IN THE SUPREME COURT OF THE STATE OF NEVADA

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JENNIFER V. ABRAMS; AND THE ABRAMS & MAYO LAW FIRM, Appellant, vs. STEVE W. SANSON; VETERANS IN POLITICS INTERNATIONAL, INC; LOUIS C. SCHNEIDER; AND LAW OFFICES OF LOUIS C. SCHNEIDER, LLC, Respondent.	S.C. NO. 73839/75834 D.C. NO: A-17-749318-C

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record 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. In the course of these proceedings leading up to this appeal, Appellant has been represented by the following attorneys:

a. Marshal S. Willick, Esq., WILLICK LAW GROUP, attorney of record for Appellant/Plaintiff.

b. Dennis L. Kennedy, Esq., and Joshua P. Gilmore, Esq., BAILEY KENNEDY, attorney of record for Appellant/Plaintiff.

There are no corporations, entities, or publicly-held companies that own 10% or more of Plaintiff's stock, or business interests.

DATED this ____ day of _____, 2018.

Respectfully Submitted By:
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ROUTING STATEMENT

This case is presumptively assigned to the Court of Appeals per NRAP 17(b)(5). However, Appellant believes that this matter should remain with the Nevada Supreme Court per NRAP 17(a)(13)&(14) as this Court's existing jurisprudence in the areas of defamation and anti-SLAPP law has been inconsistently applied in the district courts, this decision touches both constitutional and common law concerns, and a related case (No. 72778) has been retained by this Court.

STATEMENT OF THE ISSUES

1. Whether the anti-SLAPP statute is intended to protect a defendant who conspires with another defendant to willfully engage in an out-of-court smear campaign designed to extort concessions in a civil case.
2. Whether Respondents met their initial burden of proof, pursuant to NRS 41.660(3)(a), for each cause of action at issue in Appellants' First Amended Complaint, including:
    a. Whether Respondents demonstrated, by a preponderance of the evidence, that they were sued for making communications that were

"truthful or [were] made without knowledge of [their] falsehood" (NRS 41.637(4));

b. Whether Respondents demonstrated, by a preponderance of the evidence, that they were sued for making communications "in direct connection with an issue of public interest" (*id.*);

c. Whether Respondents demonstrated, by a preponderance of the evidence, that they were sued for making communications "in a place open to the public or in a public forum" (*id.*);

3. Assuming (*arguendo*) that Respondents met their burden, whether Appellants demonstrated, with *prima facie* evidence, a probability of prevailing on at least one of their claims (NRS 41.660(3)(b)); and

4. Whether Appellants should have been permitted to conduct limited discovery prior to any decision being made on Respondents' anti-SLAPP motions (NRS 41.660(4)).

JURISDICTIONAL STATEMENT

As the trial court of general jurisdiction, the district court in Clark County had original jurisdiction to hear Appellants' First Amended Complaint for Damages.

This Court is the appellate court for the district courts, and has subject matter jurisdiction to review the final decisions of those courts. Jurisdiction in this Court is pursuant to NRAP 3A(b)(1), under which an appeal may be taken from a final judgment, decree, or order entered in an action or proceedings in a district court.

STATEMENT OF CASE

This is an appeal from two orders granting Sanson's and Schneider's "anti-SLAPP" motions. The *Orders* were filed July 24, 2017, and April 24, 2018, Hon. Michelle Leavitt, District Court Judge, presiding in Dept. XII and Hon. Elizabeth Gonzalez, District Court Judge, presiding in Dept. XI, respectively. The *Orders* originated out of a hearing that took place on June 5, 2017, presided over by Judge Leavitt.[1]

[1] As detailed below, after the June 5, 2017, hearing, the Abrams parties filed a *Motion to Disqualify*, and the case was reassigned to the Senior Judge Department, so the April 24, 2018, order was entered by Chief Judge Elizabeth Gonzalez.

STATEMENT OF FACTS

I. INTRODUCTION

This is not a SLAPP[2] situation involving a large corporation attempting to cover up a whistleblower or a well-funded politician trying to silence a critic. This is a case involving a lawyer employing a defamer-for-hire to launch a relentless internet smear campaign against opposing counsel in a divorce case to try to extort the withdrawal of a sanctions motion filed against the lawyer.

The course of events was put into motion by Louis Schneider, an attorney who sought to get away with misbehavior in a private divorce case by way of out-of-court pressure tactics directed at his opposing counsel (Jennifer Abrams) and the district court judge presiding over the case (the Hon. Jennifer Elliott). Schneider engaged Steve Sanson and his *faux* organization, Veterans in Politics International ("VIPI"), mercenaries-for-hire who – as formally found as fact by one district court judge, and noted by several others – engage in *ex parte* communications with judges and pursue online defamation campaigns.

Schneider sought out Sanson's "manipulation, intimidation, and control" by way of direct judicial contact and through an on-line smear campaign against the

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[2] "Strategic Lawsuit Against Public Participation."

district court judge (Elliott) and opposing counsel (Abrams) to improperly influence the outcome of the then-pending divorce case, *Saiter v. Saiter*.[3]

Schneider sought both to apply extra-judicial pressure against attorney Abrams to cause her to drop a sanctions motion that her firm had filed against him and to discourage Judge Elliott from imposing sanctions against him for his misconduct. Schneider had brought Sanson into Judge Elliott's courtroom on another case before bringing Sanson into the *Saiter* case,[4] and Sanson was seen by two other family court judges "getting into it" with Judge Elliott in the back hallway just weeks prior to the *Saiter* hearing detailed below.

Sanson admits publicly on his social media pages that he is hired to do others' "dirty work so they can remain nameless,"[5] operating under cover of the claim that divorce and custody matters are adjudicated in a "taxpayer's courtroom" such that he has free reign to publish whatever false and defamatory allegations he wishes against

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[3] That case is the subject of a pending writ petition before this Court, No. 76772.

[4] V AA 772, 693.

[5] *See* II AA 314; VIII AA 1497.

any litigant or private attorney, and is free to contact judges about pending cases outside of court as he sees fit.[6]

In the context of the defamatory statements at issue, no anti-SLAPP analysis should be reached at all, and if there was any doubt as to the underlying motives behind the wrongful acts of Schneider and Sanson, limited discovery should have been ordered – as required by statute – prior to any decision being made on anti-SLAPP grounds.

If an anti-SLAPP analysis *was* reached, the question boils down to whether Respondents were entitled to the dismissal of the Abrams Parties' *First Amended Complaint for Damages* under the anti-SLAPP statute in light of the defamatory statements made about and against the Abrams Parties (a private attorney and law firm) in a private divorce case. The Abrams Parties did *not* sue Respondents for engaging in statutorily-protected speech, and the claims filed had at least "minimal merit."

Because Respondents are not entitled to relief under the anti-SLAPP statute, this Court should reverse and remand with instructions for the district court to enter an order denying Respondents' anti-SLAPP motions.

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[6] *See* II AA 222; III AA 418-419; VII AA 1276; VIII 1486-1488, 1490, 1526.

II. PRE-COMPLAINT FACTUAL HISTORY

In the *Saiter* divorce case,[7] attorney Abrams represented the husband, and attorney Schneider represented the wife.[8] The Abrams firm documented assorted improprieties by Schneider in a *Motion for Sanctions and Attorney's Fees* ("Sanctions Motion") alleging that he was responsible for delaying the resolution of the case and fueling unnecessary litigation for improper personal motives through billing and discovery improprieties, claiming to continue representing his client after being fired, obstructing resolution of the case against his client's wishes, and other inappropriate behavior including "sexually suggestive conduct" toward his client (Tina).[9]

Schneider responded with a written e-mail threat to the Abrams office that "[i]f your firm does not withdraw that motion, I will oppose it and take additional action beyond the opposition."[10]

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[7] No. D-15-521372-D.

[8] I AA 8.

[9] The full set of *Saiter* filings are in the record of Case No. 76772 (*Saiter*), including the Sanctions Motion at III App. 470-489; *see* I AA 183; IV AA 541 (Judge Elliott striking as "inappropriate and irrelevant" an affidavit from another of Schneider's former clients).

[10] V AA 745, 747.

At the beginning of the hearing of September 29, 2016, Judge Elliott was mistaken about many "facts."[11] Judge Elliott never revealed the source of her misinformation, which was not through any in-court proceeding or any filing, but shortly before the hearing Judge Elliott and Sanson were seen by other judges in the back hallway "getting into it."[12]

Due to Judge Elliott's misinformation, she opened the hearing not even addressing Schneider's improprieties (which were the subject of the hearing) but instead by accusing attorney Abrams and her client of misrepresenting financial information in court documents and referred to Abrams as being "unethical" while restating Schneider's position.[13] A lengthy exchange followed between Abrams and Judge Elliott, during which Abrams refuted the incorrect statements initially made by Judge Elliott point by point, and addressed misrepresentations by Schneider.[14]

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[11] The entire *Saiter* hearing transcript was filed by Sanson's counsel in this case. IV AA 539 - 655 (filed under seal).

[12] VII AA 1272; VIII AA 1487; IX AA 1700. That hallway discussion was never denied, or explained.

[13] IV AA 556-561.

[14] IV AA 561-638.

More than an hour later, after hearing from Abrams, Judge Elliott acknowledged that she had been mistaken and retracted her allegations against Abrams and her client.[15]

In light of the facts revealed during the hearing, the Sanction Motion against Schneider remained "pending." Abrams was asked to file a memorandum of fees and costs in support of her fee request against Schneider, who was ordered to produce his billing statements to date so that his representations and fee claims up to that date could be evaluated.

By the end of the hearing of September 29, the Abrams firm did not withdraw the Sanctions Motion and had requested additional fees. Schneider followed through on his e-mailed threat by ordering a copy of the video of the *closed* hearing in the divorce case (he was the only person to request the hearing video),[16] and providing it to Sanson to post on various internet channels along with commentary attacking the integrity of Abrams and her law firm.[17]

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[15] IV AA 621, 624-628; *see* III AA 418 (Judge Elliott's email).

[16] V AA 756, 781.

[17] I AA 85, 90; *see* I AA 129-134, 143-144, 153; III AA 413 - 414, 450, 458.

The Sanson commentary mentioned nothing of Schneider's improprieties that were the reason for that day's hearing or the judge being misinformed. Instead, knowing that people would not watch the entire lengthy video, Sanson directed viewers solely to the portion of the video where Judge Elliott made the unfounded preliminary remarks criticizing Abrams' ethics without mentioning the judge's retraction of those remarks after learning the actual facts.[18]

Neither Brandon Saiter (Abrams' client) nor Tina Saiter (Schneider's client) wanted their family's privacy invaded or videos from their private divorce posted online; throughout the smear campaign described below, the privacy of Brandon and Tina was invaded, their personal information was widely disseminated, and the emotional well-being of everyone in their family (including the minor children) was compromised.[19]

When Tina questioned Schneider about the video,[20] he sent her an email feigning that he did not know how it got posted and pretending that he was "not

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[18] I AA 127-131.

[19] III AA 477-480 (motion); II AA 360-361 (findings).

[20] VII AA 1259.

happy about it either" which Tina then copied to her husband Brandon.[21] Schneider then sent an email to Abrams saying that he was unsure why he was being copied with correspondence because "I don't want anything to do with this."[22]

Schneider, without acknowledging that he had put these events into motion, stipulated with Abrams to seal the *Saiter* divorce case and agreed that all internet postings of the video should be removed.[23] However, nothing in the record indicates that he ever actually did anything to remove from the internet the video that he gave to Sanson.

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[21] VII AA 1258.

[22] Ms. McLetchie apparently blacked out Schneider's response when she re-filed that page of the email string. III AA 416. The original was filed in Case No. 72778 (*Willick*) at I AA 89-90.

[23] The October 6, 2016, *Order Prohibiting Dissemination of Case Material* in the *Saiter* case recites on its face that it was stipulated to by both sides. V AA 719-720; see VII AA 1258 (Schneider confirming his stipulation to seal). The *Order* was widely discussed throughout all 3 cases (*Abrams*, *Willick*, and *Saiter*).

III. SANSON AND VIPI

Sanson claims to run an "advocacy" group (VIPI) but actually runs an internet-based extortion and defamation service intended to alter political races and judicial proceedings – essentially a modern day "protection racket."[24] Sanson advertises it as such, posting that he and his organization are available: "When people needed somone [*sic*] to get dirty so they can stay nameless, we do it without hesitation."[25]

While Sanson's later court filings denied being paid for the specific *purpose* of launching a smear campaign against Abrams[26] Sanson posted an advertisement for Schneider just when the defamation campaign began and admitted to having received payment from Schneider.[27]

Sanson has sworn that his organization is a "non-profit" from which he "takes no salary,"[28] but investigative reporters claim that it has not been any such thing for years and is actually "a for-profit organization" that is "Sanson's business" of which

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[24] II AA 284, 296; VIII AA 1624; *see* I AA 90-105.

[25] II AA 297, 314; V AA 848; VIII AA 1480, 1497.

[26] V AA 794; III AA 410.

[27] I AA 94, 187, 277-278.

[28] V AA 794. *See* VIII AA 1499 (letter from Internal Revenue Service indicating that it has no record of Sanson's organization having tax exempt status).

he is "president and owner," and in which judicial endorsements are part of his "business plan."[29] Newspaper reporters have been warning judges about Sanson's corruption for years.[30]

At least one district court judge has specifically found that Sanson's business is to actively attempt judicial corruption:

> [N]otwithstanding his self proclaimed faux cover of seeking to "expose injustice and corruption," Mr. Sanson's sole motivation for communicating with this Court was to intimidate and harass the Court. Mr. Sanson proudly proclaims that he has "declared war" on the Family Court. There is no doubt that the courts are under attack and that the entire judiciary of this great State of Nevada is on notice that, behind that false banner of "justice and corruption" is an individual and group who seek to manipulate, intimidate and control. The arsenal of weapons that Mr. Sanson utilizes include attempts to manipulate, intimidate and

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[29] Jane Ann Morrison, *Judges' ties with Sanson have courts in tight spot*, Las Vegas Review-Journal, January 21, 2018, at VII AA 1339-1343.

[30] *See, e.g., Judges want a VIP endorsement?*, Las Vegas Review-Journal, February 21, 2014, revealing Sanson's intertwining with now-disbarred former judge Steve Jones and now-deceased Lisa Willardson and their phony "Nevada Judicial Watch" group, and noting that "Nevada's judges should ask themselves whether they want the endorsement of a hack outfit that would partner with Jones and Willardson and all but accuse a sitting judge of being a communist." Posted at https://www.reviewjournal.com/uncategorized/judges-want-a-vip-endorsement. Even if these materials were not copied or referenced in the record of this case, this Court could, if it chose to, take judicial notice of readily confirmable common public knowledge, including what is reported in newspapers. *See, e.g., Mack v. Estate of Mack*, 125 Nev. 80, 206 P.3d 98 (2009) (stating that this Court has the power to take judicial notice of facts "capable of verification from a reliable source" whether asked to do so or not).

control the judicial process through off-the-record communications. This case has exposed the reality of his tactics.

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What should be frightening to this Court (and members of the Nevada judiciary in general) is that Mr. Sanson refused to acknowledge at the August 30, 2017 hearing that his communication with the Court about a pending case was inappropriate. Specifically, Mr. Sanson, through his counsel, suggested it was the Court's fault based on the earlier conversation cited above. This Court reiterates that it is inappropriate to communicate with a judicial officer off the record about a pending case - ***at <u>any</u> time and under <u>any</u> circumstances***. Mr. Sanson's attempts to deflect blame to the Court are appalling.

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Is there anything more corrupt than the influence Mr. Sanson sought to exert over the Court? And he proclaims that he seeks to expose corruption? Because this Court called him out on the inappropriateness of his communication and refused to kowtow and cower to his manipulation and control, Mr. Sanson predictably let the Court know that his wrath was coming out against the Court. This type of threat to any judicial officer strikes at the very core of the integrity of the judicial process. Moreover, such threatening behavior is an attempt to manipulate and control judicial officers if they do not succumb to Mr. Sanson's desired result.[31]

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[31] *See* VII AA 1243-1253, *Order of Recusal* entered by the Hon. Bryce Duckworth in *Irina Ansell v. Douglas Ansell*, filed on September 5, 2017, in case number D-15-521960-D (emphasis in original). Judge Duckworth's notation of Sanson's threat was spot on – Sanson's attacks against the judge started immediately after the ruling. *See, e.g.*, VII AA 1357; VII AA 1223-1226, 1231-1232.

IV. THE DEFAMATION CAMPAIGNS

Within days after Schneider gave him the video of the closed *Saiter* hearing of September 29, Sanson had posted the video on Youtube and emailed a link to the video to thousands of third parties not involved in the case.[32] An advertisement for Schneider's law office then appeared on Sanson's Facebook page.[33]

While the *Saiter* case continued, Sanson initiated a series of "smear campaigns" against Abrams via email blast, Youtube, numerous Facebook pages, Twitter accounts, Google+ accounts, and on various blogs and Facebook "groups," etc., re-posting the embedded *Saiter* hearing video again and again thereafter.[34]

For the entire time that the *Saiter* Sanctions Motion against Schneider remained pending (from October to December of 2016),[35] Sanson continued his online assault on the Abrams Parties' reputation and goodwill by posting at least three additional "articles" on VIPI's website and multiple videos on its YouTube Channel, "boosted"

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[32] *See, e.g.*, III AA 474-494.

[33] I AA 94, 187; III AA 482.

[34] *See, e.g.*, I AA 91-103.

[35] The *Saiter Decree of Divorce* was filed on December 28, 2016. *See* III App. 542-577 in Case 76772 (*Saiter*). The final order resolving pending motions and fee requests was entered months later.

to tens of thousands of recipients, each designed to deter current and prospective clients from retaining Abrams and her law firm.

The first wave of the campaign was the October 5, 2016 "Attack Article" which asserted that Abrams "attacked" a Clark County Family Court Judge in open court, that Abrams "crosses the line with a Clark County District Court Judge," and that Abrams' actions constituted unethical or unlawful conduct that must be reported to the Nevada State Bar. It quoted select portions from the beginning of the September 29 hearing video, but misrepresented the nature of the hearing by omitting any mention of the retractions of the statements by the judge and ignoring the Schneider improprieties that prompted the hearing in the first place.

By pointing viewers only to known falsehoods at the beginning of an hour and a half long video, the article falsely represents that Judge Elliott "found" Abrams to be "unethical" and that Abrams had permitted her client to mislead the Court. The Attack Article included a link to the hearing video, which identifies the parties to the divorce case and disclosed sensitive, personal, and financial information regarding Abrams' client. Details of Mr. Saiter's business practices were discussed at length in the hearing video.

The October 9, 2016 "Bully Article" falsely indicated that Abrams "bullied" Judge Elliott into issuing the *stipulated* order prohibiting further dissemination of the video of the September 29 hearing (the "Prohibition Order"); that Abrams engaged in "misbehavior" and was "disrespectful and obstructionist"; that Abrams' conduct was "embarrassing"; and that the Prohibition Order was "an attempt by Abrams to hide her behavior from the rest of the legal community and the public." The Bully Article also includes a link to the Attack Article, and identifies the divorce case by name and case number.

The November 6, 2016 "Seal-Happy Article" contains numerous false and misleading statements, including assertions that Abrams:

A. "[A]ppears to be 'seal happy' when it comes to trying to seal her cases";

B. Seals cases in contravention of "openness and transparency";

C. Seals cases "to protect her own reputation, rather than to serve a compelling client privacy or safety interest";

D. Engages in "judicial browbeating";

E. Obtained an order that "is specifically disallowed by law";

F. Obtained the Prohibition Order against the "general public" with "no opportunity for the public to be heard";

G. Obtained an "overbroad, unsubstantiated order to seal and hide the lawyer's actions"; and

H. Is an "over-zealous, disrespectful lawyer[] who obstruct[s] the judicial process and seek[s] to stop the public from having access to otherwise public documents."

Sanson further claimed, without evidence, that "after issuing our initial story about Abrams' behavior in the *Saiter* case, [VIPI was] contacted by judges, attorneys and litigants eager to share similar battle-worn experiences with Jennifer Abrams." The Seal-Happy Article contained links to the Attack Article and the Bully Article, and included a link to the September 29 hearing video. It also included a screenshot of "Family Case Records Search Results" from the district court's online search page, revealing the identities of many of Abrams' clients and the nature of their cases.

The November 14, 2016 "Acting Badly Article" consisted of another closed hearing video in the *Saiter* divorce case that was cross-posted on VIPI's website and its YouTube channel.

The November 16, 2016, "Deceives Article" discussed the allegedly "unlawful" behavior of the Hon. Rena Hughes, but closed by directing the reader to "an unrelated story we exposed how Judges and Lawyers seal cases to cover their own bad behaviors. This is definitely an example of that" with a link to the Seal-Happy Article.

During the months that Sanson's smear campaign against Abrams went on, Brandon Saiter attempted to protect his family's privacy without litigation.[36] After Sanson posted the hearing videos on YouTube, Brandon submitted two privacy complaints. As a result, YouTube removed the videos. Facebook and Constant Contact also removed the videos.

When Sanson learned that the videos had been removed, he announced that he would continue to post whatever he wanted and he re-posted two *Saiter* videos on an alternate internet service called "Vimeo."[37]

When Brandon learned that Sanson had re-posted his private divorce hearings on the internet, he submitted privacy complaints to Vimeo, which removed the videos. Undeterred, Sanson found yet another forum through which to violate the

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[36] III AA 491-494.

[37] III AA 493.

Saiters' privacy by posting the videos on a Russian website; Sanson publicly stated "I'll be damned if anyone can get that one down!"[38]

V. EXTORTION AND JUDICIAL INTIMIDATION

Immediately after the first smear campaign began,[39] Schneider approached an Abrams' associate attorney and told him that withdrawing the Sanction Motion would "make all this go away."[40] Sanson later confirmed the same proposal to another Abrams employee – i.e., if the Abrams firm capitulated and withdrew the Sanctions Motion against Schneider, the defamation campaign would end.[41] No formal response to either extortion request was ever made.

After the initial Attack Article was published, Judge Elliott attempted to persuade Sanson to stop posting the *Saiter* closed hearing video by sending him an

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[38] III AA 479, 493.

[39] "Nevada Attorney attacks a Clark County Family Court Judge in Open Court" on October 5, 2017 (the "Attack Article"), I AA 127-131.

[40] V AA 666, 745.

[41] V AA 671, 751.

email directly and informing him that the information he posted about Abrams was incorrect.[42]

Instead of issuing a correction, Sanson threatened the judge: complaining that Judge Elliott sealed the case "in error" because she was "shielding the attorney and not the litigants," he stated that he was going to "ask for an opinion from the Nevada Judicial Discipline Commission and Nevada State Bar in regards [*sic*] to the sealing of the case."[43] Sanson further proclaimed that court rules "don't apply" to him[44] and that he can do as he pleases because of the "Freedom of Information Act."[45]

VI. *WILLICK*

The extremely limited pre-litigation interactions between attorney Marshal Willick and Sanson are recounted in the record of Case No. 72778 (*Willick*); the

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[42] V AA 761-762.

[43] V AA 760. This is another example of the type of threats to judges by Sanson noted by Judge Duckworth in his order, quoted above.

[44] *See, e.g.*, III AA 467. Whether district court judges have the authority to prohibit dissemination of closed hearing videos in sealed family court cases is the central issue pending before this Court in *Saiter*.

[45] *See, e.g.*, I AA 104.

timing of the actions in that case are relevant to the procedural backdrop in this appeal, and that action was discussed throughout the litigation of this case.[46]

By January, 2017, either Sanson or Schneider had run a "background check" on Abrams to try to find additional items to be used to pressure her.[47] Finding nothing useful, they turned to information within the knowledge of Schneider – the personal relationship between Abrams and Willick. Sanson expanded the smear campaign to include Willick, falsely accusing him of multiple crimes and other wrongs,[48] including falsely claiming that "Attorney Marshall [*sic*] Willick and his pal convicted of sexually coercion of a minor."[49] The defamatory statements were repeatedly posted to dozens of sites hundreds of times and by payment "boosted" to tens of thousands of recipients.[50]

Willick filed suit against Sanson; that case was eventually assigned to Department 18, which was temporarily vacant due to the retirement of Judge David

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[46] *See, e.g.*, V AA 697 (discussing Judge Thompson's rulings and requesting judicial notice of his findings).

[47] I AA 97; *see* II AA 271.

[48] *See, e.g.*, VIII AA 1590-1615.

[49] *See, e.g.*, VIII AA 1596.

[50] VIII AA 1595-1597.

Barker. As noted below, Sanson sought out direct contact with the judge presiding in that case, leading to it eventually being assigned to the Senior Judge Program. When Sanson filed his "Special Motion to Dismiss Pursuant to NRS 41.650" on February 17, 2017, the Hon. Charles J. Thompson, Senior Judge, was presiding.

By that time, presumably on advice of counsel, Sanson posted a purported "clarification" to one of the defamatory postings.[51] It did not reference or retract the earlier posting, was not "boosted" to reach the same tens of thousands of recipients, and itself made false statements, as detailed in that appeal. The original defamatory postings were then repeated and reposted,[52] and Sanson brazenly published a promised bounty of $10,000 for "verifiable" defamatory material to be used against Willick.[53]

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[51] V AA 794.

[52] *See* VIII AA 1595 (the full history of those publications is recounted in Case No. 72778 (*Willick*).

[53] *See, e.g.*, VIII AA 1599.

VII. EVENTS AFTER THE *SAITER* ORDER

On October 6, 2016, in *Saiter*, Judge Elliott issued an "Order Prohibiting Dissemination of Case Material."[54]

The order was personally served on Sanson,[55] but he ignored it and continued to disseminate the closed *Saiter* September 29 hearing video through "boosted paid placements" on social media,[56] including Facebook, where the Saiter children had accounts and could view the video.[57] Sanson wrote and posted *additional* articles about the closed hearing and the sealed *Saiter* divorce file,[58] and solicited and posted other videos from Abrams' cases in which district court judges had specifically ordered that the videos remain private.[59]

Shortly after Sanson was personally served with the Complaint for Damages in this action, he was interviewed by Rob Lauer on an internet radio show.[60] During

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[54] See V AA 719-720.

[55] III AA 477, 491; V AA 716, 755.

[56] III AA 477, 492.

[57] III AA 492, noting that the Saiter kids had Facebook accounts.

[58] *See, e.g.*, III AA 479.

[59] I AA 103.

[60] II AA 277, 322.

that interview, Sanson admitted receiving payment from Schneider when he began the smear campaign against Abrams, and admitted his personal animosity.[61]

VIII. THE HEARINGS LEADING TO THE APPEALS

On January 9, 2017, Abrams filed suit against Schneider and Sanson requesting, in part, injunctive relief.[62]

In the *Saiter* divorce case, Abrams filed a *Motion for an Order to Show Cause* against Schneider and Sanson on February 13, 2017, alleging that they violated the *Order Prohibiting Dissemination of Case Material*[63] by posting the closed hearing video after the *Order* was issued, and that both Brandon and Tina were mortified to learn that videos of their private divorce case were being repeatedly posted on the internet for everyone, including their minor children, to see.[64]

Brandon represented that he was especially concerned about his four children, three of whom have Facebook accounts, and the possibility that they or their friends

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[61] I AA 94, 187.

[62] I AA 1.

[63] V AA 719.

[64] III AA 474-494.

would see their parents' private case materials, including the false (and later retracted) allegation that their father had lied about his finances.[65]

Brandon asked Judge Elliott to compel Schneider and Sanson to remove the private case information from the internet.[66] He asserted that Schneider had obtained the video of the closed hearing and provided it to Sanson, with payment, for the purpose of out-of-court extortion against his counsel (Abrams) to alter the outcome of the litigation and to attempt to intimidate the district court.[67] Brandon did not believe Tina was involved in the dissemination of the case materials and noted that she also wanted them removed from the internet.[68] The exhibits supporting the *Motion* were detailed and voluminous.

On March 6, 2017, Sanson made a "special appearance" in *Saiter* to contest the jurisdiction of the Court.[69] His *Opposition* raised a host of objections to both the *Motion* and the underlying *Sealing Order*, mostly based on the purported inability of

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[65] III AA 477.

[66] III AA 480.

[67] III AA 482-484.

[68] III AA 484, 492.

[69] III AA 496.

the Family Court to assert any jurisdiction over him or to constrain him in any way from posting on the internet anything he wanted from the case, regardless of whether it was closed, sealed, contrary to court order, or otherwise.

Meanwhile, on March 8, 2017, Willick opposed Sanson's anti-SLAPP motion in the *Willick* case,[70] recounting much of the history detailed above, as well as the statutory and case law behind anti-SLAPP and defamation claims, and focusing on this Court's recent opinion in *Shapiro v. Welt*.[71]

On March 14, Sanson's motion was heard by Judge Thompson, who noted at the outset that for anti-SLAPP statute purposes, whether an attorney lost on an issue when arguing an appeal is not an "issue of public concern."[72] He also indicated that a claim that a lawyer had been convicted of sexually coercing a minor is a statement of fact, not opinion.

Counsel discussed at length the appropriate limitations of any analysis of a purported anti-SLAPP motion, focusing on whether Sanson had shown that his

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[70] *See* IX AA 1654.

[71] *Shapiro v. Welt*, 133 Nev. ___, 389 P.3d 262 (Adv. Opn. No. 6, Feb. 2, 2017).

[72] V AA 797-802.

statements were true or made without knowledge of their falsity.[73] As detailed in the *Willick* appeal, the attorneys argued at length how Sanson's offering up of a bounty for "dirt" on Willick established malice, and whether and how defamatory words were not to be taken in isolation, but reviewed in context, with the question being what a reasonable person would perceive from the entire communication.

Ultimately, Judge Thompson concluded that Willick was not a "public figure," that the subjects of the defamatory posts were not "matters of public interest," and denied Sanson's anti-SLAPP motion.[74]

On March 21, 2017, in *Saiter*, Judge Elliott issued an *Order Without Hearing Pursuant to EDCR 2.23*, vacating all pending hearings in the case, and setting aside the Prohibition Order.[75] That *Order* found that the video "would clearly be disturbing emotionally and mentally to most any child who witnessed it," and that the best interests of the children trumped Sanson's "free speech rights."[76]

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[73] The entire transcript of that hearing is in the record of Case No. 72778 (*Willick*) at VIII AA 1604.

[74] V AA 797-802.

[75] II AA 346.

[76] II AA 361.

Notwithstanding, Judge Elliott went on to find that because the Prohibition Order failed to give advance notice to "all persons or entities," including Sanson,[77] it must be "struck and vacated" as "unconstitutionally overbroad."[78] Stating that her decision was a bad one for children, Judge Elliott found that "there is nothing this Court can do."[79] That finding (i.e., that a family court judge is "powerless" to prohibit the internet posting of closed hearing videos in sealed cases involving minor children despite NRS 125.110 and relevant court rules) is the focus of the pending *Saiter* writ petition.

Additionally, without significant analysis or explanation, Judge Elliott summarily denied all other pending motions – including the Sanctions Motion and fee requests against Schneider.

On March 28, 2017, both Sanson and Schneider filed anti-SLAPP motions in the *Abrams* case at issue in this appeal,[80] accompanied by massive declarations with

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[77] This finding was incorrect; Sanson was personally served with the order, and acknowledged being served with it. II AA 363; III AA 477, 491.

[78] II AA 442.

[79] VI App. 1209-1210.

[80] II AA 337, 368.

exhibits by Sanson and his attorney Maggie McCletchie.[81] The motions were opposed.[82] As discussed in detail below, nowhere in Sanson's declaration does he say that the statements made about Abrams and her law firm were truthful or made without knowledge of their falsehood. Nor did Schneider submit a declaration to the district court denying that he had hired Sanson to defame Abrams and to disparage her firm.

Two days after those filings in *Abrams* (on March 30, 2018), Judge Thompson's order was filed in *Willick* denying Sanson's anti-SLAPP motion.[83] After reciting this Court's "guiding principles" for determining whether an issue is of "public interest" as stated in *Shapiro*, Judge Thompson found that for purposes of assessing whether any of the statements at issue fall within the communications codified at NRS 41.637(4), the district court must determine: (i) whether the statement was made in direct connection with an issue of public interest; (ii) whether the statement was made in a public forum; and (iii) whether the statement was truthful or made without knowledge of falsity. Judge Thompson noted that if Sanson did not

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[81] III AA 406-469, 470-538. Schneider's anti-SLAPP motion was not supported by a declaration from him or his counsel.

[82] V AA 656-804.

[83] V AA 797-802.

establish all three of those elements, Willick was not required to establish a probability of prevailing on his claims.

Judge Thompson found that Sanson failed to meet his initial burden of proof because: each claim did not arise from a communication made in direct connection with "an issue of public interest"; Willick is not a public figure (or a "limited purpose public figure"); and Sanson failed to show that his statements were truthful or made without knowledge of their falsehood.

Because Sanson had failed to meet his initial burden, Judge Thompson did not have to address whether Willick had shown at least "minimal merit" for the claims in his *Complaint*.

The hearing in front of Judge Leavitt had an entirely different tone and outcome. Since Sanson had admitted receiving money from Schneider and had provided the sealed hearing video used for starting the defamation campaign, Abrams' counsel repeatedly asked to be able to conduct discovery into the financial ties between Schneider and Sanson to prove their conspiracy before any determination was made on the anti-SLAPP motions.[84]

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[84] *See, e.g.*, V AA 700, 756; VI AA 938.

All such requests were ignored without formal decision; the district court seemingly had no concern with Schneider's use of Sanson to try to extort concessions in the *Saiter* divorce case by use of an out-of-court defamation campaign.[85]

Instead, during the July 5, 2017, hearing, Judge Leavitt granted both "anti-SLAPP" motions without permitting any discovery, into Schneider's payments to Sanson, or the source of funding for the "sponsored ads" of the *Saiter* hearing video on VIPI's social media pages, or the scheme between Schneider and Sanson to improperly influence Judge Elliott and to extort concessions from Abrams in the *Saiter* case.[86]

The order from the July 5, 2017, hearing that granted Sanson's anti-SLAPP motion was entered on July 24.[87] The Abrams Parties filed their appeal from that order on August 21.

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[85] VI AA 928-936.

[86] VI AA 884-950.

[87] VI AA 951-970.

The order from the July 5, 2017, hearing that granted Schneider's anti-SLAPP motion was entered on April 24, 2018.[88] The Abrams Parties filed their appeal from that order on May 15.

IX. THE DISQUALIFICATION MOTION AND RE-ASSIGNMENT

Both before and after the substantive hearings in *Willick* and *Abrams*, both district court cases continued to be re-assigned to different departments. Sanson repeatedly made contact with the district court judges assigned to the cases (and with at least one Justice of this Court), and virtually every district court judge in the Eighth Judicial District recused, finding at least "implied bias," an "appearance of impropriety," that "impartiality might reasonably be questioned," etc.[89]

In *Willick*, Sanson sought out contact with Judge Bailus as soon as he was appointed to Department 18, eventually resulting in Judge Bailus' recusal and the further re-assignment of that case, as detailed in the *Willick* appellate record.

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[88] IX AA 1675.

[89] VII AA 1266, 1384; VIII AA 1453, 1471.

Eventually, the Abrams Parties filed a *Motion to Disqualify Eighth Judicial Court Elected Judiciary, and for Permanent Assignment to the Senior Judge Program, or Alternatively, to a District Court Judge Outside of Clark County.*[90]

That filing included a table showing that virtually every judge in the county had recused, been disqualified, challenged, or had financial and endorsement connections to Sanson,[91] which table did not include "the dozens of elected judges outside of the civil/criminal bench who have associated with Mr. Sanson" or "details of the complicated relationships . . . with judges—including Mr. Sanson's prior smear campaign against the Honorable Eric Johnson . . . ."[92]

A large amount of photographic evidence was included "from Mr. Sanson's website depicting him hugging, kissing, shaking hands with, and/or standing arm-in-arm with many of the elected judges.[93] It noted that 90% of the bench had either been

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[90] VII AA 1266-1370. The *Motion* was filed in both the *Abrams* and *Willick* cases.

[91] VII AA 1284.

[92] VII AA 1285.

[93] VII AA 1285; VIII AA 1501-1504. While there are photos and endorsements from Sanson with Justices of this Court, there is no indication in the record of any of the three appellate cases indicating that any member of this Court had knowledge of Sanson's corrupt practices.

placed in apparent alignment with Sanson or the target of one of his defamation campaigns.[94] The "hit list" of judges that Sanson intended to make "history" was noted.[95]

The motion detailed Sanson's extensive history of improper *ex parte* communications with the judiciary, including phoning them at home, insisting on talking to them about pending cases out of court, offering things of value to judges pending in his own cases, and other similar misbehavior.[96] It mentioned the extensive history of Sanson's efforts at judicial corruption, including envelopes handed to judges outside of courtrooms,[97] approaching judges at social events to discuss pending cases,[98] Sanson's "back hallway" button-holing of Judge Elliott, Sanson's seeking out contact with Judge Bailus, the Clerk's Office's efforts to deal with the unprecedented level of *ex parte* contacts,[99] and numerous other improprieties.[100]

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[94] VII AA 1272-1274.

[95] VII AA 1307, 1328.

[96] *See, e.g.*, VII AA 1272, 1281; VIII AA 1487.

[97] See VIII AA 1487.

[98] VIII AA 1487.

[99] VIII AA 1476.

[100] VII AA 1266-1370.

The motion was fiercely opposed,[101] but still more judges recused upon re-assignment, and Sanson's efforts to make *ex parte* contact with and improperly influence members of the judiciary assigned to his cases increased during the pendency of the motion; the circumstantial evidence that such attempts had been made to contact Judge Leavitt in this case was noted, including that the judge never denied such contacts had occurred.[102] It was during this time that Sanson contacted at least one Justice of this Court who subsequently recused from participating in the *Willick* appeal.[103]

Chief Judge Elizabeth Gonzalez took all pending matters off calendar while considering the motion to disqualify,[104] and on March 2, 2018, referred the cases to

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[101] *See* VII AA 1384; VIII AA 1394, 1453.

[102] *See* VIII AA 1471-1540. Every other judge who received an endorsement or paid money to Sanson disclosed such contacts and recused. Judge Leavitt is the only judge to not disclose endorsements or contributions. The *Motion* detailed significant circumstantial evidence of *ex parte* communications between Judge Leavitt and Sanson and Schneider, which were never denied.

[103] VIII AA 1486-1487, 1506-1510.

[104] VIII AA 1452.

the senior judge department "given the high number of recusals by sitting district court judges."[105]

Sanson filed massive papers trying to get the matter re-assigned back to Judge Leavitt,[106] which failed. When the case came before Senior Judge Kathy Hardcastle, she stayed all pending matters until resolution of this appeal.[107] Judge Hardcastle noted a long-standing relationship between her husband and counsel for Schneider, and allowed the parties to express whether any of them perceived that relationship as a conflict requiring further re-assignment.

Even though any potential bias would be in their favor, Sanson tried to use Judge Hardcastle's invitation in yet another effort to move the case back to Judge Leavitt.[108] That attempt was opposed[109] and denied by Chief Judge Gonzalez, who

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[105] VIII AA 1540-1541.

[106] *See, e.g.*, VIII AA 1542-1617, 1618-1620; IX AA 1633-1663.

[107] IX AA 1666-1667.

[108] IX AA 1674, 1668.

[109] IX AA 1699.

referred the question of whether fees should be imposed against Sanson for that effort to whichever senior judge was appointed to the case.[110]

This Appeal follows.

STANDARD OF REVIEW AND SUMMARY OF THE ARGUMENT

This Court has recognized that false statements of fact are not entitled to first amendment protection.[111] That well-settled legal principle should apply to a defamation campaign undertaken for an improper purpose, such as extortion, in which case no anti-SLAPP protection is warranted. Any doubts related to the applicability of the anti-SLAPP statute under such circumstances should be resolved by adequate discovery. The district court's legal determination of what claims should be determined first should be reviewed *de novo*.[112]

If the anti-SLAPP analysis is reached, there are two prongs to this Court's review: first, this Court must decide whether the defendants were sued for engaging

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[110] IX AA 1732, 1733-1734.

[111] *Matter of Discipline of Hafter*, No. 71744, 2017 WL 5565322, at *2 (Nov. 17, 2017) (Unpublished Disp.).

[112] "In the anti-SLAPP context, the critical consideration is whether the cause of action is based on the defendant's protected free speech or petitioning activity." *Navellier v. Sletten*, 52 P.3d 703, 709 (Cal. 2002).

in statutorily-protected speech, which involves analyzing whether the defendants satisfied all of the relevant statutory requirements; and second, assuming (*arguendo*) the defendants met their initial burden, this Court must decide whether the plaintiffs' claims have at least "minimal merit."[113]

As to the first prong, *Shapiro* states that this Court applies an abuse of discretion standard of review to an order granting or denying an anti-SLAPP motion.[114] However, the matter appears to be unsettled based on two unpublished orders issued by this Court after *Shapiro*.[115] In California, the applicable standard of review is *de novo*,[116] meriting a possible re-examination of the question of the appropriate standard of review under current Nevada law.[117]

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[113] NRS 41.637; NRS 41.660(3)(a)-(b); *see also Navellier*, *supra*, 52 P.3d at 712.

[114] *Shapiro v. Welt*, 133 Nev. at ___, 389 P.3d at 266.

[115] *Compare SPG Artist Media, LLC v. Primesties, Inc.*, No. 69078, 2017 WL 897756, at *1 (Feb. 28, 2017) (Unpublished Disp.), *with Goldentree Master Fund, Ltd. v. EB Holdings II, Inc.*, Nos. 72369, 73111, 2018 WL 1634189, at *1 n.3 (Nev. Mar. 30, 2018) (Unpublished Disp.)

[116] *See, e.g., Park v. Bd. of Trustees of Cal. State Univ.*, 393 P.3d 905, 911 (Cal. 2017); *see also Winslet v. 1811 27th Ave., LLC*, 237 Cal. Rptr. 3d 25, 32 (Cal. Ct. App. 2018).

[117] *Shapiro* was decided under a prior version of NRS 41.660.

As to the second prong, whether plaintiff has demonstrated with *prima facie* evidence a probability of prevailing on its claims (i.e., that its claims have at least "minimal merit") is a question of law to be reviewed *de novo*.[118]

Under an abuse of discretion standard of review, this Court will reverse a decision granting or denying a motion if it is "founded on prejudice or preference rather than on reason, or contrary to the evidence or established rules of law,"[119] or if it "lacks support in the form of substantial evidence,"[120] which is "evidence that a reasonable person may accept as adequate to sustain a judgment."[121] Errors of law, however, are reviewed *de novo*,[122] as are questions of constitutional or statutory

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[118] *See, e.g., Navellier v. Sletten*, 131 Cal. Rptr. 2d 201, 204-05 (Cal. Ct. App. 2003). Advocating this standard of review for the second prong of the anti-SLAPP analysis does not contradict the arguments made in *Willick*. In that case, this Court must decide whether the district court properly denied an anti-SLAPP motion by finding that the defendants did not meet their initial burden of proof under the first prong of the anti-SLAPP analysis.

[119] *State v. Eighth Jud. Dist. Ct.*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011).

[120] *Stratosphere Gaming Corp. v. Las Vegas*, 120 Nev. 523, 528, 96 P.3d 756, 760 (2004).

[121] *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007).

[122] *See, e.g., Moseley v. Dist. Ct.*, 124 Nev. 654, 662, 188 P.3d 1136, 1142 (2008); *Settelmeyer & Sons v. Smith & Harmer*, 124 Nev. 1206, 1215, 197 P.3d 1051, 1057 (2008).

construction; this Court need not defer to the district court's reading or interpretation of a statute or rule.[123]

Under a *de novo* standard of review, this Court independently determines whether a motion should have been granted or denied "without deference to the findings of the lower court."[124]

ARGUMENT

I. RESPONDENTS' DEFAMATION CAMPAIGN IS NOT ENTITLED TO ANTI-SLAPP PROTECTION

Neither a question of defamation nor an anti-SLAPP analysis exists in a vacuum; both require an in-depth inquiry into the context in which the statements were made and in which the legal actions were filed.

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[123] *See, e.g., Irving v. Irving*, 122 Nev. 494, 496, 134 P.3d 718, 720 (2006); *Marquis & Aurbach v. Eighth Jud. Dist. Ct*, 122 Nev. 1147, 1154-55, 146 P. 3d 1130, 1135 (2006); *Carson City District Attorney v. Ryder*, 116 Nev. 502, 505, 998 P.2d 1186, 1188 (2000).

[124] *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

Here, Schneider was responsible for initiating Sanson's online defamation campaign for the improper purpose of attempting to extort concessions from Abrams in the *Saiter* divorce case.

The district court, before undertaking an anti-SLAPP analysis, should have proceeded as follows: first, questioning whether the statements were made for an improper purpose; and second, questioning whether the statements were false and defamatory in nature when reviewed in context. Once those two issues were examined, no further anti-SLAPP analysis was appropriate; if the district court had any doubts, sufficient discovery should have been permitted to resolve the foundational application of the anti-SLAPP statute.

A. Sanson and Schneider Have Admitted that the Defamation Campaign was Intended for Extortion

This Court has recognized that untruthful statements "are not subject to First Amendment protection."[125] As the Nevada federal district court has explained,

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[125] *Matter of Discipline of Hafter*, No. 71744, 2017 WL 5565322, at *2 (Nov. 17, 2017) (Unpublished Disp.), citing *Standing Comm. on Discipline of U.S. Dist. Court for Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430, 1438-39 (9th Cir. 1995) (holding that a statement of opinion is not protected by the First Amendment either if it is based on disclosed facts that are untrue or if it is based on implied undisclosed

"Unlike truthful statements, false statements of fact do not enjoy First Amendment protection, since 'there is no constitutional value in false statements of fact.'"[126]

Those legal doctrines holdings apply here, and the same preliminary evaluation is appropriate for tortious statements, which is also the case here.[127]

As detailed above, both Sanson and Schneider admitted that the defamation campaign launched against Abrams was intended to pressure her to withdraw the Sanctions Motion filed against Schneider in the *Saiter* divorce case. Those admissions should disqualify their well-orchestrated defamation campaign from anti-SLAPP protection. The mere fact that Sanson, rather than Schneider, published the statements is irrelevant – as a co-conspirator, Schneider is directly responsible for all of Sanson's defamatory postings.[128]

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facts, but the speaker has no factual basis for the stated opinion).

[126] *Dehne v. Avanino*, 219 F. Supp. 2d 1096, 1107 (D. Nev. 2001) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)). This Court has looked to the *Gertz* decision for guidance when addressing defamation claims. *See Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 719-20, 57 P.3d 82, 91-92 (2002).

[127] *Weinberg v. Feisel*, 2 Cal. Rptr. 3d 385, 391 (Cal. Ct. App. 2003) ("It is well established that defamation of an individual is not protected by the constitutional right of free speech.").

[128] A conspirator is liable for all acts committed by his or her co-conspirator, even if not personally committed. *See, e.g., Beltz Travel Serv., Inc. v. Int'l Air Transp. Ass'n*, 620 F.2d 1360, 1367 (9th Cir. 1980); *Baker ex rel. Hall Brake Supply,*

Even if evidence of "falsehood" is required, that is easily shown. The months-long defamation campaign against Abrams included a host of accusations, which are detailed in the record and discussed in part below. They included assertions that Judge Elliott "found" that Abrams' client had lied about his finances, and that Abrams herself was "unethical, had used "undue influence," and had "bullied" the judge into signing an order that was actually stipulated.[129]

Any doubt as to Sanson's intended meaning for his words was removed by his representations to an employee of Abrams' firm that Abrams was "unethical and a criminal," was "breaking the law," had "unlawfully" had her staff enter a person's home, etc.[130]

Sanson's defamatory posts included the following words describing Abrams: "Bully, trick, bait, torment, intimidate, shame, shun, trick, beat up, slander, assault, torment, oppress," to name a few.[131] There was no finding by anyone, at any time,

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Inc. v. Stewart Title & Trust of Phoenix, Inc., 5 P.3d 249, 256 (Ariz. Ct. App. 2000); *see also Ivey v. Spilotro*, No. 2:11-CV-02044-RCJ, 2012 WL 2788980, at *4 (D. Nev. July 9, 2012) ("[U]under Nevada law, Plaintiff may hold co-conspirators jointly and severally liable for damages.") (citing NRS 41.141(5)(d)).

[129] *See, e.g.*, I AA 127, 133.

[130] V AA 750-752.

[131] I AA 133.

that any of those things was true; each statement was knowingly false when made, and asserted for the improper purpose of extortion.

Moreover, Sanson had already been informed, by the judge *personally*, that the preliminary statements made at the beginning of the hearing of September 29 in *Saiter* were false.[132] Because he had the hearing video and claimed to have watched it, Sanson knew that the judge, on the record, retracted her accusations as having been misinformed and incorrect.

Sanson's email blasts claiming as true that which he indisputably knew to be false fits his statements squarely into the category of statements that are excluded from anti-SLAPP protection. The district court should have never reached an "anti-SLAPP" analysis, and this Court should reverse the orders appealed from on that basis alone.

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[132] V AA 761.

B. If There Was Any Doubt, the District Court Should Have Permitted Limited Discovery as Authorized by Statute Concerning the Relationship Between Schneider and Sanson

The district court was informed that there was no legitimate purpose to the defamation campaign, and that it was conducted for the improper purpose of pressuring Abrams to withdraw the Sanctions Motion against Schneider in the *Saiter* divorce case.[133]

Given the separate admissions of Schneider and Sanson that the defamation campaign would end if Abrams would withdraw the Sanctions Motion, there should not have been any doubt on the district court's part to conclude that neither Schneider nor Sanson could seek refuge under the anti-SLAPP statute.

But if there had been any such doubt, the district court had to permit the limited discovery requested by Abrams' counsel into payments between Schneider and Sanson, and into who financed the months-long "boosted paid placements" of the defamation campaign attacks, the *Saiter* videos, and the other defamation campaign

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[133] *See, e.g.*, III AA 484.

"e-mail blasts" before proceeding further.[134] Such "limited discovery" is required by statute and should have been ordered to occur here.

Unlike a request for limited discovery made in response to a motion for summary judgment pursuant to NRCP 56(f),[135] the district court did not have the discretion to *deny* the limited discovery requested by the Abrams Parties in direct response to the anti-SLAPP motions.[136] The word "shall" is mandatory.[137]

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[134] *See* VI AA 938.

[135] NRCP 56(f) (indicating that the court "may order a continuance [of a hearing on a motion for summary judgment] to permit . . . discovery to be had . . . as is just").

[136] NRS 41.660(4) ("Upon a showing by a party that information necessary to meet or oppose the burden pursuant to paragraph (b) of subsection 3 is in the possession of another party or a third party and is not reasonably available without discovery, the court shall allow limited discovery for the purpose of ascertaining such information."); *see also Pacquiao v. Mayweather*, No. 2:09-CV-2448-LRH-RJJ, 2010 WL 1439100, at *1 (D. Nev. Apr. 9, 2010) (granting plaintiff's request for limited discovery to oppose the defendants' anti-SLAPP motion in order to challenge, *inter alia*, defendants' statements about their knowledge and reasoning).

[137] "Shall," as used under NRS 41.660(4), "imposes a duty to act." NRS 0.025(1)(d); *see also Goudge v. State*, 128 Nev. 548, 553, 287 P.3d 301, 304 (2012) ("This court has explained that, when used in a statute, the word 'shall' imposes a duty on a party to act and prohibits judicial discretion and, consequently, mandates the result set forth by the statute.").

For that reason alone, the Orders appealed from should be vacated and this matter should be reversed and remanded for purposes of allowing the Abrams Parties to conduct limited discovery in response to the anti-SLAPP motions.

II. RESPONDENTS' FAILED TO MEET THEIR BURDEN UNDER THE FIRST PRONG OF THE ANTI-SLAPP ANALYSIS

Nevada's anti-SLAPP statute provides that "[a] person who engages in a 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."[138] Any person against whom such an action is brought "may file a special motion to dismiss."[139]

"[W]hen a party moves for a special motion to dismiss under Nevada's anti-SLAPP statute, it bears the initial burden of production and persuasion."[140] Specifically, the defendant must establish, "by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to

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[138] NRS 41.650.

[139] NRS 41.660(1)(a).

[140] *John v. Douglas Cty. Sch. Dist.*, 125 Nev. 746, 754, 219 P.3d 1276, 1282 (2009), *superseded by statute on other grounds*.

petition or the right to free speech in direct connection with an issue of public concern."[141]

Of significance to this appeal, the phrase "good faith communication[s] in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern" includes any "[c]ommunication 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."[142]

Accordingly, a defendant seeking dismissal of claims under the anti-SLAPP statute must preliminarily show, by a preponderance of the evidence, that it was sued for making a communication (i) that was truthful or made without knowledge of its falsehood, (ii) in direct connection with an issue of public interest, (iii) in a place open to the public or in a public forum. Unless all three statutory elements are satisfied, the defendant's anti-SLAPP motion fails without further review of the plaintiff's claims.[143] This is true even if the defendant has grounds to challenge one

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[141] NRS 41.660(3)(a).

[142] NRS 41.637(4). The other subsections of NRS 41.637 are inapplicable.

[143] *See, e.g., Stenehjem v. Sareen*, 173 Cal. Rptr. 3d 173, 191 n.19 (Cal. Ct. App. 2014); *see also Commonwealth Energy Corp. v. Investor Data Exchange, Inc.*, 1 Cal. Rptr. 3d 390, 393 (Cal. Ct. App. 2003) ("The point is, if the moving defendant cannot meet the threshold showing, then the fact that he or she might be able to

or more of the plaintiff's claims on the merits by way of an NRCP 12(b)(5) motion to dismiss.[144]

As detailed below, Respondents were not sued for engaging in statutorily-protected speech; they were sued for seeking to extort concessions in a civil case through a relentless, months-long online smear campaign. Because they fail under each element of NRS 41.637(4)—e.g., Sanson, at Schneider's direction, published knowingly false statements of fact concerning private matters in email blasts to a select audience—Respondents' anti-SLAPP motions should have been denied.

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otherwise prevail on the merits under the 'probability' step is irrelevant.").

[144] *Goldentree Master Fund, Ltd.*, Nos. 72369, 73111, 2018 WL 1634189, at *3 n.6 (stating that various defenses raised by the appellants "are better-suited for an NRCP 12(b)(5) motion as opposed to an anti-SLAPP motion"); *Coretronic Corp. v. Cozen O'Connor*, 121 Cal. Rptr. 3d 254, 258 (Cal. Ct. App. 2011) ("Arguments about the merits of the claims are irrelevant to the first step of the anti-SLAPP analysis."); *accord Lefebvre v. Lefebvre*, 131 Cal. Rptr. 3d 171, 177 (Cal. Ct. App. 2011) ("[Defendant] may have a valid privilege-based defense which she may present in another procedural context, but such a defense may not be presented by way of an anti-SLAPP motion.").

A. Respondents Failed to Show that they Were Sued for Making Truthful Statements About the Abrams Parties, or that they Were Unaware of the Falsity of their Statements

"[N]o communication falls within the purview of NRS 41.660 unless it is truthful or is made without knowledge of its falsehood."[145] The failure to prove truth, by a preponderance of the evidence, is fatal to an anti-SLAPP motion.[146]

In the anti-SLAPP context, truth is essential and, in many ways, helps make a motion to dismiss "special" by incorporating a good faith component to the defense. For example, the litigation privilege generally immunizes a person from being sued for making knowingly false statements of fact in direct connection with a judicial proceeding.[147] Such a defendant would be able to defeat a defamation claim under NRCP 12(b)(5), but the same defendant would be unable to obtain any relief under

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[145] *Shapiro*, 133 Nev. at __, 389 P.3d at 268.

[146] *Balestra-Leigh v. Balestra*, No. 3:09-CV-551-ECR-RAM, 2010 WL 4280424, at *4 (D. Nev. Oct. 19, 2010) (denying an anti-SLAPP motion where the moving party did not set forth any evidence showing that the statements in question were "truthful or [were] made without knowledge of [their] falsehood").

[147] *Sengchanthalangsy v. Accelerated Recovery Specialists, Inc.*, 473 F. Supp. 2d 1083, 1088 (S.D. Cal. 2007) ("Plaintiff's arguments, therefore, that the statements were false and made with malice is of no consequence if the absolute litigation privilege applies.").

NRS 41.660 because that defendant could not prove that what he or she said about the plaintiff was true. Because the defendant in those circumstances did not act in good faith, the Nevada Legislature did not intend to permit the defendant to benefit from the anti-SLAPP statute.

The Respondents in this case do not get to benefit from the anti-SLAPP statute for that reason. They failed to offer any evidence indicating that their defamatory posts were true or made without knowledge of their falsehood. For example, neither Sanson nor Schneider demonstrated by a preponderance of the evidence—as required by statute—that Abrams (i) is a criminal, (ii) violated a court rule involving the sealing of family records, (iii) forced Judge Elliot to issue the Prohibition Order, (iv) breached her ethical duties, (v) embarrassed her clients, and (vi) intended to conceal her behavior, rather than protect her clients' privacy interests, by asking to close hearings.

Those omissions were not due to a mere oversight; neither Sanson nor Schneider can prove the truth of these defamatory statements (among others) because: (i) Abrams does not have a criminal record; (ii) no order has been entered in any family law case indicating that Abrams sealed court records contrary to the requirements of NRS 125.110 or Rule 3(4) of the Nevada Supreme Court Rules

Governing Sealing and Redacting Court Records, or requested a closed hearing contrary to (former) EDCR 5.02(a); (iii) Judge Elliot *sua sponte* drafted the Prohibition Order pursuant to stipulation of counsel; (iv) Abrams has not been disciplined by the Nevada State Bar; (v) no client of Abrams has submitted an affidavit claiming disagreement with or embarrassment from Abrams' litigation strategy in a divorce case; and (vi) Abrams' clients have a compelling privacy interest in keeping family matters out of the public record, as Judge Elliott found.

Not only did Sanson and Schneider fail to prove truth, the evidence is clear that they knew of the falsity of their defamatory posts. This Court need look no further in making that determination than the statements relating to the video of the September 29 hearing in *Saiter*. Schneider attended the hearing and Sanson watched the video. They both knew that Judge Elliot had retracted her accusations about Abrams (a fact confirmed in a subsequent email sent by Judge Elliot to Sanson), but they chose to disregard the truth in pursuit of their extortionist tactics.

In terms of the remaining statements, Sanson indicated that he researched cases involving Abrams. Having found nothing improper, he nonetheless chose to publish numerous falsehoods about her.

Respondents' failure to prove truth takes them outside the purview of the anti-SLAPP statute.[148] Consequently, their anti-SLAPP motions should have been denied.

B. Respondents Failed to Show that they Were Sued for Making Statements in Direct Connection with Issues of Public Interest

This Court takes into account the following factors in determining if a communication involves "an issue of public interest" under NRS 41.637(4):

(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;

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[148] *Contra Delucchi v. Songer*, 133 Nev. ___, 396 P.3d 826, 830 (Adv. Op. 42, Jun. 29, 2017) (indicating that the defendant submitted a declaration in support of this element of the statute, which stated, "The information . . . was truthful to the best of [his] knowledge, and [he] made no statements [he] knew to be false").

(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.[149]

The *Shapiro* factors, individually and collectively, weigh against any finding that Sanson's defamatory posts involved issues of public interest. First, Abrams' representation of family law clients and handling of family law cases is not—without more—a matter of public interest. Sanson was not in the midst of reporting on family law lawyers throughout Nevada and their courtroom practices when he stumbled across Abrams' work in *Saiter* and decided to post about it. To the contrary, he went out of his way to publicize misleading information about *Saiter* that was otherwise unknown to and of no interest to the general public. None of his statements about her was in any way intended to contribute to an existing public debate or controversy regarding alleged lawyer misconduct, judicial transparency, or otherwise. Abrams' work in *Saiter* was insignificant to all except those involved in *Saiter*; Sanson simply

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[149] *Shapiro*, 133 Nev. at __, 389 P.3d at 268 (*quoting Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F. Supp. 2d 957, 968 (N.D. Cal. 2013), *aff'd*, 609 F. App'x 497 (9th Cir. 2015)).

sought to generate (negative) public interest of Abrams' work in *Saiter* where none existed.[150]

Second, Ms. Abrams' work as a family law lawyer does not impact a "substantial number of people," but rather, "a relatively small specific audience." What she does when representing her clients, and how she maintains the privacy of her clients' information, is not a matter of interest to the general public.[151]

Third, Sanson's alleged interest in openness and transparency of judicial proceedings is not closely tied to his statements impugning Abrams' character and reputation. In other words, whether family law proceedings should be matters of public record is unrelated to posts (falsely) stating that Abrams is unethical, obstructive, overzealous, and embarrassing.

Fourth, Sanson's statements were specifically directed at Abrams, not the judicial process. His relentless attack was hardly intended to inform the judiciary of

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[150] *See Rivero v. Am. Fed'n of State, Cty., & Mun. Employees, AFL-CIO*, 130 Cal. Rptr. 2d 81, 89-90 (Cal. Ct. App. 2003) (finding that statements about an individual "who had previously received no public attention or media coverage" did not concern a matter of public interest).

[151] As a practical matter, despite harassing Abrams for sealing various cases, Sanson did not say what in those cases should not have been sealed or how the public was harmed through such sealing—further proof that his unwarranted attack on Abrams was not in furtherance of the public interest.

the purported need for altering courtroom practices concerning sealing court records and closing family law hearings.

Finally, Respondents sought to *make* Abrams a matter of public interest by publicizing false and defamatory information about her on the internet. But the mere fact that people follow VIPI's social media pages and listen to Sanson's weekly talk show does not mean that Sanson's media posts and email blasts are matters of public interest.[152]

Notwithstanding his inability to satisfy the *Shapiro* factors, Sanson argued below that his statements involved matters of public interest because they concerned the conduct of an attorney in a "taxpayer-funded courtroom." But Sanson's argument "sweeps too broadly."[153] Absent acting as a warning to consumers, statements about an attorney do not implicate a matter of public interest.[154] In other words, stating that

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[152] *See Du Charme v. Int'l Bhd. of Elec. Workers*, 1 Cal. Rptr. 3d 501, 506 (Cal. Ct. App. 2003) (rejecting the proposition that "any statement published on any web site in any context is protected by the anti-SLAPP statute") (emphasis removed from original).

[153] *Rivero*, 130 Cal. Rptr. 2d at 90 (rejecting the argument that communications regarding "unlawful workplace activity . . . at a publicly-financed institution" automatically constituted a matter of public interest) (emphasis removed from original).

[154] *Piping Rock Partners, Inc., Inc.*, 946 F. Supp. 2d at 969; *see also Wilbanks v. Wolk*, 17 Cal. Rptr. 3d 497, 506 (Cal. Ct. App. 2004).

something is attorney misconduct "is not the same as discussing the general topic of [attorney] misconduct"; only the latter is potentially subject to anti-SLAPP protection.[155]

As further detailed below, Sanson's statements were not intended to serve as warnings to others. In fact, Sanson does not act as a watchdog for the general public in terms of monitoring or policing attorney misconduct—his stated mission, through VIPI, is to vet candidates for political office.[156] Thus, he stepped outside of the proverbial box upon releasing his wrath on Abrams.

Moreover, "a publication does not become connected with an issue in the public interest simply because . . . it can be used as an example of bad practices or of how to combat bad practices."[157] This is particularly true if the statements in question are conclusory in nature.[158]

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[155] *Weiss v. Occidental Coll.*, No. B170384, 2004 WL 2502188, at *5 (Cal. Ct. App. Nov. 8, 2004); *see also Rivero*, 130 Cal. Rptr. 2d at 91 (distinguishing between "information that can be used as an example or as a motivator" and "information that has intrinsic value to others").

[156] V AA 737 (Ex. 4-E to Omnibus Opposition).

[157] *Wilbanks*, 17 Cal. Rptr. 3d at 507.

[158] *Weiss*, No. B170384, 2004 WL 2502188, at *5 ("Nowhere in the record can we find any description of the nature of respondent's 'serious misconduct.' The adjective "serious" does not assist us in guessing what happened at the ball park.").

A cursory review of the postings at issue reveals that Sanson's conclusory remarks about Abrams hardly served to benefit the public. More pointedly, he did not create public awareness of matters occurring in family court by seeking to damage Abrams' reputation and tarnish her firm's goodwill.

NRS 41.637(4) encourages communications that contribute to an "ongoing controversy, debate or discussion."[159] By his own admission, Sanson was not trying to expose public corruption, nor was he seeking to prompt reform in the family court by repeatedly posting, and then republishing, defamatory information about the Abrams Parties.[160] He put Abrams on his "priority list" and began "digging for dirt" on her in direct retaliation to the Sanctions Motion that she filed against Schneider in the *Saiter* divorce case.[161] It can hardly be said that his motives were true or that his actions were just; he proudly declared that he was at "war" with Abrams, and he refused to "surrender," saying, in response to various attempts to have the video of

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[159] *Du Charme*, 1 Cal. Rptr. 3d at 509-10.

[160] V AA 750 (Ex. 3 to Omnibus Opposition, at ¶ 14(b)).

[161] V AA 750 (Ex. 3 to Omnibus Opposition).

the September 29 hearing in *Saiter* removed from the internet: "I'll be damned if anyone can get that one down!"[162]

Because Sanson's defamatory posts did not involve an issue of public interest, Respondents' anti-SLAPP motions should have been denied.

C. Respondents Failed to Show that Private Email Blasts Constitute Communications Made in a Public Forum

A public forum is a place open to the use of the general public "for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[163] "Means of communication where access is selective, such as most newspapers, newsletters, and other media outlets, are not public forums."[164]

At or around the time that he published his defamatory posts on social media, Sanson republished the same defamatory posts through private emails to VIPI's

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[162] III AA 479, 493.

[163] *Weinberg*, 2 Cal. Rptr. 3d at 391 (*quoting Krishna Soc'y v. Lee*, 505 U.S. 672, 679 (1992)).

[164] *Id.* (citing *Ark. Educ. TV. v. Forbes*, 523 U.S. 666, 678–680 (1998)); *see also Toler v. Dostal*, No. A118793, 2009 WL 1163492, at *6 (Cal. Ct. App. Apr. 30, 2009) ("[I]f publication of statements is derived from means of communication where access is selective or restricted, the forum is not public").

subscribers. By communicating defamatory information about the Abrams Parties in a non-public forum, Sanson (and his co-conspirator, Schneider) lost the benefit of claiming immunity under the anti-SLAPP statute.

Judge Leavitt struggled with this argument during the hearing on the anti-SLAPP motions.[165] But she ultimately concluded that email somehow qualifies as a public forum for purposes of the anti-SLAPP statute.[166] That conclusion, respectfully, is nonsensical—only the recipient of an email has access to his or her inbox; the public does not have access to a private citizen's inbox. Because an email exchange is only between the sender and the recipient, it does not constitute a form of communication that is occurring in a public forum.

The outcome might be different if the phrase "in a place open to the public or in a public forum" did not appear in NRS 41.637(4). In *Lippincott v. Whisenhunt*,[167] the Texas Supreme Court addressed whether allegedly defamatory statements made by the defendant via email fell within the purview of Texas' anti-SLAPP statute. Because their statute "imposes no requirement that the form of the communication be

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[165] VI AA 913 (Transcript at 30:12-15).

[166] IV AA 960.

[167] *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 508 (Tex. 2015).

public," the *Lippincott* court held that the defendant did not have to show that his statements were in a public forum for purposes of meeting his initial burden of proof under the anti-SLAPP analysis.[168]

Nevada law is different, and requires Sanson to prove that his communications were made "in a place open to the public or in a public forum."[169] Sanson did not do so because he knowingly transmitted defamatory communications via email to VIPI's subscribers. Because those statements were not made in a place open to the public or in a public forum, Respondents' anti-SLAPP motions should have been denied.

In sum, Respondents did not meet their initial burden of proof showing that they were sued for engaging in statutorily protected speech as defined under the anti-SLAPP statute. Therefore, this Court should vacate the orders giving rise to this appeal and reverse and remand with instructions for the district court to deny Respondents' anti-SLAPP motions.

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[168] *Id.* at 509-10.

[169] *Pub. Employees' Ret. Sys. of Nevada v. Gitter*, 133 Nev., Adv. Op. 18, 393 P.3d 673, 679 (2017) (indicating that this Court will apply—as written—the plain language of a statute).

D. The Abrams Parties Met their Burden of Establishing that their Claims Have at Least "Minimal Merit" Under the Second Prong of the Anti-SLAPP Analysis

1. Standard of Decision

If the defendant meets its initial burden of proof under NRS 41.660(3)(a), then the burden shifts to the plaintiff to demonstrate "with prima facie evidence a probability of prevailing on [its] claims."[170] This means that the plaintiff must show that each claim has at least "minimal merit."[171]

If the plaintiff meets its burden of proof, the defendant's anti-SLAPP motion must be denied.[172] "Since an [a]nti–SLAPP motion is brought at an early stage of proceedings, the plaintiff's burden of establishing a probability of success is not high."[173] In making a determination, this Court may "[c]onsider such evidence,

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[170] NRS 41.660(3)(b).

[171] *Park*, 393 P.3d at 907. This Court looks to California case law for guidance in addressing the second prong of the anti-SLAPP analysis. *See* NRS 41.665(2).

[172] *Navellier*, 52 P.3d at 708; *see also Soukup v. Law Offices of Herbert Hafif*, 139 P.3d 30, 51 (Cal. 2006) ("The Plaintiff need only establish that his or her claim has 'minimal merit' to avoid being stricken as a SLAPP.").

[173] *Browne v. McCain*, 611 F. Supp. 2d 1062, 1068 (C.D. Cal. 2009).

written or oral, by witnesses or affidavits, as may be material."[174] The plaintiff's evidence "is not weighed by th[is] Court, but presumed true if in favor of the plaintiff."[175] This Court assesses the defendant's evidence "only to determine if it bars plaintiff's submissions as a matter of law."[176]

Importantly, a defendant who advances an affirmative defense through an anti-SLAPP motion bears the burden of proof on the defense and must establish "a probability of prevailing" on that defense.[177]

In evaluating the second prong of the anti-SLAPP analysis, this Court should clarify that defamatory comments must be reviewed in context,[178] and hold that in deciding an anti-SLAPP motion, a district court should review a series of related statements—such as several statements made over the course of a months-long online

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[174] NRS 41.660(3)(d).

[175] *Piping Rock Partners, Inc.*, 946 F. Supp. 2d at 967.

[176] *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 61 Cal. Rptr. 3d 29 (Cal. Ct. App. 2007).

[177] *Davis v. Elec. Arts Inc.*, 775 F.3d 1172, 1177 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1448, 194 L. Ed. 2d 549 (2016).

[178] *See* ROBERT D. SACK, 1 SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS § 2.4.2, at 2-20 (5th ed. 2017) ("Particular words must be read in the context of the communication as a whole, 'taking into account [the communication's] wording, the nature and use of headlines, and any other methods employed to give special emphasis.'") (internal citations omitted).

smear campaign—in context, with the question being the perception of those comments expected from a reasonable reader.[179]

2. The Abrams Parties' Claims Have at Least "Minimal Merit"

Although the First Amended Complaint for Damages contained eleven causes of action, at the June 5, 2017, hearing, the Abrams Parties' counsel agreed to dismissal of the causes of action for harassment, RICO, injunctive relief, and copyright infringement pursuant to NRCP 12(b)(5).[180] Thus, assuming (*arguendo*) this Court proceeds to the second stage of the anti-SLAPP analysis, this Court must decide whether the Abrams Parties established that the following causes of action have at least minimal merit: (i) defamation; (ii) false light; (iii) business

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[179] *Id.* at 2-21 ("A court will not isolate particular phrases and determine whether, considered alone, they are defamatory. . . . If two or more broadcasts, articles, or other communications would likely be received and perused by their audience together, the meaning of each communication may be understood in light of the other communication or communications.") (internal citations omitted).

[180] VI AA 930-931; *see also* IX AA 1677. In deciding Sanson's anti-SLAPP motion, the district court relied, in part, on the Abrams Parties' dismissal of certain claims as evidence that their remaining claims somehow lack minimal merit. VI AA 964. No law was cited for the proposition that voluntary dismissal of a claim can be used in deciding whether to dismiss a separate and distinct claim, and none is believed to exist.

disparagement; (iv) intentional infliction of emotional distress; (v) negligent infliction of emotional distress; (vi) concert of action; and (vii) civil conspiracy.

As set forth below, the Abrams Parties easily met their burden of proof.

a. Defamation

(1) General Legal Principles Regarding Defamation

"Defamation is a publication of a false statement of fact."[181] "An action for defamation requires the plaintiff to prove four elements":

(1) a false and defamatory statement;

(2) an unprivileged publication to a third person;

(3) fault, amounting to at least negligence; and

(4) actual or presumed damages.[182]

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[181] *Pegasus*, 118 Nev. at 714, 57 P.3d at 87.

[182] *Clark Cnty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 385, 213 P.3d 496, 503 (2009).

"A statement is defamatory when, under any reasonable definition[,] such charges would tend to lower the subject in the estimation of the community and to excite derogatory opinions against [her] and to hold [her] up to contempt."[183] "[I]f the defamatory communication imputes a 'person's lack of fitness for trade, business, or profession,' or tends to injure the plaintiff in his or her business, it is deemed defamation per se and damages are presumed."[184]

When assessing whether a statement is defamatory, the words "must be reviewed in their entirety and in context to determine whether they are susceptible of a defamatory meaning."[185] If a statement is susceptible to multiple interpretations, one of which is defamatory, "resolution of the ambiguity is a question of fact for the jury."[186] So, too, "the truth or falsity of an allegedly defamatory statement is an issue of fact properly left to the jury for resolution."[187]

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[183] *Posadas v. City of Reno*, 109 Nev. 448, 453, 851 P.2d 438, 442 (1993) (quotation marks and citation omitted).

[184] *Virtual Educ. Software, Inc.*, 125 Nev. at 385, 213 P.3d at 503.

[185] *Lubin v. Kunin*, 117 Nev. 107, 111, 17 P.3d 422, 425 (2001) (quotation marks and citation omitted).

[186] *Branda v. Sanford*, 97 Nev. 643, 646, 637 P.2d 1223, 1225-26 (1981).

[187] *Posadas*, 109 Nev. at 453, 851 P.2d at 442.

Whether a statement constitutes fact or opinion is determined by assessing "whether a reasonable person would be likely to understand the remark as an expression of the source's opinion or as a statement of existing fact."[188] Although a statement of opinion is not actionable, a mixed-type statement—e.g., a statement of opinion that implies the existence of undisclosed, defamatory facts—is actionable.[189]

(2) Respondents Repeatedly and Shamelessly Defamed Abrams

For several months in late 2016, Sanson authored and published the following articles: the Attack Article;[190] the Bully Article;[191] the Seal-Happy Article;[192] the Acting Badly Article;[193] and the Deceives Article.[194] These articles were sent to VIPI's subscribers via email, and separately published on VIPI's social media pages,

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[188] *Lubin*, 117 Nev. at 112, 17 P.3d at 426.

[189] *Id.* at 113, 17 P.3d at 426.

[190] V AA 708 (Ex. 1-A to Omnibus Opposition.)

[191] V AA 715 (Ex. 1-B to Omnibus Opposition.)

[192] V AA 723 (Ex. 1-C to Omnibus Opposition.)

[193] V AA 735 (Ex. 1-D to Omnibus Opposition.)

[194] V AA 737 (Ex. 1- E to Omnibus Opposition.)

for the express purpose of damaging Abrams' reputation.[195] Each article contains actionable defamation, and in many instances, statements that constitute defamation *per se* by imputing Abrams' fitness to practice law:

> **The Attack Article**: Knowing that the average reader will not watch the entire video, Sanson quotes the initial accusations made by Judge Elliott at the outset of the September 29 hearing in *Saiter* without indicating that Judge Elliot withdrew those accusations at the end of the hearing.[196] In addition, Sanson implied that Abrams committed an ethical violation requiring her referral to the Nevada State Bar. "Accusations of . . . unethical activity . . . are expressions of fact, as are allegations relating to one's professional integrity that are susceptible of proof."[197]

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[195] V AA 754 (Ex. 4 at ¶¶ 13-14.)

[196] *Cf. Las Vegas Sun, Inc. v. Franklin*, 74 Nev. 282, 287, 329 P.2d 867, 870 (1958) ("The text of a newspaper article is not ordinarily the context of its headline, since the public frequently reads only the headline. The same is true of a tag-line or leader, since the public frequently reads only the leader without reading the subsequent article to which it refers.") (internal citations omitted).

[197] *Held v. Pokorny*, 583 F. Supp. 1038, 1040 (S.D.N.Y. 1984); *see also Yoder v. Workman*, 224 F. Supp. 2d 1077, 1081 (S.D.W. Va. 2002) (denying motion to dismiss defamation action because allegation that attorney engaged in "spurious and unethical legal actions and false allegations" could "be reasonably interpreted as stating actual facts); *Wachs v. Winter*, 569 F. Supp. 1438, 1443 (E.D.N.Y.1983) (noting that statements accusing an attorney of unprofessional conduct that would

The Bully Article: Sanson refers to Abrams as having been "disrespectful and obstructionist" during the September 29 hearing in *Saiter*. He also stated that her conduct was "embarrassing" and that she has since attempted to "hide her behavior from the rest of the legal community and the public." From a reasonable person's standpoint, those statements imply that Abrams violated court rules related to sealing and rules of professional conduct in dealings with the tribunal during the September 29 hearing—mixed-type statements that are undeniably actionable under Nevada law.

The Seal-Happy Article: Sanson implies that Abrams has sealed numerous family law cases contrary to the rule of law, and directly states that Abrams procured the Prohibition Order in *Saiter* even though it was "specifically disallowed by law." Sanson separately states that Abrams was "disrespectful," "over-zealous," "bullied" Judge Elliot, engaged in "browbeating," obstructed the judicial process, and impeded public access to court records. These words do not exist in isolation; when reviewed in their entirety, they are easily

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tend to injure him in that capacity are libelous per se).

susceptible of a defamatory meaning by implying—if not stating outright—that Abrams is unethical and broke the law.[198]

The Acting Badly Article: Sanson again accuses Abrams of bullying Judge Elliot in *Saiter*, which implies the existence of undisclosed, defamatory facts (e.g., that Abrams threatened or intimidated Judge Elliot).

The Deceives Article: Sanson accuses Abrams of sealing family law cases to "cover [her] own bad behavior[]," which implies the existence of undisclosed, defamatory facts (e.g., that Abrams sealed one or more cases for reasons not permitted by statute or court rules).

When reviewed together and in context, these articles demonstrate that Sanson intentionally published defamatory statements concerning Abrams to numerous third parties.[199]

Although not addressed by the district court, Respondents argued below that a heightened burden of proof applied to the defamation claim because Abrams is a limited purpose public figure (e.g., that she had to prove that Sanson acted with actual

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[198] *Branda*, 97 Nev. at 646-47, 637 P.2d at 1225-26.

[199] *Posadas*, 109 Nev. at 454-55, 851 P.2d at 443-44 (finding that the contents of a press release together with "evidence suggesting ill will" by the defendant created issues of fact related to the plaintiff's defamation claim for the jury to decide).

malice). That is wrong as a matter of law based on this Court's holding in *Bongiovi v. Sullivan*, 122 Nev. 556, 138 P.3d 433 (2006). Notwithstanding, the threats by Sanson and Schneider and all reasonable inferences drawn from those threats, plus the open admission of personal enmity, are sufficient to create an issue of fact concerning whether Sanson acted with actual malice.[200]

For these reasons, Abrams demonstrated *prima facie* evidence that her defamation claim has at least "minimal merit."

b. False Light

False light is distinct from defamation.[201] Unlike defamation, which seeks to protect "an objective interest in one's reputation," false light seeks to protect "one's subjective interest in freedom from injury to the person's right to be left alone." Thus, a person may be placed in a "harmful false light even though it does not rise to the level of defamation," and the cause of action, which is "necessary to fully protect

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[200] *Pegasus*, 118 Nev. at 721-22, 57 P.3d at 92-93.

[201] *Franchise Tax Bd. of Cal. v. Hyatt*, 133 Nev. ___, 407 P.3d 717, 735 (Adv. Opn. No. 102, Dec. 26, 2017).

privacy interests," arises when one party gives publicity to a matter concerning another that places the other before the public in a false light ... if:

> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
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> (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.[202]

Both of those elements are made out by Sanson's months-long defamation campaign. Given that Sanson (and Schneider, as a co-conspirator) defamed Abrams, it goes without saying that Sanson (and Schneider, as a co-conspirator) also placed Abrams in a false light by portraying to the public an image of Abrams that is contrary to what she is known for and how she is perceived in the community.[203]

For example, by knowingly misrepresenting the facts of the *Saiter* case and then feigning that he had been "contacted by judges, attorneys and litigants eager to

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[202] *Id.*; *see also* RESTATEMENT (SECOND) TORTS § 652E.

[203] Assuming (*arguendo*) that the articles do not support a defamation claim, they support a false light claim. *Machleder v. Diaz*, 801 F.2d 46, 55 (2d Cir. 1986) ("[W]hile a false light claim may be defamatory, it need not be.").

share similar battle-worn experiences,[204] Sanson falsely portrayed Abrams in a light that would be highly offensive to a reasonable person.[205] Similarly, by repeatedly stating that Abrams seals cases in furtherance of her own interests rather than that of her clients, Sanson falsely portrayed Abrams in a light that would be highly offensive to a reasonable person.

The articles did exactly what Respondents intended to accomplish: cause Abrams to suffer "severe emotional distress" due to the "constant onslaught of internet posts."[206] Accordingly, Abrams demonstrated, with *prima facie* evidence, that her false light claim has minimal merit.

c. Business Disparagement

An action for business disparagement is similar to a defamation claim. The elements are:

(1) a false and disparaging statement;

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[204] V AA 723 (Ex. 1-C to Omnibus Opp.)

[205] RESTATEMENT (SECOND) TORTS § 652E cmt. b (indicating that the false light tort protects against someone being portrayed "in an objectionable false light or false position, or in other words, otherwise than as [s]he is").

[206] V AA 754 (Ex. 4 to Omnibus Opposition. at ¶ 16.)

(2) the unprivileged publication by the defendant;

(3) malice; and

(4) special damages.[207]

Malice is proven when the plaintiff shows either that the defendant published the disparaging statement with the intent to cause harm to the plaintiff's pecuniary interests, or the defendant published a disparaging remark knowing its falsity or with reckless disregard for its truth.[208] As detailed above, both alternatives are present here.

The various articles published by Sanson not only unfairly attacked Abrams' reputation, they tarnished the goodwill and business interests of Abrams' firm. In other words, by attacking Abrams, Sanson necessarily impugned the legal services provided by Abrams' firm to its clients.

There can be no doubt that Sanson acted with malice when publishing, and then reposting, the articles. For example, he told Judge Elliot, "[O]nce we start a course

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[207] *Virtual Educ. Software, Inc.*, 125 Nev. at 386, 213 P.3d at 504.

[208] *Pegasus*, 118 Nev. at 722, 57 P.3d at 92-93.

of action we do not raise our hands in defeat," and that, "In combat we never give up and we will not start given [sic] up because we exposed someone."[209]

Similarly, when speaking to an employee of the Abrams' firm, he said that Abrams is on his "priority list" and had "started this war."[210] As detailed above, he admitted to personal animosity during the Lauer radio interview. He knew what he said about Abrams' handling of the *Saiter* divorce case was untrue – despite watching the video of the September 29 hearing and then reading what Judge Elliot wrote in her email, he continued spewing falsehoods about Abrams in online posts on social media and in email blasts to VIPI's subscribers.

Finally, as it pertains to special damages, Abrams specifically said in her declaration that her firm suffered "economic damages . . . in the form of lost time, lost business, etc."[211]

Accordingly, Abrams' firm demonstrated, with *prima facie* evidence, that its business disparagement claim has minimal merit.

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[209]V AA 758 (Ex. 4-A to Omnibus Opposition.)

[210] V AA 750 (Ex. 3 to Omnibus Opposition. at ¶ 14.)

[211] V AA 754 (Ex. 4 to Omnibus Opposition. at ¶ 16.)

d. Intentional Infliction of Emotional Distress

Abrams asserted alternative claims for relief seeking damages arising from the severe mental distress caused by Respondents' online smear campaign: intentional infliction of emotional distress; and negligent infliction of emotional distress.

The elements of a claim for intentional infliction of emotional distress are:

(1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress;

(2) severe or extreme emotional distress; and

(3) actual or proximate causation.[212]

In *Hyatt*, this Court noted that medical records are not mandatory in order to establish a claim for intentional infliction of emotional distress if the acts of the defendant are sufficiently severe, citing with approval the Restatement explanation: "The intensity and the duration of the distress are factors to be considered in determining its severity. Severe distress must be proved; but in many cases the

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[212] *Olivero v. Lowe*, 116 Nev. 395, 398, 995 P.2d 1023, 1025 (2000).

extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed."[213]

The elements of a claim for negligent infliction of emotional distress are akin to those supporting a traditional claim for negligence, with damages arising in the form of emotional distress.[214]

As detailed above, the online defamation campaign at issue in this case spanned several months. The manner in which Sanson and Schneider relentlessly attacked Abrams in direct response to her filing of the Sanctions Motion in *Saiter* is sufficient indicia of extreme and outrageous conduct. The vitriolic tone of their articles alone creates issues of fact regarding the outrageousness of their conduct and whether they breached a duty of care owed to Abrams to avoid exposing her to an unreasonable risk of emotional distress.[215] Both Schneider and Sanson were aware of the importance to Abrams of her reputation for honesty and integrity.[216]

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[213] *Hyatt*, 407 P.3d at 741 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1977)).

[214] *Shoen v. Amerco, Inc.*, 111 Nev. 735, 748, 896 P.2d 469, 477 (1995).

[215] *Id.*; *see also Blasch v. Walgreen Co.*, 127 Nev. 832, 841, 264 P.3d 1155, 1161 (2011) ("Breach of duty and causation are classically questions of fact.").

[216] *See, e.g.*, IV AA 15 ("I take any challenges to our ethics very, very seriously . . . .")

Accordingly, Abrams demonstrated, with *prima facie* evidence, that her intentional and/or negligent infliction of emotional distress claim has minimal merit.

e. The Accessory Liability Claims

The Abrams Parties asserted alternative claims for relief involving accessory liability: civil conspiracy; and concert of action.[217]

"Actionable civil conspiracy arises where two or more persons undertake some concerted action with the intent 'to accomplish an unlawful objective for the purpose of harming another,' and damage results."[218] Even if "an act done by an individual is not actionable because justified by his rights, such act becomes actionable when done in pursuance of a combination of persons actuated by malicious motives, and not having the same justification as the individual."[219]

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[217] *See Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. __, 345 P.3d 1049, 1051 (Adv. Opn. No. 15, Mar. 26, 2015) (noting that civil conspiracy, aiding and abetting, and concert of action are "accessory liability theories").

[218] *Guilfoyle v. Olde Monmouth Stock Transfer Co.*, 130 Nev. 801, 813, 335 P.3d 190, 198 (2014) (quoting *Consol. Generator–Nevada, Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998)).

[219] *Eikelberger v. Tolotti*, 96 Nev. 525, 527-28, 611 P.2d 1086, 1088 (1980).

The Abrams Parties presented ample evidence supporting their accessory liability claim, including: (i) a pre-existing relationship between Sanson and Schneider—a fact confirmed by Judge Elliot in her email to Abrams saying that she had personally observed Sanson attending a hearing with Schneider in an unrelated case;[220] (ii) Schneider's written threat of taking action against Abrams "beyond filing an opposition" to her Sanctions Motion;[221] (iii) Sanson obtaining a copy of the video of the September 29 hearing in *Saiter* from Schneider—the only possible source given that Schneider is the only one who asked for a copy of the video, which, because the hearing had been closed, was only accessible to counsel for the parties;[222] (iv) Schneider's silence during the email exchange between and among Judge Elliot, Sanson, and Abrams related to the video being posted on the internet;[223] (v) VIPI's promotion of an advertisement for Schneider's law firm;[224] (vi) Schneider's

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[220] V AA 772 (Ex. 4-B to Omnibus Opp.)

[221] V AA 747 (Ex. 2-A to Omnibus Opp.)

[222] V AA 754 (Ex. 4 to Omnibus Opp. at ¶ 7; Ex. 4-C to Omnibus Opp.); *see also* Ex. 3 at ¶ 12. In his email to Judge Elliot, Sanson wrote: "[T]he video was requested, paid for and posted prior to the sealing." Ex. 4-A to Omnibus Opp. Thus, Sanson all but admitted that Schneider requested the video for him to post online.

[223] *See generally* V AA 758 (Exs. 4-A & 4-B to Omnibus Opp.)

[224] I AA 94 (First Am. Compl. at ¶ 43.)

representation to an employee of Abrams' firm, following Sanson's issuance of the first defamatory post (the Attack Article), that he could "make this all go away" if the Sanctions Motion was withdrawn;[225] and (vii) Sanson's representation to an employee of Abrams' firm that he would have refrained from attacking Abrams had she simply withdrawn the Sanctions Motion.[226]

Moreover, and as detailed above, Abrams demonstrated that myriad actions were taken through the online smear campaign by Respondents for the unlawful objective of defaming her, placing her in a false light, inflicting emotional distress upon her, and disparaging her law firm.[227]

Finally, Abrams said in her declaration that she suffered damages as a result of the wrongful actions undertaken by Sanson and Schneider in furtherance of their conspiracy.[228]

Accordingly, the Abrams Parties demonstrated, with *prima facie* evidence, that their accessory liability claim for civil conspiracy has minimal merit.

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[225] V AA 745 (Ex. 2 to Omnibus Opp. at ¶ 5.)

[226] V AA 750 (Ex. 3 to Omnibus Opp. at ¶ 14.)

[227] *See generally* V AA 708-743 (Exs. 1-A – 1-E to Omnibus Opp.; Ex. 4 to Omnibus Opp.)

[228] V AA 754 (Ex. 4 at ¶¶ 15-16.)

When the Abrams Parties' evidence, and all reasonable inferences drawn from that evidence, is viewed in a light most favorable to the Abrams Parties, it is clear that the Abrams Parties demonstrated, with *prima facie* evidence, a probability of prevailing on their claims (*e.g.*, that their claims have at least "minimal merit"). Therefore, this Court should vacate the orders giving rise to this appeal and reverse and remand with instructions for the district court to deny Respondents' anti-SLAPP motions.

CONCLUSION

Why laws were created matters. The anti-SLAPP statute is not intended to protect those trying to extort a result in civil litigation by engaging in an online smear campaign. "[T]o countenance application of the anti-SLAPP statute in [that] context, it would become a sword in the arsenal of routine civil procedure rather than a shield protecting First Amendment rights."[229]

Schneider and Sanson were not truthful, and they failed to show that they were truthful. They were not sued for making truthful statements, but for engaging in a

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[229] *Leonard v. Aruda*, No. A143518, 2015 WL 5095967, at *5 (Cal. Ct. App. Aug. 28, 2015).

deliberately false and defamatory defamation campaign for illicit purposes. The statements were not in direct connection with an issue of public interest, or any legitimate purpose, an were not made in a "public forum."

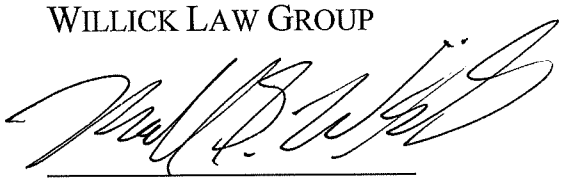
The smear campaign was not entitled to anti-Slapp protection, and if there was any legitimate doubt on any of the underlying facts, the district court was required to permit adequate discovery to resolve it.

In any event, the Abrams Parties proved that their claims for defamation, false light, and business disparagement had at least "minimal merit" precluding an "anti-SLAPP" judgment.

Sometimes it does come down to "good guys" and "bad guys." Schneider and Sanson are the bad guys here, and they should not be permitted to capitalize on laws intended to protect the innocent as a weapon to victimize others.

Dated this 24 day of October, 2018.

Respectfully submitted,
WILLICK LAW GROUP



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3. Finally, I hereby certify that I have read this appellate brief, 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief 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 brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 24 day of October, 2018.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the WILLICK LAW GROUP and that on this 12th day of October, 2018, documents entitled *Opening Brief* were filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows, to the attorneys listed below at the address, email address, and/or facsimile number indicated below:

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