionally, this Court should dismiss Plaintiff's first cause of action for lack of ripeness. Even if the misleading allegations in Plaintiff's opposition were true, Plaintiff's claim is premature because the underlying case against Plaintiff is ongoing. In fact, Plaintiff filed an answer in the case as recently as July 31. Plaintiff's first claim for relief is unripe.

Moreover, Plaintiff incorrectly argues this Court should decide this motion as one for summary judgment, and uses this argument as grounds to attach nine exhibits that are not only unauthenticated, out-of-context, and misleadingly used, but also entirely irrelevant to this case. Even if everything Plaintiff alleges were true and the exhibits Plaintiff offers stood for what Plaintiff claims they do, Plaintiff's claims would nonetheless fail, as a matter of law. Accordingly, none of Plaintiff's arguments in his opposition can overcome the absolute bar to recovery created by his admissions under oath during his plea hearing in federal court.

A. Plaintiff Responds to Defendants' Judicial Estoppel and Causation Arguments By Blatantly Misrepresenting the Scope of His Allocution and Guilty Plea.

In the face of Defendants' argument that Plaintiff's claims are estopped by his own testimony under oath to a federal judge during his guilty plea hearing (*see* Mot. at 6:5–10:20; 16:4–20:5), Plaintiff's first response is to misrepresent the scope of his allocution and guilty plea. Plaintiff repeatedly contends his guilty plea and allocution were limited to his act of conspiring to commit bank fraud against Fifth Third Bank, with which he helpfully admits Defendants had no involvement. (*See* Opp. at 2:20–22; 4:16–22; 18:16–24; 21:4–8; 25:21–26:4; 28:22–23; 33:18–25). Based upon this claim, Plaintiff contends judicial estoppel and lack of causation do not bar his lawsuit. (*See id.* at 21:4–8). Plaintiff's factual premise and his conclusion are both incorrect.

Plaintiff's efforts to limit the scope of his allocution and guilty plea to one act of conspiring to defraud a bank are belied by statements made during his plea hearing which he conceals, fails to cite, explain, or even acknowledge. (*See* Ex. A to Mot. (#7)). In reality,

1 Plaintiff's guilty plea and allocution extended beyond bank fraud in a manner fatal to his
2 present lawsuit.
3
4 **1. Plaintiff Admitted Under Oath to Knowingly and Willfully Conspiring to Operate an Illegal Gambling Business During the Relevant Time Period and Admitted His Decision to Do So Was Independent of Reliance on Advice of Counsel.**
5
6
7 Contrary to Plaintiff's misleading claims, Plaintiff not only pleaded guilty to
8 conspiring to commit bank fraud, but also to conspiring to operate an illegal gambling
9 business. (Ex. A to Mot. (#7) at 7:21–10:3). This distinction is critical because Plaintiff's
10
11 guilty plea to conspiring to operate an illegal gambling business estops him from claiming he
12 believed, as a result of Defendants' alleged advice, that his processing activities were legal so
13 long as he did so "transparently" (in other words, not lying to banks)—the very argument
14
15 Plaintiff relies upon in this case. (*See* Opp. at 8:1–10).
16 The record shows Plaintiff admitted to both conspiring to commit bank fraud and to
17 operate an illegal gambling business. Plaintiff testified under oath that "for all or some part
18
19 of the period from in or about May 2008 to and including April 14, 2011" he served "as a
20 payment processor for, at various times, each of the three entities identified in the original
21 indictment in this case as the poker companies." (*Id.* at 16:4–9 (emphasis added)). Plaintiff
22
23 fails to disclose that in addition to admitting to defrauding Fifth Third Bank (*id.* at 16:18–24),
24 he also admitted that "beginning in and around the fall of 2009 and continuing into 2011 [he
25 offered] to invest millions of dollars in three failing banks, including Sunfirst Bank, all of
26 which have since been ordered closed by bank regulators in return for processing Internet
27 poker transactions[.]" (*Id.* at 16:18–17:4 (emphasis and modifications added)).
28

THORNDAL, ARMSTRONG, DELK
BALKENBUSH & EISINGER

More to the point, he admitted that from "in or about May 2008 to and including April 14, 2011, or at least some part of that period," he combined, conspired, confederated, and agreed with a least one other person to operate an illegal gambling business in violation of federal law. (*Id.* at 7:24–25, 17:6–7, 17:13–22). He admitted he did this "willfully and knowingly." (*Id.* at 17:17–22). He admitted under oath "[h]e certainly knew that poker was gambling." (*Id.* at 20:7–11 (emphasis added)). Furthermore, he admitted "[h]e certainly knew that the government had taken the position that Internet poker was illegal gambling under the statute." (*Id.* (emphasis added)). In fact, he admitted to a specific overt act on July 27, 2009 in furtherance of a conspiracy to willfully and knowingly operate an illegal gambling business with knowledge the government had taken the position internet poker was illegal gambling under the statute. (*See id.* at 20:7–21:5). Thus, Plaintiff has admitted he knew his poker processing activities were viewed as illegal by the government, whether transparent or not, even before he retained Defendants.

In his plea hearing, Plaintiff went on to admit he acted with criminal intent and was not relying on the advice of counsel in knowingly and willfully committing those acts—including his admission to conspiring to operate an illegal gambling business. (*See id.* at 22:17–23:10, *see also* 21:8–23:10). In fact, Judge Kaplan made it a point to ensure Plaintiff admitted under oath he acted with intent as to both objects of the conspiracy: bank fraud and operating an illegal gambling business and that his acts as to both objects were independent of reliance on advice of counsel. (*See id.* at 22:3–23:10).

The preclusive breadth of Plaintiff's guilty plea and allocution is further reinforced by his statements through counsel during the sentencing phase of his criminal proceeding thereafter. The government's sentencing memorandum criticized Plaintiff's decision to continue processing even after the government's seizure on October 26, 2009 of $8.6 Million in bank accounts controlled by Plaintiff:

> Elie engaged in this continued processing despite having hired, following the October 2009 seizures, his prior counsel, William Cowden, to engage with the Department of Justice and attempt to resolve his FBI seizure and, undoubtedly, avoid his client's indictment if possible . . . . it is difficult to imagine that his attorney—whatever the legal analysis of the Government's potential case—would have encouraged his client to continue with a course of conduct that had already led to the seizure of Elie's assets and the arrests of some of his partners.

(Government's Memorandum of Law, Case No. 10 Cr. 336, p. 5, attached as Exhibit "G").[2]

Plaintiff, through counsel, attempted to mitigate the government's assertion by suggesting his unlawful conduct was undertaken against a "backdrop of legal opinions from well-regarded law firms . . . ." (Reply to the Government's Sentencing Submission, p. 2, attached as Exhibit "H"). In doing so, Plaintiff offered this dispositive concession:

> This is not to say that Mr. Elie was relying on the advice of his attorney [referencing William Cowden] or any other lawyer that his involvement with poker processing was lawful. Mr. Elie knew at the time that it was wrong to process poker transactions and looks back on his decision to engage in the conduct with so much disappointment and regret.

(Ex. H at 2 (emphasis added)). The following sentence in the reply explicitly tied this admission to the time period where Plaintiff "continued to process poker transactions after

[2] Because this reply also relies upon exhibits attached to Defendants' motion to dismiss, the exhibit lettering will continue where Defendants' motion to dismiss left off.

the seizure of funds at Fifth Third"—the time period at issue in this case. (*Id.* at 2–3 (emphasis added)). Plaintiff acknowledged these alleged legal opinions did not excuse his conduct. (*See id.* at 3).

2. Plaintiff's Claim That His Allocution is Limited to one Instance of Bank Fraud in 2008 is Blatantly False.

Plaintiff's response to this compelling evidence against him is to pretend the admissions that undermine his case do not exist. To do so, Plaintiff misleadingly claims he only pleaded guilty to defrauding Fifth Third Bank and argues his allocution only covered that conduct. (*See* Opp. at 2:20–22; 4:16–22; 18:16–24; 21:4–8; 25:21–26:4; 28:22–23; 33:18–25). For example, Plaintiff argues that judicial estoppel does not apply based upon his claim that Plaintiff's guilty plea was limited to defrauding Fifth Third Bank. (Opp. at 20:20–21:8; 25:19–26:7). Plaintiff does this by selectively citing one narrow passage from his allocution transcript and ignoring the rest. (*See* Opp. at 25:21–26:7).[3] It is unsurprising he would do so—the passages he omits are grounds for dismissal of his claims. Plaintiff's second through eighth causes of action rest upon Plaintiff's allegation that after he got in trouble with Fifth Third Bank, he had a change of heart and did not want to process poker anymore, but was misled by Defendants into believing the U.S. Government was not concerned with poker and that poker processing was legal so long as it was "transparent" (in other words, so long as Plaintiff was not lying to banks). (*See* Opp. at 8:1–16, 37:21–25, 38:15–18).

[3] To make matters worse, Plaintiff does not even accurately cite this passage. Not only does he cite the incorrect page number of the plea hearing transcript (he cites to Page 11, but his cited passage is actually on Page 16), but he actually alters the year of the incident. Thus, even though his act of bank fraud against Fifth Third Bank occurred in the summer of 2009, he wrongly asserts throughout his opposition it occurred in the summer of 2008.

1 This contention, however, is a straw man that is eviscerated upon review of the full
2 plea hearing transcript. As discussed, Plaintiff admitted to Judge Kaplan not only that he
3 knowingly and willfully conspired to defraud a bank, but also that (1) he knowingly and
4 willfully conspired to operate an illegal gambling business during a period between May,
5 2008 to April, 2011; (2) he knew poker was gambling; (3) he knew the government had taken
6 the position internet poker was illegal gambling under federal statute; (4) he knew it was
7 wrong to process poker transactions; and (5) his act of operating an illegal gambling business
8 was independent of reliance on advice of counsel. Plaintiff admits that as of July 27, 2009—
9 before he retained Defendants—he knew all of these things. Plaintiff cannot now belatedly
10 claim that during the time he was represented by Defendants in this case, he did not know
11 his activities were illegal where he has already admitted under oath he knew his activities
12 were viewed by the government as being illegal before even meeting Defendants.

13 **B. Plaintiff Is Not Entitled to Recover Damages Where His Damages Were the Result of His Own Knowing and Willful Wrongdoing.**

14 Plaintiff's second response to Defendants' legal arguments is to argue that Plaintiff is
15 entitled to recovery from Defendants because Defendants allegedly encouraged and
16 benefitted from their participation in Plaintiff's illegal activities and have not received
17 punishment for it like Plaintiff has. (*See, e.g.*, Opp. at 22:3–27:19, 28:13–28:25; 29:12–34:5).
18 Each of the arguments in Plaintiff's opposition is a variation of this argument, and each of
19 them fails, as a matter of law. Even if Plaintiff's allegations were true—and they are not—the
20 law grants Plaintiff no relief. The doctrines of judicial estoppel, collateral estoppel, and *in pari*

delicto, in addition to public policy considerations, preclude the arguments Plaintiff raises in his opposition.

1. Plaintiff's Arguments That He is Entitled to Recovery Due to Defendants' Alleged Wrongdoing Are Barred by the Doctrine of *In Pari Delicto*.

The doctrine of *in pari delicto* bars the arguments in Plaintiff's opposition and his recovery. "The doctrine of *in pari delicto* provides that a plaintiff may not assert a claim against a defendant if the plaintiff bears fault for the claim." *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 354 (3d Cir. 2001). "The rationale underlying the doctrine is that there is no societal interest in providing an accounting between wrongdoers." *In re AMERCO Derivative Litig.*, 127 Nev. ___, 252 P.3d 681, 694 (May 12, 2011) (internal quotations omitted). Thus, when a party suffers injury from wrongdoing in which he engaged, the doctrine usually prevents him from recovering for his injury. *Id.* (citing *Lafferty*, 267 F.3d at 354).

Even if Plaintiff's claims about Defendants' participation in Plaintiff's illegal activities were true, the doctrine of *in pari delicto* applies here. An Oklahoma appellate court affirmed summary judgment in favor of an attorney, holding that where the attorney and his client conspired together to defraud the United States, the client was nonetheless barred from seeking damages from the attorney, as a matter of law. *Tillman v. Shofner*, 2004 OK CIV APP 40, 5, 90 P.3d 582, 584 (2004). The court cited as a "general and universal rule that where parties to an immoral or illegal transaction are *in pari delicto* with each other, each is estopped, as to the other, to take advantage of his own moral turpitude, illegal act, or criminal conduct

for purposes of recovering damages for injuries sustained as a consequence of their joint wrong . . . . And as between parties *in pari delicto* the law will aid neither, but will leave them as it finds them." *Id.* at 7, 90 P.3d at 584 (internal quotations omitted).

Plaintiff in this case essentially asks Defendants to indemnify him from the consequences of his knowing and willful illegal conduct. The *Tillman* court recognized, however, that "an intentional wrongdoer is not eligible to recover indemnity." *Id.* at 11, 90 P.3d at 585 (internal quotations omitted). In short, Plaintiff's arguments that his claims for racketeering, conspiracy, fraud, breach of contract, breach of a duty of good faith, and professional malpractice survive due to Plaintiff's allegations of Defendants' own malfeasance (*see* Opp. at 21:9–34:3) are defeated under the *in pari delicto* doctrine by Plaintiff's admitted knowledge his ongoing participation in his poker processing activities was illegal.

2. Plaintiff's Arguments That He is Entitled to Recovery Due to Defendants' Alleged Wrongdoing Are Barred by the Doctrine of Collateral Estoppel.

The doctrine of collateral estoppel, known as issue preclusion in Nevada, *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1051, 194 P.3d 709, 711 (2008), likewise precludes the arguments in Plaintiff's opposition. The Maine Supreme Court <u>reversed</u> a trial court's denial of summary judgment in favor of an attorney despite the suing client's allegation, like here, that his illegal activity was based upon the advice of his attorney. *Butler v. Mooers*, 2001 ME 56, ¶¶ 1–3, 771 A.2d 1034, 1035 (2001). Similar to this case, the client, faced with thirty-six counts of federal crimes, pleaded guilty to a few counts of bank fraud and illegal structuring of currency transactions. *Id.* at ¶ 4, 771 A.2d at 1035–1036. Like this case, the client

acknowledged as part of his plea hearing that he committed these crimes and misled banks knowingly and willfully. *Id.* at ¶ 5, 771 A.2d at 1036. He then sued his attorney, claiming the attorney's advice led to his conviction. *Id.* at ¶ 6, 771 A.2d at 1036. The court held the client's guilty plea to knowing and willful conduct collaterally estopped his argument and precluded a finding that his criminal conduct was proximately caused by the attorney's advice, regardless of whether the advice was inaccurate. *Id.* at ¶¶ 7–9, 771 A.2d at 1037.

Issue preclusion applies here. In Nevada, issue preclusion applies when: (1) the issue decided in the prior litigation is identical to the issue presented in the current action; (2) when the initial ruling was on the merits and final; (3) the party against whom judgment is asserted was a party; and (4) the issue was actually and necessarily litigated. *Five Star*, 124 Nev. at 1055, 194 P.3d at 713. Issue preclusion applies here with respect to the issue of whether Plaintiff knew his poker processing activities were illegal. As the plea hearing transcript shows, he admitted he knew such activities were illegal during the relevant time period. He pleaded guilty and did not appeal. Plaintiff himself participated in the proceedings. This issue was actually and necessarily litigated as Plaintiff fought criminal charges, culminating in Plaintiff's allocution under oath pursuant to his guilty plea.

The U.S. Court of Appeals for the Ninth Circuit, applying the Nevada Supreme Court's holding in M*organo v. Smith*, 110 Nev. 1025, 879 P.2d 735 (1994) (*see* Mot. at 20:23–21:11), held a plaintiff was collaterally estopped from suing his attorney, regardless of how he characterized the cause of action (whether negligence, malpractice, fraud, breach of fiduciary duty, etc.) where he pleaded guilty to willful criminal conduct with respect to the

circumstances giving rise to the claim. *Weddell v. Hochman*, 1997 U.S. App. LEXIS 4043 (March 4, 1997). In this case, Plaintiff is collaterally estopped, as well as being judicially estopped, from asserting his present claims because of his aforementioned admissions under oath during his plea hearing.

3. Even if Plaintiff's Claim That He Only Pleaded Guilty to the Bank Fraud—Which He Alleges He Would Have Gotten Away with if Not For Defendants' Bad Advice—Were True, His Argument is Barred by Public Policy Against Rewarding Intentional Wrongdoing.

Regardless of whether this Court accepts Plaintiff's misleading description of his plea hearing as true (and based upon the plain language of the hearing transcript, this Court cannot), his argument that he is entitled to recovery from Defendants is unsound, barred by Nevada law, and offensive to the justice system. Plaintiff asserts had he not followed Defendants' alleged bad legal advice, he would have escaped responsibility for an act of bank fraud he admits he committed with criminal *mens rea* and with which he admits Defendants had no involvement. (Opp. at 40:14–18; 41:11–18).[4] Plaintiff argues Defendants' incorrect advice led to his indictment, placing him in a position where he was "forced" to accept punishment for this federal crime he admits he did commit. (Am. Comp at ¶ 90). Put bluntly, Plaintiffs tells this Court that but for Defendants' acts, Plaintiff would have gotten away with bank fraud. The law offers no relief for the consequences of such wrongdoing.

---

[4] Plaintiff's basis for this assertion is that his former business partner, Jeremy Johnson, was not indicted. (Opp. at 19:5–7, 40:19–21, 41:16–18). Plaintiff fails to inform this Court that Jeremy Johnson was indicted for mail fraud two months after Plaintiff in the United States District Court in and for the District of Utah, Case No. 2:11-cr-00501-DN-PMW, based upon allegations he defrauded hundreds of thousands of consumers and merchant banks through various internet marketing scams. (*See* Indictment, attached as Exhibit "I").

An appellate court in Illinois, in affirming the dismissal of a plaintiff's malpractice complaint against an attorney, refused to even consider the adequacy or actionability of the alleged advice given by the attorney where the plaintiff alleged, very similarly to this case, that due to her attorney's allegedly faulty advice, her fraud was uncovered, resulting in damages. *Mettes v. Quinn*, 89 Ill. App. 3d 77, 80–81, 411 N.E.2d 549, 551–552 (1980). The court refused to entertain such a claim, using forceful language to reproach the plaintiff:

> It has been the policy of the courts to refuse their aid to anyone who seeks to found his cause of action upon an illegal or immoral act or transaction. This refusal to aid derives not from the consideration of the defendant, but from a desire to see that those who transgress the moral or criminal code shall not receive aid from the judicial branch of Government.

Id. (internal quotations omitted). The court further noted a "long and unbroken series of precedents establishes the rule that courts will not aid a fraudfeasor who invokes the court's jurisdiction to profit from his own fraud by recovering damages." *Id.*

This is exactly the sort of relief Plaintiff herein wrongfully seeks. Plaintiff asserts that if not for Defendants' advice, he would have gotten away with bank fraud and would not have forfeited money to the government, served time in prison, lost his processing business, and tarnished his reputation. Plaintiff audaciously argues to this Court that he is entitled to money from Defendants to compensate him for money he expended or lost as a result of his participation in activities he has admitted under oath he knew were illegal. Plaintiff's argument is offensive to public policy, and the law mandates dismissal of the claims upon which it is based.

In short, for public policy reasons and under the doctrines of *in pari delicto*, judicial estoppel, and collateral estoppel, Plaintiff's arguments in her opposition that Defendants' alleged wrongful acts can serve as a basis for a claim upon which relief can be granted are misplaced.

C. Plaintiff Cannot Claim Defendants' Alleged Advice Was Harmful Where He Admits Defendants "Continuously Recommended" That Plaintiff "Retain Other Experts and Obtain Legal Opinions As to the Legalities of Third Party Poker Processing . . . ."

Not only has Plaintiff admitted he knew his poker processing activities were illegal even before he retained Defendants, he has also admitted Defendants "continuously recommended that Mr. ELIE also retain other experts and obtain legal opinions as to the legalities of third party processing . . . ." (Opp. at 10:12–14; Am. Comp. at ¶ 66). Although Plaintiff impugns evil motives to Defendants in doing so, Plaintiff's admission is dispositive of his second through eighth causes of action. Plaintiff cannot claim he was harmed by Defendants' allegedly malicious legal advice regarding poker processing when Defendants advised him to seek independent legal opinions about that very issue. What matters is Defendants advised Plaintiff to seek additional opinions on the issue—Plaintiff's speculation about Defendants' motivations for doing so is irrelevant.

Furthermore, this admission belies and refutes Plaintiff's allegations that Defendant was maliciously feeding Plaintiff incorrect legal advice for pecuniary gain. If Defendants were, for their own self-interest, intentionally providing Plaintiff bad legal advice about internet poker processing, it would defeat the object of Defendants' plot to advise Plaintiff to consult additional lawyers regarding that very issue, as Plaintiff could have obtained a

second opinion showing Defendants were wrong, thus defeating Defendants' clandestine plan. This is especially true where Defendants made a recommendation not only once, but "continuously" that Plaintiff seek such additional opinions. And this is even truer where Plaintiff claims he was skeptical of Defendants' advice and hesitant to resume poker processing in the first place. (*See* Opp. at 8:1–21, 9:4). Plaintiff's admission that Defendants advised him to seek independent advice, standing alone, defeats his second through eighth causes of action. When factoring in Plaintiff's knowledge that he knew his conduct was illegal in the first place, the need for dismissal becomes even more clear. Plaintiff knew his conduct was illegal, was allegedly skeptical of Defendants' claims regarding its legality, was continually advised by Defendants to seek second opinions, yet Plaintiff continued to do it.

D. <u>Where the Partner Weekly Case is Ongoing Against Plaintiff and Viable Marketing Corp. Is Not a Party, Plaintiff's First Cause of Action is Unripe</u>.

Plaintiff's argument that he has a ripe claim against Defendants is inherently contradictory. Plaintiff describes "as blatantly wrong" Defendant's assertion that the Partner Weekly case is ongoing and unripe. (Opp. at 16:22–23). In the very next sentence, however, Plaintiff matter-of-factly states the action is still ongoing against Plaintiff. (*Id.* at 16:23–24). As the docket report for the *Partner Weekly v. Viable Marketing Corp.* lawsuit shows, the litigation against Plaintiff remains open. (*See* Docket Report, attached as Ex. J). It is inexplicable how Plaintiff, who filed an answer in the matter as recently as July 31, can describe as "blatantly wrong" the observation that the *Partner Weekly* matter is ongoing. (*See* Ex. J).

Plaintiff argues the authority relied upon by Defendants in their motion to dismiss is distinguishable because, according to Plaintiff, a "final judgment" has already been entered against Viable Marketing Corp. ("Viable"). It is irrelevant, however, whether there is a "final judgment" against Viable because there is no final judgment against Plaintiff. Only Plaintiff is a party to this lawsuit. As Plaintiff argues in the underlying case, Plaintiff is not Viable and is not personally liable for Viable's obligations. (*See* Opp. at 16:22–24). Accordingly, the district court's judgment against Viable is irrelevant.

"[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). "[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. In this case, Plaintiff does not yet know if he has sustained damage through personal liability because he is still litigating the case. Because his underlying litigation is ongoing, his claim is unripe and premature and must be dismissed.

E. Plaintiff Incorrectly Argues This is a Motion for Summary Judgment and Attaches Irrelevant Exhibits.

Plaintiff incorrectly argues this motion should be decided as one for summary judgment merely because Defendants attached exhibits to their motion (Opp. at 14:19–22, 15:6–7, 16–25, 33:21–25), and uses this erroneous argument as justification to attach nine

irrelevant, unauthenticated, out-of-context, and misleadingly used exhibits to his opposition.[5] (Opp. at 14:19–22, 15:6–7). Plaintiff is wrong. Plaintiff ignores the authority cited by Defendants permitting courts to consider matters of public record and documents whose authenticity no party questions in motions to dismiss without converting them to motions for summary judgment. (*See* Mot. at 15:1–11). In this case, each of Defendants' exhibits—in both their motion and this reply—is a public record and Plaintiff has not disputed their authenticity. This matter should be decided as a motion to dismiss.

In any event, Plaintiff's attached exhibits are immaterial to this lawsuit. Even if the exhibits were exactly what Plaintiff claims they are—and Defendants respectfully submit that Plaintiff's description of the what these exhibits portray is unconscionably deceptive—as a result of Plaintiff's allocution and under the legal doctrines of judicial estoppel, collateral estoppel, *in pari delicto*, public policy, and proximate causation, Plaintiff is not entitled to damages and his lawsuit must be dismissed.[6] Thus, even if this motion were decided as one for summary judgment, Plaintiff's causes of action must be dismissed, as a matter of law.

---

[5] Conspicuously absent from Plaintiff's exhibits are any engagement agreements reflecting Defendants' retention to provide advice regarding the legality of Plaintiff's activities or any written opinions of any kind stating Plaintiff's activities were legal.

[6] Because the exhibits are irrelevant to this motion, it is not necessary for Defendants to rebut them, although Plaintiff's description of what they portray is unconscionably misleading and often outright false. Some of the more egregious deceptions in Plaintiff's opposition include, but are not limited to, (1) claiming certain emails show that Ifrah was a "quasi-partner" with Plaintiff (Opp. at 23:6–24:3; Ex. 2–5, 7) when, in fact, the emails were exchanged while Ifrah was suing Plaintiff for $4 Million on behalf of another client in the *Intabill* case and the emails reflect negotiations of a settlement resolution; (2) equating encouragement from Ifrah to Plaintiff to find a way to issue refunds to consumers when the State of Washington declared internet poker illegal as being the same as encouraging Plaintiff to participate in illegal poker (*see* Opp. at 24:4–11; Ex. 6); and (3) falsely claiming

Although Plaintiff suggests discovery should proceed in this case (Opp. at 34:7), Plaintiff does not request a continuance or deference under Fed. R. Civ. P. 56(d). In fact, Plaintiff's own declaration would rebut a Fed. R. Civ. P. 56(d) request where Plaintiff boasts about "endless" evidence he currently has in his possession. (*See* Opp. at 40:9–13). In reality, no amount of discovery would change the result of this lawsuit because, as discussed, Plaintiff's admissions under oath during his guilty plea hearing bar Plaintiff's entitlement to any recovery from Defendants on Plaintiff's second through eighth causes of action and because Plaintiff's professional malpractice action is plainly unripe, as a matter of law.

Where Plaintiff (1) admitted to and was sentenced for willfully and knowingly conspiring to commit bank fraud and operating an illegal gambling business independent of advice of counsel and (2) admits Defendants continuously advised him to seek additional legal opinions on the legality of his poker processing activities, he cannot recover from Defendants. Plaintiff cannot recover the damages he claims because he has admitted under oath he knew his activities giving rise to his damages were illegal and has admitted Defendants advised him to seek additional legal opinions. Plaintiff cannot recover damages even if all the false and malicious accusations he makes against Defendants were true (and they are not). All of the damages Plaintiff alleges in this case are self-inflicted as a result of

that an email identifying monthly payments received by Defendants in trust for a client pursuant to a $2 Million settlement in the *Intabill* case were "monthly payments to Defendants" (Opp. at 29:12–15) and intentionally omitting the attachment to that email which contained Defendants' entire billing statement showing that billing did not even remotely approach the $4 Million sum falsely and outrageously claimed by Plaintiff in this case. As a whole, Plaintiff claims these exhibits somehow contradict what Defendants have previously said. They do not.

Plaintiff's knowing and willful participation in activities he has admitted under oath he knew violated the law. Thus, Plaintiffs' claims for damages against Defendants, regardless of how Plaintiff characterizes his causes of action, are barred, as a matter of law. The law does not allow Plaintiff to recover damages for knowing and willful participation in illegal activity. Accordingly, Plaintiff's second through eighth causes of action must be dismissed. Likewise, Plaintiff's first cause of action is unripe and premature and must also be dismissed.

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 under Fed. R. Civ. P. 12(b)(6).

DATED this 9th day of August, 2013

THORNDAL, ARMSTRONG, DELK,
BALKENBUSH & EISINGER

s/ Brian K. Terry
BRIAN K. TERRY, ESQ. (Bar No. 3171)
KENNETH R. LUND, ESQ. (Bar No. 10133)
1100 Bridger Avenue | Las Vegas, Nevada 89101
Attorneys for Defendants,
IFRAH PLLC and ALAIN JEFF IFRAH
(incorrectly captioned ALAIN JEFFERY IFRAH)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 9th day of August, 2013, I electronically filed the foregoing REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

NAME	TEL, FAX, AND EMAIL	PARTY REPRESENTING
Sigal Chattah, Esq. LAW OFFICES OF SIGAL CHATTAH 5875 South Rainbow Blvd., #204 Las Vegas, Nevada 89118	Tel.: (702) 360-6200 Fax: (702) 643-6292 E-Mail: chattahlaw@gmail.com	Plaintiff

s/ Kenneth R. Lund, Esq.
Employee of THORNDAL, ARMSTRONG, DELK,
BALKENBUSH & EISINGER