IN THE SUPREME COURT OF NEVADA

NICOLA SPIRTOS, Appellant / Defendant, v. ARMEN YEMENIDJIAN, Respondent / Plaintiff.	Nevada Supreme Court Case Number: 80992 Eighth Judicial District Court Case Number: A-19-804785-C **APPELLANT'S OPENING BRIEF**

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RULE 26.1 DISCLOSURE

Attorneys Daniel R. McNutt and Matthew C. Wolf of the MCNUTT LAW FIRM have appeared for Appellant Nick Spirtos. Appellant is an individual.

DATED November 19, 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read the foregoing brief and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I understand that I may be subject to sanctions if the brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure. I also certify that the brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the typestyle requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Times New Roman 14-point font. Including footnotes, the brief contains 9,807 words. Finally, I certify that the brief complies with all applicable procedural rules, in particular NRAP 28(e), which requires every section of 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 is to be found.

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VERIFICATION

I, Dan McNutt, declare under penalty of perjury of the laws of Nevada that I am one of the attorneys for Appellant. I have read the foregoing brief, and it is true to the best of my personal knowledge, except for those matters stated on information and belief, and as to those matters, I believe them to be true.

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On December 10, 2019, Dr. Nicola M. Spirtos, M.D. filed a Special Motion to Dismiss. Volume 1 of Appellant's Appendix at pgs. 8–24 (1 App. 8–24). Armen Yemenidjian opposed it on January 6, 2010. 1 App. 195–222. Dr. Spirtos replied on January 16, 2010. 2 App. 223–315. On March 5, 2020, the district court denied the Motion to Dismiss. 2 App. 351–365 (the Order). Dr. Spirtos appealed on March 26, 2020. 2 App. 383–384. This Court has jurisdiction under NRS 41.670(4). The appeal is timely because the Notice of Appeal was filed less than 30 days after the Order. This Court should retain jurisdiction because NRS 41.670(4) allows an appeal "to the Supreme Court."

II. ISSUE ON APPEAL.

Whether the district court erred when it concluded that Dr. Spirtos's statements to nonparty John Oceguera at Governor Steve Sisolak's inaugural gala on January 18, 2019, at Aria Resort and Casino (the Gala) are not protected by Nevada anti-SLAPP law. The Order is subject to de novo review. *Abrams v. Sanson*, 136 Nev. Adv. Op. 9, 458 P.3d 1062, 1065 (2020).

III. STATEMENT OF THE CASE.

This case arises from the controversy surrounding the marijuana license application process at the Nevada Department of Taxation (the Department). In July 2018, the Department announced it would accept applications from existing medical

marijuana establishments (MMEs) for additional retail licenses. At that time, Dr. Spirtos was an owner of the licensee D.H. Flamingo. He spearheaded D.H. Flamingo's applications for additional retail licenses. During that process, he came to believe that the application process had been corrupted.

Shortly before the application deadline, the Department made changes to its application form that were illegal. Contrary to NAC 453D.272(1)(h), the Department deleted the requirement for the applicant to describe its key personnel. Also, in violation of NRS 453D.210(5)(b) and NAC 453D.268(2)(e), the Department deleted the requirements for the applicant to identify the address for the proposed establishment and to provide proof that it owned the address or had permission from the owner to operate the establishment.

D.H. Flamingo submitted its applications in September 2018. Before the Department announced its decision on them several months later, Dr. Spirtos had breakfast with Jorge Pupo, the official in charge of the Department's licensing program. Pupo repeatedly said he personally needed to make more money and suggested he was seeking employment or money from D.H. Flamingo. Dr. Spirtos was taken aback by Pupo's unsolicited and improper remarks.

The Department denied D.H. Flamingo's applications in December 2018. It failed to provide an explanation for its decision in violation of NAC 453D.312(7). On January 9, 2019, Dr. Spirtos met with officials at the Department to request an

explanation for the denial. The Department refused to disclose the average scores for each criterion in the applications it received and also refused to answer Dr. Spirtos's questions about the scoring process.

As Dr. Spirtos was leaving the meeting, two unidentified men approached him in the Department's parking lot and said shenanigans were occurring inside the Department. Specifically, they said an attorney for some applicants had met with Pupo daily for a week before the Department announced its decision on the applications. Later that day, Dr. Spirtos began receiving a series of anonymous text messages, one of which said Pupo had accepted kickbacks. Based on these events and others, Dr. Spirtos came to believe that the application process within the Department had been corrupted.

Beginning in late 2018, two suits were filed in the Eighth Judicial District Court that contested the integrity of the application process (the Licensing Suits). One of the suits was filed on January 4, 2019, by D.H. Flamingo. D.H. Flamingo alleged that the Department's "ranking and scoring process was corrupted" and that the Department "improperly allocated licenses and improperly favored certain applicants." It sought an order invalidating the licenses awarded by the Department and requiring the Department to redo the application process. That relief would have affected the entire marijuana industry, and it could have benefited other unsuccessful applicants besides D.H. Flamingo.

On January 18, 2019, Dr. Spirtos attended the Gala as the CEO of D.H. Flamingo. During conversation at D.H. Flamingo's table, he opined that the application process at the Department had been corrupted. Later, he spoke with John Oceguera, the former speaker of the Nevada Assembly. At that time, Oceguera was a paid lobbyist for Yemenidjian's marijuana companies—some of which were parties to the Licensing Suits. He also sat on the board of an unsuccessful applicant. Dr. Spirtos again opined to Oceguera that the application process had been corrupted.

On November 4, 2019, Yemenidjian sued Dr. Spirtos for purportedly slandering him to Oceguera at the Gala, as well as for purportedly conspiring against him. On December 10, 2019, Dr. Spirtos filed his Motion to Dismiss and argued, inter alia, that his statements to Oceguera are protected by NRS 41.637 and that Yemenidjian's claims are barred by the litigation privilege.

Yemenidjian filed an Opposition on January 6, 2020 and attached a declaration from Oceguera. Tellingly, the declaration does not support Yemenidjian's allegations. While Yemenidjian alleges Dr. Spirtos said he "had engaged in outright corruption in order to secure licenses," 1 App. 4 (Compl. ¶ 18), the declaration merely says Dr. Spirtos commented that "Yemenidjian was knee deep in the corruption at the center of the licensing process" and "*insinuated* a crime," 1 App. 209 (Oceguera Decl. ¶ 8) (emphasis added).

On March 5, 2020, the district court denied the Motion to Dismiss. It concluded, inter alia, that (1) NRS 41.637(3) is inapplicable because Oceguera was not an active government official, and there was nothing to suggest Dr. Spirtos's statements were made in direct connection with a matter under judicial consideration (2 App. 358–361 (8:17–21)); (2) NRS 41.637(4) is inapplicable because Dr. Spirtos did not make the statements in good faith, the Gala was not open to the public, and Dr. Spirtos made the statements privately to Oceguera (*id*. (9:10–23)); and (3) the litigation privilege is inapplicable because Oceguera did not have a sufficient interest in or connection to the Licensing Suits (*id*. (11:9–22)). The Order is erroneous, and the district court should have granted the Motion to Dismiss.

A special motion to dismiss involves a two-prong analysis. The first prong requires the movant to demonstrate by a preponderance of the evidence that the statement is protected by NRS 41.637. This prong has two subparts: (1) the statement must fall within one of the four categories in NRS 41.637; and (2) it must be truthful or have been made without knowledge of a falsehood. As a matter of law, opinions—i.e., statements that a reasonable listener would not interpret as expressions of fact—constitute statements made without knowledge of a falsehood. If the movant satisfies the first prong, then the nonmovant must present prima facie evidence demonstrating a probability of success. It cannot do so if the complaint involves privileged statements or warrants dismissal under NRCP 12(b)(5).

Dr. Spirtos satisfied the first prong by a preponderance of the evidence. NRS 41.637(3) applies because the topic of his conversation with Oceguera—i.e., corruption within the Department—was under judicial consideration in the Licensing Suits. NRS 41.637(4) also applies because public corruption is a matter of public interest, and the Gala was a place open to the public or a public forum. His statement to Oceguera that the license process at the Department had been corrupted was an opinion and also was true or made without knowledge of a falsehood. His purported statement to Oceguera that Yemenidjian was "knee deep in the corruption at the center of the licensing process" was too vague and generalized for a reasonable listener to find any specific factual allegations in it. The alleged remark did not accuse Yemenidjian of paying bribes or kickbacks, mention any specific criminal transactions, or even identify any particular acts by Yemenidjian.

Yemenidjian failed to satisfy the second prong. For starters, his claims are barred by the litigation privilege. The privilege covers statements related to ongoing litigation made to someone with a significant interest in the outcome of the litigation or a role in the litigation. Dr. Spirtos's conversation with Oceguera about corruption within the Department related to the subject of the Licensing Suits. Furthermore, Oceguera had a significant interest in the outcome of the Licensing Suits by being a paid lobbyist for Yemenidjian's marijuana companies—which were parties to the Licensing Suits—and a board member of an unsuccessful applicant. Indeed, the

entire marijuana industry—of which Oceguera was a member—had a significant interest in the Licensing Suits because it would be affected by D.H. Flamingo's request for an order invalidating the licenses awarded by the Department and requiring the Department to redo the application process.

Yemenidjian also failed to present prima facie evidence demonstrating a probability of success. He presented no evidence of a conspiracy, and Oceguera's declaration does not support the allegations in the slander per se claim. Finally, Yemenidjian cannot demonstrate a probability of success on his civil conspiracy claim and prayer for punitive damages because they warrant dismissal under NRCP 12(b)(5). As pled, the conspiracy claim involves a conspiracy of one person, which is legally impossible. It also does not provide fair notice of the nature and basis of the supposed conspiracy because it fails to identify the conspirators, an agreement to conspire, or any concerted acts. The prayer for punitive damages fails because it does not allege any facts establishing oppression.

For these reasons and others, this Court should reverse the Order.

IV. STATEMENT OF THE FACTS.

A. Dr. Spirtos Spearheaded D.H. Flamingo's Applications to the Department for Additional Retail Licenses.

Dr. Spirtos—a prominent and highly accomplished gynecologic oncologist—is a former faculty member at Stanford University and presently is medical director of the Women's Cancer Center. 1 App. 114–115 (Spirtos Decl., Dec. 10, 2019, ¶ 2).

From 2014 until around February 2019, he had an ownership interest in D.H. Flamingo, which had a medical marijuana license and operated a MME. *Id.* (¶ 3). In July 2018, the Department announced it would accept applications from existing MMEs for additional retail licenses. *Id.* (¶ 4). It required all applications to be submitted in September 2018. *Id.* (¶ 4). D.H. Flamingo submitted three applications prepared mostly by Dr. Spirtos. *Id.* (¶ ¶ 4, 6).

On July 6, 2018, the Department released an updated application form. 1 App. 115 (Dr. Spirtos Decl. ¶ 5). It identified the total possible points for various criteria. *Id.* (¶ 5). The most valuable criterion was based on the applicant's description of its "proposed organizational structure" and "information concerning each owner, officer and board member including *key personnel*" of the proposed establishment. *Id.* (¶ 5) (emphasis added). That language complied with NAC 453D.272(1)(h), which requires the Department to consider the experience of the applicant's key personnel. The application form also required the applicant to list the address for the prospective establishment, which complied with NAC 453D.268(2)(e). *Id.* (¶ 7). It also required proof of ownership of the address or written permission from the owner to operate the establishment, which complied with NAC 453D.268(2)(e) and NRS 453D.210(5)(b). *Id.* (¶ 7).

About two weeks later, the Department unexpectedly revised the application form. 1 App. 116–117 (Dr. Spirtos Decl. ¶ 8). The new form deleted the reference

to "key personnel" in its description of the most valuable criterion. *Id.* (¶ 8). It also eliminated the requirements to include the address for the prospective establishment and to provide proof of ownership or written permission from the owner to operate the establishment. *Id.* (¶ 9). Dr. Spirtos believed the new form was illegal. *Id.*

After D.H. Flamingo submitted its applications in September 2018 but before the Department announced its decision on them, Dr. Spirtos had breakfast with Jorge Pupo, the head of the Department's application process. 1 App. 117 (Dr. Spirtos Decl. ¶ 11). Pupo repeatedly said he needed to make more money. *Id.* (¶ 11). His statements suggested he was seeking employment with or some form of compensation from D.H. Flamingo. *Id.* (¶ 11). Dr. Spirtos was uncomfortable with the statements and felt they were improper. *Id.* (¶ 11).

In December 2018, the Department denied D.H. Flamingo's applications. 1 App. 117 (Dr. Spirtos Decl. ¶ 12). NAC 453D.312(7) states that if the Department denies an application, then it must explain the specific reasons. In violation of that regulation, the Department merely informed D.H. Flamingo that it did not achieve a high enough score without any further explanation. *Id.* (¶ 12). On January 9, 2019, Dr. Spirtos attended a meeting at the Department to discuss the scoring of D.H. Flamingo's applications. *Id.* (¶ 13). The Department refused to disclose the average scores for each criterion in the applications it received, and instead, it disclosed only the combined scores for multiple criteria. *Id.* (¶ 13). It also refused to answer

questions about the scoring process. *Id.* (¶ 13).

Dr. Spirtos has extensive experience with reviewing data for medical studies and publications. 1 App. 118 (Dr. Spirtos Decl. ¶ 15). In his opinion, the validity of the scores disclosed by the Department is dubious due to a lack of variability. *Id.* (¶ 15). Such lack of variability is virtually impossible and indicates potential data manipulation. *Id.* (¶ 15). Also, the Department supposedly reviewed each application in around 1.5 to 2 hours. *Id.* (¶ 16). Each application likely exceeded 1,000 pages. *Id.* D.H. Flamingo's applications were around 1,700 pages. *Id.* Dr. Spirtos does not believe it would have been possible for each application to have been reviewed adequately in that time. *Id.*

As Dr. Spirtos was leaving the meeting at the Department, two men approached him in the parking lot. 1 App. 118 (Dr. Spirtos Decl. ¶ 14). Dr. Spirtos does not know their names. *Id.* (¶ 14). The men said shenanigans were occurring inside the Department in relation to the application process. *Id.* They said an attorney for some applicants had met every day for a week with Pupo before the Department announced its decision. *Id.* Later that day, Dr. Spirtos began receiving a series of text messages from an anonymous individual from an unrecognized number. *Id.* One message said Pupo had taken kickbacks. *Id.*

B. The Licensing Suits Were Filed Before the Gala.

The Licensing Suits were filed before the Gala and challenged the integrity of

the license application process at the Department. On December 10, 2018, MM Development Company, Inc. sued the Department and alleged that its applications were denied by the Department. 1 App. 161 (¶ 16). It also alleged the Department "improperly granted more than one recreational marijuana store license per jurisdiction to certain applicants, owners, or ownership groups." *Id.* (¶ 17). On January 4, 2019, D.H. Flamingo also sued the Department. 1 App. 143–168 (the D.H. Flamingo Suit and the D.H. Flamingo Complaint). It alleged the Department's "ranking and scoring process was corrupted" and that the Department "improperly allocated licenses and improperly favored certain applicants." *Id.* (¶¶ 81–82; 91).

C. Dr. Spirtos Formed the Opinion that the License Application Process Had Been Corrupted.

Based on (1) Pupo's statements at breakfast, (2) the statements by unidentified men in the Department's parking lot, (3) the anonymous text messages, (4) the Department's illegal changes to the application form, (5) a lack of variability in the Department's scores, (6) his belief it would be impossible to review each application adequately in 1.5 to 2 hours, (7) the Department's refusal to explain why D.H. Flamingo received certain scores for certain criteria, despite its legal obligation to do so, (8) the Department's refusal to disclose the average score for each criterion and to answer questions about the scoring process, and (9) the Licensing Suits, Dr. Spirtos came to form the opinion that the Department's application process had been corrupted. 1 App. 119 (Spirtos Decl. ¶ 19).

D. Dr. Spirtos Spoke with John Oceguera at the Gala.

D.H. Flamingo purchased a table at the Gala. 1 App. 119 (Spirtos Decl. ¶ 20). Dr. Spirtos attended the Gala as its CEO. *Id.* During conversation at the table, Dr. Spirtos opined that the application process at the Department had been corrupted. *Id.* He never mentioned Yemenidjian or suggested he was involved in corruption or any crimes. *Id.* Dr. Spirtos also spoke with John Oceguera, the former speaker of the Nevada Assembly and a current lobbyist for Yemenidjian. *Id.* ¶ 21. During the conversation, Dr. Spirtos again opined that the application process at the Department had been corrupted. *Id.* Once more, he never mentioned Yemenidjian or suggested he was involved in corruption or any crimes. *Id.*

E. Yemenidjian Sued Dr. Spirtos.

For about nine months after the Gala, Yemenidjian showed no interest in or concern about Dr. Spirtos's conversation with Oceguera. But at his deposition in the Licensing Suits on October 9, 2019, Dr. Spirtos publicly revealed for the first time that he was cooperating with the FBI with its investigation of the Department. 1 App. 120 (Spirtos Decl. ¶ 23). Suddenly, Yemenidjian had a newfound interest in Dr. Spirtos's conversation with Oceguera, and three weeks after Dr. Spirtos's deposition, Yemenidjian raced to the courthouse and sued Dr. Spirtos. The timing of the suit speaks volumes. Yemenidjian clearly filed it to intimidate and to silence Dr. Spirtos and to discourage him from assisting the FBI.

Yemenidjian alleges the following in his Complaint. He "is one of the leading executives in the legal cannabis business in the United States," and his companies have obtained 22 cannabis licenses in Nevada and California. 1 App. 2–3 (Compl. ¶¶ 6–9). In contrast to the success of Yemenidjian's companies, D.H. Flamingo failed on multiple occasions to obtain a cannabis license in Nevada, and Dr. Spirtos attempted to use illegitimate means to compensate for that failure. *Id.* (¶¶ 10–16). Specifically, he contacted his friend George Kelesis, a member of the Nevada Tax Commission, to undo D.H. Flamingo's unsuccessful application, and he also undertook a campaign to disparage Yemenidjian. *Id.* While at the Gala, Dr. Spirtos told Oceguera that Yemenidjian had engaged in outright corruption to secure licenses. *Id.* (¶ 18). Dr. Spirtos fabricated the story to generate adverse publicity and interfere with Yemenidjian's ability to obtain future licenses. *Id.* (¶¶ 21–22).

Yemenidjian sued Dr. Spirtos for civil conspiracy and slander per se. 1 App. 6–7 (Compl. ¶¶ 25–36). The conspiracy claim alleges he "undertook a campaign with others," but it fails to identify the "others." *Id.* (¶ 26). The slander per se claim alleges he accused Yemenidjian of criminal activity. *Id.* (¶ 32). Both claims request punitive damages based on alleged oppression. *Id.* (¶¶ 28, 35).

D. The District Court Denied the Motion to Dismiss.

On December 10, 2019, Dr. Spirtos filed his Motion to Dismiss and made the following arguments:

1. His conversation with Oceguera is protected by NRS 41.637(3) because its topics—i.e., irregularities and corruption in the Department—were under judicial consideration in the Licensing Suits. 1 App. 16 (Mot. to Dismiss, 9:9–12).
2. His conversation with Oceguera is protected by NRS 41.637(4) because the Gala was a place open to the public, and the topic—i.e., public corruption—is a matter of public interest. *Id.* (9:12–14).
3. Each of Yemenidjian's claims is barred as a matter of law by the litigation privilege. *Id.* (9:24 – 10:8).
4. The conspiracy claim fails because (a) it was brought against a single defendant (*Id.* 10:11–26); (b) by failing to identify the conspirators, it does not provide fair notice (*id*. 10:27 – 11:7); (c) it lacks facts concerning an agreement to conspire and concerted actions (*id*. 11:8 – 12:7); and (d) it is redundant of the slander per se claim (*id*. 12:8–19).
5. The prayer for punitive damages fails because it does not allege facts showing oppression. *Id.* (15:25 – 16:20).

Yemenidjian made the following arguments in his Opposition:

1. Dr. Spirtos cannot invoke Nevada anti-SLAPP law because he denies accusing Yemenidjian of criminal activity. 1 App. 10–11 (Opp'n to Mot. to Dismiss, 3:22 – 4:6).

2. Dr. Spirtos's conversation with Oceguera was not a good faith communication because Dr. Spirtos said "Yemenidjian was knee deep in the corruption at the center of the licensing process for recreational cannabis licenses that the State of Nevada had awarded in early December 2018." 1 App. 209 (Oceguera Decl., ¶ 8); *see also* 1 App. 198 (Opp'n to Mot. to Dismiss, 4:15–21). During his deposition in the Licensing Suits, Dr. Spirtos admitted he does not know if Yemenidjian committed a crime. 1 App. 198 (Opp'n to Mot. to Dismiss, 4:22–28).

3. Dr. Spirtos's conversation with Oceguera is not protected by NRS 41.637(3) because (a) corruption within the Department was not a substantive issue in the Licensing Suits at the time of the Gala, and (b) Oceguera did not have an interest in the Licensing Suits. 1 App. 199 (Opp'n to Mot. to Dismiss, 5:13–21).

4. Dr. Spirtos's conversation with Oceguera is not protected by NRS 41.637(4) because (a) at the time of the Gala, corruption within the Department was not a matter of public interest, and (b) Dr. Spirtos slandered Yemenidjian for "personal financial interests." *Id.* (5:22 – 6:17).

5. The litigation privilege is inapplicable because (a) the conversation was not related to the Licensing Suits, and (b) Oceguera did not have a

significant interest in the Licensing Suits. *Id.* (7:1 – 8:2).

6. The conspiracy claim is viable because (a) it identifies fictional defendants who conspired with Dr. Spirtos (*id*. 9:16–17); (b) "there is no case mandating that a plaintiff must name each and every potential defendant—let alone in the initial pleading—in order to state a conspiracy claim" (*id*. 9:21–23); and (c) the conspiracy claim is not redundant of the slander per se claim due to its unique allegations that Dr. Spirtos conspired with fictitious defendants and engaged in "backroom maneuvering" with them (*id*. 10:5–10).

7. The request for punitive damages is viable because the Complaint alleges Dr. Spirtos made false statements with knowledge of their falsity "to undermine [Yemenidjian] and harm his reputation and business." *Id.* (11:22 – 12:12).

Dr. Spirtos made the following arguments in his Reply:

1. Per *Patin v. Ton Vinh Lee*, 134 Nev. 722, 429 P.3d 1248 (Nev. 2018), his conversation with Oceguera is protected by NRS 41.637(3) because (a) it related to a substantive issue in the Licensing Suits—i.e., corruption in the Department (2 App. 227 (Reply for Mot. to Dismiss, 5:6–13)); and (b) Oceguera had an interest in the Licensing Suits because he was a paid lobbyist for parties to the suits and also sat on

the board of an unsuccessful applicant that would be affected by and could have benefitted from the suits (*id*. 5:13–16).

2. His conversation with Oceguera is protected by NRS 41.637(4) because (a) public corruption is a matter of public interest (*id*. (5:26 – 6:15)); (b) even though it was a ticketed event, the Gala was open to the public (*id*. 6:16 – 7:8); and (c) even if it were private, Dr. Spirtos's conversation with Oceguera pertained to statements that already had been made publicly in the Licensing Suits in connection with an issue of public interest—i.e., public corruption (*id*. 7:9–20).

3. Yemenidjian cannot prevail on the merits of his claims because Oceguera's declaration does not support the Complaint. *Id.* (7:21 – 8:18). Specifically, the Complaint alleges Dr. Spirtos said "Yemenidjian had engaged in outright corruption in order to secure licenses," but in his declaration, Oceguera says Dr. Spirtos merely "insinuated" a crime. *Id.* (8:2–18). Furthermore, the declaration fails to establish Dr. Spirtos expressed a statement of fact rather than an opinion. *Id.* (8:18 – 9:12).[1]

[1] At the hearing, Yemenidjian asked the district court not to consider this argument because Dr. Spirtos first raised it in his Reply. 2 App. 331 (Tr., 16:10–11). Dr. Spirtos could not have raised the argument in his Motion to Dismiss because he had not yet seen Oceguera's declaration. *See, e.g.*, *Baugh v. City of Milwaukee*, 823

4. Yemenidjian also cannot demonstrate a probability of success on his claims because his Complaint warrants dismissal under NRCP 12(b)(5). *Id.* (9:13 – 10:1). Each claim is barred by the litigation privilege because (a) Dr. Spirtos's comments about corruption in the Department bore directly on the subject of the Licensing Suits (*id*. 10:17 – 11:5); and (b) as a paid lobbyist for parties to the Licensing Suits and a board member of an unsuccessful applicant that would be affected by the suits, Oceguera had a significant interest in or connection to the Licensing Suits (*id*. 11:15 – 12:1).

5. The conspiracy claim fails because Nevada law does not recognize a conspiracy between one person. *Id.* (12:16–24). Yemenidjian is mistaken in arguing that no Nevada case has ever required a conspiracy claim to identify the conspirators. *Id.* (12:24 – 13:7). In *Morris v. Bank of Am. Nevada*, 110 Nev. 1274, 1276, 886 P.2d 454, 456 n.1 (1994), this Court affirmed the dismissal of a conspiracy claim that failed to identify the supposed parties to the conspiracy. *Id.* By failing to identify Dr. Spirtos's co-conspirators, the Complaint does not

F. Supp. 1452, 1456–57 (E.D. Wis. 1993), aff'd, 41 F.3d 1510 (7th Cir. 1994) (prohibiting the movant from addressing new material in the opposition would give the nonmovant an unfair advantage); *see also Bayway Ref. Co. v. Oxygenated Mktg. & Trading A.G.*, 215 F.3d 219, 226–27 (2d Cir. 2000).

provide fair notice of the supposed conspiracy. *Id.* (13:8–23). The claim also does not contain any factual allegations concerning an agreement to conspire or any concerted acts between the conspirators. *Id.* (14:1 – 15:16).

6. The prayer for punitive damages does not allege facts showing Dr. Spirtos acted with oppression. *Id.* (20:1 – 21:5).

The district court heard the Motion to Dismiss on January 23, 2020 and took the matter under advisement because it had not yet reviewed the exhibits or the legal citations. 2 App. 319; 349 (Tr. 4:12–13; 34:20–22). It denied the Motion to Dismiss on March 5, 2020. 2 App. 351–365 (Order). It found NRS 41.637(3) inapplicable because Oceguera was not an active government official, and "there was nothing to suggest the oral communication was 'made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law.'" *Id.* (8:17–21). It also found NRS 41.637(4) inapplicable for two reasons: (1) an accusation that a competitor engaged in corruption to secure licenses is not a good faith communication under NRS 41.637 (*id*. (9:11–14));[2] and (2) the Gala was not open to the public or a public forum, and

[2] The district court overlooked the fact that Oceguera's declaration does not state that Dr. Spirtos accused Yemenidjian of engaging in corruption to secure licenses. 2 App. 229–230 (Reply for Mot. to Dismiss, 7:21 – 8:18). It also

Dr. Spirtos made the statements privately to Oceguera (*id*. 9:10–23).[3]

As for the litigation privilege, the district court acknowledged Dr. Spirtos's conversation with Oceguera was "arguably" related to the Licensing Suits. 2 App. 361 (Order, 11:9–11). It also acknowledged Oceguera "may have an interest in the [Licensing Suits] as an observer given his business relationship with" Yemenidjian. *Id*. (11:17–20). Nonetheless, it found the privilege inapplicable because Oceguera did not have a sufficient interest in or connection to the Licensing Suits on account of his status as a lobbyist for Yemenidjian. *Id*. (11:11–22).[4]

V. LEGAL ARGUMENTS.

A. Dr. Spirtos's Statements Are Protected by NRS 41.637.

A special motion to dismiss involves two prongs: (1) first, the movant must establish, "by a preponderance of the evidence, that the claim is based upon a" communication protected by NRS 41.637; and (2) if that burden is met, then to avoid dismissal, the nonmovant must demonstrate "with prima facie evidence a probability

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overlooked the fact that Oceguera's declaration fails to establish Dr. Spirtos expressed a statement of fact rather than an opinion. *Id*. (8:18 – 9:12).

[3] The district court overlooked the fact that anti-SLAPP law protects private conversations about statements previously made publicly in direct connection with an issue of public interest. 2 App. 229 (Reply for Mot. to Dismiss, 7:9–20).

[4] The district court failed to consider that Oceguera had an interest in the Licensing Suits because he sat on the board of an unsuccessful applicant that would be affected by and could have benefited from the outcome of the suits. 2 App. 227; 233–234 (Reply for Mot. to Dismiss, 5:13–16; 11:19 – 12:1).

of prevailing on the claim[.]" NRS 41.660(3)(a)-(b); *see also Coker v. Sassone*, 135 Nev. 8, 11–12, 432 P.3d 746, 749 (2019). The record shows by a preponderance of the evidence that Dr. Spirtos's statements are protected by NRS 41.637.

1. *NRS 41.637(3) Applies*.

NRS 41.637(3) protects a statement "made in direct connection with an issue under consideration by a" judicial body that is "truthful or is made without knowledge of its falsehood." A statement is made in direct connection with a matter under judicial consideration if it (1) relates to "substantive issues" in the litigation and (2) is made to someone "having some interest in the litigation." *Patin*, 134 Nev. at 726. As for the first part of the *Patin* test, D.H. Flamingo filed its complaint before the Gala. 1 App. 170–194. It alleged the "ranking and scoring process was corrupted and [certain applications] were not fairly and accurately scored in comparison to [other] applications." *Id.* (¶¶ 81; 91; 100; 114).

As for the second part of the *Patin* test, Oceguera was a board member of Las Vegas Wellness and Compassion LLC (LVWC) at the time of the Gala. 2 App. 252 (Wolf Decl., Jan. 16, 2020, ¶¶ 2–6). LVWC unsuccessfully applied to the Department for retail licenses. *Id.* (¶ 4). In its suit, D.H. Flamingo sought an order revoking the licenses awarded by the Department and requiring the Department to redo the application process. 1 App. 187–188; 191 (D.H. Flamingo Compl., ¶ 102(d)–(f); ¶ 121). As an unsuccessful applicant, LVWC could have benefitted from

that relief.[5] Additionally, Oceguera was a paid lobbyist for Yemenidjian's companies. 1 App. 4 (Yemenidjian's Compl. ¶ 17); *see also* 1 App. 209 (Oceguera Decl., Jan. 2020, ¶¶ 3–4). Yemenidjian's Essence companies were parties to the D.H. Flamingo Suit. 1 App. 2–3 (Yemenidjian's Compl. ¶¶ 6–8); *see also* 1 App. 172 (D.H. Flamingo Compl. ¶¶ 7–8). For these reasons, Oceguera had "some interest in the litigation." *Patin*, 134 Nev. at 726.

2. *NRS 41.637(4) Applies*.

a. *Dr. Spirtos's Conversation with Oceguera Involved a Matter of Public Interest—i.e., Public Corruption*.

NRS 41.637(4) protects a statement "made in direct connection with an issue of public interest in a place open to the public or in a public forum" that is "truthful or is made without knowledge of its falsehood." "[P]ublic interest is 'broadly' defined." *Abrams*, 458 P.3d at 1066 (quoting *Coker*, 135 Nev. at 14). A statement involves a public interest if it (1) "does not equate with mere [public] curiosity;" (2) is "something of concern to a substantial number of people;" (3) has "some degree of closeness" to the "asserted public interest;" (4) is focused on "the public interest rather than a mere effort to gather ammunition for another round of private controversy;" and (5) is not simply private information communicated "to a large

[5] In fact, LVWC ultimately became a party to D.H. Flamingo's suit.

number of people." *Shapiro v. Welt*, 133 Nev. 35, 39, 389 P.3d 262, 268 (2017) (quoting *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F. Supp. 2d 957, 968 (N.D. Cal. 2013)).

There is no question that the topic of Dr. Spirtos's conversation with Oceguera—i.e., public corruption—is a matter of public interest. In *Taylor v. Colon*, this Court held that a "presentation about cheating in the gaming industry" concerned a matter of public interest. --- P.3d ----, 136 Nev. Adv. Op. 50, 2020 WL 4376770, at *4 (Nev. July 30, 2020). In *Goldman v. Clark Cty. Sch. Dist*., No. 78282 and 78822, 2020 WL 5633065, 471 P.3d 753 (Nev. Sept. 18, 2020), this Court said "that allegations of misconduct by a high-ranking [Clark County School District] administrator is a matter of public interest[.]" *Id*. at *2.

Myriad courts outside Nevada have held that the "public is legitimately interested in" public corruption. *Silvester v. Am. Broad. Companies, Inc*., 839 F.2d 1491, 1493 (11th Cir. 1988); *see also Crabb v. Greenspun Media Grp., LLC*, No. 71443, 2018 WL 3458265, at *2 (Nev. Ct. App. July 10, 2018) (unpublished) (judicial integrity is of public interest); *Vilutis v. NRG Solar Alpine LLC*, 2018 WL 1724830, at *6 (Cal. Ct. App. Apr. 10, 2018) (alleged corruption within a town council is of public interest); *Healthsmart Pac., Inc. v. Kabateck*, 7 Cal. App. 5th 416, 429, 212 Cal. Rptr. 3d 589, 599 (Ct. App. 2016) (a "widespread illegal physician kickback scheme" is of public interest); *Chandler v. Rutland Herald Pub*.,

2015 WL 7628687, at *2 (Vt. Nov. 19, 2015) ("Allegations of public corruption clearly present a matter of public interest[.]"); *Abbas v. Foreign Policy Grp., LLC*, 975 F. Supp. 2d 1, 12 (D.D.C. 2013) (corruption within a body receiving public funds is of public interest); *Berisha v. Lawson*, 378 F. Supp. 3d 1145, 1157 (S.D. Fla. 2018) (statements concerning corruption in Albania's sale of arms to the United States were of public concern). Every Nevada citizen has an interest in knowing if a state employee accepted kickbacks or if the Department has been biased, shown favoritism, or failed to follow the law.

b. *Dr. Spirtos's Conversation with Oceguera Occurred in a Place Open to the Public or a Public Forum*.

"If a court determines the issue is of public interest, it must next determine whether the communication was made 'in a place open to the public or in a public forum'" and "is 'truthful or is made without knowledge of its falsehood.'" *Shapiro*, 133 Nev. at 40 (quoting NRS 41.637). In a mere footnote to his Opposition, Yemenidjian argued that the Gala was not open to the public because it was a ticketed event sponsored by Governor Sisolak's inaugural committee. 1 App. 200 (Opp'n to Mot. to Dismiss, 6 n.1). Yemenidjian is mistaken.

The Gala qualifies as "a place open to the public" because it was advertised to the public, and members of the public could purchase tickets to attend (some for as low as $25). 2 App. 253 (Wolf Decl., Jan. 16, 2020, ¶¶ 7–8). Similarly, magazines and newspapers are not free to the public, but some California appellate

courts have concluded that they are open to the public because they are advertised to and can be purchased by the public. *See, e.g.*, *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1039, 72 Cal. Rptr. 3d 210, 218 (2008) (newspapers and magazines "can be purchased and read by members of the public"); *see also Maranatha Corr., LLC v. Dep't of Corr. & Rehab*., 158 Cal. App. 4th 1075, 1086, 70 Cal. Rptr. 3d 614, 622 (2008); *Fullenwider v. Lifland*, 2009 WL 641303, at *2 (Cal. Ct. App. Mar. 13, 2009). Therefore, the Gala was open to the public because it was advertised to the public, and any member of the public could attend by purchasing a ticket. Furthermore, even if the Gala were not open to the public, Dr. Spirtos's statements still would be protected by NRS 41.637(4) because they pertained to allegations that already had been made publicly in the Licensing Suits in regards to a matter of public interest—i.e., public corruption. *See, e.g., Macias v. Hartwell*, 55 Cal. App. 4th 669, 674, 64 Cal. Rptr. 2d 222 (1997) (anti-SLAPP law protects private conversations about campaign flyers disseminated publicly).

3. *Dr. Spirtos's Statements Were Truthful or Made Without Knowledge of a Falsehood*.

The first prong of the anti-SLAPP analysis has two components: (1) the statement must fall into one of the four categories in NRS 41.637; and (2) it must be truthful or have been made without knowledge of a falsehood. *Stark v. Lackey*, 136 Nev. Adv. Op. 4, 458 P.3d 342, 345 (2020); *see also Delucchi v. Songer*, 133 Nev. 290, 299, 396 P.3d 826, 833 (2017). The movant merely has to show by a

preponderance of the evidence that the statement was true or made without knowledge of a falsehood, which "is a far lower burden of proof than the plaintiff must meet under" the second prong of the anti-SLAPP analysis. *Rosen v. Tarkanian*, 135 Nev. Adv. Op. 59, 453 P.3d 1220, 1224 (2019).

"[T]he preponderance standard requires proof that it is more likely than not that the communications were truthful or made without knowledge of their falsity." *Omerza v. Fore Stars, Ltd*., No. 76273, 2020 WL 406783, 455 P.3d 841, at *2 (Nev. Jan. 23, 2020) (unpublished). In determining if the movant has met that burden, "the court must consider the 'gist or sting' of the communications as a whole, rather than parsing individual words in the communications." *Rosen*, 453 P.3d at 1222; *see also Taylor*, 2020 WL 4376770, at *4. If the movant fails to establish the two components of the first prong by a preponderance of the evidence, then "the case advances to discovery." *Coker*, 135 Nev. at 12; *see also Rosen*, 453 P.3d at 1223; *Shapiro*, 133 Nev. at 38.

As a matter of law, an opinion constitutes a statement "made without knowledge of [a] falsehood under Nevada's anti-SLAPP statutes." *Abrams*, 458 P.3d at 1068 (quoting *Pegasus v. Reno Newspapers, Inc*., 118 Nev. 706, 714, 57 P.3d 82, 87 (2002)). A statement constitutes an opinion if a reasonable listener would not understand it to be "a statement of existing fact." *Nevada Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 410, 664 P.2d 337, 342 (1983); *see also Lubin v. Kunin*, 117

Nev. 107, 112, 17 P.3d 422, 426 (2001). If the "statement is susceptible of multiple interpretations, one of which is defamatory," then deciphering it is "left to the finder of fact." *Miller* v. *Jones*, 114 Nev. 1291, 1296, 970 P.2d 571, 575 (1998).

If an accusation of corruption has "no provably false factual connotation," *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 2 (1990), then it is an opinion. *See, e.g., 600 W. 115th St. Corp. v. Von Gutfeld*, 603 N.E.2d 930, 936–37 (N.Y. 1992) (*600 West*) (comments about fraud and "the smell of bribery and corruption" were opinions that did not invite a reasonable listener "to find specific factual allegations in [the] remarks."); *see also Bentley v. Bunton*, 94 S.W.3d 561, 583–84 (Tex. 2002) (citing *Milkovich*, 497 U.S. at 2) (determining whether accusations of corruption are statements of fact or opinions depends "on their verifiability and the context in which they were made," and accusations of corruption by the host of a call–in show against a judge were statements of fact when the host "repeatedly insisted that evidence he had seen but had not disclosed supported his assertions."); *Miller*, 114 Nev. at 1296–97 (an "objectively verifiable" statement is not an opinion).

In his declaration, Oceguera claims Dr. Spirtos said the following:

> During our conversation, Dr. Spirtos stated that Armen Yemenidjian was knee deep in the corruption at the center of the licensing process for recreational cannabis licenses that the State of Nevada had awarded in early December 2018. I was taken aback about the allegation that Mr. Yemenidjian had supposedly corrupted the process. I was sufficiently startled by Dr. Spirtos' statements that insinuated a crime that I subsequently spoke with Mr. Yemenidjian about Dr. Spirtos' accusation.

1 App. 209 (Oceguera Decl. ¶ 8). Dr. Spirtos denies mentioning Yemenidjian to Oceguera. 1 App. 119 (Dr. Spirtos Decl. ¶ 21). That denial satisfies the good faith component of the first prong of the anti-SLAPP analysis. *Taylor*, 2020 WL 4376770, at *4 (the plaintiff accused the defendant of calling him a cheater and a criminal, and the defendant denied doing so in his declaration attached to his special motion to dismiss. This Court said that "although there is dispute over what [the defendant] actually said during his presentation, [the defendant's] declaration denying that he called the individual depicted in the video a cheater constitutes a showing of good faith.").

Nonetheless, even if this Court were to accept Oceguera's version of the conversation, Oceguera's declaration still fails to establish that Dr. Spirtos expressed a false statement of fact. As for the statement that there was "corruption at the center of the licensing process," it was an opinion. It also was true or made without knowledge of a falsehood based on (1) Pupo's statements to Dr. Spirtos at breakfast, (2) the statements unidentified men made to Dr. Spirtos in the Department's parking lot, (3) the anonymous text messages Dr. Spirtos received, (4) the Department's illegal changes to the application form, (5) a lack of variability in the Department's scores, (6) Dr. Spirtos's belief it would be impossible to review each application adequately in 1.5 to 2 hours, (7) the Department's refusal to explain to Dr. Spirtos why D.H. Flamingo received certain scores for certain criteria, despite its legal

obligation to do so, (8) the Department's refusal to disclose to Dr. Spirtos the average score for each criterion and to answer his questions about the scoring process, and (9) the allegations in the Licensing Suits. 1 App. 119 (Spirtos Decl. ¶ 19).[6] Yemenidjian did not present any evidence that Dr. Spirtos's statement about corruption in the Department was untrue or made with knowledge of a falsehood. *See, e.g.*, *Stark*, 458 P.3d at 347 (an uncontested declaration can establish the statement was true); *see also Omerza*, 2020 WL 406783, at *2; *Taylor*, 2020 WL 4376770, at *5.

As for Dr. Spirtos's supposed statement that Yemenidjian was "knee deep in the corruption at the center of the licensing process," that remark has "no provably

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[6] In fact, on September 3, 2020, Judge Gonzalez issued her findings of fact in D.H. Flamingo's suit. 2 App. 384 - 414. Her findings demonstrate that Dr. Spirtos's opinions about the Department were true. For example, she concluded that (1) "[b]y allowing certain applicants and their representatives to personally contact [Pupo] about the application process, the [Department] violated its own established procedures for the application process," *id*. ¶ 36; (2) a "lack of training for the graders [of the applications] affected the graders' ability to evaluate the applications objectively and impartially," *id*. ¶ 53; (3) the Department "made no effort to verify owners, officers or board members (except for checking whether a transfer request was made and remained pending before the [Department])," *id*. ¶ 55; (4) the Department did not penalize applicants whose applications contain information inconsistent with the information on file in the Department's own internal records, *id*. ¶ 56; (5) the Department "issued conditional licenses to applicants who did not identify each prospective owner, officer and board member," *id*. ¶ 58; (6) Pupo gave "preferential access and treatment" to certain applicants, *id*. ¶ 59; and (7) certain irregularities in the Department's actions "is evidence of a lack of a fair process" and "create[d] an uneven playing field," *id*. ¶¶ 60–61, 63.

false factual connotation." *Milkovich*, 497 U.S. at 2. It does not expressly state Yemenidjian committed a crime, accuse Yemenidjian of paying bribes or kickbacks, mention any specific criminal transactions, or even identify any particular acts by Yemenidjian. Indeed, in his declaration, Oceguera states that the remark merely "insinuated a crime." 1 App. 209 (Oceguera Decl. ¶ 8). Without any factual details, the remark is too vague and generalized "to find [any] specific factual allegations in" it. *600 West*, 603 N.E.2d at 937. Through its use of the slang phrase "knee deep" and absence of factual details, the "loose, figurative, [and] hyperbolic language" of the remark "would negate the impression that [Dr. Spirtos] was seriously maintaining [Yemenidjian] committed [a crime]." *Milkovich*, 497 U.S. at 2; *see also 600 West*, 603 N.E.2d at 937–38 ("[T]he colloquial and loose terms 'smells of' and 'fraudulent as you can get'" prevents a reasonable listener from interpreting the statements as factual assertions). The remark therefore constitutes an opinion made without knowledge of a falsehood. *Abrams*, 458 P.3d at 1068.

B. Yemenidjian Cannot Show a Probability of Success.

1. *The Litigation Privilege Bars Yemenidjian's Claims*.

The 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." *Flatley v. Mauro*, 139 P.3d 2, 17 (Cal. 2006). "[T]he privilege applies to communications made by either an attorney or a

nonattorney that are related to ongoing litigation or future litigation contemplated in good faith." *Jacobs v. Adelson*, 130 Nev. 408, 413, 325 P.3d 1282, 1285 (2014); *see also Greenberg Traurig v. Frias Holding Co.*, 130 Nev. 627, 630, 331 P.3d 901, 903 (2014) (quoting *Fink v. Oshins*, 118 Nev. 428, 433, 49 P.3d 640, 644 (2002)) (the privilege applies to statements pertinent "in some way" to litigation). The test for determining if a statement is related to litigation "is very broad" and is "for the court to decide." *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 61–62, 657 P.2d 101, 104–05 (1983). So long as the statement "has some bearing on the subject matter of the [litigation], it is absolutely privileged." *Id.* at 61. "Any doubt as to whether the privilege applies is resolved in favor of applying it." *Adams v. Superior Court*, 2 Cal. App. 4th 521, 529, 3 Cal. Rptr. 2d 49, 53 (Cal. Ct. App. 1992).

To be protected, a statement must be made to someone with "a significant interest in the outcome of the litigation or who has a role in the litigation. In order to determine whether a person who is not directly involved in the judicial proceeding may still be 'significantly interested in the proceeding,' the district court must review 'the recipient's legal relationship to the litigation, not their interest as an observer.'" *Shapiro*, 133 Nev. at 41 (citing *Fink*, 118 Nev. at 46; quoting *Jacobs*, 130 Nev. at 416). While acknowledging Dr. Spirtos's statements "arguably" were related to litigation, the district court concluded Oceguera did not have a significant interest in the litigation. 2 App. 361 (Order, 11:3–22). That conclusion is erroneous.

Oceguera had a significant interest in the Licensing Suits through his relationship with parties to the litigation and nonparties that would be affected by and could benefit from the litigation. Specifically, Oceguera was a paid lobbyist for Yemenidjian's companies, which were parties to the D.H. Flamingo Suit. Furthermore, Oceguera sat on the board of LVWC. As an unsuccessful applicant, LVWC could have benefited from D.H. Flamingo's request for an order revoking the licenses awarded by the Department and requiring the Department to redo the application process. As the board member of an entity with a significant interest in the Licensing Suits, Oceguera himself had a significant interest in the litigation. *See, e.g.*, *Costa v. Superior Court*, 157 Cal. App. 3d 673, 678, 204 Cal. Rptr. 1 (Cal. Ct. App. 1984) (when a fraternal lodge sued a subsidiary lodge and its chairman sent an allegedly libelous letter to members of the subsidiary lodge, the litigation privilege applied to the letter because the subsidiary lodge members possessed a significant interest in the outcome of the litigation).

Moreover, Oceguera had a significant interest in the Licensing Suits as a member of the marijuana industry. The entire industry had a significant interest in the litigation because it would have been affected by D.H. Flamingo's request for an order revoking the licenses awarded by the Department and requiring the Department to redo the application process. Similarly, in *Abraham v. Lancaster Cmty. Hosp.*, Lancaster Community Hospital (LCH) brought anti-trust claims

against Antelope Valley Hospital Medical Center (Antelope), Sierra Primary Care Associates (Sierra), and several other members of the Antelope Valley medical community. 217 Cal. App. 3d 796, 801, 266 Cal. Rptr. 360 (Cal. Ct. App. 1990). LCH filed a first amended complaint that accused Mathew Abraham, Antelope's administrator, of anti-competitive conduct. *Id.* at 801–5. Abraham then sued LCH's parent company and Sierra for defamation and other claims. *Id.* at 805. He alleged, inter alia, that they made oral accusations against him throughout the Antelope Valley medical community. *Id.* at 805–6. He alleged that LCH "launched a personal attack on him . . . because he has done his job too well and made [Antelope] a more effective competitor with LCH." *Id.* at 806.

The trial court dismissed the complaint under the litigation privilege. *Id.* at 808. Affirming as for the defamation claim, the California Court of Appeals (Second District) said the litigation privilege applied to the oral statements because "the local medical community possessed 'a substantial interest in the outcome of the pending litigation' and as such were 'participants' therein." *Id.* at 823 (quoting *Costa*, 157 Cal. App. 3d at 678, 204 Cal. Rptr. 1). Likewise, the marijuana industry had a substantial interest in the Licensing Suits, and as a member of that industry, Oceguera himself had a substantial interest in the suits. Dr. Spirtos's statements to Oceguera therefore were privileged. For that reason, Yemenidjian cannot prevail on his claims as a matter of law. *Greenberg Traurig*, 130 Nev. at 630 (privileged

statements are absolutely immune from civil liability); *see also Flores v. Emerich & Fike*, 416 F. Supp. 2d 885, 910 (E.D. Cal. 2006) (same).

2. *Yemenidjian Failed to Present Prima Facie Evidence Supporting His Claims*.

If the movant satisfies the first prong of the anti-SLAPP analysis, then the nonmovant must demonstrate "with prima facie evidence a probability of prevailing on the claim[.]" NRS 14.660(3)(b). "[T]he prima facie evidence standard requires the court to decide whether the plaintiff met his or her burden of production to show that a reasonable trier of fact could find that he or she would prevail." *Taylor*, 2020 WL 4376770, at *3. To meet the second prong, the plaintiff cannot rely on conclusory assertions unsupported by evidence. *See*, *e.g.*, *Omerza*, 2020 WL 406783, at *3 ("[T]he plaintiff must point to competent, admissible evidence."); *see also NuScience Corp. v. Abraham*, 2017 WL 445410, at *16 (Cal. Ct. App. Feb. 1, 2017). Yemenidjian failed to meet this burden. As for his civil conspiracy claim, he presented no evidence that Dr. Spirtos undertook some concerted action with another person with the intent to commit an unlawful objective. *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 117–18, 345 P.3d 1049, 1052 (2015).

As for his slander per se claim, Yemenidjian failed to present any prima facie evidence supporting his allegations. As demonstrated by the following comparison, Oceguera's declaration does not support Yemenidjian's slander per se claim:

The Slander Per Se Claim	*Oceguera's Declaration*
"Spirtos proceeded to slander Mr. Yemenidjian, claiming to Oceguera that Mr. Yemenidjian had engaged in outright corruption in order to secure licenses. This statement falsely accused Mr. Yemenidjian of criminal activity, just as Spirtos had intended it." 1 App. 4 (Compl. ¶ 18).	"During our conversation, Dr. Spirtos stated that Armen Yemenidjian was knee deep in the corruption at the center of the licensing process for recreational cannabis licenses that the State of Nevada had awarded in early December 2018. I was taken aback about the allegation that Mr. Yemenidjian had supposedly corrupted the process. I was sufficiently startled by Dr. Spirtos' statements that insinuated a crime that I subsequently spoke with Mr. Yemenidjian about Dr. Spirtos' accusation." 1 App. 209 (Oceguera Decl. ¶ 8).

Yemenidjian presented no prima facie evidence that Dr. Spirtos said he "had engaged in outright corruption in order to secure licenses." 1 App. 4 (Compl. ¶ 18). For that simple reason, Yemenidjian failed to satisfy the second prong.

3. *Yemenidjian's Conspiracy Claim and Prayer for Punitive Damages Fail as a Matter of Law*.

A complaint that fails to state a claim upon which relief can be granted "cannot meet the probability of success on the merits standard." *Resolute Forest Prod., Inc. v. Greenpeace Int'l*, 302 F. Supp. 3d 1005, 1026 (N.D. Cal. 2017); *see also Taylor v. Colon*, --- P.3d ----, 136 Nev. Adv. Op. 50, 2020 WL 4376770, at *3 (Nev. July 30, 2020) (the second prong examines whether the "claim is legally sufficient."); *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 840 (9th Cir. 2001). Yemenidjian

cannot demonstrate a probability of success on his conspiracy claim and prayer for punitive damages because they warrant dismissal under NRCP 12(b)(5).

a. *The Conspiracy Claim Fails as a Matter of Law*.

The district court found Yemenidjian's conspiracy claim viable because "the co-conspirators need not be specifically identified, and the reference to 'others' are enough to state a claim for which relief may be granted under NRCP 8(a)." 2 App. 363 (Order, 13:5–8). That conclusion is erroneous. Civil conspiracy requires a concerted action between "two or more persons." *Cadle*, 131 Nev. at 117–18. Dr. Spirtos is the only non-fictitious defendant named in the conspiracy claim. As pled, the claim involves a conspiracy of one, which is legally impossible. 15A C.J.S. C*onspiracy* § 9 (Dec. 2019); *see also Morris*, 110 Nev. at 1276 n.1 (wherein this Court affirmed the dismissal of a conspiracy claim that failed "to identify any combination between two or more persons *and fails even to identify the supposed parties to the conspiracy*.") (emphasis added);[7] *McAndrew v. Lockheed Martin Corp*., 206 F.3d 1031, 1036 (11th Cir. 2000); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952); *Adperio Network, LLC v.*

[7] In its Order, the district court failed to address *Morris* even though Dr. Spirtos discussed the case in his Reply. 2 App. 351–365 (Order); *compare to* 2 App. 235 (Reply for Mot. to Dismiss, 13:3–6).

AppSlide, LLC, 2017 WL 4407928, at *8 (D. Colo. Mar. 28, 2017); *In re Hilbrant*, 2012 WL 5248615, at *3 (Bankr. W.D.N.C. Oct. 24, 2012).

The conspiracy claim also fails to provide fair notice of the supposed conspiracy. A complaint must allege facts that provide fair notice of a legally sufficient claim. *See, e.g.*, *Vacation Vill., Inc. v. Hitachi Am., Ltd*., 110 Nev. 481, 484, 874 P.2d 744, 746 (1994); *see also Liston v. Las Vegas Metro. Police Dep't*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995). The Complaint alleges Dr. Spirtos "undertook a campaign with others," but it fails to identify the "others." 1 App. 6 (Compl. ¶ 26). Dr. Spirtos has no idea with whom he allegedly conspired. The Complaint therefore does not provide fair notice of the supposed conspiracy. *See, e.g.*, *Morris*, 110 Nev. at 1276 n.1; *see also Davis v. 1568 Broadway Hotel Mgmt. LLC DoubleTree Hotel Times Square*, 2018 WL 317849, at *4 (S.D.N.Y. Jan. 5, 2018) (dismissing a conspiracy claim that failed to identify the single defendant's co-conspirator); *see also Groves v. City of Darlington*, 2011 WL 826449, at *7 (D.S.C. Jan. 14, 2011) (a conspiracy claim that "failed to identify with whom the" defendant conspired was not viable).

The conspiracy claim also does not provide fair notice because it is devoid of any factual allegations concerning an agreement to conspire and any concerted acts. Dr. Spirtos has no idea what agreement he allegedly entered, with whom he supposedly entered it, and in what concerted actions he supposedly participated.

Courts around the country have dismissed similarly defective conspiracy claims. *See, e.g., Chavez v. California Reconveyance Co*., 2010 WL 2545006, at *5 (D. Nev. June 18, 2010); *see also NordAq Energy, Inc. v. Devine*, 2019 WL 334203, at *6 (D. Alaska Jan. 25, 2019); *Galicki v. New Jersey*, 2015 WL 3970297, at *9 (D.N.J. June 29, 2015); *Ashton v. City of Uniontown*, 459 F. App'x 185, 191 (3d Cir. 2012); *Marshall v. ITT Tech. Inst*., 2012 WL 1205581, at *4 (E.D. Tenn. Apr. 11, 2012); *Baldonado v. Avrinmeritor, Inc*., 2014 WL 2116112, at *10 (D. Del. May 20, 2014); *Tanksley v. Bay View Law Grp., P.C*., 2014 WL 2216966, at *7 (D. Kan. May 29, 2014); *Feliz v. Kintock Grp*., 2007 WL 9751961, at *1 n.1 (E.D. Pa. Mar. 14, 2007); *Gunderson v. Uphoff*, 2000 WL 854283, at *6 (10th Cir. 2000); *Sooner Prod. Co. v. McBride*, 708 F.2d 510, 512 (10th Cir. 1983).

Finally, to the extent Yemenidjian alleges Dr. Spirtos conspired to slander him, his conspiracy claim is redundant of his slander claim. *See, e.g.*, *Boisjoly v. Morton Thiokol, Inc*., 706 F. Supp. 795, 803–04 (D. Utah 1988) (a conspiracy claim fails against "a single defendant where the same underlying torts are also asserted by separate counts against the same defendant."); *see also NorthStar Aviation, LLC v. Alberto*, 332 F. Supp. 3d 1007, 1017–18 (E.D. Va. 2018) (same); *Miller v. Gizmodo Media Grp., LLC*, 2019 WL 1790248, at *12 (S.D. Fla. Apr. 24, 2019) (quoting *Bahiri v. Madison Realty Capital Advisors, LLC*, 924 N.Y.S.2d 307, at *3 (N.Y. Sup. Ct. 2010)) ("[W]here the substantive tort is already pled against the

parties," the conspiracy claim will be dismissed as duplicative); *Shows v. Morgan*, 40 F. Supp. 2d 1345, 1363 (M.D. Ala. 1999) (dismissing a conspiracy claim that was redundant of libel and invasion of privacy claims). Due to these pleading defects, Yemenidjian cannot prevail on his conspiracy claim as a matter of law.

b. ***The Prayer for Punitive Damages Fails as a Matter of Law***.

The district court found the prayer for punitive damages viable because (1) cruel and unjust hardships are not necessary to recover punitive damages, and (2) the Complaint alleges Dr. Spirtos acted with oppression in conscious disregard of Yemenidjian's rights. 2 App. 363–364 (Order, 13:11 – 14:7). That ruling is erroneous and misapprehends Dr. Spirtos's arguments in his Motion to Dismiss. 1 App. 22–23 (Mot. to Dismiss, 15:25 – 16:20); 2 App. 242–243 (Reply for Mot. to Dismiss, 20:1 – 21:5).

To recover punitive damages, a plaintiff must prove oppression, fraud, or malice. NRS 42.005(1). The Complaint alleges oppression but not fraud or malice. 1 App. 6–7 (Compl. ¶ 28; ¶ 35). Oppression is defined as "despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person." NRS 4.001(4). Conscious disregard is defined as "the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences." NRS 42.001(1). Accordingly, to establish oppression, the Complaint must allege Dr. Spirtos engaged in despicable

conduct that subjected Yemenidjian to cruel and unjust hardship and either acted with knowledge of the probable harmful consequences or willfully and deliberately failed to act to avoid them. It contains no such allegations. Yemenidjian therefore cannot demonstrate a probability of success on his prayer for punitive damages.

VI. CONCLUSION.

For the foregoing reasons, this Court should reverse the Order.

DATED November 19, 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of MCNUTT LAW FIRM and on November 19, 2020, I caused a copy of the **APPELLANT'S OPENING BRIEF** to be served electronically to the following recipients:

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