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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

DARRELL T. COKER,

SUPREME COURT NO.: 73863

*Appellant,*

vs.

MARCO SASSONE,

*Appellee.*

**APPELLANT DARRELL T. COKER'S OPENING BRIEF**

APPEAL FROM THE DISTRICT COURT  
 FOR CLARK COUNTY, NEVADA, CASE NO.: A-16-742853-C

**NRAP 26.1 DISCLOSURE**

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.

1. Appellant Darrell To. Coker is an individual, and thus there is no parent corporation or publicly held company that owns 10% or more of his stock.

2. The following law firm represented Appellant in the district court proceedings leading to this appeal and represents Appellant in this appeal:

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No other law firm is expected to appear on Appellant's behalf in this appeal.

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**JURISDICTIONAL STATEMENT**

On September 2, 2016, Appellee, Marco Sassone, filed a Complaint with the district court against Appellant Darrell T. Coker and multiple other parties that have since been dismissed. (Appellant’s Appendix 1.) Appellee amended his complaint on October 3, 2016. (*Id.* at 21.) Mr. Coker removed the matter to the United States District Court for the District of Nevada on December 30, 2016. (*Id.* at 39.) Appellee voluntarily dismissed two of his claims with prejudice on January 20, 2017. (*Id.* at 46.) The federal court remanded the matter back to the state district court on March 13, 2017. (*Id.* at 49.) Following remand, Mr. Coker filed a Special Motion to Dismiss on March 16, 2017, seeking to dismiss all of Appellee’s claims pursuant to NRS 41.660. (*Id.* at 114.) The district court heard this motion on June 20, 2017 and took the motion under advisement. The court subsequently issued a minute order denying the motion on July 20, 2017 (*id.* at 325) and entered an order denying Mr. Coker’s Special Motion to Dismiss on August 23, 2017. (*Id.* at 327.)

Appellant Darrell T. Coker appeals the district court’s order denying his Special Motion to Dismiss under Nevada’s Anti-SLAPP statute, NRS 41.660. Pursuant to NRS 41.670(4), “[i]f the [district] court denies the special motion to dismiss filed pursuant to NRS 41.660, an interlocutory appeal lies to the Supreme

Court.” Because the district court denied Mr. Coker’s Special Motion to Dismiss,  
the Supreme Court has appellate jurisdiction over this matter.

1                    **ROUTING STATEMENT PURSUANT TO NRAP 28(a)(5)**

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

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

7                    (2)    NRAP 17(a)(14), as the matter raises as a principal issue a question  
8 of statewide public importance, namely, whether the distribution of artistic works  
9 in the public domain constitutes a communication in direct connection with an  
10 issue of public concern under Nevada’s Anti-SLAPP statute.

**STATEMENT OF THE ISSUES**

The issues on appeal are as follows:

(1) Whether distribution of artistic works that, by available record evidence, are in the public domain is conduct protected under Nevada’s Anti-SLAPP statute, NRS 41.635, *et seq.*

(2) Whether a party establishes his burden of proof under the first prong of the Anti-SLAPP statute by providing a sworn declaration regarding the truthfulness of his communication, or lack of awareness of his communication, that is not rebutted by any admissible evidence.

Appellee's claims were based on an alleged joint venture by which Mr. Coker allegedly created and sold forgeries of Appellee's artistic works, selling them to unsuspecting customers who were not aware they were fakes. This was never true, however. Mr. Coker purchased reproductions of works of art created by Appellee from a third party, Michael Schofield, and then re-sold these reproductions, thinking he had the legal right to do so. (*Id.* at 231.) At no point did Mr. Coker create any allegedly fraudulent reproductions, nor did Mr. Coker at any point create forge anyone's signature in connection with the sale of these reproductions. (*Id.* at 231.) In fact, there is an open question as to whether

Appellee even owns the works in question, as the works do not have copyright registrations and Appellee has provided no evidence of ownership. Furthermore, Appellee has provided no evidence at all to support any of his factual allegations.

Mr. Coker removed the matter to the United States District Court for the District of Nevada on December 30, 2016. (*Id.* at 39.) While the matter was before the federal court, Appellee voluntarily dismissed his right of publicity and works of art claims with prejudice on January 20, 2017. (*Id.* at 46.) The federal court remanded the matter back to the state district court on March 13, 2017. (*Id.* at 49.) Following remand, Mr. Coker filed a Special Motion to Dismiss on March 16, 2017, seeking to dismiss all of Appellee’s claims pursuant to NRS 41.660. (*Id.* at 114.) Defendants Darryl McCullough and And The Jello’s Jigglin, LLC joined the Special Motion to Dismiss on March 28, 2017. (*Id.* at 126.) The district court heard this motion on June 20, 2017 and took the motion under advisement. The court subsequently issued a minute order denying the motion on July 20, 2017 (*id.* at 325) and entered an order denying Mr. Coker’s Special Motion to Dismiss on August 23, 2017. (*Id.* at 327.)

In denying Mr. Coker’s Anti-SLAPP motion, the Court summarily found that Mr. Coker did not meet his burden under the first prong of the Anti-SLAPP analysis. It simply stated that “[w]hen bringing an Anti-SLAPP motion to dismiss pursuant to NRS 41.660, it is the Defendants’ burden to establish, by a

preponderance of the evidence, that their conduct was a good faith communication that was either truthful or made without knowledge of its falsehood. Defendants have not met that burden.” (*Id.* at 333.) The court provided no explanation of how Mr. Coker’s declaration was insufficient to meet his burden, and no explanation of how, if at all, Appellee’s evidence rebutted Mr. Coker’s evidentiary showing. Furthermore, the court provided no analysis whatsoever as to whether Mr. Coker’s conduct of disseminating artistic works constituted communications in furtherance of the right to free speech in direct connection with an issue of public concern, as required under the first prong of the Anti-SLAPP analysis.

## STATEMENT OF RELEVANT FACTS

### **1.0 The Dispute Between the Parties**

This is factually a very simple case. Appellee is a professional artist who allegedly created a series of artistic works reproduced in a monograph book originally published in 1979. (Appellant’s Appendix 22-23, at ¶¶10-13.) Mr. Coker purchased reproductions of artistic works allegedly created by Appellee and featured in this monograph book from a bulk art supplier named Michael Schofield. (*Id.* at 231, at ¶2.) Mr. Coker did not personally create any of the copies of the works in question (*Id.* at ¶3.) He thought the reproductions he purchased from Mr. Schofield were legitimate or otherwise legal to buy and sell. (*Id.* at ¶5.)

Despite claiming ownership of the artistic works in question, there is no record evidence that Appellee has legal rights in any of the allegedly infringed works. None of the works in question have been registered with the U.S. Copyright Office. (*Id.* at 109.)

### **2.0 The Proceedings Below**

On September 2, 2016, Appellee, Marco Sassone, filed a Complaint with the district court against Appellant Darrell T. Coker; Darrell R. Coker, Jr.; Richard Morello; Darryl McCullough; And The Jello’s Jigglin, LLC d/b/a Postal Annex; and unnamed John Doe and Roe defendants, and brought claims for (1) violation



of NRS 598.0915, Nevada’s Deceptive Trade Practices Act; (2) NRS 597.790, Nevada’s right of publicity statute; (3) violation of Nevada RICO, § 207.400(1)(j); (4) violation of Nevada RICO, § 207.400(1)(c)(1); and (5) violation of NRS 597.740, Nevada’s works of art statute. (Appellant’s Appendix 1.) Appellee amended his complaint on October 3, 2016, but alleged the same causes of action against the same parties. (*Id.* at 21.)

Mr. Coker removed the matter to the United States District Court for the District of Nevada on December 30, 2016. (*Id.* at 39.) While the matter was before the federal court, Appellee voluntarily dismissed his right of publicity and works of art claims with prejudice on January 20, 2017. (*Id.* at 46.) The federal court remanded the matter back to the state district court on March 13, 2017. (*Id.* at 49.) Following remand, Mr. Coker filed a Special Motion to Dismiss on March 16, 2017, seeking to dismiss all of Appellee’s claims pursuant to NRS 41.660. (*Id.* at 114.) Defendants Darryl McCullough and And The Jello’s Jigglin, LLC joined the Special Motion to Dismiss on March 28, 2017. (*Id.* at 126.) The district court heard this motion on June 20, 2017 and took the motion under advisement. The court subsequently issued a minute order denying the motion on July 20, 2017 (*id.* at 325) and entered an order denying Mr. Coker’s Special Motion to Dismiss on August 23, 2017. (*Id.* at 327.)

In support of his Anti-SLAPP motion, Mr. Coker provided a declaration stating that he purchased from the allegedly fraudulent artistic works at issue from a build art supplier named Michael Schofield, that he did not personally create any of the copies of the works in question, and that he thought the reproductions he purchased from Mr. Schofield were legitimate or otherwise legal to buy and sell. (*Id.* at 231, at ¶¶2-5.) He also provided copies of the canceled checks he used to pay Mr. Schofield for these copies. (*Id.* at 233.)<sup>1</sup> Appellee made no attempt to rebut the statements in this declaration, and did not make any evidentiary objections or challenges to the admissibility of the declaration. Instead, Sassone’s opposition consisted of irrelevant and inadmissible evidence, primarily relying on declarations from third parties who allegedly purchased copies of the allegedly fraudulent works **at Appellee’s direction**, and testifying as to the contents of documents without attaching copies of them. (*Id.* at 129.) Appellee then belatedly attempted to supplement the record on July 18, 2017 in a response to a notice of supplemental authority Mr. Coker filed on July 14, 2017, by attaching an unauthenticated and largely illegible document that was a purportedly fraudulent certificate of authenticity that accompanied the reproductions Mr. Coker sold. (*Id.* at 315 and 323.) At no point in these proceedings, or at any other point in the case

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<sup>1</sup> Mr. Coker also incorporated by reference at page 10 of the Anti-SLAPP Motion records of the U.S. Copyright Office showing that there were no copyright registrations for the works at issue in this case. (*Id.* at 108)

before either the federal or state district court, did Appellee provide any evidence establishing that he owned the rights to any of the works in question.

In denying Mr. Coker’s Anti-SLAPP motion, the Court summarily found that Mr. Coker did not meet his burden under the first prong of the Anti-SLAPP analysis. It simply stated that “[w]hen bringing an Anti-SLAPP motion to dismiss pursuant to NRS 41.660, it is the Defendants’ burden to establish, by a preponderance of the evidence, that their conduct was a good faith communication that was either truthful or made without knowledge of its falsehood. Defendants have not met that burden.” (*Id.* at 333.) The court provided no explanation of how Mr. Coker’s declaration was insufficient to meet his burden, and no explanation of how, if at all, Appellee’s evidence rebutted Mr. Coker’s evidentiary showing. In fact, the court made no determinations at all as to Mr. Coker’s numerous objections to the admissibility of Appellee’s evidence, making it impossible to determine to what extent the court relied on inadmissible evidence in deciding the motion. Furthermore, the court provided no analysis whatsoever as to whether Mr. Coker’s conduct of disseminating artistic works constituted communications in furtherance of the right to free speech in direct connection with an issue of public concern, as required under the first prong of the Anti-SLAPP analysis.

## SUMMARY OF THE ARGUMENT

NRS 41.637 defines conduct that is protected under Nevada’s Anti-SLAPP statute. It provides, in relevant part, that a “[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,” is protected. NRS 41.637(4). A party bringing an Anti-SLAPP motion need only show that its conduct falls under this definition by a preponderance of the evidence, and a district court deciding an Anti-SLAPP motion is supposed to treat it like a motion for summary judgment, meaning it considers but does not weigh evidence.

Mr. Coker purchased reproductions of a small number of works of art created by Appellee from a third party, thinking that they were legitimate copies and that he had the legal right to buy and sell them. Mr. Coker provided a declaration clearly laying out these facts, and Appellee provided nothing to rebut it. Furthermore, Mr. Coker provided documentation showing that there were no copyright registrations for the artistic works at issue, meaning there is a reasonable chance either that the works are in the public domain, or that someone other than Appellee must bring these claims. Appellee did not contest this lack of registration, and in fact did not provide any evidence that he owned the rights to any of the works at issue. What evidence Appellee did provide was largely

irrelevant or inadmissible, and did not address or refute any of the statements in Mr. Coker’s declaration.

Given the evidentiary record before it, the district court had no basis for finding that Mr. Coker had not met his burden under the first prong of the Anti-SLAPP analysis. His declaration clearly laid out his good-faith basis for purchasing and selling the works at issue, and Appellee provided no admissible evidence showing that Mr. Coker engaged in any of the allegedly fraudulent of which he was accused. The court also failed to provide any discussion as to whether Mr. Coker satisfied the other elements of his evidentiary burden under the first prong of the Anti-SLAPP analysis, which the statute requires.

## ARGUMENT

### **1.0 Legal Standard**

Under Nevada’s Anti-SLAPP statute, if a lawsuit is brought against a defendant based upon the exercise of its First Amendment rights, the defendant has substantive immunity from suit unless the plaintiff can meet the burden required under the statute. Evaluating the Anti-SLAPP motion is a two-step process. The Movant bears the burden on the first step, and the Non-Moving party bears the burden on the second. *See John v. Douglas County Sch. Dist.*, 125 Nev. 746, 754 (Nev. 2009).

NRS 41.660(3) provides that when a defendant files an Anti-SLAPP motion,

the court shall ... [d]etermine whether the moving party has established, by a preponderance of the evidence, that the claim is based upon 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.

NRS 41.637 establishes four categories of communications protected by the statute. The relevant category here is a “[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.” NRS 41.637(4).

An Anti-SLAPP motion is treated as a motion for summary judgment. *See Stubbs v. Strickland*, 297 P.3d 326, 329 (Nev. 2013). And like a motion for summary judgment, the granting or denial of an Anti-SLAPP motion is reviewed *de novo*. *See John v. Douglas Cnty. School Dist.*, 125 Nev. 746, 753 (Nev. 2009).<sup>2</sup>

In interpreting its Anti-SLAPP statute, Nevada courts look to the wealth of California case law interpreting that state’s statute. *See John*, 125 Nev. at 756 (stating that “we consider California caselaw because California’s anti-SLAPP statute is similar in purpose and language to Nevada’s anti-SLAPP statute”); *see also Shapiro v. Welt*, 389 P.3d at 268 (same); and *see* NRS 41.665 (defining the plaintiff’s *prima facie* evidentiary burden on second prong in terms of California law.)

An Anti-SLAPP movant does not carry a heavy burden in satisfying the first prong of an Anti-SLAPP motion. He does not need to “establish [that his] actions are constitutionally protected under the First Amendment as a matter of

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<sup>2</sup> A recent decision from this Court found that the applicable standard of review is abuse of discretion, but that is not the case here. *Shapiro v. Welt*, 389 P.3d 262 (Nev. 2017) found that, under the 2013 version of the Anti-SLAPP statute, abuse of discretion was the proper standard of review. It expressly did so, however, because that version of the statute required a defendant opposing the motion to show by *clear and convincing evidence* a probability of prevailing on its claims. *See id.* at 266. In 2015, the statute was revised to decrease this evidentiary burden to the summary judgment-like *prima facie* standard. Since this burden is essentially the same as it was before the 2013 revisions, *de novo* is the proper standard of review here.

law.” *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294, 305 (2001). Rather,

a court must generally presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis, and then permit the parties to address the issue in the second step of the analysis, if necessary. Otherwise, the second step would become superfluous in almost every case, resulting in an improper shifting of the burdens.

*Chavez v. Mendoza*, 94 Cal. App. 4th 1083, 1089 (2001). That discussion is reserved for the second prong of the analysis. *See Wallace v. McCubbin*, 196 Cal. App. 4th 1169, 1195 (2011).

## **2.0 Mr. Coker’s Conduct Was in Direct Connection with an Issue of Public Interest**

Under the first prong of the Anti-SLAPP analysis, courts do not look to the particular cause of action pled by the plaintiff, but rather looks to whether the suit is based on expressive conduct. *See Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 652 (1996) (holding that, with an Anti-SLAPP motion, the “nature or form of” the action is “not what is critical but rather that it is against a person who has exercised certain rights”). Courts typically look to “the ‘gravamen or principal thrust’ of the plaintiff’s claims.” *In Re Episcopal Church Cases.*, 45 Cal. 4th 467, 477 (2009). A defendant may take advantage of the Anti-SLAPP statute if the “defendant’s conduct underlying the plaintiff’s cause of action” was “*itself*” expressive. *City of Cotati v. Cashman*, 29 Cal. 4th 69, 78



(2008) (emphasis original). While Appellee’s claims are styled as RICO and deceptive trade practices claims, this is unimportant; they are still targeted at the expressive conduct of distributing artistic works.

## 2.1 Dissemination of Artistic Works is Expressive Conduct

An issue of “public interest” is quite simply “any issue in which the public is interested. In other words, the issue need not be ‘significant’ to be protected by the anti-SLAPP statute – it is enough that it is one in which the public takes an interest.” *Nygaard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1042 (2008). The “public interest” requirement, “like all of [California’s Anti-SLAPP statute], is to be ‘construed broadly’ so as to encourage participation by all segments of our society in vigorous public debate related to issues of public interest.” *Seelig v. Infinity Broadcasting Corp.*, 97 Cal. App. 4th 798, 808 (2002). And California’s Anti-SLAPP statute “governs even private communications, so long as they concern a public issue.” *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 897 (2004).

While the classic SLAPP suit may involve a claim for defamation or political protest, neither Nevada nor California have ever expressed a desire for their SLAPP statutes to be so narrowly interpreted. A good example is *Cammarata v. Bright Imperial*, 2011 Cal. App. Unpub. LEXIS 665, \*10 (Cal. App. 2d Dist. Jan. 26, 2011). In that case, the plaintiff sued the defendant for its pricing practices and loss-leader distribution model in the context of distributing

pornographic films. The defendant did not even make the videos, and the plaintiff argued that the claims had nothing to do with the content, but rather allegedly anti-competitive conduct, “which would be just as actionable if it arose from selling dog food as selling adult entertainment.” *Id.* The statute was also found to apply to a video game featuring the likenesses of a popular band. *See No Doubt v. Activision Publishing, Inc.*, 192 Cal. 4th 1018, 1027 (2011).

Dissemination of expressive works is itself expressive activity. The right of free speech includes the right “to ‘distribute,’ ‘pass out,’ ‘circulate,’ or otherwise disseminate ideas.” *Van Nuys Pub. Co. v. City of Thousand Oaks*, 5 Cal. 3d 817, 821 (1971). Indeed, if Mr. Coker were handing out copies of the writings of Voltaire (which are in the public domain) the law should look at his actions no differently than if he were handing out photocopies of a picture of George Washington, or if he happened to be distributing even obscene content.<sup>3</sup> A defendant need not be the writer or artist of a work in order to seek shelter under the Anti-SLAPP law. Indeed, distributors, as opposed to creators, frequently successfully invoke Anti-SLAPP protection. *See Hupp v. Freedom Communications*, 221 Cal. App. 4th 398, 405 (2013) (granting Anti-SLAPP

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<sup>3</sup> If he were distributing obscene content, he might be subject to other legal sanctions, but even obscenity would meet the **first prong** of the Anti-SLAPP statute.

1 motion after finding that distributor of Internet publication was protected under 47  
2 U.S.C. § 230); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 63 (2006) (same).

3       The public has a right to and significant interest in widespread access to  
4 creative works. The Copyright Clause of the U.S. Constitution provides that  
5 copyright exists “[t]o promote the progress of science, ... by securing for limited  
6 Times to Authors ... the exclusive Right to their respective Writings ....”  
7 U.S. Const. Art. I, § 8. One of the primary policies underlying the Copyright Act  
8 is “the public interest in the free flow of information and ideas.” *Veeck v. S. Bldg.*  
9 *Code Cong. Int’l*, 293 F.3d 791, 802 (5th Cir. 2002); *see United States v.*  
10 *Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) (noting that there is an  
11 overriding public interest in the “release to the public of the products of [the  
12 author’s] creative genius”). Works that are not protected by copyright are in the  
13 public domain, and thus freely accessible, and free to be disseminated. The  
14 Founding Fathers were concerned with this overriding public interest even before  
15 drafting the First Amendment. U.S. Const. Art. I, § 8. Indeed, early cases under  
16 the Statute of Anne<sup>4</sup> in the 1700s held that some uses of others’ works did not  
17 constitute unlawful acts. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569,  
18 576 (1994). Long before First Amendment jurisprudence began to develop,  
19 Justice Story penned his opinion on “fair abridgement” in *Folsom v. Marsh*, 9 F.

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20 <sup>4</sup> 8 Ann. c. 21 (1709) (Eng.).

1 Cas. 342 (C.C.D. Mass. 1841). This is regarded as the beginning of fair use  
2 theory in American jurisprudence.

3 Whenever a plaintiff asserts copyright protection, he should do so within  
4 the confines of the Copyright Act; to do otherwise is cuts against the values of  
5 free expression, which the Anti-SLAPP statute stands to protect. *See Festo Corp.*  
6 *v. Shoketsu Konzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 730-31 (2002) (stating  
7 that “[t]he monopoly is a property right; and like any property right, its boundaries  
8 should be clear. This clarity is essential to promote progress, because it enables  
9 efficient investment in innovation”); *see* Joseph P. Liu, “The New Public  
10 Domain,” 2013 U. ILL. L. REV. 1395, 1417-18 (2013) (identifying literature on  
11 benefits of public domain and discussing benefits); *see also* David Lange,  
12 “Reimagining the Public Domain,” 66 LAW & CONTEMP. PROBS. 463, 465-66  
13 (2003) (arguing that creativity depends on existence of robust public domain).

14 A robust public domain also helps to benefit creators of artistic works.  
15 “A robust public domain fosters free speech because it enlarges the material that  
16 can form ties in social networks and creates a ‘communicative sphere, where  
17 people can interact with each other in various [interpersonal and political] circles.”  
18 Deborah R. Gerhardt, “Copyright at the Museum: Using the Publication Doctrine  
19 to Free Art and History,” 61 J. COPYRIGHT SOC’Y 393, 444 (Spring 2014). It  
20

1 makes the job of content creators easier by providing a greater variety of source  
2 material:

3 A more robust public domain reduces the cost of creating additional  
4 works, which not only permits a greater number of works to flourish,  
5 but also invites creators to engage with existing works without having  
6 to consider the need to ask permission. As Edward Liu explains, “[a]  
7 robust public domain, as a permission-free zone, can play an  
8 important role in supporting and encouraging [creators’] intrinsic  
9 motivations, in freeing up the artistic imagination.” This not only  
10 democratizes creativity and invites a broader range of perspectives as  
11 new creators engage with existing works, but also removes the  
12 constraints that originators might place on the expressions of these  
13 diverse new creators. Thus, a robust public domain in characters not  
14 only facilitates, but also fosters, creativity by making culturally  
15 familiar source materials available to creators and adapters at no cost  
16 (either monetary or in the form of creative control).

17 Elizabeth L. Rosenblatt, “The Adventure of the Shrinking Public Domain,” 86 U.  
18 Colo. L. Rev. 561, 573 (2015) (citations omitted).

19 Despite the public interest in a robust public domain, Appellee is attempting  
20 to restrict the dissemination of artistic works beyond what would be permissible  
under the “clear” and “limited” rights delineated by the Copyright Act. *See Festo*  
*v. Shoketsu*, 535 U.S. at 730-31. Having apparently lost (or never possessed) the  
copyrights in the works he seeks to remove from public dissemination, Appellee is  
seeking to impoverish the public domain under state theories. All of Appellee’s  
claims are based upon Mr. Coker’s dissemination of “copyrightable” works. (*See*  
Appellant’s Appendix 21, at ¶¶21, 26, 29, 40, 44.) Yet Appellee consciously  
avoid the Copyright Act’s clear boundaries. Regardless of his allegations that

Mr. Coker is profiting from an enterprise of “fake lithograph” auctioneering and forging signatures, the gravamen or principal thrust of Appellee’s claims is that Mr. Coker is disseminating these works and derivatives of these works without Plaintiff’s permission – despite all available evidence showing that they are actually in the public domain. Appellee never even alleged, much less provided evidence, that he has any cognizable legal right to exercise any exclusive rights with respect to these works. If the works are not protected by copyright, then they are in the public domain. And if they are in the public domain, then the general public has an overriding interest in having access to these works. Increased public access to these works is not a hypothetical scenario, either; Appellee alleges that Mr. Coker’s conduct “*ha[s] and will continue to increase the presumed availability of Sassone’s Works, thereby significantly diluting the market value of his Works.*” (Appellant’s Appendix 21, at ¶40.) The acts that form the basis of Plaintiff’s claims are thus acts in furtherance of the right to free speech on an issue of public concern.

Even if the works in question were not in the public domain, however, Mr. Coker would still satisfy the first prong. *Maloney v. T3Media, Inc.*, 94 F. Supp. 3d 1128, 1134 (C.D. Cal. 2015) (aff’d 853 F.3d 1004 (9th Cir. 2017)) is a closely analogous case that dealt with an Anti-SLAPP motion directed at a complaint alleging right of publicity and unfair competition claims based on the

1 unauthorized distribution of photographs. In addition to finding that these claims  
 2 were preempted by the Copyright Act, the Ninth Circuit determined that the first  
 3 prong of the Anti-SLAPP analysis was satisfied because the plaintiff’s “**claims**  
 4 **stem from the publication and distribution of expressive photographs.**” *Id.* at  
 5 1010. It found that this fit the statute, because California defines ‘an issue of  
 6 public interest’ broadly.” *Id.* at 1009 n.3. And, Nevada explicitly follows  
 7 California in making this determination. *See Welt*, 389 P.3d at 268. There should  
 8 have never been any doubt as to whether Mr. Coker’s activity satisfies the first  
 9 prong, but any such doubt should be comfortably laid to rest by the affirmation in  
 10 *T3Media*.

## 11 **2.2 Appellee’s Claims Are Based Upon Mr. Coker’s Expressive** 12 **Conduct**

13 Appellee admits that he attempts to limit the public availability of artistic  
 14 works for his own profit. (*See* Appellant’s Appendix 21, at ¶38.) Yet Appellee  
 15 provided no documentary or testamentary evidence that his purported works are  
 16 subject to copyright protection, or that he has any standing to assert rights in these  
 17 works. There is also no indication that Appellee has any copyright registrations in  
 18 these purported works. (Appellant’s Appendix 109.) There is not even any  
 19 evidence that the copies exist, no evidence that Mr. Coker made them, no  
 20 evidence that Mr. Coker sold them, no evidence – merely declarations about  
 evidence that might exist – but is not of record.

Much like the plaintiff in *Cammarata*, Appellee attempts to evade the applicability of the Anti-SLAPP statute by trying to draw the court’s attention to allegations that are irrelevant for the purpose of prong one analysis. Sassone attempts to frame his causes of action as based entirely on placing allegedly forged signatures of Sassone on infringing copies of his paintings, arguing that it is the alleged forging, not the alleged copying, selling, and distribution of unauthorized copies, that is the “gravamen or principal thrust” of the Complaint. This is similar to Cammarata’s argument that “selling goods below cost, which would be just as actionable if it arose from selling dog food as selling adult entertainment.” *Cammarata*, 2011 Cal. App. Unpub. LEXIS 665 at \*10. But, just as in that case, the Appellee misses the point – the sole question under prong one is “was this expressive activity?” The question is not “what are the claims?”

As much as Appellee tries to reframe the core of his claims, he cannot hide from his own pleadings. Sassone refers to “Defendants’ illegal and unauthorized **copying**, forging, **and selling** of his Works ....” (Appellant’s Appendix 21, at ¶37) (emphasis added.) He mentions that he “purposefully restricted the availability of his Works to maintain a limited, **exclusive collection of artist originals, and originally signed derivative Works** available to the public.” (*Id.* at ¶38) (emphasis added.) He claims that he will be harmed by Defendants’ alleged “acts of **copying, imitating**, fraudulently producing, forging, **and selling**



1 **the Works of Sassone ....”** (*Id.* at ¶40) (emphasis added.) He claims that “[t]he  
 2 **mass production and sale** of Sassone’s fraudulent and fake Works **sold at low**  
 3 **prices** has, and will continue to have, an adverse economic impact on Sassone”  
 4 (*Id.* at ¶41) (emphasis added.) Appellee’s prayer for relief includes a request for  
 5 injunctive relief that would prevent Mr. Coker from “[d]irectly or indirectly  
 6 **infringing the Works of Sassone by copying the Works ... [d]istributing,**  
 7 **selling, licensing, leasing, or transferring the non-licensed materials ... and**  
 8 **[e]ngaging, participating or assisting in any further conduct that infringes on the**  
 9 **Works”** (*Id.* at 11) (emphasis added.)

10 It is thus crystal clear from the face of the Amended Complaint that  
 11 Appellee’s claims are based on alleged unauthorized copying, sale, and  
 12 distribution of Appellee’s purported works. This is copyright’s exclusive turf, and  
 13 necessarily premises liability on the expressive conduct of disseminating artistic  
 14 works.

15 Appellee’s attempts to re-interpret his claims for relief<sup>5</sup> are unavailing for  
 16 another reason. Even if this suit did primarily rest on allegations of forged  
 17 signatures, these allegations are inextricably intertwined with allegations of the

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18  
 19 <sup>5</sup> Perhaps the strangest example of this narrative shifting is Appellee’s  
 20 statement in the Opposition to the Anti-SLAPP Motion that he “does not seek to  
 stop the defendants from copying his artwork. If he did, this would be a copyright  
 infringement suit filed in federal court.” (*Id.* at 137.) Yet this is explicitly what  
 he asks for in his request for relief. (*See id.* at 31). Which is it?

1 protected activity of the copying, sale, and distribution of artistic works. This  
 2 makes Sassone’s claims “mixed” causes of action for Anti-SLAPP purposes. A  
 3 “mixed cause of action is subject to the Anti-SLAPP statute if at least one of the  
 4 underlying acts is protected conduct, unless the allegations of protected conduct  
 5 are merely incidental to the unprotected activity.” *Lauter v. Anoufrieve*, 642 F.  
 6 Supp. 2d 1060, 1109 (C.D. Cal. 2008); *see Salma v. Capon*, 161 Cal. App. 4th  
 7 1275, 1287 (2008) (action based on both protected and unprotected activity found  
 8 subject to an Anti-SLAPP motion); *Peregrine Funding, Inc. v. Sheppard Mullin*,  
 9 133 Cal. App. 4th 658, 675 (2005) (finding that plaintiffs’ claims “are based in  
 10 significant part on [defendant’s] protected petitioning activity,” thus satisfying  
 11 first prong of Anti-SLAPP analysis). Mr. Coker’s alleged copying, sale, and  
 12 distribution of Appellee’s alleged works is hardly “incidental” to this lawsuit; this  
 13 conduct is the primary source of alleged harm and the primary focus of Appellee’s  
 14 request for injunctive relief.

15 Appellee is likely to argue that Mr. Coker’s conduct is not protected  
 16 because it was allegedly unlawful, but this is not the focus of the first prong  
 17 analysis. California courts have consistently held that defendants may satisfy their  
 18 burden under the first prong even when their conduct was allegedly unlawful.  
 19 *See, e.g., Taus v. Loftus*, 40 Cal. 4th 683, 706-07, 713, 727-29 (2007) (defendants’  
 20 investigation, including an interview that was allegedly fraudulently obtained,

constituted protected activity); *Hall v. Time Warner, Inc.*, 153 Cal. App. 4th 1337,  
 1343 (2d Dist. 2007) (same); *Lieberman v. KCOP Television, Inc.*, 110 Cal. App.  
 4th 156-66 (2d Dist. 2003) (concluding that defendants’ newsgathering, including  
 the use of surreptitious videotape recordings that were allegedly illegally obtained,  
 constituted protected activity); *Doe v. Gangland Productions, Inc.*, 730 F.3d 946,  
 954 (9th Cir. 2013). Accordingly, Appellee’s constant reference to allegedly  
 fraudulent activity has no bearing here, even if it were supported by any evidence.

Appellee’s claims are thus based upon communications made in direct  
 connection with an issue of public concern.

### **3.0 Mr. Coker’s Communications Occurred in a Public Forum**

NRS 41.637(4) provides that, to be protected, the conduct in question must  
 have occurred “in a place open to the public or in a public forum,” either. There is  
 no question this requirement is satisfied here. Plaintiff alleges that Mr. Coker  
 provided these allegedly infringing works through an auction web site available to  
 the general public. (See Appellant’s Appendix 24-25, at ¶¶24-36.) A web site is a  
 public forum for purposes of Anti-SLAPP analysis. See *Cole v. Patricia A. Meyer*  
*& Associates*, 206 Cal. App. 4th 1095, 1121 (2012). Appellee did not contest this  
 requirement of the first prong before the district court, and is not expected to do so  
 here either.

**4.0 Mr. Coker’s Conduct Was Truthful or Made Without Knowledge of Falsity**

**4.1 Mr. Coker Made a Sufficient Showing to Satisfy His Burden**

Appellee’s argument that Mr. Coker’s conduct was not in good faith rests on the faulty premise that Mr. Coker created the allegedly forged signatures and stated that the works in question were authentic when he knew them not to be. Appellee never provided any evidence to support these assertions. In fact, there is not a single copy of one of these allegedly infringing works on the record, nor is there a copy of the allegedly forged signatures.<sup>6</sup>

In reality, Mr. Coker did none of the “fraudulent” activities of which he is accused. He did not make the allegedly infringing copies; rather, he bought them from a bulk art supplier name Michael Schofield. (*See* Appellant’s Appendix 231, at ¶¶2-3.) He did not sign, or authorize anyone to sign, any copies of the works. (*See id.* at ¶5.) Every alleged object that Mr. Coker sold, he purchased from Mr. Schofield. (*See id.* at ¶2-3.) It was reasonable for Mr. Coker to think that these copies were legitimate, that Mr. Schofield had the right to sell these copies, and that Mr. Coker had the subsequent right to re-sell them. (*See id.* at ¶5.)

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<sup>6</sup> Assuming, arguendo, that these works even exist, one would think that making a copy of a painting that has the artist’s signature on it would also incorporate making a copy of the signature. If we accept Sassone’s theory, then making a copy of a painting would be copyright infringement, if one cropped out the artist’s signature. But, failing to crop out the signature turns it from a copyright case into a RICO case, or into some other state violation, allowing the evasion of a preemption argument. This simply makes no sense.

1 Mr. Coker thus sold and distributed the allegedly infringing works in good faith,  
2 as he had no reason to believe that they were unauthorized copies. This is  
3 particularly so given that, by all available record evidence, the works are either in  
4 the public domain or Appellee has no legal right to them.

5 Mr. Coker's conduct was thus in good faith, and in the absence of any  
6 countervailing admissible evidence, he has satisfied the first prong of the Anti-  
7 SLAPP analysis. *See Century Sur. Co. v. Prince*, 265 F. Supp. 3d 1182, 1189 (D.  
8 Nev. 2017) (In finding that defendant satisfied burden under first prong of Anti-  
9 SLAPP statute, finding that plaintiff's mere assertions of bad-faith conduct did not  
10 rebut declaration by defendant that conduct was in good faith).

#### 11 **4.2 Appellee Did Not Provide Any Admissible Evidence to Rebut** 12 **This Showing**

13 The district court's Order does not explain what evidence it considered in  
14 finding Appellee did not meet his burden under the first prong, nor did it make  
15 any rulings as to the numerous objections Mr. Coker made as to the relevance  
16 and/or admissibility of the evidence Appellee provided.

17 An Anti-SLAPP motion is treated as a motion for summary judgment,  
18 meaning that the non-moving party must provide competent, admissible evidence  
19 to oppose it; simply making or denying factual assertions without support is  
20 insufficient. *See Stubbs v. Strickland*, 297 P.3d 326, 329 (Nev. 2013); *see also*  
*John*, 125 Nev. at 753-54 (stating that "the nonmoving party" to an Anti-SLAPP

1 motion must “provide more than general allegations and conclusions; it must  
2 submit specific factual evidence”).

3 Appellee offered the following evidence at the district court:

- 4 • A declaration from Appellee, in which he testifies as to the content of  
5 documents without providing copies of them (Appellant’s Appendix 150);
- 6 • Declarations from four individuals Appellee asked to purchase the  
7 allegedly infringing works, in which they testify as to the content of  
8 documents without providing copies of them (*Id.* at 157-173);
- 9 • An unauthenticated, essentially unreadable copy of a document  
10 purported to be a certificate of authenticity sent out by Mr. Coker with  
11 copies of the allegedly fraudulent reproductions of Appellee’s alleged  
12 works. (*Id.* at 324.)
- 13 • A declaration from a private investigator who looked into Mr. Coker’s  
14 criminal background, accompanied by the results of a records request (*Id.*  
15 at 174);
- 16 • Three court documents from the District of Nevada following  
17 Mr. Coker’s Notice of Removal of this case to that court (*Id.* at 197-203,  
18 207-210); and
- 19 • Printouts from the Nevada and Colorado Secretary of State web sites  
20 that are allegedly affiliated with Mr. Coker (*Id.* at 204-206, 211-212).

1       Of these pieces of evidence, only the first three categories are potentially  
2 relevant. The court proceedings in the federal case have nothing to do with the  
3 merits of Appellee’s claims, nor does the fact that Mr. Coker is affiliated with a  
4 few businesses. Mr. Coker does not dispute that he sold the allegedly infringing  
5 works. He does, however, dispute that he created copies of them or the allegedly  
6 fraudulent signatures or certificates of authenticity – if they even exist.

7       Mr. Coker’s criminal history is also irrelevant to this case. The fact that  
8 this seems to be Appellee’s go-to “evidence” should inform the Court as to the  
9 weakness of his case. When Appellee’s constant drumbeat is “Mr. Coker did  
10 something bad 17 years ago” one must question why that is. It seems to be an  
11 attempt to cover a gossamer-thin case.

12       A prior criminal conviction cannot be used as evidence that a person has  
13 engaged in particular conduct. *See* NRS 48.045(2) (providing that “[e]vidence of  
14 other crimes, wrongs or acts is not admissible to prove the character of a person in  
15 order to show that the person acted in conformity therewith”); *see also Mortensen*  
16 *v. State*, 115 Nev. 273, 280 (1999) (finding that the statute’s reference to “person”  
17 means it applies to all persons, not just criminal defendants); *and see Bongiovi v.*  
18 *Sullivan*, 122 Nev. 556, 575-76 (2006) (applying NRS 48.045(2) to civil case).  
19 The only possible relevance this document has is it could theoretically serve as  
20 impeachment evidence under NRS 50.095. But that statute provides that

“[e]vidence of a conviction is inadmissible under this section if a period of more than 10 years has elapsed since: (a) the date of the release of the witness from confinement; or (b) [t]he expiration of the period of the witness’s parole, probation or sentence, whichever is the later date.” NRS 50.095(2). The records attached to Donald Dibble’s declaration show that Mr. Coker was convicted of racketeering<sup>7</sup> in 2000 and served a sentence of 60 months. This means that his sentence ended in early 2005, more than ten years ago. There is no evidence that he was released from confinement any later than that, and so this conviction is inadmissible even for impeachment purposes. Therefore, it only serves as an attempt to try and prejudice the Court against Mr. Coker by pointing at him and saying “he did a bad thing 17 years ago.”

Next are the declarations of Sassone, Collin Clark, Jelena Popovic, Diane Nelson-Menniger, and Sarah Burton-Sousa. These self-serving declarations all have a common theme – they purport to refer to documents and things, without even trying to authenticate those documents. In fact, no documents are attached. They discuss nothing more than the experiences of four individuals purchasing

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<sup>7</sup> The documents attached to the declaration do not at any point mention “a large art counterfeit fraud in the State of Florida,” as Mr. Dibble claims. The Court should thus disregard this statement under the best evidence rule.



allegedly infringing copies of Appellee’s works at Appellee’s direction.<sup>8</sup> The declarations refer to the contents of web sites, documents, and items, and it is apparent from the declarations that the only source of the declarants’ knowledge of the facts asserted therein is their review of these web sites, documents, and items (presuming they exist, or ever existed). These statements are thus inadmissible under the best evidence rule.

NRS 52.235 requires that a party provide an original (or a duplicate as per NRS 52.245) of a document in order “[t]o prove the content of a writing.” A party cannot provide “secondary oral proof” to establish the contents of a document. *Stephans v. State*, 262 P.3d 727, 733 (Nev. 2011). Yet that is precisely what Appellee attempted to do at the district court. All five declarants describe the contents of web sites, receipts, allegedly forged signatures, allegedly fraudulent certificates of authenticity, and allegedly unauthorized copies of artistic works. None of these documents or items are attached to the declarations or the Amended Complaint, nor are they otherwise of record. There is nothing in the declarations suggesting that the declarants independently obtained knowledge as to the contents of these documents and items other than by reviewing them. They are

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<sup>8</sup> It is worth noting that even if all other deficiencies in this case evaporated, it would be difficult to understand how four people, presumably told by Appellee to purchase “fraudulent” infringing works, could have been deceived that the works were not infringing. Even if we believe these declarants, it is telling that there is not a single person testifying that they were *deceived*.

thus testifying as to the contents of documents and items without actually providing them. This is not permitted under NRS 52.235, and thus all such statements in these five declarations are inadmissible.

This leaves the alleged certificate of authenticity. As an initial, incurable matter, there is no declaration authenticating this document; it was simply attached as an exhibit to Appellee's response to Mr. Coker's Notice of Supplemental Authority.<sup>9</sup> Under NRS 52.015, a party providing evidence must lay a foundation for its authenticity. However, the only attempt Appellee makes at authenticating this document is a statement in the response itself that "[t]his is a copy of the purported Certificate of Authenticity that witness' [sic] Jelena Popovic, Diane Nelson-Menniger, and Sarah Burton-Sousa attest they received with the purported 'original lithograph.'" (Appellant's Appendix 320 at n.8.) But this is not proper authentication; this is an attorney arguing that a document is what a declarant, in a separate filing, was actually referring to. This does not in any way cure the deficiencies in the declarations, since there is still not a declarant

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<sup>9</sup> The Court should note that, while Mr. Coker did not lodge any objection to this evidence in the district court, there was no opportunity to do so. Appellee attached this document as an exhibit to his opposition to Mr. Coker's notice of supplemental authority, to which Mr. Coker was not permitted by the rules to file a reply. Furthermore, Appellee filed his response on July 18, 2017, a mere **two days** before the Court denied Mr. Coker's Anti-SLAPP motion, meaning there was no time either to prepare a reply or seek leave to file one. The Court should thus consider and decide this evidentiary objection.

testifying on personal knowledge that the document attached to Appellee's Response is authentic.

But even if it were properly authenticated, the document is irrelevant; the only allegedly fraudulent thing about it is the statement that the work in question is an "Original Hand Signed Lithograph" by Appellee, and a certification at the bottom that "to the best of our knowledge, the information and statements contained herein are true and correct." (*Id.* at 324.) Mr. Coker's declaration states that he thought the copies he purchased from Mr. Schofield were authentic, and the alleged certificate states that this is true to the best of Mr. Coker's knowledge.<sup>10</sup> Based on Mr. Coker's knowledge, then, there is nothing false about this certification. Appellees claim otherwise, of course, but never provided any admissible evidence that any copy was inauthentic or that Mr. Coker was or should have been aware of this.

Accordingly, the only admissible and relevant record evidence is (1) Mr. Coker's declaration in which he testifies that he purchased what he thought to be authentic reproductions of the works in question and had the right to purchase and sell them; and (2) a printout from the Copyright Office showing that the works in question have not been registered. There is no admissible evidence

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<sup>10</sup> The alleged certificate of authenticity does not actually identify anyone other than Appellee, and so there is nothing to suggest that Mr. Coker created or even knew about the alleged certificate. For the sake of argument, however, Mr. Coker will assume the certification statement is supposed to refer to him.

1 offered in rebuttal. On this record, the Court must find that Mr. Coker’s conduct  
 2 was in good faith for purposes of NRS 41.637(4).

**CONCLUSION**

Appellee is an artist who, by all appearances, does not have any legal right in the works at issue in this case. This entire suit appears to be an attempt by Appellee to circumvent the requirements of the Copyright Act by claiming injuries based on the allegedly unauthorized sale and distribution of artistic works in which he does not have legal rights. It is a blatant attempt to stifle the distribution of expressive works of art, which is expressive activity protected under Nevada’s Anti-SLAPP statute. Mr. Coker provided evidence that he did not create any alleged unauthorized copies, and was unaware that any copies were not legitimate. Appellee did not provide any admissible evidence in rebuttal. Mr. Coker’s conduct was thus in good faith, and was done in direct connection with an issue of public concern in a public forum. The Court should thus reverse the district court’s denial of Mr. Coker’s Special Motion to Dismiss and remand with instructions to decide the motion on the second prong with the record currently before it.

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**RULE 28.2 CERTIFICATION**

1. The undersigned has read the following opening brief of Defendant/Appellant Darrell T. Coker;

2. To the best of the undersigned's knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

3. The following brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found; and

4. The brief complies with the formatting requirements of Rule 32(a)(4)-(6) because it was written in 14-Point Times New Roman, and the type-volume limitations stated in Rule 32(a)(7). Specifically, the brief is 7,980 words as counted by Microsoft Word.

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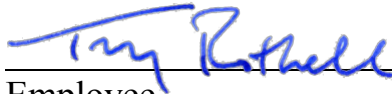
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of this foregoing document was electronically filed on this 6<sup>th</sup> day of March 2018, and served via the Nevada Supreme Court's Eflex electronic filing system to:

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Respectfully Submitted,



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