In the
Supreme Court of the State of Nevada

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Elizabeth A. Brown
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DAPHNE WILLIAMS,

Defendant-Appellant,

vs.

CHARLES "RANDY" LAZER,

Plaintiff-Respondent.

Supreme Court No. 80350

Appeal from the
Eighth Judicial District Court
for Clark County, Nevada

District Court Case No.
A-19-797156-C

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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

1. Appellant Daphne Williams is an individual, and thus there is no parent corporation or publicly held company that owns 10% or more of her stock.

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

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

RANDAZZA LEGAL GROUP, PLLC

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JURISDICTIONAL STATEMENT

On June 21, 2019, Respondent, Charles "Randy" Lazer, filed a Complaint with the District Court against Appellant Daphne Williams. (*See* Volume I of Appellant's Appendix ("AA") at 1–69.)[1] Ms. Williams filed an NRS 41.660 Special Motion to Dismiss on August 9, 2019. (I-AA 70–118.) The District Court heard this Motion on September 11, 2019, and denied the motion without prejudice, notice of which order was entered on October 3, 2019. (I-AA 230–234.) Mr. Lazer then filed his First Amended Complaint on October 8, 2019. (I-AA 235–243.) Ms. Williams filed a Special Motion to Dismiss this amended complaint on October 22, 2019. (II-AA 244–266.) The District Court heard this motion on December 9, 2019, and denied the motion notice of which order was entered on December 20, 2019. (III-AA 574–608; 609–615.) Ms. Williams timely filed her Notice of Appeal of the December 20, 2019 order on December 26, 2019. (III-AA 616–621.)

Ms. Williams appeals the District Court's order denying her Special Motion to Dismiss under Nevada's Anti-SLAPP statute, NRS

[1] For the Court's convenience, citations to Appellants' Appendix shall be cited as "[Vol. No.]-AA [Page No.]."

41.660, as to Mr. Lazer's First Amended Complaint. Pursuant to NRS 41.670(4), "[i]f the [district] court denies the special motion to dismiss filed pursuant to NRS 41.660, an interlocutory appeal lies to the Supreme Court." Because the District Court denied Ms. Williams's Special Motion to Dismiss, the Supreme Court has appellate jurisdiction over this matter.

ROUTING STATEMENT

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

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

(2) NRAP 17(a)(12), as the matter raises as a principal issue a question of statewide public importance, namely, whether statements in a complaint made to the Nevada Real Estate Board, which results in an investigation and preliminary finding of violations, and where the subject of the investigation then appeals, is protected under Nevada's litigation privilege.

STATEMENT OF THE ISSUES

There are three issues on appeal in this matter:

1. Whether a defendant who brings a Special Motion to Dismiss under NRS 41.660 satisfies her burden to show she made her statements in "good faith" under the statute when she provides declaration and documentary evidence showing she did not make any statement with knowledge of falsity, and the plaintiff provides no evidence showing the defendant made the statements with knowledge of falsity, but merely speculation and their own opinions.

2. Whether statements in a complaint to the Nevada Real Estate Board, which results in an investigation and preliminary finding of violations, and where the subject of the investigation then appeals, is protected under Nevada's litigation privilege.

3. Whether even if the statements are not privileged, if they are sufficient to sustain a complaint for defamation, as a matter of law, in light of the Anti-SLAPP law's requirements.

STATEMENT OF THE CASE

This is a defamation case based on statements made in a complaint about a realtor to, and only to, an executive body tasked with disciplining realtors. The complaint consisted of true statements about Mr. Lazer or statements of subjective opinion about Mr. Lazer.

Mr. Lazer filed his initial Complaint on June 21, 2019, asserting claims against Ms. Williams for defamation, fraud, and extortion based on her complaint to the Nevada Real Estate Division ("NRED"). (*See* I-AA 1–69.) On August 9, 2019, Ms. Williams filed a Special Motion to Dismiss Plaintiff's Complaint under NRS 41.660, Nevada's Anti-SLAPP statute (the "Initial Anti-SLAPP Motion"). (*See* I-AA 70–118.) Her motion was supported by documentary evidence and a declaration in which she testified that her statements were true and she made them in good faith, as defined under NRS 41.637. Mr. Lazer opposed the motion, supported by a declaration from him and the Seller claiming that Ms. Williams's statements in the NRED complaint were false, but without providing any factual basis for the contention she made them knowledge of their falsity. (I-AA 119–203.)

The District Court held a hearing on the Initial Anti-SLAPP Motion on September 11, 2019. Notice of entry of the order denying the motion without prejudice was filed on October 3, 2019. (I-AA 230–234.) Mr. Lazer then filed his First Amended Complaint (the "FAC"), replacing the claims for fraud and extortion with claims for defamation, business disparagement, intentional infliction of emotional distress, and negligence. (I-AA 235–243.) Ms. Williams filed an Anti-SLAPP Motion as to the FAC on October 22, 2019 (the "Anti-SLAPP Motion"), attaching a more thorough declaration from Ms. Williams; [2] a declaration from Ms. Williams's loan officer in the condo sale, Bryan Jolly; a declaration from Ms. Williams's mother; and numerous additional documents all showing that Ms. Williams's statements were made in good faith. (II-AA 244–438.) Mr. Lazer opposed with essentially the same opposition as to the first Anti-SLAPP Motion and provided only a supplemental declaration from Mr. Lazer raising new factual issues. (III-AA 439–535.)

[2] Truly, the first one was sufficient, but the second one was bolstered in order to remove all doubt.

The District Court held a hearing on the Anti-SLAPP Motion on December 9, 2019, again denying it without prejudice, notice of entry of which order was entered on December 20, 2019. (III-AA 609–615.) It found that it could not determine whether Ms. Williams made her statements in good faith, and could not determine that Ms. Williams's complaint to the NRED was protected by Nevada's absolute privilege for statements made in judicial or quasi-judicial proceedings. (III-AA 609–615.) Williams filed notice of appeal on December 26, 2019. (III-AA 616–621.)

STATEMENT OF FACTS

In 2017, Mr. Lazer represented Ms. Williams's former landlord, Rosane Cardoso Ferreira, formerly Rosane Krupp ("Ferreira" or the "Seller"), in a transaction for the sale of a condominium unit; Ferreira was the seller, Ms. Williams was the buyer. (*See* II-AA 269, ¶4.) Ms. Williams is an African American woman. (*See* II-AA 268, ¶3.) On May 21, 2017, Ms. Williams signed a Residential Purchase Agreement ("RPA") for the sale of the condo. (*See* II-AA 277–290.) On August 23, 2017, Ms. Williams filed a Statement of Fact with the NRED (the "NRED Complaint") regarding Mr. Lazer's conduct during and after the condo sale. (*See* II-AA 273, ¶35; *see also* II-AA 292–296.) Mr. Lazer's Complaint is based on the allegation that several statements within the NRED Complaint are false.

1.0 Mr. Lazer's May 13, 2017 Statement, Which Ms. Williams Took as Biased in Nature.

On or around May 13, 2017, while taking pictures of the condo in question, Mr. Lazer told Ms. Williams "Daphne, I think you are going to be successful. When you become successful and you want to buy a bigger house and if your brother is retired by then, I'd be glad to be your realtor." (II-AA 269, ¶5.) In a vacuum, reasonable minds could

disagree as to the intent behind that statement. In fact, out of context, it would be hard for the undersigned to see sexism or racism in that statement. However, the undersigned has never walked an inch, much less a mile, in a Black woman's shoes. The best the undersigned can do is to empathize that statements that might seem meaningless to a White, privileged, attorney, just might seem dismissive, racist, or sexist to someone with a lifetime of different experiences behind her.

Ms. Williams considered the implications in this statement to be that she was not successful already, and was living off of her brother's income. Ms. Williams considered such assumptions to be biased. (*See* II-AA 269, ¶6.)

Mr. Lazer does not dispute that he said this. He only quarrels with Ms. Williams' *opinion* that it was racist, sexist, or unprofessional. (*See* I-AA 237, ¶24.) Was it intentionally biased? Was it unconsciously biased?[3] Was it not biased at all? Was Ms. Williams simply overly-

[3] One of the most unfortunate parts of this entire case is that Mr. Lazer may very well consider himself to be the least racist person in the world, yet could still express unconscious bias. Even highly educated attorneys clearly suffer from this ailment. This is why attorneys in some states, such as California, must take 1 hour of CLE on elimination of bias in the profession. California MCLE Rule 2.72(A)(2) (requiring

sensitive to bias? Even if she were hypersensitive and sees bias in the most innocent of situations, she has the right to *feel* any way that she may feel about it – and if in her opinion, it was biased, then no man has the right to tell her that her *opinion* is false.

2.0 Mr. Lazer's Disclosure of Confidential Information

Also on May 13, 2017, Mr. Lazer shared several pieces of personal information about the Seller with Ms. Williams that she did not previously know, including details about how he and the Seller met and the commission Mr. Lazer was charging for the transaction. (*See* II-AA 269, ¶¶7–8.) Ms. Williams understood that, as the Seller's realtor, Mr. Lazer had a duty to maintain confidentiality and that disclosing this information to Ms. Williams was unethical or, at the very least, unprofessional. (*See* II-AA 269, ¶9.) Mr. Lazer admits or does not dispute the majority of this, instead claiming he could disclose it. But this is merely a disagreement with Ms. Williams's non-actionable opinion.

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attorneys to take "at least one hour dealing with the recognition of bias in the legal profession and society by reason of, but not limited to, sex, color, race, religion, ancestry, national origin, physical disability, age, or sexual orientation). Starting after January 2023, California attorneys will also be required to complete CLE hours on the subject of implicit bias. *See* California AB (Oct. 2, 2019).

Mr. Lazer only disputes that he told Ms. Williams he and the Seller met on an online dating web site. He does not dispute the other statements in the NRED complaint, that the Seller asked for his help in moving in January 2017 and that, when the Seller broke up with her last boyfriend, she contacted Mr. Lazer to help "move her things back from Tonopah to Las Vegas." (II-AA 293.) Ms. Williams contemporaneously called her mother, Kathryn Harris, and relayed these details of the conversation with her. (*See* II-AA 298–299, ¶¶3-4.)

Mr. Lazer admitted in his response to the NRED that he and the Seller were "very, very good and caring friends," and that he and the Seller lived together for several weeks. (*See* I-AA 315–317.) He claimed to the NRED that the Seller already provided this information to Ms. Williams prior to May 13, 2017, but he admitted to telling Ms. Williams this information. (*See* II-AA 317.) Ms. Williams was not aware of any authorization to share this information. (*See* II-AA 269, ¶9.)

3.0 Mr. Lazer's Admitted Practice of Contacting Appraisers Prior to Appraisal

At various points in 2017, Mr. Lazer informed Ms. Williams's loan officer that, in the course of his work as a real estate agent, he had contacted real estate appraisers and given them information to

influence their appraisal of property for which he was acting as a broker prior to these individuals conducting their appraisal. (*See* II-AA 269–270 ¶11; *see also* II-AA 330–333.) Mr. Lazer admits he does this, and claims only that it is not unethical to do so. But this, again, is merely a disagreement with Ms. Williams's non-actionable opinion.

Prior to August 23, 2017 and after learning of this, Ms. Williams spoke with employees of the NRED regarding this practice, and they informed her real estate agents are not supposed to do this. (*See* II-AA 270, ¶12.) Upon learning this information, Ms. Williams subjectively considered Mr. Lazer's claimed practice of contacting real estate appraisers to be unethical and unprofessional. (*See* II-AA 270, ¶12.) Mr. Lazer admits that he engaged in this practice. (*See* I-AA 238, ¶26.) The only quarrel here is with Ms. Williams' subjective belief – informed by NRED employees' knowledge – that a realtor for a seller should not be working to influence an appraiser.

4.0 Ms. Williams Allowed Removal of Property from the Condo

Mr. Lazer claims that Ms. Williams lied when she told the NRED that Mr. Lazer falsely stated she did not allow the Seller's "movers" into the condo to remove the Seller's property. But Ms. Williams did allow

these people in, and the only remaining items of property are fixtures that were sold along with the condo.

During the course of the sale of the condo, Ms. Williams allowed multiple individuals to remove furniture from the condo at the Seller's request. (*See* II-AA 270, ¶13.) Mr. Lazer does not dispute that he claimed Ms. Williams did not allow movers into the condo. (*See* I-AA 238, ¶27.) Rather, Mr. Lazer claims that Ms. Williams lied in her complaint to the NRED because she did not allow unknown third parties unrestricted access to the condo to remove property. But that is not the assertion Ms. Williams relayed in her NRED complaint.

The reason Ms. Williams wanted to place restrictions on the ability of third parties to remove property from the condo is that Ms. Williams lives alone, and she did not want strangers coming to her residence any time they pleased. (*See* II-AA 270, ¶14.) Due to her work schedule, she also was not able to make herself available on short notice to coordinate the moving of furniture from the condo. (*See* II-AA 270, ¶15.) She informed Mr. Lazer of this in June 2017 when she explained her basis for not signing the proposed addendum to the RPA requiring her to grant undefined "reasonable access" to third parties to remove

property. (*See* II-AA 340–341.) Mr. Lazer admitted to the NRED that, regarding any property which Ms. Williams may have initially not allowed a third party to remove (at their convenience, as opposed to hers), she later allowed its removal at a time that worked for her. (*See* II-AA 312.)[4]

Mr. Lazer refers to unspecified items of the Seller's property that remain in the condo. (*See* I-AA 238, at ¶27.) These items are a wall-mounted shelf and television bracket. (*See* II-AA 270, ¶16; II-AA 312, 318, 323–324.) It was and is Ms. Williams's understanding that these items constitute "fixtures" that were sold along with the condo and which Ms. Williams was not required to return to the Seller. (*See* II-AA 270, ¶16; *see also* II-AA 278, ¶4.)

5.0 Mr. Lazer Did Not Send a Fully Executed Contract to Ms. Williams

Mr. Lazer claims Ms. Williams lied by claiming that Mr. Lazer never sent her a fully executed copy of the RPA. But it is true that Mr. Lazer never sent her a fully executed copy signed by all the parties, and

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[4] Mr. Lazer was not personally involved in the removal of furniture or personal items from the condo, and thus does not have any first-hand knowledge on this subject. (*See* II-AA 270, ¶13.)

because of this she did not receive such a copy until after the close of escrow. This statement is true.

On May 18, 2017, Mr. Lazer sent an email purportedly attaching a copy of the RPA with the Seller's signature. (*See* I-AA 238, ¶28.) Ms. Williams was unable to print this version of the RPA and sign it. (*See* II-AA 271, ¶17.) Because of this, she asked Mr. Lazer to meet her at a Whole Foods location with a printed version of the RPA that she could review and sign. (*See* II-AA 271, ¶18.) They met at a Whole Foods on May 21, 2017 and Ms. Williams signed the RPA at this time. (*See* II-AA 271, ¶18.) Mr. Lazer admits that this meeting took place. (III-AA 466, ¶3(c).)[5] The copy that she signed did not have the Seller's signature on it, and she added additional terms to the RPA prior to signing it. (*See* II-AA 271, ¶¶18–19.)

Ms. Williams understood that, because she added additional terms to the RPA, Mr. Lazer would have to allow the Seller to review this version of the RPA before signing it. (*See* II-AA 271, ¶20.) During this

[5] This admission is significant because Mr. Lazer's basis for claiming Ms. Williams lied in her NRED Complaint about not receiving a signed version of the RPA is that he emailed her a copy with the Seller's signature on May 18, 2017. He later admitted that this was not the final version. (III-AA 466, ¶3(c).)

meeting on May 21, Mr. Lazer told Ms. Williams he would send her a fully executed version of the RPA signed by all parties. (*See* II-AA 271, ¶20.) Mr. Lazer never sent Ms. Williams a fully executed copy of the RPA, nor did he tell her she should request a fully executed copy from a third party, such as her loan officer or a title company. (*See* II-AA 271, ¶20.) If she had received such an instruction she would have requested a copy of the fully executed RPA from a third party immediately. (*See* II-AA 271, ¶20.)[6] Because Mr. Lazer did not send her a fully executed copy of the RPA,[7] she did not receive one until requesting it from Ticor Title on July 31, 2017. (*See* II-AA 271, ¶21; *see also* II-AA 335.)

Mr. Lazer claimed that he had authorization from the Seller to accept changes to the RPA that Ms. Williams made "and use her already-existing signature as the binding signature." (III-AA 466, ¶3(d).) Mr. Lazer did not claim he told Ms. Williams of this alleged

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[6] Mr. Lazer sent a fully executed copy of the RPA to Ms. Williams's loan officer, Bryan Jolly, on May 23, 2017. (*See* II-AA 346, ¶17.) As a matter of professional practice, he assumed that Mr. Lazer had already sent the RPA to Ms. Williams and thus had no reason to forward it to Ms. Williams or inquire as to whether she had received it. (*See id.*)

[7] Mr. Lazer additionally did not provide Ms. Williams with a receipt for earnest money paid pursuant to the RPA. (*See* II-AA 271, ¶22.) Mr. Lazer admits this. (*See* I-AA 238–239, ¶29.)

authorization, however, and she was not aware of it. (III-AA 570, ¶5.) Mr. Lazer claimed Ms. Williams called him on May 22, 2017 and instructed him to send the fully-executed RPA to her lender, but this conversation never happened and Ms. Williams never gave this instruction. (III-AA 570, ¶6.)

6.0 Ms. Williams was Not Responsible for Escrow Delays

Mr. Lazer claims Ms. Williams lied when she told the NRED that Mr. Lazer falsely claimed she was to blame for having to extend the close of escrow deadline multiple times. But Ms. Williams's statement was true, as Mr. Lazer's assertion on this point was, and is, false. Third parties, not Ms. Williams, were responsible for the delays in closing escrow, and Ms. Williams was extremely quick to make necessary payments and provide necessary documents.

One of the conditions for consummating the sale of the condo was the close of escrow, i.e., finalizing and confirming that Ms. Williams had secured financing for the purchase of the condo. This was initially scheduled to take place on June 30, 2017. (*See* II-AA 279, ¶5(C).)

The road to closing escrow involved several steps. First, Ms. Williams was not obligated to proceed with the purchase of the condo

unless the appraisal for the condo concluded it was worth an amount greater than or equal to the purchase price of $86,000. (*See* II-AA 277, ¶1(G) and 278, ¶2(B).) The Seller was responsible for paying for the appraisal of the condo, and on May 30, 2017, Mr. Jolly sent Mr. Lazer a form for payment of the appraisal. (*See* II-AA 344, ¶9 and II-AA 354.) At Mr. Lazer's request, Mr. Jolly then scheduled the appraisal of the condo as quickly as possible once the Seller paid for the appraisal. (*See* II-AA 344–345, ¶10.) Due to scheduling issues with the appraiser, the appraisal did not take place until June 7, 2017. (*See* II-AA 272, ¶25; *see also* II-AA 405; *and see* II-AA 344–345, ¶10 and II-AA 359.) Mr. Jolly received the appraiser's report on June 9, 2017 and forwarded it to Mr. Lazer. (*See* II-AA 344–345, ¶10 and II-AA 365.)

In contracts for the sale of condo units, the purchaser must order, fill out, and submit a document called a "condo questionnaire." (*See* II-AA 344, ¶ 5.) Ordering this document requires payment of a non-refundable fee. (*See* II-AA 344, ¶7.) Because this payment was non-refundable and Ms. Williams would not be obligated to purchase the condo unless the appraisal came in at or above the purchase price, she chose not to order the questionnaire until the appraisal report came in.

(*See* II-AA 272, ¶24.)[8] She ordered the condo questionnaire on June 10, 2017. (*See* II-AA 272, ¶25.) She did not make a request for expedited delivery of the questionnaire, as doing so would have cost significantly more money and Mr. Jolly informed her the normal turnaround time for standard delivery was one week. (*See* II-AA 272, ¶26; *see* II-AA 344, ¶¶5–6.) Ms. Williams's decision was common for purchasers. (*See* II-AA 344, ¶6.) Ms. Williams and Mr. Jolly received the condo questionnaire on June 23, 2017, and Mr. Jolly informed Mr. Lazer of its arrival on that day. (*See* II-AA 345, ¶12 and II-AA 369.)[9]

The close of escrow had to be extended multiple times from June 30 to, eventually, July 24, 2017. This was not due to any negligence of Ms. Williams, but rather because the original and amended close of escrow dates fell near July 4. (*See* II-AA 272, ¶27; II-AA 345, ¶14.) Several employees at the loan company Ms. Williams used, Alterra

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[8] Mr. Jolly informed Mr. Lazer of Ms. Williams's decision regarding the timing of ordering the condo questionnaire. (*See* II-AA 345, ¶11.) Mr. Lazer apparently did not find this decision to be cause for concern, as he told Ms. Williams that "[t]hings are moving well" regarding the sale of the condo on June 15, 2017. (*See* II-AA 407.)

[9] The RPA was silent as to when Ms. Williams had to request a condo questionnaire or what delivery option to choose. (*See, generally*, II-AA 277–290.)

Home Loans ("Alterra"), took vacations around this time, leaving Alterra short-staffed. (*See* II-AA 345, ¶14.) Once it became apparent that there would be difficulties in meeting the close of escrow deadlines, Alterra management became involved to speed up the processing and closing of Ms. Williams's loan. (*See* II-AA 345, ¶14.) The last time Alterra asked for information and documents from Ms. Williams was July 12, 2017, and Ms. Williams provided these documents within a few hours of this request. (*See* II-AA 272, ¶28; *see also* II-AA 410.) In fact, Ms. Williams contemporaneously expressed her dissatisfaction with delays in closing escrow. (*See* II-AA 272, ¶28; *see also* II-AA 413.)

Despite all this, Mr. Lazer claimed several times during the course of the sale of the condo that Ms. Williams was to blame for the closing delays. (*See, generally*, II-AA 348–403.) Regardless of whether Mr. Lazer knew he was wrong, his statements on this issue were false.

7.0 Ms. Williams's June 27, 2017 text message and conversation

Mr. Lazer claims Ms. Williams lied when she relayed the contents of a conversation she had with the Seller on June 27, 2017 to the NRED. But Ms. Williams had this conversation with the Seller and contemporaneously told her mother what the Seller told her, consistent

with what Ms. Williams reported to the NRED. Mr. Lazer disputes that this statement is true, but he has nothing to show Ms. Williams made it with knowing falsity, as required to defeat an Ant-SLAPP motion.

At several points during the course of the sale of the condo, Mr. Lazer sent Mr. Jolly communications that *both* Ms. Williams and Mr. Jolly considered unprofessional. (*See* II-AA 27, ¶33; II-AA 345–346, ¶¶15-16 and II-AA 382-383.) By June 27, 2017, Ms. Williams had become frustrated with Mr. Lazer's conduct and the fact that the property had not yet been sold. (*See* II-AA 272–273, ¶29.) On that day, she sent a text message to Mr. Lazer telling him to stop his racist, sexist, and unprofessional behavior that was interfering with the Seller and Ms. Williams closing the sale of the condo, and that if he refused to do so she would have no recourse but to file a complaint with the Nevada Board of Realtors and HUD pointing out his unethical and unprofessional behavior. (*See* II-AA 272–273, ¶29.)

On June 27, 2017, the Seller called Ms. Williams directly. The Seller told Ms. Williams that Mr. Lazer directed the Seller to demand that Ms. Williams to apologize to Mr. Lazer for the text message. (*See*

II-AA 273, ¶30.)[10] The Seller also said during this call that Mr. Lazer had ulterior motives in acting as her real estate agent and that he was trying to sabotage the transaction. (*See* II-AA 273, ¶30.) Ms. Williams contemporaneously informed her mother of the contents of this conversation. (*See* II-AA 299, ¶7.)

Immediately after Ms. Williams sent the June 27 text message, Mr. Lazer began acting erratically and aggressively, including by sending baffling and unprofessional communications to Mr. Jolly about how he could not possibly be racist. (*See* II-AA 273, ¶34; II-AA 345–346, ¶16 and II-AA 382-383.) He also started making legal threats against Ms. Williams and accusing her of extortion based on her text message. (*See* II-AA 273, ¶34.)

8.0 The NRED Complaint and Subsequent Harassment

Aside from the above-mentioned conduct, Mr. Lazer was consistently rude and unprofessional to Ms. Williams throughout 2017. (*See* II-AA 273, ¶33.) Ms. Williams sincerely believes she would not

[10] The notion of a professional instructing the *client* to call an opposing party to demand anything on the professional's behalf is a concept that cuts at the core of professional representation. This bizarrely unprofessional conduct supports the opinion that Mr. Lazer conducted himself unprofessionally.

have been subjected to this kind of treatment had she not been an African American woman. (*See* II-AA 273, ¶33.) Again, perhaps there was bias, and perhaps there was not. Perhaps the bias was intentional or unintentional – but who is *anyone* to tell Ms. Williams what she was permitted to *feel*?

Escrow closed on July 24, 2017 and the sale of the condo was finally complete. (*See* II-AA 273, ¶32.) Despite this, Mr. Lazer continued to threaten to sue Ms. Williams if she did not apologize for her June 27 text message and *pay him for his alleged time lost in responding to it*. (*See* II-AA 273, ¶32.) Ms. Williams retained counsel due to Mr. Lazer's unrelenting and unhinged conduct. (*See* II-AA 273, ¶34.)

Due to Mr. Lazer's conduct during the course of the sale of the condo, Ms. Williams decided to submit the NRED Complaint on August 23, 2017, a month after the close of escrow. (*See* II-AA 273, ¶35.) She submitted the NRED Complaint because she wanted to inform the NRED of Mr. Lazer's behavior so that the NRED could take corrective action if it felt such was warranted. (*See* II-AA 274, ¶37.) Ms. Williams believed at that time, and still believes today, that every statement she

made in the NRED Complaint was either true or an expression of her opinion of Mr. Lazer and his conduct. (*See* II-AA 273–274, ¶¶35–36.)

Shortly after Ms. Williams submitted the NRED Complaint, Mr. Lazer sent a lengthy response to the NRED repeatedly accusing her of extortion and perjury. (*See* II-AA 305–328.) He then sent copies of this response to several employees and directors of Ms. Williams's employer, Southwest Gas, again accusing her of fraud and extortion. These communications, to say the least, appeared to be the screeds of an enraged and unstable individual. (*Id.*) Mr. Lazer's continued unstable behavior made Ms. Williams (and her mother) fear for her safety and she contemplated seeking a restraining order against Mr. Lazer. (*See* II-AA 274–275, ¶¶39–40; *see also* II-AA 300, ¶9.)

The NRED initially determined, based on its investigation of the NRED Complaint, that Mr. Lazer had violated Nevada statutes and NAC 645. (*See* II-AA 274, ¶38; *see also* II-AA 417–418; *and see* II-AA 420–421.) At that point, Ms. Williams' opinion was vindicated.

Mr. Lazer appealed this initial finding. (*See* II-AA 417–421.) The NRED's legal counsel disagreed with this initial assessment and, around April 2018, the NRED chose not to pursue Mr. Lazer any

further. (*See* II-AA 274, ¶38; *see also* II-AA 417–421.)[11] Leading up to filing this lawsuit, Mr. Lazer continued to send threatening and harassing communications to Ms. Williams. (*See* II-AA 274–275, ¶¶39-40.)

[11] Contrary to Mr. Lazer's assertions, the NRED neither dismissed its findings of Mr. Lazer's statutory and ethical violations, nor was Mr. Lazer "cleared of any wrongdoing." (*Compare* I-AA 239, ¶32 and II-AA 420–421.)

SUMMARY OF THE ARGUMENT

In 2017, Ms. Williams purchased a condo, the seller of which was represented in this transaction by Mr. Lazer. During the course of this sale, Mr. Lazer made statements and engaged in conduct that Ms. Williams subjectively felt was racist, sexist, unprofessional, and unethical. She warned Mr. Lazer that she would file an ethics complaint against him if he did not cease this behavior. Mr. Lazer immediately became unhinged and began to threaten Ms. Williams. Approximately a month after the sale of the condo was completed, Mr. Lazer continued to harass Ms. Williams, so she filed her NRED Complaint. This complaint expressed her opinions of Mr. Lazer, attached relevant documents, and recounted facts about Mr. Lazer's conduct and statements that he largely conceded are true. Any statements in the NRED complaint that are not true or substantially true are expressions of opinion about Mr. Lazer that are absolutely protected. Even if every statement in the NRED Complaint was false and Ms. Williams knew it, the complaint is absolutely protected under Nevada's litigation privilege.

Mr. Lazer, after spending the better part of two years continuing to threaten and harass Ms. Williams and her attorney, sued Ms. Williams. Ms. Williams filed a special motion to dismiss under NRS 41.660, attaching documentary evidence and a declaration establishing that the statements in her NRED complaint were either true or were made without knowledge of falsity. In opposition, Mr. Lazer provided declarations claiming that he disagreed with her opinions, but he did nothing to show falsity at all, much less that Ms. Williams had actual knowledge of her opinions being "false."

Despite this, the District Court denied the special motion to dismiss because it felt Ms. Williams had not demonstrated she made her statements in "good faith" under Nevada's Anti-SLAPP statute. Mr. Lazer amended his complaint to add new claims based on the same facts, and Ms. Williams filed another special motion to dismiss with significantly more evidence establishing the truth of her statements to the NRED and her lack of knowledge of falsity. Mr. Lazer provided nothing substantively new in opposition. The District Court again, despite this disparity in quantity and quality of evidence, denied the special motion to dismiss at the first prong, and even went so far as to

say it could not conclude Ms. Williams's statements were protected under Nevada's litigation privilege. Given that this Court considers the matter *de novo*, it is tasked with coming to a conclusion on the record before it.

Ms. Williams has done more than enough to show that she made her statements in good faith. Furthermore, there is no question that her statements are absolutely privileged. Even if they were not, the statements themselves have been proven true or incapable of serving as the basis for a defamation action. The Court should reverse the District Court's denial of Ms. Williams's special motion to dismiss with instructions to grant the motion.

ARGUMENT

1.0 Legal Standard

The denial of an Anti-SLAPP Motion is reviewed *de novo*. *Coker v. Sassone*, 432 P.3d 746, 748-49 (Nev. 2019). The review has two parts.

First, the defendant must show, by a preponderance of the evidence, that the plaintiff's claim is "based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a).

Second, once the defendant meets his minimal burden on the first prong, the plaintiff must show that he has a probability of prevailing on his claims. *See* NRS 41.660(3)(b); *see also John v. Douglas County Sch. Dist.*, 125 Nev. 746, 754 (Nev. 2009).

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

First Amendment as a matter of law." *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294, 305 (2001).[12] Rather,

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

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

[12] Nevada courts look to case law applying California's Anti-SLAPP statute, Cal. Code Civ. Proc. § 425.16, which shares many similarities with Nevada's law. *See John*, 125 Nev. at 756 (stating that "we consider California case law because California's anti-SLAPP statute is similar in purpose and language to Nevada's anti-SLAPP statute"); *see also Shapiro v. Welt*, 389 P.3d 262, 268 (Nev. 2017) (same); *Coker v. Sassone*, 432 P.3d 746, 749 n.3 (Nev. 2019) (finding that "California's and Nevada's statutes share a near-identical structure for anti-SLAPP review … Given the similarity in structure, language, and the legislative mandate to adopt California's standard for the requisite burden of proof, reliance on California case law is warranted"); *Rosen v. Tarkanian*, 453 P.3d 1220 (Nev. 2019) (same); *and see* NRS 41.665(2) (defining the plaintiff's *prima facie* evidentiary burden in terms of California law).

2.0 Ms. Williams Satisfied the First Prong of the Anti-SLAPP Analysis

2.1 First Prong Standards

The Anti-SLAPP statute protects:

> 1. Communication[s] that [are] aimed at procuring any governmental or electoral action, result or outcome;
>
> 2. Communication[s] of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity;
>
> 3. Written or oral statement[s] made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law; or
>
> 4. Communication[s] made in direct connection with an issue of public interest in a place open to the public or in a public forum,
>
> Which [are] truthful or [are] made without knowledge of its falsehood.

NRS 41.637.

In getting past the low hurdle of prong one, a defendant does not need to prove that her statements are constitutionally protected as a matter of law. *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294, 305 (2001). That is presumed in the prong one analysis. *Chavez v. Mendoza*, 94 Cal. App. 4th 1083, 1089 (2001). "Otherwise, the

second step would become superfluous in almost every case, resulting in an improper shifting of the burdens." *Id.* However, this is what Mr. Lazer argued, and will likely argue in this case – that since he thinks the statements are not First Amendment protected, they cannot meet Prong One. This is precisely wrong.

The merits of a plaintiff's claims, and the legality of the defendant's actions, are not relevant under prong one.[13] **The moving party must make only a *threshold* showing as to the first prong of the analysis; questions going to the merits of the plaintiff's claims are reserved for the second prong**. *See John v. Douglas County Sch. Dist.*, 125 Nev. 746, 750 (2009); *see also City of Costa Mesa v. D'Alessio Investments, LLC*, 214 Cal. App. 4th 358, 371 (4th Dist. 2013) (stating that "[t]he merits of [the plaintiff's] claims should play no part in the first step of the anti-SLAPP analysis").[14]

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[13] If relevant at all, they should only be considered during the second prong analysis. *See Coretronic v. Cozen O'Connor*, 192 Cal. App. 4th 1381, 1388 (2d Dist. 2011); *see also Taus v. Loftus*, 40 Cal. 4th 683, 706-07, 713, 727-299 (2007).

[14] This is of the utmost importance to focus on – since Mr. Lazer seems to wish to conflate the two – apparently arguing that "good faith" requires that the claims be evaluated in their entirety in the first prong. This is unsupported by a single reported case or any reasonable

At the District Court, Mr. Lazer insisted that Ms. Williams could not meet her burden of demonstrating she made her statements in "good faith" because he provided declarations claiming that Ms. Williams's statements in the NRED Complaint were false. And, the lower court improperly credited this argument.

While this was never sufficient to defeat Ms. Williams's good faith showing, this is especially so in light of recent case law from this Court clarifying what a defendant must do to satisfy their burden under the first prong of the Anti-SLAPP analysis. Previously, Anti-SLAPP motions were treated as motions for summary judgment, which could be defeated by showing there was a genuine dispute of material fact. *Tarkanian*, 453 P.3d at 1227-28.

This is still the case in the second prong analysis, but as to prong one, this Court established in *Rosen v. Tarkanian* that courts are permitted to weigh competing evidence in determining good faith. 453 P.3d at 1223-25 (finding that it was appropriate to weigh competing evidence submitted by the parties and draw reasonable inferences in

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interpretation of the statute. Nevertheless, this is the argument in virtually every case invoking the statute.

favor of moving party in deciding whether plaintiff had shown "good faith" under Anti-SLAPP statute by a preponderance of the evidence).

Subsequent decisions of this Court reinforce the conclusion that the moving party's burden under prong one is not meant to be difficult to meet. *Stark v. Lackey*, 458 P.3d 342 (Nev. 2020), dealt with a defamation suit based on statements authored by third parties and published on the defendant's web site. The defendant filed an Anti-SLAPP motion containing a declaration by the defendant testifying that "she has only made true statements on NDOW Watch [the Facebook page on which the statements were published] and that she believes that the statements made by others on the Facebook page are either statements of opinion or contain substantial truth." *Id.* at 344. The Court found that this declaration, even though it did not attest to the truth of any individual speaker or statement, was sufficient to satisfy the defendant's burden under prong one in the absence of contravening evidence. *Id.* at 347. That is literally all that is required. Contrary evidence may be introduced, but that evidence must complete the difficult task of showing that the defendant was lying about her mental state at the time she made the statements. This is not theoretically

impossible. A defendant could make statements against interest, or a plaintiff could have other evidence that shows that the defendant *knew* her statements were false. But, as in this case, it is simply a matter of metaphysical impossibility to defeat a prong one showing with a mere declaration provided by an opposing party as to what the other person was actually thinking or what the other person actually *knew*.

The Court in *Abrams v. Sanson* approved of the conclusions in *Tarkanian* as to the prong one analysis, and made it clear that statements of opinion can never be made *with knowledge of falsity* for purposes of the "good faith" analysis.[15] *Abrams v. Sanson*, 458 P.3d 1062 (Nev. 2020). "'Because 'there is no such thing as a false idea,' statements of opinion are statements made without knowledge of their falsehood under Nevada's anti-SLAPP statutes." *Id.* at 1068 (quoting *Pegasus v. Reno Newspapers, Inc.*, 188 Nev. 706, 714 (2002)) (internal citations omitted). Game. Set. Match.

[15] Importantly, the Court in *Sanson* applied the same standards as in *Tarkanian* despite the case not dealing with a public figure plaintiff or the issue of actual malice.

2.2 Mr. Lazer's claims are based on protected conduct

Mr. Lazer's claims are based upon Ms. Williams's August 2017 NRED Complaint. There is no question that these statements fall under NRS 41.637(1)-(3). The District Court determined that Ms. Williams's statements fall into at least one of these protected categories, and Mr. Lazer has not appealed this finding. For the sake of completeness, however, Ms. Williams will explain why her statements fall into protected categories of speech.

First, the NRED Complaint was aimed at procuring governmental action, namely the NRED taking action against Mr. Lazer for conduct which Ms. Williams believed was racist, sexist, unprofessional, and unethical in the form of imposing discipline and/or fines. NRS 41.637(1) is thus satisfied. Mr. Lazer did not argue otherwise at the District Court, and is foreclosed from doing so for the first time on appeal.

Second, the NRED Complaint was a communication of information to the NRED, which is tasked with regulating the behavior of licensed real estate agents in the State of Nevada, regarding the improper conduct of a licensed real estate agent. In fact, the NRED had jurisdiction to initially impose discipline on Mr. Lazer. (*See* II-AA 417–

421.) NRS 41.637(2) is thus satisfied. Mr. Lazer did not argue otherwise at the District Court, and is foreclosed from doing so for the first time on appeal.

Third, the NRED Complaint was a statement made in direct connection with an issue under consideration by an executive body, or any other official proceeding. The complaint initiated the NRED's investigation of Mr. Lazer, an official proceeding of an executive body. The NRED is an executive body, and the Real Estate Commission of the NRED, the body responsible for conducting disciplinary proceedings, is appointed by the Nevada Governor, the chief executive of the State. (*See* II-AA 423–424.) "The Nevada State Legislature … created the Department of Business and Industry … as a State Department included under the State Executive Branch." *White v. Conlon*, 2006 U.S. Dist. LEXIS 43182, *9 (D. Nev. June 6, 2006). The NRED Complaint initiated the NRED's investigation of Mr. Lazer, an official proceeding of an executive body, thus satisfying NRS 41.637(3).

At the District Court, Mr. Lazer argued that NRS 41.637(3) does not apply because this subsection applies only to official proceedings that are already underway, and not to actions that initiate such

proceedings. This is simply wrong. *See, e.g., Carver v. Bonds*, 135 Cal. App. 4th 328, 350 (2005) (noting that "[c]omplaints to regulatory agencies such as the [Board of Podiatric Medicine] are likewise considered to be part of an 'official proceeding' under the anti-SLAPP statute"). Even a parent's letter to a school urging that it fire a baseball coach has been found to be part of an "official proceeding" and thus protected. *See Lee v. Fick*, 135 Cal. App. 4th 89, 96 (2005). If a letter asking a school to fire a coach, when there was no pre-existing proceeding prior to sending the letter, is part of an "official proceeding," then surely a formal complaint to the NRED is as well.

The U.S. District Court for the District of Nevada has agreed that Nevada's Anti-SLAPP statute "has no temporal requirement that only communications that come after the filing of a complaint are protected, and demand letters, settlement negotiations, and declarations are clearly 'made in direct connection' with a complaint, which is 'under consideration by a … judicial body.'" *LHF Prods., Inc. v. Kabala*, 2018 U.S. Dist. LEXIS 148256, *8 (D. Nev. Aug. 24, 2018). Under Mr. Lazer's reading of the statute, his own complaint that initiated the

District Court action would not be protected under the Anti-SLAPP statute, which is plainly incorrect.

Mr. Lazer additionally argued that there is no evidence that Ms. Williams's complaint to the NRED was part of an official proceeding under the statute. This makes no sense. The NRED is responsible for disciplining real estate agents like Mr. Lazer, and Mr. Lazer admitted this at the District Court. (*See* I-AA 146, ¶51.) Mr. Lazer admitted in his complaint that the NRED initiated an investigation because of the NRED Complaint, to which Mr. Lazer responded. The NRED in fact *initially* found that Mr. Lazer was in violation of Nevada statutes and ethical standards for real estate agents and imposed a monetary fine on Mr. Lazer. (*See* II-AA 417–421.) Mr. Lazer cannot (unsanctionably) claim that the NRED did not conduct such an investigation in response to Ms. Williams's complaint. Mr. Lazer's claim that these protections are only afforded to complaints to a government agency that result in a formal hearing or adjudication finds no support in the statute or case law. It is incorrect as a matter of logic, as well, as it would make the statute's protections contingent on future events. For example, a Bar Complaint against an Attorney would not be protected unless the Bar

actually took disciplinary action. This would allow a plaintiff to bring suit on the Complaint, only for the Bar to later issue a formal adjudication after discovery in the proceeding had proceeded and the time to file an Anti-SLAPP motion had elapsed. There is no authority that suggests this is how the statute operates. The NRED Complaint is protected under NRS 41.637(3).

2.3 Ms. Williams made her statements in good faith

At the District Court, Mr. Lazer repeatedly argued that "good faith" means something it does not. Good faith is defined, in this context, by the Anti-SLAPP statute. Good faith means "truthful or … made without knowledge of [their] falsehood." NRS 41.637. Therefore, when we are looking at the first prong, falsity is *statutorily irrelevant*. It is properly described as a standard even higher than that of the Actual Malice standard under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). That standard requires knowing falsity *or* reckless disregard for the truth. Under the first prong of the Anti-SLAPP law, even a recklessly false statement can meet prong one, even if the motion might fail at prong two.

The plaintiff must prove ***knowing*** *falsity* to rebut a defendant's initial showing of good faith. The fundamental inquiry is whether the defendant knowingly lied; "[t]he test is subjective, with the focus on what the defendant *believed* and *intended to convey*, not what a reasonable person would have understood the message to be." *Nevada Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 415 (1983) (emphasis in original). This standard has been met and exceeded in this case.

The term "good faith" in the Anti-SLAPP statute does not have any independent significance from its definition in the statute. The Nevada Supreme Court in *Welt* clarified that this simply means "[t]he declarant must be unaware that the communication is false at the time it was made." 389 P.3d at 267.

The only question as to "good faith" under the Anti-SLAPP statute is whether the moving party's statements were true or made without knowledge of falsity. That is it. There are no other questions. There is no inquiry into motive. There is no inquiry into whether the moving party should have had subjective doubts, or should have investigated the truth of their statements. Mr. Lazer can only defeat Ms. Williams's showing of good faith on the first prong if he can show that Ms.

Williams actually *knew* that her statements were false. There is no record evidence showing this.

Mr. Lazer tried to rebut Ms. Williams's showing of good faith by attempting to fabricate disputes of fact as to a few of the statements contained in the NRED Complaint. But the first prong is not meant to require an analysis of each facet of each individual statement, and is not meant to allow a plaintiff to defeat an Anti-SLAPP motion simply by claiming that, in his opinion, a statement is false. It is merely a *threshold* requirement where the Court is not supposed to inquire as to the merits of a plaintiff's claims. *See John*, 125 Nev. at 750 (2009); *see also D'Alessio*, 214 Cal. App. 4th at 371; *Coretronic*, 192 Cal. App. 4th at 1388; *Loftus*, 40 Cal. 4th at 706-07, 713, 727-299. The U.S. District Court for the District of Nevada has a recent, illustrative case where the Court did the prong one analysis properly, and it found that declarations are sufficient to satisfy a defendant's burden on the first prong. *Kabala*, 2018 U.S. Dist. LEXIS 148256 at *8 (stating that "because LHF offers two signed declarations – one from its counsel and another from a witness – that declare that the communications were truthful or made without knowledge of their falsehood, I find that LHF

has made the requisite showing that its communications are protected").

A statement must include a false assertion of fact to be defamatory. Even if there is doubt as to whether some of the statements in the NRED Complaint are completely, 100% true, this level of veracity is not required. The doctrine of substantial truth bars a court from imposing defamation liability[16] based on a statement's immaterial inaccuracies, so long as the gist of the statement is truthful or made without knowledge of falsity. *See PETA v. Bobby Berosini, Ltd.*, 11 Nev. 615, 627-28 (1995) (finding allegation that trainer beat orangutans with steel rods was not defamatory where trainer actually beat them with wooden rods) (overruled on unrelated grounds in *City of Las Vegas Downtown Redevelopment Agency v. Hecht*, 113 Nev. 644 (1997)). "[M]inor inaccuracies do not amount to falsity unless the inaccuracies 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" *Pegasus*, 118 Nev. at 715 n.17. If the "gist" or "sting" of a story is true, it is not

[16] There is no authority to suggest a court should distinguish between what is considered true under the First Amendment and what is considered true under the Anti-SLAPP statute.

defamatory even if some details are incorrect. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991). This Court recently clarified that "[i]n determining whether the communications were made in good faith, the court must consider the 'gist or sting' of the communications as a whole, rather than parsing individual words in the communications." *Tarkanian*, 453 P.3d at 1222; *see Sanson*, 458 P.3d at 1068-69 (same). "In other words, the relevant inquiry 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,' and not on the 'literal truth of each word or detail used in a statement.'" *Sanson*, 458 P.3d at 1069 (quoting *Tarkanian*, 458 P.3d at 1224). None of the nits in the FAC rise to a level of actionability.

Furthermore, Mr. Lazer's claims are largely premised on Ms. Williams's statements of opinion that Mr. Lazer was racist, sexist, unprofessional, and unethical. A statement of opinion cannot be false or defamatory, as the First Amendment recognizes that there is no such thing as a "false" idea. *See Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 714 (Nev. 2002); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). An "evaluative opinion" cannot be false or defamatory,

either. *See Bobby Berosini*, 11 Nev. at 624-25 (finding that claiming depictions of violence towards animals shown in video amounted to "abuse" was protected as opinion). Such an opinion is one that "convey[s] the publisher's judgment as to the quality of another's behavior, and as such, it is not a statement of fact." *Id*. at 624. To determine whether a statement is one of protected opinion or an actionable factual assertion, the court must ask "whether a reasonable person would be likely to understand the remark as an expression of the source's opinion or as a statement of existing fact." *Pegasus*, 118 Nev. at 715. This Court has recognized that a statement of opinion ***cannot be made with knowing falsity*** for purposes of the "good faith" inquiry. *Sanson*, 458 P.3d at 1068.

2.3.1 Statements of opinion

While the FAC tries to hide the fact that Mr. Lazer's claims are premised primarily on Ms. Williams's statements of opinion, Mr. Lazer conceded this point at the District Court. The Opposition to the Anti-SLAPP Motion makes it clear Mr. Lazer is seeking to be paid money because he is upset about statements in the NRED Complaint that he was **racist**, **sexist**, **unprofessional**, and **unethical**. These are

statements of opinion which cannot support a defamation claim. Mr. Lazer did not challenge that these are statements of opinion incapable of being false, but instead merely claimed that Ms. Williams's opinion is unreasonable. He thus conceded that these are statements of opinion, and thus as a matter of law, they cannot be anything other than "good faith" as the Anti-SLAPP statute defines that term.

Even without this concession, it hardly requires explaining that "racist," "sexist," and "unprofessional" are terms that lack a precise meaning, and which readers could interpret in any different number of ways. Merely accusing someone of being racist or discriminatory "is no more than meaningless name calling" and is not defamatory. *See Overhill Farms, Inc. v. Lopez*, 190 Cal. App. 4th 1248, 1262 (2010) (citing *Stevens v. Tillman*, 855 F.2d 394, 402 (7th Cir. 1988)).

The Southern District of New York recently dealt with a case where a white social studies teacher placed students in physically uncomfortable positions to simulate conditions on a slave ship, and concluded that media commentary calling the teacher "racist" was protected as opinion. *Cummings v. City of New York*, 2020 U.S. Dist. LEXIS 31572, *54-60 (S.D.N.Y. Feb. 24, 2020). Calling someone "sexist"

is likewise purely a statement of opinion. *See Hanson v. County of Kitsap*, 2014 U.S. Dist. LEXIS 89036, *15-16 (W.D. Wash. June 30, 2014) (finding statement that plaintiff made a "sexist response" was expression of non-actionable opinion). So too is the term "unprofessional." *See Moldea v. New York Times Co.*, 22 F.3d 310 (D.C. Cir. 1994) (finding that criticisms of a journalist's "sloppy journalism" and unprofessional techniques were not defamatory).

"Unethical" is arguably susceptible to a defamatory meaning if it implies false, undisclosed facts. But that is not what happened here. The NRED Complaint lays out precisely what conduct Ms. Williams alleged was unethical, and Mr. Lazer did not dispute he engaged in any such conduct. Mr. Lazer disagreed with the opinion that his conduct was unethical, but Ms. Williams's evaluative opinion of it is non-actionable; she disclosed the facts on which she based her opinion. *See Bobby Berosini*, 11 Nev. at 624-25. Even the NRED initially shared her opinion. The facts here are similar to those in *IQTAXX, LLC v. Boling*, 44 Med.L.Rptr. 1561 (Nev. Dist. Ct. 2016), where an individual published a review of a tax preparation company containing undisputed facts and then concluding that the company's conduct constituted

"MALPRACTICE!" The court found that this constituted an opinion based on disclosed facts and was thus not defamatory. *See id*. at 1565. To the extent "racist," "sexist," or "unprofessional" are not statements of pure opinion, they are also expressions of evaluative opinion based on disclosed facts.

This leaves a number of factual statements in the NRED Complaint. Mr. Lazer, however, either conceded that most of these are true or provided no evidence that Ms. Williams made the statements with knowledge of their falsity. For the sake of completeness, each of the allegedly defamatory statements will be addressed in turn below.

2.3.2 Mr. Lazer's May 13, 2017 statements

Mr. Lazer did not contest that he said to Ms. Williams on May 13, 2017, "Daphne, I think you are going to be successful. When you become successful and you want to buy a bigger house and if your brother is retired by then, I'd be glad to be your realtor." (II-AA 269, ¶5; I-AA 237, ¶24.) Ms. Williams subjectively felt that this statement was sexist because Mr. Lazer did not know Ms. Williams, and yet he apparently assumed that she was not successful and needed to rely on her brother. (*See* II-AA 269, ¶6.) Mr. Lazer did not allege any part of

this statement is false, but rather that "[n]o reasonable person could believe, in good faith, that" the above statement "could possibly re [sic] sexist, unprofessional, or unethical." (I-AA 237, ¶24.) The implication that Ms. Williams was not already "successful" is certainly insulting, as is the implication that she mooches off her brother. It is not beyond the pale to believe that Ms. Williams could at least subjectively extrapolate that it was a bias-driven statement.[17]

Whether or not it was reasonable, and whether or not Mr. Lazer agreed with it, Ms. Williams's opinion regarding the nature of Mr.

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[17] Courts have accepted the concept of "microaggressions," seemingly innocuous or automatic, involuntary reactions that indicate bias. *See Weinberg v. William Blair & Co.*, 2015 U.S. Dist. LEXIS 133759, *17-18 (N.D. Ill. Sept. 30, 2015) (noting that statements at issue in discrimination claim included "potentially offensive microaggressions whose true meaning depends greatly on context. For example, remarking that Weinberg looks like the Jewish baseball player Sandy Koufax may have been a coded suggestion that all Jewish individuals look alike"). These more subtle indicators of bias have also been a point of legal academic discussion. *See* R.A. Lenhardt, "Understanding the Mark: Race, Stigma, and Equality in Context, 79 N.Y.U.L. REV. 803, 837 (June 2004) (defining "microaggressions" as "the term used to refer to the slights, racialized comments and insults, and non-verbal 'put-downs' that racially stigmatized individuals endure on a daily basis"); *see also* Angela Onwuachi-Willig and Jacob Willig-Onwuachi, "A House Divided: The Invisibility of the Multiracial Family, 44 HARV. C.R.-C.L. L. REV. 231, 240-41 (Winter 2009) (discussing microaggressions in the form of offensive assumptions made about black spouse in multi-racial couple).

Lazer's statement cannot be "false." She disclosed the facts on which she based her opinion to the NRED. The statement is thus incapable of being a statement of fact, and Ms. Williams could not have made it with knowledge of falsity. Ms. Williams made this statement in good faith, as the law defines that term.

2.3.3 Mr. Lazer shared information Ms. Williams thought was confidential

Mr. Lazer denied only that he told Ms. Williams that he and the Seller met on an dating web site. (I-AA 144, ¶29.) He admitted that he told Ms. Williams the commission he was set to earn, and he was silent on Ms. Williams's claim that he told her further information on how he and the Seller met. (I-AA 144–145, ¶¶29–32.) Mr. Lazer admitted to the NRED in 2017 that he told Ms. Williams personal information about the Seller and the nature of their alleged "friendship," but claimed he was authorized to do so. Ms. Williams was not aware of any authorization either to tell her about the Seller's personal life or Mr. Lazer's commission, and Mr. Lazer did not allege Ms. Williams was aware of such authorization.[18] (*See* II-AA 269, ¶9.)

[18] Mr. Lazer claimed that Ms. Williams would have known about this alleged authorization if she asked the Seller about it. (*See* I-AA

Ms. Williams was thus, in August 2017, in a position where she believed Mr. Lazer told her information about the Seller's personal life and his commission without authorization from the Seller. (*See id.*) Ms. Williams believed that sharing this information without authorization from the Seller was unethical. (*See id.*) It does not matter whether someone else allegedly also told Ms. Williams this information; Ms. Williams did not tell Mr. Lazer she was already aware of it, and she had no reason to believe Mr. Lazer was aware she already knew it. (*See id.*) Whether Mr. Lazer actually did commit a violation of the rules of professional conduct for real estate agents is irrelevant. The only thing that matters is whether Ms. Williams subjectively believed he was acting *unethically*, from her layperson's perspective, based on this information, which she affirmatively did. (*See id.*) She made these statements in good faith as the statute defines that term.

237–238, ¶25.) But that is not an allegation of knowing falsity, and Ms. Williams was not required to perform a reasonable investigation to have made her statements in good faith.

2.3.4 Mr. Lazer's contact with the appraiser

Mr. Lazer admitted that he has a practice of communicating with appraisers prior to their appraisal of real estate in his deals. (*See* I-AA 238, ¶26.) He claimed there is nothing unethical about this practice.

Ms. Williams spoke with an NRED employee prior to filing the NRED Complaint, and the employee told her realtors are not supposed to do this. (*See* II-AA 270, ¶12.) "[T]he Dodd-Frank … Act reduced the amount of direct contact between lenders and appraisers." *Masters v. Class Appraisal, Inc.*, 2019 U.S. Dist. LEXIS 161487, *2, 2019 WL 4597365 (E.D. Mich 2019). The Act prohibits conduct that seeks to influence an appraiser. 15 U.S.C.S. §1639e(b)(3); *see also* 75 Fed. Reg. 77450, 77457 (2010) (federal guidelines interpreting the Dodd Frank Act and prohibiting certain communications with appraisers). Although this brief is not an in-depth analysis of the Dodd-Frank Act, it certainly does appear that such contact *could* be illegal – depending on the content of the conversation. And a layperson like Ms. Williams certainly would be exposed to plenty of information about Dodd-Frank, without necessarily understanding it as well as a lawyer might.

But, let us presume that this reasonable interpretation of Dodd-Frank is incorrect. Let us also presume that the NRED employee who advised Ms. Williams was similarly mistaken. Ms. Williams still *subjectively believed* that Mr. Lazer's practice was unethical. (*See id.*) She made this statement in good faith as defined by the statute.

2.3.5 Ms. Williams allowed removal of property from the condo

Ms. Williams stated in the NRED Complaint that Mr. Lazer falsely claimed she "didn't let the seller's 'movers' get into the house to access her [the Seller's] property." As explained in the Statement of Relevant Facts Section 1.4, Mr. Lazer's claim to this extent is a false statement of fact. Ms. Williams allowed people with the Seller's authorization into the condo to remove the Seller's property. Mr. Lazer admitted this in his response to the NRED and his Initial Complaint. (*See* II-AA 312, 318, & 323–324.)

Ms. Williams did not agree to the Seller's proposed contractual addendum on this issue, which would have required her to give strangers ill-defined "reasonable access" to her residence; this was not acceptable to her. (*See* II-AA 270, ¶¶14–15.) The only remaining items in the condo were wall-mounted shelves and a television bracket, which

Ms. Williams believed are fixtures that were sold along with the condo. (*See* II-AA 270, ¶16; II-AA 278, ¶4; II-AA 312, 318, & 323–324.)

Mr. Lazer's assertion that Ms. Williams did not allow the Seller's "movers," into the condo to remove the Seller's property was thus factually false, meaning Ms. Williams's statement in the NRED Complaint is true. Even if there is some possible ambiguity in the meaning of the words in the NRED Complaint, Ms. Williams made this statement without knowing it to be false. She thus made this statement in good faith as defined by the statute.

2.3.6 Mr. Lazer did not send Ms. Williams a fully executed copy of the RPA

Mr. Lazer claimed Ms. Williams lied when she told the NRED that Mr. Lazer did not provide her a signed copy of the RPA because he sent her a version with the Seller's signature on May 18, 2017. (*See* I-AA 238, ¶28.) However, Ms. Williams's statement is **provably** true. As explained in the Statement of Relevant Facts Section 1.5, the version Mr. Lazer sent was not the final version, as Ms. Williams made revisions to the terms of the RPA during a May 20, 2017 meeting at a Whole Foods. Because the Seller needed to approve these additional terms, Ms. Williams asked Mr. Lazer to send her a fully executed copy

once the Seller signed it. (*See* II-AA 271, ¶¶17–20.) He did not. Ms. Williams did not receive it until after escrow. (*See* II-AA 271, ¶¶20-21.)

Ms. Williams's statement is thus literally true. Even if there is some possible ambiguity in the meaning of the words in the NRED Complaint, she made this statement without knowing it to be false. She thus made this statement in good faith as defined by the statute.

In his Opposition to the Anti-SLAPP Motion, Mr. Lazer for the first time referred to an alleged May 22, 2017 phone call in which Ms. Williams told Mr. Lazer to send the RPA to Mr. Jolly. This conversation never happened, as explained in the Statement of Relevant Facts Section 1.5. This last-minute allegation is not credible, as Mr. Lazer did not at any point previously claim this happened, whether in his response to the NRED, his demand letters to Ms. Williams, his initial or amended complaints, or in his opposition to Ms. Williams's Initial Anti-SLAPP Motion. Even the email transmitting the RPA to Mr. Jolly makes no mention of Ms. Williams's alleged request, and Mr. Jolly has no recollection of Mr. Lazer telling him to forward it to Ms. Williams or Ms. Williams asking for a copy. (III-AA 534; II-AA 346, ¶17.) To believe Mr. Lazer's statement, the Court would have to

believe that Ms. Williams told Mr. Lazer to send Mr. Jolly the fully-executed RPA, then Mr. Lazer made no mention of this request when he sent it, then Ms. Williams never asked Mr. Jolly for the RPA despite knowing Mr. Lazer would have sent it to him instead of her. The claim is nonsensical and not even remotely plausible, and in light of *Tarkanian*, the Court is obligated to weigh the implausibility of this claim against the unrebutted evidence provided by Ms. Williams. Mr. Lazer's claim is a self-serving, false statement introduced at the 11th hour in a desperate attempt to create a factual dispute. The Court should disregard it.

2.3.7 Mr. Lazer falsely claimed Ms. Williams was responsible for delays in closing escrow

Mr. Lazer claimed during the sale of the condo that the delays in closing escrow were due to Ms. Williams's negligence and failure to meet due diligence deadlines. (*See, generally*, II-AA 348–403.) Mr. Lazer's claims were false at the time he made them.

The appraisal of the condo was delayed due to scheduling issues not Ms. Williams's fault (II-AA 272, ¶¶25, 27-28; II-AA 344–345, ¶¶10, 12, 14; II-AA 354, 359, & 365; II-AA 405); Ms. Williams did not order the condo questionnaire until after the appraisal report came in because

she did not want to pay a non-refundable fee if the condo was not sufficiently valuated (II-AA 271, ¶21; II-AA 344–345, ¶¶4-7, 11; II-AA 277–278, ¶¶1(G) and 2(B)); she made the normal decision of making a standard delivery order for the condo questionnaire, which she was told would take 7 days; (II-AA 272, ¶26; II-AA 344, ¶¶5-6); she ordered the questionnaire on June 10, 2017 (II-AA 272, ¶25); the RPA did not set a timeline regarding the condo questionnaire (II-AA 277–290); delays in closing escrow were due to Alterra being short-staffed (II-AA 272, ¶27; II-AA 345, ¶14); and Ms. Williams was always timely in providing documents and information to Alterra (II-AA 272, ¶28; II-AA 346, ¶17). Mr. Lazer did not dispute any of these facts at the District Court.

Mr. Lazer claimed throughout the sale of the condo that all delays in closing escrow were Ms. Williams's fault. (*See, generally,* II-AA 348–403.) Ms. Williams provided declarations and documentary evidence showing that all delays beyond the initial delay were due to staffing issues at Alterra. She provided that the initial delay was caused by delays in conducting the appraisal and receiving the condo questionnaire that were not her fault. (*See* II-AA 272, ¶27; II-AA 345, ¶14.) Mr. Lazer, during the sale, did not qualify his statements by

saying that Ms. Williams was one of multiple reasons for these delays, but rather said she alone was the cause for the delays. Regardless of whether Mr. Lazer believed these delays were due to Ms. Williams's actions, he falsely claimed she was responsible for delays in closing escrow. Ms. Williams's complaint is thus true or made without knowledge of its falsity – good faith as defined by the statute.

2.3.8 The June 2017 call with the Seller

Ms. Williams had a phone call with the Seller on June 27, 2017 during which the Seller said, *inter alia*, that Mr. Lazer instructed her (his client) to tell Ms. Williams to apologize to Mr. Lazer, that Mr. Lazer was trying to sabotage the sale of the condo, and that Mr. Lazer had ulterior motives. (*See* II-AA 272–273, ¶¶29–30.) Williams contemporaneously told her mother about this conversation. (*See* II-AA 299, ¶7.) The Seller did not deny that this conversation took place or that Mr. Lazer instructed her to tell Ms. Williams to apologize. (*See* I-AA 149, ¶¶12-13.)

While Mr. Lazer disputed the contents of this conversation, he made no allegation and provided no evidence that Ms. Williams made her statements regarding this conversation with knowledge they were

false. This is particularly unlikely given that she contemporaneously relayed these statements to her mother. She met her burden of showing she made this statement in good faith as defined by the statute.

2.3.9 Ms. Williams's NRED Complaint is protected if <u>any</u> of the statements in it were made in good faith as defined by the statute

Ms. Williams's factual statements are by and large true, and any dispute Mr. Lazer may have with the majority of them are insignificant. Given this, and the fact that the allegedly actionable core of Ms. Williams's statements are expressions of opinion, Ms. Williams made her statements in good faith. Ms. Williams satisfies her burden under the first prong of the Anti-SLAPP law, and now Mr. Lazer must show a probability of prevailing on his claims. He cannot do so.

Even if Mr. Lazer could rebut Ms. Williams's showing of good faith as to some of her statements at issue, he has not done so as to all of them. Any possibly questionable statements are inextricably intertwined with statements that undeniably are either true or that Ms. Williams made without knowledge of falsity. This makes Mr. Lazer's claims "mixed" causes of action for Anti-SLAPP purposes. These "mixed

cause[s] of action [are] subject to the Anti-SLAPP statute if **at least one of the underlying acts is protected conduct**, unless the allegations of protected conduct are merely incidental to the unprotected activity." *Lauter v. Anoufrieva*, 642 F. Supp. 2d 1060, 1109 (C.D. Cal. 2008) (emphasis added); *see also Salma v. Capon*, 161 Cal. App. 4th 1275, 1287 (2008) (holding that a cause of action based on both protected and unprotected activity under California's Anti-SLAPP statute is subject to an Anti-SLAPP motion); *Peregrine Funding, Inc. v. Sheppard Mullin*, 133 Cal. App. 4th 658, 675 (2005) (finding that because plaintiffs' claims "are based in significant part on [defendant's] protected petitioning activity," the first anti-SLAPP prong was satisfied"). Several of Ms. Williams's statements were unquestionably expressions of opinion, true, or made without knowledge of falsity. None of the statements on which Mr. Lazer premises liability are merely incidental to these protected statements, and thus all of Ms. Williams's statements are protected.

3.0 Mr. Lazer Cannot Show a Probability of Prevailing on His Claims

NRS 41.660 defines a plaintiff's burden of proof as "the same burden of proof that a plaintiff has been required to meet pursuant to

California's anti-Strategic Lawsuit Against Public Participation law as of the effective date of this act." NRS 41.665(2). Mr. Lazer cannot simply make vague accusations or provide a mere scintilla of evidence to defeat Ms. Williams's Motion. Rather, to satisfy his evidentiary burden under the second prong of the Anti-SLAPP statute, Mr. Lazer must present "substantial evidence that would support a judgment of relief made in the plaintiff's favor." *S. Sutter, LLC v. LJ Sutter Partners, L.P.*, 193 Cal. App. 4th 634, 670 (2011); *see also Mendoza v. Wichmann*, 194 Cal. App. 4th 1430, 1449 (2011) (holding that "substantial evidence" of lack of probable cause was required to withstand Anti-SLAPP motion on malicious prosecution claim). Mr. Lazer cannot make this showing as to any of his claims.

3.1 Ms. Williams's statements are absolutely privileged

Ms. Williams's statements to the NRED are absolutely protected under the litigation privilege. Statements made in quasi-judicial proceedings, such as those before administrative bodies, are absolutely privileged. *See Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212, 217 (1999); *see also Lewis v. Benson*, 101 Nev. 300, 301 (1985) (applying absolute privilege to citizen complaint to internal

affairs bureau against police officer). This privilege bars any liability for statements made in the course of these proceedings, **even if they are made maliciously and with knowledge of their falsity**. *See Sahara Gaming*, 115 Nev. at 219. It is not "limited to the courtroom, but encompasses actions by administrative bodies and quasi-judicial proceedings. The privilege extends beyond statements made in the proceedings, and includes statements **made to initiate official action**." *Wise v. Thrifty Payless, Inc.*, 83 Cal. App. 4th 1296, 1303 (2000) (emphasis added) (holding absolute privilege applied to husband's report to the Department of Motor Vehicles regarding wife's drug use and its possible impact on her ability to drive); *see also Fink v. Oshins*, 118 Nev. 428, 433-34 (2002) (holding that "the privilege applies not only to communications made during actual judicial proceedings, but also to '**communications preliminary to a proposed judicial proceeding**'") (emphasis added).

"[The] absolute privilege exists to protect citizens from the threat of litigation for communications to government agencies whose function it is to investigate and remedy wrongdoing." *Wise*, 83 Cal. App. 4th at 1303. "[C]ourts should apply the absolute privilege liberally, resolving

any doubt 'in favor of its relevancy or pertinency,'" and district courts should "resolve[] any doubt in favor of a broad application of the absolute privilege." *Oshins*, 118 Nev. at 434. Finally, the privilege applies to all claims based on the same set of facts: "[i]f a statement is protected, either because it is true or because it is privileged, that 'protection does not depend on the label given the cause of action.'" *Francis v. Dun & Bradstreet, Inc.*, 3 Cal. App. 4th 535, 540 (1992) (quoting *Reader's Digest Assn. v. Superior Court*, 37 Cal. 3d 244, 265 (1984)). "Though the privilege originally formed as a defense to defamation, it has been expanded to cover a variety of torts.'" *Allstate Ins. Co. v. Belsky*, 2018 U.S. Dist. LEXIS 162318, *8 (D. Nev. Sept. 21, 2018); *Lebbos v. State Bar*, 165 Cal. App. 3d 656, 667 (1985) (noting that litigation privilege applies to claims including, *inter alia*, intentional infliction of emotional distress and negligence).

Though the Nevada Supreme Court apparently has not yet dealt with a case applying the absolute privilege to claims against a *real estate agent*, California has recognized that its similar absolute privilege applies to such circumstances. *See King v. Borges*, 28 Cal. App. 3d 27, 34 (1972) (extending absolute privilege to complaint against

real estate agent filed with state division of real estate); *see also Vultaggio v. Yasko*, 215 Wis. 2d 326, 334 (Wis. 1998) (noting Wisconsin extending absolute privilege to "statements made to a real estate broker's board"). Ms. Williams's complaint to the NRED is comparable to a complaint filed with a state bar against an attorney, which is considered an official proceeding. *See Lebbos*, 165 Cal. App. 3d at 667 (finding that "[i]nformal complaints to the State Bar are part of 'official proceedings' protected by" California's privilege); *see also Katz v. Rosen*, 48 Cal. App. 3d 1032, 1036-37 (1975) (stating that "[i]nformal complaints received by a bar association which is empowered by law to initiate disciplinary procedures are as privileged as statements made during the course of formal disciplinary proceedings").

Nevada has found that establishing this absolute privilege requires two elements to be satisfied: "(1) a judicial [or quasi-judicial] proceeding must be contemplated in good faith and under serious consideration, and (2) the communication must be related to the

litigation." *Jacobs v. Adelson*, 325 P.3d 1282, 1285 (Nev. 2014).[19] "Good faith" here is a low bar because the privilege applies "even when the motives behind [the statements] are malicious and they are made with knowledge of the communications' falsity." *Id.* This condition of the absolute privilege is satisfied if the speaker makes a statement while seriously considering litigation or a quasi-judicial proceeding, regardless of their motives.[20] At the District Court, Mr. Lazer only contested the first element of this privilege.

The FAC show this to be the case. Ms. Williams told Mr. Lazer in June 2017 she planned to file a complaint against him, then did so two months later. To bolster the strength of her complaint, at least initially, **the NRED found cause to discipline Mr. Lazer** – though they later reversed on appeal. (*See* II-AA 417–421.) The NRED had the ability to initiate an investigation, which it did, and impose discipline,

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[19] This privilege applies equally to lawyers and non-lawyers alike. *See Clark Cty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 383 (2009) ("VESI").

[20] This requirement of the privilege is meant to prevent parties from abusing the privilege by, for example, making defamatory statements in a demand letter with no intention of initiating litigation, then distributing these statements to media outlets and claiming an absolute privilege. The facts here are the exact opposite of this scenario.

which it also initially did.[21] The NRED investigation, including the NRED Complaint which initiated it, is thus an "official proceeding" for purposes of the litigation privilege. The privilege thus applies even if every statement in the NRED Complaint was false and Ms. Williams knew every statement to be false. *See Fitzgerald v. Mobile Billboards, Ltd. Liab. Co.*, 416 P.3d 209, 211 (Nev. 2018) (noting that "the common law absolute privilege bars any civil litigation for defamatory statements even when the defamatory statements were published with malicious intent").

The NRED Complaint is unquestionably absolutely privileged, even if Ms. Williams knew that every statement in it was false.[22] All of Mr. Lazer's claims must fail and he cannot show a probability of prevailing on them. But even if the absolute privilege did not apply, Mr. Lazer's claims fail on the merits.

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[21] Mr. Lazer agreed that the NRED has these duties and powers. (I-AA 146, ¶51.)

[22] This, of course, is not the case, as Ms. Williams believed every statement in the complaint to be true. (*See* II-AA 274, ¶36.)

3.1.1 Mr. Lazer's defamation claims fail as a matter of law

To establish a cause of action for defamation, a plaintiff must show: (1) a false and defamatory statement by the defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages. *See Wynn v. Smith*, 117 Nev. 6, 10 (Nev. 2001); *see also Pegasus,* 118 Nev. at 718. A statement is only defamatory if it contains a factual assertion that can be proven false. *See Pope v. Motel 6*, 114 P.3d 277, 282 (Nev. 2005).

As discussed in Argument Section 2.3.1, *supra*, a statement can only be defamatory if it is false and factual. If a statement is true or substantially true, such that the "gist" or "sting" of a story is true, it is not defamatory even if some details are incorrect. *Masson*, 501 U.S. at 517. A statement also cannot be defamatory if it is an expression of opinion. *See Pegasus*, 118 Nev. at 714.

As explained in Argument Sections 2.3.2 to 2.3.8, *supra*, the vast majority of the statements in the NRED Complaint which contain factual assertions are true or substantially true, and are not defamatory. This only leaves the statements that Mr. Lazer's conduct

described in the NRED Complaint was racist, sexist, unprofessional, and unethical. As explained above, these are statements of opinion which cannot support a defamation claim.

Aside from this defect, Mr. Lazer provided absolutely no evidence that he suffered any damages whatsoever. He simply claimed he had to spend time responding to the NRED, which is not reputational harm recoverable in a defamation claim. Ms. Williams's statements are either true, substantially true, or incapable of defamatory meaning, and are thus protected under the First Amendment, and Mr. Lazer has suffered no damages. Mr. Lazer cannot show a probability of prevailing on his defamation claims.

3.1.2 Mr. Lazer's business disparagement claim fails

A defamation action concerns statements that injure a plaintiff's personal reputation, while a business disparagement claim concerns statements regarding the quality of the plaintiff's goods or services. "Thus, if a statement accuses an individual of personal misconduct in his or her business or attacks the individual's business reputation, the claim may be one for defamation per se; however, if the statement is directed towards the quality of the individual's product or services, the

claim is one for business disparagement." *VESI*, 125 Nev. at 385-86. Mr. Lazer attempted to plead a claim for defamation, not business disparagement. Ms. Williams's NRED Complaint clearly makes claims targeted at Mr. Lazer's personal character, not the quality of Mr. Lazer's services as a realtor, and the statements at issue could only possibly harm Mr. Lazer's personal reputation. Ms. Williams's statements are not of the character with which a claim for business disparagement is concerned.

Even if they were, though, the claim still fails. A business disparagement claim requires falsity and a lack of privilege, in addition to a higher malice requirement and proof of special damages. *See id*. at 386. As with his defamation claims, Mr. Lazer provided no evidence of damages, such as a loss of business, as a result of the NRED Complaint. This claim thus fails for the same reasons the defamation claims fail.

3.1.3 Mr. Lazer's intentional infliction of emotional distress claim fails miserably

There has never been a case where mere spoken words of a garden variety defamation claim have supported a claim of intentional infliction of emotional distress. Nevertheless, SLAPP plaintiffs

virtually always add this claim to their complaints. They should be sanctioned for that, even if there were no Anti-SLAPP law.

To establish a cause of action for intentional infliction of emotional distress, Mr. Lazer must affirmatively prove: "(1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff's having suffered severe or extreme emotional distress, and (3) actual or proximate causation." *Olivero v. Lowe*, 116 Nev. 395, 398-99 (2000) (citing *Star v. Rabello*, 97 Nev. 125, 126 (1981) (citations omitted). "Extreme and outrageous conduct is that which is outside all possible bounds of decency and is regarded as utterly intolerable in a civilized community." *Maduike v. Agency Rent-A-Car*, 114 Nev. 1, 4 (1998). The bar for establishing extreme and outrageous conduct is high, and not every statement that one finds personally upsetting may provide the basis for liability. *See Chehade Refai v. Lazaro*, 614 F. Supp. 2d 1103, 1121-22 (D. Nev. 2009). Harm is only recognized for this tort if "the stress [is] so severe and of such intensity that no reasonable person could be expected to endure it." *Alam v. Reno Hilton Corp.*, 819 F. Supp. 905, 911 (D. Nev. 1993).

First, Mr. Lazer's claim fails because the majority of the statements at issue are undeniably true, and an IIED claim cannot be premised on a true statement. *See Dun & Bradstreet*, 3 Cal. App. 4th at 540. Second, Mr. Lazer cannot prove the elements of an IIED claim. There is nothing extreme or outrageous about Ms. Williams's conduct. She followed the NRED's procedures for submitting a complaint against a licensed realtor, and the NRED felt the allegations were sufficient initially to impose discipline on him. And as explained above, Ms. Williams's statements were either true or statements of opinion. There is nothing extreme about telling an executive body tasked with overseeing realtors about the actual or perceived misconduct of a realtor. Even if Ms. Williams's statements were false, they amount to nothing more than minor insults which cannot make out an IIED claim. Furthermore, there is nothing particularly severe or extreme about the stress Mr. Lazer alleges. Having to spend time responding to the NRED is not stress so severe and of such intensity that no reasonable person could be expected to endure it." *Alam*, 819 F. Supp. at 911.

And as with his other claims, the IIED claim fails for lack of evidence of damages. There are no documents and no declarations even

claiming, much less specifying or quantifying, any kind of emotional distress caused by the NRED Complaint. There is likewise no evidence that Ms. Williams intended to inflict any kind of emotional distress when she filed the NRED Complaint. This claim thus fails.

3.1.4 Mr. Lazer's negligence claim fails

Mr. Lazer's negligence claim is completely subsumed by his defamation claims. Negligence is already an element of a defamation claim, and so this is duplicative of Mr. Lazer's other claims and must be dismissed. But aside from this, Mr. Lazer again failed to provide any evidence of damages. The negligence claim fails.

CONCLUSION

Ms. Williams filed a complaint with an executive agency meant to investigate the misconduct of realtors in Nevada. The NRED performed an investigation and initially found that Mr. Lazer violated Nevada law and ethics rules. Mr. Lazer appealed this decision as part of a formal proceeding. He then retaliated against Ms. Williams for filing this complaint, claiming that her expressions of opinion based on admittedly true facts are defamatory. Ms. Williams's NRED Complaint is absolutely protected, regardless of her motives, and Mr. Lazer suffered no cognizable damages resulting from the complaint. This is precisely the kind of suit Nevada's Anti-SLAPP statute is meant to foreclose, and this Court should send a clear message that citizens do not need to fear retaliation from thin-skinned individuals when they report misconduct to the government. The Court should reverse the District Court's denial of Ms. Williams's special motion to dismiss with instructions to grant the motion.

Dated: June 1, 2020.

RANDAZZA LEGAL GROUP, PLLC

/s/ Marc J. Randazza

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CERTIFICATION OF ATTORNEY

1. The undersigned has read the following opening brief of Defendant/Appellant Daphne Williams;

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

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

4. The brief complies with the formatting requirements of Rule 32(a)(4)-(6) and the type-volume limitations stated in Rule 32(a)(7). Specifically, the brief was written in 14-Point Century Schoolbook font, and the brief is 13,909 words as counted by Microsoft Word.

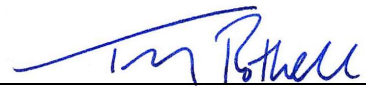
Dated: June 1, 2020.

/s/ Marc J. Randazza
Marc J. Randazza

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2020, a true and correct copy of the foregoing Appellant's Opening Brief was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

Respectfully Submitted,



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