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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

APPELLANTS' REPLY BRIEF

(Appeal from Eighth Judicial District Court, Clark County

Senior Judge, Hon. Charles Thompson, Dept. 18)

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I. THE STANDARD OF REVIEW SHOULD BE *DE NOVO*.

Respondents rely on *Shapiro v. Welt*, 133 Nev. ___, 389 P.3d 262 (Nev. 2017) for the proposition that this Court should review the denial of Appellant's anti-SLAPP motion under an "abuse of discretion" standard rather than under a *de novo* standard as espoused in Appellants' Opening Brief. (Ans. Br. at 26)

Yet, the *Shapiro* case, which involved defamatory statements made in 2014, was decided under the 2013 version of Nevada's anti-SLAPP statute, which went into effect on October 1, 2013. The law was further amended, however, in 2015, and the 2015 amendment applies to this case since it took effect on June 8, 2015[1] and the statements at issue here were all made in December 2016 and January 2017. Under the 2015 amendment, the rationale of the *Shapiro* standard of review no longer applies, and the standard of review should return to *de novo*, as was the case prior to the 2013 amendment.

In *Delucchi v. Songer*, 396 P.3d 826,831 (Nev. 2017), this Court explained that "[t]he 2013 amendment completely changed the standard of review for a special motion to dismiss by placing a significantly different burden of proof on the parties."

Under the 2013 amendment, if the moving party established "by a preponderance of the evidence, that the claim is based upon a good faith

[1] *Crowley v. Thyssen*, Adv. Op. at 2 (Nev. App. 2017)

communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern" (the "First Prong") then the burden shifted to the plaintiff to "establish *by clear and convincing evidence* a probability of prevailing on the claim" (the "Second Prong"). NRS 41.660(3)(b)(2013).

In 2015, however, the Nevada legislature again amended NRS 41.660(3)(b) eliminating the "clear and convincing evidence" standard, and instead providing that if the defendant carries his burden on the First Prong, then the Plaintiff simply has to show "a prima facie case of a probability of prevailing on the merits of the claim." This change in the standard of proof required of the Plaintiff under the Second Prong, now allows this Court to return to the *de novo* standard of proof it used prior to the 2013 amendment, because the evidence now again turns on whether plaintiff has established a prima facie case as a matter of law.

As explained in *Vancheri v. GNLV Corp*., 105 Nev. 417, 777 P.2d 366, 368 (Nev. 1989), "[a] prima facie case is defined as sufficiency of evidence in order to send the question to the jury." "The question of sufficiency of the evidence does not turn on whether the trier of fact will make the desired finding. Therefore, a witness's credibility and the weight of the evidence are not of consequence in the presentation of a prima facie case." *Id*.; *emphasis added*.

This Court has recognized that California's anti-SLAPP law is "similar in purpose and language to our anti-SLAPP statute." *Shapiro v. Welt*, 133 Nev. __, 389 P.3d 262, 268 (Nev., 2017); *Delucchi v. Songer*, 396 P.3d 826, 832 (Nev. 2017). California appellate courts review anti-SLAPP motions *de novo*. *Alpha & Omega Dev., LP v. Whillock Contracting, Inc.*, 200 Cal.App.4th 656, 132 Cal.Rptr.3d 781 (Cal.App. 2012) ("An appellate court reviews an order granting an anti-SLAPP motion under a de novo standard…"). In *Baral v. Schnitt*, 1 Cal.5th 376, 383-384, 376 P.3d 604, 205 Cal.Rptr.3d 475, 480-481 (Cal. 2016) the California Supreme Court, explained:

> Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. . . If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. We have described this second step as a "summary-judgment-like procedure." The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law.

(*Emphasis added*; internal citations omitted.) *See also*, *Wilbanks v. Wolk*, 121 Cal.App.4th 883, 894, 17 Cal.Rptr.3d 497, 503 (Cal.App. 2004).

A *de novo* standard of review is also consistent with NRS 41.660(5) which expressly 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." *Emphasis added*. This means, as held by this Court prior to the 2013 anti-SLAPP amendment, that an anti-SLAPP motion is like a motion for summary judgment and should therefore be decided *de novo*. *Stubbs v. Strickland*, 129 Nev.Adv.Op. 15, 297 P.3d 326, 329 (Nev. 2013); *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 57 P.3d 82, 87 (Nev. 2002); *Wood v. Safeway, Inc*., 121 P.3d 1026, 121 Nev. 724 (Nev. 2005) ("[t]his court reviews a district court's grant of summary judgment de novo.")

Lastly, applying a *de novo* standard of review would also be consistent with the principle that appellate courts typically review the interpretation and application of constitutional principles on a *de novo* basis. *Baba v. Board of Supervisors of City & County of San Francisco*, 142 Cal.App.4th 504, 512 (2004). As explained in *In re George T.*, 33 Cal.4th 620, 93 P.3d 1007, 16 Cal.Rptr.3d 61, 69 (Cal. 2004), reviewing courts have a "constitutional responsibility that cannot be delegated to the trial of fact" and they must "make an independent constitutional judgment on the facts of the case." *See also*, *McCoy v. Hearst Corp*. 42 Cal.3d 835, 844 (1986).

Here, anti-SLAPP statutes involve constitutional rights of first amendment free speech and cases such as this one, which depend on their application, should be subject to *de novo* review.

II. THE UNCONTROVERTED EVIDENCE SHOWS THAT ALL OF APPELLANTS' STATEMENTS WERE MADE IN GOOD FAITH, AND ARE SUBJECT TO ANTI-SLAPP PROTECTION.

To be covered under Nevada's anti-SLAPP statute, the statement at issue must have been made in "good faith." NRS 41.650. "Good faith" is statutorily defined in part as a statement "which is truthful or is made without knowledge of its falsehood." NRS 41.637. As shown below, all of Appellants' statements were made in good faith and there is no evidence in Respondents' scant evidentiary record – a) a short "form" declaration from Willick,[2] b) computer screenshots of the statements,[3] an internet post in which Sanson asks for public help in dealing with Respondents' lawsuits,[4] and an online exchange with a third party in which Sanson states he believes his statements to be *true and encourages the reader to read the documents and judge for himself*[5] – that controverts this.

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[2] AA VII:1443: Willick Decl.
[3] *See e.g.*, AA VII:1465
[4] AA VII:1454
[5] AA III:1466-1467

A. Appellant's "Opinions" Fall Within the Definition of "Good Faith" and Are Entitled to Anti-SLAPP Protection.

Two of the five statements at issue in this case constitute Appellants' constitutionally protected "opinions."[6]

Relying on the definition of "good faith" in NRS 41.637, Respondents make the absurd argument that Nevada's anti-SLAPP statute can only apply to and protect "facts," and not "opinions," because only facts can be proven to be true or be proven to have been made without knowledge of their falsity. (Ans. Br. at 39-46.)

First, an opinion by its very definition is "a view or judgment formed about something, not necessarily based on a fact or knowledge…" *Oxford Living Dictionaries*: https://en.oxforddictionaries.com/definition/opinion, as of April 7, 2018. Since "there is no such thing as a false idea" (*Pegasus v. Reno Newspapers, Inc*., 118 Nev. 706, 714, 57 P.3 82, 87 [Nev. 2002]), opinions necessarily fall

[6] 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" and VIPI's January 14, 2017 statement on the *Holyoak* case which is a mix of opinion and true statements of fact (the underlined portions are opinion, the rest are true facts): "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 [sic] 100,000 in legal bills. Then he pressured his client into allowing him to continue with the appeal." (AA II:327-335.)

within the statutory definition of "good faith" since they by definition are *made without knowledge of their falsity*.

Second, it is undisputable that opinions are part of protected free speech rights. "Statements of opinion generally are not actionable." *Open Source Sec., Inc. v. Perens* (N.D. Cal., 2017), *quoting*, *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co*. 173 F.3d 725, 730-31 (9th Cir. 1999). *See also*, *Pegasus v. Reno Newspapers, Inc*., 118 Nev. 706, 57 P.3d 82 (Nev. 2002). As the U.S. Supreme Court stated in *Milkovitch v. Lorain Journal Co*., 497 U.S. 1, 20, 21, 110 S. Ct. 2695 (1990), a statement "will receive full constitutional protection" if it is not "provably false . . . Loose, figurative, or hyperbolic language' is protected by the First Amendment as it cannot reasonably be interpreted as stating actual, provable facts." "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Pegasus*, *supra*, 57 P.3d 87.

Respondents' proposed (mis)reading of the statute would essentially *obliterate protections for this most basic of constitutionally protected free speech*, gutting the very purpose of anti-SLAPP laws – i.e. to protect vexatious litigation from stifling free speech about a matter of public interest. *Vess v. Ciba-Geigy Corp*., 317 F.3d 1097, 1109 (9th Cir. 2003).

This surely is not a reasonable interpretation of Nevada's anti-SLAPP statute.

B. Appellant's Factual Statements Were Also Made in Good Faith; *No Evidence* Controverts This.

Three of the statements in this case involved statements of facts, which Appellant's evidence showed were made in good faith as they were either true or substantially true, or were in any event made without knowledge of their falsity. Again, there is no evidence in the record to controvert this.

Appellants' 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 Willick Law Group" involved a true statement of fact. Willick admitted the truth of the statement in his online letter to Sanson stating "[y]ou …apparently could not come up with anything to criticize, so you decided to publicize the long-past personal problems of one of my employees,"[7] Appellants hyperlinked the statement to a public online consumer review indicating that Richard Crane was working for the firm,[8] and Appellants hyperlinked the statement to the Supreme Court's opinion refusing to reinstate Mr. Crane to the practice of law based on his sexual misconduct.[9]

[7] AA I:196, last para.
[8] AA II:303
[9] AA I:304

The statement "[a]ttorney Marshall Willick loses his appeal to the Nevada Supreme Court" was also true or substantially true. Willick spent about half of his Answering Brief in the *Holyoak* case trying to overturn Supreme Court precedent on a pension survivor benefits issue,[10] and the Supreme Court refused to overturn that precedent.[11]

The statement "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 of Virginia signed by US District Judge Norman K. Moon" was a statement of fact that was unintentionally ambiguous due to its inadvertent lack of commas.[12] The statement was hyperlinked to the relevant court document, and was made in good faith without knowledge of its falsity at the time it was made.[13] When the ambiguity was discovered just a few days later, Sanson attempted to clarify the statement and redistribute it in all the same channels as the original post along with the hyperlinked source documents.[14]

The truth of the statements, the fact that the statements were all hyperlinked to source materials, along with Sanson's declaration that all of his statements were

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[10] AA II:403-419
[11] AA II:329, fn. 2.
[12] Sanson Decl., AA I at 85:25-86:8
[13] Sanson Decl., AA I at 87:3-7
[14] AA I at 86:5-8

made in good faith and without knowledge of the falsity of any of the statements, along with his efforts to fix the one statement that was inadvertently ambiguous, all make an evidentiary showing of "good faith." It should be emphasized that "good faith" does not even require the statements to be true – it simply requires that the statements be made *without knowledge of their falsity at the time they were made*. NRS 41.637(4).

Despite Respondents' unsupported condemnation of Appellants, nothing in their scant evidentiary record controverts Appellants' evidence.

III. EACH OF THE STATEMENTS INVOLVE A MATTER OF "PUBLIC INTEREST."

A. "Public Interest" is Broadly Construed.

Nevada's anti-SLAPP statute, like that of California's, does not define the term "public interest." NRS 41.635 et seq.; *Shapiro v. Welt*, *supra*, 389 P.3d 262, 268.

However, California courts have held that the term "public interest" should be broadly construed. In *Nygård, Inc. v. Uusi–Kerttula*, 159 Cal.App.4th 1027, 1039, 72 Cal.Rptr.3d 210 (2008), the court held that "public interest" is broadly construed "to safeguard the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Similarly, in *Dunn v. City of Escondido,* Adv. Op. Page 7, (S.D. Cal. 2018), quoting *Sarver v. Chartier*, 813 F.3d 891, 901 (9th Cir. 2016), the federal District Court explained that "[the Ninth

Circuit has] 'construe[d] "public issue or public interest" ... broadly in light of the statute's stated purpose to encourage participation in matters of public importance or consequence…" The *Dunn* court went on to explain that "the activity of the defendant need not involve questions of civic concern; **social or even low-brow topics may suffice.**" *Id.*; *emphasis added.*

In *Du Charme v. International Brotherhood of Electrical Workers*, 110 Cal.App.4th 107, 115, 1 Cal.Rptr.3d 501, 507 (Cal.App. 2003) , cited by Respondents, the Court held that "[t]he definition of `public interest' within the meaning of the anti-SLAPP statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community. . ." *Emphasis added*. The court stated that "[a]lthough matters of public interest include legislative and governmental activities, they may also include activities that involve private persons and entities, especially when a large, powerful organization may impact the lives of many individuals." *Id*. ; *emphasis added.*

Such is the case here. By taking public stances on various controversial matters, Respondents have become one of the most visible and vocal family law firm in Nevada. Their lobbying and litigation activity on divorce law (including on

federal law such as pensions and military benefits)[15] affects large groups of people and is necessarily of public interest.

B. "Public Interest" is Found in the Broad Subject Matter of the Statements, Not in Plaintiff's Individual Status.

Respondents argue that Appellants' statements are not of public interest because "the public is not interested in a private citizen's unrelenting disdain for an attorney." (Ans. Br. at 29.) Not only are Appellants not "private citizens" – they are a news outlet – but this misstates the proper inquiry for determining a topic of "public interest."

As the Ninth Circuit explained in *Doe v. Gangland Prods., Inc.*, 730 F.3d 946, 956 (9th Cir. 2013), "the proper inquiry is whether the broad topic of defendant's conduct, *not the plaintiff*, is connected to a public issue or an issue of public interest." (Emphasis added.) The court reviewed numerous applicable cases. For example, in *M.G. v. Time Warner, Inc.,* 89 Cal.App.4th 623, 626, 629, 107 Cal.Rptr.2d 504 (2001), the defendants had published an article about a little league coach molesting one of the kids on the team, but did so with an accompanying picture that included other teammates and coaches. The court rejected plaintiffs' efforts to characterize the issue as pertaining to their identities on the team, and instead looked at the "broad topic" and held that "the general

[15] AA III:1067 (letter to legislature); AA III:1089 (Minutes of legislative testimony); AA II:403-419 (*Holyoak* Answering Brief)

topic of child molestation in youth sports" was an issue of public interest. *Id.* Similarly, in *Terry v. Davis Community Church*, 131 Cal.App.4th 1534, 1538, 1547–48, 33 Cal.Rptr.3d 145 (2005) the court found that defendants' reports and meetings regarding an inappropriate relationship between plaintiffs and a girl in their youth group involved an issue of public interest under the anti-SLAPP statute. The court rejected plaintiffs' attempt to narrow the inquiry to whether there was public interest in "a private relationship between [the plaintiff husband] and the girl" (*Id.* 131 Cal.App.4th at 1547) and instead held that "the broad topic of the report and the meetings was the protection of children in church youth programs, which is an issue of public interest." *Id.* at 1548, 33 Cal.Rptr.3d 145. The *Doe v. Gangland* Court concluded:

> We believe the statutory language compels us to focus on the conduct of the defendants and to inquire whether that conduct furthered such defendants' exercise of their free speech rights concerning a matter of public interest. We find no requirement in the anti-SLAPP statute that the plaintiff's persona be a matter of public interest.

Supra, 730 F.3d at 956.

Here, the statement regarding Assembly Bill 150 pertains to the use of veterans' disability benefits to pay spousal support.[16] The statement pertaining to a

[16] AA I:5-6 (Complaint); AA I:204 (statement as it appeared online.)

federal judge's finding that Willick defamed an opposing party[17] pertains to the broad topic of over-zealous and unethical lawyering. The statement about Willick employing a sex offender in his family law office[18] goes to the issue of sex offenders having access to children *even at family law offices.* The statement regarding Willick's firm's charging over $100,000 in the *Holyoak* case[19] goes to the issue of attorney price gouging. The statement about Willick losing his appeal to the Supreme Court in the Holyoak case goes to price-gouging and survivor pension benefits.[20] All of these issues are topics of broad public concern.

Accordingly, Respondent's argument that there is no public interest in Respondents is wholly irrelevant.

C. The Statements Meet The *Piping Rock* Criteria Adopted in *Shapiro*.

Each of the statements fall within the "guiding principles" of the *Piping Rock Partners* case, supra, 946 F.Supp.2d at 968, adopted by this Court in *Shapiro v. Welt, supra* 389 P.3d 268.

Specifically, none of the statements pertain to issues that "equate with mere curiosity;" all of them "concern a substantial number of people" (litigants, disabled veterans, clients, those who may be subject to overzealous lawyering, price gouging, etc.); all have "*some degree* of closeness between the challenged

[17] AA I:6-8: Complaint, ¶¶26-29
[18] AA I:8: Complaint, ¶¶ 30-31
[19] AA I:8, Complaint 32-33

statements and the asserted public interest" (they directly relate to the particular topic of public concern and hyperlink to relevant documents); the statements "focus" on the public interest and are not simply trying to "gather ammunition for another round of private controversy" – indeed the statements focus on the activity that is the wrongdoing, and there is no "private" controversy as they all involve public proceedings; and finally, none of the statements are an attempt to "turn otherwise private information into a matter of public interest simply by communicating it to a large number of people" since the matters were already part of public discourse and records.

Moreover, this Court has already held that the performance and behavior of attorneys and judges in open court is of great public concern. *See, e.g., Lubin v. Kunin*, 117 Nev. 107, 114 (Nev. 2001) ("Nevada citizens have a right to know what transpires in public and official legal proceedings"); *Davis v. Avvo, Inc.*, No. C11-1571RSM, 2012 WL 1067640, at *3 (W.D. Wash. Mar. 28, 2012) ("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"); *Standing Comm. on Discipline of U.S. Dist. Court for S. Dist. of California v. Ross*, 735 F.2d 1168, 1170 (9th Cir.1984) (lawyering is "a profession imbued with the public interest and trust.")

[20] AA I:9-10: Complaint, ¶¶34-35.

Likewise, information that can be construed as a warning to potential consumers has also been held to be of public concern, even if, *arguendo*, they did not directly call for the reader to take action. In *Wilbanks v. Wolk*, 17 Cal.Rptr.3d 497 (Cal.App. 2004), the case erroneously relied on by Respondents, the court *granted* anti-SLAPP protection to the defendant finding that the statements served as a "warning not to use plaintiffs' services" and "[i]n the context of information ostensibly provided to aid consumers choosing among brokers" and "therefore, were directly connected to an issue of public concern." *Id*. 121 Cal.App.4 at 901; 17 Cal.Rptr. 3d at 508; *see also, Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 262 (9th Cir. 2013) "statements warning consumers of fraudulent or deceptive business practices constitute a topic of widespread public interest, so long as they are provided in the context of information helpful to consumers."

Here, statements such as: "Would 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," which hyperlinked to a Supreme Court disciplinary Order and evidence that the sex offender continued to work at the provided information and documents helpful to consumers and should be viewed as a "consumer warning." Similarly, statements pertaining to Willick's views on veteran disability benefits, his price gouging tactics, overzealous litigation tactics,

misrepresentations to the court, all provide helpful information and serve as warnings to potential litigants.

The cases cited in Respondent's *own brief* (at pp. 37-38) show that there is no requirement that VIPI expressly state "don't use Willick's law firm." *See e.g.*, *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc*. (statements were "intended" to warn consumers not to do business with plaintiffs because of their business practices); *Chaker v. Mateo*, 147 Cal.Rptr.3d 496, 502 (Cal.App. 2012) (statements about plaintiff's "character and business practices . . . were intended to serve as a warning to consumers about his trustworthiness.") Accordingly, these statements are by their very nature "of public interest."

Moreover, arguments that these are not consumer protection statements because they are allegedly false, insincere or inaccurate have no legal bearing on the issue and should be disregarded. *Piping Rock Partners*, *supra*, 946 F.Supp.2d at 969 ("it makes no difference, for purposes of the public interest requirement, that the warning was not sincere accurate or truthful.")

D. "Public Interest" Does Not Mean "Newsworthy."

Respondents erroneously argue that the statements that pertain to Willick's past acts, e.g., his 2014 legislative testimony against veteran rights, his employment of a former lawyer who was disbarred for sexual misconduct, his failure to overturn Supreme Court precedent on survivor pension benefits, are no

longer of "public interest" because they relate to acts that happened in the past – i.e., they are no longer "newsworthy."

Yet, the issue of timeliness only comes into play, if at all, when the statement is not of public interest in the first instance. As explained in *Du Charme v. International Brotherhood of Electrical Workers*, 110 Cal.App.4th 107, 119, 1 Cal.Rptr.3d 501, 510 (Cal.App. 2003), *relied on by Respondents*:

> We therefore hold that in order to satisfy the public issue/issue of public interest requirement of subdivisions (e)(3) and (4) of the anti-SLAPP statute, in cases where the issue is not of interest to the public at large, but rather to a limited, but definable portion of the public (a private group, organization, or community), the constitutionally protected activity must, at a minimum, occur in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging participation in matters of public significance.

Emphasis added. That is not the case here.

The broad subject matter of the speech – attorney price gouging, military pensions and disability pay, over-zealous lawyering, etc. are issues of broad public concern. Additionally, this Court and others have already held that reporting on judicial proceedings and attorney conduct are matters of public interest. *See, e.g.*, *Lubin v. Kunin*, 117 Nev. 107, 114 (Nev. 2001); *Howard v. State*, 128 Nev.Adv.Op. 67, 291 P.3d 137, 141 (2012); *Davis v. Avvo, Inc.*, No. C11-1571RSM, 2012 WL 1067640, at *3 (W.D. Wash. Mar. 28, 2012); *Standing*

Comm. on Discipline of U.S. Dist. Court for S. Dist. of California v. Ross, 735 F.2d 1168, 1170 (9th Cir.1984).

Moreover, *Du Charme* is consistent with the U.S. Supreme Court's holding in *Snyder v. Phelps*, 562 U.S. 443, 453, 131 S.Ct.1207 (2011) 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." *Citations omitted; Emphasis added.*

Respondent's argument that this Court should ignore federal free speech law when applying Nevada's anti-SLAPP statutes because it purportedly did so in *Delucchi v. Songer*, 133 Nev. __, 396 P.3d 826, 832-833 (2017) is a misreading of the case. (Ans. Br. at 33) In *Delucchi*, *supra*, 396 P.3d at 832, this Court found "persuasive and consistent with our own anti-SLAPP case law" the holding in *City of Montebello v. Vasquez*, 1 Cal.5th 409, 376P.d 624 (2016) that "[t]he Legislature *did not limit* the scope of the anti-SLAPP statute to activity protected by the constitutional rights of speech and petition." *Emphasis added*.

Indeed, Nevada's anti-SLAPP statute necessarily involves considerations of free speech principles since NRS 41.650 expressly states that it protects a "good faith communication in furtherance of the right to petition **or the right to free speech**…." (Emphasis added.) *See also*, *Dunn v. City of Escondido*, Adv. Op., p.

6 (S.D. Cal. 2018) (California's anti-SLAPP statute applies "because [Plaintiff's] claim arises from acts in furtherance of the [Defendant's] free speech rights").

Accordingly, Respondents' "timeliness" argument fails on all fronts.

E. It is Undisputed that the Statements Were Made in a Place Open to the Public or In a Public Forum.

Respondents do not dispute that the statements were made in a place open to the public or in a public forum.

Accordingly, Appellants have met their burden of proof on the First Prong of Nevada's anti-SLAPP motion – showing by a preponderance of the evidence that the claim is based upon a good faith communication in furtherance of the right …to free speech in direct connection with an issue of public concern (NRS 41.660 (3)(a)) – and the burden now shifts to Respondents under the Second Prong of the anti-SLAPP statute.

IV. RESPONDENTS WHOLLY FAILED TO CARRY THEIR BURDEN OF PROOF UNDER THE SECOND PRONG.

Under the Second Prong of Nevada's anti-SLAPP statute, Respondents must demonstrate "with prima facie evidence a probability of prevailing on the claim." NRS 41.660(3)(b). This means that the complaint must be both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Jarrow Formulas Inc. v. LaMarche*, 31 Cal.4th 728, 740-741; *emphasis added*. The court "should

grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support of the claim." *Wilson v. Parker, Covert & Chidester*, 28 Cal.4th 811, 821 (2002); *emphasis added*.

Respondents have failed to meet this burden. Their claims for defamation, business disparagement, false light and conspiracy are barred as a matter of law on the facts presented, and none of the scant "evidence" submitted in opposition to Appellants' anti-SLAPP motion[21] establishes a prima facie case of prevailing on these claims.

A. The Absolute Fair Reporting Privilege Applies.

Respondents cannot overcome that, as a matter of law, at least three of the statements at issue (and arguably four), are subject to the absolute Fair Reporting Privilege which would bar their claims for defamation, business disparagement and false light. *Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212, 984 P.2d 164, 166 (1999).

After the filing of Appellant's Opening Brief, this Court issued its decision in *Adelson v. Harris*, Adv. Op. at 6, 402 P.3d 665 (Nev. 2017) in which it considered "as an issue of first impression, whether a hyperlink in an Internet

[21] AA III: 1446-1476

publication that provides specific attribution to a document protected by the fair report privilege qualifies as a protected report for purposes of that privilege."

In *Adelson*, this Court adopted the test in the leading case of *Dameron v. Wash. Magazine, Inc*., 779 F.2d 736, 739 (D.C. Cir. 1985), which articulated the test as follows:

> The privilege's underlying purpose—encouraging the dissemination of fair and accurate reports—also suggests a natural limit to its application. . . . The privilege is . . . unavailable where the report is written in such a manner that the average reader would be unlikely to understand the article (or the pertinent section thereof) to be a report on or summary of an official document or proceeding. **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 or proceedings.**
> …

Drawing on this rule, this Court in *Adelson* held:

> The *Dameron* test reflects Nevada's policy that citizens have a right to a fair account of what occurs during official proceedings. *See*, *e.g*., *Lubin*, 117 Nev. at 114, 17 P.3d at 427. By focusing on the average reader and specific attributions or overall context, the test also properly asks whether an average Nevada citizen can understand that the report is summarizing an official document or proceedings. For these reasons, we adopt the *Dameron* test . . .
>
> Under Dameron, specific attributions may sufficiently reference underlying sources to bring a document within the fair report privilege, even if the overall context fails to do so. (779 F.2d at 739). <u>When a specific attribution makes it apparent to an average reader that a document</u>

> draws from judicial proceedings, it will be immune from civil liability.

Adelson, supra, at 6-7; *emphasis added.*

Here, the two statements pertaining to Willick's actions in the *Holyoak* divorce case, which were clearly hyperlinked to copies of the applicable judicial opinion/documents,[22] the statement regarding Willick firm's employment of a sex offender in its office which was clearly hyperlinked to this Court's Order and a Review Journal article and online comment,[23] and arguably (see below) the ambiguous statement pertaining to Willick's defamation of an opposing party, which was linked to the Virginia Supreme Court's decision on the issue,[24] should all be afforded protection under the Fair Reporting Privilege because they are fair and accurate or substantially accurate and their specific attributions make it apparent to an average reader that the statement draws from judicial proceedings.

As explained by this Court in *Moreira-Brown v. Las Vegas Review Journal, Inc.* (D. Nev. 2017), so as long as the "alleged defamatory statements were a fair and accurate report of a judicial proceeding, they are absolutely privileged, and the material recited will not support a defamation suit even if the statements were made maliciously and with knowledge of their falsity." *Emphasis added*.

[22] AA II:312-324, AA II: 326-336
[23] AA II:302-310
[24] AA II:269-290

The only one of the above statements that could have been read unfairly is the one that inadvertently omitted the commas. Yet even that statement was attempted to be promptly corrected and republished with its original hyperlinks to the relevant court proceeding.

B. No Opinions or True Statements of Fact Can Support a Claim for Defamation or Business Disparagement.

The two statements that constitute non-actionable "opinion," and the three statements that contain true or substantially true statements of fact cannot, *as a matter of law*, serve as a basis for Respondents' defamation or business disparagement claims.[25] *Milkovitch v. Lorain Journal Co*., 497 U.S. 1, 20, 110 S. Ct. 2695 (1990) (opinions); *Pegasus v. Reno Newspapers, Inc*., 118 Nev. 706, 714, 57 P.3d 82, 87 (2002) (true facts).

[25] The statements that constitute non-actionable opinions are: 1) "[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;" and 2) statement that Willick's services in the Holyoak case were not worth $100,000, and that he "scammed" his client and the court.

The statements that constitute true or substantially true statements of fact are: 1) the portion of VIPI's January 14, 2017 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 in the case; 2) the 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;" and 3) VIPI's statement pertaining to the *Holyoak* divorce case "[a]ttorney Marshall [sic] Willick loses his appeal to the Nevada Supreme Court."

Likewise, the single statement that was inadvertently ambiguous due to a lack of commas should not serve as basis for defamation or business disparagement because it was hyperlinked to its source materials from which consumers could clearly read the basis for the statement. *Jankovic v. Inter'l Crisis Grp*., 429 F.Supp.2d 165, 177 n.8 (D.D.C. 2006). Accordingly, all the claims fail since they are all based on these statements five statements.

C. No Malice Has Been Shown, Let Alone by Clear and Convincing Evidence, to Support a Claim of Business Disparagement nor to Support a Claim of Defamation if Willick is Found to be a Public Figure.

To succeed on a claim of business disparagement, Respondents must show, with *clear and convincing evidence* that Appellants acted with malice in making each of the statements at issue. *Clark Cty. Sch. Dist. v. Virtual Ed. Software*, 125 Nev. 374, 387, 213 P.3d 496, 505 (2009). No evidence whatsoever has been submitted to support this.[26]

Willick would similarly have to prove malice by clear and convincing evidence to sustain a claim of defamation if he is found to be a public figure. *Chowdhry v. NLVH, Inc*., 109 Nev. 478, 483, 851 P.2d 459, 462 (1993).

Relying on *Bongiovi v. Sullivan*, 122 Nev. 556, 138 P.3d 433 (2006), Willick argues that he cannot be a "public figure" nor a "limited public figure" because he is simply an accomplished family law lawyer in Nevada. (Ans. Br. at

47.) Yet, while the plaintiff in *Bongiovi* was not found to be a public figure, the Court reiterated the rule that to be a limited public figure the plaintiff must "voluntarily come to the forefront of a national or local debate concerning that medical issue or have 'affirmatively step[ped] outside of their private realms of practice to attract public attention.' The Court explained that:

> Coming to the forefront of a debate has included behavior such as: writing letters to politicians and hiring a private lobbyist and public relations agent, authoring articles in national magazines and appearing on national television shows, testifying before an FDA panel, and 'writing [letters] to newspapers, professional journals and organizations, fellow physicians, and government officials' regarding an issue. (Citations omitted.)

Significantly, Willick writes to and testifies before the Nevada legislature on family law issues.[27] He Chaired the Legislative Committee of the national American Academy of Matrimonial Lawyers.[28] He Chaired the Military Pension/Benefits Committee of the national American Bar Association,[29] which is a topic to which some of the statements herein pertain. He lectures in Montana, Alaska, Colorado, Texas, California, D.C. and other places on the issue of the splitting of military benefits in divorce cases,[30] again, one of the issues to which

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[26] See AA III:1446-1476.
[27] AA III:1067 (letter); AA III:1089 (Minutes of testimony)
[28] AA III:1261
[29] AA III:1262
[30] AA III:1264

the some of the statements herein pertain. Indeed, his 11 page resume[31] shows an extensive and intentional interjection into issues of public debate through legislative testimony, chairing legislative committees of national organizations, making national and local media appearances, authoring national and local articles and books, etc. *Frankly, it is difficult to imagine what more Willick can do to become a public figure in the area of family law and in the area of pensions and military benefits in divorces.*

D. No Reckless Disregard for the Truth Has Been Shown in order to Support a Claim of False Light.

To maintain a claim for false light invasion of privacy, Respondents must show that Sanson acted with "reckless disregard" when publishing the statements – i.e., that he "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). No evidence of any kind was submitted on this issue in any of the 30 pages of exhibits that Respondent submitted in opposition to Appellants' anti-SLAPP motion.[32]

E. No Consequential or Special Damages Have Been Shown.

Proof of special damages is an essential element of a claim of business disparagement. *Clark Cty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev.

[31] AA III:1259-1269
[32] AA III:1446-1476.

374, 386, 213 P.3d 496, 501 (Nev. 2009). No special damages whatsoever have been shown.

In fact, other than the allegation that they incurred attorneys' fees and costs in filing this SLAPP action, Respondents failed to allege, let alone prove, any damages whatsoever.

F. Documents Pertaining to Other Cases Were All Part of the Record in this Case, Except for the Documents Pertaining to the *Ansell* Divorce Case.

The documents submitted to this Court which pertain to other cases into which Respondents dragged Appellants were all part of the lower court's record in this action, with the exception of the documents pertaining to the *Ansell* divorce case which came after the this case was stayed. As such, it was not necessary for appellants to confer with Respondents before submitting them as part of the record, nor asking the Court to take judicial notice thereof as they were already part of a Request for Judicial Notice in the lower court.

Noteably, Respondents likewise submit documents in the Ansell case that were not part of the underlying record in this case. Appellants have no objection to this Court disregarding all of the Ansell related proceedings as they are not directly germane to this case other than to show the lengths to which Respondents have gone to stifle Appellants' free speech.

/ / /

G. Remanding The Case to The District Court to Determine Whether Respondents Have Met Their Burden of Proof Under the Second Prong Would Be a Waste of Judicial Resources and Undercut the Purpose of the Anti-SLAPP Statute.

Respondents' request that this Court remand the case to the District Court to determine whether they have met their burden of proof on the Second Prong of the anti-SLAPP statute (Ans. Br. at 50-53) would lead to a colossal waste of resources and would undermine the very purpose of the anti-SLAPP statute.

This Court has authority to review these proceedings de novo. If the case is remanded to the District Court, it will simply end up back before this Court regardless of which side is victorious. Appellants have already spent considerable resources defending this action and other actions and proceedings filed by the Respondents over the past 14 months trying to stifle their speech. Appellants pray that this Court will exercise its authority to finally put an end to this action, and to remand the case solely to grant attorney's fees, costs and statutory damages to Appellants.

It should also be noted that anti-SLAPP is not an all or nothing proposition. While Appellants do not believe it is warranted to do so, this Court can strike all or some of the statements from the case, and some even if not all of the causes of action. *Baral v. Schnitt*, 1 Cal.5th 376, 376 P.3d 604, 614-615 (2016); *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1019-1020 (2001) (defendant entitled to fees and costs where five of nine causes of action were

dismissed); *City of Cotati v. Cashman* 29 Cal.4th 69, 78, 124 Cal.Rptr.2d 519, 52 P.3d 695 (2002) (parts of a claim dismissed).

However, once this Court determines that a cause of action is a SLAPP, there is no right to "leave to amend," because the anti-SLAPP motion goes beyond the pleadings and puts an immediate end to claims that chill first amendment activity. *Simmons v. Allstate Ins. Co*., 92 Cal.App.4th 1068, 1073-1074, (2001). Consequently, any attempted amendment of dismissed claims, including in the First Amended Complaint that Respondents filed on April 3, 2017 – the same day as Appellants' Notice of Appeal – would be dismissed with prejudice as no amendment of these claims would be permitted.

V. 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

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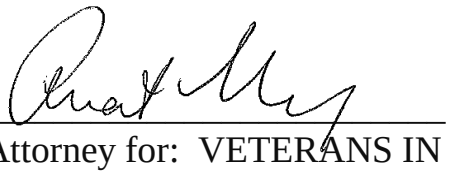
/ / /

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 statutory damages of $10,000 to each Appellant pursuant to NRS 41.670(1)(b).

Respectfully submitted on this 9th day of April, 2018,

By: 

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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 9th day of April, 2018.

By: _____

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NRAP 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)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed half the type volume specified for an opening brief (i.e., 7,000 words). This brief is 6,954 words in length.

3. Finally, I certify that I have read this reply, 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 9th day of April, 2018,

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' REPLY 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 9th day of April, 2018, in Las Vegas, NV