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IN THE SUPREME COURT OF NEVADA

VETERANS IN POLITICS INTERNATIONAL, INC.; AND STEVE W. SANSON Appellants, vs. MARSHAL S. WILLICK; AND WILLICK LAW GROUP, Respondents.	SUP. CT. CASE #: 72778 DIST. CT. CASE #: A-17-750171-C (Dept. 18)

APPELLANTS' OPENING BRIEF

Appeal from Eighth Judicial District Court, Clark County

Senior Judge, Hon. Charles Thompson, Dept. 18

ATTONREY'S NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record for Appellants Veterans in Politics International Inc., and Steve W. Sanson, certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. No parent corporations exist for Appellant Veterans in Politics International, Inc.

2. No publicly held company owns 10% or more of the stock of Veterans In Politics International, Inc.

3. Anat Levy & Associates, P.C. is the only law firm that has appeared for the Appellants, including in the district court; Anat Levy is the only lawyer of the firm who has represented the Appellants and is expected to appear on their behalves in this Court.

4. Appellant Steve W. Sanson, an individual, does not use a pseudonym.

Respectfully submitted this 21st day of August, 2017,

By: _____

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STATEMENT OF JURISDICTION

This Court has appellate jurisdiction over this matter pursuant to Nevada's Anti-SLAPP statutes, specifically, NRS 41.670 (4) which states as follows: "If the court denies the special motion to dismiss filed pursuant to NRS 41.660, an interlocutory appeal lies to the Supreme Court."

On January 27, 2017 Respondents sued Appellants for defamation and other claims arising from five internet posts pertaining to Respondents' work as attorneys.[1] On February 17, 2017, Appellant moved to dismiss the complaint pursuant to Nevada's Anti-SLAPP statutes, NRS 41.650 et seq..[2] On March 14, 2017, the district court denied Appellants' Anti-SLAPP motion.[3]

On March 31, 2017, Appellants received notice of entry of the court's order denying their anti-SLAPP motion.[4]

On April 3, 2017, Appellants filed their Notice of Appeal.[5] Such notice was timely under NRAP, Rule 4(a)(1) because it was filed within 30 days of service of the Notice of Entry of Order.

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[1] Appellants' Appendix ("AA") I:1-28: Complaint
[2] AA I-V:53-946: Anti-SLAPP motion to dismiss, and supporting declarations of Sanson and Levy with exhibits
[3] AA VII:1602-1603: Minute Order on anti-SLAPP motion
[4] AA VIII:1682-1691: Notice of Entry of Order denying anti-SLAPP motion

ROUTING STATEMENT PURSUANT TO NRAP 28(A)(5)

This appeal should be presumptively retained by the Supreme Court pursuant to the following:

1. NRS 41.670(4) which states: "If the court denies the special motion to dismiss filed pursuant to NRS 41.660, an interlocutory appeal lies to the Supreme Court."

2. NRAP 17(10), because it involves federal and state constitutional free speech rights and issues of first impression in Nevada: (a) whether and how hyperlinks to source materials, prompt written clarifications or corrections, and opinions affect a determination of a defendant's "good faith" under Nevada's anti-SLAPP statute NRS 41.660(a); and b) whether an attorney's law related practices are matters of "public interest/concern" under such anti-SLAPP statutes.

3. NRAP 17(11), because the case involves issues of statewide public importance as it deals with the extent to which free speech rights are protected under Nevada's anti-SLAPP statutes.

[5] *Id.*

ISSUES PRESENTED

This appeal involves a *de novo* review of the following issues:

1. Whether the VIPI Defendants sufficiently established that they engaged in **"good faith"** communications as required by Nevada's Anti-SLAPP statute, NRS 41.660(3)(a), where:

   a. The statements at issue constitute Appellant's non-actionable opinion, or were true statements of fact as shown by the evidence presented, or if false, were made without knowledge of their falsity;

   b. The Appellant hyperlinked each statement to the relevant source materials for readers to independently evaluate; and

   c. The appellant promptly and publicly clarified the single statement that could be conceived as a false statement of fact.

2. Whether written online statements are **of "public concern / public interest"** under Nevada's anti-SLAPP statutes, NRS 41.660(3)(a) and NRS 41.637(4), where they pertain to work and court practices of a Nevada attorney who: (1) is an officer of the Court, (2) is admitted and regulated by the State Bar of Nevada which is governed by publicly elected Justices and which very purpose is to protect the public interest, and (3) represents clients in courtrooms that serve the public and are open to the public as a matter of qualified constitutional right.

3. Whether Respondents are "public figures" or "limited public figures" when they purposely inject themselves into public discourse, including by testifying before the legislature, writing books and dozens of articles for public dissemination, appearing on television and other mass media to promote themselves and their viewpoints, and serving as an expert witness in numerous cases.

4. Whether Respondents have demonstrated with prima facie evidence a probability of prevailing on each of their remaining claims under NRS 41.660(3)(b): defamation, false light invasion of privacy, business disparagement and conspiracy.

I. STATEMENT OF THE CASE

A. INTRODUCTION

This is an appeal under NRS 41.670 from the district court's denial of Appellant's anti-SLAPP (Strategic Lawsuit Against Public Participation) motion. Nevada's anti-SLAPP statutes provide for early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation. *Panicaro v. Crowley,* NV Ct of Appeals No. 67840 (Nev. App., Jan. 5, 2017). *Vess v. Ciba-Geigy Corp*., 317 F.3d 1097, 1109 (9th Cir., 2003). This case falls squarely within the anti-SLAPP statutes.

Appellants Veterans in Politics International, Inc. ("VIPI") and its President, Steve Sanson ("Sanson"), are being sued for publicly criticizing a Nevada family law lawyer and his law firm about their courtroom and legal practices.

VIPI is a media outlet, a veterans' non-profit advocacy group, and serves as a government "watchdog."[6] VIPI publishes blog articles, makes internet postings on its website and through social media outlets, has a weekly internet show, and sends E-mail "blasts" to its followers with its latest news and information.[7] Its President, Sanson, does all this for free. Sanson is 100% combat-related disabled after serving twelve years in our nation's military: six years in combat as a

[6] AA I:83: Sanson Decl., ¶ 2; AA VII:1500: Sanson Supp. Decl., ¶¶ 2-3.
[7] *Id*.

decorated Marine in Desert Storm and Desert Shield, and six years as an Army reservist and military chaplain.[8]

Respondents are Nevada family law lawyer Marshal Willick ("Willick") and his law firm, the Willick Law Group. Willick touts his firm as "the premiere Family Law firm in Nevada." He voluntarily thrusts himself into public debate by testifying before the Nevada legislature, writing books and articles for public consumption, being extensively quoted in newspapers and other publications, and actively marketing his firm to the public including through billboards.[9]

B. PROCEDURAL HISTORY

On January 27, 2017, Willick filed this case asserting causes of action for defamation, false light invasion of privacy, business disparagement, negligent and intentional infliction of emotional distress, harassment, RICO, concert of action, conspiracy, copyright infringement and injunctive relief.[10] The case is based on five statements that, Sanson, in his capacity as VIPI's President, posted online from December 25, 2016 to January 14, 2017 criticizing Willick and his firm's professional conduct.[11]

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[8] AA VII:1500: Sanson Supp. Decl., ¶ 2.
[9] AA III:468: Willick's resume; AA V:1089, AA V:1108-1110: Minutes of Assembly meeting; AA V:1067: Willick's letter to Assembly; AA VI:1271: screenshot of Willick's books; AA VI:1273-1285: sample articles quoting Willick; AA VI:1287: Billboard
[10] AA I:1-28: Complaint
[11] *Id.*

Notably, this is not the first time that Willick has sued a veterans group for criticizing him. He did the same thing, asserting the same claims, in 2012 when a veterans group criticized him for advocating the use of veterans' disability benefits to pay for spousal support.[12] This time, however, not only did Willick file suit to stifle his critics — he also had his fiancée, fellow family law lawyer Jennifer Abrams ("Abrams"), do the same. Willick and Abrams have each filed separate complaints against VIPI and Sanson, alleging the same causes of action, though each relating to the particular criticisms that VIPI made of them.[13]

To maximize the financial pain to VIPI and Sanson, both Willick and Abrams also sued Sanson's wife (a family therapist) and her separate corporation (through which she operates her therapy business), as well as a host of others who are on VIPI's charter or who had dealings with VIPI.[14] Willick and Abrams have also each dragged VIPI and Sanson into unrelated divorce cases. In one case, Abrams tried unsuccessfully to have Sanson *incarcerated* for posting a video court transcript showing Abrams bullying the Judge.[15] In the other, Willick is subpoenaing highly confidential financial, phone and other records pertaining to

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[12] AA II:355-377: *Willick v. Jere Beery, et. al.*, Eighth Judicial District Court, case no. A-12-661766-C, Second Amended Complaint

[13] AA V:1000-1040: *Abrams v. Schneider*, Eighth Judicial District Court, case no. A-17-749318-C, Amended Complaint; AA1-28: Complaint in the instant action.

[14] *Id*.

[15] AA I:31-52: *Saiter v. Saiter*, Eighth Judicial District Court, case no. D-15-521372-D, Motion for an Order to Show Cause; *see also*, AA1787-1809: *Saiter*,

VIPI and Sanson, including tax returns, contributions, expenses, member identification, and cell phone data (including pictures, texts, messages, documents, metadata, etc.).[16] Willick and Abrams have also taken other steps, discussed in Section IIIA3 below, to intimidate and financially damage Appellants into silence.

On February 17, 2017 Appellants timely moved to dismiss the case under Nevada's Anti-SLAPP statutes. NRS 41.650 et. seq.[17]

On February 24, 2017, Appellants also filed a NRCP 12(b)(1) motion to dismiss Respondents' copyright infringement claim for lack of subject matter jurisdiction,[18] a NRCP 12(b)(5) motion to dismiss Respondents' remaining claims for failure to state a claim,[19] and a NRCP 12(f) motion to strike portions of the complaint.[20] Those motions have not been heard in the district court and are the not at issue in this appeal.

On March 13, 2017, the day before the hearing on Appellants' anti-SLAPP motion, Willick filed an untimely supplemental declaration in opposition to

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Notice of Entry of Order denying Abrams' motion for OSC

[16] AA IX:1958-1961: *Ansell v. Ansell*, Eighth Judicial District Court, case no. D-15-521960-D, letter from Verizon Wireless; AA IX:1962-66: *Ansell*, Amended Subpoena Duces Tecum; AA IX:1967-1969: *Ansell*, Second Amended Notice of Taking Video Taped Deposition.

[17] AA I-V:53-946: Anti-SLAPP motion, including declarations of Sanson (at AA I:82-II:350) and Levy (at AA II:351-V:946)

[18] AA V:947-951

[19] AA V:952-983

[20] AA V:984-992

Appellants' anti-SLAPP motion.[21] The supplemental declaration was replete with legal argument and unsubstantiated insults against Appellants. Appellants immediately objected and moved to strike portions of the supplemental declaration.[22] That same day, Willick associated in as co-counsel with his fiancé, Josh Gilmore of the Bailey Kennedy firm.[23]

On March 14, 2017, the district court heard Appellant's anti-SLAPP motion.[24] At the onset of the hearing, the court indicated that it had not received Willick's supplemental declaration and would not therefore need to consider Appellants' corresponding objections and motion to strike.[25]

The anti-SLAPP motion required that Appellants show by a preponderance of the evidence that the statements at issue were made in good faith, in direct connection with an issue of public concern and was made in a place open to the public or in a public forum. NRS 41.637(4). If Appellants showed this, then to defeat the motion, the burden would have shifted to Respondents to "demonstrate with prima facie evidence a probability of prevailing on the claims." NRS 41.660(3)(b). At the close of the hearing, the Court denied the motion, ruling that Appellants did not carry their initial burden of proof. The court did not reach the

[21] AA VII:1504-1590: Affidavit of Marshal Willick
[22] AA VII:1591-1598: Motion to Strike
[23] AA VII:1599-1601: Notice of Association of Counsel
[24] AA VII:1602-1603: Minute Order; AA1604-1670: Transcript of Proceedings; AA VIII:1682-1691: Notice of Entry of Order

issue of whether Respondents could make a prima facie of prevailing on their claims.[26]

Appellants made an immediate oral request to stay the proceedings pending this appeal,[27] and pursuant to written motion[28] heard on shortened time,[29] such stay was granted.

Notice of entry of order of the court's denial of Appellants' anti-SLAPP motion was served on March 31, 2017, [30] and Appellants timely filed their Notice of Appeal on April 3, 2017,[31] pursuant to NRS 41.670(4) which provides that "[i]f the court denies the special motion to dismiss filed pursuant to NRS 41.660, an interlocutory appeal lies to the Supreme Court."

Also on April 3, 2017, Respondents filed a First Amended Complaint ("FAC") purportedly pursuant to NRCP 15(a).[32] The FAC dropped their claims for emotional distress, harassment, RICO, concert of action and copyright

[25] AA VIII:1605, line 20-1606 line 15: Transcript of Proceedings
[26] AA VIII:1682-1691: Notice of Entry of Order
[27] AA VII:1602-1603: Minute Order, at 1:8
[28] AA VIII:1709-1720
[29] AA IX:1921-1926
[30] *Id*.
[31] AA VIII:1707-1708: Notice of Appeal
[32] AA VIII:1692-1706: FAC

infringement, and dismissed all the other defendants in the case except for VIPI and Sanson.[33]

On April 20, 2017, pursuant to Appellant's written motion,[34] and over the Respondents' objections,[35] the district court stayed all further proceedings in this case, including discovery, pending this appeal.[36]

II. STATEMENT OF FACTS

A. THE CAMPAIGN TO STIFLE PROTECTED SPEECH

In or about October 2016, VIPI posted a court video online showing Abrams bullying Judge Elliott during a hearing in the *Saiter v. Saiter* divorce case, Eighth Judicial District Court case no. D-15-521372-D.[37] VIPI followed up that posting with blog articles criticizing Abrams' court practices and later, also criticizing Willick and his firm's work-related tactics.[38] What ensued has been a "torrential

[33] Appellants reserved the right to challenge in the district court the propriety of filing an amended complaint without leave of court under NRCP 15(a) after the adjudication of an anti-SLAPP motion. For purposes of this appeal, however, such filing should not stop this Court from issuing a decision. Appellants have a statutory right to have their anti-SLAPP motion reviewed. NRS 41.670(4). If they prevail, then the complaint will be dismissed with prejudice and Respondents will not have had the opportunity to file a FAC.

[34] AA VIII:1709-1720: Motion to Stay Proceedings; AA VIII:1721-1909: Levy Decl.

[35] AA IX:1927-1933: Opposition to Motion to Stay Proceedings

[36] AA VII:1448: Notice of Order Staying Proceedings

[37] AA I:62: Sanson Decl., ¶ 2.

[38] AA I:82-II:350: Sanson Decl. ¶¶ 3-5

downpour" of retaliatory court proceedings and other actions by Willick and Abrams, of which this case is a part:

1. The *Saiter* Divorce Case -- Failed Attempt to Incarcerate Sanson

Apparently embarrassed by the *Saiter* court video,[39] Abrams obtained an order in the *Saiter* case prohibiting the dissemination of *all* documents and information pertaining to the case by *anyone*.[40] When VIPI refused to abide by the order on constitutional grounds, Abrams unsuccessfully moved to have Sanson and her opposing counsel in the case incarcerated for *54 days* for contempt.[41] Pursuant to Sanson's special appearance and objections, Judge Elliott refused to issue an order of contempt and vacated her prior order as unconstitutional.[42] In so doing, the court also stated:

> The Court further FINDS that *Plaintiff's Motions appear to be more about bolstering Abrams' civil action against Schneider and Sanson, especially since neither party has alleged specific harm.* Proper venue to hear this matter appears to be Abrams' civil action against Schneider and Sanson, or the State Bar of Nevada, if appropriate.

Emphasis added; AA1808, at 4-10. The *Saiter* case is now closed.

[39] AA I:93: Abrams complains that posting the video is intended to put her "in a bad light."
[40] AA I:108-109: *Saiter*, Posted copy of Order Prohibiting the Dissemination of Case Material
[41] AA I:31-52: *Saiter*, Motion for Order to Show Cause
[42] AA VIII:1787-1809: *Saiter*, Notice of Order, at AA1805

2. The Abrams Lawsuit – Recently Dismissed on Anti-SLAPP Grounds

On January 9, 2017, Abrams, represented by Willick, sued her opposing counsel in the *Saiter* case, Louis Schneider, VIPI and Sanson (the "Abrams Lawsuit").[43] She also sued each of VIPI's officers (including one who lives in Missouri), Sanson's wife and his wife's corporation.[44] None of these entities had anything to do with the purported defamation alleged in the Abrams Lawsuit.[45] The Abrams Lawsuit alleged the same causes of action as Willick's 2012 action against the other veterans groups—defamation, business disparagement, false light, emotional distress, harassment, RICO violations, copyright violations, concert of action, and conspiracy.[46]

The district court recently dismissed the Abrams Lawsuit pursuant to Nevada's anti-SLAPP laws, NRS 41.650 et. seq. and will award attorney's fees and costs.[47]

3. Intimidation Tactics

Willick posted the complaint in the Abrams Lawsuit on numerous websites, and then published a purported letter to Sanson (which in fact was never sent to

[43] AA V:1000-1040: *Abrams*, Amended Complaint
[44] *Id*.
[45] AA I:83:23-84:2, AA I:84:23-27: Sanson Decl. at ¶¶ 6, 11.
[46] AA V:1042-1064: *Willick v. Beery, et.al*, Eighth Judicial District Court, case no.A-126611766-C, Second Amended Complaint
[47] AA IX:1955-1957: *Abrams*, Minute Order; AA IX:1970-1993: Notice of Entry

Sanson) disparaging Sanson in worse terms that he complains of in this lawsuit.[48] Willick falsely accused VIPI of having a "pay-to-play" candidate interview process, Sanson of using VIPI's income for his personal expenses, failing to file tax returns, and using VIPI as an "unethical scheme to extort concessions."[49] He further accused Sanson of being a "hypocrite…but even worse," "a sleazy extra out of 'Harper Valley PTA,'" states that Sanson is the very definition of "hypocrite – not to mention slimy beyond words."[50] Willick also called Sanson a "two-bit unemployed hustler," and accused him of "shaking down candidates for cash and conspiring with like-minded cronies."[51] He called Sanson "repugnant," and falsely stated that VIPI's radio show is a "fraud" and that VIPI is a "sham organization."[52] Willick also falsely claimed that Sanson was "forced to flee California."[53] Willick also posted a picture of Sanson on his firm's website with the word "HYPOCRITE"– *one of the very words that Willick in this lawsuit claims is defamatory* – plastered across Sanson's chest.[54]

On January 22, 2017, Sanson received texts from a phone number that belongs to someone with the *same name* as Abrams' minor daughter, Kelly Grob

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of Order.

[48] AA I:193-198: Willick's online open letter to Sanson

[49] *Id.*, at AA I:195-198; *see also*, AA I:84: Sanson Decl. at ¶¶7-9

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

(not a common name).[55] The texts urged VIPI to take down a court video showing Judge Rena Hughes bullying a 12-year-old unrepresented child in court.[56]

On January 29, 2017, Sanson for the first time had the SIM card from his Samsung cell phone stolen.[57] Samsung, however, reportedly does not store personal information on SIM cards, so it is believed that the perpetrator did not obtain confidential information from the stolen card. Sanson completed a police report on the incident.[58]

It is as yet unconfirmed whether these events are related to Willick and Abrams, however, the timing, the name of Abrams' daughter, and Willick's unrelenting *continuing* quest to obtain Sanson's cellphone data (see subsection 6 below) suggest that they are.

4. <u>"Take Down" Notices</u>

Abrams and Willick also sent "take down" notices to VIPI's online vendors, including to YouTube, Facebook, Vimeo and Constant Contact.[59] Willick and Abrams falsely claimed that VIPI was engaging in copyright violations under the Digital Millennium Copyright Act ("DMCA") and/or were somehow violating their privacy rights by posting articles about their court proceedings and public

[54] AA I:200: screenshot from Willick Law Group website
[55] AA I:202: Confirming letter to Kelly Grob
[56] AA I:85: Sanson Decl. ¶12
[57] *Id.*, at ¶13
[58] *Id.*

work practices (collectively, "Take Down" notices).[60] The Take Down notices caused those vendors to automatically take down certain VIPI articles and postings and Constant Contact, VIPI's email provider, suspend VIPI's access pending their investigations and pursuant to their pre-set "terms of use" policies.[61] VIPI has spent (and continues to spend) considerable resources dealing with the effects of these notices, which affected not just its postings about Willick and Abrams, but also its other business activities such as announcing guests on its weekly show, announcing its endorsement interviews, circulating news about legislation and politics and its general operations.[62]

5. <u>The "Willick Lawsuit" — the Case at Hand</u>

On January 27, 2017, Willick brushed off the "form complaint" that he used in 2012 and in the Abrams Lawsuit to sue Sanson and VIPI in his own name.[63] Abrams filed the case as Willick's attorney.[64] The claims are again identical to those made in the prior suits, but this time relate to statements made by VIPI about Willick's legal antics.[65] As stated above, VIPI and Sanson moved to dismiss the

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[59] AA II:338-349: Vendors notices
[60] AA I:87: Sanson Decl., ¶16
[61] *Id*.
[62] *Id*.
[63] AA I:1-28: Amended Complaint
[64] Mr. Gilmore was hired later, just prior to the 3/14/2017 hearing on Appellant's anti-SLAPP motion. *See*, AA VII:1599-1601: Notice of Association of Counsel
[65] *C.f.*, *Abrams*, Amended Complaint at AA I:112-191 and *Willick* complaint in this case at AA I:1-28

case pursuant to Nevada's anti-SLAPP statutes[66], but the court denied the motion.[67] The case, including discovery, is now stayed pending this appeal.[68]

6. The Ansell Divorce Case — An End-Run Around the Court's Stay of Discovery

Now unable to obtain legal discovery on VIPI and Sanson's cellphone data, Willick went on a witch hunt to obtain this information another way: he subpoenaed all of Sanson's and VIPI's confidential and private cell phone records, including texts, data, pictures, and any other information from Verizon Wireless in an unrelated divorce case of Doug and Irina Ansell, Eighth Judicial District Court, case no. D-15-521960-D.[69] Upon learning of this from Verizon Wireless (Willick never served a copy on Sanson), Appellants filed a motion to quash, which is pending.[70]

On July 22, 2017, Willick served two more subpoenas on Sanson in the *Ansell* case, this time seeking all of VIPI's financial records, including tax returns, contributions, expenses, member and other information, for the past two years,[71] and to take Sanson's deposition.[72] None of this has *anything* to do with the *Ansell*

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[66] AA I:53-V:946: Anti-SLAPP motion with supporting declarations and exhibits
[67] AA VII:1602-1603: Minute Order; AA1682-1691: Notice of Entry of Order
[68] AA IX:1950-1954: Notice of Entry of Order Staying Proceedings
[69] AA VIII:1804: *Ansell,* Subpoena Duces Tecum served on Verizon Wireless
[70] AA IX:1994-2000: *Ansell,* Motion to Quash Subpoena Served on Verizon Wireless
[71] AA IX:1962-1966: *Ansell*, Amended Subpoena Deuces Tecum served on Sanson
[72] AA IX:1967-1969: *Ansell*, Second Amended Notice of Taking Videotaped

divorce, and these subpoenas are likewise the subject of a pending motion to quash.[73]

B. THE STATEMENTS AT ISSUE IN THIS LAWSUIT

Each of Respondents' causes of action stem from the following five statements that VIPI posted online from December 25, 2016 to January 14, 2017:

a. A December 25, 2016 statement on the VIPI website stating **"[t]his is the type of hypocrisy we have in our community. People that claim to be for veterans but yet the screw us for profit and power."**[74] The statement pertained to and was hyperlinked to a November 14, 2015 interview that Willick gave on VIPI's radio show regarding Willick's views on Assembly Bill 140.[75] Assembly Bill 140 was intended to stop the use of veteran disability benefits to pay spousal support -- the same topic for which the other veterans group criticized Willick in 2012.[76] VIPI supported the bill, and Willick testified against it before the legislature.[77]

Deposition served on Sanson

[73] AA IX:2009-2023: *Ansell*, Motion to Quash Subpoena Duces Tecum and Deposition Subpoena served on Steve Sanson on July 22, 2017

[74] AA I:5-6: Complaint, at ¶¶ 20-25; *see also*, AA I:204: statement as it appeared online.

[75] *Id*.

[76] AA II:359-360: *Willick v. Jeere*, Second Amended Complaint, at ¶25

[77] AA II:207, 222-236: Minutes of 3/20/2015 Assembly Judicial Committee hearing showing Willick's testimony; AA II:207, 216-217: *Id*., showing Sanson's testimony

b. A January 12, 2017 post on VIPI's website stating **"Attorney Marshall [sic] Willick and his pal convicted of sexually coercion of a minor Richard Crane was found [sic] guilty of defaming a law student in United States District Court Western District of Virginia signed by US District Judge Norman K. Moon."**[78] This article was hyperlinked to a Review Journal article about Crane's conviction for child sexual malfeasance and suspension from the practice of law, the State Bar's Order of Suspension of Crane, and Judge Moon's Order finding that Willick committed defamation per se.[79]

c. A January 14, 2017 post on the VIPI website stating **"[w]ould you have a Family Attorney handle your child custody case if you knew a sex offender works in the same office? Welcome to The [sic] Willick Law Group."**[80] The statement was hyperlinked to several documents showing that Crane was working for Willick despite Crane's suspension from the practice of law.[81]

d. Two January 14, 2017 Facebook postings pertaining to a recent case that Willick handled, entitled Holyoak v. Holyoak:

(1). One posting stated: **"Nevada Attorney Marshall Willick gets the Nevada Supreme Court decision: From looking at all these papers It's**

[78] AA I:6-8: Complaint, ¶¶ 26-29
[79] AA II:269-290: Statement as it appeared online with hyperlinked documents
[80] AA I:8: Complaint, ¶¶30-31

obvious that Willick scammed his client, and later scammed the court by misrepresenting that he was entitled to recover property under his lien and reduce it to judgement. He did not recover anything. The property was distributed in the Decree of Divorce. Willick tried to get his client to start getting retirement benefits faster. It was not with 100,000 in legal bills. Then he pressured his client into allowing him to continue with the appeal."[82] The posting was hyperlinked to a Supreme Court decision in *Leventhal v. Black*, 305 P.3d 907, 129 Nev. Adv. Op. 50 (Nev., 2013) which sets forth the criteria for asserting an attorney's charging lien.[83]

(2) The other posting stated: **"Attorney Marshall [sic] Willick loses his appeal to the Nevada Supreme Court."**[84] A copy of the Nevada Supreme Court's decision in Holyoak v. Holyoak was hyperlinked to the statement.[85]

III. SUMMARY OF ARGUMENT

The standard of appellate review is *de novo. Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Nevada's anti-SLAPP statute, NRS 41.650, provides for civil immunity from all claims based on a good faith communication in furtherance of the right to petition or the right to free speech in

[81] AA II:302-310: Statement as it appeared online with hyperlinked documents
[82] AA I:8-9: Complaint, ¶¶ 32-33
[83] AA II:312-324: Statement as it appeared online with the hyperlinked documents
[84] AA I:9-10: Complaint, ¶¶ 34-35
[85] AA II:326-336: Statement as it appeared online with hyperlinked documents

direct connection with an issue of public concern. NRS 41.660(3)(b). If a defendant makes this initial showing by a preponderance of the evidence, then the burden shifts to the plaintiff to show "with prima facie evidence a probability of prevailing on the claim." *Id*. The motion is treated as one for summary judgment, with each side coming forward with *evidence*. *Stubbs v. Strickland,* 129 Nev. Adv. Op. 15, 297 P.3d 326, 329 (Nev. 2013). *See also,* NRS 41.660(5)

Appellants submitted three detailed declarations and hundreds of pages of documents[86] establishing that they meet the criteria for anti-SLAPP protection. Yet, the district court found that Appellants did not carry their initial burden to show by a preponderance of the evidence that the statements were made in good faith or pertained to issues of public concern.[87] The court also held that Respondents were not public figures or limited public figures.[88] Consequently, the district court denied the motion and did not even reach the issue of whether Respondents made a prima facie case of prevailing on their claims.

The district court's ruling was erroneous for the following reasons:

On the issue of "good faith," the court failed to consider each of the five statements at issue on their own merits, and instead simply lumped them all together to find that Defendants did not show that the statements were truthful or

[86] AA I:53-946
[87] AA VIII:1690, lines 1-9
[88] *Id.*

made without knowledge of their falsity.[89] Yet, Appellants' briefing and evidence showed that two of the five statements at issue constitute non-actionable opinion which as a matter of law should be found to have been made in good faith because there is no such thing as "a false idea." *Pegasus* v. *Reno Newspapers, Inc.*, 118 Nev. 706, 714, 57 P.3d 82, 87 (Nev. 2002). Another two of the statements are true or substantially true and therefore should have been found to have been made in good faith as a matter of law since true statements of fact cannot be made in bad faith. And finally, the ambiguous statement that was erroneously published without commas, was hyperlinked to its source materials (as were all the statements), was promptly clarified, was attested under oath to have been made in good faith and was corroborated by other evidence as having been made in good faith.

On the issue of "public interest," the court misapplied the factors enunciated in *Shapiro v. Welt*, (Nev. 2017) and *Piping Rock Partners*, *infra*, finding that a lawyer's professional work inside and outside of a public courtroom, is not of "public interest," and is instead "private" and "personal." The law holds otherwise, and in addition, the State Bar's Mission Statement acknowledges that it *exists* to regulate lawyers and "protect the public." Lawyers work in publicly funded and open courtrooms, before judges who are publicly elected and their

[89] AA VIII:1690, lines 7-9

professional conduct has a profound effect on the public. Each of the statements at issue pertained to Respondents' professional conduct and should have been found to pertain to issues of public concern.

The court also erroneously found that Willick is not a "public figure" or a "limited public figure." Yet Respondents fall squarely within the definition of a public figure as enunciated in *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 342 (1974). Willick purposely thrusts himself into public debate by voluntarily testifying before the legislature, sending letters to the legislature, writing books on the family law issues that are distributed to the public, writing and publishing dozens of articles, being extensively quoted in newspapers, mass marketing his services to the public via billboards and online media, serving as an expert witness, receiving numerous awards.[90] As a public figure, the public interest in his actions is heightened, as is the Respondents' burden in proving defamation.

Lastly, it is uncontroverted that all of the statements at issue were published online and/or through mass E-mail blasts, thereby meeting the final prong of the anti-SLAPP criteria – the statements were made "in a place open to the public or in a public forum."

Accordingly, the court should have held that Appellants met the statutory requirements for anti-SLAPP immunity by a preponderance of the evidence, and

[90] AA II:207, 222-236 (testifies before legislature); AA III:468-479 (resume) AA

then determined whether Respondents made a prima facie *evidentiary* showing of a probability of prevailing on their claims.

The only *evidence* Respondents submitted in opposition to Appellants' motion was a) a short "form" declaration from Willick stating that he read the brief and that the statements in it are true except where alleged on information and belief,[91] and b) three exhibits consisting of computer screenshots of the statements themselves,[92] a post in which Sanson asks for public help in dealing with Respondents' lawsuits,[93] and an exchange with a third party in which Sanson indicates that he believes that all the statements are *true – a statement that actually shows good faith*.[94] None of it rebuts the three anti-SLAPP factors established by Appellants – good faith, public interest and public place/forum. Moreover, none of this establishes a prima facie case of defamation, business disparagement or false light.

Respondents' defamation and business disparagement claims fail because, two of the five statements at issue constitute non-actionable opinion, and another two of the statements are true or substantially true. Accordingly, they cannot serve as a basis for defamation or business disparagement. And, three of these four

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III:480 (books); AA III:482-495 (articles); AA III:477 (billboard)
[91] AA VII:1443: Willick Decl.
[92] *See e.g.*, AA VII:1465
[93] AA VII:1454
[94] AA VII:1466-1467

statements are also subject to Nevada's Fair Reporting Privilege which serves as an absolute shield from liability. Likewise, the single statement that was inadvertently ambiguous due to a lack of commas cannot serve as basis for defamation or business disparagement because it was hyperlinked to its source materials thereby making it non-actionable opinion.

Further, to establish a claim for business disparagement, and if Respondents are found to be public figure for purposes of defamation, Respondents would have to establish by *clear and convincing* evidence that Appellants acted with *malice*, which they have not done. *See, Clark Cty. Sch. Dist. v. Virtual Educ. Software, Inc*., 125 Nev. 374, 386, 213 P.3d 496, 501 (Nev. 2009); *see also, New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Respondents also failed to establish a prima facie case of false light invasion of privacy. Neither opinions nor true or substantially true statements of fact can serve as a basis for such claims. Moreover, Respondents would have to show that Appellants acted with "reckless disregard" when publishing the statements – i.e., that they "in fact entertained serious doubts as to the truth of his publication" but published them anyway. *St Amant v. Thompson*, 390 U.S. 727, 731 (1968). Respondents failed to proffer any such evidence.

Given that none of Respondents' afore-mentioned claims are viable, their claim for conspiracy necessarily fails. Moreover, the new allegations for this claim

in the FAC make no legal sense, and the fact that they contradict allegations in the original complaint demonstrates that this claim should be viewed as a sham under Sham Pleading Doctrine.

Appellants respectfully request that this Court grant their anti-SLAPP motion and send a strong message to Respondents – that they cannot continue to unabashedly wield the sword of their law license to silence their critics' constitutionally protected free speech rights.

IV. ARGUMENT

A. STANDARD OF SUPREME COURT REVIEW

This Court should review the denial of Appellant's Anti-SLAPP motion *de novo*. *See, e.g., Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) ("[t]he appropriate standard of review for a denial of a special motion to dismiss would be the same as for a grant of summary judgment: de novo").

Because a suit pursuant to NRS 41.670(c) cannot commence unless the Court denies a special motion to dismiss, a special motion to dismiss "functions as a motion for summary judgment and allows the district court to evaluate the merits of the alleged SLAPP claim." *Stubbs v. Strickland*, 129 Nev. Adv. Op. 15, 297 P.3d 326, 329 (Nev. 2013). *See also,* NRS 41.660(5) ("[i]f the court dismisses the action pursuant to a special motion to dismiss filed pursuant to subsection 2, the dismissal operates as an adjudication upon the merits.").

B. STANDARD AND PURPOSE OF ANTI-SLAPP STATUTES

Anti-SLAPP statutes recognize that permitting unsupported lawsuits against people for exercising their First Amendment rights chills free speech. *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1109 (9th Cir., 2003). *The litigation process itself is the chilling factor and punishment*. NRS 41.660 et seq. provides a clear procedure for legitimate defamation Plaintiffs to follow: They must have their evidence in hand when they file their case, or they must know what they need in order to show that their case has merit. Without the Anti-SLAPP statute, the standards for dismissal at the onset of the case under NRCP 12(b)(5) would allow Plaintiffs to survive a motion to dismiss with little more than a rote recitation of the elements of their claim. Anti-SLAPP statutes recognize the fragility of free speech rights and require both sides to come forward with their evidence at the onset of the case.

Nevada's anti-SLAPP statute, NRS 41.650 states as follows:

> Limitation of liability. A person who engages in good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern is immune from any civil action for claims based upon the communication.

NRS 41.660(1)-(1)(a). NRS 41.637(4) defines "good faith" in relevant part as a:

> Communication made in direct connection with an issue of public interest in a place open to the public or in a public forum

> . . . which is truthful or is made without knowledge of its falsehood. (Emphasis added.)

Nevada's anti-SLAPP statutes (NRS 41.660(3)(a)) require Appellants to carry an initial burden of proof by a preponderance of the evidence to show that their communications meet the criteria of NRS 41.637(4) – i.e., that the statements involve a "communication made in direct connection with an issue of public interest in a place open to the public or in a public forum…which is truthful or is made without knowledge of its falsehood."

Once this burden is met, then the burden shifts to Respondents "to demonstrate with prima facie evidence a probability of prevailing on the claim." NRS 41.660(3)(b). The motion is to be treated as one for summary judgement with both sides coming forward with their evidence. NRS 41.640(5) states that "[i]f the court dismisses the action pursuant to a special motion to dismiss filed pursuant to subsection 2, the dismissal operates as an adjudication upon the merits."

C. THE DISTRICT COURT'S RULING ON APPELLANT'S ANTI-SLAPP MOTION AND ITS ERRORS

On February 17, 2017 Appellants moved to dismiss this case under Nevada's Anti-SLAPP statutes, NRS 41.650.[95] In support of the motion,

[95] AA I:53-946: Anti-SLAPP motion, and attached declarations (with exhibits) of Sanson (at AA I:82-II:350) and Levy (at AA II:351-V:946)

Appellants submitted two detailed declarations from Steve Sanson,[96] a supporting declaration from counsel, Anat Levy,[97] and hundreds of pages of documents in support of Appellants initial burden of proof.

Respondents opposed the motion with a brief replete with salacious and unsupported allegations, supported solely by a short "form" declaration from Willick stating:

> I have read the preceding filing, and I have personal knowledge of the facts contained therein, unless stated otherwise. Further, the factual averments contained therein are true and correct to the best of my knowledge, except as to those matters based on information and belief, and as to those matters, I believe them to be true. . . . The factual averments contained in the preceding filing are incorporated herein as if set forth in full. [98]

Appellants objected to this Declaration as "Willick is unqualified to attest to, and fails to establish, any of the 'fact'" and "it would be improper for the Court to consider any of the factual allegations in the Opposition without proper evidentiary support."[99] Moreover, the only exhibits submitted by Respondents were: a) print-outs of the online statements at issue,[100] b) an irrelevant mention on VIPI's website indicating that VIPI routinely exposes corruption on behalf of people who prefer not to speak out and accordingly could use those people's help now to fight against

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[96] AA I:82-II:350 and AA VII:1499-1503
[97] AA II:351-946
[98] AA VII:1443
[99] AA V:1328, lines 9-13
[100] AA VII:1449-1460, 1464, 1469-1476

this lawsuit,[101] and c) an online exchange between Sanson and a third party in which Sanson tells the third party that he believes what he wrote is true and to look up the facts relating to Willick for himself – a statement that actually shows Sanson's good faith.[102]

On March 14, 2017, the district court denied Appellants' motion.[103] The court found that (a) Appellants did not demonstrate that they acted in "good faith," (b) the subject matter of the statements were not of "public concern," and (c) Respondent Willick is not a "public figure."[104] Having found that Appellants did not carry their initial burden of proof, the court declined to even consider whether Respondents made a prima facie case of prevailing on their claims.[105]

Appellants believe that the district court made the following errors:

1. <u>Good Faith</u>

On the issue of good faith, the district court simply held: "upon review of the defamatory statements at issue in the Complaint, the Court finds that the VIPI Defendants have not established, by a preponderance of the evidence, that each

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[101] AA VII:1461-1463: "…when people needed someone to get dirty so they can stay nameless, we do it without hesitation. Where are those people now when we need some assistance?"
[102] AA VII:1466-1467
[103] AA VII:1602-1603: Minute Order; *see also,* AA1682-1691: Notice of Entry of Order
[104] AA VIII:1682-1691: Order denying anti-SLAPP motion at AA1690, lines 1-9
[105] *Id,*. at lines 9-16.

was truthful or was made without knowledge of its falsity."[106] The court lumped together all of Appellants' five separate statements, failing to consider even which ones were made in good faith as a matter of law. The court failed to categorize each of the statements as either:

a) Statements of "opinion," which as a matter of law are not actionable and which are therefore necessarily made in "good faith." As shown below, two of the five statements at issue, fall into this category.[107]

(b) Statements of "fact" that are true and therefore are necessarily made in good faith. Another two of the five statements at issue fall into this category.[108]

(c) Statements of "fact" that are not true, but which were made in good faith. One of the five statements at issue was ambiguous and can arguably fall into this category even though it was later clarified.[109]

(d) Statements of "fact" that are not true, and which were not made in good faith. There are no statements at issue that fall into this last category, and no evidence was presented to show otherwise. Moreover, Sanson declared that he

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[106] Id., at 1690, lines 1-3

[107] The December 25, 2016 statement indicating that Willick is not for veterans, and one of the January 14, 2017 statements indicating that Willick scammed the court into awarding his fees in the *Holyoak* case.

[108] The January 14, 2017 statement indicating that a sex offender worked at the Willick Law Group, and the January 14, 2017 statement that Willick lost an issue he tried to appeal to the Supreme Court.

[109] The January 12, 2017 statement pertaining to the ruling of a Virginia federal judge against Willick.

made all the statements in good faith.[110] Accordingly, all of the statements in this case should have been found to have been made in good faith.

2. Public Concern

In applying the factors adopted by this Court in *Shapiro v. Welt*, 133 Nev. Adv. Op. 6, Case No. 67596, filed Feb. 2, 2017 as to what constitutes "public concern," the district court stated that the statements were not of "public concern," because they pertained to court proceedings, which the court viewed as "private" and "personal:"

> MS. LEVY: number five, a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.
>
> THE COURT: Now, that's kind of what he's done here; isn't it?
>
> MS LEVY: No. What private information, Your Honor?
>
> THE COURT: Well, information about his handling of cases in the Supreme Court and so on.
>
> MS. LEVY: That's not private information. That's public record.
>
> THE COURT: Well, it's private in the sense, but it's his personal –
>
> MS. LEVY: That's not personal either.
>
> THE COURT: -- communication with his client.

[110] AA I:87: Sanson Decl., ¶ 15, lines 3-7

> MS. LEVY: What goes on it these courtrooms are absolutely – this is the public's –
>
> THE COURT: It's public –
>
> MS. LEVY: -- this is the public's courtroom.
>
> THE COURT: But it's also private too. Well, okay.
>
> MS. LEVY: The people's courtroom. That's why – that's why all the pleadings are always open to the public to review. This is why we have media who sit in and report on what happens. This is not private information or anything that should be kept a secret. And the day it is, is the day we have a major problem in our democracy, Your Honor.
>
> THE COURT: Okay. All right.[111]

The district court not only misapplied the *Shapiro* factors but it also ignored the federal definition of "public concern," finding that a lawyer's professional conduct in and out of the courtroom is generally private. Yet, cases are clear that a lawyer's work and court proceedings are indeed of public concern.

3. Public Figure

The district court stated "I think the real key here is whether Willick is a public figure."[112] The fact that Willick should have been found to be a public figure would have heightened the public interest in his professional conduct and would raise the burden on Respondents in making a prima facie case of

[111] AA VIII:1604-1670: Transcript of Proceedings, at AA1662:5-1663:6
[112] *Id*., at 1665:20-21.

defamation because they would have to show "malice" by clear and convincing evidence.

Further, the district court erroneously relied on *Doe v. Brown*, No. 62752, 2015 WL 3489404 (2015), an unpublished and distinguishable opinion that was not cited in either party's brief and which the parties had no opportunity to address.[113] The court stated:[114]

> I went and I looked up a case. Fortunately, our Supreme Court now allows us to cite to unpublished decisions in Doe versus Brown which is a May 29th, 2015, opinion of our Supreme Court. . . . As Deputy District Attorneys the Browns were government employees, not elected officials. Now Willick isn't – isn't even a government employee. We conclude the Browns are not public figures. Well, if they're not public figures, I can't see how Willick became a public figure. I can see cases where prosecutors and defense attorneys might become, like in an O.J. Simpson case, but Willick isn't a public figure.

Yet, the law holds otherwise. Those who voluntarily thrust themselves into public debate, such as the Respondents in this case, are indeed public figures or limited public figures.

D. APPELLANTS' SHOWED THAT THE STATEMENTS WERE MADE IN GOOD FAITH

Nevada's anti-SLAPP statutes require that the statements be made in good faith. NRS 41.637. "Good faith" is defined in relevant part as a "[c]ommunication made in direct connection with an issue of public interest in a place open to the

[113] AA IV:682-1691: Order, at AA VIII:1690, lines 4-6

public or in a public forum, which is truthful or is made without knowledge of its falsehood." NRS 41.637(4). Appellants' good faith was established by a preponderance of the evidence as follows:

1. Appellants' Declaration of Good Faith; No Contravening Evidence

Appellants submitted a declaration testifying that each of the statements at issue were made in good faith:

> I made each of the above postings on behalf of VIPI in good faith, believing them to be true or believing them to constitute my valid good faith opinion on the subject. I at all times hyperlinked my statements to the documents I believed were relevant so that readers would be able to judge for themselves. The postings also gave readers the case numbers in case they wanted to look further into the cases to make up their own minds about VIPI's postings.[115]

Respondents proffered no *evidence* to the contrary. The only evidence submitted was a pro forma declaration from Willick and three exhibits -- the statements themselves, two postings from VIPI's website—one of which was irrelevant,[116] and one of which actually supports a finding of good faith because it shows Sanson stating that he believes the statements to be true and he encourages the reader to read the linked documents for himself.[117]

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[114] AA VIII:1604-1670: Transcript of Proceedings, at 1666, lines 3-10
[115] AA I:82-II:350: Sanson Decl., at ¶15
[116] AA VII:1574-1575
[117] AA VII:1467

2. Two of Appellants' Statements Constitute Non-Actionable Opinion and Were Necessarily Made in Good Faith

A statement "will receive full constitutional protection" if it is not "provably false." *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 20, 110 S. Ct. 2695 (1990).) "Loose, figurative, or hyperbolic language" is protected by the First Amendment, as it cannot reasonably be interpreted as stating actual, provable facts. *Milkovich*, 497 U.S. at 21-23.) The determination of whether a statement is a protected "opinion" is a question of law for the Court to decide. *Celle v. Fillipino Reporter Enterprises Inc.*, 209 F.3d 163, 178 (2d Cir. 2000). The more imprecise the meaning is of a statement, the more likely it will be viewed as protected "opinion." *Id.*

For example, in *Shriver v. Warman*, 156 Ohio Misc.2d 7, 925 N.E.2d 1052 (2009) the words "**hypocrites**" "**low moral values**," "**no integrity**," "**Liars and Thief's**," and "**not smart enough**" were held to be non-actionable opinions. In *Jones v. American Broadcasting Companies, Inc*., 694 F.Supp. 1542 (M.D. Fla., 1988), the words "**hypocrite**" "**wacky screwball**" "**crazily eccentric**," "**irrational**" were opinions. In *McCabe v. Rattiner*, 814 F.2d 839, 842 (1st Cir. 1987), the word "**scam**" was held to be a statement of opinion. In *Wait v. Beck's N.Am. Inc*., 241 F.Supp.2d 172, 183 (N.D.N.Y. 2003), the court held that the word "**unethically"** "generally [is] constitutionally protected statements of opinion." In *Biro v. Conde Nast*, 883 F.Supp.2d 441, 453 (2012), the court held that the use of

the terms "**shyster**," "**con man**," and finding an "**easy mark**" is "rhetorical hyperbole" and "imaginative expression" that is typically understood as opinion. In *Adelson v. Harris*, 973 F.Supp.2d 471, 493 (SDNY 2013), *applying Nevada law*, the court held that the claim that Adelson's money is "**dirty**" and "**tainted**" "is the sort of rhetorical hyperbole and unfalsifiable opinion protected by the First Amendment."

Moreover, political speech in particular is typically found to be opinion. Courts "shelter strong, even outrageous political speech," because "the ordinary reader or listener will, in the context of political debate, assume that vituperation is some form of political opinion neither demonstrably true nor demonstrably false." Sack, *Sack on Defamation* at §4:3:1[B], 4-43. As stated in *Koch v. Goldway*, 817 F.2d 507, 509 (9th Cir. 1987), where the "circumstances of a statement are those of a heated political debate … certain remarks are necessarily understood as ridicule or vituperation, or both, but not as descriptive of factual matters."

Here, two of the statements at issue constitute non-actionable opinion:

First, VIPI's December 25, 2016 statement stating **"[t]his is the type of hypocrisy we have in our community. People that claim to be for veterans but yet they screw us for profit and power"** is non-actionable *opinion*. The statement is incapable of precise factual verification. As with the word "hypocrite" in the *Shriver* and *Jones* cases, the word "scam" in the *McCabe* case, and the word

"unethical" in the *Wait* case, the words "hypocrisy" and "screw us for profit and power" are so imprecise that they cannot be proven one way or the other as fact and therefore constitute opinion.

Indeed, Willick himself used these words to describe Sanson in his online letter[118], and wrote a letter to the legislature, which became part of the legislative record, describing veterans who disagreed with him as "**hack-jobs**," "**nut jobs**," claimed that they have "**un-American political agendas**," are "**fringe groups**," and "**flag-wrapped militants**."[119] He titled his letter: "**So-Called 'Veteran Support Groups' Seek to Pervert Family Law For Their Personal Enrichment**," and insulted the groups in the section titled **"The Anti-USFSPA Fringe Groups."[120]**

Moreover, the statement pertained to political speech and should therefore be given even more consideration as opinion. VIPI's statement was hyperlinked to Willick's 2015 VIPI radio interview in which Willick explained why he challenged Assembly Bill 140 before the Nevada state legislature.[121]

Second, Respondents' January 14, 2017 statement related to the *Holyoak* case, in which Willick represented a wife over the interpretation of a clause in her

[118] AA I:195-198: Willick's online letter
[119] AA II:248-267: Willick's 3/20/2015 letter to Assembly at AA II:232-233
[120] AA V:1067-1078
[121] AA III:496: Relevant portion of 2010 VIPI radio interview transcript

marital settlement agreement,[122] is also a nonactionable statement of opinion, mixed with true statements:

> **Nevada Attorney Marshall Willick gets the Nevada Supreme Court decision: From looking at all these papers it's obvious that Willick scammed his client, and later scammed the court by misrepresenting that he was entitled to recover property under his lien and reduce it to judgement. He did not recover anything. The property was distributed in the Decree of Divorce. Willick tried to get his client to start getting retirement benefits faster. It was not with 100,000 in legal bills. Then he pressured his client into allowing him to continue with the appeal.[123]**

The court in *McCabe v. Rattiner*, 814 F.2d 839, 842 (1st Cir. 1987), held that the word "scam" constitutes opinion. The statement of whether Willick's services were worth $100,000 in legal fees is obviously opinion. The rest of the statement is true: Willick's client had already divided the property pursuant to a divorce decree before Willick got involved. As this Court explained in its opinion, "both parties executed a joint petition for summary decree of divorce… the petition divided their community property through a memorandum of understanding (MOU), which they mediated with the assistance of a former family court judge."[124] Also, Willick did try to get his client to receive retirement benefits faster. The issue in the *Holyoak* case was whether Holyoak should get a portion of her husband's retirement benefits when he became eligible (as Willick espoused)

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[122] AA VI:1150: *Holyoak*, Willick's Answering Brief, at 1152:12-18
[123] AA II:327-335: Statement as it appeared online
[124] AA II:337-335: *Holyoak*, Supreme Court Opinion hyperlinked to VIPI's

or when he actually retires (as opposing counsel espoused).[125] Willick's brief to the Supreme Court stated: "The heart of Eric's appeal . . . is the contention that the one sentence in the parties' MOU about PERS benefits, incorporated in their *Decree*, was an 'unambiguous contract' constituting Toni's waiver of her right to receive pension payments from Eric upon his eligibility to retire. Eric is incorrect."[126] Willick concludes by stating "In short, there is nothing in the record, in the statues, in any case, or in any other authority from anywhere stating that Toni was not entitled to begin receiving her share of the pension upon Eric's eligibility for retirement."[127] That portion of Sanson's statement is clearly true.

VIPI's posting was also hyperlinked to this Court's decision in *Leventhal*, *supra*, which lays out the requirements for attorneys to recover on a fee charging lien.[128] There is no reason that VIPI could not opine on whether Willick's fees in the case were appropriate. Willick's client also publicly objected to Willick's fee requests arguing that they were not worth the $100,000 he charged.[129] His client argued that Willick was hired after all the property was divided, and that Willick charged her for making arguments to the Supreme Court that she never authorized:

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statement, at AA II:327, ¶3

[125] AA II:379-422: Holyoak, Willick's Answering Brief

[126] *Id*., at AA II:397:2-7

[127] *Id.*, at AA II:403:1-3

[128] AA II:312-324: online Statement showing hyperlinked case

[129] AA III:453-466: *Holyoak*, opposition to Willick's motion for lien

> Willick has spent so much time, energy and money on survivor benefits instead of focusing on the life insurance Toni was already awarded and to this date, still does not have . . . Mr. Willick can fight for anything he wants to fight for on his own dime and his own time, but not to the detriment of Toni's case and then charge her for ALL of it.[130]

Sanson and VIPI were perfectly within their rights to express an opinion on this public matter, and met their burden of demonstrating that this statement was made in good faith.

3. Hyperlinking To Source Materials Further Shows Good Faith and Heightens A Finding of Opinion

The use of hyperlinks to disclose underlying source documents in a statement is legally encouraged and turns the statement into one of non-actionable opinion. In *Nicosia v. De Rooy*, 72 F.Supp.2d 1093 (N.D. Cal. 1999), the Court found that hyperlinks transformed a statement into a constitutionally protected opinion. In that case, the plaintiff sued the defendant for defamation for accusing him of embezzlement. The statement was hyperlinked to an article which in turn hyperlinked to two other articles, thereby not even providing a direct link to the source materials. The court nonetheless found that even the more remote articles were part of the context of the embezzlement accusation and the statement therefore did not constitute defamation.

[130] *Id*., at AA II:456:21-23, and AA III:457 lines, 10-11

In *Franklin v. Dynamic Details, Inc*., 116 Cal.App.4th 375, 379, 10 Cal.Rptr.3d 429 (2004) the Court held that "[t]he e-mails disclosed the facts upon which the opinions were based by directing the reader to the FCC Web site and (via a Web link on the FCC Web site) to another company's Web site… A reader of the emails could view those Web sites and was free to accept or reject Axton's opinions based on his or her own independent evaluation." Similarly, in *Agora Inc. v. Axxess, Inc.*, 90 F.Supp.2d 697, 702-05 (D.Md. 2000) the court dismissed plaintiff's defamation claim based in part on facts disclosed in hyperlinked documents.

In *Jankovic v. Inter'l Crisis Grp*., 429 F.Supp.2d 165, 177 n.8 (D.D.C. 2006), the court noted that even if the meaning of an allegedly defamatory statement was unclear, it was clarified by the "two internet links" at the end of the sentence. The Court stated "[w]hat little confusion the sentence could possibly cause is easily dispelled by any reader willing to perform minimal research."

As stated in *Adelson v. Harris*, 973 F.Supp.2d 471, 485 (S.D. NY 2013), *applying Nevada law*:

> "Protecting defendants who hyperlink to their sources is good public policy, as it fosters the facile dissemination of knowledge on the Internet. It is true, of course, that shielding defendant who hyperlink to their sources makes it more difficult to redress defamation in cyberspace. But this is only so because Internet readers have far easier access to a commentator's sources. It is to be expected, and celebrated, that the increasing access to information should decrease the need for defamation suits."

Here, each of Appellants' statements contained hyperlinks to source materials, whether to the VIPI radio show, Court Orders, newspaper articles or other documents. It makes no difference if Respondent believes that VIPI's opinions were unfair or unwarranted, as the readers were free to read the source materials and opine on it for themselves.

4. <u>Two of Appellants' Statements Were True or Substantially True And Were Necessarily Made In Good Faith</u>

VIPI's January 14, 2017 Facebook post stating **"[w]ould you have a Family Attorney handle your child custody case if you knew a sex offender works in the same office? Welcome to the [sic] Willick Law Group**," was true. The statement hyperlinked to a legal bill showing that Richard Crane was working with Willick despite being suspended from the practice of law due to sexual malfeasance.[131] Willick admitted the truth of the statement in his online letter to Sanson stating: "[y]ou have now decided to attack me on your mailing list, but apparently could not come up with anything to criticize, so you decided to publicize the long-past personal problems of one of my employees."[132]

Likewise, VIPI's January 14, 2017 Facebook post pertaining to the *Holyoak* case stating **"[a]ttorney Marshall [sic] Willick loses <u>his</u> appeal to the Nevada Supreme Court"** (emphasis added), is true or substantially true. Willick spent

[131] AA II:302-310: Statement as it appeared online with hyperlinked documents

almost half of his Supreme Court Answering Brief in the *Holyoak* case trying to overturn Supreme Court precedent on pension survivor benefits, instead of solely focusing on the issue that his opponent was actually appealing – whether the pension benefits of Willick's client should start when her husband is eligible for such benefits or when he actually retires.[133] In opposing Willick's motion for a fee lien, his client stated:

> When Toni met with Willick a week before oral arguments at the Supreme Court, she expressed her concern that his argument of survivor benefits would overshadow the issue of first eligibility – the main issue that affected Toni's financial future. Toni was right to be concerned about that because over 90% of Marshal Willick's oral argument to the Supreme Court on January 25, 2016 was about survivor benefits.[134]

Willick's opponent also objected to Willick's raising the survivorship issue as it was outside the scope of the appeal.[135] Consequently, the Supreme Court declined to overturn its prior precedent on survivorship noting that:

> [I]n her answering brief, respondent raises issues concerning alleged errors in this court's precedent on survivorship rights. However, *respondent did not file a cross-appeal, and thus lacks the ability to challenge the district court's ruling* on these issues."[136]

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[132] AA I:193-198: Willick's online letter, at AA196, last paragraph.
[133] AA II:379-422: *Holyoak*, Willick's Answering Brief at AA403-419
[134] AA VI:1224-1257: *Holyoak*, Opposition to Willick's motion for lien, at AA V:1247, lines 10-15
[135] AA II:424-431: *Holyoak*, Reply Brief, at AA II:428:5-10
[136] AA II:323-336: *Holyoak*, Opinion, at AA II:329, ftnt. 2

(Emphasis added.) Willick had also filed a motion for partial remand to the District Court, which the Supreme Court denied.[137] Accordingly, it is true, and at a minimum, substantially true, that Willick lost his appeal to the Supreme Court and this statement should be found to have been made in good faith.

5. One of Appellants' Statements Was Inadvertently Ambiguous, But Was Made in Good Faith

The single statement at issue that falls into this category is the January 12, 2017 post on the VIPI website stating **"Attorney Marshall [sic] Willick and his pal convicted of sexually coercion of a minor Richard Crane was found [sic] guilty of defaming a law student in United States District Court Western District of Virginia signed by US District Judge Norman K. Moon."**[138] The statement was inadvertently posted without commas and was intended to read: "Attorney Marshall [sic] Willick**,** and his pal convicted of sexually coercion of a minor Richard Crane**,** was found guilty of defaming a law student in United States District Court Western District…."[139] VIPI tried to clarify the statement after publication, but inserted the comma in the wrong place. VIPI then again clarified

[137] AA II:433-438: Willick's motion for limited remand; AA II:440-441: Supreme Court's denial of the motion
[138] AA II:269-290: online Statement with hyperlinked documents
[139] AA I:85-87: Sanson Decl., at 14b

the post on January 18, 2017 changing the entire form of the statement so that there could be no confusion.[140] The new post read:

> CLARIFICATION:
> Attorney Marshal Willick's letters against opposing party found defamatory per se in 2008; Willick settled before trial on the issue of privilege. Click onto link below: (hyperlink to Virginia court's order). Richard Crane, formerly with Willick's firm, guilty of sexual misconduct involving a minor and suspended from the practice of law. Click onto link below: (hyperlink to Supreme Court's order of suspension).

Notably, NRS 41.337 requires media to make public corrections within *20 days of demand*; Appellants' clarification was made within *6 days of publication*, without a demand. This should show good faith.

Moreover, the original and clarified statements were hyperlinked to a Review Journal article about Crane's conviction and suspension,[141] the State Bar's Order of Suspension of Crane,[142] and Judge Moon's Order finding that Willick committed defamation per se.[143] Thus, even absent Appellants' voluntary clarification, any ambiguity caused by the mistake in the statement should not be actionable since Respondents hyperlinked and disclosed their source materials. *See, Jankovic v. Inter'l Crisis Grp.*, 429 F.Supp.2d 165, 177 n.8 (D.D.C. 2006) ("[W]hat little confusion the sentence could possibly cause is easily dispelled by

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[140] AA II:271-300: Clarification
[141] AA II:271-272
[142] AA II:273-275
[143] AA II:276-290

any reader willing to perform minimal research") It was true that Willick was found to have committed defamation per se, and it was true that his colleague Richard Crane was suspended from the practice of law for sexual coercion of a minor. Thus, Appellants provided the district court with sufficient evidence that this statement was made in good faith.

6. Even if the Latter Statement Constituted an Inadvertent Falsehood, Anti-SLAPP Statutes Do Not Require Statements to Be True.

Even if the Court finds that Appellants' erroneous statement above constituted a false statement of fact, several courts have expressly rejected the argument that statements must be truthful in order to be protected under Anti-SLAPP statutes. In *Piping Rock Partners, Inc. v. David Lerner Associates*, 946 F. Supp.2d 957, 969, 2013 U.S. Dist. Lexis 70660 (N.D. Cal. 2013), the case this Court relied on in *Shapiro v. Welt*, 133 Nev., Adv. Op. 6, (2017), the California Supreme Court stated:

> By asserting that the statements are not in the public interest because they are false, plaintiffs urge the Court to "read a separate proof-of-validity requirement into the operative sections of the statute," which this Court cannot do…. Moreover, "plaintiffs' argument confuses the threshold question of whether the SLAPP statute potentially applies with the question of whether an opposing plaintiff has established a probability of success on the merits.

(Citations omitted; emphasis added). The anti-SLAPP statutes require only that the statements be either true *or made without knowledge of its falsehood*, i.e.,

made in good faith. NRS 41.637(4). Accordingly, all the statements at issue should have been found to have been made in good faith.

E. THE STATEMENTS WERE DIRECTLY RELATED TO A MATTER OF "PUBLIC CONCERN" / "PUBLIC INTEREST."

Nevada's anti-SLAPP statutes require that the speech at issue be directly related to a matter of public interest or public concern. NRS 41.650. (The terms are used interchangeably in Nevada's anti-SLAPP statute (*c.f.*, NRS 41.637 and 41.650) and applicable case law.)

1. Attorney Conduct Is a Matter of "Public Interest."

Courts have held that criticism of a professional's on-the-job performance is a matter of public interest. For example, in *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F. Supp. 957, 968 (N.D. Cal. 2013) *aff'd*, 609 F. App'x 497 (9th Cir. 2015), the court held that statements about the lack of trustworthiness of a real estate investment firm was of "public concern" notwithstanding the fact that the statements were baseless and defendants had never conducted business with the plaintiff investment firm. In *Wilbanks v. Wolk*, 121 Cal.App.4th 883, 900, 17 Cal.Rptr.3d 497 (2004), the court held that statements "ostensibly provided to aid consumers choosing among brokers ... were directly connected to an issue of public concern." The court found that the question did not turn on the credibility of the speaker as a known consumer watchdog, but instead turned on the substance of the statements which "were a warning not to use plaintiffs' services." *Id.*

Similarly, in *Chaker v. Mateo,* 209 Cal.App.4th 1138, 147 Cal.Rptr.3d 496 (Cal. App. 2012), the court held that "statements posted to the 'Ripoff Report' Web site about [plaintiff's] character and business practices plainly fall within the rubric of consumer information about [plaintiff's] business and were intended to serve as a warning to consumers about his trustworthiness." 209 Cal.App.4th 1138, 1146, 147 Cal.Rptr.3d 496 (2012). In that case, the defendant posted derogatory statements about the operator of a forensics business. *Id.* at 1142.

Additionally, the U.S. Supreme Court has provided guidance on the issue of whether speech involves a matter of public interest. In the seminal case of *Snyder v. Phelps*, 562 U.S. 443, 453, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011), members of a church picketed the funeral of a fallen Marine. Their signs stated "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You." *Snyder, supra,* at p. 2. The Marine's father sued the church for defamation and related claims. The Court held that "[s]peech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' . . . or when it 'is a subject of legitimate news.'" *Snyder, supra,* at p. 2; emphasis added; citations omitted. In finding that all these statements were of public concern, the court explained that "[a] statement's

arguably 'inappropriate or controversial character... is *irrelevant* to the question of whether it deals with a matter of public concern.'" *Id.*, at p. 7, *citing*, *Rankin v. McPherson*, 483 U.S. 378, 387 (1987).

Using the principles in *Snyder*, the Ninth Circuit Court of Appeals has further identified speech that is of public concern. In *Obsidian Finance Group, LLC v. Cox*, 740 F.3d 1284, 1292 (9th Cir. 2014), the court held that blog posts accusing plaintiff of financial crimes during bankruptcy involve a matter of public concern. In *Gardner v. Martino*, 563 F.3d 981, 989 (9th Cir. 2009) the court held that a business owner's refusal to give a refund to a customer who bought an allegedly defective product is a matter of public concern. In *Manufactured Home Cmtys., Inc. v. Cnty. Of San Diego*, 544 F.3d 959, 965 (9th Cir. 2008) the court held that a claim that a mobile home park operator charged excessive rent is a matter of public concern.

Against this backdrop, and recognizing that California's anti-SLAPP laws are similar to Nevada's, this Court adopted California's "guiding principles" for determining whether speech pertains to a matter of public interest. *See, Shapiro v. Welt*, 133 Nev.Adv.Op. 6 (Nev. 2017). Under this standard, the Court considers the following factors:

(1) "public interest" does not equate with mere curiosity;

(2) a matter of public interest should be something of concern to a substantial number of people; a matter of concern to a speaker and a relatively small specific audience is not a matter of public interest;

(3) there should be some degree of closeness between the challenged statements and the asserted public interest – the assertion of a broad and amorphous public interest is not sufficient;

(4) the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy; and

(5) a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.

(*Citing, Piping Rock Partners, Inc., supra*, 946 F.Supp.2d at 968.)

2. <u>Speech Criticizing Attorneys' Work Falls Within the Purview of Public Interest.</u>

Under the above standards, statements criticizing lawyers fall squarely within the purview of public interest. The performance and behavior of attorneys and judges in open court is not a "mere curiosity," but rather, a matter of great public concern. *See, e.g.*, *Lubin v. Kunin*, 117 Nev. 107, 114 (Nev. 2001) ("'fair, accurate and impartial' reporting of judicial proceedings is privileged and nonactionable, thus affirming the policy that Nevada citizens have a right to know what transpires in public and official legal proceedings"). *See also, Howard v. State*, 128 Nev.Adv.Op. 67, 291 P.3d 137, 141 (2012) ("court proceedings are presumptively public and can only be sealed from public review "where the public's right to access is outweighed by competing interests."

Reflecting the importance of the public's right to know about attorney conduct, courts have found that criticizing attorneys is protected activity for Anti-SLAPP purposes. In *Davis v. Avvo, Inc.*, No. C11-1571RSM, 2012 WL 1067640, at *3 (W.D. Wash. Mar. 28, 2012), the Court found it had "no difficulty finding that the Avvo.com website is 'an action involving public participation,' in that it provides information to the general public which may be helpful to them in choosing a doctor, dentist, or lawyer". In *Standing Comm. on Discipline of U.S. Dist. Court for S. Dist. of California v. Ross*, 735 F.2d 1168, 1170 (9th Cir.1984), the court held that lawyering is "a profession imbued with the public interest and trust." Indeed, the Nevada State Bar's Mission statement is "[t]o govern the legal profession, to serve our members, **and to protect the public interest**." *https://www.nvbar.org/about-us/our-mission* (as of August 17, 2017; emphasis added).

Respondents are officers of the court (Nev. Sup. Ct. Rule 39), licensed and regulated by the state, report to elected officials, assist in the administration of justice, and practice in courtrooms paid for by the public. What they do is a matter of public interest and each of the statements in this case dealt with Respondents' work practices and are of public interest.

a. VIPI's December 25, 2016 statement pertained to the 2015 interview that Willick gave to VIPI espousing his views on the use of military disability benefits to pay spousal support.

b. VIPI's January 12, 2017 statement about a federal judge in Virginia finding that Willick committed defamation per se against a law student who was opposing his client in a divorce case.

c. VIPI's January 14, 2017 statement about Willick's colleague, Richard Crane, being suspended from the practice of law for committing sexual coercion on a minor, were likewise of public concern because they dealt with the behaviors of lawyers in litigating their cases and in being suspended from practicing law.

d. Appellants' two January 14, 2017 Facebook posts pertaining to Willick's work on the *Holyoak* case, Willick's lost his bid to overturn Supreme Court precedent and how he sought $100,000 for his work on the case is likewise of public concern because it involved potential overcharging of clients, work done in open court and efforts to overturn Supreme Court precedent.

3. <u>Argument That a Statement Is False Is Irrelevant To Whether It Is Of Public Concern.</u>

Respondents wrongly claim that Appellants' statements cannot be of public concern because they are false. First, Appellant's statements of opinion cannot be false, "because there is no such thing as a false idea." *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 714, 57 P.3d 82, 87 (Nev. 2002). "However

pernicious opinions may seem, courts depend on the competition of other ideas, rather than judges and juries, to correct them." *Id.*

Second, falsity has no legal bearing on whether a statement is of public concern. In *Piping Rock Partners*, *supra*, the Court held:

> Here, as in *Chaker* and *Wilbanks*, Dobbs's statement is a warning to consumers not to do business with plaintiffs because of their allegedly faulty business practices. It makes no difference, for purposes of the public interest requirement, that the warning was not sincere, accurate, or truthful. Accordingly, the Court finds that defendants have made a threshold showing that plaintiffs' suit arises from an act in furtherance of the defendants' rights of petition or free speech.

Supra, 946 F.Supp.2d at 969 (emphasis added). Accordingly, the Court should dismiss out of hand any arguments pertaining to alleged falsity of the statements in determining whether Appellants' speech was of public concern.

F. THE COMMUNICATIONS WERE MADE IN A PLACE OPEN TO THE PUBLIC OR IN A PUBLIC FORUM

As admitted in the complaint, Defendants statements were posted on the internet, including on VIPI's publicly accessible website, and redistributed via publicly accessible Facebook pages and/or via Constant Contact group emails.[144]

Accordingly, Defendants meet this final criteria for their anti-SLAPP motion in that each of the communications was made in "a place open to the public or in a public forum." NRS 41.637(4).

[144] AA I:6-10: Complaint, e.g., ¶¶ 20-35 and *passim*

Thus, Appellants made the prima facie showing required under Nevada's Anti-SLAPP laws. The burden should now shift to Respondents to show a prima facie case of a probability of prevailing on the merits of their claims.

V. PLAINTIFFS FAILED TO MAKE A PRIMA FACIE CASE OF A PROBABILITY OF PREVAILING ON THEIR CLAIMS

As stated above, on April 3, 2017, the same day on which Appellants filed their Notice of Appeal and on the eve of the hearing on Appellants' then-pending motions to dismiss under NRCP 12(b)(5) and 12(b)(1), Respondent filed a FAC under NRCP 15(a), abandoning their claims for intentional and negligent infliction of emotional distress, harassment, concert of action, RICO violations and copyright infringement. The statements on which the original complaint was based continued to form the basis for the FAC, but the causes of action were pared back to defamation, false light invasion of privacy, business disparagement and civil conspiracy.[145] The below address only the claims remaining in the case.

A. RESPONDENTS DID NOT MAKE A PRIMA FACIE CASE PREVAILING ON A CLAIM OF DEFAMATION

The issue of whether a statement is "defamatory" is a question of law for the Court to decide. *Branda v. Sanford*, 97 Nev. 643, 637 P.2d 1223, 1225 (1981).)

[145] Although the FAC also added a cause of action for Deceptive Trade Practices and an additional statement allegedly made by VIPI in February 2017 that Respondents claim are defamatory, such additional matters are not the subject of this appeal since they have not yet been adjudicated in the district court.

The elements of a cause of action for defamation are: (1) a *false and defamatory* statement of *fact* by defendant concerning the plaintiff; (2) an *unprivileged* publication to a third person; (3) fault, amounting to *malice* if the plaintiff is a public figure (negligence if the plaintiff is not a public figure); and (4) actual or presumed damages. *Chowdhry v. NLVH, Inc*., 109 Nev. 478, 483, 851 P.2d 459, 462 (1993).

As stated above, VIPI's December 25, 2017 statement that "[t]his is the type of hypocrisy we have in our community. People that claim to be for veterans but yet they screw us for profit and power" constitutes non-actionable opinion.[146]

VIPI's January 14, 2017 statement that Willick's services in the Holyoak case were not worth $100,000, that he "scammed" his client and the court[147] is likewise a nonactionable statement of opinion. The portion of the statement indicating that Willick tried to get his client retirement benefits faster and that the parties' property in the case was divided before Willick became involved are all true.

Also true are VIPI's January 14, 2017 statement "[w]ould you have a Family Attorney handle your child custody case if you knew a sex offender works in the same office? Welcome to the [sic] Willick Law Group."[148]

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[146] AA II:204
[147] AA II:312
[148] AA II:302

VIPI's January 14, 2017 Facebook post, again pertaining to the *Holyoak* divorce case stating "[a]ttorney Marshall [sic] Willick loses his appeal to the Nevada Supreme Court"[149] was also true or substantially true. *Emphasis added*. Willick indeed tried to appeal the timing of his clients' pension benefits, but did so in the form of a responsive brief instead of a separate appeal, and thus the Supreme Court declined to address the issue and Willick lost this attempted appeal.

The January 12, 2017 statement that was inadvertently posted without the commas became a combination of true statement of fact (that Willick defamed an opposing party, and that Willick's colleague was suspended from the practice of law for sexual coercion of a minor) and arguably an opinion, because even if it was read as a false statement of fact (that Willick engaged in sexual coercion of a minor), the statement was hyperlinked to its source materials so that readers could assess the statement for themselves. As stated in the Restatement of Torts (Second), "[a] simple expression of opinion based on disclosed…nondefamatory facts is not itself sufficient for action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. Restatement (Second) of Torts §566 cmt. c. "The rationale behind this rule is straightforward: When the facts underlying a statement of opinion are disclosed, the readers will understand that they are getting the author's interpretation of the facts presented; they are

[149] AA II:305

therefore unlikely to construe the statement as insinuating the existence of additional, undisclosed facts." *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995).

Further, at least three of the statements are subject to the fair reporting privilege. To benefit from the fair reporting privilege, (1) it must be "apparent either from specific attribution or from the overall context that the article is quoting, paraphrasing or otherwise drawing upon official documents and proceedings; and (2) the statement must constitute a "fair and accurate" description of the underlying proceeding." The fair reporting privilege "extends to any person who makes a republication of a judicial proceeding from material that is available to the general public." *Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212, 984 P.2d 164, 166 (1999). In Nevada, if the privilege applies, it is "*absolute*," meaning it "*precludes liability even where the defamatory statements are published with knowledge of their falsity and personal ill will toward the plaintiff*." *Circus Circus Hotels v. Witherspoon*, 99 Nev. 56, 657 P.2d 101, 104 (1983) (emphasis added); *see also, Sahara Gaming Corp., supra*, 984 P.2d at 165.

As discussed above, VIPI's two January 14, 2017 Facebook posts regarding Willick's actions in the *Holyoak* case are substantially accurate and fair. The portion of VIPI's January 12, 2017 statement indicating that a Virginia Court

found that Willick committed defamation per se, and that his colleague was found guilty of sexual coercion of a minor is also accurate and fair. All three of these statements hyperlinked to, and were reporting on, official court documents and proceedings. The single statement that was ambiguous without the commas would be entitled to absolute immunity from. Accordingly, these three statements should be deemed subject to the fair reporting privilege.

Lastly, Respondents should be held to be "public figures" or "limited public figures," and as such should be made to show *by clear and convincing evidence* that the statements—including the one that inadvertently omitted the commas—were made with actual *malice*.

The U.S. Supreme Court defines "public figures" as "[t]hose who, by reason of the notoriety of their achievements…seek the public's attention," and therefore, "have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 342 (1974); *see also*, *Wynn v. Smith*, 117 Nev. 6, 16 P.3d 424 (Nev., 2001) (Wynn held to be a public figure.) In *Young v. The Morning Journal*, 129 OhioApp.3d 99, 717 N.E.2d 356 (1998) the court found that a local attorney's well-publicized involvement in running a narcotics investigative unit for 15 years made him a "public figure" for purposes of a defamation suit. In *Schwartz v. Worral Publications, Inc*., 258 N.J. Super. 493, 610 A.2d 425 (App.Div. 1992) the

court found that an attorney for the school boards association was a "public figure."

Here, Willick claims his firm is "the premiere Family Law firm in Nevada." In 2010 he described himself as follows: "In every state there tends to be one guy who tends to write the instruction manuals and the text books and teach the courses. For here in Family Law that's pretty much my role."[150] Willick voluntarily thrusts himself into public discourse by testifying before the legislature,[151] writing dozens of articles,[152] writing books that are sold to the public,[153] being quoted in the Las Vegas Review Journal and other publications,[154] receiving awards for his work,[155] making public appearances, and publicly advertising his services.[156] Clearly, Respondents are "public figures" (or limited public figures) by reason of the notoriety of their achievements and their voluntary injection into matters of public discourse.

As public figures, Respondents must show *by clear and convincing evidence* that any purportedly defamatory statement was "made with 'actual malice' – i.e., with knowledge that it was false or with reckless disregard of whether it was false

[150] AA III:496: Relevant portion of transcript of Willick's 2010 VIPI interview
[151] AA II:207, 222-236: Assembly committee minutes
[152] AA III:468-479: Willick's resume citing publications
[153] AA III:480: Screenshot of Willick's books
[154] AA III:482-494: Sampling of articles quoting Willick
[155] AA III:470: Willick resume citing awards, appointments and certification
[156] AA III:477: Billboard

or not." *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *see also, Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678, 2696 (1989). A showing of "reckless disregard" for the truth "requires more than a departure from reasonably prudent conduct." *Id.* Evidence must exist sufficient to suggest that the defendant "in fact entertained serious doubts as to the truth of his publication," *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), or had a "high degree of awareness of … probable falsity." *Harte-Hanks Communications*, *supra*, 109 S. Ct. at 2696. Here, Respondents presented *no evidence* of malice, let alone by clear and convincing evidence.

Lastly, even if Respondents are not held to be public figures, and need only show negligence, the only statement at issue that could involve negligence is the January 12, 2017 post that inadvertently omitted commas. Yet as shown above, any ambiguity in that post was legally cured by the hyperlinks to the relevant source materials. *Adelson v. Harris*, 973 F.Supp.2d 471, 485 (S.D. NY 2013) (applying Nevada law).

B. RESPONDENTS DID NOT MAKE A PRIMA FACIE CASE OF PREVAILING ON A CLAIM OF FALSE LIGHT

A claim for False Light invasion of privacy requires that "(a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."

Franchise Tax Bd., of Cal., v. Hyatt, 130 Nev.Adv.Op. 71, 335 P.3d 125, 141 (2014) (emphasis added). "Reckless disregard" means more than just a departure from reasonably prudent conduct. It means that the evidence must show that Appellants "in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

In this case, there were no false statements of fact made about Plaintiffs; except for the ambiguity in the January 12, 2017 statement that was inadvertently published without commas. Yet, Respondents presented no evidence that Appellant knew of the falsity of the statement at the time it was made or that Appellant acted with malice when it was published.

Further, all of the statements pertained to Respondents' publicly available legal work. There is nothing that would constitute a false light invasion of *privacy*.

C. RESPONDENTS DID NOT MAKE A PRIMAE FACIE CASE OF PREVAILING ON A CLAIM OF BUSINESS DISPARAGEMENT

The elements of a business disparagement claim are: "(1) a false and disparaging statement, (2) the unprivileged publication by the defendant, (3) malice, and (4) special damages." *Clark Cty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 386, 213 P.3d 496, 501 (Nev. 2009). Further, any claim of "malice" must be shown by clear and convincing evidence and "proof of special damages is an essential element of business disparagement." *Clark Cty. Sch. Dist. v. Virtual Ed. Software*, 125 Nev. 374, 387, 213 P.3d 496, 505 (2009).

Here, not only do the statements at issue not constitute false statements of fact that would support a claim for business disparagement, but Respondents have provided no proof of malice and no proof of special damages.

Further, under NRS 41.337, special damages are expressly prohibited when a statement is corrected within 20 days of demand.

D. RESPONDENTS DID NOT MAKE A PRIMA FACIE CASE OF PREVAILING ON A CLAIM OF CONSPIRACY

To establish a claim for civil conspiracy, a plaintiff must show (1) the commission of an underlying tort; and (2) an agreement between the defendants to commit that tort. *Boorman v. Nevada Mem'l Cremation Soc'y, Inc.* (D. Nev., 2011) (emphasis added). "Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." *Applied Equipment Corp. v. Litton Saudi Arabia Ltd*., 7 Cal.4th 503,510-511, 28 Cal.Rptr.2d 475, 478, 869 P.2d 454 (Cal., 1994)

Here, Respondents originally alleged that there was a conspiracy between Appellants and the other defendants in the case.[157] Now that Respondents dismissed the other defendants, Respondents claim in their FAC that the conspiracy was instead between Appellants and Louis Schneider, a third party.[158]

[157] AA I:16: Complaint, ¶70
[158] AA VII:1549: FAC ¶¶87-88

This makes no sense. A conspiracy claim is designed to make other defendants liable even though they didn't commit the principle wrongful act. Here, Schneider is not a party to the case and Appellants are already directly alleged to have committed the principle acts. It therefore makes *no sense* to have a conspiracy claim that brings *no one new* into the alleged wrongdoing.

Second, as stated in *Flowers v. Carville*, 266 F.Supp.2d 1245, 1249 (D. Nev., 2003): "a cause of action for defamation is a necessary predicate to a cause of action for conspiracy to defame." Since Respondents' claims for defamation, false light invasion of privacy and business disparagement all fail, no civil conspiracy claim can be maintained for those causes of action.

Third, the Sham Pleading Doctrine prevents a plaintiff from avoiding a destructive allegation in a prior complaint by simply omitting it without explanation in an amended complaint, or by pleading facts inconsistent with such prior allegations. *Vallejo Development Co. v. Beck Development Co.*, 24 Cal.App.4th 929, 946 (1994). *See also*, *Womack v. Lovell*, 237 Cal.App.4th 772, 787 (2015). Under this doctrine, the Court may examine the prior complaint to ascertain whether the allegations are a mere sham, so as to prevent an abuse of process.

VI. CONCLUSION

For the reasons stated above, Appellants respectfully request that the Court:

a) Reverse the District Court's denial of Appellant's anti-SLAPP motion and grant such motion in its entirety; and

b) Remand the case to the lower court for the sole purpose of awarding attorneys' fees and costs to Appellants under NRS 41.670(1)(a), and additional damages of $10,000 to

each Appellant pursuant to NRS 41.670(1)(b).

Respectfully submitted on this 21st day of August, 2017,

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NRAP RULES 28.2 AND 32(a)(7)(D)(9)

ATTORNEY CERTIFICATION

The undersigned counsel of record for Appellants Veterans in Politics International Inc., and Steve W. Sanson, certifies pursuant to NRAP Rules 28.2 and 32(a)(7)(D)(9) as follows:

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010, 14 characters per inch font, in the Times New Roman typestyle.

2. I further certify that this brief complies with the page-or-type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 13,976 words which is under the 14,000 word limit.

3. Finally, I certify that I have read this petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the petition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

sanctions in the event that the accompanying petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted this 21st day of August, 2017,

By: _____

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CERTIFICATE OF ELECTRONIC SERVICE

I am over the age of 18 and am not a party to the within action. On the date indicated below I caused to be served a true and correct electronic copy of the document entitled **APPELLANTS' OPENING BRIEF** on the below listed recipients via the master transmission list with the Nevada Supreme Court:

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I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed this 21st day of August, 2017, in Las Vegas, NV