IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON T. SMITH, Appellant, vs. KATY ZILVERBERG; AND VICTORIA EAGAN, Respondents.	Electronically Filed Jun 19 2020 05:05 p.m. Elizabeth A. Brown Clerk of Supreme Court Case Nos. 80154 / 80348

RESPONDENTS' ANSWERING BRIEF

Appeal from Eighth Judicial District Court, Clark County

The Honorable Jim Crockett, District Judge

District Court Case No. A-19-798171-C

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in Nevada Rules of Appellate Procedure ("NRAP") Rule 26.1(a) that must be disclosed. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

Respondents Katy Zilverberg and Victoria Eagan are individuals residing in Clark County, Nevada.

In district court, Margaret A. McLetchie, Alina M. Shell, and Leo S. Wolpert, of McLetchie Law represented Ms. Zilverberg and Ms. Eagan. Ms. McLetchie, Ms. Shell, and Mr. Wolpert of McLetchie Law represent Ms. Zilverberg and Ms. Eagan on appeal.

DATED this 19th day of June, 2020.

/s/ *Margaret A. McLetchie*
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I. ISSUES PRESENTED FOR REVIEW

A. Whether the district court correctly held that Respondents met their initial burden of proof under Nevada Revised Statutes §§ 41.660(3)(a) and 41.637(4). Specifically, whether:

1. Respondents demonstrated, by a preponderance of the evidence,[1] that they were sued for making communications that were "truthful or [were] made without knowledge of [their] falsehood" where they submitted over a dozen authenticated, admissible exhibits demonstrating the bases for their beliefs in the veracity of their statements; and,

2. The district court correctly applied the *Shapiro* factors in holding that Respondents demonstrated, by a preponderance of the evidence, that they were sued for making communications "in direct connection with an issue of public interest" where Appellant, by his own admission, is a public figure in their shared business community and the general public.

B. Whether the district court correctly held that Appellant did not demonstrate with *prima facie* evidence a probability of prevailing on his defamation claim (as well as his claims for conspiracy and injunctive relief, which are predicated on his defamation claim) where Appellant provided no evidence of falsity or actual malice other than a self-serving declaration.

C. Whether the district court abused its discretion in awarding Respondents all requested attorneys' fees and costs where all *Brunzell* factors weighed in favor of Respondents and all fees and costs were supported with admissible evidence.

D. Whether the district court abused its discretion in awarding Respondents $20,000.00 in discretionary awards under Nevada

[1] Contrary to Mr. Smith's unsupported claims (Opening Brief ("OB"), pp. 1–2), Respondents' evidence is not false; it was authenticated and Mr. Smith did not object. Other than one exhibit, the district court considered the evidence.

Revised Statutes § 41.670 where the lawsuit's lack of merit was obvious and it clearly targeted speech.

II. STATEMENT OF THE CASE

This case is about one thing only: Appellant Jason Smith's unlawful attempt to enlist the district court in his crusade to silence Respondents Katy Zilverberg and Victoria Eagan ("Respondents") after they spoke up about his bullying behavior in their shared business community. Filing this lawsuit itself was an act of bullying by Mr. Smith: while his complaint lacked merit, he hoped to use his superior financial position to litigate Ms. Zilverberg and Ms. Eagan into silence—a classic strategic lawsuit against public participation ("SLAPP").[2]

Per his complaint, Mr. Smith is a "well-known public figure;" he has been dubbed "America's #1 thrifter;" he tours America teaching others to buy and sell online; he has appeared on Spike TV's Thrift Hunters and hosts multiple thrifting shows on YouTube. (1JA2.)[3] He alleges he built a reputation in the thrifting

[2] "A SLAPP lawsuit is characterized as 'a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights.' The hallmark of a SLAPP lawsuit is that it is filed to obtain a financial advantage over one's adversary by increasing litigation costs until the adversary's case is weakened or abandoned." *John v. Douglas Cty. Sch. Dist.*, 125 Nev. 746, 752, 219 P.3d 1276, 1280 (2009) (citations omitted).

[3] Throughout this Answering Brief, citations to the Joint Appendix take the form of [Volume]JA[page]; *e.g.*, 1JA2 corresponds to Vol. 1, p. 2 of the Joint Appendix.

community by "providing advice and expertise to individuals relating to thrifting and buying and selling online." (1JA2–3.) However, as reflected by the evidence in district court, Mr. Smith's reputation in the thrifting community was not what it seemed. Hushed complaints about his anti-social and bullying behavior abounded in the thrifting community, but rarely saw the light of day due to Mr. Smith's well-earned reputation for retaliating against critics.

In June 2018, Ms. Zilverberg posted a YouTube video entitled "Jason T Smith is an abusive bully" (the "YouTube Video") in which she warned the thrifting community and the general public that Mr. Smith engaged in hypocritical behavior, heaping abuse on his perceived enemies and intimidating them into silence in various ways. (*See* 1JA25; 1JA38–42; 2JA268–70.) In 2019, Ms. Eagan posted on Facebook that others had been harassed by Mr. Smith to the point that they sought the authorities' intervention. (*See* 1JA25; 1JA42–43; 2JA272–73.)

Ms. Zilverberg and Ms. Eagan met the first prong of Nevada's anti-SLAPP analysis by "establish[ing], by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of … the right to free speech in direct connection with an issue of public concern." Nev. Rev. Stat. § 41.660(3)(a). Their statements were all "good faith communications" under Nevada Revised Statutes § 41.637—*i.e.*, either true, made without knowledge of their falsehood, or

opinions[4] incapable of being defamatory—and do not falsely imply anything. The instant SLAPP vindicates Ms. Zilverberg's and Ms. Eagan's contentions that Mr. Smith will go to great lengths—including abusing the legal process—to retaliate against those who speak out about his behavior. Exemplifying his suit's baselessness, Mr. Smith never evidenced any communication in which either Ms. Zilverberg or Ms. Eagan claims he had a criminal record; even if they made such a communication, they had reason to believe in its truth. (*See* 1JA42–43; 2JA271–72.) Furthermore, if saying someone is a bully were a statement of fact—rather than a non-actionable matter of opinion—the evidence presented by Ms. Eagan and Ms. Zilverberg would show its veracity. (*See, e.g.*, 2JA364–65.)

The district court also correctly determined that the communications were "in direct connection with an issue of public concern" under Nevada Revised Statutes § 41.660(3)(a). Far from ignoring *Pope v. Fellhauer*, 2019 WL 1313365, 437 P. 3d 171 (Nev. March 21, 2019) as claimed by Mr. Smith (OB, p. 2), the district court correctly distinguished *Pope* from this matter and applied the *Shapiro* factors consistently with this Court's precedent to determine that Ms. Zilverberg and Ms. Eagan met their burden under the first prong of the anti-SLAPP analysis. (*See*

[4] "[O]pinions about public matters stated in public fora … constitute good-faith communications under Nevada's anti-SLAPP statutes." *Abrams v. Sanson*, 136 Nev. Adv. Op. 9, 458 P.3d 1062, 1068 (2020).

2JA353–55; 3JA500–03.) Mr. Smith's status as a public figure does not, as he claims, pertain only to "the malice requirement under a defamation per se claim." (OB, p. 2.) Rather, in line with what would later become this Court's explicit mandate[5], the district court correctly determined Mr. Smith's status as a public figure is material to whether the communications at issue are protected under the first prong of Nevada's anti-SLAPP analysis. (*See* 3JA500–01.) The evidence also reflects that the other *Shapiro* factors weighed in Respondents' favor; for instance, their communications furthered an ongoing discussion on a topic that was of interest to a substantial number of people. (*See id.*)

Respondents met their burden under the first prong of the anti-SLAPP analysis; the burden then shifted to Mr. Smith. *See* Nev. Rev. Stat. § 41.660(3)(b). Contrary to his arguments on appeal, Mr. Smith failed to demonstrate "with prima facie evidence a probability of prevailing on the claim." (OB., p. 4.) The *only* piece of evidence Mr. Smith submitted was a self-serving affidavit that, as the district court held, was insufficient—if not completely inadmissible—to demonstrate actual

[5] "And, because the standard for 'actual malice' is essentially the same as the test for 'good faith' in prong one, only differing in the party with whom the burden of proof lies, it is appropriate to use the inquiry in defamation cases for determining the truthfulness of a statement under prong one." *Rosen v. Tarkanian*, 135 Nev. 436, 441, 453 P.3d 1220, 1224 (2019).

malice. (*See* 2JA358–59;[6] 3JA503–05.) Based on his complaint, Mr. Smith is a public figure. Actual malice is thus an essential element of his defamation claim. (3JA504, ¶¶ 66–67.) Because Mr. Smith did not provide *prima facie* evidence of actual malice, he failed to meet his burden under the second prong of anti-SLAPP analysis, and the district court properly dismissed his suit. (3JA503–05.) Even if he were not a public figure, Mr. Smith failed to provide *prima facie* evidence of other elements of defamation, such as falsity, fault amounting to negligence, or damages.[7]

Affirming the district court would not, as Mr. Smith hyperbolically claims, "effectively destroy well-settled Nevada law and turn Tort law as it is known in the United States upside down." (OB, p. 3.) The district court followed the letter of Nevada's anti-SLAPP statute and vindicated its purpose in dismissing Mr. Smith's meritless suit and imposing fees, costs, and a statutory award against him. While Mr. Smith argues that "the court must still review [a fees] motion for reasonableness," (OB, p. 5) the district court did exactly that. (*See* 4JA666–68.) Further, the district court did not "further misappl[y] NRS 46.270 [sic]" (OB, p. 5) when it concluded Ms. Zilverberg and Ms. Eagan were entitled to $10,000 each in statutory awards

[6] "[THE COURT:] The affidavit of Mr. Smith was grossly insufficient to make this prima facie showing there's a probability of prevailing on the merits." (2JA359.)

[7] "THE COURT: The problem is, it's not defamatory per se. You would have to demonstrate if there was actual damage to the Plaintiff." (2JA356.)

under Nevada Revised Statutes § 41.670. Rather, the district court recognized this case for what it was—a frivolous lawsuit prosecuted in a haphazard fashion—and properly exercised its discretion to deter such cases by awarding $10,000.00 each to Ms. Zilverberg and Ms. Eagan. (4JA668–69.)

In short, Mr. Smith is not entitled to have the courts silence his detractors when they subject his ugly behavior in the thrifting community to public scrutiny. Mr. Smith gambled on Ms. Zilverberg and Ms. Eagan backing down to his baseless legal threats and lost. Nevada's anti-SLAPP statute protects speakers from precisely this type of lawsuit, and now he must pay the price. The district court's decisions must be affirmed in their entirety.

III. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

Mr. Smith's Statement of Facts—particularly his characterization of the underlying dispute in this matter—is an attempt to mislead this Court and requires a response. As the evidence overwhelmingly indicates—and the district court correctly held—the instant matter is a paradigmatic SLAPP: a meritless lawsuit aimed at silencing and punishing critics for expressing negative opinions and revealing unflattering facts about an issue of public concern.

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A. The Underlying Dispute.

This is indeed "factually a very simple case."[8] (OB, p. 5.) Mr. Smith is, as claimed, "a long-time and well-known member of the thrifting community, a community of individuals who buy and sell used goods online," who has "built his reputation" and "established a highly successful business" that is "based on his well-known brand name and reputation as a knowledgeable and successful thrifter." (*Id.* (citations omitted).)

Beneath the surface of Mr. Smith's "brand name and reputation" is an ugly truth: that Mr. Smith built his reputation despite repeatedly engaging in anti-social, bullying behavior toward his fellow thrifters. (*See generally* 1JA37–44; 2JA268–70.) Worse, Mr. Smith maintained his reputation by intimidating his critics into silence and retaliating against them for speaking up about his behavior, including by revealing the names of his pseudonymous detractors and subjecting them to

[8] Mr. Smith argues "there was no discovery allowed or even an evidentiary hearing." (OB, p. 5; *see also id.*, p. 10.) Mr. Smith did not move t for discovery or an evidentiary hearing at all, much less make a showing that "information necessary … is in the possession of another party or a third party and is not reasonably available without discovery" under Nevada Revised Statutes § 41.660(4). To the extent that Mr. Smith argues that discovery should have been allowed or an evidentiary hearing conducted, he waived such argument. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.") (citations omitted).

harassment. (1JA39–40 (citing 1JA155; 1JA157; 1JA159; 1JA162; 1JA164; 1JA168); 2JA268–69.) Indeed, Mr. Smith attempted to have his enemies banned from online retailing events (1JA40–41 (citing 1JA58; 1JA170–76; 1JA178–79; 1JA181–82); 2JA269–70), and engaged in online harassment and bullying severe enough to cause his victims to contemplate suicide. (1JA41–42 (citing 1JA86; 1JA88; 1JA184; 1JA186–96); 2JA270.) As Mr. Smith built his thrifting empire, his misdeeds were an "open secret" in the community, only spoken of in whispers due to justified fear of Mr. Smith's reprisals (1JA25), leaving vulnerable members of the thrifting community oblivious to Mr. Smith's abusive tendencies.

Respondents Katy Zilverberg and Victoria Eagan are, as Mr. Smith claims, also members of the thrifting community. (OB, p. 5.) Ms. Zilverberg was an administrator in Mr. Smith's Facebook group and Ms. Eagan was a friend of Mr. Smith. (*Id*., pp. 5–6.) In these positions, they witnessed Mr. Smith's abusive behavior toward others in the thrifting community. (*See, e.g.*, 1JA57; 1JA63.) After Ms. Eagan and Ms. Zilverberg began a relationship with each other (OB., p. 6), they became Mr. Smith's targets. Far from merely expressing his displeasure at Ms. Eagan leaving her then-husband—also Mr. Smith's friend (*id*.)—Mr. Smith became upset that he was not the first person to be told and that Respondents' relationship might somehow damage his business. (2JA296.)

Contrary to Mr. Smith's baseless (and irrelevant) contentions (OB, pp. 7, 9), the evidence demonstrates that Ms. Zilverberg and Ms. Eagan have never been his competitors and thus stood to gain nothing financially by making their voices heard. (2JA264–66 (citing 2JA293–98; 2JA323–26).) Indeed, Respondents and Mr. Smith do not sell similar types of thrifted items nor do Respondents charge for their educational or video content; if Mr. Smith were to quit the community it would have zero impact—positive or negative—on either of Respondents' businesses. (2JA294–96; 2JA324–26.) Ms. Zilverberg and Ms. Eagan did not begin "a campaign against Smith to injure his business and smear his reputation." (OB, p. 6.) Rather, they decided enough was enough and chose to risk their business by warning the thrifting community about how Mr. Smith, one of its most visible and venerated members, behaved when he thought he could intimidate his victims into silence.

In the YouTube Video, Ms. Zilverberg expressed her negative opinions of Mr. Smith and his behavior in the thrifting community. (*See generally* 1JA37–42; 2JA268–70.) While Mr. Smith characterizes Ms. Zilverberg's statements as false, the district court correctly recognized that they are all either true, made without knowledge of their falsehood, or non-actionable opinions. (3JA502–03.)

On or about April 25, 2019, Ms. Eagan posted on Facebook that multiple restraining orders were sent by others who had similar negative experiences with

Mr. Smith, and said post was "liked" by Ms. Zilverberg. (1JA42–43; 2JA272–73.) Contrary to Mr. Smith's argument (OB., p. 7), Ms. Eagan's statements were truthful or made without knowledge of falsehood—the evidence reflects that Ms. Eagan was informed of others' attempts to file restraining orders against Mr. Smith or otherwise have authorities intervene to stop Mr. Smith's abuse. (*See* 1JA42–43 (citing 1JA4; 1JA63–64; 1JA113; 1JA198–99); 2JA272–73.)

While Mr. Smith's harassment history is verified by the evidence submitted to the district court, Mr. Smith failed to point to any statement made by Ms. Zilverberg or Ms. Eagan in which they indicated that he had "a criminal record." (OB, p. 7.) To demonstrate that—if they were ever made at all—statements regarding Mr. Smith's "criminal record" were made without knowledge of their falsehood, Ms. Zilverberg and Ms. Eagan presented a background check of a "Jason Todd Smith." (OB, p. 8; *see also* 1JA201–09.) Assuming, *arguendo*, that Ms. Zilverberg or Ms. Eagan stated Mr. Smith has a criminal record, any such alleged statement is substantially true or made without knowledge of its falsehood regardless of how much of the background check pertains to Mr. Smith or a different, identically-named individual. This is because Mr. Smith himself bragged about his criminal past. (1JA44 (citing 1JA211).) Thus, the "gist" or "sting" of any such statements (assuming they exist)—that Mr. Smith has engaged in past criminal

behavior—is substantially true by Mr. Smith's own admission.

While nobody disputes that the parties dislike each other—not uncommon in litigation—Respondents' public statements go far beyond airing a private dispute. Rather, Respondents performed a public service by warning the thrifting community about Mr. Smith. The district court recognized this. Its holding should be affirmed.

B. The Anti-SLAPP Motion to Dismiss.

Mr. Smith filed his Complaint on July 9, 2019. After retaining the undersigned, Respondents filed their special anti-SLAPP Motion to Dismiss and multiple exhibits (the "Motion") on September 6, 2019. (OB, pp. 9–10; 1JA20–211.) Mr. Smith filed his opposition and lone exhibit on September 20, 2019.[9] (*See* 2JA218–43.) Respondents filed a reply on September 26, 2019. (2JA252–345.)

While Respondents successfully argued their statements were protected and that Mr. Smith could not show a probability of prevailing on the merits of his claims, they did not, as Mr. Smith claims, submit "false statements as support for their anti-SLAPP Motion." (OB, p. 10.) The evidence produced by Respondents is not false and was authenticated. (*See* 1JA58–60; 2JA294; 2JA297–99; 2JA324.) Furthermore, Mr. Smith failed to make any evidentiary objections in district court. While

[9] The district court declined to construe Mr. Smith's opposition as untimely. (*See* 3JA499, n.1.)

Respondents did not deny that they made the YouTube Video and the Facebook post at issue in this matter, they did deny saying that Mr. Smith has "a criminal record" and Mr. Smith never produced any specific statement supporting this contention. (*See, e.g.*, 1JA42–44; 2JA271–72; 2JA285, n.9.)

The district court heard the Motion on October 3, 2019, and entered a written order granting it on October 31, 2019. (OB, p. 10; *see also* 3JA495–507.)[10] Mr. Smith grossly mischaracterizes the district court's findings, stating that "the district court relied on evidence on [sic] which the district court admitted was false or unsubstantiated, without allowing an evidentiary hearing or discovery." (*Id*.) The transcript reflects the court recognized that Ms. Zilverberg and Ms. Eagan "presented very comprehensive information in the form of admissible evidence as required by EDCR 2.21, with supporting affidavits and exhibits, to explain why they have said the things they did, why the things they said were stated in good faith in an effort to educate and alert the public community involved in this thrifting activity as to concerns they have about the integrity, honesty and tactics of Mr. Smith." (2JA348–49.) The district court contrasted Respondents' evidence with Mr. Smith's

[10] Mr. Smith contends that his "competing order"—omitted from the appendix and not before the Court—"accurately reflected the findings of fact and conclusions of law which occurred at the hearing" and that a "review of the transcript of the hearing will show the differences." (OB, p. 10.) Mr. Smith does not support this contention.

lone exhibit, a declaration "comprised almost entirely of what would be inadmissible conclusory statements about what he presumes to be … [Respondents'] intentions, motivations, state of mind, and inner most thoughts." (2JA349.) The district court admonished Mr. Smith for his affidavit's "entirely conclusory" statements regarding Respondents' developing "animosity and personal spite" toward him, which "offer[ed] nothing in the way of specific factual evidence that would lead the Court to make that conclusion, or would justify such an inference being made." (2JA350.) Further, "[t]he affidavit of Mr. Smith was grossly insufficient to make this prima facie showing there's a probability of prevailing on the merits." (2JA359.)

While the district court held one of Respondents' twenty exhibits inadmissible (*see* 2JA351; 3JA503, ¶ 57), Mr. Smith did not challenge the authenticity and admissibility of the remaining exhibits in district court.[11] As the district court noted, Mr. Smith's silence with regard to the remaining nineteen exhibits was damning.[12]

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[11] The only exhibit Mr. Smith contested was Exhibit 16, the background report for "Jason Todd Smith." (2JA250.)

[12] "[THE COURT:] And as to those items that were truthfully communicated, Mr. Smith just avoids dealing with them head on, he chooses to, ***since apparently he can't deny under oath they took place, he just doesn't mention those***. Instead, he focuses all of his attention on the errors in terms of the restraining order and criminal history. He doesn't deny he has a conversation with Miss Eagan where she says he accuses her of having reported to others he had a criminal history. She says, I never told anybody about his criminal history, but I can tell you that he told me he had a criminal history. So these are important considerations, Smith doesn't address it in

Mr. Smith never moved for discovery or for an evidentiary hearing, and has waived the ability to do so now. *See Old Aztec Mine, Inc.*, 97 Nev. at 52, 623 P.2d at 983.

Based on the overwhelming disparity of evidence, the district court held Ms. Zilverberg and Ms. Eagan met their burden under the first prong of the anti-SLAPP analysis and that Mr. Smith failed to meet his burden under the second prong, granting the Motion. (2JA355; 3JA500–07.)

C. Motion for Attorneys' Fees, Costs, and Statutory Award.

On October 17, 2019, Respondents filed a motion for attorney's fees, costs, and a statutory award pursuant to Nevada Revised Statutes § 41.670. (OB. p. 11; *see* 3JA421–69 (the "Fees Motion").) In addition to untimely moving the court to retax costs on October 22, 2019 (3JA470–76), Mr. Smith opposed the Fees Motion on October 31, 2019 (3JA482–91). On November 1, 2019, Respondents opposed the Motion to Retax Costs (3JA508–19) and supplemented the memorandum of costs. (3JA520–45.) On November 7, 2019, Respondents submitted a reply in support of the Fees Motion, along with supporting exhibits (3JA554–626.) The district court heard the motions on November 21, 2019, and, on December 20, 2019, noticed entry of a written order granting Respondents all requested attorneys' fees, costs, and a

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his effort to disqualify these statements as in good faith dealing with the matter of public interest, and therefore is entitled to protection of the anti-slap [sic] statute." (2JA360–61 (emphasis added).)

statutory award in the total amount of $89,002.53. (4JA662–70.)

While Mr. Smith argues that this order "did not reflect the proceedings" (OB, p. 11), he provided no transcript to support this contention.[13] In its order, the district court held that "all [the *Brunzell*] factors weigh in favor of awarding [Respondents] all their requested attorney's fees to date … and [Respondents] will be entitled to additional fees and costs associated with additional work." (4JA666.) The district court then went factor-by-factor, fully fleshing out why the requested fees and costs were reasonable and adequately supported. (4JA666–68.) Furthermore, the district court found that Mr. Smith's lawsuit "was brought and prosecuted … without reasonable basis in fact or law" and that an award of $10,000.00 to each defendant under Nevada Revised Statutes § 41.670(1) was "an appropriate sanction to deter future filing of SLAPP suits." (4JA669.)

IV. SUMMARY OF ARGUMENT

A "person who engages in a good faith communication in furtherance of … the right to free speech in direct connection with an issue of public concern ***is immune from any civil action*** for claims based upon the communication." Nev. Rev.

[13] Given that Mr. Smith fails to support his claim with a citation to the record, this Court need not consider it. *See Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 997, 860 P.2d 720, 725 (1993) ("This court need not consider the contentions of an appellant where the appellant's opening brief fails to cite to the record on appeal.") (citation omitted).

Stat. § 41.650 (emphasis added). Here, the district court correctly found that Mr. Smith sued Respondents based on their good faith communications in furtherance of their right to free speech in direct connection with an issue of public concern—specifically, the anti-social and abusive behavior that Mr. Smith, a renowned public figure, engages in among the thrifting community and his attempts to bully his detractors into silence. (3JA500–03.)

The district court correctly held that Respondents exceeded their burdens under Nevada's anti-SLAPP statute. (4JA668, ¶ 43.) The district court also correctly held that Mr. Smith failed to meet his burden of demonstrating his defamation claim had any probability of success. (3JA503–06.) Though Mr. Smith argues that prior cases in which this Court declined to dismiss an action under the anti-SLAPP statute—specifically *Coker v. Sassone* and *Pope v. Fellhauer*—should guide this Court to reverse the district court (OB, p. 13), those cases are inapplicable or distinguishable. *Pope* presented an entirely different factual scenario that implicated a private dispute between neighbors, not allegations that a high-profile member of an international business community has repeatedly engaged in misconduct. And *Coker* stands for the proposition that the conduct of producing art forgeries is not protected by Nevada's anti-SLAPP statue. *See Coker v. Sassone*, 135 Nev. 8, 12–14, 432 P.3d 746, 750–51 (2019). *Coker* is entirely silent on whether the

communications in this matter merit anti-SLAPP protection, which they do.

Likewise, the district court did not "incorrectly appl[y] the second prong of the anti-SLAPP analysis[.]" (OB, p. 14.) Rather, the district court correctly determined that Mr. Smith's defamation claim was doomed and that Mr. Smith's lone piece of supporting evidence was grossly inadequate to support said claim. (2JA349.) While Mr. Smith argues that Respondents' statements "were at least negligent" (OB, p. 14), such argument is wholly irrelevant. That is because, as a public figure, Mr. Smith must demonstrate that Respondents' fault amounted to "actual malice," not mere negligence, to succeed on his defamation claim. And even if negligence were the correct quantum of fault for his defamation claim, Mr. Smith could not even meet that low bar. Thus, the district court properly dismissed Mr. Smith's suit under the anti-SLAPP statute.

Finally, the district court did not abuse its discretion in awarding Respondents all their requested fees, costs, and a statutory award of $20,000. Reduction of this award—supported by all the *Brunzell* factors and competent evidence submitted by Respondents and their counsel—would negate the significant deterrent effect the anti-SLAPP statute is supposed to embody. This Court must therefore affirm the district court's decisions in their entirety.

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V. STANDARDS OF REVIEW

In reviewing a district court's order granting an anti-SLAPP motion to dismiss, this Court engages in de novo review. *Coker*, 135 Nev. at 10, 432 P.3d at 748–49 ("As amended, the special motion to dismiss again functions like a summary judgment motion procedurally, thus, we conclude de novo review is appropriate.").

Mr. Smith recites the definition of a SLAPP suit and the two-prong test the district court must use in determining whether a case should be dismissed under Nevada Revised Statutes § 41.660. (OB, pp. 16–18.) Indeed, the moving defendants must establish their burden under the first prong by a preponderance of the evidence, and on de novo review, this Court should "give[] deference to the district court's findings of fact" while independently reviewing "whether those facts satisfy the applicable legal standard." (OB, p. 18 (citing *Hernandez v. State*, 124 Nev. 639, 647, 188 P.3d 1126, 1131–32 (2008).)

Here, Respondents established their burden under the first prong by a preponderance of the evidence, and thus, contrary to Mr. Smith's contention (OB, p. 18), this Court must also review the district court's analysis of the second prong of the anti-SLAPP analysis—*i.e.*, whether Mr. Smith demonstrated with *prima facie* evidence a probability of prevailing on the claim. Given the wealth of evidence submitted by Respondents in comparison to the lone, self-serving, inadequate

declaration submitted by Mr. Smith, Respondents ably satisfied the "substantial evidence test" urged by Mr. Smith, as "a reasonable mind might accept as adequate to support a conclusion" (OB, p. 18 (quoting *State Emp't Sec. Dep't v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (citation omitted)) that Mr. Smith had zero probability of prevailing on any of his claims.

Although Mr. Smith coyly elides it in his Opening Brief (*see* OB, pp. 18–19), this Court reviews an award of fees and costs for an abuse of discretion. *See Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 80, 319 P.3d 606, 615 (2014); *see also Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001) ("An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." (citation omitted)). A district court's award of fees is not disturbed on appeal absent an abuse of discretion. *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1353–54, 971 P.2d 383, 386 (1998). Here, the district court's award of fees, costs, and a discretionary award under Nevada Revised Statutes § 41.670 were well within the district court's discretion and must be upheld.

VI. LEGAL ARGUMENT

Mr. Smith's suit—a bald-faced attempt to silence Respondents' criticism and make an example of them so no other member of their shared community ever

dares to speak out against him—is a quintessential SLAPP and a desperate attempt to keep his long history of abhorrent behavior hidden from the thrifting community and the general public. The district court correctly determined that Respondents' warnings about Mr. Smith met the first prong of Nevada's anti-SLAPP statute by a preponderance of the evidence. The communications—which are factual, made without knowledge of falsehood, or are opinions incapable of being true or false—are of interest not only to members of the thrifting community (*i.e.*, Mr. Smith's past, present, and future targets) but also to the general public that interacts with Mr. Smith and purchases Mr. Smith's products based on a trustworthy, progressive façade that, in Respondents' (and many others') opinions, is phony.

A. The District Court Correctly Held that Respondents Met Their Burden.

To prevail on a special motion to dismiss, a defendant must first "establish[], 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). Nevada anti-SLAPP law defines a "[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" as, *inter alia*, a communication: (1) "made in direct connection with an issue of public interest"; (2) made "in a place open to the public or in a public

forum;" and (3) "which is truthful or is made without knowledge of its falsehood." Nev. Rev. Stat. § 41.637.

In the instant case, the district court correctly held that Ms. Zilverberg and Ms. Eagan met these three requirements by a preponderance of the evidence. (3JA500–03.) First, the district court held that Respondents' communications were directly connected to an issue of public concern. (3JA500–02.) Specifically, they were criticism of (and warnings about) the anti-social behavior that Mr. Smith—a public figure—has long inflicted upon members of the ever-growing thrifting community. (*Id*.) Second, Respondents' complained-of communications were made on the internet, a public forum.[14] (3JA502.) Third, the district court correctly held that Respondents' communications are all either truthful or opinion incapable of being true or false and were thus made without knowledge of falsehood. (3JA502–03.)

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[14] This contention was not disputed in district court and is not addressed here.

1. Respondents' Statements Were Made In Direct Connection with an Issue of Public Concern.

Nevada has adopted California's five-factor *Weinberg* test[15] for determining what constitutes "an issue of public interest" in the anti-SLAPP context. *Shapiro v. Welt*, 133 Nev. 35, 389 P.3d 262, 268 (2017). Specifically:

> (1) "public interest" does not equate with mere curiosity;
> (2) a matter of public interest should be something of concern to a substantial number of people; a matter of concern to a speaker and a relatively small specific audience is not a matter of public interest;
> (3) there should be some degree of closeness between the challenged statements and the asserted public interest—the assertion of a broad and amorphous public interest is not sufficient;
> (4) the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy; and
> (5) a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.[16]

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[15] *See Weinberg v. Feisel*, 2 Cal. Rptr. 3d 385, 392–93 (Cal. Ct. App. 2003). Throughout this brief, the *Weinberg* factors may also be referred to as the *Shapiro* factors.

[16] The California court deciding *Weinberg* originally phrased this prong as "those charged with defamation cannot, by their own conduct, ***create their own defense by making the claimant a public figure***. A person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people." *Weinberg*, 2 Cal. Rptr. 3d at 392–93 (emphasis added; citations omitted). Here, the district court did not need to look to Respondents' conduct to determine whether their communications or conduct "made" Mr. Smith a public figure—Mr. Smith himself insisted that he is a "well-known public figure" in his complaint. (1JA2.)

Shapiro, 133 Nev. at 39–40, 389 P.3d at 268 (quoting *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F. Supp. 2d 957, 968 (N.D. Cal. 2013)). Furthermore, Nevada courts "define an issue of public interest broadly." *Coker*, 135 Nev. at 14, 432 P.3d at 751. As argued below, the district court correctly weighed each of these factors in holding that the statements at issue in this case necessarily pertain to a matter of public interest.

a. The Instant Case is Distinguishable from *Pope v. Fellhauer*.

Mr. Smith disingenuously claims that this matter is "identical" to the one addressed in this Court's "key mark" (but unpublished) decision in *Pope v. Fellhauer*, 2019 WL 1313365, 437 P.3d 171 (Nev. March 21, 2019). (OB, pp. 13, 27.) The district court rejected this spurious argument, and this Court must as well.

Pope is distinguishable from the instant matter in many respects. *Pope* involved a dispute between three cul-de-sac neighbors; the neighbors quarreled and had verbal altercations. *Id*. at *1. In *Pope*, Mr. Pope began making statements about the Fellhauers on social media sites, such as Twitter and Alert-ID, a "neighborhood crime-reporting website," alleging that the Fellhauers were dangerous, sick, and mentally unstable; that they were the reason behind the neighborhood being labeled a "crime zone;" and asserting the Fellhauers recorded a naked one-year-old

swimming in Mr. Pope's pool. *Id*. Eventually, the Fellhauers filed a defamation complaint against Mr. Pope, and in response, Mr. Pope filed an anti-SLAPP motion to dismiss, which the district court denied. *Id*.

In *Pope*, this Court looked to the *Shapiro* factors in determining whether there was a "public interest" or "public concern" in Mr. Pope's statements about the Fellhauers. *Id*. at *2. In applying these factors, this Court determined that Mr. Pope was simply making public his private feud with the Fellhauers—*i.e.*, that there was "not a sufficient connection between Pope's statements and his asserted public interest of warning potential neighbors and others about the Fellhauers' 'abusive and potentially illegal behavior.'" *Id.* This Court noted that there was "no evidence that anyone—other than his two friends—were concerned with Pope's commentary or that [Pope] was adding to a preexisting discussion." *Id*. This Court further characterized Mr. Pope's statements as "a single [person being] upset with the status quo" and that Mr. Pope "was using the online forums as 'ammunition for another round of [the] private controversy[.]'" *Id*. at *3.

By contrast, Ms. Zilverberg's and Ms. Eagan's truthful allegations regarding Mr. Smith (a public figure) touch on a matter of concern to a substantial number of people, as the already-massive online thrifting community continues to grow along with the market for Mr. Smith's thrifting-related products. (*See* 1JA34; 2JA362–

63;[17] 3JA501.) Furthermore, as a public figure, Mr. Smith's conduct in the community is automatically of concern to a large number of people. *See Serova v. Sony Music Entm't*, 26 Cal. App. 5th 759, 772, 237 Cal. Rptr. 3d 487, 496 (Cal. Ct. App. 2018), *as modified on denial of rehearing* (Sept. 13, 2018) ("Public interest in the life and work of entertainers and other celebrities can create an 'issue of public interest' for purposes of [California's anti-SLAPP statute]. There is a public interest which attaches to people who, by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities.") (internal citations and quotation marks omitted). Based on Mr. Smith's complaint, he created such "legitimate and widespread" attention to his activities in the thrifting community (*see* 1JA2), and thus his behavior in the thrifting community is a matter of public concern.

Here, there is a wealth of evidence that the complained-of statements added to a preexisting (albeit hushed) discussion of Mr. Smith's behavior and elicited significant concern and further commentary. Even though Ms. Zilverberg's widely

[17] "[THE COURT:] …the thrifting community is a public interest, and although it's definitely smaller than all of the Democrats, or all the Republicans, or all the people that live in Nevada … because of the fact that it's an internet-based marketing system, it actually touches upon many, many people … as opposed to somebody beefing in an HOA situation and complaining and making comments about other members of the board…" (2JA362–63.)

viewed YouTube Video was only public for five days (1JA57–58), it was commented on hundreds of times. (*See* 1JA58; *see generally* 1JA66–153 (full collection of comments posted to the YouTube Video).) Although some commenters took Mr. Smith's side and leveled criticism (and vitriol) at Ms. Zilverberg, many commenters expressed support for Ms. Zilverberg and gratitude for her courage in exposing Mr. Smith's behavior. (*See generally id.*) Several members of the thrifting community shared their own stories of being subjected to Mr. Smith's anti-social behavior. (*See* 1JA35–36, n.8.) The voluminous online discussion spurred by the YouTube Video demonstrates that—unlike the statements in *Pope*—the communications at issue in this matter were of concern to a substantial number of people and thus directly connected to an issue of public concern. *See Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1042, 72 Cal. Rptr. 3d 210, 220 (2008) ("'an issue of public interest' within the meaning of [California's anti-SLAPP statute] is *any issue in which the public is interested*. In other words, the issue need not be 'significant' to be protected by the anti-SLAPP statute—it is enough that it is one in which the public takes an interest.") (emphasis in original).

Finally, in *Pope*, the parties were all private citizens whose dispute did not extend beyond the boundaries of their cul-de-sac. *Pope*, 2019 WL 1313365 at *2–3. Here, by contrast, Mr. Smith is a public figure who has made his living projecting a

certain image and cultivating his reputation not merely within the thrifting community, but with the general public. (1JA2; 2JA247–48.) Although Respondents' complained-of statements speak to their own negative interactions with Mr. Smith, the complained-of statements go far beyond a mere personal dispute. Indeed, the complained-of statements speak to Mr. Smith's long history of bullying and abuse not merely with Respondents, but with several other members of the thrifting community. (*See, e.g.*, 1JA35–36, n.8 (list of comments posted on the YouTube video in which many members of the thrifting community shared their stories of Mr. Smith's bad behavior).) Therefore, the district court correctly determined that, in contrast to *Pope*, the communications at issue in this matter are directly connected to a matter of public concern and thus merit anti-SLAPP protection.

b. Respondents' Statements About Mr. Smith Transcend "Mere Curiosity," as they Pertain to Mr. Smith's Professional Conduct as an Educator and Administrator of Online Thrifting Groups.

Mr. Smith argues—without citation—that Ms. Zilverberg's and Ms. Eagan's statements were "not directly connected to the thrifting community nor the buying and selling of used goods." (OB, p. 27.) However, this argument is misplaced for multiple reasons. First, thrifting is a social activity, and thrifting community members' interactions with Mr. Smith are inextricably linked with people's choices

to do business with him in that community. People have a right to base their decision to patronize a business not merely on the quality of that business' product, but also on how that business' purveyor treats them and other members of their shared community.

Second, and more importantly, constricting the topics of speech "directly connected to an issue of public concern" to statements about Mr. Smith that are only "directly connected to the buying and selling of used goods" would be an unwarranted departure from this Court's explicit mandate that courts define "public interest" broadly. *Coker*, 135 Nev. at 14, 432 P.3d at 751. Mr. Smith's business in the thrifting community goes beyond the mere buying and selling of used goods; Mr. Smith offers educational materials and runs online thrifting groups *for profit*. Respondents' statements are criticism of Mr. Smith's on-the-job performance and a warning to consumers regarding the behavior they can expect when interacting with Mr. Smith in any of his paid roles as thrifter, teacher, or administrator, not to mention his status in the thrifting community which enables him to take on such roles. Respondents' statements are therefore directly connected with a matter of public concern.

This Court and others have held that criticism of a professional's on-the-job performance is a matter of public interest. *See Abrams*, 136 Nev. Adv. Op. 9, 458

P.3d at 1066 ("The public has an interest in an attorney's courtroom conduct that is not mere curiosity, as it serves as a warning to both potential and current clients looking to hire or retain the lawyer"); *Piping Rock*, 946 F. Supp. 2d at 969 (holding that a warning to consumers not to do business with investment firm due to allegedly faulty business practices meets the public interest standard); *Chaker v. Mateo*, 209 Cal. App. 4th 1138, 1146, 147 Cal. Rptr. 3d 496, 502 (Cal. Ct. App. 2012) (criticism of a plaintiff's character and business practices plainly falls within in the rubric of consumer information and is thus a public interest); *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 899, 17 Cal. Rptr. 3d. 497, 506 (Cal. Ct. App. 2004) ("Consumer information, however, at least when it affects a large number of persons, also generally is viewed as information concerning a matter of public interest."); *Healthsmart Pacific, Inc. v. Kabateck*, 7 Cal. App. 5th 416, 430, 212 Cal.Rptr.3d 589, 599 (Cal. Ct. App. 2016) ("[M]embers of the public, as consumers of medical services, have an interest in being informed of issues concerning particular doctors and healthcare facilities[.]") (citations omitted).

Just as the aforementioned courts held that other professionals' on-the-job performance was a matter of public interest, this Court should affirm the district court's holding that Mr. Smith's on-the-job performance as a thrifter and educator—including his propensity for abuse and bullying in the thrifting community—is a

matter of public interest. (3JA501–02.) Even though the complained-of statements do not pertain to whether Mr. Smith is effective at the business of thrifting itself, they do pertain to other products he sells—educational materials, how-to guides, and access to a closed community[18] of individuals who can take in Mr. Smith's "advice and expertise … relating to thrifting and buying and selling online." (1JA2–3.) Respondents' complained-of statements naturally call into question Mr. Smith's credibility and trustworthiness, which are two essential factors when a consumer of educational materials decides from whom to learn. Indeed, knowing whether one might be subjected to abuse and bullying by a group's leader—especially when that leader projects himself as a friendly, progressive person—*should* influence a consumer's decision to join said group. Thus, the district court correctly recognized that there is a degree of closeness between the challenged statements and the interest in warning the public about Mr. Smith's behavior asserted by Respondents. (3JA501–02.)

Finally, anti-SLAPP law has long stood for the principle that those who profit from their public persona should not be able to sue critics into silence when it turns

[18] Although Mr. Smith's Facebook group, The Thrifting Board, is ostensibly free to join, Mr. Smith and his group's administrators (also known as "lifeguards") can, and have, excluded and banned many individuals from said group. (1JA57, ¶ 6; 1JA63, ¶ 6.)

out that persona is based on a lie. In *Sipple v. Foundation for Nat. Progress*, 71 Cal. App. 4th 226, 83 Cal. Rptr. 2d 677 (Cal Ct. App. 1999), the plaintiff—a political consultant who devised media strategy based on gender-based advertising against domestic violence—sued the publishers of Mother Jones magazine for defamation after they published an article describing his ex-wives' testimony that he had physically and verbally abused them. *Sipple*, 71 Cal. App. 4th at 230, 83 Cal. Rptr. 2d at 679. In upholding the trial court's grant of the magazine's anti-SLAPP motion to strike, the appellate court explained that plaintiff "was able to capitalize on domestic violence issues in order to further his career" and therefore "the details of [plaintiff's …] ability to capitalize on domestic violence issues in his advertising campaigns for politicians known around the world, while allegedly committing violence against his former wives, are public issues, and the article is subject to the protection of [California anti-SLAPP law]." *Id.* at 239–40, 684–85. Here, just as in *Sipple*, Mr. Smith has profited from projecting a progressive, trustworthy image he fails to uphold off-camera. Therefore, Respondents' allegations that Mr. Smith does not live up to what he projects are directly connected with a matter of public concern, and the district court correctly held that this factor weighed in favor of Respondents. (3JA501.)

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c. Respondents' Statements Were in the Public Interest Regardless of the Size of Their Audience.

Mr. Smith argues—again without citation—that because Ms. Zilverberg and Ms. Eagan only posted about Mr. Smith "on their YouTube channel and Facebook pages" and because they are "not a publisher to a mass general audience," their statements were not in direct connection with a matter of public concern. (OB, p. 28.)

However, it is beyond debate that warnings about Mr. Smith's behavior affect large numbers of people beyond Mr. Smith and Respondents and are therefore directly connected to a matter of public concern. Even if Mr. Smith's conduct toward his fellow members of the thrifting community was not automatically a matter of public concern by virtue of his widespread notoriety and undisputed status as a public figure, Respondents' communications were directed to a substantial number of people—the thrifting community writ large, not merely members of Mr. Smith's or Respondents' specific Facebook groups, which by themselves have tens of thousands[19] of members. (*See* 2JA298, ¶ 25; 2JA326, ¶ 18.) Courts have rejected the

[19] "[THE COURT:] I think maybe I read 55,000 people are involved in this thrifting activity, that is a large number of people, as opposed to somebody beefing in an HOA situation and complaining and making comments about other members of the board, that is a very small insular body, and I don't think the public interest would be invoked." (2JA363.)

notion that a community must be larger than some "magic number" for communications made to the community to merit anti-SLAPP protection. Recently, a California appellate court held that allegedly defamatory statements in a press release published by the non-profit Ethiopian Sport Federation (ESF) merited anti-SLAPP protection because the allegations against its former board member were "clearly issues that would affect, and thus be of interest to members of ESF and the Ethiopian community at large, i.e., ***a discrete but substantial portion of the public***." *Teferi v. Ethiopian Sports Fed'n in N. Am.*, No. B282403, 2019 WL 1292272, at *7 (Cal. Ct. App. Mar. 20, 2019) (emphasis added).

Likewise, *Hecimovich v. Encinal Sch. Parent Teacher Org.*, 203 Cal. App. 4th 450, 137 Cal. Rptr. 3d 455 (Cal. Ct. App. 2012), demonstrates that even communications which pertain to a tiny segment of the population can merit anti-SLAPP protection. In *Hecimovich*, the plaintiff sued over allegations regarding his fitness to coach the Encinal School's after-school youth basketball team. *Hecimovich*, 203 Cal. App. 4th at 454–57, 137 Cal. Rptr. 3d at 459–61. Even though the only people directly affected by the plaintiff's alleged actions (and the defendants' alleged communications) were children who attended that specific school (and their parents), the court nevertheless held that the statements at issue touched on "an issue of public interest." *Id*. at 466, 467. The court concluded that

"safety in youth sports, not to mention problem coaches/problem parents in youth sports, is another issue of public interest within the SLAPP law." *Id*. at 468, 469.

Notably, the court in *Teferi* did not entertain some sort of calculus to determine whether there were "enough" Ethiopians or persons of Ethiopian descent living in America to make statements concerning the Ethiopian community a matter of public concern. Nor did the court in *Hecimovich* entertain the question of how large a school must be to determine whether allegations about a coach at said school implicates a matter of public interest under anti-SLAPP law. The district court likewise properly declined to engage in such analysis. (*See* 3JA501.) This Court should also decline to apply such a calculus here, as Respondents have demonstrated that the thrifting community is a discrete, but substantial, portion of the public,[20] and therefore statements regarding Mr. Smith's conduct in said community are in direct connection with a matter of public concern.

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[20] Indeed, if the thrifting community were not a substantial portion of the public, Mr. Smith would never have been able to parlay his success in the thrifting community into having his own cable TV show or appearing as an expert on TV shows that have viewerships reaching far beyond the thrifting community to the public at large, such as Pawn Stars. (*See* 1JA2, ¶¶ 8, 10.)

d. Construing "Public Interest" Broadly Is Proper.

Mr. Smith asserts that Ms. Zilverberg's and Ms. Eagan's statements are not "a concern to a substantial number of people versus that of a relatively small market of customers of [Ms. Zilverberg and Ms. Eagan] in the thrifting community." (OB, p. 28.) From the outset, Mr. Smith's position ignores this Court's unambiguous guidance regarding the scope of a "public interest" under anti-SLAPP law. Nevada courts "define an issue of public interest broadly." *Coker*, 135 Nev. at 14, 432 P.3d at 751.

"In general, [a] public issue is implicated if the subject of the statement or activity underlying the claim (1) ***was a person or entity in the public eye***; (2) could affect large numbers of people beyond the direct participants; or (3) involved a topic of widespread, public interest." *D.C. v. R.R.*, 182 Cal. App. 4th 1190, 1215, 106 Cal. Rptr. 3d 399, 417 (Cal. Ct. App. 2010) (internal quotation marks and citations omitted) (emphasis added). While thrifting in itself is arguably a "topic of widespread, public interest" as evidenced by the large numbers of people engaged in the community, it is beyond debate that Mr. Smith is a public figure—*i.e.*, a "person or entity in the public eye." (*See* 1JA2, ¶¶ 7–12.)

California courts have long held that a plaintiff's status as a public figure is critical—if not dispositive—to the determination of whether a statement about him

is a matter of public concern. For instance, the California Court of Appeals held that allegedly defamatory statements about private conduct (specifically, a famous boxer's ex-girlfriend's decision to have cosmetic surgery) touched on a matter of public concern due to the parties' notoriety. *Jackson v. Mayweather*, 10 Cal. App. 5th 1240, 1255, 217 Cal. Rptr. 3d 234, 248 (Cal. Ct. App. 2017). In one circumstance, a California court implicitly held that the plaintiff's admission that he was a public figure was itself enough to connect statements about him and his church to an issue of public interest. *Heying v. Newsmax Media, Inc.*, No. B278384, 2018 WL 346001, *4 (Cal. Ct. App. 2018). In the instant case, this Court need not look past Mr. Smith's Complaint (1JA2, ¶¶ 7–12) to determine that he is a public figure whose accomplishments and professional standing create legitimate and widespread attention to his conduct in the thrifting community and beyond.

More recently, the California Supreme Court explicitly endorsed the proposition that a person's status as a "figure in the public eye" is sufficient "to establish the statement is 'free speech in connection with a public issue or an issue of public interest.'" *Wilson v. Cable News Network, Inc.*, 7 Cal. 5th 871, 902, 444 P.3d 706, 725 (2019) (internal quotation marks and citations omitted). As Mr. Smith is undisputedly a public figure (1JA2, ¶¶ 7–12), the district court correctly held that Respondents' criticism of his behavior—particularly his behavior within the

thrifting community—is necessarily in direct connection with an issue of public concern and therefore merits protection under Nevada's anti-SLAPP statute.

e. Respondents' Statements Were Not a "Mere Effort to Gather Ammunition."

Mr. Smith argues—again without citation—that Ms. Zilverberg's and Ms. Eagan's statements were "to further their feud with [Mr. Smith] and to take away his business." (OB, p. 29.) To the contrary, the district court correctly held that Respondents' communications "were not a 'mere effort to gather ammunition for another round of private controversy' but rather that their focus was on the public interest in preventing bullying and anti-social behavior in the thrifting community." (3JA502, ¶ 47.) This is because Respondents provided evidence in the form of declarations and attached exhibits that they are not competitors of Mr. Smith, nor do they stand to gain anything by continuing to "feud" with him. (*See generally* 2JA264–66 (citations to exhibits omitted); 2JA293–321 [declaration of Ms. Zilverberg and attached exhibits]; 2JA323–35 [declaration of Ms. Eagan and attached exhibits].) Indeed, both respondents avowed that there is a "lack of overlap" in goods sold; that they "did not see other thrifters as competition;" that they do not compete with Mr. Smith with regard to thrifting education; and that if Mr. Smith were to suddenly quit the community, it would have zero impact on their business. (2JA294–95;2JA324–25.) Thus, the district court correctly determined that this

factor weighed in favor of Respondents.

f. Evidence Demonstrated that Respondents' Statements Furthered Preexisting Discussion.

Mr. Smith argues that "[a] person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people." (OB. p. 29.) While Mr. Smith is correct that wide communication of otherwise private information does not make such information a matter of public interest, Mr. Smith's behavior in the thrifting community is not "otherwise private information" to begin with. (*See* 3JA502, ¶ 48.) Furthermore, Respondents presented evidence that the complained-of statements added to a preexisting discussion of Mr. Smith's conduct and that their complained-of statements generated yet more discussion of said conduct. (*See, e.g.*, 1JA34–36 (citations to exhibits omitted).) Thus, the district court properly determined that the communications were in direct connection with an issue of public concern.

2. Respondents' Statements Were True or Made Without Knowledge of Falsity.

Recently, this Court held that "the relevant inquiry in prong one of the anti-SLAPP analysis is whether a preponderance of the evidence demonstrates that the gist of the story, or the portion of the story that carries 'the sting' of the [statement], is true." *Rosen*, 135 Nev. at 441, 453 P.3d at 1224 (internal quotation marks and

citations omitted). The "gist" or "sting" of Respondents' communication—that, despite outward appearances, Mr. Smith engages in bullying and retaliatory behavior in the thrifting community—is true and is supported by the wealth of evidence provided by Respondents.

Mr. Smith essentially asks this Court to overturn *Rosen* and "parse each individual word in the statements to assess it for its truthfulness." *Rosen*, 135 Nev.at 440. He does so by claiming—with less than minimal evidentiary support—that nobody has ever successfully obtained a restraining order against him and that he has not been convicted of crimes in the past.[21] (*See, e.g.*, OB, pp. 20–21.) However, this Court rejected this approach: "in a defamation action, it is not the literal truth of each word or detail used in a statement which determines whether or not it is defamatory; rather, the determinative question is whether the 'gist or sting' of the statement is true or false." *Rosen*, 135 Nev. at 441, 453 P.3d at 1224 (internal quotation marks and citations omitted). Thus, to meet their burden of proof in prong one, Respondents needed to "establish only 'by a preponderance of the evidence' that the statements were true or made without knowledge of their falsity." *Id*.

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[21] As noted throughout, Mr. Smith did not provide any statement in which Ms. Zilverberg or Ms. Eagan claimed he had a criminal record.

Respondents did so in district court. As the district court bluntly put it, there was "no demonstration of known falsehood anywhere." (2JA361.) Yet in his Opening Brief, Mr. Smith still claims, without any supporting evidence, that Respondents' communications were knowingly false. (OB, pp. 20–21.) Mr. Smith argues that Ms. Eagan "posted statements on her Facebook … that Smith has multiple restraining orders against him." (*Id.*) Mr. Smith claims that the YouTube video contained "a false statement, among others, that Smith has, and will, find out where people live in order to 'take them down,' inferring that Smith stalks people." (OB, p. 21.) Mr. Smith further alleges that Ms. Zilverberg claimed, "Smith has caused people to want to commit suicide." (*Id*.) However, as the district court correctly recognized, Respondents met their burden of demonstrating by a preponderance of the evidence that each of these complained-of statements were either true or made without knowledge of falsehood.

a. Statements that Mr. Smith Finds Out Where People Live In Order to "Take Them Down" Are Truthful or Were Made Without Knowledge of Falsehood.

In district court, Respondents argued (and provided ample evidence) that Mr. Smith found out a pseudonymous person's address, then revealed her real name and hometown to unmask, mock, and embarrass her in his own Facebook video. (*See* 1JA39–40.) While Mr. Smith may not have intended to cause that person physical

harm by finding out her real name and address, Respondents have never alleged anything of the sort. Obviously, Mr. Smith's acts of unmasking an intentionally pseudonymous internet user and mocking said person on the internet were intended to cause that person emotional harm and lower her status in the thrifting community—*i.e.*, "take them down." Mr. Smith has not contested, nor can he contest, the veracity of this allegation.

As detailed in the Motion, another member of the thrifting community alleged that Mr. Smith dug up her arrest record and shared said information with that person's husband. (*See* 1JA40.) Thus, Respondents demonstrated by a preponderance of the evidence the truth of their allegations regarding Mr. Smith's gathering and revealing personal information to the detriment of his enemies in the thrifting community.

b. Mr. Smith's Harassment Has Caused Individuals to Contemplate Suicide.

In the YouTube Video, Ms. Zilverberg stated that there had "been a couple people who were pushed to the point where they felt like maybe it was the best thing they could do was just kill themselves," implying that Mr. Smith's bullying had caused them to contemplate suicide. (1JA41.) The statement that Mr. Smith induced suicidal ideation in his victims is either true or, at the very least, was made without knowledge of its falsehood.

In early 2018, Mr. Smith alleged that a member of the thrifting community, Robyn Yednock-Haas, had been convicted of crimes and incarcerated; subsequently, in a March 16, 2018, group text to which Mr. Smith was a party, Ms. Yednock-Haas's husband, Jim, expressed hope to Mr. Smith that the thrifting community would not "know about Robyn's jail thing." (1JA184 (Screenshots of March 16, 2018, text message conversation between Jim Haas and Jason T. Smith).) In response, Mr. Smith bragged that Ms. Yednock-Haas "may be doing something Drastic" and that "[s]he left these goodbye messages to Kim and Debbie," implying that Mr. Smith believed she was contemplating suicide as a result of his exposing her past to the thrifting community. (*Id*.)

Furthermore, on June 10, 2018, a member of the thrifting community named Christopher E. Lesley shared the story of how his friendship with Mr. Smith fell apart due to Mr. Smith's bullying. (*See generally* 1JA186–96 (June 10, 2018, Facebook chat between Ms. Zilverberg and Christopher E. Lesley).) Mr. Lesley claimed that Mr. Smith told him he had to "make a choice" between being on "Team Jason" or "Team Danni [Ackerman][22]." (1JA194.) According to Mr. Lesley, after he refused to choose between his friends in the thrifting community, Mr. Smith

[22] As noted *infra*, Ms. Ackerman is another member of the thrifting community who faced Mr. Smith's abuse.

threatened that unless Mr. Lesley—whose wife, Janet, is black—chose him, he would out him as a "n*gger lover" to hate groups, who would presumably harass him further. (1JA193.) When Mr. Lesley refused to give in to these racist threats, Mr. Smith told Mr. Lesley's LinkedIn associates that he was a pedophile. (1JA192.) Mr. Lesley was forced to create new social media profiles, new email addresses, and change his phone number as a result of Mr. Smith's harassment. (*Id*.)

Mr. Lesley revealed to Ms. Zilverberg that the "hate and threats" he "had to endure were pushing [him] over the edge" and that the whole incident with Mr. Smith made him "very depressed." (1JA187.) In the context of a "very depressed" person, it is not unreasonable to infer that said person being "pushed over the edge" means he is having thoughts of suicide. This inference is confirmed by Janet Lesley's comment on the YouTube Video, in which she stated that her husband "was on the brink of suicide after putting up with [Mr. Smith's] libel, slander and bullying." (1JA88.)

Ms. Zilverberg's statement that Mr. Smith's behavior drives people to suicidal thoughts was further vindicated when Cindy Sorley commented on the YouTube Video, stating that she knew "one person that was ready to commit suicide over his behavior." (1JA86.) Thus, the preponderance of the evidence indicates that Ms. Zilverberg's implication—that Mr. Smith's bullying has driven individuals to

suicidal ideation—is either substantially true or was made without knowledge of falsehood. It is therefore a good faith communication entitled to anti-SLAPP protection.

c. Respondents Did Not Claim that Mr. Smith Has A Criminal Record—But Even if They Did, They Had Reason to Believe it Was True.

As a threshold matter, Mr. Smith did not provide the district court with any evidence beyond naked allegations that Respondents have ever said or implied that Mr. Smith has a criminal record. On appeal, he continues in this vein, repeatedly claiming that "Respondents have falsely alleged to the public that Smith has a criminal record of restraining orders and a verified history of harassment." (OB, pp. 2, 7, 21.) However, Mr. Smith did not bother to specify any actual statements made by Respondents, let alone provide evidence of statements in which Respondents claimed Mr. Smith has a criminal record. Respondents' allegations that others attempted to file restraining orders against him, or that he has engaged in bullying behavior, or even that his behavior has driven others to contemplate suicide, are not allegations that Mr. Smith is a criminal or has a criminal record, as much as Mr. Smith argues they are.

Furthermore, the screenshot of an online background check of Jason Todd Smith (Exhibit 16 to the Motion, 1JA201–09) was not presented to the district court

as proof that Mr. Smith committed all the acts alleged in said exhibit.[23] Rather, it demonstrated that if Respondents *had* accused Mr. Smith of having a criminal record—which they did not—they had a reasonable basis for forming this opinion. Respondents are not police officers, private eyes, or experts on background reports and therefore had neither the ability nor the duty "to verify its veracity prior to posting a statement that infers Smith has a criminal history." (OB, p. 22.) Indeed, the district court recognized that even if some of the information in that exhibit did not pertain to Appellant, Respondents established by a preponderance of the evidence that their statements regarding Mr. Smith were good faith communications. (*See* 2JA359–60.[24])

Furthermore, Mr. Smith has not refuted Respondents' contention—which is

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[23] To the extent that Mr. Smith argues that "Respondents continue to injure Smith's reputation by now associating Smith's name with additional false charges in a public Court document," (OB, pp. 8–9) such putative claims would be barred by Nevada's litigation privilege, which precludes civil liability based on "communications uttered or published in the course of judicial proceedings." *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101, 104 (1983).

[24] "[THE COURT]: But the overall impression that one has is, that they were basically providing information about his reputation and specific acts and his character based upon experience they had with him personally, or experience[s] that others had with these people regarded as reliable reporters of information, and some of those people were not reliable, but given the overall context, I think the Defendants clearly demonstrate to this Court they were acting in good faith. I think they would in fact concede that some of their information turned out to be incorrect, but the bulk of it, the overwhelming majority, appears to be well-founded and to have been communicated truthfully and in good faith." (2JA359–60).

supported by evidence—that Mr. Smith himself bragged about engaging in criminal activities in the past. (*See* 1JA44; 1JA211.) Thus, Mr. Smith's arguments that the crimes in said exhibit do not pertain to him (*see, e.g.*, OB, pp. 8–9) are irrelevant to the determination of whether allegations that Mr. Smith engaged in criminal activity—which again, Respondents did not make—were made without knowledge of their falsehood and were therefore good faith communications.

d. Ms. Eagan Had Reason to Believe that Others Had Filed Restraining Orders Against Mr. Smith.

Mr. Smith argues that Ms. Eagan "posted false statements on her Facebook … that Smith has multiple restraining orders against him" and that "Respondents have falsely alleged to the public that Smith has a criminal record of restraining orders." (OB, pp. 2, 7, 21.) Mr. Smith further complains that he "has never had any restraining orders against him." (OB, p. 8.)

Even if Respondents did not produce evidence that anybody has obtained a restraining order against Mr. Smith, and even if, *arguendo*, it is not true that Mr. Smith has had restraining orders filed against him, Respondents produced sufficient evidence to demonstrate, by a preponderance of the evidence, that the complained-of statement was made without knowledge of its falsehood. Ms. Eagan heard identical allegations from two trusted sources that two of Mr. Smith's harassment victims, Danni Ackerman and Ms. Ackerman's mother, had filed restraining orders. (*See* 1JA43;

1JA63–64, ¶¶ 14–15; 1JA198–99.)[25] As noted in the Motion, Ackerman commented on the YouTube Video that she and her mother "had police involved" in her encounters with Mr. Smith. (*See* 1JA113.) The district court recognized that the "gist" or "sting" of this statement—that Mr. Smith's harassment has caused his victim to seek the authorities' intervention—is true. Thus, even if it were not true, the statement that there have been restraining orders against Mr. Smith was made without knowledge of its falsehood. It is entitled to anti-SLAPP protection.

B. The District Court Correctly Held that Mr. Smith Failed to Meet His Burden.

The second step in evaluating an anti-SLAPP 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)(b). Mr. Smith failed to meet this burden, and this Court should affirm the district court's holding.

Mr. Smith argues that "there is more than a minimal level of legal sufficiency shown through admissible evidence that Respondents made the false and defamatory statements about Smith with 'actual' knowledge they were false. In other words, Respondents either lied or turned a blind eye." (OB, p. 31.) If these contentions were

[25] Mr. Smith did not refute this. (*See generally* 2JA247-251.)

true, Mr. Smith would be able to cite to something in the record of this case, rather than the unsupported arguments of his counsel, to demonstrate their veracity. That Mr. Smith does not cite to any such part of the record reflects that his argument is baseless. While Mr. Smith claims that Respondents' argument "completely ignores the constant stream of false and defamatory statements made by Respondents" (OB, p. 32), Mr. Smith himself ignored his burden of providing evidence—other than the say-so of himself and his counsel—that the complained-of statements were false at all, much less that "Respondents knew they were false when they published them, or at a minimum, Respondents published them with reckless disregard for their veracity." *(Id*.)

Just as in district court, Mr. Smith's arguments on appeal regarding the second prong of the anti-SLAPP analysis are wholly devoid of evidentiary support. As one California court held, an anti-SLAPP plaintiff "cannot rely on the allegations of the complaint, but must produce evidence that would be admissible at trial." *Heying*, 2018 WL 346001 at *5 (internal quotation marks and citation omitted). As Mr. Smith failed to produce any evidence—besides his own declaration, which parrots the allegations in his Complaint—to support any of his claims, the district court correctly ruled that Mr. Smith failed to meet his burden under the second prong

of Nevada's anti-SLAPP analysis.[26] (3JA503–06.)

In Nevada, the elements of a defamation [per se] claim are: (1) a false and defamatory statement by a defendant concerning the plaintiff; (2) an unprivileged publication of this statement to a third person; (3) fault of the Defendant; and (4) [presumed] damages. *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 718, 57 P.3d 82, 90 (2002). As discussed at length *supra*, Respondents' alleged statements consist of true (or substantially true) facts and opinions, none of which satisfy the first element of a defamation claim.

Respondents proffered evidence to the district court suggesting that individuals have sought restraining orders against Mr. Smith, and that Mr. Smith has had individuals barred (or had individuals' invitations rescinded) from thrifting events, which would naturally have the effect of "taking down" someone who had hoped to attend those events. (2JA348–49.) Mr. Smith presented nothing beyond a declaration which, as noted by the district court did not contradict any of the evidence proffered by Defendants. (2JA349.) Thus, the district court properly decided that Mr. Smith had not provided *prima facie* evidence of fulfilling the first

[26] Mr. Smith does not appear to contest that the district court properly dismissed his only other causes of action: conspiracy and injunctive relief. (*See* OB, pp. 30–32.) Because those claims are entirely predicated on Mr. Smith's inadequately supported defamation claim, and because "injunctive relief" is not a cause of action, the district court properly dismissed them. (3JA505–06.)

element of defamation—*i.e.*, that the statements Respondents made about him were either false or defamatory. (3JA504.)

Additionally, Mr. Smith did not demonstrate Respondents' fault, and therefore the district court recognized that he failed to satisfy the third element of defamation. Mr. Smith is by his own admission "a well-known public figure in the thrifting community and with the general public" (1JA2) and thus bore the burden of demonstrating that Respondents made defamatory statements with actual malice—*i.e.*, "knowledge that [the statement] was false or [published] with reckless disregard of whether [the statement] was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964). This, in turn, "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Time, Inc. v. Pape*, 401 U.S. 279, 291–92 (1971).

Although Mr. Smith nakedly pleaded that Respondents' "false publications/statements were published with malice as [Respondents] knew that these publications/statements were false when made and/or had reason to doubt the truthfulness of these publications/statements when made" (1JA7), the district court properly held that this legal conclusion was devoid of evidentiary support

demonstrating that Respondents did not believe what they said. (2JA349–50.) Ms. Zilverberg and Ms. Eagan submitted evidence to the district court that they never entertained any doubts—let alone serious ones—as to the truth of what they said about Mr. Smith; they believed in the veracity of their allegations when they made them, and they still believe in the veracity of their allegations today. (1JA58, ¶¶ 16–17; 1JA63–64, ¶¶ 8, 15–16.)

The district court saw through Mr. Smith's attempts to mislead it by conflating the legal term "actual malice" with its colloquial meaning—*i.e.*, that "personal history and animosity toward Plaintiff was the reason for Defendants' publication of these [allegedly defamatory statements] … again demonstrating Defendants' malice." (1JA7, ¶ 49.) As noted by the district court, that is not the "actual malice"[27] standard, which focuses on whether the defendant believes in the truth of her statements, not whether the defendant dislikes the subject of her speech. (3JA504.) Thus, Mr. Smith failed to establish a probability of prevailing on his defamation claim. (*Id.*)

[27] Although Nevada statute defines "actual malice" as "that state of mind arising from hatred or ill will toward the plaintiff," it specifically exempts "that state of mind occasioned by a good faith belief in the truth of the publication or broadcast." Nev. Rev. Stat. § 41.332. Thus, even under Nevada law, a speaker's personal feelings of animus are not relevant to a determination of "actual malice" if the speaker sincerely believes in the truth of the statement.

Even if Mr. Smith were not a public figure, he did not provide any evidence to support the contention that Respondents were negligent in making the complained-of communications without independently verifying their veracity. As the wealth of evidence provided by Respondents reflects, Respondents went to great lengths, such as speaking with numerous different, trusted sources, before speaking out.

Furthermore, as the district court noted at the hearing on the Motion,[28] the statements at issue were not defamatory *per se*, and Mr. Smith failed to provide any evidence of damages—an essential element of a defamation *per quod* claim. Without any *prima facie* evidence of damages, Mr. Smith's defamation claim must fail.

Thus, no matter what standard of fault applies, Mr. Smith's defamation claim does not have minimal merit, and the district court correctly dismissed it under the anti-SLAPP statute.

C. The District Court Did Not Abuse Its Discretion in Determining Respondents' Awards.

Mr. Smith argues that "reason and fairness dictate that Respondents should be awarded attorneys' fees based only upon competent evidence, and a showing the fees are not excessive." (OB, p. 33.) Ms. Eagan and Ms. Zilverberg agree, as the

[28] *See* 2JA348–70.

district court did exactly that—based the award of fees and costs on the fees reasonably incurred by counsel in this matter. The district court did so by explicitly evaluating the fees and costs—all supported by Respondents' admissible evidence—under the *Brunzell* factors. Furthermore, the district court was well within its discretion to grant a $10,000.00 award each to Ms. Eagan and Ms. Zilverberg, as nothing in Nevada Revised Statutes § 41.670 restrains said discretion; allowing wide discretion to deter SLAPP suits is in line with the intent of Nevada's anti-SLAPP law to immunize speakers from liability. *See* Nev. Rev. Stat. § 41.650. Mr. Smith's suggestion that this Court intrude upon the district court's discretion and "reduce the total of $89,002.53 awarded in attorneys' fees, costs and statutory awards to at least to [sic] $46,872.34" (OB, p. 36) should therefore be rejected.[29]

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[29] Should Respondents prevail in this appeal, they will further be entitled to all fees and costs incurred during the appeal process, as well as fees incurred in litigating the Fees Motion. When a party appeals a trial court's dismissal of claims under the anti-SLAPP statute and is unsuccessful in that appeal, the anti-SLAPP statute authorizes the award of attorney's fees and costs to the prevailing party on appeal. *See Trapp v. Naiman*, 218 Cal. App. 4th 113, 122, 159 Cal. Rptr. 3d 462, 469 (2013) ("Any fee award must also include those incurred on appeal."); *GeneThera, Inc. v. Troy & Gould Prof'l Corp.*, 171 Cal. App. 4th 901, 910, 90 Cal. Rptr. 3d 218, 225 (2009) ("The provision for fees and costs is broadly construed so as to effectuate the legislative purpose of reimbursing the prevailing defendant for expenses incurred in extricating [himself or itself] from a baseless lawsuit. Accordingly, respondents are entitled to their attorney fees on appeal.") (internal quotation marks and citation omitted).

1. The Fees and Costs Incurred Were Reasonable and Necessary.

Mr. Smith falsely argues that "the attorneys' fees and costs incurred by Respondents were entirely unreasonable and unnecessary" because prior to Respondents retaining the undersigned, "the Parties were imminently close to resolving all issues and settling this matter without Court intervention." (OB, pp. 15, 34.) Mr. Smith further claims that Respondents "vehemently refused [to settle], without any justification or good cause, and proceeded to unnecessarily file [the Motion] and incur unnecessary fees." (OB, pp. 34–35.)

Mr. Smith is simply upset that his bad faith gambit to steamroll Respondents into an unfavorable settlement—pay him $10,000 and enter into a permanent gag order (3JA559 (citing 3JA573, ¶¶ 4–6; 3JA576, ¶¶ 4–6))—backfired on him once Respondents retained counsel familiar with how Nevada's anti-SLAPP statute protects speakers from exactly this type of lawsuit. It was Mr. Smith's complaint—aimed at silencing and extorting his critics—that necessitated the Motion. The fact that the district court granted it reflects that Mr. Smith's lawsuit is precisely what anti-SLAPP law exists to discourage.

While not required to do so, Respondents attempted to negotiate a resolution (3JA559,3JA579–80; 3JA592–95); it is Mr. Smith that should have resolved this case. Mr. Smith has nobody to blame but himself for forcing Respondents to incur

fees to extricate themselves from his baseless suit.

2. The District Court Properly Applied the *Brunzell* Factors and Based Its Fees Award on Admissible Evidence.

Mr. Smith correctly states the *Brunzell* factors[30] that apply to applications for attorney's fees and costs. (OB, p. 33–34.) However, he ignores the district court evaluated each factor and found each one favored a full award. (4JA666, ¶ 32.) Second, the district court found that the rates sought were reasonable in light of the high quality of Respondents' advocates and their work. (4JA666–67, ¶¶ 33–35.) The district court found—in spite of Mr. Smith's contention that "one anti-SLAPP motion" is a cookie-cutter affair that requires little effort (OB, p. 35)— the character of the work was difficult, intricate, important, and required time and skill. (4JA667, ¶¶ 36–43.) Third, the district court held that Respondents' "counsel exercised appropriate discretion in the time and attention they dedicated to litigating this matter, and how they structured work in this matter" by allocating "the largest portion of the work in this matter [to] a qualified associate who billed at a lower

[30] "(1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived." *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

rate" and by deducting or omitting entries where appropriate. (4JA667, ¶¶ 44–45.) Finally, the district court held that the fourth factor, the result, weighed in favor of Respondents: they achieved complete dismissal. (4JA667, ¶¶ 46–47.) Nothing in the Fees Order evinces an abuse of discretion.

3. The District Court Correctly Awarded Each Defendant $10,000.00).

Nevada Revised Statutes § 41.670(1)(b) leaves it to the district court's discretion whether to award a successful anti-SLAPP defendant up to $10,000.00. It simply states that a court "may" make such an award in addition to awarding fees and costs. The district court explicitly found "that the instant lawsuit was brought and prosecuted by Plaintiff without reasonable basis in fact or law." (4JA669, ¶ 51.) Thus, the district court did not abuse its discretion in granting Respondents a statutory award. The district court recognized that this was a paradigmatic SLAPP that should never have been filed, as reflected by its determination that it was leaning toward awarding both fees and the discretionary award before the Fees Motion was even made. (*See* 2JA365.[31]) Indeed, Mr. Smith's lawsuit was doomed *ab initio*; as a public figure, Mr. Smith was required to demonstrate actual malice to prevail on his

[31] "THE COURT: My reading is, I think you are entitled to an award of statutory damages too, but that is just a leaning, so I would like to address that separately[.]" (2JA365.)

defamation claim, yet provided absolutely nothing beyond his own naked assertion (and his counsel's misunderstanding of the "actual malice" standard) to support it.

Mr. Smith argues that because "[t]his matter was brought against Respondents collectively" and "at all times relevant hereto Respondents have retained counsel together," Respondents "at most should be awarded a total of $10,000[]." (OB, p. 36.) Mr. Smith provides no citation for this proposition because there is none. The mere fact that Nevada Revised Statutes § 41.670 contemplates that a single person may be the target of a SLAPP (and may therefore be eligible for a statutory award) should not be read as a mandatory cap on said award when multiple defendants are named. If it did, the law would create a perverse incentive for a SLAPP plaintiff to name as many potential defendants as possible—not only to silence the maximum number of voices but also to dilute the impact of the $10,000.00 discretionary award across multiple defendants. Because Nevada's anti-SLAPP statute should be construed liberally to protect speakers' First Amendment rights, this Court should read Nevada Revised Statutes § 41.670 as permitting the district court to award $10,000.00 per prevailing defendant.

The district court properly exercised its discretion. The $20,000.00 statutory award must be upheld.

VII. CONCLUSION

This matter reflects why anti-SLAPP statutes exist. This case should serve as a warning that Nevada courts are not open to unsupported lawsuits which seek to punish those who inform their business community about the predatory behavior of its most well-known member. Mr. Smith pleaded himself out of a viable defamation suit in his complaint. He then refused to quit while he was behind, forcing Respondents to incur fees and costs to litigate this matter to its inevitable conclusion. This Court must affirm the district court's decisions in their entirety.

DATED this 19th day of June, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Nev. R. App. P. 28.2:

I hereby certify that this brief complies with the formatting requirements of Nev. R. App. P. 32(a)(4), the typeface requirements of Nev. R. App. P. 32(a)(5) and the type style requirements of Nev. R. App. P. 32(a)(6) because the ANSWERING BRIEF has been prepared in a proportionally spaced typeface (14-point Times New Roman font).

I further certify that this ANSWERING BRIEF complies with the type-volume limitation of Nev. R. App. P. 32(a)(7)(A)(i) because it contains 13,982 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing RESPONDENTS' ANSWERING BRIEF was filed electronically with the Nevada Supreme Court on the 19th day of June, 2020. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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