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IN THE SUPREME COURT OF THE STATE OF NEVADA

DARRELL T. COKER,

Appellant,

vs.

MARCO SASSONE,

Appellee.

SUPREME COURT NO.: 73863

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

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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

MARCO SASSONE, Plaintiff, vs. DARRELL T. COKER, *et al.*, Defendants.	Case No. A-16-742853-C Dept. No. XXXII **DEFENDANT DARRELL T. COKER'S REPLY IN SUPPORT OF SPECIAL MOTION TO DISMISS PLAINTIFF SASSONE'S COMPLAINT PURSUANT TO NRS 41.660 and INCORPORATED OPPOSITION TO COUNTERMOTION FOR FEES AND COSTS.**

Defendant Darrell T. Coker hereby files his Reply in support of his Special Motion to Dismiss Plaintiff Marco Sassone's ("Sassone") Complaint Pursuant to NRS 41.660.

1.0 INTRODUCTION

Plaintiff Sassone insists that this case has nothing to do with copyright. Meanwhile, nothing in his Opposition changes the fact that this is a case about

the dissemination of visual works of art.[1] Further, Sassone does not provide any admissible evidence establishing any element of his claims. He provides multiple declarations from himself and third parties who testify as to the contents of other documents, but he fails to provide any of these documents. Under the best evidence rule, none of this testimony is admissible, and so Sassone's only support for his Opposition are the allegations in his Complaint and argument of counsel.

This is insufficient to oppose an Anti-SLAPP motion, which the Court should grant in its entirety by dismissing all of Plaintiff Sassone's claims with prejudice, awarding Defendant Coker his attorneys' fees and costs incurred in defending himself from this suit, and awarding Mr. Coker $10,000 in statutory damages.

2.0 ARGUMENT

Deciding an Anti-SLAPP motion is a two-step process. First, the defendant must show (as relevant here) that the plaintiff's claims are based upon a good-faith communication in direct connection with a matter of public interest in a public forum. *See* NRS 41.637(4), 41.660(3)(a). Second, the plaintiff must show by *prima facie* evidence that he has a likelihood of prevailing on his claims. *See* NRS 41.660(3)(b). Nevada courts look to California case law in interpreting its Anti-SLAPP law. *John v. Douglas County Sch. Dist.*, 125 Nev. 746, 756 (Nev. 2009); *Shapiro v. Welt*, 389 P.3d 262, 268 (Nev. 2017); *Fellhauer v. Pope*, Case No. 68673 (Nev. Apr. 20, 2017).

2.1 Mr. Coker Has Met His Burden Under Prong One

2.1.1 Sassone's Claims Are Based Upon Communications Made in a Public Forum in Direct Connection with an Issue of Public Interest

Prong one of the Anti-SLAPP statute is the low burden portion of the statute. California cases (upon which this court should rely) define issues of public interest

[1] In other words, it is a copyright case.

quite broadly – almost circularly defining them as "issues in which the public is interested." 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*.

In analyzing the California statute, the court held that mere distribution of videos over the internet qualified under the first prong of the statute. See *id*. As discussed in Mr. Coker's Anti-SLAPP Motion, dissemination of expressive works is itself expressive activity. 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.[2] 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-

[2] 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.

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

As already explained in the Anti-SLAPP Motion, there is a significant public interest in the dissemination of artistic works, particularly if they are in the public domain. (*See* Anti-SLAPP Motion at 5-9.) Mr. Coker did not create these works, but merely distributed them. (*See* Declaration of Darrell T. Coker ["Coker Decl."], attached as **Exhibit 1**, at ¶¶2-3, 5.) However, even the distribution of works *not* in the public domain would meet the first prong. *See Maloney v. T3Media, Inc.*, 94 F. Supp. 3d 1128, 1134-35 (C.D. Cal. 2015) (finding that distribution of photographs of student athletes to be protected under first prong of Anti-SLAPP statute). This activity may not support an Anti-SLAPP motion if Sassone meets his burden under the second prong, but there is no question that distribution of expressive works is covered under the first prong of the statute. *See No Doubt v. Activision Publishing, Inc.*, 192 Cal. App. 4th 1018, 1028-28 (2011) (finding that distribution of likeness of band in video game was protected under first prong, but denying Anti-SLAPP motion on second prong); *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1112 (W.D. Wash. 2010) (finding that creation and distribution of documentary film was protected under first prong of similar Washington Anti-SLAPP statute).

Despite Sassone's apparent shock (or anger) at the motion (as evidenced by the Opposition's hyperbole), it should not have come as a surprise. Mr. Coker does not ask this court to employ the Anti-SLAPP statute in a novel or trailblazing manner. The Central District of California granted just such a motion, in a strikingly similar case. *See T3Media*, 94 F. Supp. 3d 1128 (C.D. Cal. 2015). And, the Ninth Circuit recently upheld that decision. *Maloney v. T3Media, Inc.*, 2017 U.S. App. LEXIS 5894 (9th Cir. Apr. 5, 2017).

In that case, the court granted an Anti-SLAPP motion on a complaint alleging right of publicity and unfair competition claims based on the unauthorized distribution of photographs. In addition to finding that these claims were preempted by the Copyright Act,[3] the Ninth Circuit determined that the first prong of the Anti-SLAPP analysis was satisfied because the plaintiff's "**claims stem from the publication and distribution of expressive photographs**." *Id*. at *10. It found that this fit the statute, because California defines 'an issue of public interest' broadly." *Id*. at *10 n.3. And, Nevada explicitly follows California in making this determination. *See Welt*, 389 P.3d at 268. There should have never been any doubt as to whether Mr. Coker's activity satisfies the first prong, but any such doubt should be comfortably laid to rest by the affirmation in *T3Media*.

Sassone admits that he attempts to limit the public availability of artistic works for his own profit. (*See* Amended Complaint at ¶38.) And despite providing multiple declarations in support of his Opposition, Sassone provided no documentary or testamentary evidence that his purported works are subject to copyright protection, or that he has any standing to assert rights in these works. There is also no indication that Sassone has any copyright registrations in these purported works. (*See* Coker Motion to Dismiss at *Exhibit 5*.) There is not even any evidence that the copies exist, no evidence that Mr. Coker made them, no 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,* Sassone attempts to evade the applicability of the Anti-SLAPP statute by trying to draw the court's attention to

[3] The Court should note that, under the reasoning in *T3Media*, it may grant the Anti-SLAPP Motion on preemption grounds. The issue of preemption is discussed in the pending Motion to Dismiss and its Reply, which are hereby incorporated into the Anti-SLAPP motion.

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. (Opposition at 6-8.) 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 Plaintiff 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 Sassone tries to reframe the core of his claims in the Opposition, he cannot hide from his own pleadings. Sassone refers to "Defendants' illegal and unauthorized **copying**, forging, **and selling** of his Works . . . ." (Amended Complaint 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 the Works of Sassone** . . . ." (*Id*. at ¶40) (emphasis added.) He claims that "[t]he **mass production and sale** of Sassone's fraudulent and fake Works **sold at low prices** has, and will continue to have, an adverse economic impact on Sassone" (*Id*. at ¶41) (emphasis added.) Sassone's prayer for relief includes a request for injunctive relief that would prevent Defendants from "[d]irectly or indirectly **infringing the Works of Sassone by copying the Works . . . [d]istributing, selling, licensing, leasing, or transferring the non-licensed materials . . .** and [e]ngaging,

participating or assisting in any further **conduct that infringes on the Works**" (*Id*. at 11) (emphasis added.)

It is thus crystal clear from the face of the Amended Complaint that Sassone's claims are based on alleged unauthorized copying, sale, and distribution of Sassone's purported works. This is Copyright's exclusive turf, and necessarily premises liability on the expressive conduct of disseminating artistic works.

Sassone's attempts to re-interpret his claims for relief[5] are unavailing for another reason. Even if this suit did primarily rest on allegations of forged signatures, these allegations are inextricably intertwined with allegations of the protected activity of the copying, sale, and distribution of artistic works. This makes Sassone's claims "mixed" causes of action for Anti-SLAPP purposes. A "mixed cause of action is subject to the Anti-SLAPP statute if at least one of the underlying acts is protected conduct, unless the allegations of protected conduct are merely incidental to the unprotected activity." *Lauter v. Anoufrieva*, 642 F. Supp. 2d 1060, 1109 (C.D. Cal. 2008); *see Salma v. Capon*, 161 Cal. App. 4th 1275, 1287 (2008) (action based on both protected and unprotected activity found subject to an Anti-SLAPP motion); *Peregrine Funding, Inc. v. Sheppard Mullin*, 133 Cal. App. 4th 658, 675 (2005) (finding that plaintiffs' claims "are based in significant part on [defendant's] protected petitioning activity," thus satisfying first prong of Anti-SLAPP analysis). Mr. Coker's alleged copying, sale, and distribution of Sassone's alleged works is hardly "incidental"

[5] Perhaps the strangest example of this narrative shifting is Sassone's statement in the Opposition 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." (Opposition at 9.) Yet this is explicitly what he asks for in his request for relief. (*See* Amended Complaint at 11). Which is it?

to this lawsuit; this conduct is the primary source of alleged harm and the primary focus of Sassone's request for injunctive relief.

Accordingly, Sassone's claims for relief are all based upon expressive conduct.[6] The only remaining question as to whether Mr. Coker has satisfied prong one is whether this conduct was in good faith.

2.1.2 Sassone Has Provided No Evidence That Mr. Coker's Conduct Was Not in Good Faith

Sassone's brief 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. Sassone provides no evidence to support these assertions. In fact, we do not have a single copy of one of these allegedly infringing works, nor do we have a copy of the allegedly forged signatures.[7]

That, by itself, is enough to establish that Sassone has not rebutted Mr. Coker's showing as to good faith.

To go a step further, 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* Declaration of Darrel Coker ["Coker Decl."], attached as **Exhibit 1**, 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

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[6] The Anti-SLAPP Motion discusses that the conduct alleged was in a public forum. (*See* Anti-SLAPP Motion at 9.) Sassone does not argue to the contrary.

[7] 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.

¶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.) Mr. Coker thus sold and distributed the allegedly infringing works in good faith, as he had no reason to believe that they were unauthorized copies. His conduct was thus made in good faith, and in the absence of any countervailing admissible evidence, he has further satisfied the first prong of the Anti-SLAPP analysis.

2.2 Sassone Failed to Meet His Burden Under Prong Two

NRS 41.660 defines a plaintiff's burden of proof as "the same burden of proof that a plaintiff has been required to meet pursuant to California's [Anti-SLAPP] law as of the effective date of this act." NRS 41.665(2). Sassone cannot simply make accusations or provide mere scintillae of evidence to defeat the Motion. Rather, to satisfy his evidentiary burden under the second prong of the Anti-SLAPP analysis, Sassone must present "substantial evidence that would support a judgment of relief made in the plaintiff's favor." *S. Sutter, LLC v. LJ Sutter Partners, L.P.*, 193 Cal. App. 4th 634, 670 (2011); *see also Mendoza v. Wichmann*, 194 Cal. App. 4th 1430, 1449 (2011) (holding that "substantial evidence" of lack of probable cause was required to withstand Anti-SLAPP motion on malicious prosecution claim). Sassone has not made this showing.

2.2.1 Sassone's Evidence is Either Irrelevant or Inadmissible

An Anti-SLAPP motion is treated as a motion for summary judgment, meaning that the non-moving party must provide competent, admissible evidence to oppose it; simply making or denying factual assertions without support is 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 motion must "provide more than general allegations and conclusions; it must submit specific factual evidence").

Sassone's Opposition consists of the following supporting evidence:

- A declaration from Sassone, in which he testifies as to the content of documents without providing copies of them (Opposition at *Exhibit 1*);
- Declarations from four individuals Sassone asked to purchase the allegedly infringing works, in which they testify as to the content of documents without providing copies of them (Opposition at *Exhibits 2-5*);
- A declaration from a private investigator who looked into Mr. Coker's criminal background, accompanied by the results of a records request (Opposition at *Exhibit 6*);
- Three court documents from the District of Nevada following Mr. Coker's Notice of Removal of this case to that court (Opposition at *Exhibits 7-8, 10*); and
- Printouts from the Nevada and Colorado Secretary of State web sites that are allegedly affiliated with Mr. Coker (Opposition at *Exhibits 9, 11*).

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

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

A prior criminal conviction cannot be used as evidence that a person has engaged in particular conduct. *See* NRS 48.045(2) (providing that "[e]vidence

of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith"); *see also Mortensen v. State*, 115 Nev. 273, 280 (1999) (finding that the statute's reference to "person" means it applies to all persons, not just criminal defendants); *and see Bongiovi v. Sullivan*, 122 Nev. 556, 575-76 (2006) (applying NRS 48.045(2) to civil case). The only possible relevance this document has is it could theoretically serve as 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 59.095(2). The records attached to Donald Dibble's declaration show that Mr. Coker was convicted of racketeering[8] 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."

This leaves 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

[8] 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.

purchasing allegedly infringing copies of Sassone's works at Sassone's direction.[9] 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 Sassone is attempting to do here. 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, 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 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.

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[9] 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 Sassone 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*.

2.2.2 Sassone Has Not Shown a Probability of Prevailing on His Deceptive Trade Practice Claim

Mr. Coker did not create unauthorized copies of Sassone's purported works, instead purchasing them from a bulk art dealer. (*See* Coker Decl. at ¶¶2-3.) He did not create any allegedly fraudulent certificates of authenticity. (*See id*. at ¶4). Every alleged object that Mr. Coker sold, he purchased from Mr. Schofield. (*See id*. at ¶6.) It was reasonable for Mr. Coker to think that these works 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 ¶8.)

Sassone identifies three prohibited activities under NRS 589.0915: (1) knowingly passing off goods or services for sale as those of another person; (2) knowingly making false representations as to the source, sponsorship, approval, or certification of goods for sale; and (3) disparaging the goods of another person by false or misleading representations of fact. As explained above, there is no admissible evidence establishing any of this conduct. The allegedly fraudulent signatures, counterfeit works, and certificates of authenticity are not in evidence. Sassone has thus manifestly failed to meet his burden under prong two of the Anti-SLAPP analysis as to this claim. Even if the Court were to accept the allegations in these declarations, none of them establish the necessary scienter under NRS 589.0915. And, as already discussed in the pending Motion to Dismiss and its Reply, even if the Court were to accept all of Sassone's bare allegations as true, there would still be no cause of action here for deceptive trade practices.[10]

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[10] Additionally, under the reasoning in *T3Media*, the Court may find that Sassone has failed to meet his burden on this prong on preemption grounds.

2.2.3 No Probability of Prevailing on the RICO Claims

Sassone's RICO claims are premised on allegations that Mr. Coker (1) engaged in multiple transactions involving fraud or deceit; (2) forged Sassone's signature; and (3) obtained property by false pretenses. (Opposition at 13-16.) Similar to the deceptive trade practices claim, Sassone's Opposition relies entirely on declarations about other documents to support these claims. For the reasons already explained, almost none of this evidence is admissible and cannot be used to satisfy Sassone's burden under prong two. And again, even if the Court were to find these declarations admissible, they do nothing to indicate that Mr. Coker had any knowledge of the allegedly fraudulent nature of the artistic works that he distributed. Sassone thus fails to meet his burden under prong two as to his RICO claims.

2.3 OPPOSITION TO COUNTER MOTION FOR FEES UNDER NRS 41.670(2)

2.3.1 Even if the Court Denies this Motion, it is Not Frivolous or Vexatious

If the Court denies the Anti-SLAPP Motion, it should not grant attorneys' fees, costs, or damages to Sassone. NRS 41.670(2) provides that a court shall award a nonmoving party its reasonable fees and costs if it finds that an Anti-SLAPP motion was frivolous or vexatious.

Sassone does not provide the Court with any standards on what a frivolous or vexatious Anti-SLAPP motion looks like. Instead, he summarily states that "[t]he defendant has advanced absurd theories in support of his motion," claiming that Mr. Coker's counsel "almost literally 'wrote the book' on anti-SLAPP statutes" and "should know better" (Opposition at 17 n.10.) Sassone does not explain which arguments are absurd or how they are absurd.

While Mr. Coker's counsel appreciates the vote of confidence as to his qualifications regarding Anti-SLAPP matters, he did not "write the book" on this

subject.[11] Thomas R. Burke did, and he continuously updates it. *See* Thomas R. Burke, "Anti-SLAPP Litigation," THE RUTTER GROUP. Despite his experience in this area of law, as a matter of good practice, Mr. Coker's counsel often bounces ideas off of his colleagues.[12] In this case, Mr. Coker's counsel discussed the merits of the legal theories in the Motion with Mr. Burke. (*See* Declaration of Thomas R. Burke ["Burke Decl."], attached as **Exhibit 2**, at ¶6.) Mr. Burke agreed that this Motion was a proper application of the Anti-SLAPP statute. (*Id.* at ¶7.) As Mr. Burke did, in fact, "write the book" on Anti-SLAPP litigation, and his view comported with that of the Central District of California (*see T3Media*, 94 F. Supp. 3d at 1134-35) and was later supported by the Ninth Circuit, the words "frivolous" or "vexatious" did not enter into the equation.

Thus, without Sassone pointing to any particular standards regarding frivolity or vexatiousness, it is difficult to see how two of the more experienced Anti-SLAPP litigators in the country could be so wrong about the statute's application to this case that the Court should consider this Motion frivolous or vexatious. Such a conclusion would be particularly unsupportable given that the Ninth Circuit in *T3Media* upheld the grant of an Anti-SLAPP motion on similar facts. If this motion is *frivolous*, then the Ninth Circuit must have made a grave error.

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[11] Indeed, Mr. Randazza did write many articles about the Anti-SLAPP statute, was instrumental in the drafting of its current language, and has a high degree of expertise in what the statute is, how it works, and when it should be employed. If Sassone's contention of the undersigned's expertise is credited, then respectfully, Plaintiff's counsel should take pause before presuming that the instant motion is frivolous and sanctionable.

[12] In fact, Mr. Randazza credits this practice as the foundation of his expertise. He learned it from his mentors, including Sassone's counsel.

3.0 Conclusion

Based on the foregoing, Defendant Coker respectfully requests that this Court dismiss Plaintiff's claims for deceptive trade practices and RICO with prejudice, pursuant to NRS 41.660. Mr. Coker is also entitled to his costs and reasonable attorneys' fees, and the Court should award Mr. Coker statutory damages under NRS 41.670(b) to deter Plaintiff and others like him from filing meritless suits directed at an effort to deprive the public domain of works that have lawfully passed into it. In the alternative, if the Court denies this Motion, it should not find that this motion was frivolous or vexatious, and should not award Sassone any fees, costs, or damages.

Dated: April 24, 2017.

Respectfully submitted,

/s/ Marc J. Randazza

Marc J. Randazza (NV Bar No. 12265)
Ronald D. Green (NV Bar No. 7360)
Alex J. Shepard (NV Bar No. 13582)
RANDAZZA LEGAL GROUP, PLLC
4035 S. El Capitan Way
Las Vegas, NV 89147

Attorneys for Defendant,
Darrell T. Coker

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of April, 2017, I served a true and correct copy of the foregoing document via the Eighth Judicial District Court's Wiznet electronic filing system or, if necessary, via electronic mail and U.S. Mail, on the attorneys listed below:

Dominic P. Gentile
Clyde DeWitt
Lauren E. Paglini
GENTILE CRISTALLI MILLER ARMENI SAVARESE
410 S. Rampart Blvd., Suite 420
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Riley A. Clayton, Esq.
HALL JAFFE & CLAYTON, LLP
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Las Vegas, NV 89128
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Respectfully submitted,

Employee,
Randazza Legal Group, PLLC

EXHIBIT 1

Declaration of
Darrell T. Coker

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

MARCO SASSONE, Plaintiff, vs. DARRELL T. COKER, *et al.*, Defendants.	Case No. A-16-742853-C Dept. No. XXXII **DECLARATION OF DARRELL T. COKER**

I, Darrell T. Coker, declare the following:

1. I am over 18 years of age and competent to testify about the matters contained in this declaration. I have personal knowledge of the truth of the statements made herein, and if called upon to do so, I could and would testify competently thereto.

2. Regarding the lithographs at issue in this case, I bought all of these copies of the paintings from a bulk art supplier named Michael Schofield.

3. I never personally created any of the copies of any of the works in question.

4. I have copies of the canceled checks I used to pay Mr. Schofield for the copies of the paintings, they are attached as ***Exhibit 1***.

5. I admit that I sold the copies, however, I did not think that doing so would be an issue because I thought the reproductions that I bought from the bulk supplier were legitimate or otherwise legal to buy and sell.

6. I sold about 10 of the Sassone copies and made a very small profit from them.

7. Everything that I sold were all copies of paintings.

8. I have not sold any other copies of Sassone's work from the moment Sassone served me with the lawsuit.

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

Executed on: 5/23/2017

DocuSigned by:
Darrell Coker
B0377F830479480...

Darrell T. Coker

EXHIBIT 1

Check Records

DO NOT USE FOR REORDERING PURPOSES

Protect Your Duplicate Checks Store your duplicate checks in your check box.

☑ Track your expenses...

☐ Clothing ☐ Food ☐ Transportation
☐ Credit Card ☐ Utilities ☐ Mortgage
☐ Entertainment ☐ Insurance ☐ Other: _____

☐ TAX-DEDUCTIBLE ITEM

5132

9-25

BALANCE FORWARD 0

THIS ITEM 50

BALANCE

DEPOSIT

OTHER

BALANCE FORWARD

S. W. Gas

[redacted]

For enhanced security, your name and account number do not appear on this copy.

NOT NEGOTIABLE

DO NOT USE FOR REORDERING PURPOSES

Protect Your Duplicate Checks Store your duplicate checks in your check box.

☑ Track your expenses...

☐ Clothing ☐ Food ☐ Transportation
☐ Credit Card ☐ Utilities ☐ Mortgage
☑ Entertainment ☐ Insurance ☐ Other: _____

☐ TAX-DEDUCTIBLE ITEM

5133

9-26

BALANCE FORWARD

THIS ITEM 192

BALANCE

DEPOSIT

OTHER

BALANCE FORWARD

Cox

[redacted]

For enhanced security, your name and account number do not appear on this copy.

NOT NEGOTIABLE

DO NOT USE FOR REORDERING PURPOSES

Protect Your Duplicate Checks Store your duplicate checks in your check box.

☑ Track your expenses...

☐ Clothing ☐ Food ☐ Transportation
☐ Credit Card ☐ Utilities ☐ Mortgage
☐ Entertainment ☐ Insurance ☐ Other: _____

☐ TAX-DEDUCTIBLE ITEM

5134

9-26

BALANCE FORWARD

THIS ITEM 6700

BALANCE

DEPOSIT

OTHER

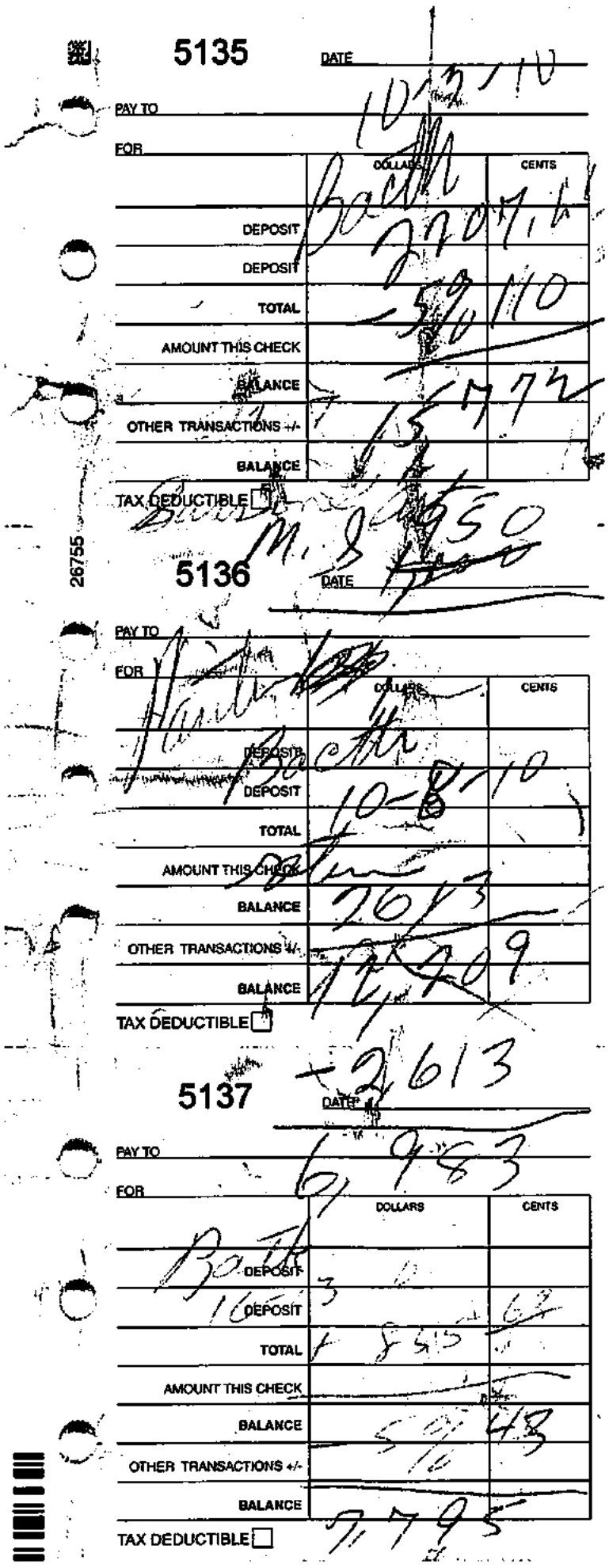
BALANCE FORWARD

Michael Sobieski

[redacted]

For enhanced security, your name and account number do not appear on this copy.

NOT NEGOTIABLE



5135

DATE 10/3/10

PAY TO Beth

FOR

	DOLLARS	CENTS
DEPOSIT	270	11
DEPOSIT		
TOTAL	59	110
AMOUNT THIS CHECK		
BALANCE	5772	
OTHER TRANSACTIONS +/-	15	
BALANCE		

TAX DEDUCTIBLE

Beth M. 250

26755

5136

DATE

PAY TO

FOR

	DOLLARS	CENTS
DEPOSIT	Beth	
DEPOSIT	10-8-10	
TOTAL		
AMOUNT THIS CHECK		
BALANCE	2613	
OTHER TRANSACTIONS +/-	14209	
BALANCE		

TAX DEDUCTIBLE

+2613

5137

DATE

PAY TO 6,983

FOR

	DOLLARS	CENTS
DEPOSIT	Beth	
DEPOSIT	3	62
TOTAL	8515	
AMOUNT THIS CHECK		
BALANCE	5	43
OTHER TRANSACTIONS +/-	16	
BALANCE	7795	

TAX DEDUCTIBLE

5132 DATE 9-15-10

PAY TO

FOR

	DOLLARS	CENTS
DEPOSIT		
DEPOSIT		
TOTAL		
AMOUNT THIS CHECK		
BALANCE		
OTHER TRANSACTIONS +/-		
BALANCE		

TAX DEDUCTIBLE ☐

26755

5133 DATE 9-26-10

PAY TO

FOR

	DOLLARS	CENTS
DEPOSIT		
DEPOSIT		
TOTAL		
AMOUNT THIS CHECK		
BALANCE		
OTHER TRANSACTIONS +/-		
BALANCE		

TAX DEDUCTIBLE ☐

5134 DATE

PAY TO

FOR

	DOLLARS	CENTS
DEPOSIT		
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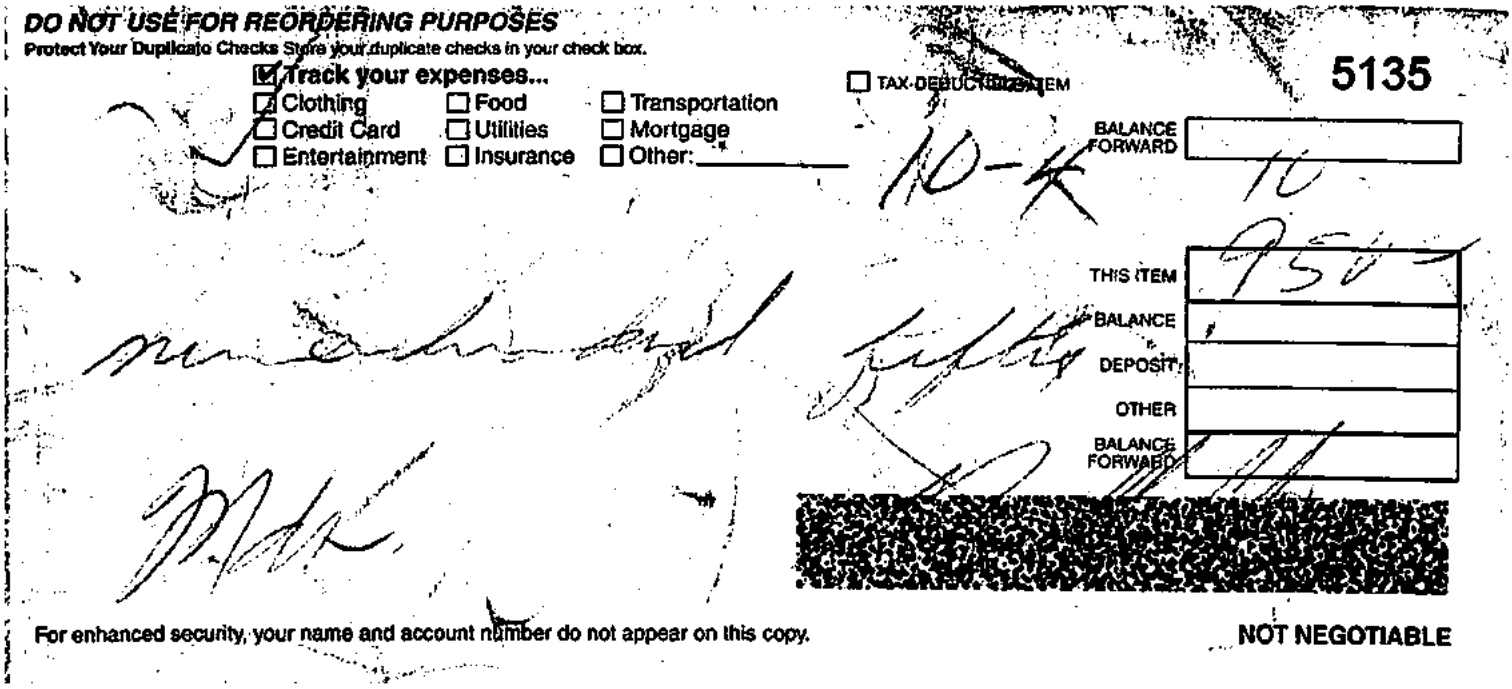
TOTAL		
AMOUNT THIS CHECK		
BALANCE		
OTHER TRANSACTIONS +/-		
BALANCE		

TAX DEDUCTIBLE ☐



DO NOT USE FOR REORDERING PURPOSES

Protect Your Duplicate Checks Store your duplicate checks in your check box.

Track your expenses...

Clothing Food Transportation

Credit Card Utilities Mortgage

Entertainment Insurance Other:

TAX-DEDUCTIBLE ITEM

5135

10-K

BALANCE FORWARD

THIS ITEM

BALANCE

DEPOSIT

OTHER

BALANCE FORWARD

For enhanced security, your name and account number do not appear on this copy.

NOT NEGOTIABLE

EXHIBIT 2

Declaration of
Thomas R. Burke

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MARCO SASSONE, Plaintiff, vs. DARRELL T. COKER, *et al.*, Defendants.	Case No. A-16-742853-C Dept. No. XXXII **DECLARATION OF THOMAS R. BURKE**

I, THOMAS R. BURKE, declare:

1. I am over the age of 18 years and fully competent to make this Declaration. The facts set forth herein are within my personal knowledge and are true and correct.

2. I am a partner with Davis Wright Tremaine LLP in San Francisco and a Co-Chair of the firm's national media law practice.

3. I am the author of *Anti-SLAPP Litigation*, published by The Rutter Group, a division of Westlaw. Anti-SLAPP Litigation is the first and currently the only legal treatise that covers the extensive appellate case law that concerns California's anti-SLAPP statute as well as issues raised by other states' statutes.

4. I wrote *Anti-SLAPP Litigation* in 2012 and I update this book annually.

5. I have successfully used the Anti-SLAPP statute in litigation hundreds of times and I am often consulted for my opinion and expertise in Anti-SLAPP litigation.

6. On or around March 15, 2017, Marc Randazza called me to ask my opinion on the Anti-SLAPP motion he intended to file in this case.

7. We discussed the motion's underlying legal theory. While I do not opine on how the Anti-SLAPP motion should be ultimately decided, I do not think there is anything frivolous or vexatious in the arguments presented in the motion.

8. In 2015, the Central District of California granted an Anti-SLAPP motion in a case where the plaintiff sought to use preempted claims to stop the distribution of artistic materials. *See Maloney v. T3Media, Inc.,* 94 F. Supp. 3d 1128 (C.D. Cal. 2015).

9. On April 5, 2017, within weeks of my conversation with Mr. Randazza, the Ninth Circuit upheld that decision in *Maloney v. T3Media, Inc.*, 853 F.3d 1004 (9th Cir. 2017).

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

Executed on this 23rd day of May, 2017.

DocuSigned by:
A6B95D3D60544E5...

Thomas R. Burke

Electronically Filed
1/25/2018 3:42 PM
Steven D. Grierson
CLERK OF THE COURT

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

MARCO SASSONE, Plaintiff,	)	CASE NO. A-16-742853
	)	DEPT. NO. XXXII
vs.	)	
DARRELL COKER, DARRYL MCCULLOUGH, JELLO'S JIGGLIN, ET AL., Defendants.	)	**Transcript of Proceedings**

BEFORE THE HONORABLE ROB BARE, DISTRICT COURT JUDGE

ALL PENDING MOTIONS

TUESDAY, JUNE 20, 2017

APPEARANCES:

For the Plaintiff: CLYDE DEWITT, ESQ.
LAUREN E. PAGLINI, ESQ.

For the Defendants: MARC J. RANDAZZA, ESQ.
ALEX J. SHEPARD, ESQ.
STEVEN STEELE, ESQ.

RECORDED BY: CARRIE HANSEN, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording, transcript produced by transcription service

TUESDAY, JUNE 20, 2017 AT 10:50 A.M.

THE LAW CLERK: *A742853.*

THE COURT: All right. If you could make your appearances, please?

MR. DEWITT: Clyde Dewitt, of counsel to Mr. Gentile's firm, standing in for Dominic Gentile with Lauren Paglini.

THE COURT: Okay.

MR. RANDAZZA: Marc Randazza, Randazza Legal Group, for the defendant, Darrell Coker and with Alex Shepard.

MR. STEELE: Good morning, Your Honor. Steven Steele on behalf of defendants Jello's Jigglin, LLC, DBA Postal Annex, and Darrell McCullough [sic].

THE COURT: All right. Could you spell your last name for me, please?

MR. STEELE: S-T-E-E-L-E.

THE COURT: Steele. Okay. All right.

Well, welcome everyone. I think most people know that stylistically I like to sort of cover things, put things in context, talk with you at least for the initial stage of things. So, have a seat and relax.

Mr. Ravenholt.

MR. RAVENHOLT: Yes, sir.

THE COURT: I've noticed that you're here and you're on this case. Do you want to come sit up here at the counsel table or --

MR. RAVENHOLT: I was originally hired for the defendants and then the insurance company took over. I've been --

THE COURT: Okay.

MR. RAVENHOLT: -- given notice by the insurance company they're going to [indiscernible], so I figured I better catch up and take a look.

THE COURT: Okay.

MR. RAVENHOLT: I'm not officially on board yet, and so I'm going to just sit here.

THE COURT: Okay. Fair enough.

MR. RAVENHOLT: Thank you.

THE COURT: Fair enough. All right.

Now, there's a little bit to this one and so I'll try to move through this quickly. I've got a couple things I want to say though that I think frame the legal issue that I've got to deal with and what I'd like to ask you all is let me cover some of this, but if I say something that's incorrect factually, interrupt me because I don't like to do that.

We're here as the defendant has a Motion to Dismiss the Complaint and that's joined in as well by other

defendants and so here's the way it goes.

Plaintiff is an artist and a painter. Plaintiff asserts that he -- he does assert that he's the owner of all rights, title, and interest of copyright of his works, plaintiff Marco Sassone. He does allege that the father and son defendants, Coker defendants I guess we could say, obtained a book of his works and then, in 2008, began to do things they shouldn't have done, imitating, producing fraudulent lithographs from images without permission from the plaintiff and also imposing a -- as they allege it to be, a forged, I guess, Marco Sassone signature on these reproductions or productions. They do allege that the Cokers were with others, including Morello [phonetic] to create and operate an auction business or auction businesses to sell these, as they alleged to be fraudulent works as original, signed lithographs, by the artist, Marco Sassone.

The plaintiff seems to indicate that he became aware of this -- they stylized this as a forgery, in October 2014, discovering this in a -- by looking at online auctions. And they allege that this mass production of what they think are forged items selling for between 100 and 650 bucks, that diluted the market value of Marco Sassone's work.

In case anybody wonders, though I read this

basically yesterday and hten again with my second cup of copy this morning, I didn't know who Marco Sassone was. I like artwork and stuff, but, for whatever reason, I -- just so you know, I don't know anything about this work or this artist.

Okay. So the Amended Complaint has three cause of action in it. It looks like originally there were more than that and some Federal Court stuff happened, but, in any event, the Amended Complaint has deceptive trade practice, violation of Nevada RICO -- and two out of three are RICO based, let's just say.

Now, the case was over in Federal Court, likewise for a cup of coffee. December 30th of 2016, remove to Federal Court, and then March 22nd of this year, Judge Andy Gordon over there remanded it back to State Court. And, so, that brings us to what I can do as a State Court Judge because the Motion brings up, at least it seems like three reasons to dismiss. One, --

MR. STEELE: Your Honor, I hate to interrupt. I believe the Amended Complaint actually has five claims for relief. Two of them are RICO based. There's a work of arts claim, deceptive --

MR. RANDAZZA: Two were withdrawn.

MR. STEELE: Okay. Which two?

MR. RANDAZZA: [Indiscernible].

THE COURT: Plaintiff voluntarily dismissed a couple -- publicity in violation of works of art.

MR. STEELE: My apologies.

THE COURT: Works of art claims. Is that it? Okay.

All right. So, the defense as well -- Mr. Sassone fails to establish standing because he doesn't specifically allege and he has exclusive copy right interest and I do have in my analysis here for my worksheet here, it's a 15-page brief, by the way, this one. I do have a breakdown of what was alleged and what have you and we can talk about it. But that's the first thing brought up.

But, really, I think most of what we're going to talk about today has to do with this idea of federal preemption and that's the second thing that's brought up in here, the idea that this -- there's a Copyright Act and this Visual Artist Rights Act but, anyway, the idea in general that federal law covers this federal question and, so, therefore, the case has to be done in Federal Court and not State Court.

And, then, the other thing, the last thing, I think, brought up is regardless of preemption, the RICO and deceptive trade practices claim fails to state a claim with specificity as required.

All right. So, I told you it's 15 pages of stuff.

I wanted to not cover all 15 pages with you. So let me see how I should do this.

Well, let me start with the standing part, even though I don't think it's the most significant one to spend time on here today. The defense side says that the plaintiff lacks standing because only the legal or beneficial owner of an exclusive right under a copyright has standing to sue for infringement under 17 U.S.C. 201(b). And, then, Section 106 lists all of these exclusive rights necessary. But, just breaking it down, it seems like practically, the defense is saying that Mr. Sassone fails to allege he has exclusive right as a copyright holder. He does allege, quote:

> He's the sole owner of all right, title, and interest in and to the copyright of his works.

However, the criticism from the defense perspective is he fails to plead exclusive, has the exclusive right to publish, license, reproduce. And, you know, you could try to change my mind on that if you're the defense, but my -- in going into the hearing, I think there is enough to allege to survive if you're the plaintiffs on that front because I think essentially there is enough of an exclusivity claim, if you will. But, that's why we have court. Maybe you'll change my mind.

But, preemption, to me, is where it's all at. Are

we going to do this thing in State Court or it's going to be back over there in the building with, you know, a lot of Cherrywood and marble. Preemption. The defense side of it is well drawn out and, you know, you've given me all the right tests from the Ninth Circuit, copyright preemption tests and what have you, and of course we're going to talk about all that.

It seems like everybody sort of agrees on this idea of a test of preemption. And I can cover it. Again, it's all in your pleadings, but there was a couple passages that, for our part in it, we thought really said it best and one of them does come from the plaintiff's Opposition where you cite to this *Valenti Kritzer Video versus Pinkney* [phonetic], a Ninth Circuit case, talking about the two-part test to determine this preemption issue. First, a court should determine whether the relevant item is subject to the copyright acts or, you know, this -- the federal area of law covering this stuff. And, second, must be determined if the state law claim is equivalent to any of the exclusive rights within the general scope of a copyright, 17 U.S.C. stuff.

The Court in that case said this: To survive preemption, the state cause of action must protect rights which are quantitatively different from copyright rights.

The state claim must have a, quote: Extra element which changes the nature of the action.

Now, I think that's really what I have to do. In other words, do we have a case here in State Court that is preempted or consumed already by what's laid out in the copyright federal statutes or is there something in here, in the state claim, that has an extra element changing the nature of the action beyond -- this is my words, beyond a -- if there's such a thing, a simple copyright claim? And, you know, the case I cited to from the Ninth Circuit talks about this distinction of this test being consistent with congressional intent and I guess promulgated United States Code. That's who does it, United States Congress, the idea that general laws of defamation, fraud would remain unaffected if a cause of action contains elements, differing kinds of copyright infringement.

So, it seems to me, based upon that case or others that were mentioned in here, this *Med Track* case or any other cases. The real analysis for me is: Do we have a case where the plaintiff has alleged something because we're in a Motion to Dismiss posture -- has the plaintiff alleged something that is, in fact, an extra element changing it from a copyright infringement case to a state claim type case? And, so, the -- really the question is: What does the plaintiff say about that? And the best I can

make of it -- oh, by the way, there's also this *Del Madrina Props versus Rosen Gardner* [phonetic] a Ninth Circuit case which -- same type stuff:

> To survive a preemption, the state cause of action must protect rights which are quantitatively different from copyright.

Extra element. So, I guess there's a number of cases over there.

So, in this case, what I'd say is the first element of the preemption test if met. It really falls within the scope of the copyright law. The question really is the second element. The idea is -- of whether there's this separate element and the plaintiff -- as far as I can see, the plaintiffs are saying that there is in that what you have is forging a signature -- so a phony signature, phony certificates of authenticity, misrepresenting to the public that these are original works of art, and that -- that's basically it. That's the extra series of elements and I know probably, Mr. Dewitt, you're going to tell me more, but --

MR. DEWITT: I suspected that question was directed to this table.

THE COURT: Okay. But, basically, that's the idea is: What are the extra elements that take it away from, you know, a copyright case in Federal Court to a state,

more than copyright, sort of scenario, I think is really what it is.

So, with all that, and I know there's more to it, but it's a defense motion. So I probably should start with them even though you stood up.

MR. DEWITT: I think it's -- oh, you said you want him to talk first?

THE COURT: Yeah. I probably should start with --

MR. DEWITT: Okay. Fair enough.

THE COURT: -- the one that brought the Motion.

MR. DEWITT: His Motion.

THE COURT: Even though you stood up and even though you've got that grey hair that if I had, I'd always be reelected.

Go ahead.

MR. RANDAZZA: Your Honor, just as a procedural thing, we're here on Motions. We're also here on an Anti-SLAPP Motion which would be -- there may be two standards here. So, we're going to -- if we get past the Motion to Dismiss here, are we talking about that as well?

THE COURT: Right. I see that. Okay.

MR. RANDAZZA: So, as far as what is alleged here, yes. They do attempt to make this argument that forging the signature, the certificate of authenticity, and the misrepresentation of authorship are these extra elements.

Now, if we're just addressing the Motion to Dismiss right now, we're talking about what they've alleged, not talking about what's in their burden in prong two of the Anti-SLAPP. That doesn't get them out of preemption. We're still talking about exclusive rights, provided to him, under Title 17, including, you know, was - you said this case has a lot. This case is something that I just -- as somebody who does a lot of copyright work was delighted to see, a VARA issue because VARA, this 106(a) is so infrequently used, so infrequently invoked, something that we enacted in order to live up to our obligations --

THE COURT: The Visual Artist Rights Act.

MR. RANDAZZA: Yeah. And that's really the key to these elements. This is a law that allows an artist to claim originality, allows that artist to claim this is my work or to deny that that is their work. This might be another story if we were perhaps -- if my client was alleged to have painted some works of his own or taken dogs playing poker and said this is work by Marco Sassone. That's a different story, but there's no allegation that these are not actually works by Mr. Sassone. There is no allegation of anything but a poor attribution. This is clearly within VARA.

Now, as far as we were talking earlier about maybe changing your mind on whether or not he had standing, --

THE COURT: Yeah.

MR. RANDAZZA: -- I think that I would like to attempt at that.

THE COURT: Sure. Go ahead.

MR. RANDAZZA: Because when we are talking about works of art, it is intertwined in with the preemption issue because these exclusive rights, you can allege them, say I have all exclusive right, but you cannot enforce those rights in a U.S. Court unless you also have a registration. So, if we were in a court outside of the United States, most countries do not require registration. We are unique in that regard, but we are still permitted to have that under the TRIPS Agreement.

So, absent an allegation of registered rights, you do not have the keys to a courthouse door in a copyright case. You do not have standing. This was what was directly at issue in the infamous *Righthaven* cases that took place here where those exclusive rights failed to be alleged, failed to be present, and thus the Federal Court dismissed those cases for lack of subject matter jurisdiction.

So, they've made this factual allegation but that factual allegation is insufficient. It's kind of like if you say I don't -- really there is no analogy. Copyright is sui generis because I can paint a work, I can make a

song, I can make a movie, that still isn't necessarily mine because of the complexities of who actually owns it. Is it a work for hire? Well, then if that's the case the employer would own the copyright to it and be the only one to have rights to it. Was it a joint work?

So, the Section 106 rights must be plead in order to correctly assert that you have this exclusive ownership. So, you can't leapfrog over that.

Nevertheless, even if he had, -- well, frankly, he avoided doing so, I believe, in order to avoid being in Federal Court because we do have this element missing that, if we were in Federal Court, he would be immediately thrown on a 12 --

THE COURT: Now, on that note, I hope this is a decent question, but it's one I had. And if it's not that good of question, given that you guys practice in Federal Court, and -- with limited exception, a case called *Gardner*, I was never in Federal Court a whole lot, but Judge Gordon's reason for sending this thing over here. Was it procedural? It was a procedural decision. Right? Having to do with --

MR. RANDAZZA: Yes.

THE COURT: -- that?

MR. RANDAZZA: Yes. It was a failure on the defense side to --

THE COURT: Okay.

MR. RANDAZZA: -- all get on the same page within 30 days to unanimously decide that we wanted to remove it.

THE COURT: In other words, correct me if I'm wrong, but the Federal Judge -- or no Federal Judge ever said anything about this preemption issue yet, unless I missed it.

MR. RANDAZZA: No, Judge. Judge Gordon skipped over that.

THE COURT: Okay.

MR. RANDAZZA: So, I happen to think that under Title 17 this is an exception that you don't need exclusivity, but, nevertheless, we weren't all on the same page until 45 days or so in so here we are.

THE COURT: Okay.

MR. RANDAZZA: So you are the first one.

THE COURT: So the only one so far that is being asked to deal with this preemption issue is us. Right?

MR. RANDAZZA: Correct, Your Honor.

THE COURT: Okay.

MR. RANDAZZA: So, I don't -- I just don't see anything in here and I think, you know, rather than belabor the Court's time going over my briefing, I think we've briefed the VARA issues. So if there are any questions that you have about the VARA issues and how they play into

the preemption, I'd be happy to answer them. But, other than that, we'll stand on our briefing.

THE COURT: Do you agree with this general sort of stance that the plaintiffs take as a matter of law, Mr. Randazza, this idea that there's a way to avoid the preemption and that way is to have this separate element that these cases talk -- these federal cases talk about? You agree with that. Right?

MR. RANDAZZA: Yes. If there is a genuine extra element, but there are cases that we've cited that -- you know, courts have looked at these a number of times, these copyright in disguise claims, and I think that's what we have here because it went back to the standing issue. I think they're -- I don't know what the reason is but there must be a reason that these works are not registered --

THE COURT: Okay.

MR. RANDAZZA: -- to Mr. Sassone because we have shown in our evidence that --

THE COURT: Because that's what it would take to sort of, in fairness, trigger the non-preemption.

MR. RANDAZZA: That would at least establish standing. So, that alone would at least establish standing or a presumption of standing. We could, of course, challenge the validity of the copyright registrations. It is not infrequent that parties will make a registration

when they have right to do so and then run into court and say you're violating my copyright.

THE COURT: Okay. All right. I didn't mention in my preliminary overview anything about, you know, 41.660, the Anti-SLAPP stuff but I covered -- I figured I'd cover the whether I should be doing this or not stuff first.

MR. RANDAZZA: Okay.

THE COURT: But do you want to say anything about your Anti-SLAPP?

MR. RANDAZZA: I'm happy to do it, Your Honor under the plan that you had, but if you want me to jump right into it, sure.

THE COURT: No, go ahead.

MR. RANDAZZA: We have a -- this is a -- the Anti-SLAPP statute is intended on prong one to be extremely broad both by design here and by the fact that the Legislature saw fit to make it an explicit statement in the law that we should look to California and look to California cases interpreting prong one.

Now, this is a -- do we -- are we still talking about the 60-day issue on it or are we -- you withdrew that, correct?

MR. DEWITT: No.

MR. RANDAZZA: Okay. So, under prong one, it's almost a circular definition when you get to look at these

California cases. The matter of public concern is anything that the public is concerned with and, if you look at some of the cases that have outlined where that border is, that prong is extremely easy to get over. I realize that the second one is where the challenge may lie, but in California, we had cases, for example, that were talking about even advertising on a porn site was a matter of public concern.

And, most analogously, in fact, a case that I found to be both legally and factually probably sharing 98 percent of its genetic material is the one that we cited, *T3 Communications* where there were photographs of -- at issue instead of paintings. So, I think we get over prong one, especially if Your Honor follows that decision, which, at the time that we filed it, it was only a Central District of California case but the Ninth Circuit affirmed it I think sometime right about the time that they filed their Opposition. So, this is not a unique application of the Anti-SLAPP law. May be the first time here, but given that we are --

THE COURT: Yeah. I've seen it about three or four times since I've been here and I -- you know, the thing about it here is, you know, just the devil's advocate type of question, but it's the one I would have to ask and that is: Doesn't have to be truthful?

MR. RANDAZZA: Yes.

THE COURT: And how do you reconcile that given that there's allegations that -- what we're talking about. The entire basis of this ls seems to be that we have phony certificates of authenticity, forged signatures, you know, given that you have to have a truthful aspect under 41.637. How would that reconcile --

MR. RANDAZZA: There actually -- there's a conjunction there. It says truthful or without knowledge as to its falsity.

Now, you have works that are in the public domain, you have a right to distribute them. By all indications, if I were to take, for example, -- if I were to run off copies of *Candide* by Voltaire, it's in the public domain. I would know that I have a right to distribute those. And if I were to look at artwork and say, hey, can I distribute this as a matter of works that are in the public domain? Frequently, works fall into the public domain. That's the whole purpose of the Copy Right Act really, the founders intended that it would be the engine of creating a robust public domain from which later people could work on building on the backs of those that came before them.

So, the truthfulness element here is: Can I distribute these works? Can I distribute these works because they're part of the public domain? Well, there is

a way to check that. You look at the copyright register. None of these works are listed as being registered as anybody claiming them as anything but public domain.

Now, with the allegation, the allegation that they are forged signatures, the allegation that there's false certificates of authenticity, I don't see those and it is their burden to bring them forward in order to show that they are here. We don't have them. Why don't we have a copy of them? Once we make the Anti-SLAPP Motion, it is to -- their burden to bring them forward and -- or to seek a stay of this Motion tin order to engage in discovery. I don't see why they would need discovery in order to produce that because if they have these, why don't we at least have a photocopy of them? All we have is four people testifying that they may have seen them, but these are all people that were his agents and where is this best evidence.

So, allegations might get you past a Motion to Dismiss, but those allegations --

THE COURT: Yeah. A procedural posture is that. That's the one we're in.

MR. RANDAZZA: If we're in the Motion to Dismiss, but under the Anti-SLAPP Motion, --

THE COURT: Yeah.

MR. RANDAZZA: -- if we're talking about that either before or after or simultaneously, that's not the

standard under the Anti-SLAPP statute. It is their burden to bring forward prima facie evidence and we don't have any evidence that's admissible, much less anything that would be determined to be prima facie.

THE COURT: Isn't it really the case though that -- I mean, it's like -- there's a shifting burden in all this Anti-SLAPP stuff, Mr. Randazza, I think and --

MR. RANDAZZA: Yes.

THE COURT: -- it starts with your side. You have to meet the initial burden. If you do it, then I think it shifts over to the other side. But if you don't meet the initial burden, there's no shifting, I think, is the way it works.

MR. RANDAZZA: Right. Well, we do have our declaration from the defendant where he says he believed he had the right to distribute these. So, we've -- that burden -- that prong one burden is intentionally supposed to be an easy one to get over. I think that we have provided evidence that shows that we get over it. I don't even think we needed that to get there, but we do have belt and suspenders that we have that declaration and we have nothing contravening it.

THE COURT: Okay. All right. All right. All right. Mr. Dewitt.

MR. DEWITT: This isn't a copyright case. This is

a fraud case. This doesn't have a thing to do with copyright. Unfortunately, and as an aside, if the defense filed a Motion to Strike a whole lot of paragraphs that aren't relevant to the claims, they could have won because there's a whole bunch of stuff in the Complaint that doesn't have a thing to do with the claims and, when you deal with preemption, you don't deal with the facts that generally are alleged in the circumstances surrounding. You deal with the claims. Okay?

And think about this. And this is why copyright has nothing to do with it. In a shadowbox in my living room, I have a white shirt. Okay? And it has Frank Sinatra embroidered in the back of it. I happen to know because it was given to me by a friend of mine who worked for Frank Sinatra for 17 years that Frank Sinatra had worn that shirt at concerts. Now, if I could prove that, that shirt is worth a fortune, which I can't because the guy who gave it to me is dead and various other things, but if I can't, it's worth however much, you know, the size 15-32 shirt is worth, white shirt.

THE COURT: You could do --

MR. DEWITT: It --

THE COURT: Do some --

MR. DEWITT: -- doesn't have a copyright on it.

THE COURT: -- DNA testing on it.

MR. DEWITT: I -- well, we've thought about that actually.

THE COURT: We have that now.

MR. DEWITT: But the point is if somebody got a bunch of white shirts like that and went out and said, these are concert worn Frank Sinatra shirts, and let's assume I can prove the value, it would dilute the value of mine because they're everywhere. There's not going to be any new ones, obviously. And that's an example of why copyright doesn't have a thing to do with this. Just because an artwork is subject to copyright, which it is, obviously, it -- but that has nothing to do with it. Artwork in the '70s, a lot of it isn't copyright because of the [indiscernible] convention.

But what we're talking about here is a guy who buys a book, as you may have seen in the Complaint. There was -- it was published in the '90s a coffee table book with Mr. Sassone's works in it. I don't know if it was all of them, but it was many of them, and the defendant -- that's where he got the pictures. Copied them out of the book, advertised them as original Sassone lithographs. Sassone never made a lithograph in his life. He would make serigraphs and, until this case, I had no idea what the difference between those two things were but there's apparently a significant difference. I looked that up and

I was confused, but if you know anything about art, which I gather you do, you know the difference. And the certificate of authenticity, it doesn't matter whether there's a copyright on it. Doesn't have a thing to do with it.

So, if you talk about the two-step analysis of whether it's preempted, it doesn't pass either step because the claims are not subject to the copyright end. The claims themselves. There's no claim that Sassone owned the copyright. It's in the allegations of general fact and that's where they're getting this and they've done a better job of turning this fraud case into a copyright case than I think Lewis Carroll could have done. They've written all kinds of things about the copyright law and it's all very interesting and I've seen it all before, but it doesn't have a thing to do with this case. This is just like somebody fraudulently selling allegedly worn Frank Sinatra shirts when they aren't. And that's how you get RICO because that's what this guy does, according to what we've alleged and what we understand. I mean, I think he got convicted of this before and RICO is a pattern of this and we alleged a series and --

MR. RANDAZZA: Your Honor, --

MR. DEWITT: -- you only need two --

MR. RANDAZZA: -- we've objected to this line of

argument in our briefing. I mean, I didn't want to object to the evidentiary issues before that, but --

MR. DEWITT: I'll --

MR. RANDAZZA: -- this guy was --

THE COURT: Well, from -- I saw it in there. It says something --

MR. RANDAZZA: His record from --

THE COURT: -- about him being convicted in Florida or --

MR. DEWITT: I'll confine my argument. The allegations --

THE COURT: It doesn't -- let me say this. Hold on a second. I will agree with Mr. Randazza. For purposes of what I need to figure out here, it doesn't really have much relevance as to whether he was convicted or not --

MR. DEWITT: That doesn't matter because --

THE COURT: -- in Florida or --

MR. DEWITT: -- what matters is what's in the Complaint.

THE COURT: But I -- you know, I see why you threw it in there, but --

MR. DEWITT: So, --

THE COURT: You know, to me, I'm going to focus on the test and whether you met the --

MR. DEWITT: And as you have --

THE COURT: -- sort of an evidentiary predicate is what it really is, as alleged, to make it through the test to not have preemption.

MR. DEWITT: As you have identified, the second element says something extra. It's not just something extra. RICO doesn't have a thing to do -- it's not extra at all. It's just -- it's fraud. And that's all this case is about.

The reason that we dismissed two of the claims is because, arguably, and we didn't want to get into a side battle about that, arguably they were preempted. Maybe they were, maybe they weren't. It doesn't matter to us because RICO has so much more dramatic damages than those claims did and the same thing with the Deceptive Trade Practices Act. Right? It -- claiming a copy of a serigraph from a book is an original lithograph, if that isn't a deceptive trade practice, I don't know what is. In every state I've ever practiced.

Now, --

THE COURT: Yeah. I saw that in --

MR. DEWITT: -- so, the allegation is --

THE COURT: On Paragraphs 45 through 52, they do -- it seems like somebody took NRS 598, the various sections, and used that as a template even. I mean, your Complaint does seem to lay out the elements under Chapter

598.

MR. DEWITT: You're talking about deceptive trade or --

THE COURT: Yeah.

MR. DEWITT: -- RICO trade?

THE COURT: Yeah. Deceptive trade practice.

MR. DEWITT: Yeah. And it's that simple.

THE COURT: Yeah.

MR. DEWITT: And, so, the copyright thing is a distraction and I can understand why it was raised because the general facts in there, if you look at them, oh, yeah, this could be a copyright case, but it isn't. That's the whole point. The claims don't have a thing to do with copyright. It's not just an extra element. It's a -- none of the elements are copyright. It doesn't make any difference whether -- the damage here is the defendant has flooded the market with our clients allegedly original stuff, which, obviously, the more of it that's out there, the less it's worth, and if he tries to sell a serigraph, which he'd like to do, he's going to get less for it because a dealer is going to say: Well, these things are everywhere. Well, they really aren't. They're everywhere because the defendant has put them everywhere. You -- ordinarily, they're limited to 100 or something like that.

Now, the --

THE COURT: It seems like in these federal cases when you see -- this misrepresentation is the word, it -- you know, I was just thinking about this looking at these cases last night and -- the best I could, and it seemed like if you had misrepresentation of some sort, you know, the fraudulent misrepresentation, that that -- it seems like that does satisfy the additional element.

MR. DEWITT: Absolutely.

THE COURT: And that's what you're basically saying is plaintiff's signatures on the unauthorized productions or reproductions, that's a misrepresentation. Advertising them as an original, that's a misrepresentation.

MR. DEWITT: Correct.

THE COURT: Providing forged certificates of authenticity, that's a misrepresentation. Right? I mean, that's basically what you're saying --

MR. DEWITT: Exactly.

THE COURT: -- and that's enough to be the additional element it seems like consistent with these federal cases.

MR. DEWITT: Exactly.

THE COURT: Okay.

MR. DEWITT: And as to the -- what else do we have to talk about here?

THE COURT: Are there any others that are missing? Any other overt, you know, alleged acts, you know, --

MR. DEWITT: No. It --

THE COURT: -- acts of misrepresentation?

MR. DEWITT: But I would emphasize that it's not that there's copyright plus an additional element. It's just additional elements.

THE COURT: Right.

MR. DEWITT: Copyright is not in there. So, prong one of the test goes array also.

As to the --

THE COURT: That's one that I have to think about. I haven't thought of it quite that way because I felt like the first prong was probably met because it -- you know, the -- the general issues that are in play here had to do with, at the root source, you know, copyright type stuff, but really --

MR. DEWITT: Well, if at the end of the --

THE COURT: -- it's that second element anyway that -- I mean, I'll just tell you it does seem to me that you have stuff here alleged that -- of misrepresentation separate and distinct from copyright in general. I mean, you've got it alleged. Again, I've said it a few times: Advertising as originals, when they're not, as alleged.

MR. DEWITT: Right.

THE COURT: You know: Forged certificates of authentic and -- well, forged -- you're alleging phony or fake signatures of this artist.

MR. DEWITT: Right.

THE COURT: So, I mean, yeah.

MR. DEWITT: So, the other issue --

THE COURT: You don't need to tell me much more about that aspect of it. I think you meet -- I'll just tell you flat out --

MR. DEWITT: And let me say this, if you give us leave to amend the Complaint, which I've asked for --

THE COURT: Yeah.

MR. DEWITT: -- in response to the Motion to Dismiss, look, I don't like the Complaint very much either now that I've looked at it and all this stuff has come flying at it. An Amended Complaint is going to take all this stuff out. It's going to be more specific and, obviously, at this stage of the game, amending the Complaint is almost automatic in response to the 12(b)(6) Motion. When we talk about the SLAPP Motion for a second.

THE COURT: Okay. All right.

MR. DEWITT: SLAPP statutes were designed to protect people's essentially First Amendment rights, the rights to petition the government, the right to get out there and picket in front of a hotel where you don't like

the management or something because what used to happen is -- an example, a client of mine before there was a SLAPP statute, was a bunch of animal rights people. They were picketing because they were moving the foxes away from some area near the airport in Los Angeles and they got sued and it scared them to death. And as a result of that kind of thing, they passed a SLAPP statute because they were engaged in core First Amendment activity. We don't like this. And the Legislature didn't want people to be able to bully people who did that or who came to the City Council to complain about things or to file lawsuits or things like that. And it all is the First Amendment.

Now, in Constitutional Law 102, as I recall, about the first thing I learned about the First Amendment was fraud is an exception. And to be covered by the First Amendment, you have to say something that's true and none of the things -- and this is really important. None of the things that are material to the allegations in this case were true. It was all lies. This was an original Sassone and as to the -- and this is the first tier of the SLAPP analysis so it's before --

THE COURT: You know, Mr. Randazza -- sorry to interrupt you, but hopefully every time I do that I do it for a good reason. He brought up something that he was right about. The -- if you look at it, this SLAPP, Anti-

SLAPP area of law, the way it works -- you know, we have this *Stubbs Strickland* case in Nevada from 2013.

MR. DEWITT: Right.

THE COURT: So, it allows a defendant to file a Special Motion to Dismiss, which they've done. It functions as a Motion for Summary Judgment. So, it has to be taken in a summary judgment posture, it seems to me. And, so, I think Mr. Randazza's point in that regard is well taken and I should have gotten it -- I should have said that but now I see it. So it really brings up this whole criticism of: You know, what about your evidence now since we're in a Motion for Summary Judgment posture and not a Motion to Dismiss posture? What's your evidence, you know, to support fending this thing off?

MR. DEWITT: I don't think the Court's quite gotten the analysis right, partially. There's a two-step process. Step one is: Is this a SLAPP suit?

THE COURT: Right. The initial showing has to be from the defendant and if they meet that, then it shifts to you to show prima facie evidence of probability of prevailing on the claim.

MR. DEWITT: But the initial showing --

THE COURT: Right.

MR. DEWITT: -- is that the suit is a SLAPP suit. I mean, if this was a suit for personal injury, just to

make a ridiculous example, --

THE COURT: Right.

MR. DEWITT: -- and they filed an Anti-SLAPP Motion, it would never get to the summary stage -- summary judgment stage because personal injury suits aren't subject to SLAPP Motions. It's not for personal injury lawsuit -- personal injury is not a First Amendment activity.

So, before you get to the summary judgment tussle, you have to look at: Is this a SLAPP suit? Okay? And it isn't and the reason it isn't is because it's a fraud claim. And it's all -- it's all about fraud. It's not about copyright. It's not about -- the idea -- and this is really, really important. The idea that there's a constitutionally protected or encouraged right to distribute public domain stuff. That's true and if all my client -- if all his client did was copy my client's serigraphs and put them up for sale at a swap meet and somebody comes and says: That's a nice little picture, I'd like to buy it. Is it an original? No, no, no, it's just a copy out of magazine or a book. Then we wouldn't have a case. At least under these [indiscernible]. The whole idea -- the whole gravamen of this thing is not when he copied it and that's where we're getting distracted here. It's not the copying that's the offense. It's not the selling that's the offense. It's the fraud that's --

THE COURT: It's the misrepresentation.

MR. DEWITT: -- the offense and fraud is not a --

THE COURT: Right.

MR. DEWITT: -- SLAPP suit, as we know, because fraud is not protected by the First Amendment.

THE COURT: Yeah.

MR. DEWITT: So we don't ever get past the first prong of it.

Now, knowledge of fraud, the pleadings allege he copied it out of a book. That's enough to -- and then said it's original. Well, how can he not know it's original if he copied it out of a -- you know, I mean, it just doesn't work that way.

So, it -- he doesn't get to the evidence stage. It's just a question of -- it's a fraud case and it's not any more of a SLAPP case than the personal injury cases. It just isn't. So we don't get to the summary judgment tussle, which is the second phase of it.

THE COURT: Okay. Understood.

MR. STEELE: Your Honor, may I be heard briefly?

THE COURT: Sure.

MR. STEELE: My position is a little different.

THE COURT: Mr. Steele.

MR. STEELE: Thank you.

My client should be dismissed today whether it's

under 12(b)(5) or under the Anti-SLAPP. We've heard almost a half hour of back and forth without any communication, act, conspiracy, anything involving my client, who is a small business owner, who in the coming days is going to have to pay legal fees that could go on for years on an allegation on a Complaint that merely states that he sold -- no, I'll take that back. That he shipped whatever these pieces were or were not. There's no allegation even in our rather significant Reply in Opposition to their Request for Attorneys' Fees, of all things, to support the notion that my client engaged in any act except for four agents of plaintiff purchased art from a website. The art or whatever it was was delivered to him and he shipped it.

So, regardless of how we decide the preemption issues, the Anti-SLAPP, whatever, if you look through the Complaint, there's no allegation that my clients engaged in copying the lithographs, in forging signatures, in producing certificates of authenticity. There's no allegation that my clients made any communication or speech that knowingly was false. The speech that they brought back on us was: Well, Mr. McCullough sent an e-mail and said that they'd be shipped by FedEx and here's the tracking number, which, believe it or not, the package arrived and forms part of the basis for their Complaint.

So, regardless of what is sorted out between these

two, my client should walk out today and not have to defend themselves against these claims where they have no more skin in the game than the UPS delivery guy or the guy that puts the stamp on the mail.

Besides that, I don't know why we're here and we shouldn't be required to maintain in the conspiracy the plaintiffs created or allege.

THE COURT: All right, Mr. Steele. That's probably a good segue for you, Mr. Dewitt.

MR. DEWITT: Not quite. I had one more thing to say about -- but that's okay.

THE COURT: Okay.

MR. DEWITT: I'll say my one more thing and then I'll deal with that.

THE COURT: Where are you from, Mr. Dewitt?

MR. DEWITT: Chicago originally. Is that obvious?

THE COURT: I just thought I'd ask.

MR. DEWITT: I lived in Texas for 14 years and it didn't seem to do anything.

VARA, we cited in our Opposition a case and a statute that says there's exceptions to VARA based on the definition in 17 U.S.C. Section 101 and they didn't respond to that and I suspect the reason is there's no response to be made. We cited a case an there's a typographical error in the citation. It's somebody versus Disney Internet --

do you have a page -- oh, I know where it is --

THE COURT: Well, I'll just tell you I --

MR. DEWITT: Page 7 of our --

THE COURT: In a preliminary sense, we, you know, came up with that VARA seems to protect original works of art and that they wouldn't apply to reproductions, depictions, or other uses of --

MR. DEWITT: Right. I just wanted to make sure the Court --

THE COURT: So that, therefore, wouldn't apply, but I know Mr. Randazza is probably going to tell me we got that wrong, but that was our thought.

MR. DEWITT: I have another case, too, if you're interested, but --

THE COURT: Okay.

MR. DEWITT: Now, the Complaint --

THE COURT: At some point, I would like for you to talk about Mr. Steele's situation and --

MR. DEWITT: I am about to.

THE COURT: -- the innocent delivery people. Yeah.

MR. DEWITT: I don't think the Complaint alleges that he's so innocent. And if my assistant can tell me a paragraph number. I think we alleged that he knew it was -- he's not subject to SLAPP or anything because he's not

doing First Amendment stuff, he's just shipping things. But if he ships things knowingly, then he's not such an innocent [indiscernible] as he'd like to think -- like you to think that he is. That's for discovery and things. I mean, if he can in discovery and it shows that he didn't know anything and there's no evidence that his client knew, then he wins, but if he's at a 12(b)(6) -- 12(b)(5), sorry about that. I practice in Federal Court too much. In a 12(b)(5) does the Complaint get passed it?

THE COURT: Yeah.

MR. DEWITT: Yes, it does.

THE COURT: Okay.

MR. DEWITT: I don't think -- I mean, he may be able to -- and it may wind up -- he'll go in front of the jury and say: I had no idea this was going on. And, if the jury believes him, he's going to win.

THE COURT: Okay.

MR. STEELE: Your Honor, can I respond very briefly --

THE COURT: Sure.

MR. STEELE: -- simply to the Anti-SLAPP portion as it pertains to my client?

THE COURT: Well he says they're not going to bring an Anti-SLAPP against your people.

MR. STEELE: And I heard what he said and that's

why I felt the need to get up and state my position on the case law --

MR. RANDAZZA: We filed the Anti-SLAPP, not him.

THE COURT: Yeah, that's you. He, being Mr. Randazza right here.

MR. RANDAZZA: He's -- I think he's arguing that he is covered even under the allegations if I'm --

THE COURT: Okay. All those -- I think what the plaintiffs are alleging though is that you either knew or should have known that you're -- what? Conspiring? Where is this in the Complaint? I was just asking her to pull it up. It would be easier to do that.

MR. STEELE: While she's looking that up, Your Honor, --

THE COURT: I mean, I have it here, too, but --

MR. STEELE: -- the mere commercial transaction is protected commercial speech under Nevada SLAPP rules. So, for him to say we didn't engage in any speech is inaccurate because there were commercial transactions. There's the communication from McCullough to plaintiff's buyers indicating: Hey, it's been shipped today, which was an accurate statement and the parcels or the shipments arrived as he indicated. So, he did communicate and that speech was communicated and protected.

In terms of the Complaint, in the Complaint, the

Amended Complaint, allegations as it pertains to my clients, I went through it over and over again and the only sort of allegation that I see is that the lithographs were subsequently shipped by Postal Annex. That's the allegation that, you know, his buyers went online, bought whatever it was, and my guy, as a small business owner that's in the business of shipping you name it, ships products. If plaintiff's trying to make some sort of allegation or place some burden on defendants that we're to inspect every piece of mail that comes through their store is erroneous and absurd.

Any sort of specific allegation, again, well, defendants -- you know, defendants just had some sort of idea, but plaintiff was required under the Anti-SLAPP to bring prima facie evidence. There's nothing that he's brought as it pertains to my clients. And even under 12(b)(5), there's no specific allegation of wrongdoing on the part of my clients. And under 12(b)(1), plaintiff lacks standing. If there was some sort of issue between the purchasers of the yard and the shipper of the yard, he doesn't represent those buyers. So he has no standing even under 12(b)(1) to bring claims against my clients.

So, whether we want to do it under 12(b)(1), 12(b)(5), or the Anti-SLAPP, my defendant should still walk out of here dismissed from this case.

MR. RANDAZZA: Your Honor, I just briefly -- I would -- on this, I would hate to disagree with him, but I think he's got the Anti-SLAPP analysis wrong. His distribution would probably be covered under the Anti-SLAPP. So, if you sued a newspaper for something that's in the newspaper and then you sued the delivery -- sued the paperboy, the paperboy would be able to claim expressive conduct by delivering and distributing. So, I'm not retained by his client, but as somebody with an interest in the Anti-SLAPP law being correctly interpreted, I'd like to throw that out there.

Now, let's look at what Mr. Dewitt argued. The best admission that he made is that it is true that it is First Amendment protected activity to distribute public domain works. You could extend that to any works that you have authorization to distribute. There may be works that are not in the public domain, but perhaps distributed under what's known as a Creative Commons License. This is a -- if Your Honor is not familiar with it, it's a form of copyright that people might create to work -- say that this can be distributed under Creative Commons under certain conditions. And some of them are just share and share alike. There a lot of people that are copyright anarchists who want to make a work and like to see it distributed.

So, we are talking about that. We are talking

about a defendant, Mr. Coker, who has produced admissible evidence that he believed when he distributed these copies that he had every legal right to do so. He admits that he sold these copes. That's not a question.

However, I did not think that doing so would be an issue because I thought that the reproductions that I bought from the bulk supplier were legitimate or otherwise legal to buy and sell, just as if he had bought copies of John Stuart Mills' *On Liberty* and tried to distribute them.

So I don't know why we would be outside of the Anti-SLAPP statute.

Now, the other argument that Mr. Dewitt made is that fraud is not First Amendment protected, as if we're already there that we've proven fraud. I don't know what fraud we have here because the only people that we have in the record that purchased any works that could be deemed to be to have been defrauded were Mr. Sassone's agents. So we don't have a defrauded party. Nevertheless, I think that Mr. Dewitt misses a very important point that even fraud is First Amendment protected. In the *United States versus Alvarez*, the man was convicted for lying about winning the Congressional Medal of Honor and, as bad as that fraud is, I don't know of any fraud that can be worse than standing up and saying I won the Congressional Medal of Honor, but

the United States Supreme Court said that even that statement is First Amendment protected.

Now, Mr. Coker isn't quite there, but proven fraud may be punishable. Sure. But we're not there. All we have is this allegation of some kind of fraud with no victim, with no actual parties. The only people that participated that we can see in any evidence here that participated in this so-called RICO were these four people who are actually working for Mr. Sassone.

So, let's take a look at -- Your Honor mentioned that you looked at some cases that brought in these extra elements, these misrepresentations, these issues that are covered under VARA. In every one of those cases, those are either pre-VARA or VARA being somewhat obscure, the defendant did not bother to raise VARA. Fortunately, I have an obsession with VARA. So, as soon as I saw this, I said: Ah, VARA. So, we have VARA elements here. All of these extra elements that he is pleading, correct, they might jump outside of Section 106 but then they land right on Section 106(a). So they are still preempted.

Now, we keep hearing: Serigraph, lithograph. It makes my head spin to keep them straight. Let's just call them what they are: Copies. So, anybody who made a copy, which we don't even -- we have an allegation that my client made the copy. We have an allegation that my client made

it from this book. But we're in an Anti-SLAPP posture here and as much as Mr. Dewitt might have said, maybe with the benefit of discovery, he has missed that train. There is an ability to seek discovery under the Anti-SLAPP statue by a separate motion, not while we're here.

Now, I don't have copies of these copies. I don't know what these copies look like. I don't know what this book looks like. I don't know any of that. All I know is I'm hearing argument of counsel that says if you look at the subtitles, this is a copyright case. People made copies. Section 106. People distributed copies. Section 106. People falsely attributed these copies to somebody else. Section 106(a). There is not a single thing here that we have that couldn't have been brought as a VARA or a copyright claim.

Now, saying that under VARA this might not have succeeded, that is not the test for preemption. The test for preemption is not had the plaintiff brought a copyright claim or a VARA claim they would have won and thus it's preempted. I mean, that would kind of get rid of the whole purpose of preemption. They have found something that should have been a VARA claim. I don't know if it would have succeeded or not had they brought that, but that is not the test. The teste is simply: Does this fit within Section 106 of Section 106(a)? And that I believe most

definitely does.

This discussion of this Frank Sinatra shirt, it's an interesting, but it's like a Penn and Teller routine making you look over here. This is an object. Autographed baseball I think was in their papers.

THE COURT: Yeah.

MR. RANDAZZA: Frank Sinatra shirt, counterfeit handbag, anything you might want to come up with. That's not the point because that shirt -- if that shirt had a painting on it, on the back of it, or a design on it and they said this is Frank Sinatra's work, that's another story. But this is simply falsifying where an object came from is one thing, but, here, what we have is -- even in the allegations let alone the lack of evidence at the Anti-SLAPP stage, what we have is genuinely -- if we had Mr. Sassone here, according to these pleadings, if we pointed to one of these copies, he would say: Yes, that's a copy of my work. It would be very different if I took M.C. Escher's work and I wrote Marco Sassone at the bottom of it and distributed that. That might be a misrepresentation. This is not a misrepresentation to attribute these works to him and all we have from my guy here is really the same as him --

THE COURT: Is it a misrepresentation to say that it's his signature if it's not?

MR. RANDAZZA: I don't believe that's even in the allegations, that it was actually his signature. There were -- supposedly certificates saying that it was a genuine copy. I don't know even what that means, but I don't see them here. Again, we might get past 12(b)(5), they should probably, if I were in their position, wish that we did not because I actually don't know what happens if you dismiss under this 12(b)(5) and then there's a pending Anti-SLAPP, but I would prefer if I were on their side to lose on 12(b)(5) because then there isn't the mandatory attorneys' fees shift.

But even if we had not filed a 12(b)(5) and we were just here on Anti-SLAPP, we have met that burden. His arguments have shown that we have met that burden on the first prong. And, on the second prong, I don't know why this record is so void of any admissible evidence of any kind. I must presume that that's because it doesn't exist because I know for a fact it's not due to failure of counsel. I'm proud to say that this man taught me most of what I know about litigation, so -- as a mentor of mine, I know he didn't mess it up. It doesn't exist if it isn't this courtroom right now.

THE COURT: Okay. All right. Thank you, Mr. Randazza.

Well, it's their Motion, but, Mr. Dewitt, since

you're the mentor, you can add something else if you want, I guess, or not.

MR. DEWITT: I would -- since I didn't have a chance to respond to the *Alvarez* claim.

THE COURT: Okay.

MR. DEWITT: In *Untied States versus Alvarez* was not fraud. That's really important. What happened there -- it's the Stolen Valor Act and what happened is the people were running around claiming they had medals and things like that they really didn't have. And that became popular and so Congress passed the Stone Valor Act which says if you say that you have some kind of a medal from American service, I don't know what the definition of it was, then it's a crime. Okay? You don't have to injure anyone --

THE COURT: Unless it's on your DD214, in which case you do have it, but go ahead.

MR. DEWITT: Anyway, if you lie about it, it's a crime.

THE COURT: Right. I know that *Alvarez* case.

MR. DEWITT: So, anyway, what the Supreme Court says --

THE COURT: Yeah.

MR. DEWITT: -- that standing alone is protected by the First Amendment. Now, they were careful though to limit it to that and the people have written about it and

the cases that have talked about it say it would be different if it said -- the Stolen Valor Act said you claim you have some declaration, whatever it is, in an effort to obtain goods or services. Then it becomes fraud and then it's no longer protected by the First Amendment. So, I mean, fraud has an element of, you know, trying to benefit from something.

THE COURT: Yeah.

MR. DEWITT: Now, the -- Mr. Alvarez was running for public office, but the Supreme Court said -- and that's why he was telling people about all these medals he didn't have and the Supreme Court said: Well, that doesn't make any difference because it's the statute we're looking at and the statute on its face is unconstitutional because it doesn't require the liar to be -- to attempt to benefit by virtue of it. It only requires him to lie and Judge Kozinski of the Ninth Circuit, and I don't know if you're familiar with him, wrote this delightful concurring opinion in the Ninth Circuit's Opinion in *Alvarez* explaining why people lie all the time. Oh yeah, that's a beautiful dress. You know, it's just -- that's different than fraud. Fraud is when you lie to get something. That's what's going on here.

Again, the threshold thing about SLAPP is if you look at the Complaint, is it a SLAPP case? This is like a

personal injury case. It doesn't get that far. You don't get to the summary judgment squabble until you look at the Complaint and say: This is a SLAPP case.

THE COURT: Okay.

MR. DEWITT: If the Complaint says they were picketing, protesting, you know, and damaging, that's a SLAPP case. This isn't and it doesn't get -- that -- it doesn't get passed prong one is the important thing.

THE COURT: All right. Well, in the course of this hearing, I have to say I've taken a few notes that, in my mind, are going to require me to look more intently at some things. I typically like to give people decisions in court, but from time to time -- and, you know, court has utility, especially with really good lawyers like you all. You know, it gives us a reason to think and look at things and I made about five or six notes, things I just sort of want to follow-up with and look at.

And, so, we're going to have to take it under advisement, but we'll try to do a decision within a couple of week from today, within a couple of weeks. Now that might be a minute order styled decision asking the prevailing party to write the ultimate decision and the reason for that is because I can see this thing being, you know, 15 or 20-page decision and it just helps sometimes to, you know, prevail upon the party who does well to draft

the Order. So, we'll come up with something within a couple of weeks and I can appreciate the type of advocacy I've seen and there's a lot of things to figure out. We'll do the best we can to do just that. Like I say, about a couple of weeks. Okay? All right.

MR. RANDAZZA: Thank you, Your Honor.

MS. PAGLINI: Thank you, Your Honor.

MR. STEELE: Thank you.

PROCEEDING CONCLUDED AT 11:55 A.M.

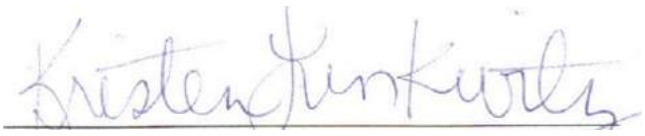
* * * * *

CERTIFICATION

I certify that the foregoing is a correct transcript from the audio-visual recording of the proceedings in the above-entitled matter.

AFFIRMATION

I affirm that this transcript does not contain the social security or tax identification number of any person or entity.



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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

MARCO SASSONE, Plaintiff, vs. DARRELL T. COKER, *et al.*, Defendants.	Case No. A-16-742853-C Dept. No. XXXII **NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT DARRELL T. COKER'S MOTION TO DISMISS PLAINTIFF SASSONE'S COMPLAINT PURSUANT TO NRCP 12(b)(1) & NRCP 12(b)(5) AND SPECIAL MOTION TO DISMISS PLAINTIFF SASSONE'S COMPLAINT PURSUANT TO NRS 41.660**

Defendant Darrell T. Coker hereby files this Notice of Supplemental Authority in support of his Motion to Dismiss Plaintiff Marco Sassone's Complaint Pursuant to NRCP 12(b)(1) and NRCP 12(b)(5) (the "Motion to Dismiss"), and his Special Motion to Dismiss Plaintiff Sassone's Complaint Pursuant to NRS 41.660 (the "Anti-SLAPP Motion").

On July 13, 2017, the United States District Court for the District of Nevada issued a decision relevant to the issues presented by Mr. Coker's Motion to Dismiss and Anti-SLAPP Motion, *Century Surety Company v. Prince*, Case No. 2:16-cv-2465-JCM-PAL. (*See Century Surety* decision, attached as **Exhibit 1**.)

Century Surety dealt with an insurance company suing attorneys based on allegedly fraudulent litigation activity that resulted in the attorneys securing a multi-million-dollar judgment for their clients against the insurance company. The insurance company brought RICO claims and a conspiracy claim. The attorneys filed an Anti-SLAPP motion under NRS 41.660 because the suit was based on litigation conduct, which is protected under the broad protections of the Anti-SLAPP statute. The court granted the Anti-SLAPP motion as to all counts.

The *Century Surety* court found that the insurance company failed to allege sufficient facts to show that the attorneys' conduct was not in good faith, and thus found that they satisfied the first prong of the Anti-SLAPP statute. (**Exhibit 1** at 7-9.) The Court should look to this analysis in determining whether Plaintiff has provided any competent evidence to show bad faith under NRS 41.637, as Mr. Coker has provided evidence showing that his conduct was made in good faith.

While the facts in *Century Surety* differ from those here, that court's discussion of the evidentiary burden of a plaintiff under the Anti-SLAPP statute's second prong, and as to the elements of RICO and conspiracy claims, is instructive. The *Century Surety* court found that the plaintiff did not meet its evidentiary burden as to the *scienter* element of a RICO claim, as it only asserted that court filings by the defendants contained patently false information, and that an attorney persuaded a party to sign an allegedly fraudulent settlement agreement. (See *id*. at 13-14.) Furthermore, it found that mere conclusory

allegations of a conspiracy did not satisfy the plaintiff's evidentiary burden. (*See id*. at 16.) In that context, this decision is quite similar to the case before this Court.

As the legal discussion in *Century Surety* is relevant to the issues presented in Mr. Coker's Motion to Dismiss and Anti-SLAPP Motion, the Court should consider the *Century Surety* decision in rendering an opinion on the pending motions.

Dated: July 14, 2017.

Respectfully submitted,

/s/ Marc J. Randazza

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Case No. A-16-742853-C

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of July 2017, I served a true and correct copy of the foregoing document via the Eighth Judicial District Court's Odyssey electronic filing system or, if necessary, via electronic mail and U.S. Mail, on the attorneys listed below:

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EXHIBIT 1

Century Surety Company v. Prince,
Case No. 2:16-cv- 2465-JCM-PAL

Order
July 13, 2017

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

CENTURY SURETY COMPANY, Plaintiff(s), v. DENNIS PRINCE, et al., Defendant(s).	Case No. 2:16-CV-2465 JCM (PAL) ORDER

Presently before the court is defendant Dennis Prince's ("Prince") special motion to dismiss pursuant to Nevada Revised Statute ("NRS") § 41.660. (ECF No. 37). Prince had previously filed a special motion to dismiss (ECF No. 17) but was ordered to refile the motion within the court's page limitation on December 13, 2016.[1] (ECF No. 32). Prince filed the present special motion to dismiss on December 16, 2016. (ECF No. 37).[2]

Plaintiff Century Surety Company ("Century") filed a response to the special motion to dismiss (ECF No. 44), to which Prince replied (ECF No. 57).

Defendant George Ranalli ("Ranalli") joined Prince's original special motion to dismiss (ECF No. 25) and filed an errata with the court to join the refiled special motion to dismiss on December 28, 2016. (ECF No. 43). Ranalli also filed his own motion to dismiss. (ECF No. 26). Century responded in January 2017 (ECF No. 46), and Ranalli replied (ECF No. 53).

---

[1] The original special motion to dismiss will be denied for failure to comply with Local Rule 7-3. LR 7-3(c) ("A motion to file a brief that exceeds these page limits will be granted only upon a showing of good cause. A motion to exceed these page limits must be filed before the motion or brief is due . . . . Failure to comply with this subsection will result in denial of the request."); (ECF No. 17).

[2] Having originally been fifty-six pages long, the magistrate judge ordered the motion refiled to comply with Local Rule 7-3. (ECF No. 32).

Defendant Sylvia Esparza ("Esparza") also joined in the special motion to dismiss on December 20, 2016. (ECF No. 40). Also before the court is Esparza's motion to dismiss. (ECF No. 18). Century responded by incorporating and adopting by reference its response to Prince's motion. (ECF No. 45). Esparza replied to Century's response to Prince's special motion to dismiss, but not specifically in favor of her own motion. (ECF No. 56).

Furthermore, Prince moved to stay the proceedings. (ECF No. 55). Ranalli and Esparza both joined in the motion to stay. (ECF Nos. 59, 60). A hearing was held on March 7, 2017, regarding that motion. (ECF No. 69). Magistrate Judge Leen issued an order which granted Prince's motion. (*Id*.). Century filed objections to the order and asked the court to reverse the magistrate judge's order. (ECF No. 71). Prince responded to Century's objections (ECF No. 72), and all other defendants joined in Prince's response (ECF Nos. 73, 74).

I. Introduction

The present case concerns an alleged scheme to fraudulently procure a multi-million dollar judgment against Century as a result of a catastrophic vehicle accident. (ECF No. 1). Century brings two claims. (*Id*.). Century's first claim is brought under the Nevada Racketeer Influenced and Corrupt Organizations Act ("RICO") per NRS 207.470. (*Id*. at 12–18). Century brings a second claim for civil conspiracy, alleging that defendants Prince, Ranalli, and Esparza engaged in a "bad faith insurance 'setup.'" (*Id*. at 2, 18–19).

Michael Vasquez ("Vasquez") is the sole owner and manager of Blue Streak Auto Detailing, LLC ("Blue Streak"). (ECF No. 1 at 3). On January 12, 2009, Vasquez was driving his Ford F-150 truck on St. Rose Parkway when he struck Ryan Pretner ("Pretner"), who was riding his bicycle on the shoulder of the road. (ECF Nos. 1 at 3, 37 at 3). Pretner was "violently thrown from his bicycle resulting in a catastrophic brain injury and over $2,000,000 in medical expenses." (ECF No. 37 at 3). Vasquez was allegedly "'off work' and running 'personal errands' at the time of the [a]ccident." (ECF No. 1 at 6).

At that time, Vasquez had a personal automobile liability insurance policy ("personal policy") from Progressive. (*Id*. at 3). Blue Streak, a mobile detailing business owned and operated by Vasquez, was covered by a commercial liability garage coverage policy ("garage policy") from

Century. (ECF Nos. 1 at 3, 37 at 3). The personal policy had a $100,000 policy limit whereas the garage policy had a $1,000,000 policy limit. (ECF No. 37 at 3).

Pretner was initially represented by Esparza. (ECF No. 1 at 7). Progressive offered Esparza the personal policy limit—$100,000—immediately following the accident. (ECF No. 37 at 4). Due to the severity of Pretner's injuries, "Esparza could not provide a release until all possible insurance coverage was exhausted." (*Id*. at 4). Esparza made a demand on Century for its policy limit. (*Id*.). Century denied the demand, taking the position that coverage did not exist under its policy because Vasquez was not acting in the scope or course of business at the time of the accident. (*Id*.). Next, Esparza requested a copy of Century's garage policy. (*Id*.). However, Century refused to provide Esparza with a copy of the garage policy. (*Id*.).

Prince was retained by Pretner roughly three weeks prior to the applicable statute of limitations deadline. (*Id*. at 17). At that time, Esparza's involvement in the case ceased. (ECF No. 18 at 3). Prince filed a complaint against Vasquez and Blue Streak "[o]n January 7, 2011, five days before the statute of limitations expired." (ECF No. 37 at 5).

Century alleges "Prince informed Progressive that he planned to represent [p]laintiffs before filing suit against Vasquez and Blue Streak, but assured Progressive that he planned to set up [p]laintiff Century Surety for a subsequent bad faith claim and that he would not pursue Vasquez personally." (ECF No. 1 at 4). Century further alleges "[t]here was no evidence to support [that Vasquez was in the course and scope of his business at the time of the accident] and all of the evidence available and known to [Prince, Esparza, and Ranalli], expressly contradicted material allegations in the complaint." (*Id*.).

Prince, on the other hand, argues that "[t]he claims against Blue Streak were based upon allegations that Vasquez was in the course and scope of his employment at the time of the collision." (ECF No. 37 at 5). Moreover, Prince argues that the allegations in the state complaint were supported by case law, the nature of the business, and a potential witness. (*Id*.).

Century was informed that Prince represented Pretner, that there were allegations that there may be coverage under Century's garage policy, and was provided a copy of the complaint. (ECF Nos. 1 at 8, 37 at 5). Century's response was merely to provide Prince with a copy of the garage

policy. (ECF No. 37 at 6). Century elected to neither indemnify nor defend Vasquez or Blue Streak, believing that coverage did not exist under its policy and "that Progressive was defending the action." (ECF No. 1 at 8); *see also* (ECF No. 37 at 6).

Defaults were entered against Vasquez and Blue Streak on June 27, 2011. (ECF Nos. 1 at 8, 37 at 6). Prince sent copies of the defaults to Century. (ECF No. 37 at 6). Century replied that it had "no coverage for this matter" and that Progressive was handling the case. (*Id*.).

Thereafter, Progressive and Prince negotiated a settlement agreement, and Progressive retained Ranalli to "represent Vasquez and Blue Streak in connection with the covenant and settlement negotiations." (*Id*. at 7). "Progressive informed [d]efendant Ranalli that Prince 'has agreed to give us a [c]ovenant [n]ot to [e]xecute in exchange for the payment of our policy limit' and instructed [d]efendant Ranalli to work with Prince to draft a settlement agreement." (ECF No. 1 at 9).

> Progressive and Defendant Prince agreed to a settlement under which Progressive would pay its $100,000 policy limit, Pretner and his co-legal guardians would obtain an assignment by Blue Streak and Vasquez of their rights to proceed against Plaintiff Century Surety under the Garage Policy, and Defendant Prince would proceed to obtain a default judgment against Vasquez and Blue Streak. The agreement also provided that Pretner and his co-legal guardians would provide a covenant not to execute on the resulting [state court] judgment.

(*Id*.). Vasquez was allegedly "reluctant to sign" the settlement agreement "because he did not believe Century Surety had any responsibility for the accident," and executed the agreement only due to "pressure from Defendant Ranalli." (*Id*. at 9–10).

"On February 15, 2012, Prince filed an [a]pplication for [e]ntry of [d]efault [j]udgment requesting judicial determination of damages" and, after a hearing, a default judgment in the amount of $18,050,185.45 was entered in plaintiffs' favor. (ECF No. 37 at 7); *see also* (ECF No. 38–16). Subsequently, Prince, as a result of the assignment of rights and the covenant not to execute, filed *Andrew v*. *Century Sur*. *Co*. in state court, and Century removed the case to federal court. *See* No. 2:12-CV-00978-APG-PAL, 2014 WL 1764740 (D. Nev. Apr. 29, 2014); (ECF No. 26 at 3). Prince, on behalf of his client, sought to collect "damages related to the default judgment and Century's bad faith." (ECF No. 37 at 7–8); *see also* (ECF No. 1 at 11).

Century filed an answer in the *Andrew* case on June 15, 2012, arguing "[p]laintiffs' alleged right to seek damages against Century was obtained through fraud, misrepresentation, and/or collusion." (ECF No. 37 at 7). Century first tried, in October 2012, to intervene in the state court action, but its motion to intervene was denied in its entirety. (*Id*. at 7–8). Century never filed any counterclaims in the *Andrew* case and has been denied the opportunity to reopen discovery to investigate its fraud and collusion defense "because Century had 'raised that issue from the outset.'" (*Id*. at 8).

II. Legal Standard

A. Motion to dismiss

The court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "[a] short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although rule 8 does not require detailed factual allegations, it does require more than labels and conclusions. *Bell Atl*. *Corp*. *v*. *Twombly*, 550 U.S. 544, 555 (2007). Furthermore, a formulaic recitation of the elements of a cause of action will not suffice. *Ashcroft v*. *Iqbal*, 556 U.S. 662, 677 (2009) (citation omitted). Rule 8 does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. *Id*. at 678–79.

To survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Id*. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id*. When a complaint pleads facts that are merely consistent with a defendant's liability, and shows only a mere possibility of entitlement, the complaint does not meet the requirements to show plausibility of entitlement to relief. *Id*.

In *Iqbal,* the Supreme Court clarified the two-step approach district courts are to apply when considering a motion to dismiss. *Id*. First, the court must accept as true all of the allegations contained in a complaint. However, this requirement is inapplicable to legal conclusions. *Id*. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id*. at 678. Where the complaint does not permit the court to infer more than the mere possibility of

misconduct, the complaint has "alleged – but not shown – that the pleader is entitled to relief." *Id*. at 679. When the allegations in a complaint have not crossed the line from conceivable to plausible, plaintiff's claim must be dismissed. *Twombly*, 550 U.S. at 570.

The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v*. *Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). The *Starr* court held:

> First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.

Id.

B. Special motion to dismiss

The court will first consider Prince's special motion to dismiss pursuant to NRS § 41.660, which protects "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." Nev. Rev. Stat. § 41.660; (ECF No. 37). Prince argues that Century's complaint is a strategic lawsuit against public participation ("SLAPP") complaint. (ECF No. 37). Prince contends that the complaint was brought against the three attorney defendants personally for "improper and retaliatory" purposes. (*Id*. at 3). Moreover, Prince emphasizes that the complaint directly targets the defendants' First Amendment right to petition the court system by seeking to "effectively chill Prince and other attorneys from vigorously advocating for injured clients by forcing attorneys to defend themselves against claims for personal liability for purely strategic litigation decisions." (*Id*. at 2).

Nevada's "anti-SLAPP" statute governs how the court must adjudicate the instant motion; the court is to:

> (a) Determine 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;
> (b) If the court determines that the moving party has met the burden pursuant to paragraph (a), determine whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim;

> (c) If the court determines that the plaintiff has established a probability of prevailing on the claim pursuant to paragraph (b), ensure that such determination will not:
> (1) Be admitted into evidence at any later stage of the underlying action or subsequent proceeding; or
> (2) Affect the burden of proof that is applied in the underlying action or subsequent proceeding;
> (d) Consider such evidence, written or oral, by witnesses or affidavits, as may be material in making a determination pursuant to paragraphs (a) and (b);
> (e) Except as otherwise provided in subsection 4, stay discovery pending:
> (1) A ruling by the court on the motion; and
> (2) The disposition of any appeal from the ruling on the motion . . . .

Nev. Rev. Stat. § 41.660(3).

III. Discussion

A. Anti-SLAPP analysis

1. Protected activity

First, the court must determine if Century's complaint is based entirely on defendants' "[g]ood faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." Nev. Rev. Stat. § 41.637. Prince argues, and Century does not contest, that the complaint is based on a "[w]ritten or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law." Nev. Rev. Stat. § 41.637(3); *see also* (ECF No. 37 at 8–9).

Prince contends that "because both of Century's claims arise from the same conduct by Prince in furtherance of his pursuit of a lawsuit on behalf of his injured client," the activity is protected by Nevada's anti-SLAPP statute. (ECF No. 37 at 10). Century argues, however, that Prince, Ranalli, and Esparza fail on the "good faith" requirement of NRS 41.630. (ECF No. 44 at 11–15). In order for Prince's petition to the court to be in good faith, it must "[be] truthful or [be] made without knowledge of its falsehood." Nev. Rev. Stat. § 41.637.

Century claims that Prince knew Vasquez was not acting in the course or scope of employment at the time of the accident, so the claim against Blue Streak relied on knowingly false statements and, as a result, was done in bad faith. (ECF Nos. 1 at 4, 44 at 12–15). However, Prince asserts his good faith intention when filing the complaint; namely, that "[w]ith the statute of limitations expiring, Prince was obligated to protect his catastrophically injured client, and

Prince had to name Blue Streak as a defendant in the complaint to preserve a $1,000,000 claim." (ECF No. 37 at 18) (emphasis removed). Furthermore, "Prince informed Century that he had legal research to support an allegation that Vasquez was in the course and scope of his business." (*Id*.).

Prince has shown "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." Nev. Rev. Stat. § 41.660(3)(a). Here, Century has not sufficiently disputed Prince's assertions to show that "the defendant[s] abused the privilege [to petition the court] by publishing the communication with malice in fact." *Circus Circus Hotels, Inc*. *v*. *Witherspoon*, 657 P.2d 101, 105 (Nev. 1983).

The heart of Century's argument is that Prince knew that the complaint he filed in the underlying state court action was not truthful, citing to conflicts between the allegations in the complaint and "known facts and evidence." (ECF No. 44 at 11–15). Century had, however, ample opportunity to contest those facts, yet elected not to. (ECF No. 37 at 5) ("Prince sent Century a letter of representation that included a courtesy copy of the Pretner complaint . . . Century's claim file acknowledges that Lisa Henderson, a licensed attorney assigned to the claim . . . knew about the [r]espondent [s]uperior allegations against Blue Streak.").

Furthermore, Prince argues that he had "a good faith legal basis to allege responde[a]t superior liability against Blue Streak—regardless of whether Vasquez's own lay opinions would have ultimately been found to be true or not." (ECF No. 57 at 5). Prince alerted Century to these allegations and gave them an opportunity to discuss the factual and legal basis for the *respondeat superior* claim.

> Prince sent letters to both Henderson and claims adjuster Holland enclosing copies of the defaults, and requesting they contact his office to discuss the matter in 'greater detail.' . . . Rather than contact Prince to discuss the basis for the defaults, Henderson responded via e-mail to Prince the same day that, 'Century has no coverage for this matter,' and that it was her 'understanding that this matter is being handled by Progressive Insurance.'

(*Id*. at 6).

Similarly, Century had ample opportunity to inquire about and challenge Prince's legal conclusion. (ECF No. 37 at 5) ("Prince explained his position to Century, disclosed the policy limits offer by Progressive, and referred to 'legal research' that 'indicates coverage exists under

your policy.'"). Century's decision not to dispute Prince's complaint does not constitute "malice in fact" on Prince's part when filing the complaint. Prince's intention when filing the complaint was to preserve a $1,000,000 claim for his client. (*Id*. at 18). Century, on the other hand, chose not to defend Blue Streak or even reply to Prince when he attempted to contact Century regarding the claim—despite Prince's allegation that Vasquez was, in fact, acting in the course and scope of his business. (*Id*. at 5).

Accordingly, the court finds that Prince has satisfied the first prong of the anti-SLAPP analysis, and Century's claims are based on Prince's good faith filing of a complaint with the state court.

2. Probability of prevailing on the claim

i. RICO

a. Legal standard

"Nevada courts have interpreted the state RICO statute consistently with the provisions of federal RICO." *Steele v. Hosp. Corp. of Am.*, 36 F.3d 69, 71 (9th Cir. 1994) (citing *Allum v. Valley Bank of Nev.*, 849 P.2d 297, 298 n.2 (Nev. 1993) ("Nevada's racketeering statutes . . . are patterned after the federal [RICO] statutes"), *cert. denied*, 510 U.S. 857 (1993)).

To plead a civil RICO claim, plaintiff must demonstrate: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to plaintiff's 'business or property.'" *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005) (quoting *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir. 1996)).

Further, because RICO claims involve underlying fraudulent acts, Federal Rule of Civil Procedure 9(b)'s heightened pleading standard applies. *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1065–66 (9th Cir. 2004); *see also* Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."). Thus, to sufficiently plead its RICO claim, a plaintiff must specify the time, place, and content of the alleged underlying fraudulent acts and statements, as well as the parties involved and their individual participation. *Edwards*, 356 F.3d at 1066.

The standard for the special motion to dismiss requires that the court determine "whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim." Nev. Rev. Stat. § 41.660(3). If the complaint is shown to be predicated on the defendants' "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," then the plaintiff must show by clear and convincing evidence that they have a likelihood of prevailing on its claim. *Shapiro v. Welt*, 389 P.3d 262, 266 (Nev. 2017) ("After 2013 . . . the plaintiff's burden increased to clear and convincing evidence.").

b. Predicate acts

Here, Century pleaded three predicate acts stemming from Prince, Ranalli, and Esparza's conduct in relation to Pretner's state court claim: (1) alleging Vasquez was in the course and scope of his employment constituted offering false evidence and insurance fraud; (2) alleging that Blue Streak owned the Ford F-150 constituted offering false evidence and insurance fraud; and (3) acts related to the settlement agreement and obtaining Vasquez's signature on the covenant not to enforce constituted obtaining a signature by means of false pretenses, suborning perjury, offering false evidence, and insurance fraud. (ECF No. 1 at 13–17).[3]

Century contends that "Prince was not interested in going after Vasquez personally because Progressive is one of his clients." (ECF No. 1 at 8). Prince, on the other hand, contends that he "made the strategic litigation decision to protect a potential $1,000,000 claim from being time barred by asserting claims against Blue Streak." (ECF No. 37 at 17). Indeed, Century admits that Prince went so far as to "inform[] [p]laintiff Century Surety that he represented Pretner and his co-legal guardians and provide[] a copy of the complaint to [p]laintiff Century Surety." (ECF No. 1 at 8).

Century alleges that Ranalli's actions while drafting and executing the settlement agreement constituted acts sufficient to sustain a RICO claim. (*Id*. at 15–18). These actions

[3] "'Racketeering activity,'" as will be discussed later, "means engaging in at least two crimes related to racketeering that have the same or similar pattern, intents, results, accomplices, victims or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated incidents, if at least one of the incidents occurred after July 1, 1983, and the last of the incidents occurred within 5 years after a prior commission of a crime related to racketeering." Nev. Rev. Stat. § 207.390. A predicate act is one of the incidents used to allege racketeering activity. *See* Nev. Rev. Stat. § 207.360.

include "work[ing] with Prince to draft the settlement agreement, rather than defend Vasquez and Blue Streak" and "persuad[ing] Vasquez to sign the settlement agreement," which allegedly "contained misrepresentations." (*Id*. at 16).

The only allegation of Esparza's involvement is that she, having previously represented Pretner, "interviewed other attorneys and was involved in the decision to retain . . . Prince" and shared her case file with him. (*Id*. at 7). Century contends that, in the course of litigation representing Pretner, "Prince then orchestrated a settlement agreement along with the help of Defendant Ranalli." (*Id*. at 4). Century alleges that Esparza's previous representation of Pretner means that she "knew about and participated in the commission of these predicate acts." (*Id*. at 17).

c. Enterprise and pattern

Despite these allegations, Century fails to adequately plead—let alone show by clear and convincing evidence—the elements of a RICO claim. *Shapiro*, 389 P.3d at 266. In order to sufficiently allege the existence of an enterprise, Century would have to show that "the various associates function as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583 (1981). Indeed, Century fails to identify "an entity separate and apart from the pattern of activity in which it engages." *Id*. (defining "enterprise"). Instead, Century's allegations concern only an isolated court case wherein Prince, Ranalli, and Esparza interacted with one another regarding Pretner's claims against Vasquez and Blue Streak. (ECF No. 1).

Century's complaint also fails the "continuity requirement," which "focuses on whether the associates' behavior was 'ongoing' rather than isolated activity." *Odom v. Microsoft Corp*., 486 F.3d 541, 553 (9th Cir. 2007). Prince's conduct during the course of the state court case does not "show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *Sever v. Alaska Pulp Corp*., 978 F.2d 1529, 1535 (9th Cir. 1992) (emphasis in original) (quoting *H.J. Inc. v. Nw. Bell Tel. Co*., 492 U.S. 229, 239 (1989)).

As a result, Prince's allegations in state court that Vasquez acted in the course and scope of his employment, the assertion that Blue Streak owned the Ford F-150, and the subsequent execution of a settlement all do not sufficiently show an "enterprise" or a pattern of racketeering

activity. This conduct also does not indicate that Prince—because of the resolution in a single complaint in state court—"amount[s] to or pose[s] a threat of continued criminal activity." *Sever*, 978 F.2d at 1535.

Instead, the defendants' actions can, at best, be "characterized as a single episode with a single purpose which happened to involve more than one act taken to achieve that purpose," which is insufficient to sustain a RICO cause of action. *Sever*, 978 F.2d at 1535. Here, Century admits that there was *single* purpose, specifically the "bad faith" insurance scheme allegedly designed by Prince, Rinalli, and Esparza to obtain a multi-million dollar judgment against Century. (ECF No. 1). All other "predicate acts" are just steps taken to achieve that one purpose. *Sever*, 978 F.2d at 1535.

Moreover, because all of the alleged instances of insurance fraud referenced in Century's complaint are in furtherance of a purported single bad-faith insurance "set up," Century has not adequately alleged multiple instances of insurance fraud that would constitute the "predicate acts" required to support a RICO claim. *Perelman v. State*, 115 Nev. 190, 192 (Nev. 1999) ("Although NRS 686A.291 makes the filing of a false statement a crime, the overall intent of the statute is to address the filing of a false claim through the use of fraud, misrepresentations, or false statements. Thus, **when multiple false statements are made in support of one claim, only one crime has been committed**." (emphasis added)).[4]

In sum, Century has not sufficiently pleaded a pattern of activity or conduct. Without a pattern of predicate acts, Century cannot sustain a RICO claim. *Living Designs, Inc.*, 431 F.3d at 361.

d. Racketeering activity

This court now considers whether Century's complaint sufficiently alleges "racketeering activity (known as 'predicate acts')" to meet the third element of its RICO claim. *Edwards*, 356 F.3d at 1066. Prince's allegations in the state court complaint do not amount to offering false

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[4] While "proof of prior convictions of 'predicate crimes' or of a RICO violation is not a prerequisite to a civil RICO cause of action," the predicate acts follow the same analysis in a civil RICO claim as they would in a criminal RICO case. *Hale v. Burkhardt*, 764 P.2d 866, 868 (Nev. 1988).

evidence or to insurance fraud under NRS § 207.360. Consequently, Century has not adequately demonstrated a pattern of racketeering activity.

First, Prince's complaint does not satisfy the statutory definition of "offering false evidence."[5] Prince's complaint was not forged or fraudulently altered, and Century never contends that it was. *See* (ECF No. 1). Moreover, Prince argues that the claims presented in the state court complaint were not only made in good faith but also had sufficient factual and legal basis to assert *respondeat superior* liability against Blue Streak. (ECF No. 37 at 18).

In addition, Century has not shown, by clear and convincing evidence, that Prince ever "knowingly and willfully" acted to defraud Century. Nev. Rev. Stat. § 686A.2815; *Shapiro*, 389 P.3d at 266. To the contrary, Prince argues he filed a good faith complaint, potentially preserving a million dollar claim for his client with the statute of limitations about to run, and he informed Century of that complaint. *See* (ECF Nos. 1 at 8, 37 at 17). Century alleges that insurance fraud is a predicate act arising from Prince's complaint in state court. (ECF No. 1 at 12–18). In this instance, however, negotiating a settlement agreement and covenant not to enforce and then "persuading" Vasquez to sign it does not meet the statutory definition of insurance fraud. *See* Nev. Rev. Stat. § 686A.2815.

Century does not allege that the settlement between Prince and Progressive concealed or omitted facts. (ECF No. 1). To the contrary, Century argues only that the complaint and settlement agreement contained patently false information. (ECF No. 44 at 11–14). To the extent any of the allegations in the complaint were false, Century had both notice of those claims and an opportunity to contest the factual and legal allegations in the underlying state court complaint. (ECF No. 37 at 5–6, 15–16). Century was the one that elected to neither defend Vasquez nor Blue Steak in the law suit, or *otherwise appear at all*. (*Id*.).

Moreover, Progressive's policy limit offer and request for a covenant not to execute predated Prince's involvement in the case:

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[5] "A person who, upon any trial, hearing, inquiry, investigation or other proceeding authorized by law, offers or procures to be offered in evidence, as genuine, any book, paper, document, record or other instrument in writing, knowing the same to have been forged or fraudulently altered, is guilty of a category D felony and shall be punished as provided in NRS 193.130." Nev. Rev. Stat. § 199.210.

> Progressive offered Pretner's prior counsel Esparza the full $100,000 from the beginning. Because of the extent of Pretner's injuries, however, Esparza could not provide a release until all possible insurance coverage was exhausted. Accordingly, on May 26, 2009, Esparza requested that Progressive provide a [c]ovenant [n]ot to [e]xecute to allow her to explore coverage under other policies, including the Century policy.

(ECF No. 37 at 4) (footnote omitted).

Esparza had been handling the claim for the years prior to Prince's involvement, and Esparza had consistently been offered Progressive's policy limits. (*Id*. at 21). Progressive made the same policy limit offer to Prince. (*Id*.) ("Progressive proposed the covenant to Prince to finally be able to pay the policy limits *it had been offering for years*." (emphasis added)). Prince even disclosed Progressive's policy limit offer to Century. (*Id*. at 5) ("Prince sent Century a letter of representation that included a courtesy copy of the Pretner complaint . . . . In the attached cover letter, Prince . . . disclosed the policy limits offer by Progressive . . . ."). Thereafter, Progressive hired Ranalli to negotiate the covenant after Century had denied the claim. (*Id*.). Prince did not and could not "orchestrate" an offer that was made prior to his involvement in the case.

The execution of a settlement agreement does not constitute—as Century contends—perjury, subornation of perjury, or obtaining a signature by false pretenses. (ECF No. 1 at 17). Century fails to allege any "representation of some fact or circumstance which is not true and is calculated to mislead." *See Hale*, 764 P.2d at 868 (Nev. 1988). Instead, Century alleges simply that Ranalli "persuaded" Vasquez to sign the agreement. (ECF No. 1 at 16).

Consequently, Century has not adequately shown any racketeering activity to serve as the basis of a RICO claim. To the contrary, Judge Gordon, presiding over the *Andrew* case, expressly ruled that "Century breached its duty to defend" in the underlying case. *Andrew*, 2014 WL 1764740, at *6; *see also* (ECF No. 37 at 2) ("[Judge] Gordon ruled as a matter of law that Century breached its duty to defend its insureds, and was therefore bound by the state court judgment."). Indeed, Judge Herndon was explicit in Century's failure to act during the hearing regarding Century's motion for leave in the underlying state court case:

> I think Century stuck their head in the sand and said, hey. We determined we're not going to have coverage here because of what we believe the facts to be. So we're going to stand back and we're not going to defend. We're not going to intervene. We're not going to seek any reservation of rights or any declaratory relief. We're

> just going to let the baby fall forward and hopefully we won't have any involvement. Then oops. It's going into default.

(ECF No. 38-26 at 34).

Accordingly, Prince did not and could not "orchestrate" Century's failure to defend. Instead, Prince contacted Century regarding Pretner's claims, and Century made a unilateral decision to deny coverage, refuse to defend Vasquez or Blue Streak, and to not appear in the state court litigation. (ECF No. 37).

e. Injury

Consistent with the foregoing, Century has failed to show that its injury "flow[s] from the defendant's violation of a predicate Nevada RICO act." *Allum v. Valley Bank*, 849 P.2d 297, 299 (Nev. 1993). Century admits that it "was aware of the underlying litigation" but chose not to appear in the litigation to defend its insured or contest Prince's allegations. (ECF No. 1 at 11). Instead, Century relied on "it[s] belie[f] that Progressive was defending the action." (*Id.*).

Despite relying on an unwarranted assumption that Progressive was litigating in its stead, Century contends that the default judgment was entered "as a result of the [d]efendants' actions." (*Id.* at 17–18). To the contrary, the injury stems from Century's failure to defend or appear. Century had notice of the litigation alleging coverage. (*Id.* at 11). In fact, Century does not dispute that "[a]s of June 27, 2011, Century had denied coverage, closed its file, and declined to defend Blue Streak or Vasquez." (ECF No. 37 at 6); *see also* (ECF No. 57 at 19). Thus, Century purposefully declined its opportunity to participate in the underlying state litigation.

As a result of Century's failure to sufficiently plead a RICO claim, the court does not need to address whether the absolute litigation privilege applies in this instance. Accordingly, the special motion to dismiss will be granted as to Century's RICO claim.

ii. Civil conspiracy

"In Nevada, an actionable civil conspiracy is defined as a combination of two or more persons, who by some concerted action, intend to accomplish some unlawful objective for the purpose of harming another which results in damage." *Flowers v. Carville*, 266 F. Supp. 2d 1245, 1249 (D. Nev. 2003) (internal quotation marks and citation omitted); *see also Cadle Co. v. Woods & Erickson, LLP*, 345 P.3d 1049, 1052 (Nev. 2015) ("In Nevada, however, civil conspiracy

liability may attach where two or more persons undertake some concerted action with the intent to commit an unlawful objective, not necessarily a tort.").

Here, Century's claim for civil conspiracy involves the "fraudulent" procurement of a default judgment against Century by Prince, which invokes the requirements of Federal Rule of Civil Procedure 9(b). When pleading a claim for civil conspiracy, a plaintiff must plead with particular specificity as to "the manner in which a defendant joined in the conspiracy and how he participated in it." *Arroyo v. Wheat*, 591 F. Supp. 141, 144 (D. Nev. 1984).

Century has not sufficiently pleaded either a "concerted action" or an "inten[t] to accomplish some unlawful objective." *Flowers*, 266 F. Supp. 2d at 1249.[6] The formation of "a conspiracy agreement, explicit or tacit, to harm [Century]" constitutes a mere recitation of the elements for civil conspiracy. (ECF No. 1 at 18); *see also Iqbal*, 556 U.S. at 677. Century's only other allegation is a conclusory assertion of a "bad faith set up which wrongfully resulted in a multi-million dollar judgment." (ECF No. 1 at 18).

First, Century has not shown by clear and convincing evidence that defendants Prince, Ranalli, and Esparza acted in concert with one another. *Shapiro*, 389 P.3d at 266. Here, Century's complaint alleges that Esparza joined and participated in the "conspiracy" by virtue of her involvement in the decision to retain Prince and giving Prince her case file on Pretner's accident. (ECF No. 1 at 7). Century alleges that Esparza's previous representation of Pretner means that she "knew about and participated in the commission of these predicate acts." (*Id*. at 17). This conclusory allegation is not enough to sustain a finding that Esparza engaged in a civil conspiracy.

The complaint admits that "instead of retaining counsel to defend Vasquez and Blue Streak, Progressive hired Defendant Ranalli to work with Prince to draft and execute the settlement agreement." (*Id*. at 9) (emphasis removed). As a result, "Ranalli was instructed to work on a settlement agreement as Prince had already agreed with Progressive regarding the assignment in exchange for a covenant not to execute after payment of Progressive's policy limits." (ECF No. 26 at 16). As stated above, these facts show that Ranalli did not act in concert with Prince, as the

[6] The court need not address whether the civil conspiracy claim is time-barred under a four-year statute of limitations, or viable in conjunction with the RICO claim, because Century's RICO claim fails the anti-SLAPP analysis as a matter of law.

settlement agreement had already been agreed upon. Therefore, Century has failed to sufficiently allege—much less prove by clear and convincing evidence—a concerted action sufficient to maintain a cause of action for civil conspiracy. *Shapiro*, 389 P.3d at 266.

Second, Prince's settlement agreement with Progressive in this case is not tortious, and therefore cannot be the basis for an "unlawful objective" to sustain Century's conspiracy claim. As previously discussed, Century had ample opportunity to engage in the litigation to protect its own interests and those of Blue Streak, but it elected instead to rely on its belief that Progressive was litigating in its place. (ECF Nos. 1 at 11, 37 at 6). Progressive, having appeared in the litigation, had the duty to defend its insured—Vasquez—and the right to enter into a good-faith settlement agreement.

> Factors to be considered by the Court in assessing whether a settlement is in good faith is the amount paid in settlement, the allocation of the settlement proceeds among plaintiffs, the insurance policy limits of settling defendants, the financial condition of settling defendants, and the existence of collusion, fraud or tortious conduct aimed to injure the interests of non-settling defendants . . . Any negotiated settlement involves cooperation, but not necessarily collusion. It becomes collusive when it is aimed to injure the interests of an absent tortfeasor. Moreover, the price of a settlement is the prime badge of its good or bad faith.

In re MGM Grand Hotel Fire Litigation, 570 F. Supp. 913, 927–928 (D. Nev. 1983).

In short, Century has not sufficiently shown that the settlement was in bad faith. Progressive's settlement with Prince was made at the outset of the claim and offered the policy limit. *In re MGM Grand Hotel Fire Litigation*, 570 F. Supp. at 927–928; (ECF No. 37 at 4, 6–7). Moreover, Century has not shown that the negotiated settlement went beyond permissible cooperation to constitute tortious "collusion." *In re MGM Grand Hotel Fire Litigation*, 570 F. Supp. at 927–928. Indeed, Century had the opportunity to pay out on the insurance claim for its policy limit. (ECF No. 37 at 4). Alternatively, Century could have appeared in the litigation to dispute the existence of coverage, rather than unilaterally closing its file. (ECF No. 37 at 5–7). As a result, Century has not shown by clear and convincing evidence that the aim of the negotiated settlement in the underlying case was to injure Century's interests.

Accordingly, the special motion to dismiss will also be granted as to the civil conspiracy claim.

IV. Conclusion

In sum, Century's SLAPP complaint is barred by Nevada law. The special motion to dismiss satisfies the two-prong statutory test because Century's complaint is based on Prince's good faith petitioning of the court, and Century has not shown a likelihood of prevailing on either of its claims. Nev. Rev. Stat. § 41.660(1). As Ranalli and Esparza have joined in Prince's motion, the instant complaint is barred against all defendants. Thus, the complaint will be dismissed. Therefore, Century's objections to the order staying discovery are now moot.

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the special motion to dismiss pursuant to NRS 41.660 (ECF No. 37) be, and the same hereby is, GRANTED with prejudice, as to all defendants.[7]

IT IS FURTHER ORDERED that Prince's first special motion to dismiss (ECF No. 17) be, and the same hereby is, DENIED as moot.

IT IS FURTHER ORDERED that Esparza's motion to dismiss (ECF No. 18) and Ranalli's motion to dismiss (ECF No. 26) be, and the same hereby are, DENIED as moot.

IT IS FURTHER ORDERED that Century's objections to the order staying discovery (ECF No. 71) be, and the same hereby are, DENIED as moot.

The clerk shall enter judgment accordingly and close the case.

DATED July 13, 2017.

James C. Mahan
UNITED STATES DISTRICT JUDGE

[7] "If the court dismisses the action pursuant to a special motion to dismiss filed pursuant to subsection 2, the dismissal operates as an adjudication upon the merits." Nev. Rev. Stat. § 41.660(5)

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DISTRICT COURT

CLARK COUNTY, NEVADA

MARCO SASSONE, Plaintiff, vs. DARRELL T. COKER an individual, DARRELL R. COKER, an individual, RICHARD MORELLO an individual, DARRYL MCCULLOUGH an individual, AND THE JELLO'S JIGGLIN, LLC d/b/a Postal Annex, DOES 1-10, and ROE ENTITIES 1-10, inclusive, Defendants.	CASE NO. A-16-742853-C DEPT. XXXII **PLAINTIFF'S RESPONSE TO DEFENDANT DARRELL T. COKER'S SUPPLEMENTAL AUTHORITY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF SASSONE'S COMPLAINT PURSUANT TO NRCP 12(b)(1) & NRCP 12(b)(5) AND SPECIAL MOTION TO DISMISS SASSONE'S COMPLAINT PURSUANT TO NRS 41.660**

Plaintiff MARCO SASSONE ("Sassone"), by and through counsel, Dominic P. Gentile, Esq., Clyde DeWitt, Esq., and Lauren E. Paglini, Esq., of the law firm of Gentile Cristalli Miller Armeni Savarese, hereby files this Response to Defendant Darrell T. Coker's ("Coker") Supplemental Authority in Support of Motion to Dismiss Plaintiff Sassone's Complaint Pursuant to NRCP 12(b)(1) and NRCP 12(b)(5) and Special Motion to Dismiss Sassone's Complaint Pursuant to NRS 41.660 (the "Motion").

/ / /

This Response is made and based on the following Memorandum of Points and Authorities; the papers and pleadings already on file herein; and any oral argument permitted by the Court in this matter.

Dated this 13th day of July, 2017.

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

On June 20, 2017, this Court heard oral argument relating to Coker's Motion to Dismiss pursuant to NRCP 12(b)(1) and NRCP 12(b)(5) (hereinafter "MTD"), and Defendant Coker's Special Motion to Dismiss pursuant to NRS 41.660 (hereinafter "anti-SLAPP motion"). At the conclusion of the hearing, this Court took both the MTD and anti-SLAPP motion under advisement.

On July 14, 2017, Coker filed a Notice of Supplemental Authority in Support of his MTD and anti-SLAPP motion. Coker cited *Century Surety Company v. Prince*, Case No. 2:16-cv-2465-JCM-PAL (D. Nev., July 13, 2017) ("*Century Surety*")[1] in further support of his anti-SLAPP motion.[2]

II.

LEGAL ANAYLSIS

In analyzing the *Century Surety* opinion, and its rather convoluted underlying facts, it is important to keep the two prongs of the anti-SLAPP analysis separated. *Century Surety* is unusual in that it, albeit correctly, analyzes some underlying facts in the Prong One analysis on the "good faith" issue. Importantly, in *Century Surety,* the merits of the Plaintiff's claims are irrelevant to Prong One.[3] The inclination is often to mix the two prongs together, which is

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[1] The opinion was not published and does not appear in Westlaw.

[2] NEV. REV. STAT. 41.660.

[3] California law is well-established on this point. In determining whether a defendant's claims arise from protected petitioning and speech activities, a court does not consider the legitimacy of the plaintiff's claims *Coretronic Corp. v. Cozen O'Connor*, 192 Cal. App. 4th 1381, 1388, 121 Cal. Rptr. 3d 254 (2d Dist. 2011) ("Arguments about the merits of the claims are irrelevant to the first step of the anti-SLAPP analysis."); *City of Costa Mesa v. D'Alessio Investments, LLC*, 214 Cal. App. 4th 358, 371, 154 Cal. Rptr. 3d 698, 709 (4th Dist. 2013) ("The merits of [the plaintiff's] claims should play no part in the first step of the anti-SLAPP analysis [citations omitted]. The first step only determines whether Section 425.16's *procedural* protection applies; the second step of the analysis addresses whether there is sufficient merit to the claims at issue to allow the litigation to proceed [Italics in original]"); *See Malin v. Singer*, 217 Cal. App. 4th 1283, 159 Cal. Rptr. 3d 292 (2d Dist. 2013) ("Even if we were to accept [counsel's] assertion that they are innocent of the criminal computer hacking and wiretapping allegations, their claim is "more suited to the second step of an anti-SLAPP motion. A showing that a defendant did not do an alleged activity is not a showing that the alleged activity is a protected activity," quoting *Gerbosi v. Gaims, Weil, West & Epstein, LLP*, 193 Cal. App. 4th 435, 446, 122 Cal. Rptr. 3d 73 (2d Dist. 2011)).

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incorrect. Notably, though, the *Century Surety* opinion distinctly separates the two prongs.

Prong One requires the court to first determine, "[W]hether 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*." NEV. REV. STAT. § 41.660(3)(a) (emphasis added).

There was no question in the *Century Surety* case that the communication was "in furtherance of the right to petition." For example, abuse of process actions are subject to anti-SLAPP motions because they arise from the filing of a lawsuit – a petition in court. *Yu v. Signet Bank/Virginia*, 103 Cal. App. 4th 298, 316, 126 Cal.Rptr. 2d 516 (1st Dist. 2002)[4] ("It is ironic that a lawsuit challenging distant forum abuse—a practice calculated to prevent [the plaintiffs'] public participation in the collection action against them—should itself meet the threshold definition of a SLAPP suit, but that is the result under the anti-SLAPP statute.").[5] *Accord Booker v. Rountree*, 155 Cal.App.4th 1366, 1370, 66 Cal.Rptr.3d 733 (4th Dist. 2007) ("[A]buse of process claim is subject to the anti-SLAPP statute because it arises out of his filing the underlying action."); *Flores v. Emerich & Fike*, 385 Fed.Appx. 728, 732, 2010 W.L. 2640625 (9th Cir. 2010); *Blaha v. Rightscorp, Inc.*, 2015 W.L. 4776888 (C.D. Cal., May 8, 2015); *S.A. v. Maiden*, 229 Cal.App.4th 27, 42, 176 Cal.Rptr.3d 567 (1st Dist. 2014).

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[4] As noted, Nevada courts look for guidance to California's interpretation of its parallel anti-SLAPP statute, CAL. C. CIV. PROC. 425.16. *See Shapiro v. Welt*, 389 P.3d 262, 268 (Nev. 2017).

[5] The tort of abuse of process is the use of the machinery of the legal system for an ulterior motive. *ComputerXpress, Inc. v. Jackson*, 93 Cal.App.4th 993, 1014, 113 Cal.Rptr.2d 625 (4th Dist. 2001) ("*ComputerXpress*"). The tort's essence "'lies in the misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice....' [Citations.]" *Drum v. Bleau, Fox & Associates*, 107 Cal.App.4th 1009, 1019, 132 Cal.Rptr.2d 602 (2nd Dist. 2003) ("*Drum*"); *see also ComputerXpress*, 93 Cal.App.4th at 1014 ("Because the purpose of the tort [of abuse of process] is 'to preserve the integrity of the court,' it 'requires a misuse of a judicial process. . . .' [Citations.]"].) The inherent nature of the tort, therefore, arises from acts in the context of a judicial proceeding in furtherance of a person's right of petition or free speech and, as a result, falls within the purview of the anti-SLAPP statute. CAL. C. CIV. PROC. § 425.16 (e)(1) & (e)(2); *see, e.g., Siam v. Kizilbash*, 130 Cal.App.4th 1563, 1570, 31 Cal.Rptr.3d 368 (6th Dist. 2005) (Cause of action for abuse of process subject to the anti-SLAPP statute because it arises from the exercise of the right to petition.); *ComputerXpress*, *supra*, 93 Cal.App.4th at 1014 (abuse of process claim based on filing of complaint with Securities and Exchange Commission constitutes a statement before an official proceeding under § 425.16 (e)(1)); *see also Jarrow Formulas, Inc. v. LaMarche*, 31 Cal.4th 728, 736, n.6, 3 Cal.Rptr.3d 636, 74 P.3d 737 (2003) (Noting Legislature was aware in adopting and amending anti-SLAPP statute that abuse of process claims might be SLAPP suits.).

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In *Century Surety*, the Prong One issue was not whether the underlying conduct could trigger an anti-SLAPP motion because the complaint was attacking a lawsuit—it clearly could. Rather, it was whether the underlying activity "in furtherance of the right to petition" (*i.e.*, the lawsuit that the defendant had filed) was filed in "good faith."[6] The court found that it was, and therefore, moved to Prong Two of the analysis.

Nevada's anti-SLAPP statute protects "an action is brought against a person 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." That statutory language is a classic example of legislatures enacting statutes with ambiguous modifiers, raising the question of whether "good faith" modifies only "communication in furtherance of the right to petition," which it clearly does, or both that and "the right to free speech in direct connection with an issue of public concern." Our Supreme Court has squarely held that it modifies both. *Shapiro v. Welt*, 389 P.3d 262, 267 (Nev. 2017) ("We conclude that the term 'good faith' does not operate independently within the anti-SLAPP statute. Rather, it is part of the phrase "'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.'"). Thus, in the case at bar, there are two issues involved: (1) whether the speech involved was "in direct connection with an issue of public concern," which has been briefed and which the *Century Surety* case did not address; and (2) whether the defendant's expressive activities were in good faith, an issue punctuated by the *Century Surety* case.

The operative conduct that this case attacks is not at all protected by any right of free speech and was not at all in good faith. None of the speech involved is protected, nor is it of public concern. The speech that is the gravamen of this case is not the paintings. As noted, if Coker had truthfully identified the subject paintings as the cheap copies that they were, none of Plaintiff Sassone's claims could stand. The nub of the complaint is Coker lying about the source

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[6] Nevada's anti-SLAPP statute differs from that of California in this respect. California's protects, "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue," Cal. C. Civ. Proc. 452.16(b)(1), while Nevada's protects "an action is brought against a person 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 [emphasis added]." NEV. REV. STAT. ANN. § 41.660.

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and authenticity of the paintings to inflate their value so as to sell them for more. Fraud simply never can be equated with free speech, nor can it ever be in good faith.

For example, in *United States v. Alvarez*, 567 U.S. 709, 132 S.Ct. 2537, 183 L.Ed.2d 574 (2012), to which movants alluded in oral argument, the United States Supreme Court reaffirmed the principle that, "Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment." 567 U.S. at 724.[7] In *Alvarez*, Mr. Alvarez lied, but not for any pecuniary gain, and thus, First Amendment protection was held to apply.

In the case at bar, however, Coker did much more—Coker lied about the source and the authenticity of paintings so as to command a higher price for the purported lithographs. *See* Certificate of Authenticity, a true and correct copy of which is appended hereto and incorporated herein as **Exhibit 1**.[8] That is fraud.

The *Century Surety* case reminds us all that the prong-one analysis has two parts, both "good faith" and protected speech. The Coker's conduct exhibited neither; and it is his burden to establish otherwise.

As noted, the court in *Century Surety* reached prong two[9] of the claim only because it found in favor of the defendant on prong one. Here, this Court need not reach prong two because the operative conduct that Plaintiff Sassone's case attacks is not at all protected by any right of free speech and was not at all in good faith.

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[7] Indeed, *Alvarez* noted that the only categories of unprotected speech that have been permitted to-date are: "(1) advocacy intended, and likely, to incite imminent lawless action, (2) obscenity, (3) defamation, (4) speech integral to criminal conduct, (5) so-called "fighting words," (6) child pornography, (7) **fraud**, (8) true threats, and (9) speech presenting some grave and imminent threat the government." 567 U.S. at 717 (emphasis added).

[8] This is a copy of the purported Certificate of Authenticity that witness' Jelena Popovic, Diane Nelson-Menniger, and Sarah Burton-Sousa attested they received with the purported "original lithograph." Notably, Coker describes these purported lithographs as "original, hand signed." Exhibit 1.

[9] Only where the moving party demonstrates prong one does the burden shift to the non-moving party to demonstrate with prima facie evidence a probability of prevailing on the claim. NEV. REV. STAT. § 41.660(3).

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III.

CONCLUSION

For the foregoing reasons, and the reasons set forth in his Opposition, Plaintiff Sassone respectfully requests that this Court deny Defendant Coker's anti-SLAPP motion, and its MTD, in their entirety.

Dated this 18th day of July, 2017.

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CERTIFICATE OF SERVICE

The undersigned, an employee of Gentile Cristalli Miller Armeni Savarese, hereby certifies that on the 18th day of July, 2017, she caused to be served, a copy of **PLAINTIFF'S RESPONSE TO DEFENDANT DARRELL T. COKER'S SUPPLEMENTAL AUTHORITY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF SASSONE"S COMPLAINT PURSUANT TO NRCP 12(b)(1) & NRCP 12(b)(5) AND SPECIAL MOTION TO DISMISS SASSONE'S COMPLAINT PURSUANT TO NRS 41.660**, by electronic service in accordance with Administrative Order 14.2, to all interested parties, through the Court's **Odyssey E-File & Serve**, system addressed to:

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EXHIBIT 1

EXHIBIT 1

Certificate of Authenticity

Marco Sassone

Marco Sassone was born in Campi Bisenzio, a Tuscan village, in 1947. The family moved to Florence in 1954, and there he met painters Ottone Rosai and Ugo Maturo, who encouraged him to follow his interest in art. In 1959 he enrolled at the Istituto Galileo Galilei, where he studied architectural drafting for several years. In 1963 he studied with painter Silvio Loffredo, a professor of art at the Accademia in Florence, himself a pupil of the Austrian master Oskar Kokoschka in November 1967, soon after the flood had devastated the city, Sassone moved to California. He exhibited for the first time in the United States at the Dalzell-Hatfield Galleries in Los Angeles and became a regular exhibitor at the annual Festival of the Arts in Laguna Beach. Throughout the seventies, he exhibited extensively in the U.S. and abroad. In 1976 he collaborated with director John Wilson to produce an autobiographical documentary. The following year his work was exhibited at the National Academy of Design in New York. Marco Sassone received a gold medal in 1978 from the Italian Academy of Arts, Literature and Science. In 1979 the monograph Sassone by art historian Donelson Hoopes was published in concurrence with the artist's exhibition at the Laguna Art Museum.

Title: Unknown
Medium: Lithograph
Description: *Original, Hand Signed, Lithograph*

This is to certify that, to the best of our knowledge, the information and statements contained herein are true and correct.

Register of Actions
Case No. A-16-742853-C

Marco Sassone, Plaintiff(s) vs. Darrell Coker, Defendant(s)

Case Type: **Other Civil Matters**
Date Filed: **09/02/2016**
Location: **Department 32**
Cross-Reference Case Number: **A742853**
Supreme Court No.: **73863**

Party Information

		Lead Attorneys
Defendant	**Coker Jr, Darrell R**	
Defendant	**Coker, Darrell T**	**Marc J. Randazza, ESQ** *Retained* 702-420-2001(W)
Plaintiff	**Sassone, Marco**	**Dominic P. Gentile** *Retained* 702-880-0000(W)

Events & Orders of the Court

07/20/2017 **Minute Order** (3:00 PM) (Judicial Officer Bare, Rob)

Minutes

07/20/2017 3:00 PM

- This matter came before this Court on June 20, 2017 for Defendant Darrell T. Coker s Motion to Dismiss Plaintiff s Complaint Pursuant to NRCP 12(b)(1) and NRCP 12(b)(5) and Defendant Darrell T. Coker s Special Motion to Dismiss Plaintiff s Complaint Pursuant to NRS 41.660. Defendants Darryl McCullough and Jello s Jigglin LLC joined both Motions. After carefully considering the arguments and evidence submitted, Court issued its Decision this 18th day of July, 2017. COURT ORDERED Defendant s Motions to Dismiss are DENIED. Regarding Defendant s Motion to Dismiss per NRCP 12, this Court finds that federal preemption does not apply and that this matter is appropriately in state court. In order for state law to be preempted by the federal Copyright Act, two conditions must be satisfied: the content of the protected right must fall within the subject matter of copyright, and the right asserted under state law must be equivalent to the exclusive rights of copyright holders under the Copyright Act. Laws v. Sony Music Entm't, Inc., 448 F.3d 1134 (9th Cir. 2006). To satisfy the equivalent rights part of the preemption test the alleged misappropriation must be equivalent to rights within the general scope of copyright as specified by section 106 of the Copyright Act. Del Madera Properties v. Rhodes & Gardner, Inc., 820 F.2d 973, 977 (9th Cir. 1987). Section 106 provides a copyright owner with the exclusive rights of reproduction, preparation of derivative works, distribution, and display. Id. To survive preemption, the state cause of action must protect rights which are qualitatively different from the copyright rights. Id. The state claim must have an extra element which changes the nature of the action. Id. That extra element must not be part and parcel of the copyright claim. Id. [T]wo district courts have held that common law fraud is not preempted by [the Copyright Act] because the element of misrepresentation is present. Valente-Kritzer Video v. Pinckney, 881 F.2d 772, 776 (9th Cir. 1989)(citing Tracy v. Skate Key, Inc., 697 F.Supp. 748, 751 (S.D.N.Y.1988); Brignoli v. Balch Hardy & Scheinman, Inc., 645 F.Supp. 1201, 1205 (S.D.N.Y.1986)). This conclusion appears to be consistent with congressional intent. Valente-Kritzer Video, 881 F.2d at 776 (citing H.R.Rep. No. 94 1476, 94th Cong., 2d Sess. 132, reprinted in 1976 U.S.Code Cong. & Admin.News 5659, 5748 ([T]he general laws of defamation and fraud, would remain unaffected as long as the causes of action contain

elements ... that are different in kind from copyright infringement.)). In this case, Plaintiff is alleging that the Defendants were engaged in a criminal enterprise creating fraudulent copies of his paintings, forging his signature on those copies, forging certificates of authenticity, and then misrepresenting to the public that they were original. Under the relevant case law, the extra element must transform the nature of the action from copyright to fraud. This Court finds that the allegations in Plaintiff s Complaint accomplish that, thereby making the nature of these claims qualitatively different than a copyright claim. As such, federal preemption does not apply. Defendants additionally argue that the deceptive trade practice claim and the RICO claims are not sufficiently plead. During the June 20, 2017 hearing, Plaintiff s counsel indicated he was willing and able to file a Second Amended Complaint to address these pleading deficiencies in order to clarify the allegations. The Court will allow such amendment. This amendment must also adequately address the involvement of Defendants Darryl McCullough and Jello s Jigglin LLC. The operative Amended Complaint does not specifically allege that these Defendants had any knowledge of or involvement in the alleged criminal enterprise, which would be a requisite element to the deceptive trade practice claim and the RICO claims. As such, if these Defendants are to remain in this lawsuit, the Second Amended Complaint must sufficiently allege claims against these Defendants that are sufficient under NRCP 12. Regarding Defendant s Motion to Dismiss per NRS 41.660, this Court finds that the Defendants have failed to met their burden. NRS 41.660(3)(a) provides that, upon a special motion to dismiss, 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 requires said good faith communication[s] to be truthful or..made without knowledge of its falsehood. Here, the allegations that are the basis of this lawsuit are that Defendants were engaged in a criminal enterprise creating fraudulent copies of his paintings, forging his signature on those copies, forging certificates of authenticity, and then misrepresenting to the public that they were original. When 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. Given that the Defendants failed to meet the first element of this analysis, the burden does not shift to the Plaintiff, and the Court need not evaluate whether the Plaintiff has shown a probability of prevailing on the claim. Thus, both Motions to Dismiss and their respective Joinders are denied. Plaintiff s counsel is directed to submit a proposed order. The Order is to be consistent with this Minute Order, the submitted briefing, and oral argument. Counsel may add language to or further supplement the proposed Order in accordance with the Court s findings and any submitted arguments. A Status Check: Order is set for August 16, 2017 in chambers for the order. Parties need not appear. Plaintiff is ordered to file a Second Amended Complaint within 30 days of the Notice of Entry of the Court Order reflecting this Decision, in order to address the discussed listed above. CLERK'S NOTE: Minutes distributed 7/20/17, via e-mail, as follows: criminalattorney@drsltd.com efc@randazza.com dgentile@gcmaslaw.com kenroberts@drsltd.com

Return to Register of Actions

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DISTRICT COURT

CLARK COUNTY, NEVADA

MARCO SASSONE, Plaintiff, vs. DARRELL T. COKER an individual, DARRELL R. COKER, an individual, RICHARD MORELLO an individual, DARRYL MCCULLOUGH an individual, AND THE JELLO'S JIGGLIN, LLC d/b/a Postal Annex, DOES 1-10, and ROE ENTITIES 1-10, inclusive, Defendants.	CASE NO. A-16-742853-C DEPT. XXXII **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that an *Order (1) Denying Defendant Darrell T. Coker's Motion to Dismiss Plaintiff's Complaint Pursuant to NRCP 12(b)(1) and NRCP 12(b)(5) and Joinders Thereto* and *(2) Denying Defendant Darrell T. Coker's Special Motion to Dismiss Plaintiff's Complaint Pursuant to NRS 41.660 and Joinders Thereto,* a copy of which is attached hereto, was entered in the above-entitled matter on

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the 23rd day of August, 2017.

Dated this 23rd day of August, 2017.

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MILLER ARMENI SAVARESE

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CERTIFICATE OF SERVICE

The undersigned, an employee of Gentile Cristalli Miller Armeni Savarese, hereby certifies that on the 23rd day of August, 2017, she caused to be served, a copy of **NOTICE OF ENTRY OF ORDER**, by electronic service in accordance with Administrative Order 14.2, to all interested parties, through the Court's **Odyssey E-File & Serve,** system addressed to:

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DISTRICT COURT

CLARK COUNTY, NEVADA

MARCO SASSONE,

Plaintiff,

vs.

DARRELL T. COKER an individual, DARRELL R. COKER, an individual, DARRYL MCCULLOUGH an individual, AND THE JELLO'S JIGGLIN, LLC d/b/a Postal Annex, DOES 1-10, and ROE ENTITIES 1-10, inclusive,

Defendants.

CASE NO. A-16-742853-C
DEPT. XXXII

ORDER

(1) DENYING DEFENDANT DARRELL T. COKER'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO NRCP 12(b)(1) AND NRCP 12(b)(5) AND JOINDERS THERETO;

AND

(2) DENYING DEFENDANT DARRELL T. COKER'S SPECIAL MOTION TO DIMSS PLAINTIFF'S COMPLAINT PURSUANT TO NRS 41.660 AND JOINDERS THERETO.

This matter came before this Court on June 20, 2017 for Defendant Darrell T. Coker's Motion to Dismiss Plaintiff's Complaint Pursuant to NRCP 12(b)(1) and NRCP 12(b)(5), and Defendant Darrell T. Coker's Special Motion to Dismiss Plaintiff's Complaint Pursuant to NRS 41.660. Defendants Darryl McCullough and Jello's Jigglin LLC joined both Motions. Marc John Randazza, Esq. and Alex Shepard, Esq., Randazza Law Group, PLLC, appeared on behalf of

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Defendant Darrell T. Coker. Stephen Steele, Esq., Hall, Jaffe, & Clayton, LLP, appeared on behalf of Defendants Darryl McCullough and The Jello's Jigglin, LLC d/b/a Postal Annex. Clyde DeWitt, Esq. and Lauren E. Paglini, Esq., Gentile Cristalli Miller Armeni Savarese, appeared on behalf of Plaintiff Marco Sassone.

Regarding Defendant's Motion to Dismiss per NRCP 12(b)(1) and NRCP 12(b)(5), and joinder thereto, this Court finds that federal preemption does not apply and that this matter is appropriately in state court. In order for state law to be preempted by the federal Copyright Act, two conditions must be satisfied: (1) the content of the protected right must fall within the subject matter of copyright, and (2) the right asserted under state law must be equivalent to the exclusive rights of copyright holders under the Copyright Act. *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134 (9th Cir. 2006). To satisfy the equivalent rights part of the preemption test the alleged misappropriation must be equivalent to rights within the general scope of copyright as specified by Section 106 of the Copyright Act. *Del Madera Properties v. Rhodes & Gardner, Inc.*, 820 F.2d 973, 977 (9th Cir. 1987). Section 106 provides a copyright owner with the exclusive rights of reproduction, preparation of derivative works, distribution, and display. *Id.* To survive preemption, the state cause of action must protect rights which are qualitatively different from the copyright rights. *Id.* That is, the state claim must have an extra element which changes the nature of the action. *Id.* That extra element must not be part and parcel of the copyright claim. *Id.* "[T]wo district courts have held that common law fraud is not preempted by [the Copyright Act] because the element of misrepresentation is present." *Valente-Kritzer Video v. Pinckney*, 881 F.2d 772, 776 (9th Cir. 1989) (citing *Tracy v. Skate Key, Inc.*, 697 F.Supp. 748, 751 (S.D.N.Y.1988)); *Brignoli v. Balch Hardy & Scheinman, Inc.*, 645 F.Supp. 1201, 1205 (S.D.N.Y.1986). That conclusion appears to be consistent with congressional intent. *Valente-Kritzer Video*, 881 F.2d at 776 (citing H.R. Rep. No. 94 1476, 94th Cong., 2d Sess. 132,

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reprinted in 1976 U.S. Code Cong. & Admin. News 5659, 5748 ("[T]he general laws of defamation and fraud, would remain unaffected as long as the causes of action contain elements . . . that are different in kind from copyright infringement.")).

In this case, Plaintiff has alleged that the Defendants were engaged in a criminal enterprise creating fraudulent copies of his paintings, forging his signature on those copies, forging certificates of authenticity, and then misrepresenting to the public that they were original. Under the relevant case law, the extra element must transform the nature of the action from copyright to fraud. This Court finds that the allegations in Plaintiff's Complaint accomplish that, thereby making the nature of these claims qualitatively different than a copyright claim. As such, federal preemption does not apply.

Defendants additionally argue that the deceptive trade practice claim and the RICO claims are not sufficiently plead. During the June 20, 2017 hearing, Plaintiff's counsel indicated he was willing and able to file a Second Amended Complaint to address these pleading deficiencies in order to clarify the allegations. The Court will allow such amendment. This amendment must also adequately address the involvement of Defendants Darryl McCullough and Jello's Jigglin, LLC. The operative Amended Complaint does not specifically allege that these Defendants had any knowledge of or involvement in the alleged criminal enterprise, which would be a requisite element to the deceptive trade practice claim and the RICO claims. As such, if these Defendants are to remain in this lawsuit, the Second Amended Complaint must sufficiently allege claims against these Defendants that are sufficient under NRCP 12.

Regarding Defendant's Motion to Dismiss per NRS 41.660 and joinders thereto, this Court finds that the Defendants have failed to meet their burden. NRS 41.660(3)(a) provides that, upon a special motion to dismiss, 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

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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 requires said good faith communication[s] to be truthful or made without knowledge of its falsehood. Here, the allegations that are the basis of this lawsuit are that Defendants were engaged in a criminal enterprise creating fraudulent copies of his paintings, forging his signature on those copies, forging certificates of authenticity, and then misrepresenting to the public that they were original. When 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. Given that the Defendants failed to meet the first element of this analysis, the burden does not shift to the Plaintiff, and the Court need not evaluate whether the Plaintiff has shown a probability of prevailing on the claim. Thus, both Motions to Dismiss and their respective Joinders are denied.

The Court having reviewed and considered Defendant Darrell T. Coker's Motion to Dismiss Plaintiff's Complaint Pursuant to NRCP 12(b)(1) and NRCP 12(b)(5) and Defendant Darrell T. Coker's Special Motion to Dismiss Plaintiff's Complaint Pursuant to NRS 41.660 filed by Defendant, the Joinders filed by Defendants Darryl McCullough and Jello's Jigglin' LLC and Opposition filed by Plaintiff; the other papers and pleadings already on file herein, and good cause appearing therefore,

IT IS HEREBY ORDERED that, Defendants' Motion to Dismiss Plaintiff's Complaint Pursuant to NRCP 12(b)(1) and NRCP 12(b)(5) and joinders thereto are hereby DENIED. This Court finds that federal preemption does not apply and the matter is appropriately in state court.

IT IS FURTHER ORDERED that, Defendants' Motion to Dismiss Plaintiff's Complaint Pursuant to NRS 41.660(3)(a) and joinders thereto are hereby DENIED. This Court finds that 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.

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Defendants have not met this burden;

IT IS FURTHER ORDERED that Plaintiff shall have thirty (30) days from the date of notice of entry of this order to file the Second Amended Complaint to address the pleading deficiencies in order to clarify the allegations; and

IT IS FURTHER ORDERED that in its Second Amended Complaint, Plaintiff must adequately address the involvement of Defendants Darryl McCullough and The Jello's Jigglin, LLC.

DATED this 17 day of August, 2017.

DISTRICT COURT JUDGE

ROB BARE
JUDGE, DISTRICT COURT, DEPARTMENT 32

Prepared and submitted by:

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