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9
 10 **UNITED STATES DISTRICT COURT**
 11 **DISTRICT OF NEVADA**

12 BRUCE CRISPIN LEYSER,
 13 Plaintiff,

14 vs.

15 JAMIE MILES GOLD,
 16 Defendant.

Case No. 2:06-cv-01072-RJH-LRL

**DEFENDANT'S MOTION TO
 DISSOLVE PRELIMINARY
 INJUNCTION;
 AND REQUEST FOR IMMEDIATE
 HEARING**

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 19 Pursuant to Fed. R. Civ. P. 65, Defendant Jamie Miles Gold ("Gold"), through his
 20 respective counsel, the law firm of Snell & Wilmer LLP, respectfully submits this Motion to
 21 Dissolve Preliminary Injunction; and Request for Immediate Hearing.

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1 This Motion is based upon the attached Memorandum of Points and Authorities, the
2 papers and pleadings on file, and any oral argument this Court may entertain at the time of
3 hearing.

4 Dated: November __, 2006.

5
6 SNELL & WILMER, L.L.P.

7
8 By: 

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Sponsored by Bodog.net, Defendant Jamie Gold won the 2006 World Series of Poker ("WSOP") Tournament. Competing with 8,773 participants, Gold claimed the \$12 million first place winning share after almost two weeks of play. Plaintiff alleges that Gold promised to share the winnings. While Gold admits he made the promise, it was not supported by bargained-for consideration. It was nothing more than a promise to make a gift. With no legal obligation to do so, Gold still intended to honor his promise and share the winnings. Plaintiff, however, acted unreasonably and refused to recognize necessary expenses or provide protection to Gold for legitimate tax issues. Instead of continuing good faith negotiations, Plaintiff filed this litigation and drew media attention to it. Now that Plaintiff has shown his true colors by unnecessarily filing suit and attempting to discredit Gold's reputation in the media, Gold no longer intends to share his winnings.

Plaintiff secured an *ex parte* TRO freezing \$6 million of the WSOP winnings with the Rio. Gold later stipulated to a preliminary injunction conditioned on the ability to challenge later

1 the injunction. The \$6 million remains with the Rio where it earns no interest or return. Gold
2 now files this Motion seeking dissolution of the injunction.

3 It is settled that a preliminary injunction may *not* be granted unless the moving party can
4 show both (1) irreparable harm and (2) a likelihood of success on the merits. Plaintiff can show
5 neither. There is no irreparable harm because Plaintiff has an adequate remedy at law -- money
6 damages, which is the only relief he seeks in his Complaint. Similarly, Plaintiff cannot show a
7 likelihood of success on the merits. The oral promise was nothing more than an unenforceable
8 offer to make a gift. The injunction should be dissolved, and the funds distributed to Gold.

9 **II. PROCEDURAL HISTORY**

10 On August 21, 2006, Plaintiff filed an *Ex Parte* Application for Temporary Restraining
11 Order and/or Preliminary Injunction in state court seeking to freeze \$6 million of Mr. Gold's \$12
12 million prize. A TRO was entered the same day. On August 30, 2006, Defendant removed the
13 case to this Court. On September 5, 2006, the Court held a hearing on the entry of a Preliminary
14 Injunction. Defendant's counsel posed no objection to an entry of the Preliminary Injunction
15 provided Defendant could later challenge the entry after counsel had the opportunity to discuss
16 the matter with the client and review the documentation. This Court granted the Preliminary
17 Injunction adopting the language of the state court's TRO. This Court further ordered that
18 Defendant would have until September 15, 2006, to "provide notification to Plaintiff and to the
19 court of any challenge." On September, 15, 2006, Defendant filed a Notice of Intent to
20 Challenge. Defendant now files this Motion to support its challenge.

21 **III. STATEMENT OF FACTS**

22 **A. The Gold-Bodog Contract**

23 Defendant Jamie Miles Gold ("Gold" or "Defendant") is a television producer and
24 professional poker player. Bodog.net is an online poker educational site. On July 13, 2006, Gold
25 entered into an exclusive client services agreement with Riptown.com on behalf of Bodog. *See*
26 Bodog Contract attached as Ex. 1. Bodog contracted with Gold because of his poker skills and
27 prior tournament wins. *See* Bodog Website attached as Ex. 2. The contract required Gold to wear
28 its clothing and participate in several media events in exchange for receiving a \$10,000 buy-in to

1 the World Series of Poker ("WSOP"). *See* Bodog Contract at "Services" P.1. In other words,
2 Bodog bought Gold a "seat" at the tournament. Despite allegations in Plaintiff's Complaint to the
3 contrary, the contract has no "requirement" that Gold secure celebrities to wear Bodog clothing
4 during the World Series of Poker. The contract contains an integration clause that makes this
5 point clear: it precludes any other "agreements, proposals or representations, written or oral."
6 The contract merely required Gold to participate in the tournament while wearing Bodog apparel.
7 The hope was that Gold would advance deep into the tournament and create exposure for his
8 sponsor. He did.

9 **B. The Gold-Leyser Relationship**

10 Gold and Plaintiff Bruce Crispin Leyser ("Leyser" or "Plaintiff"), met in July 2006. *See*
11 Gold Decl. at ¶ 6 attached as Ex. A. Specifically, they met through Leyser's wife, Jules. She met
12 Gold at a poker tournament and discovered that Gold was a principal in a TV production
13 company. Leyser, a British citizen, was looking to pitch certain reality TV show concepts. Gold
14 agreed to meet with Leyser.

15 In their initial meeting, Leyser discussed his various TV concepts. Plaintiff also discussed
16 possible employment with Gold's television production company. Apparently, Leyser had
17 serious financial problems. *See* Gold Decl. at ¶6. In fact, Leyser was unemployed and playing
18 poker online in an attempt to pay his rental obligations in California. *See* NPR interview attached
19 as Exhibit 3. Subsequently, Leyser forwarded his resume to Gold detailing his production
20 experience. *See* Leyser resume attached as Exhibit 4. Leyser also forwarded his reality TV
21 concepts by e-mail. *See* Leyser e-mails attached as Exhibit 5.

22 In a later meeting, Gold and Leyser discovered that they both shared a love for poker.
23 Leyser expressed a desire to play in the WSOP, but he did not have money to pay the \$10,000
24 entry fee. Gold informed Leyser about his relationship with Bodog. Gold informed Leyser that
25 Bodog was looking to secure celebrities to sponsor for the WSOP to wear the Bodog apparel.
26 Leyser stated that he could procure celebrities and asked whether Bodog would consider
27 sponsoring him in return. *See* Gold Decl. at ¶ 9. Specifically, Leyser stated that he had
28 relationships with "A-list" celebrities Matthew McConaughey and Matthew Perry, both of whom

1 would "likely" be interested in a WSOP sponsorship. *See Id.* Gold informed Plaintiff that Bodog
2 might agree if he could secure such celebrities, but he was not certain.

3 Gold believed that the Plaintiff's purpose for suggesting he could secure celebrities was
4 two-fold. First, he wanted to impress Gold in order to market his production ideas to Gold's
5 production company and potentially secure employment. *See* Gold Decl. at ¶10. Second, he
6 hoped to secure his own seat through Bodog. *See Id.* Gold made no promises or assurances that
7 Bodog would provide him a seat because he was unaware of what Bodog could or would agree to.
8 More importantly, Gold did not discuss sharing the proceeds from Gold's participation in the
9 WSOP -- let alone agree to do so in exchange for Plaintiff securing celebrities.

10 Plaintiff did not secure the stated celebrities. *See* Gold Decl. at ¶ 11. Instead, just prior to
11 the start of the WSOP, Leyser told Gold he could only secure two lesser-known celebrities,
12 Matthew Lillard and Dax Shepard. *See Id.* Plaintiff asked Gold whether he believed Bodog
13 would accept these celebrities and secure a seat for Plaintiff. Gold told Plaintiff that he knew,
14 based on the celebrity status of the two individuals, that Bodog would not sponsor him. Gold did,
15 however, offer to secure sponsorships for Lillard and Shepard, which he did. Plaintiff thereafter
16 expressed great disappointment in not being able to participate in the WSOP. Gold, feeling sorry
17 for Plaintiff, promised to share his winnings. It was only *after* Plaintiff secured Lillard and
18 Shepard -- and not in exchange for this alleged service -- that Gold expressed a desire to assist
19 Plaintiff by sharing a portion of any winnings. *See* Gold Decl. at ¶¶ 11-15. Gold's offer was
20 nothing more than a promise to make a gift, which he initially intended to honor.

21 **C. The WSOP Event and Plaintiff's Harassing Behavior**

22 At the WSOP, Gold started strong. He amassed a commanding chip lead starting on the
23 third day when he ended with \$3.7 million in chips. He went on to maintain his lead and ended
24 each subsequent day as the chip leader. Gold's performance was drawing media attention. It was
25 also drawing Plaintiff's attention. As Gold advanced, Plaintiff started to increase his attempted
26 contacts/communications with him. Gold wanted to focus on the business at hand -- playing the
27 best poker possible and advancing. Plaintiff, however, was more concerned with securing a daily
28 affirmation from Gold that he would fulfill his promise. Leyser or his wife called or text

1 messaged Gold every hour he played, while tracking his status online. *See* Gold Decl. at ¶ 17. To
2 confirm his interest, and after it appeared Gold would win money, Leyser and his wife traveled to
3 the WSOP and began to spread the word that Gold “owed” Leyser half of any winnings. *See*
4 Gold Decl. at ¶ 19. The speculation and innuendo swirled around the tournament. *See* Gold
5 Decl. at ¶ 20.

6 Plaintiff's harassing contacts hit a crescendo on the last day of the tournament. Gold stood
7 with a commanding \$8.88 million lead on his nearest competitor. He was assured to win no less
8 than \$1.2 million. Gold wanted to be left alone to rest and focus on the day's work. Plaintiff was
9 not satisfied and continued to hound Gold with calls. Finally, after incessant badgering and
10 continuous phone calls from Plaintiff, Gold left Plaintiff a voicemail message confirming his
11 intention to take care of Plaintiff and, in the process, hoping to remove Leyser as a distraction. At
12 the time of the call, Gold's main focus was concentrating on playing poker, limiting all outside
13 distractions, and winning the tournament. *See* Gold Decl. at ¶ 23. The message confirmed this
14 intent:

15
16 So please just be with me. I can't imagine you're going to have a
17 problem with it. I just don't want any stress about any money or
18 any of that shit going on today, or even after the end of the day. I'm
19 sure you're going to be fine; you're going to be very well taken care
20 of, absolutely fairly. We're just trying to handle this properly and
21 after now I don't even want to talk [the money] about it or think
22 about it.

23 *See* Plaintiff's Emergency Motion for Hearing on Motion for Preliminary Injunction at P. 7:11-
24 14.

25 Gold thereafter capitalized on his chip lead. The play at the final table lasted 14 hours, and
26 Gold eliminated the final eight opponents, earning the first place prize of \$12 million.

27 Immediately following Gold's win, Plaintiff continued to harass him. *See* Gold Decl. at ¶
28 24. This included a multitude of calls from Plaintiff, Plaintiff's attorneys, and other professionals.
See Id. Gold retained Sam Israel, a California tax attorney, to analyze the tax issues related to
disbursement of the prize money. *See* Israel Decl. attached as Exhibit B at ¶ 3. Almost

1 immediately, Israel was contacted by Mark Seif, a lawyer and professional poker player
2 representing Leyser, explaining how the Rio could distribute the funds directly to Leyser. *Id.* at ¶
3 9. Israel became concerned. Israel believed there were many issues related to a direct
4 distribution to Leyser including potential IRS audit risks and the inability of Gold to deduct
5 business expenses. *See Id.* Seif, however, was not concerned. Seif allegedly found an obscure
6 loophole that allowed Leyser to avoid taxes if he returned to the British Isles. *See* Israel Decl. at
7 ¶ 10, 11. In other words, once Leyser received any distribution of funds he intended to leave the
8 country without paying taxes. Seif continued demanding release of \$6 million to Leyser. When
9 Israel requested an indemnity agreement with Leyser or an escrow account to hold back funds for
10 taxes, in case Leyser left the country, it was rejected. *Id.* at ¶ 12.

11 Israel was contacted by another attorney and a tax accountant representing Leyser, who
12 also suggested that the Rio could transfer funds directly to Leyser. *See* Israel Decl. at ¶ 8, 13.
13 Again, neither of Leyser's professionals would agree to any indemnity agreement or hold back of
14 funds for purposes of tax liability, nor would they agree to provide a legal opinion that Gold
15 would not be taxed on any amounts paid to Leyser. *Id.* at ¶ 8. Instead, while attempting to
16 resolve the tax issue, Leyser filed the instant complaint.

17 In the end, Plaintiff refused anything other than \$6 million. *See* Gold Decl. at ¶ 26. In
18 other words, Plaintiff refused to accept that his gift should be reduced for any of the taxes or
19 expenses incurred by Gold in winning the \$12 million prize. *See Id.* In fact, Plaintiff did not
20 even want the customary tip the winner provides to the dealers at the final table to come out of his
21 "gift." *See* Gold Decl. at ¶ 27. The parties did not agree on a solution but continued to negotiate.
22 Much to Gold's surprise and disappointment -- and while Gold believed negotiations were
23 continuing in good faith -- Leyser rushed and filed this lawsuit with no prior notice to Gold. This,
24 while the entire \$12 million remained with the Rio so Gold could evaluate the tax implications.
25 The Preliminary Injunction that is now in place was ordered on September 13, 2006. Gold
26 collected \$6 million of his winnings; the remaining \$6 million is still in the custody of the Rio
27 Hotel & Casino. *See* Gold Decl. at ¶ 29. The money is accumulating no interest or other return.
28

1 Because Plaintiff is not entitled to any of the monies from Defendant whatsoever, the preliminary
2 injunction should be dissolved.

3 **IV. ANALYSIS**

4 To determine whether preliminary injunctive relief is appropriate, the Ninth Circuit Court
5 of Appeals follows a four-part test condensed into two alternative formulations of proof:

6 The traditional equitable criteria for granting preliminary injunctive
7 relief are (1) a strong likelihood of success on the merits, (2) the
8 possibility of irreparable injury to plaintiff if the preliminary relief
9 is not granted; (3) a balance of hardships favoring the plaintiff, and
10 (4) advancement of public interest (in certain cases). In this circuit,
11 the moving party may meet its burden by demonstrating either (1) a
combination of probable success on the merits and the possibility of
irreparable injury or (2) that serious questions are raised and the
balance of hardships tips sharply in its favor.

12 *Los Angeles Memorial Coliseum Comm'n. v. Nat'l Football League*, 634 F.2d 1197, 1200 (9th
13 Cir. 1980) (citations omitted); *Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291,
14 1298 (9th Cir. 2003); *Diamontiney v. Borg*, 918 F.2d 793, 795 (9th Cir. 1990); *Int'l Jensen v.*
15 *Metrosound U.S.A.*, 4 F.3d 819, 822 (9th Cir. 1993); *Cassim v. Bowen*, 824 F.2d 791, 795 (9th
16 Cir. 1987). "These two formulations represent two points on a sliding scale in which the required
17 degree of irreparable harm increases as the probability of success decreases." *Diamontiney*, 918
18 F.2d at 795. Under these formulations, the balance of harm is the most important factor.
19 *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (en banc).

20 Here, Plaintiff is not entitled to injunctive relief for the following two reasons. First, there
21 is no threat of irreparable harm. Plaintiff seeks money, not the prevention or continuance of an
22 event necessary to maintain the status quo or prevent a further injury. Second, Plaintiff does not
23 enjoy a reasonable probability of success on the merits because, as shown below, Plaintiff has not
24 met its burden of showing the existence of the necessary elements for an enforceable contract.

25 **A. The Alleged Harm Is Not Irreparable**

26 Plaintiff must show that the alleged harm would be irreparable. *Dollar Rent-A-Car of*
27 *Washington, Inc. v. Travelers Indem. Co.*, 774 F.2d 1371, 1374 (9th Cir. 1985); 11A CHARLES
28

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1 ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2948 (2d ed. 1995).
2 If the alleged harm will not impair the court's ability to grant relief, then it is not irreparable and
3 injunction is not appropriate. WRIGHT, supra at § 2948.1. Generally, if there is an adequate
4 remedy at law, the court has the ability to grant relief without injunction. *Id. at* § 2944. If the
5 remedy at law seeks monetary damages, then there are adequate post-judgment measures, such as
6 attachment, that make injunctive relief unnecessary. *Rosen v. Cascade Int'l, Inc.*, 21 F.3d 1520,
7 1527 (11th Cir. 1994).

8 Most importantly, the United States Supreme Court has held that the temporary loss of
9 income, ultimately to be recovered through litigation, is not irreparable injury. *Sampson v.*
10 *Murray*, 415 U.S. 61, 90, 94 S.Ct. 937, 952 (1974).

11 The key word in this consideration is irreparable. Mere injuries,
12 however substantial, in terms of money, time and energy
13 necessarily expended are not enough. The possibility that adequate
14 compensatory or other corrective relief will be available at a later
15 date, in the ordinary course of litigation, weighs heavily against a
16 claim of irreparable harm.

17 *Id.* (quoting *Virginia Petroleum Jobbers Assoc. v. Fed. Power Comm'n*, 104 U.S.App.D.C. 106,
18 110, 259 F.2d 921, 925 (D.C.Cir. 1958)). The Ninth Circuit has formally applied this rule in
19 denying injunctive relief when monetary damages were the only damages. *Colorado River*
20 *Indian Tribes v. Town of Parker*, 776 F.2d 846, 851 (9th Cir. 1985) ("economic injury alone is
21 not considered irreparable."); *Cotter v. Desert Palace, Inc.*, 880 F.2d 1142, 1145 (9th Cir. 1989)
22 ("[i]njuries compensable in monetary damages are 'not normally considered irreparable.'")
23 (internal citations omitted). In fact, the Ninth Circuit has unequivocally held that "[m]ere
24 financial injury will not constitute irreparable harm if adequate compensatory relief will be
25 available in the course of litigation." *People of State of Cal. ex rel. Van De Kamp v. Tahoe Reg'l*
26 *Planning Agency*, 766 F.2d 1316, 1319 (9th Cir.1985); *Goldie's Bookstore, Inc. v. Superior*
27 *Court of the State of California*, 739 F.2d 466, 471 (9th Cir. 1984). Thus, if the moving party
28 alleges claims at law and seeks only monetary damages, injunction is not proper.

Plaintiff's Complaint seeks one form of relief -- money damages. As a result, and as

1 detailed above, Plaintiff cannot show irreparable harm. Instead, Plaintiff alleges that “Defendant
2 is a gambler and there is the possibility that he will dispose of the funds.” See Verified Complaint
3 at ¶ 30. This is not sufficient to demonstrate any irreparable harm.

4 Finally, as a practical matter, if all a party had to do was allege a fear that the money being
5 fought over might not be there at the end of the dispute, then plaintiffs in every lawsuit would be
6 entitled to a preliminary injunction while the case proceeds. That is not the purpose of
7 preliminary injunctions.

8 **B. Plaintiff Has Not Met His Burden of Showing His Likely Success on the Merits**

9 As shown above, Plaintiff cannot show a threat of irreparable harm. Therefore, he must
10 show a very high likelihood of success on the merits. *Diamontiney*, 918 F.2d at 795. Contrary to
11 Plaintiff’s blanket assertions, a discussion of “success on the merits” requires an examination of
12 the underlying substantive claim.¹ Here, there is no enforceable contract for two reasons: (1)
13 there was no bargained-for consideration supporting the promise; and (2) even if there were, the
14 oral agreement has missing or indefinite terms. Gold did nothing more than promise to make a
15 gift. Because the gift was never delivered by Gold to Plaintiff, there is no enforceable promise.
16 See Gold Decl. at ¶ 28. Therefore, there is no probability of success on the merits.

17 **1. Plaintiff’s Story Is Contradicted by the Plain Terms of the Bodog Contract**

18 Before addressing the legal deficiencies of Plaintiff’s claim, the Court should first consider
19 an undisputed factual deficiency that brings the legitimacy of Plaintiff’s claim into serious
20 question. According to Plaintiff, Gold sought Plaintiff’s assistance to fulfill his obligations under
21 the Bodog contract. Plaintiff specifically alleges:

22
23 *Defendant informed Plaintiff that he had a contract with "Bodog"*
24 *a gambling company whereby Bodog was offering Defendant a*
25 *seat in the 2006 World Series of Poker main event provided that*
26 *Defendant secured some celebrities to wear their clothing during*
the World Series of Poker man event. Defendant, aware that
27 Plaintiff had friendship with some entertainment celebrities, entered

28 ¹ Plaintiff’s Complaint alleges Breach of Contract, Misrepresentation, Fraud, Intentional Infliction of Emotional Distress, and Unjust Enrichment. This motion, however, addresses only the Breach of Contract claim as it is the basis for all of the others. Once it fails, the rest do as well.

1 into an agreement with Plaintiff whereby Plaintiff would secure
2 some celebrity figures for Bodog and Plaintiff and Defendant would
3 "share" the seat in the World Series of Poker main event.

4 See Plaintiff's Emergency Motion for Hearing on Motion for Preliminary Injunction at P.5:16-23.

5 Despite Plaintiff's allegations to the contrary, Gold's contract with Bodog did not
6 condition Gold's seat at the WSOP "provided that Gold secured some celebrities to wear" Bodog
7 clothing. The contract, in fact, makes no mention of securing celebrities. Rather, it merely
8 requires Gold to wear the Bodog apparel during the WSOP.

9 The Bodog contract explicitly states what Gold, described in the agreement as "Client,"
10 must do in return for his buy-in to the tournament:

11 Client agrees to appear at and wear pre-approved Bodog branded
12 clothing, jewelry and/or a Bodog hat during the World Series of
13 Poker beginning July 28, 2006, in Las Vegas, NV ("Event") and in
14 any pre-approved interviews associated with the Event which will
15 take place during the same time. Client shall pre-approve all
16 clothing and/or hats that Client wears. Client agrees to wear said
17 items for as long as Client remains playing in the tournament.

18 Additionally Client agrees to take part in the following media
19 activities at the Event:

20 Attend and do Red Carpet Media at the Bodog Party at Tao at the
21 Venetian on July 25, 2006
22 Do interview with Extra at Event.

23 Have photograph taken with Bodog CEO Calvin Ayre.

24 Do video interview with Bodog CEO Calvin Ayre.

25 Bodog Contract attached as Ex. 1. In return for Gold's performing the above task, "Client will
26 receive a \$10,000 buy-in to the World Series of Poker." *Id.* The contract does *not* require Gold
27 to provide celebrities. In fact, the integration clause precludes any other "agreements, proposals
28 or representations, written or oral" including securing celebrities. Simply put, Plaintiff has no
support for his claims.

Similarly, Gold did not seek or otherwise bargain-for the celebrities with whom Plaintiff
promised Bodog sponsorships. Rather, Plaintiff solicited those celebrities in an unsuccessful

1 attempt to secure his own seat through Bodog. Moreover, Gold did not agree to share his seat in
2 return for Plaintiff's efforts to secure celebrities. In fact, Gold did not even discuss sharing his
3 winnings until after Bodog agreed to provide the celebrities a sponsorship. In other words, Gold's
4 promise was not part of a binding contract. It was intended as a gift because he felt sorry that
5 Plaintiff could not participate in the tournament. While Gold previously intended to honor that
6 gift by sharing the winnings, Plaintiff's behavior, including his apparent intent to avoid any tax
7 liability and premature filing of this suit, has now caused Gold to change his intentions.

8 **2. There is No Enforceable Contract**

9 For a contract to be enforceable, Plaintiff must show "an offer and acceptance, meeting of
10 the minds, and consideration." *May v. Anderson*, 121 Nev. Adv. Rep. 67, 119 P.3d 1254, 1257
11 (Nev. 2005) (citing *Keddie v. Beneficial Ins., Inc.*, 94 Nev. 418, 421, 580 P.2d 955, 956 (1978)
12 (Batjer, C.J., concurring)). In *Matter of the Estate of Kern*, 107 Nev. 988, 991, 823 P.2d 275, 277
13 (1991), the Nevada Supreme Court held that negotiations do not constitute a binding contract
14 unless there is something sufficient to "indicate the terms of the contract or provide necessary
15 details." *Id.* If material terms are "lacking or are insufficiently certain and definite," then there is
16 no contract. *Id.*

17 Here, there is neither consideration nor sufficiently certain and definite terms to enforce
18 the contract.

19 **a. There is no consideration to support the contract.**

20 To constitute consideration, a performance or return promise must be bargained for. *Pink*
21 *v. Busch*, 100 Nev. 684, 688, 691 P.2d 456, 459 (1984). A performance or return promise is
22 bargained for if "it is sought by the promisor in exchange for his promise and is given by the
23 promisee in exchange for that promise." *Id.*; *see also Berge v. Fredericks*, 95 Nev. 183, 187, 591
24 P.2d 246, 247 (1979) (adopting test in context of a contract for marriage); *see also* RESTATEMENT
25 (SECOND) OF CONTRACTS § 71(1), (2) (1981). Importantly, past performance cannot be
26 consideration as the promises must bear a "reciprocal relation of motive or inducement: the
27 consideration induces the making of the promise and the promise induces the furnishing of the
28 consideration." RESTATEMENT (SECOND) OF CONTRACTS § 71, cmt b; *see also McMullen v.*

1 *Meijer, Inc.*, 355 F.3d 485, 490 (6th Cir. 2004) (“past consideration cannot serve as legal
2 consideration for a subsequent promise”); *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1012 (10th
3 Cir. 2002) (“Generally, past services cannot serve as consideration for a subsequent promise”).

4 Here, Plaintiff’s actions in securing the celebrities to wear Bodog clothing do not form
5 valid consideration. Gold did not seek a promise from Plaintiff to secure the celebrities.
6 Similarly, Gold did not offer to share his seat in exchange for such a promise. In other words,
7 there was no "reciprocal relation of motive or inducement." Plaintiff secured the celebrities in an
8 effort to secure his own seat from Bodog.

9 Even assuming that Plaintiff’s procurement to Bodog of Lillard and Shepherd somehow
10 constitutes a benefit to Gold, it is not enough to create an enforceable contract. Gold did not
11 agree to share any of his winnings with Plaintiff until *after* Bodog bought Gold a seat at the
12 tournament, *after* Plaintiff produced Lillard and Shepherd to Bodog, and *after* Bodog refused to
13 buy Plaintiff a seat at the tournament. Therefore, anything Gold may have said could not possibly
14 have induced Plaintiff to do anything. It was already done, so there was only past action. As
15 explained above, past action does not constitute the consideration necessary to create an
16 enforceable contract. RESTATEMENT (SECOND) OF CONTRACTS § 71, cmt b.

17 **b. The terms of the alleged oral agreement are not definite enough to**
18 **form a valid contract**

19 A valid contract cannot exist when material terms are lacking or are insufficiently certain
20 or definite. *May v. Anderson*, 121 Nev. Adv. Rep. 67, 119 P.3d 1254, 1257 (Nev. 2005). To
21 determine if a contract or its terms are definite, the court must consider whether it can discern the
22 “putative contract’s exact meaning and fix the legal liability of the parties.” *Chung v. Atwell*, 103
23 Nev. 482, 484, 745 P.2d 370, 371 (1987).

24 Here, the Court cannot ascertain the exact meaning and legal liabilities of the parties with
25 Gold's voicemail. Because this is the only evidence presented of an alleged agreement, Plaintiff
26 has failed to show a substantial likelihood of success.² First, the voicemail merely confirms
27

28 ² To date, Plaintiff has not provided Gold with an audio copy of the alleged voicemail message cited by
Plaintiff as his sole evidence of a contract. While Gold believes that he left Plaintiff a voicemail message

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1 Gold's intent to make a gift. It makes no mention of Plaintiff's purported consideration. Second,
2 Plaintiff alleges the parties agreed to "share" a seat and winnings in return for his securing of
3 celebrities. See Verified Complaint at ¶ 13. It is unclear whether the "share" Plaintiff believes he
4 is entitled to is before taxes, expenses, and tips. While Plaintiff now interprets the promise as
5 such, Gold strongly disagrees. Gold intended to deduct all expenses associated with the
6 tournament, including associated expenses, tips, reimbursement to Bodog for the stake fee (as his
7 contract required), and taxes. Gold's voice message even confirms his intent regarding taxes --
8 "after taxes." See Plaintiff's Emergency Motion for Hearing on Motion for Preliminary
9 Injunction at P.7:11.

10 **3. Gold's Statements Were an Offer of a Gift That Ultimately Went**
11 **Undelivered**

12 In Nevada, a gift is defined as "the voluntary transfer of money or property by one to
13 another, without any consideration or compensation therefore." *Simpson v. Harris*, 21 Nev. 353,
14 31 P. 1009, 1011 (1893); see *Olk v. United States*, 536 F.2d 876, 877 (9th Cir. 1976) (recognizing
15 Nevada's common law definition of a gift as "a voluntary executed transfer of his property by one
16 to another, without any consideration or compensation therefore"). To make a gift valid, "the
17 transfer must be executed." *Simpson*, 31 P. at 1011; see also *Stockgrowers' & Ranchers' Bank of*
18 *Reno v. Milisich*, 52 Nev. 178, 283 P. 913, 915 (1930) (delivery is "an essential element of a gift
19 inter vivos"); *Edmonds v. Perry*, 62 Nev. 41, 61, 140 P.2d 566, 575 (1943) (there is no gift until
20 the donor transfers the gift to the "donee's exclusive dominion and control, an essential element
21 of a gift inter vivos.")

22 Here, Gold did not deliver any money to Plaintiff. See Gold Decl. at ¶ 28. Instead, Gold
23 revoked the gift. In other words, there was no obligation to pay Plaintiff any money. Simply put,
24 Plaintiff cannot enforce the promise to make an undelivered gift.

25 Therefore, Plaintiff cannot show a high likelihood of success on the merits because the
26 merits are that the Plaintiff seeks to enforce an undelivered gift. The law is clear that a gift is not

27
28 on or about the time alleged in the Verified Complaint, Gold does not remember the exact language used,
and reserves his right to challenge Plaintiff's transcription after hearing the message.

