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

HOWARD SHAPIRO and JENNA  
SHAPIRO

Appellants,

vs.

GLENN WELT, RHODA WELT,  
LYNN WELT, and MICHELLE WELT,

Respondents.

Supreme Court No.: 73943

Case No. A-14-706566-C

**Respondents' Appendix**

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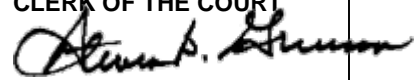
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1 **Certificate of Service**

2 Per NRAP 25(c), I certify that I am an employee of Wilson Elser  
3 Moskowitz Edelman & Dicker LLP, and that on March 30, 2018, **Respondents'**  
4 **Appendix** was served via electronic means by operation of the Court's electronic  
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**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

HOWARD SHAPIRO and JENNA SHAPIRO, Case A-14-706566-C  
Dept. 27

Plaintiffs,

vs.

**Glenn Welt, Rhoda Welt, Lynn Welt &  
Michele Welt's Supplemental Reply re  
Renewed Motion to Dismiss**

GLEN WELT, RHODA WELT, LYNN WELT,  
MICHELLE WELT, individuals;  
CHECKSNET.COM, a corporation; DOES I  
through X, and ROE CORPORATIONS I  
through X, inclusive,

Defendants.

Since briefing was completed on this motion, the Supreme Court of Nevada issued an opinion interpreting NRS 41.637. Given a change in controlling law, the Welts provide this supplemental brief. The Supreme Court's new opinion supports the Welts because it adopted at least two of the Welts' arguments concerning statutory construction of NRS 41.637.

DATED this 10<sup>th</sup> day of July, 2017.

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### **I. New binding authority interprets NRS 41.637.**

On June 29, 2017 the Supreme Court of Nevada decided *Delucchi v. Songer*.<sup>1</sup> The decision primarily addressed whether the 2013 amendments to Nevada’s anti-SLAPP statutes were prospective or retroactive in application. The Court determined some parts were retroactive, however others were not. The retroactivity portion of the opinion has no application here as the conduct at issue occurred in 2014, after the 2013 amendments took effect. *Delucchi* did not discuss NRS 41.637(3) and (4), the two statutes the Welts argue protect their speech.

However, *Delucchi* also discussed how to determine whether the speech at issue qualifies for protection under NRS 41.637. This analysis is directly relevant to the issues pending in the Welts’ motion. *Delucchi* considered a case from the Supreme Court of California “involving an interpretation of its own anti-SLAPP statute, which we have previously recognized as similar in purpose and language to our anti-SLAPP statute.”<sup>2</sup> *City of Montebello v. Vasquez* reversed a ruling denying an anti-SLAPP motion because the communication did not implicate First Amendment rights.<sup>3</sup> The reversal was required because “[t]he Legislature did not limit the scope of the anti-SLAPP statute to activity protected by the constitutional rights of speech and petition.” Instead, “[t]he Legislature spelled out the kinds of activity it meant to protect” in the statutes it passed.<sup>4</sup> As a result “courts determining whether conduct is protected under the anti-SLAPP statute look not to First Amendment law, but to the statutory definitions” the Legislature provided.<sup>5</sup> This avoided the problem of requiring courts “to wrestle with difficult questions of constitutional law.”<sup>6</sup> *Vasquez* summarized that the defendant establishes the speech at issue is protected if that speech is “within one of the four categories ... defining [the statutory] phrase, ‘act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue.’”<sup>7</sup>

<sup>1</sup> 133 Nev. Adv. Op. 42 (2017).

<sup>2</sup> *Id.* at 13 (quotations and citation omitted).

<sup>3</sup> 376 P.3d 624, 632 (Cal. 2016).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 633.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* (first alteration in original) (*quoting* Cal. Civ. Proc. Code § 425.16(e) (2016)).

1           *Delucchi* found *Vasquez*'s "rationale persuasive and consistent with our own anti-SLAPP  
2 caselaw."<sup>8</sup> *Delucchi* stated in Nevada, "a defendant's conduct constitutes 'good faith  
3 communication in furtherance of the right to petition or the right to free speech in direct  
4 connection with an issue of public concern' if it falls within one of the four categories  
5 enumerated in NRS 41.637 and 'is truthful or is made without knowledge of its falsehood.'"<sup>9</sup>

6       **II.   *Delucchi* supports the Welts' arguments that their speech was protected.**

7           The Welts' briefing expressly argued the definition that the Supreme Court ultimately  
8 adopted in *Delucchi*. If the speech that generated the lawsuit arises from at least one of the four  
9 categories of speech NRS 41.637 defines, then it is protected. *Delucchi* conclusively invalidates  
10 the Shapiros' argument that the Welts' speech was not "in good faith" based upon citations to  
11 BLACK'S LAW DICTIONARY. *Delucchi* also defeats the Shapiros's argument that the website was  
12 not in furtherance of the right to free speech. Like California, the Nevada Legislature did not  
13 condition protection upon whether the speech concerned a constitutional right. Nevada instead  
14 specifically defined the speech it wished to protect.

15           Applying *Delucchi*, the Welts' speech is protected by NRS 41.637(3) and (4). The  
16 speech remains protected if it "is truthful or is made without knowledge of its falsehood."<sup>10</sup> The  
17 Welts' motion specifically provided the information they used to support those statements. The  
18 Shapiros provided no evidence to the contrary, instead arguing without support that all  
19 statements on the website "are either blatant lies or embellishment."<sup>11</sup> The Shapiros have  
20 presented no evidence upon which the court could find the Welts' speech was untruthful or made  
21 with knowledge of its falsehood. Similarly, they provided no clear and convincing evidence of a  
22 probability to prevailing on the merits, such as *Delucchi* evaluated.

23       **III.   *Delucchi* supports the Welts.**

24           *Delucchi* adopted the same analytical framework the Welts urged here. Although it  
25 ultimately concluded the plaintiffs there had presented sufficient evidence to defeat the anti-

26  
27 <sup>8</sup> 133 Nev. Adv. Op. 42, at 15.

28 <sup>9</sup> *Id.*

<sup>10</sup> NRS 41.637.

<sup>11</sup> Opposition at 22:13.

1 SLAPP motion, it did so based upon extensive evidence that was provided to the district court.  
2 That exact evidence is missing here. The Welts speech is within the definition of speech  
3 protected by NRS 41.637(3) and (4). It is protected speech, meaning the Welts' motion to  
4 dismiss should be granted.

5 DATED this 10<sup>th</sup> day of July, 2017.

6 WILSON ELSER MOSKOWITZ  
EDELMAN & DICKER LLP

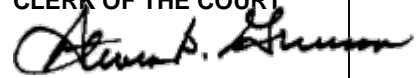
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BY: /s/ Naomi E. Sudranski  
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**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

HOWARD SHAPIRO and JENNA SHAPIRO, Case A-14-706566-C  
Dept. 27

Plaintiffs,

vs.

**Notice of Entry of Order**

GLEN WELT, RHODA WELT, LYNN WELT,  
MICHELLE WELT, individuals;  
CHECKSNET.COM, a corporation; DOES I  
through X, and ROE CORPORATIONS I  
through X, inclusive,

Defendants.

Please take notice that a Second Amended Order Granting Glenn Welt, Rhoda Welt,  
Lynn Welt & Michele Welt's Renewed Motion to Dismiss was entered by the court on October  
17, 2017. A copy is attached hereto.

DATED this 24<sup>th</sup> day of October, 2017.

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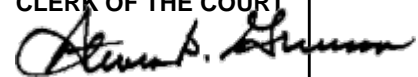


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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

HOWARD SHAPIRO and JENNA SHAPIRO, Case A-14-706566-C  
Dept. 27

Plaintiffs,

vs.

**Second Amended Order Granting Glenn  
Welt, Rhoda Welt, Lynn Welt & Michele  
Welt's Renewed Motion to Dismiss**

GLEN WELT, RHODA WELT, LYNN WELT,  
MICHELLE WELT, individuals;  
CHECKSNET.COM, a corporation; DOES I  
through X, and ROE CORPORATIONS I  
through X, inclusive,

Defendants.

On May 26, 2017 Defendants Glenn Welt, Rhoda Welt, Lynn Welt and Michele Welt ("the Welts") moved to dismiss Howard and Jenna Shapiros' complaint ("the Shapiros"). The Shapiros opposed and filed a countermotion. Both motions were heard on July 19, 2017. Alex Ghibaudo appeared for the Shapiros, Michael Lowry appeared for the Welts.

The Welts' ask the court to decide if their speech is protected by either NRS 41.637(3) or NRS 41.637(4). The court concludes both statutes apply to the speech at issue. The speech was protected, shifting the burden of proof to the Shapiros. The Shapiros have not provided the evidence necessary to meet their burden. Consequently, the Welts' motion is granted and the Shapiros' countermotion is denied for the reasons described in this order.

**I. This case concerns an intra-familial dispute in New Jersey.**

This matter stems from comments made on a website regarding a conservatorship case litigated in New Jersey. Walter Shapiro is the father of plaintiff Howard Shapiro.<sup>1</sup> On August 5,

<sup>1</sup> To avoid confusion due to identical last names, the parties are referenced by their first names.

1 2014 Howard petitioned a New Jersey court to appoint him as Walter's conservator.<sup>2</sup> The  
2 petition alleged Walter was allegedly no longer mentally fit to care for himself. The Welts are  
3 relatives of Walter and opposed Howard's petition.<sup>3</sup>

4 The Nevada complaint alleges defamation arising from a website that concerns the New  
5 Jersey petition, [www.howardshapirovictims.com](http://www.howardshapirovictims.com). The complaint attaches an email and letter  
6 from Glenn Welt stating he will post the website for public viewing.<sup>4</sup> Mr. Welt's stated goal is  
7 to invite Howard Shapiro's "known victims to appear in court along with other caretakers,  
8 neighbors, acquaintances and relatives you've threatened."

9 **II. Nevada's anti-SLAPP statutes.**

10 "A SLAPP suit is a meritless lawsuit that a party initiates primarily to chill a defendant's  
11 exercise of his or her First Amendment free speech rights."<sup>5</sup> "The hallmark of a SLAPP lawsuit  
12 is that it is filed to obtain a financial advantage over one's adversary by increasing litigation  
13 costs until the adversary's case is weakened or abandoned."<sup>6</sup> "When a plaintiff files a SLAPP  
14 suit against a defendant, Nevada's anti-SLAPP statute allows the defendant to file a special  
15 motion to dismiss in response to the action."<sup>7</sup>

16 Under the 2013 version of the statute in effect when the speech at issue in this case  
17 occurred,<sup>8</sup> a "person who engages in a good faith communication in furtherance of the right to  
18 petition or the right to free speech in direct connection with an issue of public concern is immune  
19 from any civil action for claims based upon the communication."<sup>9</sup> Anti-SLAPP statutes are  
20 invoked when "an action is brought against a person based upon a good faith communication in  
21 furtherance of ... the right to free speech in direct connection with an issue of public concern"<sup>10</sup>  
22 NRS 41.637 defines "[g]ood faith communication in furtherance of the right ... to free speech in  
23

24 <sup>2</sup> Petition attached as Exhibit A to motion.

25 <sup>3</sup> Answer attached as Exhibit B to motion.

26 <sup>4</sup> Complaint at Exhibits 3, 4.

27 <sup>5</sup> *Stubbs v. Strickland*, 129 Nev. Adv. Op. 15, 297 P.3d 326, 329 (2013) (citations omitted).

28 <sup>6</sup> *John v. Douglas Cnty. Sch. Dist.*, 125 Nev. 746, 752, 219 P.3d 1276, 1280 (2009).

<sup>7</sup> *Stubbs*, 297 P.3d at 329 (citations omitted).

<sup>8</sup> S.B. 286, 77th Leg., effective on October 1, 2013. The statutes were subsequently amended in the 2015 Legislative Session.

<sup>9</sup> NRS 41.650.

<sup>10</sup> NRS 41.660(1).

1 direct connection with an issue of public concern.” This term includes a “[w]ritten or oral  
2 statement made in direct connection with an issue under consideration by a legislative, executive  
3 or judicial body, or any other official proceeding authorized by law.”<sup>11</sup> It also includes  
4 “[c]ommunication made in direct connection with an issue of public interest in a place open to  
5 the public or in a public forum.”<sup>12</sup> These protections extend to any communication “which is  
6 truthful or is made without knowledge of its falsehood.”<sup>13</sup>

7 *Delucchi v. Songer* recently addressed these definitions.<sup>14</sup> *Delucchi* considered a case  
8 from the Supreme Court of California “involving an interpretation of its own anti-SLAPP statute,  
9 which we have previously recognized as similar in purpose and language to our anti-SLAPP  
10 statute.”<sup>15</sup> *City of Montebello v. Vasquez* concluded “[t]he Legislature did not limit the scope of  
11 the anti-SLAPP statute to activity protected by the constitutional rights of speech and petition.”<sup>16</sup>  
12 Instead, “[t]he Legislature spelled out the kinds of activity it meant to protect” in the statutes it  
13 passed.<sup>17</sup> As a result “courts determining whether conduct is protected under the anti-SLAPP  
14 statute look not to First Amendment law, but to the statutory definitions” the Legislature  
15 provided.<sup>18</sup> This avoided the problem of requiring courts “to wrestle with difficult questions of  
16 constitutional law.”<sup>19</sup> *Vasquez* summarized that the defendant establishes the speech at issue is  
17 protected if that speech is “within one of the four categories ... defining [the statutory] phrase,  
18 ‘act in furtherance of a person’s right of petition or free speech under the United States or  
19 California Constitution in connection with a public issue.’”<sup>20</sup>

20 *Delucchi* found *Vasquez*’s “rationale persuasive and consistent with our own anti-SLAPP  
21 caselaw.”<sup>21</sup> *Delucchi* stated in Nevada, “a defendant’s conduct constitutes ‘good faith  
22 communication in furtherance of the right to petition or the right to free speech in direct

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23 <sup>11</sup> NRS 41.637(3).

24 <sup>12</sup> NRS 41.637(4).

25 <sup>13</sup> NRS 41.637.

26 <sup>14</sup> 133 Nev. Adv. Op. 42 (2017).

27 <sup>15</sup> *Id.* at 13 (quotations and citation omitted).

28 <sup>16</sup> 376 P.3d 624, 632 (Cal. 2016).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 633.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* (first alteration in original) (quoting Cal. Civ. Proc. Code § 425.16(e) (2016)).

<sup>21</sup> 133 Nev. Adv. Op. 42, at 15.

1 connection with an issue of public concern' if it falls within one of the four categories  
2 enumerated in NRS 41.637 and 'is truthful or is made without knowledge of its falsehood.'"<sup>22</sup>

3 **a. Standard of review.**

4 When resolving this motion the district court shall "[c]onsider such evidence, written or  
5 oral, by witnesses or affidavits, as may be material in making a determination pursuant to  
6 paragraphs (a) and (b)."<sup>23</sup> Under the 2013 version of the statute in effect when the speech at  
7 issue in this case occurred, when a special motion to dismiss is filed, the district court must first  
8 "[d]etermine whether the moving party has established, by a preponderance of the evidence, that  
9 the claim is based upon a good faith communication in furtherance of the right to petition or the  
10 right to free speech in direct connection with an issue of public concern."<sup>24</sup> If the moving party  
11 meets its burden, the court then determines "whether the plaintiff has established by clear and  
12 convincing evidence a probability of prevailing on the claim."<sup>25</sup> This standard is stringent.<sup>26</sup>  
13 The opposing party must provide actual, admissible evidence, not merely a narrative  
14 disagreement with the moving party.<sup>27</sup>

15 **III. The Welts meet their burden of proof.**

16 The Welts must first demonstrate the Shapiros' complaint is "based upon a good faith  
17 communication in furtherance of the right to petition or the right to free speech in direct  
18 connection with an issue of public concern."<sup>28</sup> Nevada's "based upon" requirement has not yet  
19 been interpreted. In the absence of Nevada authority, it is appropriate to consider California  
20 authority.<sup>29</sup> By borrowing from California, Nevada implicitly adopted California case law  
21 interpreting that statute.<sup>30</sup>

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22 <sup>22</sup> *Id.*

23 <sup>23</sup> NRS 41.660(3)(d).

24 <sup>24</sup> NRS 41.660(3)(a).

25 <sup>25</sup> NRS 41.660(3)(b).

26 <sup>26</sup> *In re Jane Tiffany Living Trust 2001*, 124 Nev. 74, 79, 177 P.3d 1060, 1063 (2008) (quotation  
25 omitted).

27 <sup>27</sup> *John*, 125 Nev. at 762, 219 P.3d at 1287.

28 <sup>28</sup> NRS 41.660(1).

29 <sup>29</sup> *Shapiro v. Welt*, 133 Nev. Adv. Op. 6, 389 P.3d 262, 268 (2017).

30 <sup>30</sup> *International Game Technology, Inc. v. Dist. Ct.*, 122 Nev. 132, 153, 127 P.3d 1088, 1103  
27 (2006) ("When the Legislature adopts a statute substantially similar to a federal statute, a  
28 presumption arises that the legislature knew and intended to adopt the construction placed on the  
federal statute by federal courts.")

1 NRS 41.660(1)'s "based upon" requirement is substantively identical to California's  
2 "arise from" requirement. In California, it "means simply that the defendant's act underlying the  
3 plaintiff's cause of action must itself have been an act in furtherance of the right of petition or  
4 free speech."<sup>31</sup> "[T]he critical point is whether the plaintiff's cause of action itself was based on  
5 an act in furtherance of the defendant's right of petition or free speech."<sup>32</sup> The focus "is not the  
6 form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or  
7 her asserted liability—and whether that activity constitutes protected speech or petitioning."<sup>33</sup>

8 The Shaprios' complaint is "based upon" the Welts' website, satisfying this requirement.

9 **a. NRS 41.637(3) applies to the speech on the Welts' website.**

10 The core question under review by the New Jersey judicial body was whether Walter  
11 needed a conservator and, if so, whether Howard was qualified and suitable for that role. NRS  
12 41.637(3) protects a "[w]ritten or oral statement made in direct connection with an issue under  
13 consideration by a ... judicial body."<sup>34</sup> No Nevada appellate court has yet addressed this  
14 definition, so the court considers persuasive California case law interpreting its statute protecting  
15 "any written or oral statement or writing made in connection with an issue under consideration or  
16 review by a ... judicial body...."<sup>35</sup>

17 **i. § 425.16(e)(2) is construed broadly.**

18 California has broadly defined the phrase "made in connection with an issue under  
19 consideration or review." *Briggs v. Eden Council for Hope & Opportunity* arose from a dispute  
20 between a landlord and a tenant-rights organization, known as ECHO.<sup>36</sup> The landlords sued  
21 ECHO because, in part, it helped a tenant file a small claims action.<sup>37</sup> ECHO moved to dismiss,  
22 arguing the statements giving rise to the lawsuit were made concerning matters under review by  
23 a judicial body and thus protected. The Supreme Court of California was asked to decide if "a  
24 defendant, [filing an anti-SLAPP motion to dismiss] a cause of action arising from a statement

25 <sup>31</sup> *City of Cotati v. Cashman*, 52 P.3d 695, 701 (Cal. 2002) (internal citations omitted).

26 <sup>32</sup> *Id.*

26 <sup>33</sup> *Navellier v. Sletten*, 52 P.3d 703, 711 (Cal. 2002) (emphasis in original).

27 <sup>34</sup> NRS 41.637(3).

27 <sup>35</sup> Cal Code Civ Proc § 425.16(e)(2).

28 <sup>36</sup> 969 P.2d 564 (Cal. 1999).

28 <sup>37</sup> *Id.* at 566.

1 made before, or in connection with an issue under consideration by, a legally authorized official  
2 proceeding, demonstrate separately that the statement concerned an issue of public  
3 significance?" It concluded no, based upon the statute's plain language.

4 California's statute "expressly makes subject to a special motion to strike '[a] cause of  
5 action against a person arising from any act of that person in furtherance of the person's right of  
6 petition or free speech under the United States or California Constitution in connection with a  
7 public issue....'"<sup>38</sup> The statute defined this phrase to include "any written or oral statement or  
8 writing made in connection with an issue under consideration or review by a ... judicial  
9 body...."<sup>39</sup> *Briggs* concluded the plain language "encompasses any cause of action against a  
10 person arising from any statement or writing made in, or in connection with an issue under  
11 consideration or review by, an official proceeding or body."<sup>40</sup>

12 Applying this definition, *Briggs* concluded the lawsuit was based upon protected activity.  
13 ECHO's communications with the tenant concerning the small claim were "made in connection  
14 with issues under consideration or review by official bodies or proceedings—specifically, HUD  
15 or the civil courts."<sup>41</sup> Even communications in preparation for or anticipation of a judicial  
16 proceeding were protected.<sup>42</sup>

17 *Briggs* specifically rejected the argument that the judicial proceeding must be of public  
18 significance to qualify for protection. "[T]he statute requires simply *any* writing or statement  
19 made in, or in connection with an issue under consideration or review by" a judicial body.<sup>43</sup>

20 Thus these clauses safeguard free speech and petition conduct aimed at advancing  
21 self government, as well as conduct aimed at more mundane pursuits. Under the  
22 plain terms of the statute it is the context or setting itself that makes the issue a  
23 public issue: all that matters is that the First Amendment activity take place in an  
24 official proceeding or be made in connection with an issue being reviewed by an  
authorized official proceeding to which it connects.<sup>44</sup>

25 <sup>38</sup> *Id.* at 568.

26 <sup>39</sup> *Id.* (emphasis in original).

26 <sup>40</sup> *Id.*

27 <sup>41</sup> *Id.* at 569.

27 <sup>42</sup> *Id.*

28 <sup>43</sup> *Id.* at 570 (emphasis in original).

28 <sup>44</sup> *Id.* (emphasis in original).

1 Subsequent decisions have also discussed when a communication is “made in connection  
2 with an issue” being considered by a judicial body.<sup>45</sup> *People ex rel. 20th Century Ins. Co. v.*  
3 *Bldg. Permit Consultants, Inc.* evaluated whether allegedly fraudulent repair estimates submitted  
4 to an insurance company were “made in connection with an issue” being considered by a judicial  
5 body.<sup>46</sup> They were not. “While some of the reports eventually were used in official proceedings  
6 or litigation, they were not created ‘before,’ or ‘in connection with an issue under consideration  
7 or review by a legislative, executive, or judicial body, or any other official proceeding authorized  
8 by law.’”<sup>47</sup> “At the time defendants created and submitted their reports and claims, there was no  
9 ‘issue under consideration’ pending before any official proceeding.”<sup>48</sup> California’s anti-SLAPP  
10 protections did not extend so broadly as to protect communications merely “because they  
11 eventually could be used in connection with an official proceeding....”<sup>49</sup>

12 In *Paul v. Friedman* a securities broker successfully defended an arbitration proceeding  
13 brought against him.<sup>50</sup> He then sued the lawyer who pursued the action, asserting the lawyer’s  
14 investigation of the broker’s private life during the arbitration was harassing and that the lawyer  
15 had publically revealed information allegedly obtained from that investigation. These actions  
16 were not statutorily protected. “The statute does not accord anti-SLAPP protection to suits  
17 arising from any act having any connection, however remote, with an official proceeding. The  
18 statements or writings in question must occur in connection with ‘an issue under consideration or  
19 review’ in the proceeding.”<sup>51</sup>

20 In short, it is insufficient to assert that the acts alleged were “in connection with”  
21 an official proceeding. There must be a connection with an issue under review in  
22 that proceeding. In *20th Century Insurance*, there was a connection to an issue but  
23 no pending proceeding; here, there is a pending proceeding, but no connection to  
24 an issue before the tribunal.<sup>52</sup>

25 <sup>45</sup> Cal Code Civ Proc § 425.16(e)(2).

26 <sup>46</sup> 86 Cal. App. 4th 280, 282 (2000).

27 <sup>47</sup> *Id.* at 284-285 (quoting Cal Code Civ Proc § 425.16(e)(1), (2)).

28 <sup>48</sup> *Id.* at 285.

<sup>49</sup> *Id.*

<sup>50</sup> 95 Cal. App. 4th 853 (2002).

<sup>51</sup> *Id.* at 866.

<sup>52</sup> *Id.* at 867.



1        *Neville v. Chudacoff* concerned an employee leaving a business, Maxsecurity, to form a  
2 competing business and, in the process, allegedly misappropriating trade secrets.<sup>53</sup> In May, 2005  
3 Maxsecurity sent its customers a letter from its lawyer, Chudacoff, stating that the former  
4 employee had breached his employment contract and warning the customers not to do business  
5 with him. Maxsecurity filed suit against the former employee in September, 2005. The  
6 employee cross-claimed for defamation arising from the letter. Maxsecurity moved to dismiss  
7 the counterclaims, arguing they were based upon the letter and the letter was a protected  
8 communication “in connection with an issue under consideration or review by a legislative,  
9 executive, or judicial body....”<sup>54</sup> The court concluded “[t]he only reasonable inference from the  
10 [Letter], however, is that Maxsecurity and Chudacoff were contemplating litigation against  
11 Neville seriously and in good faith when the Letter was written.”<sup>55</sup>

12        The former employee also argued the letter was not protected because it was not sent to  
13 potential parties to the anticipated litigation. *Neville* explained “a statement is ‘in connection  
14 with’ litigation ... if it relates to the substantive issues in the litigation and is directed to persons  
15 having some interest in the litigation.”<sup>56</sup> This definition extended “to protect statements to  
16 persons who are not parties or potential parties to litigation, provided such statements are made  
17 ‘in connection with’ pending or anticipated litigation.”<sup>57</sup> All of the employee’s arguments were  
18 rejected, letter was protected, and the counterclaim dismissed.

19        *McConnell v. Innovative Artists Talent & Literary Agency, Inc.* concerned a business  
20 break-up where two employees, McConnell and Press, sought to leave and create their own  
21 competing business.<sup>58</sup> They initiated suit seeking declaratory relief concerning sections of their  
22 contract concerning their ability to terminate their own employment.<sup>59</sup> The next day  
23 Innovative’s president, Harris, ordered them removed from the company’s offices and sent them  
24 a letter advising that they had been given “new job duties” that, in effect, prevented them from

25        <sup>53</sup> 160 Cal. App. 4th 1255 (2008).

26        <sup>54</sup> *Id.* at 1262.

26        <sup>55</sup> *Id.* at 1269.

27        <sup>56</sup> *Id.* at 1266.

27        <sup>57</sup> *Id.* at 1270.

28        <sup>58</sup> 175 Cal. App. 4th 169 (2009).

28        <sup>59</sup> *Id.* at 173.

1 working at all.<sup>60</sup> The now former employees added causes of action for wrongful termination  
2 and retaliation, both relying upon Harris's letter.<sup>61</sup> Innovative moved to dismiss these causes of  
3 action arguing the letter was a protected communication because it was made "in connection  
4 with an issue under consideration" by a judicial body.<sup>62</sup>

5 This argument was rejected. There was a judicial proceeding pending when the letter  
6 was sent, but there was not a sufficient connection between the letter and an issue under  
7 consideration. The day the letter was sent, the pending lawsuits "sought declaratory and  
8 injunctive relief establishing that McConnell and Press were legally free to leave Innovative  
9 whenever they chose." However, Harris's letter

10 was obviously directed at preventing McConnell from taking clients with him  
11 when he left, not at establishing that McConnell was legally required to stay.  
12 Indeed, the Harris letter on its face says nothing at all about McConnell's lawsuit,  
13 and nothing at all about any claims Innovative might make in that lawsuit.  
14 Consequently, it is difficult to find any basis to conclude that Innovative's letter  
15 was written "in connection with an issue under consideration" in those lawsuits,  
16 of which no mention at all was made.<sup>63</sup>

17 Innovative responded the letter was part of its "efforts to investigate pending or  
18 prospective claims and/or prepare for their potential resolution."<sup>64</sup>

19 But the letters do not mention the lawsuits; do not mention any desire to  
20 investigate; do not refer to any misconduct by McConnell and Press; and do not  
21 mention "pending or prospective claims" or their "potential resolution." In short,  
22 the McConnell/Press causes of action for retaliation and wrongful termination  
23 could not have been based on protected litigation activity, in the form of  
24 Innovative's investigation of pending claims, when no such investigative activity  
25 is reflected in Harris's letter.<sup>65</sup>

26 Several other California decisions decided whether certain communications were in  
27 connection with an issue pending before a judicial body. In *Moore v. Shaw* an attorney drafted  
28 an agreement to terminate a trust and was later sued because of it.<sup>66</sup> The attorney then moved to  
dismiss certain causes of action, arguing they were protected communications. "We note Nancy  
Shaw drafted the termination agreement in September 1999, one year before George's death and

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<sup>60</sup> *Id.* at 173-174.

<sup>61</sup> *Id.* at 174.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 177-78.

<sup>64</sup> *Id.* at 178.

<sup>65</sup> *Id.*

<sup>66</sup> 116 Cal. App. 4th 182 (2004).

1 nearly three years before Kenton filed his petition against her.”<sup>67</sup> Consequently her actions were  
2 not made in connection with an issue under consideration by a judicial body and were not  
3 protected.<sup>68</sup>

4 In *Healy v. Tuscany Hills Landscape & Recreation Corp.* a HOA filed suit against one of  
5 its unit owners and sent a letter to its membership about the topic of the lawsuit.<sup>69</sup> The unit  
6 owner’s counterclaim for defamation arising from the letter was dismissed. “Because one  
7 purpose of the letter was to inform members of the association of pending litigation involving the  
8 association, the letter is unquestionably in connection with judicial proceedings and bears some  
9 relation to judicial proceedings.”<sup>70</sup> *Contemporary Services Corp. v. Staff Pro Inc.* concluded an  
10 email update to a group of customers concerning court rulings and favorable imposition of  
11 sanctions in litigation against the company’s competitor was protected activity because it was in  
12 connection with an issue under consideration or review by a judicial body.<sup>71</sup>

13 Applied to the facts at issue here, the complaint alleges the Welts’ website was created  
14 after the judicial proceeding was commenced, satisfying NRS 41.637(3)’s first element. The  
15 second element requires a connection between the speech and the issue under consideration. The  
16 core question before the New Jersey court was whether Howard was qualified and suitable to be  
17 Walter’s guardian. The speech on the website was directly connected to that issue. The Welts’  
18 satisfy both elements of NRS 41.637(3).

19 **ii. NRS 41.637(3)’s direct connection requirement is satisfied.**

20 There is one material textual difference between the California and Nevada statutes.  
21 California protects “any written or oral statement or writing made in connection with an issue  
22 under consideration or review....”<sup>72</sup> Nevada protects “any (3) Written or oral statement made in  
23 *direct* connection with an issue under consideration....”<sup>73</sup> NRS 41.637(3) does not define when  
24 a statement is “in direct connection” such that it qualifies for protection.

25 <sup>67</sup> *Id.* at 197.

26 <sup>68</sup> *Id.*

26 <sup>69</sup> 137 Cal. App. 4th 1 (2006).

27 <sup>70</sup> *Id.* at 5-6 (internal quotations omitted).

27 <sup>71</sup> 152 Cal. App. 4th 1043, 1055-1056 (2007).

28 <sup>72</sup> Cal. Civ. Proc. Code § 425.16(e)(2).

28 <sup>73</sup> Emphasis added.

1 When the plain language of the statute does not answer the question, the statute should be  
2 construed “according to that which reason and public policy would indicate the legislature  
3 intended.”<sup>74</sup> Statutes are to be construed “as a whole, so that all provisions are considered  
4 together and, to the extent practicable, reconciled and harmonized. In addition, the court will not  
5 render any part of the statute meaningless, and will not read the statute’s language so as to  
6 produce absurd or unreasonable results.”<sup>75</sup>

7 The “in direct connection” requirement was not part of the statute as originally enacted in  
8 1993.<sup>76</sup> It was added in 1997,<sup>77</sup> but the legislative history is silent as to why. The 2013  
9 amendments did not modify the language but did add it to the first sentence of NRS 41.637 and  
10 the new NRS 41.637(4).<sup>78</sup>

11 NRS 41.637(3) is a nearly verbatim copy of Cal. Civ. Proc. Code § 425.16(e)(2). In 1997  
12 when NRS 41.637(3) was created, § 425.16(e)(2) could fairly be read to literally encompass *any*  
13 speech having *any* connection to the issue under review or consideration. By adding the word  
14 “direct” to § 425.16(e)(2)’s language, the Nevada Legislature implicitly rejected the California  
15 standard and required more of a connection between the speech and the issue under review or  
16 consideration by the judicial body. However, California case law since 1997 rejected an  
17 interpretation of § 425.16(e)(2) that would protect *any* speech with *any* connection, as *Paul v.*  
18 *Friedman* concluded.<sup>79</sup> California courts have instead interpreted § 425.16(e)(2) as requiring  
19 what can fairly be described as a “direct connection,” like NRS 41.637(3). This textual  
20 difference does not make a substantive difference to deciding the Welts’ motion.

21 **b. NRS 41.637(4) also applies to the speech on the Welts’ website.**

22 The Welts alternatively argue NRS 41.637(4) applies to the speech on the website. NRS  
23 41.637(4) protects any “[c]ommunication made in direct connection with an issue of public  
24  
25

26 <sup>74</sup> *Hardy Cos. v. SNMARK, LLC*, 126 Nev. 528, 533, 245 P.3d 1149, 1153 (2010).

27 <sup>75</sup> *Id.* at 534, 245 P.3d at 1153.

28 <sup>76</sup> 1993 Nev. Stat., ch. 652 at 2848-2849.

<sup>77</sup> 1997 Nev. Stat., ch. 387 at 1365.

<sup>78</sup> 2013 Nev. Stat., ch. 176 at 623.

<sup>79</sup> 95 Cal. App. 4th 853, 866-67 (2002).

1 interest in a place open to the public or in a public forum,”<sup>80</sup> but only if that communication “is  
2 truthful or is made without knowledge of its falsehood.”<sup>81</sup>

3 On appeal, the Supreme Court adopted “California’s guiding principles ... for  
4 determining whether an issue is of public interest under NRS 41.637(4).”<sup>82</sup> It specifically listed  
5 five guiding principles.<sup>83</sup> The Supreme Court directed “the district court to apply California’s  
6 guiding principles in analyzing whether the Welts’ statements were made in direct connection  
7 with an issue of public interest under NRS 41.637(4).”<sup>84</sup> Applying these principles, the Welts’  
8 speech on the website was within NRS 41.637(4)’s definition.

9 **i. How does California apply its guiding principles?**

10 *Shapiro* specifically cited *Piping Rock Partners*, a dispute between two real estate  
11 investment trust (“REIT”) firms, Piping Rock Partners and David Lerner Associates.<sup>85</sup> Piping  
12 Rock Partners’ sole shareholder, Germain, also “launched a public forum on his blog REIT  
13 Wrecks to encourage discussion of non-traded REITs.”<sup>86</sup> “In response to a reader’s post about  
14 DLA and Lerner, Germain posted a reply explaining that DLA and Lerner appeared to be  
15 violating a regulation promulgated by the Financial Industry Regulatory Authority (FINRA).”<sup>87</sup>  
16 This generated “months of publicity,” a formal FINRA complaint, and two class action  
17 lawsuits.<sup>88</sup>

18 The firms each alleged the other then began online smear campaigns.<sup>89</sup> Piping Rock  
19 Partners sued DLA, who moved to dismiss arguing its statements were protected by §  
20 425.16(e)(3) as “any written or oral statement or writing made in a place open to the public or a  
21 public forum in connection with an issue of public interest.”<sup>90</sup> The eight posts admittedly  
22

23 <sup>80</sup> NRS 41.637(4).

24 <sup>81</sup> NRS 41.637.

25 <sup>82</sup> *Shapiro*, 389 P.3d at 268.

26 <sup>83</sup> *Id.* (quoting *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F. Supp. 2d 957,  
968 (N.D. Cal. 2013)).

27 <sup>84</sup> *Id.*

28 <sup>85</sup> *Piping Rock Partners*, 946 F. Supp. 2d at 965.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 965.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 965-66.

<sup>90</sup> *Id.* at 967.

1 authored by a DLA representative were originally posted to the website Ripoff Reports.<sup>91</sup> Piping  
2 Rock Partners conceded Ripoff Reports was a public forum.<sup>92</sup>

3 The court concluded the posts concerned an issue of public interest because they were “a  
4 warning to consumers not to do business with plaintiffs because of their allegedly faulty business  
5 practices.”<sup>93</sup> However, several of the factual statements in the posts were demonstrably false.  
6 “California law does not require a statement to be serious or truthful in order to concern an issue  
7 of public interest.”<sup>94</sup> By contrast, Nevada law protects only speech within defined categories  
8 “which is truthful or is made without knowledge of its falsehood.”<sup>95</sup>

9 DLA counterclaimed based upon 12 statements posted to Germain’s blog, who moved to  
10 dismiss. He argued the statements were protected by § 425.16(e)(3) “because they were made on  
11 public internet website, accessible by all. DLA and Lerner argue that REIT Wrecks is not public  
12 because Germain controls the very website on which he posted the offending statements.”<sup>96</sup>  
13 DLA and Lerner’s argument was summarily rejected. “It is settled that Web sites accessible to  
14 the public ... are public forums for purposes of the anti-SLAPP statute.”<sup>97</sup> The court did not  
15 address whether the 12 posts concerned an issue of public interest because that was conceded.<sup>98</sup>

16 *Piping Rock Partners* summarized California case law for determining whether speech  
17 concerned an issue of public interest. It also indicates the Welts’ website was a public forum.  
18 However, *Piping Rock Partners* provided limited guidance as to what speech concerned an issue  
19 of public interest.

20 **c. Invoking sovereign powers as a conservator is an issue of public interest.**

21 The parties have not presented any California authority expressly determining whether  
22 speech concerning the qualifications and suitability of a person who has petitioned for a  
23 conservator appointment concerns “an issue of public interest.” However, *Young v. CBS Broad.*,

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24  
25 <sup>91</sup> *Id.* at 965-66.

26 <sup>92</sup> *Id.* at 967.

27 <sup>93</sup> *Id.* at 969.

28 <sup>94</sup> *Id.*

<sup>95</sup> NRS 41.637.

<sup>96</sup> *Piping Rock Partners*, 946 F. Supp. 2d at 974-95.

<sup>97</sup> *Id.* (quoting *Wong v. Tai Jing*, 189 Cal. App. 4th 1354, 1366 (2010)).

<sup>98</sup> *Id.* at 976.

1 *Inc.* determined that being appointed a conservator makes a person a public official, subject to  
2 public scrutiny. California had previously determined a social worker qualified as a public  
3 official. It found the conservator to be in a similar position. By accepting the appointment, the  
4 conservator “became an agent of the state with the power to interfere in the personal interests of  
5 a private citizen to whom she was not related and without that citizen’s consent.”<sup>99</sup> “A person  
6 holding these sovereign powers over another unrelated person and using them for compensation  
7 is subject to the public’s independent interest in her performance, and warrants public scrutiny  
8 beyond that occasioned by the controversy with Mann.”<sup>100</sup>

9 *Young* did not expressly analyze if the news report was a “written or oral statement or  
10 writing made in a place open to the public or a public forum in connection with an issue of  
11 public interest,”<sup>101</sup> because the parties conceded it was.<sup>102</sup> However, *Young*’s analysis of  
12 whether a conservator is a public official indicates the qualifications and suitability of a  
13 conservator are a matter of public interest because of the sovereign power a conservator invokes.  
14 If so, for anti-SLAPP purposes, there is no rational basis distinguishing a person who is applying  
15 to be a conservator from one who has successfully applied and been appointed. In both contexts,  
16 speech concerning the conservator’s qualifications and suitability are issues of public interest.

17 **d. California has not yet created one, uniform analysis to determine whether**  
18 **speech concerns an issue of public interest.**

19 The Welts argue alternatively that if applying for a court appointment as a conservator is  
20 not a significant public interest on its own, then their speech still meets various standards used in  
21 California courts to determine if speech concerns an issue of public interest. For instance, in  
22 *Nygård, Inc. v. Uusi-Kerttula* an employer sued a former employee for statements about working  
23 conditions that he made in a magazine interview. The court evaluated if the statements  
24 concerned an issue of public interest. *Nygård* surveyed California case law and concluded “these  
25 cases and the legislative history that discusses them suggest that ‘an issue of public interest’

26  
27 <sup>99</sup> 212 Cal. App. 4th 551, 561 (2012).

<sup>100</sup> *Id.* at 562.

<sup>101</sup> Cal. Code Civ. Proc. § 425.16(e)(3).

<sup>102</sup> *Young*, 212 Cal. App. 4th at 559.

1 within the meaning of [§ 425.16(e)(3)] is *any issue in which the public is interested*.<sup>103</sup> “[T]he  
2 issue need not be ‘significant’ to be protected by the anti-SLAPP statute—it is enough that it is  
3 one in which the public takes an interest.”<sup>104</sup> As the public did have an interest in the company’s  
4 working conditions, the statements were protected. Applied here, *Young*’s conclusions about the  
5 public interest about how conservators exercise sovereign powers indicates Howard’s  
6 qualifications and suitability to be a conservator were an issue of public concern.

7 *D.C. v. R.R.* concerned online threats against a teenager’s life based upon his sexual  
8 orientation. The court noted although publically accessible websites are public forums, “not  
9 every Web site post involves a public issue.”<sup>105</sup> *D.C.* summarized California case law, including  
10 *Nygård*, and developed a three part analysis to determine whether an issue of public interest is  
11 present. “A public issue is implicated if the subject of the statement or activity underlying the  
12 claim (1) was a person or entity in the public eye; (2) could affect large numbers of people  
13 beyond the direct participants; or (3) involved a topic of widespread, public interest.”<sup>106</sup> If the  
14 “issue is of interest to only a private group, organization, or community, the protected activity  
15 must occur in the context of an ongoing controversy, dispute, or discussion, such that its  
16 protection would encourage participation in matters of public significance.”<sup>107</sup> *D.C.* concluded  
17 the facts presented did not satisfy the standard for concerning a “public interest,” consequently  
18 excluding the online threats from anti-SLAPP protections.

19 The Welts’ speech is still protected using the *D.C.* test. Howard petitioned a New Jersey  
20 court to be appointed as Walter’s conservator. As *Young* indicates, this placed him in the public  
21 eye, satisfying *D.C.*’s first factor. Even if Howard was not in the public eye, meaning the issue  
22 is of interest “to only a private group, organization, or community,” there was an “ongoing  
23 controversy, dispute, or discussion,” specifically Howard’s qualifications and suitability to be  
24 appointed Walter’s conservator by a New Jersey court. Protecting the Welts’ speech concerning  
25 this dispute “would encourage participation in matters of public significance” because of

26 <sup>103</sup> *Nygård*, 159 Cal. App. 4th at 1042 (emphasis in original).

27 <sup>104</sup> *Id.*

28 <sup>105</sup> 182 Cal. App. 4th 1190, 1226 (2010).

<sup>106</sup> *Id.* at 1226.

<sup>107</sup> *Id.*



1 *Young*'s analysis noting the public's interest in how conservators exercise a state's sovereign  
2 power. If those discussing a conservator's qualifications, suitability, or acts after appointment  
3 are outside anti-SLAPP protections, public discourse is inhibited.

4 *Weinberg v. Feisel* created the five factor test that *Piping Rock Partners* cited.<sup>108</sup>  
5 Weinberg sued Feisel "for libel, slander, and intentional infliction of emotional distress after  
6 defendant told others that plaintiff had stolen a valuable collector's item from him."<sup>109</sup> Feisel  
7 moved to dismiss, arguing his speech concerned a matter of public interest because it deterred  
8 crime.<sup>110</sup> The court created the five part test and concluded, "[u]nder the circumstances, the fact  
9 that defendant accused plaintiff of criminal conduct did not make the accusations a matter of  
10 public interest."<sup>111</sup> The "defendant did not report his suspicions to law enforcement, and there is  
11 no evidence that he intended to pursue civil charges against plaintiff."<sup>112</sup> The court characterized  
12 the defendant's speech as "a private campaign, so to speak, to discredit plaintiff in the eyes of a  
13 relatively small group of fellow collectors."<sup>113</sup> As there was no allegation "that plaintiff is a  
14 public figure or that he has thrust himself into any public issue, defendant's accusations related  
15 to what in effect was a private matter."<sup>114</sup>

16 *Weinberg* also protects the Welts' website. First, as *Young* described, the sovereign  
17 powers a conservator exercises are not a mere curiosity. A conservator uses those powers to take  
18 involuntary control over another person's life. *Young*'s description of a conservator's power also  
19 satisfies *Weinberg*'s second factor that the issue "should be something of concern to a substantial  
20 number of people...."<sup>115</sup> Third, there is a close relationship between the public interest in the  
21 qualifications and suitability of conservators and the Welts' speech addressing Howard's own  
22 qualifications and suitability. Fourth, the Welts' speech is directed at the public interest by  
23 discussing Howard's qualifications and suitability and searching for information on that topic so  
24

25 <sup>108</sup> 110 Cal. App. 4th 1122, 1132-33 (2003).

26 <sup>109</sup> *Id.* at 1126.

27 <sup>110</sup> *Id.*

28 <sup>111</sup> *Id.* at 1127.

<sup>112</sup> *Id.* at 1126-27.

<sup>113</sup> *Id.* at 1127.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1132.

1 as to provide it to the New Jersey court that considered Howard's petition. Fifth, and finally,  
2 Howard put his qualifications and suitability to be a conservator in dispute by petitioning the  
3 New Jersey court. The Welts then spoke on that topic.

4 California's varying standards for determining whether speech addresses an issue of  
5 public concern all indicate the Welts' speech was protected because Howard's qualifications and  
6 suitability to be Walter's conservator are very much issues of public concern.

7 **IV. The Shapiros' do not meet their burden of proof.**

8 The Welts met their burden to demonstrate the speech on the website is within NRS  
9 41.637(3) and NRS 41.637(4)'s definitions. The burden of proof now shifts to the Shapiros. The  
10 court must determine "whether the plaintiff has established by clear and convincing evidence a  
11 probability of prevailing on the claim."<sup>116</sup> "[A] plaintiff opposing an anti-SLAPP motion cannot  
12 rely on allegations in the complaint, but must set forth evidence that would be admissible at  
13 trial."<sup>117</sup>

14 **a. There is no probability of success for Jenna Shapiro's claims.**

15 The only statement on the Welts' website about Jenna Shapiro was that she is married to  
16 Howard. Neither the complaint nor the Shapiros' opposition argues that factual statement is  
17 inaccurate. Having offered no evidence, let alone clear and convincing evidence, Jenna has not  
18 demonstrated a probability of success on her claims.

19 **a. There is no probability of success for Howard Shapiro's defamation claims.**

20 The complaint separately alleges both defamation and defamation per se.<sup>118</sup> The court  
21 agrees with all of the Welts' arguments. Howard has not met his burden of proof to demonstrate  
22 a probability of success on his defamation cause of action.

23  
24 <sup>116</sup> NRS 41.660(3)(b).

<sup>117</sup> *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 151 Cal.App.4th 688, 699 (2007).

25 <sup>118</sup> They are actually just one cause of action. See *Munda v. Summerlin Life & Health Ins. Co.*,  
26 127 Nev. 918, 922, 267 P.3d 771, 773 n.3 (2011) ("In their complaint, the Mundas pleaded  
27 negligence per se as a separate cause of action from negligence; however, it is not a separate  
28 cause of action, but rather a method of establishing the duty and breach elements of a negligence  
claim."); *Cervantes v. Health Plan of Nev., Inc.*, 127 Nev. 789, 793, 263 P.3d 261, 264 (2011)  
("Although Cervantes pleaded negligence and negligence per se in her complaint as separate  
causes of action, they are in reality only one cause of action. Negligence per se is only a method  
of establishing the duty and breach elements of a negligence claim.").

1                   **i. The Welts' speech was absolutely privileged.**

2           Nevada has adopted and applied the litigation privilege. "We conclude that the absolute  
3 privilege affords parties to litigation the same protection from liability that exists for an attorney  
4 for defamatory statements made during, or in anticipation of, judicial proceedings."<sup>119</sup> Applied  
5 here, the Welts were participants in the New Jersey proceedings concerning their relative,  
6 Walter.

7           The complaint acknowledges the Welts' website was created after Howard petitioned to  
8 be appointed Walter's conservator. Consequently, the statements on the website were made in  
9 the course of New Jersey judicial proceedings by participants to that proceeding. The statements  
10 were intended to achieve, and logically relate to, the object of that litigation: objecting to  
11 Howard's qualifications and suitability to be Walter's conservator.

12           The website's intent was also to locate potential witnesses and evidence relevant to the  
13 question qualification and suitability question before the New Jersey court. The website first  
14 specifically identifies this Howard Shapiro as opposed to other Howard Shapiros in the country.  
15 It then states "[a]ll persons with knowledge of Howard A. Shapiro's actions against Walter  
16 Shapiro or other illegal acts committed by Howard Shapiro are encouraged to appear in court.  
17 You many also submit information via email."<sup>120</sup>

18           If the attorneys to the New Jersey matter had posted a website identifying Howard and  
19 asking potential witnesses to come forward, it would be absolutely privileged. In modern times,  
20 posting a website is indistinguishable from mailing letters to Howard's known associates,  
21 identifying him and asking these individuals if they have any information relevant to his  
22 qualifications and suitability. The Supreme Court of Nevada has previously concluded if the  
23 statement would be privileged if issued by a lawyer, it is privileged if issued by a party.<sup>121</sup>  
24 "[T]here is no good reason to distinguish between communications between lawyers and  
25 nonlawyers."<sup>122</sup>

26 <sup>119</sup> *Clark Cnty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 378, 213 P.3d 496, 499  
27 (2009).

28 <sup>120</sup> Exhibit 1 to Complaint, at 2.

<sup>121</sup> *Clark Cnty. Sch. Dist.*, 125 Nev. at 384, 213 P.3d at 503.

<sup>122</sup> *Id.* at 383, 213 P.3d at 502.

1 Nevada has limited its general litigation privilege in only one, narrow area when  
2 statements are made to the media. *Jacobs v. Adelson* concerned a statement a defendant made to  
3 a media outlet in response to coverage of a complaint against him.<sup>123</sup> “We adopt the majority  
4 view that communications made to the media in an extrajudicial setting are not absolutely  
5 privileged, at least when the media holds no more significant interest in the litigation than the  
6 general public.”<sup>124</sup> This exception does not apply here. The Welts’ statements to their website  
7 were not made to a media outlet in an extrajudicial setting. The statements were instead made in  
8 direct relation to the New Jersey case in an attempt to locate relevant evidence and witnesses.

9 Applied here, the speech that is the basis for the Shapiros’ complaint was absolutely  
10 privileged as communications made in the course of litigation. The website seeks to identify  
11 potential witnesses and evidence that may be relevant to the New Jersey proceeding. The  
12 website is not a statement issued to media sources, but instead seeks out those who have  
13 information relevant to Howard’s qualifications and suitability. Consequently, the statements are  
14 absolutely privileged, preventing Howard from demonstrating a probability of success on the  
15 merits of his defamation cause of action.

16 **ii. Mr. Shapiro sought to be appointed as a public official and must show**  
17 **clear and convincing evidence of actual malice.**

18 The Welts alternatively argue that Howard cannot demonstrate a probability of success  
19 on the merits of his defamation claim because he was a public official. The Supreme Court of  
20 Nevada has adopted “the *Gertz* test for determining whether a person is a general-purpose or a  
21 limited-purpose public figure.”<sup>125</sup> *Gertz* “reiterated that the *New York Times* standard applies  
22 only to public officials and public figure plaintiffs....”<sup>126</sup> *The New York Times Company v.*  
23 *Sullivan* standard is quite high for public officials to sue for defamation.

24 To promote free criticism of public officials, and avoid any chilling effect from  
25 the threat of a defamation action, the High Court concluded that a defendant could  
26 not be held liable for damages in a defamation action involving a public official

27 <sup>123</sup> 130 Nev. Adv. Op. 44, 325 P.3d 1282 (2014).

<sup>124</sup> *Id.* at 1284.

<sup>125</sup> *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 720, 57 P.3d 82, 91 (2002).

<sup>126</sup> *Id.* at 719, 57 P.3d at 91 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343-47 (1974)).

1 plaintiff unless “actual malice” is alleged and proven by clear and convincing  
evidence.<sup>127</sup>

2 By applying to be Walter’s court-appointed conservator, Howard voluntarily subjected  
3 himself to the public official standard. As previously discussed, *Young v. CBS Broad., Inc.*  
4 determined that by becoming a conservator, the person “became an agent of the state with the  
5 power to interfere in the personal interests of a private citizen to whom she was not related and  
6 without that citizen’s consent.”<sup>128</sup> In that circumstance, a conservator is a public official subject  
7 to the actual malice standard. “A person holding these sovereign powers over another unrelated  
8 person and using them for compensation is subject to the public’s independent interest in her  
9 performance, and warrants public scrutiny beyond that occasioned by the controversy with  
10 Mann.”<sup>129</sup> “A person such as [the conservator] who by court appointment exercises that power  
11 for the benefit of a nonrelative and for compensation thus does so as a public official for  
12 purposes of defamation liability.”<sup>130</sup>

13 Applied here, Howard sought the same type of control over Walter as was at issue in  
14 *Young*. He sought to use the power and authority of the State of New Jersey to take control of  
15 Walter’s personal and financial affairs. By seeking this power, Howard subjected himself to the  
16 same type of public scrutiny that was invited in *Young*.

17 The Supreme Court of Idaho performed a somewhat similar analysis in *Bandelin v.*  
18 *Pietsch*.<sup>131</sup> A lawyer and former state legislator was appointed as the guardian of an incompetent  
19 person. The lawyer was later prosecuted for contempt due to what the district court considered  
20 negligence in his handling of the conservatorship. This was reported in the local news and the  
21 lawyer subsequently sued the paper for defamation.

22 The court concluded the lawyer, as a guardian, was a public figure. The guardian could  
23 not “maintain that he is not a public figure and was just an attorney handling the probate affairs  
24 of a client. He was rather the court appointed guardian, a pivotal figure in the controversy  
25

26 <sup>127</sup> *Id.* at 718-19, 57 P.3d at 90 (citing 376 U.S. 254, 279-80 (1964)).

27 <sup>128</sup> *Young*, 212 Cal. App. 4th at 561.

28 <sup>129</sup> *Id.* at 562.

<sup>130</sup> *Id.*

<sup>131</sup> 563 P.2d 395 (Idaho 1977).

1 regarding the accounting of the estate that gave rise to the defamation and invasion of privacy  
2 actions.”<sup>132</sup> As a public figure the lawyer was required to show actual malice, but could not.

3 Whether as a public official or figure, Howard must show the statements on the Welts’  
4 website were made with actual malice.<sup>133</sup> To demonstrate a probability of success on the merits  
5 of his defamation claim, Howard had to provide actual, clear and convincing evidence that the  
6 Welts knew their statements were false or had serious doubts about the veracity of those  
7 statements and published them anyway. Howard submitted no such evidence.

8 The defamation cause of action arises solely from the website’s statements.<sup>134</sup> The  
9 complaint specifically lists the factual statements Howard believes were defamatory<sup>135</sup> and  
10 attached as Exhibit 1 a printout of the website. The website lists Howard’s contact information.  
11 The complaint does not allege these statements of fact are false. The website then states a  
12 background check of Howard Shapiro revealed certain information. The Welts’ provided the  
13 background check upon which this statement relied.<sup>136</sup> The website accurately stated the  
14 information contained in the background check. The website also accurately noted the  
15 foreclosure status of Howard’s home.<sup>137</sup>

16 The website then states Walter loaned \$100,000 to Howard and executed a power of  
17 attorney in his favor. The complaint does not deny the loan and the power of attorney is attached  
18 to the New Jersey petition. The website also lists acts that were reasonably believed to be taken  
19 by Howard concerning Walter that would be inconsistent with the acts of a conservator. As the  
20 website notes, these statements arose from conversations with two witnesses.

21 Howard sought a court-appointed position that would make him a public official. As  
22 someone seeking to be a public official, he must demonstrate actual malice to show a probability  
23 of success on his defamation claim. He has not presented such evidence.

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25  
26 <sup>132</sup> *Id.* at 398

27 <sup>133</sup> *Pegasus*, 118 Nev. at 722, 57 P.3d at 92-93.

28 <sup>134</sup> Complaint at ¶ 25.

<sup>135</sup> *Id.* at ¶ 17.

<sup>136</sup> Attached as Exhibit E to motion.

<sup>137</sup> *Lis Pendens* attached as Exhibit F to motion.

1                                    **iii. Mr. Shapiro is a limited-purpose public figure who lacks clear and**  
2                                    **convincing evidence of actual malice.**

3            The Welts' third alternative argument is Howard is a limited-purpose public figure as to  
4 the New Jersey conservatorship proceedings. "A limited-purpose public figure is a person who  
5 voluntarily injects himself or is thrust into a particular public controversy or public concern, and  
6 thereby becomes a public figure for a limited range of issues. The test for determining whether  
7 someone is a limited public figure includes examining whether a person's role in a matter of  
8 public concern is voluntary and prominent."<sup>138</sup>

9            "Once the plaintiff is deemed a limited-purpose public figure, the plaintiff bears the  
10 burden of proving that the defamatory statement was made with actual malice, rather than mere  
11 negligence. This is to ensure that speech that involves matters of public concern enjoys  
12 appropriate constitutional protection."<sup>139</sup> "Whether a plaintiff is a limited-purpose public figure  
13 is a question of law...."<sup>140</sup>

14            Applied here, Howard voluntarily petitioned a New Jersey court to appoint him as  
15 Walter's conservator. This put his qualifications and suitability for that position at issue. The  
16 statements on the website were explicitly designed to seek and obtain information that support  
17 the Welts' position in that litigation: Howard was not qualified or suitable. Howard made  
18 himself a limited-purpose public figure, but again has not presented clear and convincing  
19 evidence of actual malice to create a probability of success on his defamation claim.

20                                    **b. Howard concedes other causes of action cannot prevail.**

21            The Shapiros' complaint also alleged causes of action for extortion, civil conspiracy,  
22 "fraud," and punitive damages. The Shapiros' opposition did not address or provide evidence  
23 concerning them. The court concludes the Shapiros cannot provide clear and convincing  
24 evidence demonstrating a probability of success on these causes of action for the reasons  
25 discussed in the Welts' briefing.<sup>141</sup>

26  
27 <sup>138</sup> *Pegasus*, 118 Nev. at 720, 57 P.3d at 91.

28 <sup>139</sup> *Bongiovi v. Sullivan*, 122 Nev. 556, 572, 138 P.3d 433, 445 (2006).

<sup>140</sup> *Id.*

<sup>141</sup> EDCR 2.20(e).

1     **V.     The Welts are awarded their attorneys' fees, costs, and discretionary relief.**

2             If an anti-SLAPP special motion to dismiss is granted, the court "shall award reasonable  
3 costs and attorney's fees to the person against whom the action was brought...."<sup>142</sup> The Welts  
4 are directed to submit a memorandum of costs and attorneys' fees with appropriate supporting  
5 documentation.

6             The Welts also request \$10,000 each from Howard Shapiro and a separate \$10,000 each  
7 from Jenna Shapiro. When an anti-SLAPP motion is granted, the district court "may award, in  
8 addition to reasonable costs and attorney's fees ..., an amount of up to \$10,000 to the person  
9 against whom the action was brought."<sup>143</sup> Texas has a similar statute indicating the purpose and  
10 amount of this discretionary award should be "sufficient to deter the party who brought the legal  
11 action from bringing similar actions described in this chapter."<sup>144</sup>

12             The court concludes the relief the Welts' request is appropriate in this situation to deter  
13 the Shapiros from bringing similar actions in the future. These awards are merited by the facts  
14 that led to this case. The Welts came to the assistance of an elderly family member who may be  
15 suffering from mental decline and who may be vulnerable to exploitation. Undisputed  
16 documentation submitted with their motion indicates they were not the only ones concerned  
17 about Howard's qualifications and suitability to be Walter's conservator. Yet, their act of  
18 kindness was met only with litigation both in New Jersey and Nevada. The Shapiros attempted  
19 to use litigation to intimidate the Welts into silence. This action is precisely what the Nevada  
20 Legislature sought to prevent via its anti-SLAPP statutes.

21             Per NRS 41.660(1)(b), the court exercises its discretion and awards \$10,000 each to  
22 Glenn Welt, Rhoda Welt, Lynn Welt, and Michele Welt from Howard Shapiro and awards a  
23 separate \$10,000 each to Glenn Welt, Rhoda Welt, Lynn Welt, and Michele Welt from Jenna  
24 Shapiro.

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26  
27             <sup>142</sup> NRS 41.660(1)(a).

28             <sup>143</sup> NRS 41.660(1)(b).

<sup>144</sup> Texas Civil Practice and Remedies Code § 27.009(a)(2).



1 The Second Amended Order Granting Glenn Welt, Rhoda Welt, Lynn Welt &  
2 Michele Welt's Renewed Motion to Dismiss in A-14-706566-C is DATED this 17 day of  
3 OCT, 2017.

4  
5 Nancy L. Alf  
6 DISTRICT JUDGE AL

7 Submitted by:

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*Approval declined July 24, 2017*

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