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SUPREME COURT

STATE OF NEVADA

DAPHNE WILLIAMS, Appellant, vs. CHARLES "RANDY" LAZER, Respondent.	No. 80350

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

Counsel for plaintiff/respondent 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. Respondent Charles "Randy" Lazer is an individual, and thus there is no parent corporation or publicly held company that owns 10% or more of her stock.

2. Bohn & Trippiedi represented Respondent in the district court and continues to represent Respondents on appeal.

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I. INTRODUCTION

Four Nevada judges - consisting of District Court Judge Joe Hardy, as well as the entire Nevada Court of Appeals - have now unanimously ruled that Appellant Daphne Williams has failed to prove she made her alleged defamatory statements in good faith - meaning the statements were truthful or made without knowledge of their falsehood - as required under NRS 41.637. Judge Hardy made this same finding twice, denying Appellant's Anti-SLAPP special motion to dismiss and then denying Appellant's renewed Anti-SLAPP motion on the same grounds. The Court of Appeals reviewed Judge Hardy's decisions de novo - from scratch - and came to the same conclusion. None of these decisions have been close calls. Appellant now takes her fourth bite at the same apple after failing at two motions to dismiss and an appeal. Respondent requests this Court make the same rulings as its judicial predecessors and deny Appellant's Petition for Review.

Appellant's Petition for Review focuses almost exclusively on the issues of racism and sexism, casting this matter as a racial struggle between Appellant and Respondent. However, Appellant misses the mark. As all of the previous rulings have concluded, Appellant cannot show she made her statements in good faith. Even without the claims of racism and sexism upon which Appellant focuses, the

Court of Appeals still had an ample record of Appellant's false statements upon which to find Appellant failed to meet her burden to show she made her statements in good faith. The first several pages of the Court of Appeals' Order of Affirmance goes over the surprisingly dense thicket of facts undergirding this case and comes to the conclusion that Appellant did not meet her burden.

Finally, even if Appellant did meet her burden to show her NRED statement of fact was a good faith communication, Respondent has met his burden under NRS 41.660(3)(b) to make a prima facie showing that he has a probability of success on the merits. Appellant made numerous false, defamatory statements in her NRED complaint, as is clear from the record of this case. And the absolute litigation privilege does not apply to the anti-SLAPP analysis.

In the alternative, if the privilege does apply here, it still does not justify overturning the Court of Appeals' Order of Affirmance because the privilege only applies to the second prong of anti-SLAPP analysis. Appellant has failed to meet her burden on the first prong, so the absolute privilege is inapplicable here.

II. ARGUMENT

1. Legal Standard for an Anti-SLAPP Motion.

Appellant's Anti-SLAPP Motion to Dismiss is a specific type of statutory

motion brought under NRS 41.635 et seq. Appellant alleges her NRED Statement of Fact cannot be the source of a defamation complaint because it is protected under the anti-SLAPP statute. However, Appellant cannot meet her burden to show she is entitled to statutory anti-SLAPP protections.

NRS 41.660(3) sets out the standards the district court shall evaluate in determining whether to grant an anti-SLAPP motion:

> 3. If a special motion to dismiss is filed pursuant to subsection 2, the court shall:
>
> (a) Determine whether the moving party has established, by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern;
>
> (b) If the court determines that the moving party has met the burden pursuant to paragraph (a), determine whether the Respondent has demonstrated with prima facie evidence a probability of prevailing on the claim;
>
> ...
>
> (d) Consider such evidence, written or oral, by witnesses or affidavits, as may be material in making a determination pursuant to paragraphs (a) and (b)....

Thus, an anti-SLAPP motion requires, in part, a two step analysis: First, to determine whether the movant has established by a preponderance of the evidence that the claim is based on 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. Second, if the movant meets her burden, the next step is for the court to

determine whether the nonmovant has demonstrated with prima facie evidence a probability of prevailing on his claim.

Importantly, NRS 41.637 states that a "good faith communication" is one that is "truthful" or "made without knowledge of its falsehood." The burden is on the moving party, here, Appellant, to prove "by a preponderance of the evidence that her 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). Appellant cannot meet this burden because she knew her statements were false when she made them. And even if Appellant can meet that burden, Respondent meets his burden under NRS 41.660(3)(b) to make a prima facie showing that he has a probability of prevailing on his claim.

2. The Court of Appeals Properly Found Appellant Failed to Meet Her Burden to Show She Made Her Statements in Good Faith.

Appellant cannot meet the requirements for anti-SLAPP relief against Respondent because Appellant's submission to the Nevada Real Estate Commission ("**NRED**") was not made in good faith. As the district court twice ruled, and as the Court of Appeals affirmed, there is insufficient proof Appellant made her NRED Statement of Fact ("**complaint**") in good faith because Appellant was aware that her statements to NRED were false when she made those statements.

Appellant makes various attacks against the Order of Affirmance, but all fail. First, as to the claim regarding Respondent's contact with the appraiser: The Court of Appeals cited to NRS 645C.557(3), which explicitly allows a person with an interest in a real estate transaction to make certain requests of an appraisal. This is not some internal ethical rule for real estate agents; it is a statute. Appellant cannot claim ignorance of the law as a defense.[1] Appellant is presumed to know the law. Additionally, the Court of Appeals ruled Appellant did not make a sufficient showing of proof of her conversation with NRED. And the Court of Appeals cites to NRED's closing of the case without disciplining Respondent as proof that Respondent was entitled to speak with the appraiser. Finally, Appellant never raised the issue of Respondent's alleged improper contact with the appraiser prior to filing her NRED complaint, so this was not a vital issue for Appellant during the transaction itself, and Appellant went forward with the transaction through to closing. If Appellant truthfully believed Respondent's contact with the appraiser was unethical, it seems likely Appellant would have raised this issue during the transaction. The fact that she did not do so shows this was not a legitimate concern for Appellant. Certainly, the Court of Appeals was within reason to find, on these

[1]Or, in the Latin translation, "ignorantia juris non excusat."

bases, that Appellant failed to meet her burden to show her statements regarding Respondent's contact with the appraiser were truthful or were made without knowledge of their falsehood.

Appellant also claimed in her NRED complaint that Respondent failed to provide Appellant with "a receipt for Appellant's earnest money." However, at page 8, footnote 5 of the Order of Affirmance the Court of Appeals stated Appellant, in her appeal briefs, did "not address her claim that Lazer was ethically obligated to provide a receipt." Appellant argues that the Court of Appeals is "wrong" because Appellant did not raise this as an issue of ethics in her NRED complaint; Appellant simply stated Respondent failed to provide her with a receipt. However, in the context of the NRED complaint, this statement regarding the earnest money receipt was in the middle of a long string of accusations from Appellant that Respondent was unethical and a liar. Thus, the Court of Appeals placed this statement in context and found Appellant failed to show good faith as to this allegation as well.

At page 5, Appellant cites to Stark v. Lackey for the proposition that "an affidavit stating that the defendant believed the communications to be truthful or made them without knowledge of their falsehood is sufficient to meet the

defendant's burden absent contradictory evidence in the record." 136 Nev. 38, 43, 458 P.3d 342, 347 (2020). However, in the instant matter, there is ample "contradictory evidence in the record," including the declarations of Respondent and the nonparty seller of the real property, as well as various items of documentary evidence and communications disputing Appellant's declarations.

At page 5, Appellant also cites to Abrams v. Sanson, 458 P.3d 1062, 1068-9 (2020) for the proposition that "statements of opinion can never be made with knowledge of falsity for purposes of 'good faith' analysis...." However, the Court of Appeals analyzed Appellant's statements and determined they were not statements of opinion but statements of fact, so Appellant's citation to Abrams for this proposition is improper. Additionally, as noted in greater detail below, the Court of Appeals was well within its bailiwick to analyze whether Appellant's statements were of opinion or of fact.

At page 8 of her Petition, Appellant misstates a portion of the district court proceedings, First, Appellant claims Respondent "never rebutted" Appellant's declarations. However, this is completely false. Respondent produced not only his own declaration to rebut Appellant's declaration, but Respondent also produced the declaration of the seller of the property in question, who is not a party to this case,

and not beholden to either party, and who directly contradicted Appellant's statements.[2] The seller's declaration is proof Appellant lied in her NRED complaint, and thus that Appellant did not bring her NRED complaint in good faith.[3]

In the middle of page 8, Appellant reaches her main issue with the Court of Appeals's decision: the racism and sexism issue. In making these arguments, Appellant conflates two separate issues: (1) Appellant's argument that perceptions of racism and sexism are opinions and thus not subject to defamation laws versus (2) the Court of Appeals ruling that Appellant's NRED complaint references racist emails and text messages which Appellant never produced. Indeed, at page 9 of its Order, the Court of Appeals states, "[t]here is no evidence in this limited record to indicate that Lazer made any remarks about Williams's race or gender."[4] The Court of Appeals then continues that Appellant "does not provide adequate evidence of these racist and sexist emails or texts, and there is evidence to the contrary." Tellingly, in her declaration to her anti-SLAPP motion in the district court,

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[2]Appellant also makes this same false claim at page 4, footnote 1 of her Petition.

[3]Beginning at page 29 below, Respondent catalogues various other false statements in Appellant's NRED complaint which show she did not bring her NRED complaint in good faith.

[4]At footnote 6, the Court of Appeals clarifies that Appellant did allege one oral statement, which does not mention Appellant's race or gender.

Appellant does not mention a belief that she possessed racist or sexist texts or emails from Respondent, so she never rehabilitated this falsehood in the district court proceedings. (I-AA 91-5; I-AA 223-5; II-AA 268-75) Thus, the Court of Appeals concludes, the district court was correct in ruling it could not find Appellant made her NRED complaint in good faith.

The distinction is that the Court of Appeals is not just basing its ruling on a finding that Respondent was not racist or sexist. It is basing its ruling on the fact that Appellant claimed Respondent sent her racists and sexist emails and text messages, but Appellant has not produced any such written communication, either in her NRED case or in the instant matter. Thus, her allegation that such emails and texts exist was not truthful.

In attempting to refute the Court of Appeals on this point, Appellant states at page 9 of her Petition that Respondent sent an email to Appellant's loan officer, which Appellant claims could be construed as racist. However, Appellant never produced this email to NRED to support her claims that Respondent is racist and sexist. Additionally, Appellant never referenced this email in any of her declarations from the district court proceedings as proof of Respondent's alleged racist and sexist writings. And, in fact, this email was sent only to Mr. Jolly. (II-

AA 382-3) Nothing in the record indicates Appellant knew of or had ever seen this email prior to submitting her NRED complaint, so any implication that Appellant relied on this email is unsupported by the record of this case. Appellant had already sent her text to Respondent accusing him of racism well before Respondent sent the email to Mr. Jolly. (I-AA 51) Accordingly, the email Respondent sent to Appellant's loan officer is completely irrelevant to the Court's inquiry in this matter.

To the extent this Court finds Respondent's email to Mr. Jolly relevant, the Appellant's attorneys at page 9 of their Petition - that Respondent is a "shockingly racist" white man - Respondent vehemently denies these accusations. As stated in paragraph 19 of Respondent's declaration attached to both of his district court oppositions, Respondent has dedicated many hours of his life to the cause of equality for all races, sexes, and religions, a passion sparked by his family history which includes family members who were killed in the Holocaust due to their religion. Further, as Respondent stated in the email in question (AA 382), Respondent spent years of his life heading a community service project to deliver food and clothing to low income Black families outside of Detroit, along with speaking to raise funds benefitting Black children. As he was when Appellant

originally accused him of being racist and a sexist, Respondent is deeply hurt by these renewed allegations contained in Appellant's Petition.

3. The Court of Appeals Properly Determined Appellant's NRED Complaint was a Statement of Fact, not Opinion.

Appellant, at pages 10 through 19 of her Petition, continues this barrage of attacks against the Court of Appeals' ruling as to the "racism and sexism" issues. This entire ten page section of Appellant's Petition is aimed at the following six sentences from the Court of Appeals' decision:

> Although Williams could possibly have perceived Lazer's alleged comment at the condominium as racist and sexist, her accusation as it is presented on appeal appears to be made as a statement of fact, not opinion. Indeed, the NRED complaint is titled as a "Statement of Fact," so there is no basis for opinion when filing such a complaint with the NRED. Filing a Statement of Fact with the NRED unsurprisingly necessitates making a communication as a statement of fact. Although it is not implausible that a person could file an invalid complaint based only on speculative exaggerations, this is not the case here. In her sworn declaration attached to her anti-SLAPP motion to dismiss, Williams states "Never at any time have I doubted the truth of the statements I made .... At this time, even upon review, I have no doubt as to the veracity of the statements I made[,]" which implies that she believed her statements to be objectively true. Also, her NRED complaint appears to have been meant to have Lazer viewed in contempt by the NRED, which is a statement of fact per Pegasus.

[Internal citations omitted.] If this small section of the Court of Appeals 11 page Order of Affirmance is completely removed, the result would not change. This section only discusses the claims of racism and sexism. The preceding sections of the Order of Affirmance, as stated above, discuss Appellant's allegations in her NRED complaint that Respondent was unethical, that he lied, and that he withheld

documentation from Appellant. Those claims - which are undisputed statements of fact - were the focus of Respondent's arguments before the Court of Appeals. Thus, even assessing only the pure factual claims, and ignoring the Court of Appeals's discussion of the allegations of racism and sexism, this Court must uphold the Court of Appeals's Order of Affirmance.

In addition, the issue of whether a statement is fact or opinion is a question of law for the court to decide. And the Court of Appeals, in a de novo opinion, determined that Appellant's allegations that Respondent acted in a sexist and racist manner, coupled with Appellant's claims that she had emails and texts to support those allegations, were statements of fact.

The Court of Appeals states at page 9 of its Order of Affirmance that "Williams's claim that the statements in her NRED complaint were mere opinions is unpersuasive." In support of this section of its opinion, the Court of Appeals cites to Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 57 P.3d 82 (2002).

In Pegasus, the plaintiffs, owners of a restaurant, sued a newspaper because the newspaper published a negative review of the plaintiffs' restaurant. The plaintiffs alleged that there were statements of fact contained in the restaurant review, while the newspaper countered that the review was a statement of opinion.

In resolving this dispute, the Court had to decide whether the restaurant review was a statement of fact or a statement of opinion. The relevant portion of the Court's ruling is as follows:

> In determining whether a statement is actionable for the purposes of a defamation suit, 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." ... However, **this court has also stated that comments must be considered in context.**

Id. at 715, 88 [Emphasis added]. Thus, in the instant matter, the Court of Appeals was correct to perform an analysis of Appellant's NRED complaint and determine to what extent it was a statement of fact versus a statement of opinion.

The Court of Appeals was also correct in how it performed its analysis. At page 16 of her Petition, Appellant argues, "there is no explanation in the Order as to why Williams's motivations are relevant to the prong one inquiry. A defendant's motivations are completely unrelated to whether a statement is made in 'good faith' under NRS 41.637." Further, at pages 11-12, Appellant argues the Court of Appeals was wrong to consider that the NRED complaint form is entitled, "Statement of Fact." However, Appellant's absolutism regarding analysis of the good faith requirement is at odds with this Court's precedent. As stated in Pegasus, the Court must review the statement "in context" to determine if it is a statement of fact or a statement of opinion. Id. Thus, it was correct for the Court of Appeals to examine

the context and surrounding circumstances in which Appellant made the statements contained in her NRED complaint. As noted by the Court of Appeals at page 9, footnote 7, that context included the fact that Respondent had recently threatened to sue Appellant, which shows Appellant did not make her statements in good faith but as a form of retaliation or a preemptive strike to intimidate Respondent into refraining from filing suit. That context also included the fact that the NRED complaint is entitled "STATEMENT OF FACT".[5]

Pegasus was not the first Nevada case to find that context matters in determining whether a statement is one of fact or opinion for defamation purposes. In Nevada Indep. Broad. Corp. v. Allen, 99 Nev. 404, 412, 664 P.2d 337, 343 (1983), which Pegasus cites to, this Court found held that "[e]ven if we were to assume that some of the foregoing remarks were not actionable, it nonetheless is reasonable to consider all the comments in context." Thus, this Court has been weighing the context of potentially defamatory statements, in determining whether a statement is fact or opinion, since at least 1983.

California has a robust body of law on the "context" issue. In Overhill Farms,

[5]Contrast an NRED "Statement of Fact" with Pegasus, where this Court found a review of a restaurant was a statement of opinion. The contrast between a document entitled Statement of Fact, versus an opinion article about the quality of a meal at a restaurant, demonstrates, in part, why the Court of Appeals was correct to find that Appellant's "Statement of Fact" was not an opinion.

Inc. v. Lopez 190 Cal.App.4th 1248, 119 Cal.Rpt.r3d 127 (2010), an employer, Overhill Farms, Inc. ("**Overhill**") brought an action against its former employees for defamation, among other claims. Overhill had recently terminated the former employees based on a claim that the former employees did not have valid Social Security numbers and/or failed to explain a discrepancy with their Social Security numbers. Id. at 1255, 135. The former employees then protested in public places and distributed literature which stated, in relevant part, that Overhill had used the Social Security number issue as a pretext for terminating the employees, but that the terminations were actually based on racist and ageist motives. Id. at 1255-6, 134-5. In return, Overhill filed suit against the former employees, including for defamation. Id. at 1256, 135. The former employees filed an anti-SLAPP motion, which the district court denied as to Overhill's defamation claim. Id. at 1256, 136.

On appeal, the California Court of Appeals affirmed because the literature distributed by the former employees stated that the firings were based on race. Id. at 1261-2, 139-40. Thus, there were factual assertions and implications accompanying the claims of racism which transformed the claims of racism into statements of fact. As the court therein stated:

> In determining whether a statement declares or implies a provably false assertion of fact, courts apply the totality of the circumstances test.

> "Under the totality of the circumstances test, '[f]irst, the language of the statement is examined. For words to be defamatory, they must be understood in a defamatory sense.... Next, the context in which the statement was made must be considered.'" [Court considers the totality of the circumstances "[t]o ascertain whether the statements in question are provably false factual assertions"].) Whether a challenged statement "declares or implies a provable false assertion of fact is a question of law for the court to decide, unless the statement is susceptible of both an innocent and a libelous meaning, in which case the jury must decide how the statement was understood."

Id. at 1261, 139 [Internal citations omitted]. Accordingly, it is not simply a matter of, as Appellant argues, pointing to the words racist and sexist and ending the inquiry. Courts review the totality of the circumstances to determine if a statement is one of fact or opinion, as the Court of Appeals did here when it found that the circumstances and assertions in Appellant's NRED complaint were such that Appellant's claims of racism and sexism were transformed into statements of fact.[6]

The United States Supreme Court came to this same conclusion 30 years ago in Milkovich v. Lorain Journal Co., 497 U.S. 1, 18, 110 S. Ct. 2695, 2705-6, 111 L. Ed. 2d 1 (1990), where it stated in pertinent part as follows:

> Thus, we do not think this passage from Gertz was intended to create a wholesale defamation exemption for anything that might be labeled "opinion." ... Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that **expressions of "opinion" may often imply an assertion of objective fact**.

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[6]See also Hawran v. Hixson, 209 Cal. App. 4th 256, 289, 147 Cal. Rptr. 3d 88, 116 (2012) ("We apply a 'totality of the circumstances' test to determine both whether (a) a statement is fact or opinion, and (b) a statement declares or implies a provably false factual assertion; that is, courts look to the words of the statement itself and the context in which the statement was made."); Franklin v. Dynamic Details, Inc., 116 Cal. App. 4th 375, 10 Cal. Rptr. 3d 429, (2004); McGarry v. Univ. of San Diego, 154 Cal. App. 4th 97, 112, 64 Cal. Rptr. 3d 467, 479 (2007); Ruiz v. Harbor View Community Assn.,134 Cal.App.4th 1456, 37 Cal.Rptr.3d 133 (2005).

> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. **Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact**. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'" It is worthy of note that at common law, even the privilege of fair comment did not extend to "a false statement of fact, whether it was expressly stated or implied from an expression of opinion."

[Emphasis added] [Internal citations omitted]. Thus, the Nevada Court of Appeals' analysis of the "racist and sexist" allegations in Appellant's NRED complaint is not some new, worrisome trend in the law which will dull free speech. The idea of evaluating a purported opinion statement to determine if it may imply factual assertions is a long-standing concept found in the jurisprudence of the United States Supreme Court (Milkovich), the Nevada Supreme Court (Pegasus), and the California Supreme Court (Overhill Farms), as well as the common law.

4. The Court of Appeals Correctly Decided the Absolute Privilege Does Not Apply Here.

i. The absolute litigation privilege has no application in the anti-SLAPP context.

As argued in Respondent's Answering Brief before the Court of Appeals, the absolute litigation privilege does not intersect with Nevada's statutory anti-SLAPP framework. The Court of Appeals agreed, stating at page 1, footnote 9, as follows:

> [T]he absolute litigation privilege is a separate doctrine from the anti-SLAPP statute. While there is no conclusive authority on the

> matter, **the Nevada Supreme Court has traditionally treated the absolute litigation privilege separately from a special motion to dismiss under Nevada's anti-SLAPP statutes**. See, e.g., Patin v. Ton Vinh Lee, 134 Nev. 722, 726-27, 429 P .3d 1248, 1251 (2018) (recognizing that the litigation privilege and anti-SLAPP statutes are separate areas of law, even though they "serve similar policy interests"); Shapiro, 133 Nev. at 40-41, 389 P.3d at 268-69 (treating claims under the absolute litigation privilege separate from a denial of an anti-SLAPP motion to dismiss).

[Emphasis added]. Thus, Appellant's arguments concerning the litigation privilege are a nonstarter. As this Court stated in Patin, "[a]lthough Patin argues that the statement is protected by the fair report privilege, she has not cited any authority for the proposition that an affirmative defense such as the fair report privilege can be asserted within the confines of an anti-SLAPP motion to dismiss... nor is that argument self-evident...." 134 Nev. 722, 727, 429 P.3d 1248, 1252 (2018). See also Shapiro v. Welt, where this Court analyzed the district court's granting of an anti-SLAPP motion separately from its analysis of the absolute litigation privilege. 133 Nev. 35, 40-1, 389 P.3d 262, 268-9. As with the fair report privilege, the litigation privilege is an affirmative defense which is separate and apart from the anti-SLAPP statute and cannot be used by a movant to succeed on an anti-SLAPP motion.

ii. Even if the absolute privilege applies in the anti-SLAPP context, it only applies to the second prong, and thus Appellant, who has not satisfied the first prong, cannot employ the privilege.

Alternatively, if this Court is inclined to consider the absolute litigation

privilege, that privilege only applies to the second step of the NRS 41.637 analysis. That is, the absolute privilege does not come into play until Appellant proves that she made her statements to NRED in good faith, which she has not proven to date. At page 20 of her Petition, Appellant cites to Feldman v. 1100 Park Lane Associates 160 Cal.App.4th 1467, 1485 (2008), for the proposition that "[t]he litigation privilege is 'relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing.'" (quoting Flatley v. Mauro, 38 Cal. 4th 2990). Thus, the absolute privilege is arguably relevant to the second step, and not the first step, in the anti-SLAPP analysis. Because Appellant has not made the first step good faith communication showing, the absolute privilege does not come into play.

As this Court is aware, there are two steps to the anti-SLAPP analysis:

1. Appellant must make a showing that her communication was made in good faith - that is, her communication was truthful or made without knowledge of its falsehood.

2. If Appellant makes her good faith showing, the burden shifts to Respondent to make a prima facie showing that he has a probability of success on his claims.

NRS 41.660(3).

To date, Judge Hardy and the Nevada Court of Appeals have ruled that Appellant has failed to make a showing that her communication - her NRED complaint - was made in good faith. Assuming this Court comes to the same conclusion, then it need not even analyze the absolute privilege because the absolute privilege only comes into play upon Appellant's satisfaction of the first step. The litigation privilege does not allow Appellant to bypass her burden to show she made her NRED complaint in good faith.

As Appellant has not made her initial good faith showing, the absolute privilege is a non-factor in this appeal.

To the extent this Court desires additional analysis of the absolute privilege, Respondent points this Court to pages 46 through 55 of Respondent's Answering Brief before the Court of Appeals, where Respondent argues, inter alia, that submitting an NRED complaint which is closed without hearing is not a "quasi-judicial proceeding"; that this case is not analogous to the facts in Lewis v. Benson because the role of a police officer is not akin to that of a real estate salesperson; there is no evidence a judicial proceeding was under serious consideration here; and Nevada does not have as broad a reading of the privilege as do the California courts,

and Nevada does not have the same statutory privilege as does California, so the privilege does not apply to an NRED complaint.

5. Response to ACLU's Amicus Brief.

On January 4, 2021, the American Civil Liberties Union and the American Civil Liberties Union of Nevada (collectively, "**ACLU**") filed an amicus curiae brief. This Court has requested Respondent answer ACLU's brief.

ACLU's entire brief focuses solely on the free speech issue and argues the Court of Appeals erred when it ruled Appellant's statements in her NRED complaint were factual. As noted above, in keeping with Pegasus and Overhill Farms, as well as numerous other precedent, the Court of Appeals conducted an analysis of Appellant's NRED complaint and determined that, in context, and considering the totality of the circumstances, Appellant's statements in the complaint were statements of fact.

Further, ACLU gives an incorrect recitation of the facts and record in this case. At page 2, ACLU claims "Lazer does not dispute that he uttered the offending remarks," those remarks being:

> "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."

However, Respondent has maintained since 2017 that he did not make this

statement. As Respondent stated in his response to Appellant's NRED Statement of Fact back on August 31, 2017, Respondent did not tell Appellant she was "going to be successful;" Respondent told Appellant that she already "was successful." (II-AA 316) Respondent continued on, telling Appellant "when you want to buy a bigger home and if your brother is retired by then, I'd be glad to be your realtor." Id. Respondent disputed the statement in question in 2017, he disputed it before the district court, and he disputed it at page 24 of his Answering Brief before the Court of Appeals. ACLU is incorrect.[7]

ACLU also makes a misstatement at page 8 of its brief, where it states Pegasus was "[t]he only case cited by the Court of Appeals...." This is false because the Court of Appeals also cites to Stark v. Lackey, 136 Nev. 38, 458 P.3d 342 (2020); Coker v. Sassone, 135 Nev. 8, 432 P.3d 746 (2019); Shapiro v. Welt, 133 Nev. 35, 389 P.3d 262, (2017); Abrams v. Sanson, 136 Nev. 83, 89, 458 P.3d 1062, 1068 (2020); Rosen v. Tarkanian, 135 Nev. 436, 453 P.3d 1220, (2019); Jacobs v. Adelson, 130 Nev. 408, 325 P.3d 1282 (2014); and Patin v. Ton Vinh Lee, 134 Nev. 722, 429 P .3d 1248 (2018).

[7]Additionally, Respondent clarifies that the reason he mentioned Appellant's brother was because Appellant mentioned that her brother was a realtor, and thus when Appellant's brother retires as a realtor, Respondent would be happy to act as Appellant's realtor. This portion of the conversation had nothing to do with the gender of Appellant or her brother, but rather Appellant's brother's status as a licensed realtor.

Further, at page 9, ACLU argues that "an evaluative statement of opinion, such as the statement that someone else is a bad person, [does not] become a potentially defamatory statement of fact because it happens to appear in a formal complaint under the heading 'Statement of Fact.'" However, Appellant's defamatory statements did not "just happen to appear" in a Statement of Fact by mere chance or happenstance. Appellant decided to submit the NRED Statement of Fact and include defamatory statements therein, despite having knowledge of the title of the document within which she was making those statements. Appellant is responsible for that decision and its consequences. In the same passage on page 9, ACLU further argues that "just as labeling a statement as 'opinion' does not automatically make it opinion, labeling it as 'fact' does not make it fact." However, the title of the NRED complaint form is just one of several factorss the Court of Appeals cited to in coming to its conclusion that, in the context of the entirety of the facts and circumstances, the statements in Appellant's NRED complaint were statements of opinions. Indeed, ACLU even cites to Rose v. Hollinger Int'l, Inc., 889 N.E.2d 644, 648 (Ill. App. Ct. 2008), and notes that courts must "consider the context in which statement appears in determining whether it is fact or opinion...." Indeed, in Rose, the court stated that "[a] false assertion of fact can be libelous even

though couched in terms of an opinion." Id.

6. Response to FALA's amicus brief.

On January 4, 2021, the First Amendment Lawyers Association ("**FALA**") filed an amicus curiae brief. This Court has requested Respondent answer FALA's brief.

In a similar vein to ACLU, FALA's brief focuses entirely on the racism and sexism allegations. Thus, the common thread among all three briefs supporting Appellant's position is their laser focus on the claims of racism and sexism, at the expense of Respondent's allegations regarding Appellant's numerous other false, defamatory statements. Again, even without the racism and sexism claims, Appellant's Petition fails on the remainder of the claims, which Appellant does not dispute are factual allegations. However, Petitioner will address FALA's arguments regarding the sexism and racism issues.

Interestingly, FALA cites to Stevens v. Tillman, 855 F.2d 394, 409 (7th Cir. 1988), where the court stated that a claim of racism is "not actionable unless it implies the existence of undisclosed, defamatory facts." Here, that is exactly what happened: Appellant called Respondent a racist and a sexist, and claimed that she could support those allegations with "emails and text messages" from Respondent.

As we know, those emails and text messages were never produced in this case. Thus, the instant matter squares with Stevens v. Tillman because here, Appellant "implies the existence of undisclosed, defamatory facts," namely, the phantom emails and text messages. Accordingly, even under Stevens v. Tillman, which FALA cites to, Appellant's claims of racism and sexism are actionable, defamatory statements.

Further, in Lennon v. Cuyahoga Cty. Juvenile Court, 2006-Ohio-2587, ¶ 30, to which FALA also cites, the court was determining whether calling another person a "racist" was actionable. As in Stevens v. Tillman, the Lennon court stated that if the speaker "implies that he or she has additional knowledge to support [her claim of racism], it may seem more verifiable to a reader or listener." Id. That is precisely what happened in the instant matter when Appellant referenced nonexistent texts and emails. (I-AA 53-57)

Based on these two cases, as well as Overhill Farms and Pegasus, FALA is incorrect in its statement on page 13 of its brief that "claims of racism are always an opinion...." To the contrary, a claim of racism can be defamatory depending on the context surrounding that claim, and whether the person claiming racism implies that he or she has other information, knowledge, or documentation to support that claim.

Thus, the Court of Appeals had ample support from precedent across the country to come to its conclusion that the statements in Appellant's NRED complaint were statements of opinion.

FALA also cites to Condit v. Clermont County Review, 110 Ohio App.3d 755, 757-8, 675 N.E.2d 475, 477, but in that case, the alleged defamatory statement was contained in the political commentary column of a newspaper. As the court in Condit stated, "[e]ditorials are, by definition, articles that express views and opinion... and are commonly understood to be so." Id. 761, 479. The editorial in Condit is a far cry from the instant matter, where Appellant made her statements in a complaint to a regulatory body under the banner "Statement of Fact." Condit may be akin to the restaurant review in Pegasus, but in no way do the facts in Condit apply to the instant matter.

FALA also claims at page 9 that "Williams has no alternative form or forum to lodge a complaint against a realtor who is a member of NRED," but there is nothing in the record to support this argument, Appellant never made this argument in the district court of to the Court of Appeals, and FALA does not cite to a statute or rule in support of this argument.

At page 10, FALA makes an entire paragraph of argument which contradicts

the record. FALA first claims as follows: "No claim is made that [Apellant's] complaint to regulatory authorities implied any provably false factual implications...." However, this argument ignores the catalogue of factual falsehoods which Respondent listed in both of his district court oppositions as well as his Answering Brief before the Court of Appeals. This catalogue is reiterated in Section 7 below. FALA also claims that Respondent does not dispute the content of the alleged oral statement he made to Appellant regarding her success, but as stated above, Respondent has disputed Appellant's characterization of that conversation since 2017.

Finally, Respondent requests this Court ignore FALA's references to the "disturbing trend" regarding police and the Black Lives Matter movement contained in FALA's brief. These references are completely irrelevant to the issues in this matter and are intended to inflame the passions of this Court. While Respondent is extremely sympathetic to the racial struggles of Black people in this country, and has volunteered his time and effort to help eradicate those struggles, invoking a "disturbing trend" which is outside of the bounds of this case is wholly improper and that invocation should not factor into this Court's analysis.

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7. Additional Facts Supporting the District Court and Court of Appeals Decisions.

At pages 8 through 10 of its Order of Affirmance, the Court of Appeals analyzes the facts supporting its ultimate decision. These facts include Appellant's claims regarding Respondent's contact with the appraiser; the receipt for the earnest money; and the lack of emails or texts supporting Appellant's allegations of racism and sexism.

In the first five pages of the opinion, the Court of Appeals recounts numerous other facts, and at footnote 1 on page 1, the Court of Appeals states that it "recount[s] the facts only as necessary for our disposition." Presumably, then, the facts contained in the first five pages of the Order of Affirmance are necessary to the Court of Appeals's decision. However, Appellant does not address any of these other underlying facts.

Appellant's NRED complaint was riddled with numerous falsehoods - none of which mention race or sex, none of which are even arguably matters of opinion, and all of which support the conclusion that Appellant did not make her NRED complaint in good faith. Accordingly, the following are the remaining facts showing Appellant did not act in good faith when filing her NRED complaint and which show Respondent can make a prima facie showing of a probability of success

on his various causes of action.

i. Appellant falsely claims Respondent lied on several occasions.

At the second paragraph on page 2 of her NRED complaint, Appellant claims Respondent "lied on several occasions." (I-AA 055) To support this claim, Appellant first alleges Respondent lied about Appellant not allowing Ms. Krupp, the seller, to remove all of her personal property from the condo. Id. However, Respondent's statement that Appellant did not allow Ms. Krupp to remove personal property from the condo is in fact true. Ms. Krupp herself provided a declaration stating Appellant "refused to allow me to remove certain items of personal property from the unit, all of which, to my knowledge, remain in the unit to this day." (I-AA 148, paragraph 11) Further, the record shows Respondent emailed Appellant and her lender on July 18, 2017, stating that Appellant was preventing the seller from removing personal property. (II-AA 396) Thus, Appellant's statement that Respondent lied about Appellant refusing to allow Ms. Krupp to retrieve personal property is false, and Appellant knew it was false. Accordingly, Appellant's claim that Respondent "lied" about Appellant's refusal to allow Ms. Krupp to remove personal property is one of the knowingly false, defamatory statements which defeats Appellant's anti-SLAPP motion.

In further support of her claim that Respondent lied, Appellant claims Respondent "falsely accused me of being negligent in meeting due diligence time frames noted in said contract." (I-AA 055) However, there is proof in the record verifying Appellant negligently failed to meet the deadlines in the Residential Purchase Agreement ("**RPA**"). On May 21, 2017, Appellant and Respondent met at a supermarket and Appellant signed the RPA after making some minor edits, and as instructed to do by Appellant, Respondent sent the signed contract to Appellant's loan officer, Bryan Jolly, two days later. (III-AA 465-6, paragraph 3(d); II-AA 350). It is clear Mr. Jolly was facilitating this transaction for Appellant, as various other documents went through Mr. Jolly and Mr. Jolly was even obtaining Appellant's signature to certain documents. (See II-AA 349, where Mr. Jolly requests the Seller's Real Property Disclosure form ("**SRPD**"); II-AA 352, where Mr. Jolly requests a form for Appellant's signature; II-AA 376, where Mr. Jolly, on behalf of Appellant, requests certain language be added into an addendum) When Respondent sent the fully executed RPA to Mr. Jolly, that was the equivalent of sending the fully executed RPA to Appellant. (III-AA 465-6, paragraph 3) Thus, Respondent accurately stated that Appellant caused the delays and the delay was not caused by Respondent's alleged failure to provide Appellant with a signed RPA,

and Appellant's statements to the contrary were knowingly false.

ii. Appellant falsely claims the seller told Appellant that Respondent was trying to sabotage the sale and had an ulterior motive.

At the bottom paragraph on page 2 of the NRED complaint, Appellant claims that on June 27, 2017, the seller told Appellant the following:

> "Randy keeps telling me if the property doesn't sell and things don't work out for me in Maryland, I can always come back and live with him until I get on my feet." She then said, "He always like me like that, but I don't like him like that. There is always an ulterior motive. I don't know why he is trying to sabotage this deal."

(I-AA 055)

Appellant's allegations that Ms. Krupp made these statements are knowingly false and directly contradicted by Ms. Krupp. Ms. Krupp submitted a declaration stating as follows:

> 12. To the contrary of what Appellant stated in her Statement of Facts lodged with NRED, I did not make any statement to Appellant to the effect of me moving in with Mr. Lazer, and I also did not make any statement to Appellant that Mr. Lazer "likes me like that, but I don't like him like that."
>
> 13. I also never stated to Appellant that Mr. Lazer had an ulterior motive or acted to sabotage the transaction.

(I-AA 149)

Thus, Appellant's claims as to what Ms. Krupp told Appellant are verifiably false. Ms. Krupp directly contradicts these statements, proving she never made them to Appellant, and thus proving Appellant made knowingly false, defamatory statements to NRED. The most damaging aspect of the false allegations which

Appellant attributes to Ms. Krupp is that they are allegedly from a third party and they directly impugn Respondent's personal and professional character.

There is also evidence in the record proving Respondent, contrary to Appellant's claims about sabotage, actually saved this deal and the sale was completed through his efforts. (II-AA 374-387)

Appellant further lied in her Statement of Facts by stating Respondent told her he met the seller on a dating website, when in reality, the seller told that piece of information to Appellant, as stated in paragraph 10 of the seller's declaration. (I-AA 149)

iii. Appellant falsely claimed that Respondent "falsely" accused Appellant of meeting her due diligence timeframes in the RPA.

In the middle of page 2 of her Statement of Fact narrative, Respondent incorrectly claims as follows:

> [Respondent] falsely accused me of being negligent in meeting due diligence timeframes noted in said contract.

(I-AA 055)

In reality, Respondent correctly stated that Appellant failed to timely obtain a condo questionnaire, which, in addition to Appellant reducing her down payment from 20% to 5%, was the cause of the 24-day delay in closing the sale of the property. (I-AA 142, paragraphs 8-13; 143, paragraphs 20-22) Instead of

immediately ordering the condo questionnaire after entering into the RPA, Appellant chose to wait until after the appraisal to order the questionnaire, and then, did not place a "rush" order due to the extra cost associated with a rush. (II-AA 344, paragraphs 5-7) Appellant made these strategic decisions of her own accord, but they impacted the seller because they necessitated a delay in the closing of the transaction while the lender evaluated the condo questionnaire. Appellant's failure to obtain the condo questionnaire until June 23, 2017, made it logistically impossible to close by the June 30, 2017, close of escrow date. As a result, Respondent was accurate when he stated that Appellant caused the delay in the closing of the sale of the property, and Appellant's allegation in her Statement of Fact that Respondent made a "false" statement in blaming Appellant for the delay was incorrect. Regardless of Appellant's reason for delaying her order of the condo questionnaire, Respondent was correct in stating Appellant caused the delay in this transaction. Accordingly, Appellant's description of Respondent's statements regarding Appellant causing the delay in closing as "false" - essentially stating that Respondent lied - is yet another demonstrably untrue, defamatory statement by Appellant as against Respondent.

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iv. Appellant baselessly claimed Respondent is unethical.

At various points in her NRED complaint, Appellant claims Respondent acted unethically. (I-AA 054-6) At the top of page 3, Appellant states that "[b]ased on statements Mr. Lazar [sic] has made during this transaction, via text, email and in person to me, my lender, and the seller, I am questioning his ethics and professionalism as a realtor." (I-AA 056) Presumably, this last claim that Respondent is unethical is based on all of the various false, defamatory statements Appellant made throughout her Statement of Fact, and thus Appellant's claim that Appellant is "unethical" is yet another defamatory statement. The word "unethical," used in the context of an NRED complaint implies Respondent violated the ethical rules governing a real estate agent. Because Appellant does not cite to any such rules or show any violations, this statement is defamatory.

III. CONCLUSION

Appellant wishes for this entire case to be about her claims of racism and sexism, and then to argue that those claims are matters of opinion which are not actionable. Reading Appellant's Petition, one might believe that Appellant's NRED complaint simply said "Randy Lazer is racist and sexist." If such were the case, Appellant would be entitled to anti-SLAPP relief. However, her NRED complaint

is three-plus pages in length, the majority of which consists of factual recitations and claims unrelated to racism or sexism, such as that Respondent shared confidential information; acted unethically by communicating with an appraiser; "lied on several occasions"; never provided a receipt for Appellant's earnest money deposit; never provided Appellant a signed copy of the contract; and falsely accused Appellant of being negligent in meeting contractual deadlines. Try as she might, Appellant cannot make this a single issue case about her right to call someone racist and sexist; Appellant's own NRED complaint belies Appellant's efforts because there are many other defamatory allegations in the complaint.

Further, as in Overhill Farms, Appellant's claims of racism and sexism are not standalone accusations; they are surrounded by and contextualized by numerous other allegations which are unquestionable statements of fact, as well as by the circumstances which form the background of this case. The Court of Appeals did not act improperly by analyzing the context of Appellant's claims of racism and sexism because that is exactly what is supposed to happen according to Pegasus, Overhill Farms, and the various other authorities cited to herein.

Further, this Court's precedent shows that the absolute litigation privilege does not apply to an anti-SLAPP motion. Even if it did, it would only apply to the

second prong of the analysis. Because Appellant has met the first prong of the anti-SLAPP motion - a good faith communication - the absolute litigation privilege does not have any relevance to this Court's analysis of the instant matter.

Lastly, Appellant should not be rewarded for attempting to destroy Respondent's 26 year career and his reputation, and attempting to subject him to discipline and fines, based on a "Statement of Fact" which is full of lies.

Based on the foregoing, Respondent requests this Court uphold the Court of Appeals's Order of Affirmance and remand this matter to the district court so this case may proceed in the ordinary course.

DATED this 8th day of March, 2021.

BOHN & TRIPPIEDI

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect X8 14 point Times New Roman.

2. I further certify that this brief complies with the 9,333 word limit contained in this Court's Order filed February 26, 2021, because, excluding the parts of the brief exempted by NRAP 32(a)(7), it is proportionately spaced and has a typeface of 14 points and contains 8,499 words.

3. 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 NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be

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found.

DATED this 8th day of March, 2021.

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CERTIFICATE OF SERVICE

In accordance with N.R.A.P. 25, I hereby certify that I am an employee of Bohn & Trippiedi and that on the 26th day of February, 2021, a copy of the foregoing **RESPONDENT'S ANSWERING BRIEF** was served electronically through the Court's electronic filing system to the following individuals:

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An Employee of BOHN & TRIPPIEDI