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 REPLY BRIEF**

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CERTIFICATE OF COMPLIANCE

I now certify that I have read the preceding 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 type style requirements of NRAP 32(a)(6) because it has been prepared with proportionally spaced typeface using Times New Roman 14-point font. Including footnotes, the brief contains 6,282 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 on is to be found.

DATED March 19, 2021.

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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 knowledge, except for those matters stated on information and belief, and as to those matters, I believe them to be true.

DATED March 19, 2021.

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I. INTRODUCTION.

Words matter, and the actual words in Oceguera's declaration are case-dispositive. Throughout his brief, Yemenidjian claims Dr. Spirtos told Oceguera that he had "committed a crime." However, Oceguera's declaration (which is the sum and substance of the entire case) does not use those words at all. Rather, in his declaration, Oceguera merely claims that 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 (¶ 8). Oceguera merely interpreted Dr. Spirtos's alleged remark as "insinuating" a crime. *Id*. Thus, the district court should have granted Dr. Spirtos's special motion to dismiss because his alleged remark is "immune from any civil action." NRS 41.650.

Nevada 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." NRS 41.637(3). At the time of the Gala, the topic of Dr. Spirtos and Oceguera's conversation—i.e., "corruption at the center of the licensing process," 1 App. 209 (¶ 8)—was a substantive issue in the Licensing Suits. Based in part on alleged corruption, D.H. Flamingo requested an order in the Licensing Suits requiring the Department to redo the license application process. Oceguera was interested in the case because he was a paid lobbyist for Yemenidjian's marijuana

companies (some of which were parties to the case). Oceguera also personally sat on the board of an unsuccessful license applicant that could have benefitted from the Licensing Suits.

Yemenidjian's argument that corruption was not a substantive issue in the Licensing Suits is meritless. It was a substantive issue because it impacted D.H. Flamingo's legal rights and was detailed throughout the complaint. *See, e.g.*, 1 App. 184–89 (¶¶ 81; 91; 100; 114). Equally baseless is Yemenidjian's argument that Oceguera did not have an interest in the case. Yemenidjian even alleges in his complaint that Oceguera "worked in the cannabis industry with" him. 1 App. 4 (¶ 17).

Nevada also 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." NRS 41.637(4). The topic of the Gala conversation—governmental corruption—is an issue of public interest. Governmental corruption is an issue of public interest even if private actors participate in it. While ticketed, the Gala was a place open to the public or a public forum because anyone could purchase a ticket. Yemenidjian mistakenly believes that NRS 41.637(4) requires a forum to be available for free to every citizen to be a place open to the public or a public forum. That position plainly contradicts this Court's precedent. Newspapers and trade shows are not free and HOA meetings are

restricted to homeowners, yet this Court has protected statements made at those forums under NRS 41.637(4). Like newspapers, HOA meetings, trade shows, and Facebook pages, the Gala was a meeting place for the unfettered discussion and debate of ideas, including ones about the license process.

Even if Dr. Spirtos had accused Yemenidjian of being "knee deep" in the corruption of the license application process (which Dr. Spirtos denies), that alleged remark would be an opinion made without knowledge of falsehood. An accusation of corruption or criminal conduct can be an opinion based on its diction and circumstances. Due to the alleged remark's loose and colloquial language and lack of specific facts, no reasonable listener would understand it to be an assertion of an existing fact that Yemenidjian had committed a crime. It did not mention any specific actions, events, or transactions that, if true, would violate Nevada's anti-bribery statutes, NRS 197.010–020. The slang phrase "knee deep" would alert a reasonable listener that the alleged remark is an ad lib opinion expressed while socializing at the Gala rather than a presentation of an existing fact.

Because Dr. Spirtos satisfied the first prong of anti-SLAPP, the second prong required Yemenidjian to present "prima facie evidence a probability of prevailing" on his claims. NRS 41.660(3)(b). Yemenidjian has no probability of success because the litigation privilege bars his claims. The privilege protects any statement—even a false and malicious one—that has some relation to a case made

to someone with a significant interest in the case's outcome or a role in the case. Dr. Spirtos and Oceguera's conversation about "corruption at the center of the licensing process," 1 App. 209 (¶ 8), had some relation to the Licensing Suits. Yemenidjian even argues that Dr. Spirtos spoke with Oceguera "to get ammunition for his plan to receive a license *through litigation*[.]" Answering Brief (AB) 26 (emphasis added). Oceguera had a significant interest in the case. He "worked in the cannabis industry with" Yemenidjian, 1 App. 4 (¶ 17), was a paid lobbyist for Yemenidjian's marijuana companies (some of which were parties to the case), and sat on the board of an unsuccessful license application that could have benefitted from the case.

For these reasons and others, this Court should reverse the district court's denial of Dr. Spirtos's special motion to dismiss.

II. ARGUMENTS.

A. Yemenidjian's Jurisdictional Arguments Are Meritless.

After reversing the denial of a special motion to dismiss, this Court usually will remand the case if the district court did not address the second prong of anti-SLAPP. *See, e.g., Kosor v. Olympia Companies, LLC*, 136 Nev. Adv. Op. 83, 2020 WL 7866872, at *6 (Nev. Dec. 31, 2020); *see also Nielsen v. Wynn*, No. 77361, 470 P.3d 217, 2020 WL 5230591, at *2 (Nev. Sept. 1, 2020) (unpublished). Yemenidjian argues that because the district court denied Dr. Spirtos's motion under the first prong, this Court lacks jurisdiction to review the second prong, as well as Dr.

Spirtos's arguments about the litigation privilege and Rule 12(b)(5). AB 1; 28–30. Yemenidjian is wrong for two reasons.

First, because the litigation privilege "is a matter of law for the court to decide" and is reviewed de novo, an appellate court can consider it under the second prong even if the district court did not reach the prong. *Clark Cty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 382, 213 P.3d 496, 502 (2009); *see, e.g.*, *Greco v. Greco*, 2 Cal. App. 5th 810, 826, 206 Cal. Rptr. 3d 501, 513 (2016) (although the lower court did not reach the "merits prong," the appellate court concluded that the litigation privilege barred a fraud claim); *see also Lan Lee v. Yunchun Li*, 2014 WL 2535484, at *3 (Cal. Ct. App. June 6, 2014) (the district court did not reach the second prong, but the appellate court concluded the litigation privilege barred interference and emotional distress claims); *Swallow v. Roberts*, 2020 WL 1428231, at *4–11 (Cal. Ct. App. Mar. 24, 2020) (reversing the district court's conclusion that a special motion to dismiss was untimely, the appellate court said the motion should have been granted as to certain claims barred by the litigation privilege); *Reif v. California Cong. of Parents, Teachers, & Students, Inc.*, 2014 WL 4628518, at *8 (Cal. Ct. App. Sept. 17, 2014) (addressing the litigation privilege "without remand" because it is "subject to independent review."). Likewise, an appellate court can determine if the plaintiff's claims are legally sufficient because

that question "is subject to independent review." *Roberts v. Los Angeles Cty. Bar Assn.*, 105 Cal. App. 4th 604, 615–16, 129 Cal. Rptr. 2d 546, 553 (2003).

Second, this Court does not need to remand this case because the parties briefed the second prong, and the district court ruled on Dr. Spirtos's arguments regarding the prong. *See, e.g., Riley v. Usher*, 2015 WL 1858743, at *3 n.6 (Cal. Ct. App. Apr. 22, 2015) ("Although the trial court did not reach the second prong of the anti-SLAPP analysis, the parties have fully briefed the issue and we exercise our discretion to decide it."). Dr. Spirtos raised the litigation privilege and Rule 12(b)(5) under the second prong. *See, e.g.*, 1 App. 10–16 (3:14–17; 9:20–21); 2 App. 225–32 (3:3–5; 9:13 – 10:1); 2 App. 325–327 (10:21–22; 12:13–15). Yemenidjian responded to Dr. Spirtos's arguments, 1 App. 201–206 (7:1 – 12:12), and the district court ruled on them, 2 App. 361–64 (11:3 – 14:7).

B. NRS 41.650 Immunizes Dr. Spirtos from Liability.

1. *NRS 41.637(3) Applies.*

The district court erred by not applying NRS 41.637(3). That statute protects a "statement made in direct connection with an issue under consideration by a" judicial body—i.e., a statement that "relates to the substantive issues in the litigation and is directed to persons having some interest in the litigation." *Patin v. Ton Vinh Lee*, 134 Nev. 722, 726, 429 P.3d 1248, 1251 (2018). Before the Gala, D.H. Flamingo alleged in the Licensing Suits that the Department's "ranking and scoring

process was corrupted" and "certain applications were favored over others." 1 App. 188–87 (¶¶ 81; 91). It requested an order requiring the Department to redo the application process. 1 App. 187–188 (¶ 102(e)-(f)). Dr. Spirtos and Oceguera's conversation about "corruption at the center of the licensing process for recreational cannabis licenses," 1 App. 209 (¶ 8), related to those substantive issues in the Licensing Suits. Oceguera had an interest in the case. He was a paid lobbyist for Yemenidjian's marijuana companies, some of which were parties to the case. 1 App. 209 (¶¶ 3–4); 1 App. 172 (¶¶ 7–8). He also sat on the board of an unsuccessful applicant that could have benefitted from an order requiring the Department to redo the application process. 2 App. 252 (¶¶ 2–6).

In response, Yemenidjian argues that corruption was not a substantive issue in the Licensing Suits because D.H. Flamingo's complaint uses the word "corrupt" in only four paragraphs and contains no claims "based on corruption." AB 22–23.[1] Courts "have adopted a fairly expansive view of what constitutes litigation-related

[1] Yemenidjian's argument is misplaced because although corruption was a *substantive* and *substantial* issue in the Licensing Suits, an issue can be a *substantive* issue in a case without being a *substantial* issue. *See, e.g.*, *Right*, BLACK'S LAW DICTIONARY (11th ed. 2019) (quoting 1 James W. Moore, Moore's Federal Practice § 1.05[2][b], at 1–29 (3d ed. 2016)) (a substantive right is not necessarily a substantial right). Also, Yemenidjian is wrong about whether D.H. Flamingo pled a claim "based on corruption." 1 App. 187–89 (¶¶ 100; 114). Finally, Yemenidjian's argument that D.H. Flamingo did not allege "impropriety" by "other applications," AB 23, overlooks D.H. Flamingo's allegations about favoritism. 1 App. 184–89 (¶¶ 82; 91; 114).

activities" under anti-SLAPP law. *Kashian v. Harriman*, 98 Cal. App. 4th 892, 908, 120 Cal. Rptr. 2d 576, 588 (2002). A communication "must simply be reasonably relevant to the subject matter of the lawsuit (pending or contemplated) to be considered protected activity." *Fitbit, Inc. v. Laguna 2, LLC*, 2018 WL 306724, at *5 (N.D. Cal. Jan. 5, 2018) (quoting *Neville v. Chudacoff*, 160 Cal.App.4th 1255, 1266, 73 Cal.Rptr.3d 383 (2008)) (internal quotes omitted).[2]

An issue "concerned with the legal rights of the parties" is a substantive issue. *Sims Snowboards, Inc. v. Kelly*, 863 F.2d 643, 645 (9th Cir. 1988). Corruption was a substantive issue in the Licensing Suits because it impacted D.H. Flamingo's legal rights. Due to alleged corruption and other issues, D.H. Flamingo requested an order requiring the Department to "cease issuing any conditional licenses," conduct the "license application process again," and refrain "from any further proceedings with respect to the issuance or recognition of new" licenses. 1 App. 187–190 (¶¶ 100; 102(e)–(f); 114; 117). NRS 41.637(3) protects Dr. Spirtos and Oceguera's conversation related to those substantive issues. *See, e.g., Hand & Nail Harmony, Inc. v. ABC. Nails & Spa Prod.*, 2016 WL 9110162, at *4 (C.D. Cal. Dec. 9, 2016)

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[2] The "reasonably related" test applies to the litigation privilege. *See, e.g., Silberg v. Anderson*, 50 Cal. 3d 205, 219, 786 P.2d 365, 374 (1990); *see also Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 650 (9th Cir. 2009). It also applies to CAL. CIV. CODE § 425.16(e)(2) (equivalent to NRS 41.637(3)) because California looks to the privilege to construe the statute. *See, e.g., Salon Supply Store, LLC v. Creative Nail Design, Inc.*, 2015 WL 11438492, at *10 (S.D. Cal. June 19, 2015).

(protecting a letter about counterfeiting because counterfeiting was under judicial review); *see also Lund v. Gifford*, 2016 WL 7031517, at *6 (Cal. Ct. App. Dec. 2, 2016) (protecting statements about "a key issue" in litigation).

Yemenidjian also argues—despite alleging that Oceguera "worked in the cannabis industry with" him, 1 App. 4 (¶ 17)—that Oceguera was uninterested in the Licensing Suits because he "was not a party" or a party's owner. AB 24. However, the phrase "some interest" in *Patin* is not limited to parties or their owners. Thus, as a matter of law, one can be interested in litigation without being a party or its owner. *See, e.g.*, *Neville*, 73 Cal. Rptr. 3d at 394 (CAL. CIV. CODE § 425.16(e)(2) "protect statements to persons *who are not parties or potential parties to litigation*" that "are made 'in connection with' pending or anticipated litigation.") (emphasis added); *see also Crestmont Capital, LLC v. P.A.R. Consulting*, 2020 WL 5887014, at *5 (C.D. Cal. July 16, 2020) (nonparties in "the lending community who share[d] an ongoing economic relationship with" the plaintiffs "possessed a substantial interest in" a case);[3] *Healy v. Tuscany Hills Landscape & Recreation Corp*., 137 Cal. App. 4th 1, 3–4, 39 Cal. Rptr. 3d 547, 548–89 (2006) (when an HOA told nonparties that the defendant-homeowner had increased its costs, § 425.16(e)(2) protected the

[3] By "work[ing] in the cannabis industry with" Yemenidjian, 1 App. 4 (¶ 17), Oceguera had an interest in the litigation by sharing "an ongoing economic relationship with" him. *Crestmont Capital*, 2020 WL 5887014, at *5.

statement); *Neville*, 73 Cal. Rptr. 3d at 392 (§ 425.16(e)(2) protected a letter to the plaintiff's customers about its misappropriated trade secrets); *Sparrow LLC v. Lora*, 2014 WL 12573525, at *1–4 (C.D. Cal. Dec. 4, 2014) (same).

Finally, Yemenidjian's comparison of this case to *Patin* is misplaced. AB 23–24. In *Patin*, an attorney's website advertised a verdict in a wrongful death case. 134 Nev. at 723. It described the defendants as a dental office, the office's owner, Dr. Lee, and dentists Dr. Traivai and Dr. Park. *Id*. Dr. Lee sued for defamation because while the jury had found the dental office and Dr. Traivai negligent, it had acquitted him. *Id.* This Court said NRS 41.637(3) did not protect the advertisement. *Id*. at 727. The verdict amount and the parties' names were not substantive issues in the case, and persons uninterested in the litigation could read the advertisement online. In contrast, the Gala conversation related to substantive issues in the Licensing Suits and occurred between persons interested in the litigation.

2. *NRS 41.637(4) Applies*.

The district court erred by not applying NRS 41.637(4). That statute protects a communication "made in direct connection with an issue of public interest in a place open to the public or in a public forum[.]" An issue of public interest "is any issue in which the public is interested." *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1042, 72 Cal. Rptr. 3d 210, 220 (2008); *see also Shapiro v. Welt*, 133 Nev. 35, 39, 389 P.3d 262, 268 (2017) (identifying factors for distinguishing a public

interest from a private interest). The topic of the Gala conversation—governmental corruption—concerns "a substantial number of people" and "goes beyond" mere public curiosity in a private controversy. *Goldman v. Clark Cty. Sch. Dist.*, No. 78282 & 78822, 471 P.3d 753, 2020 WL 5633065, at *2 (Nev. Sept. 18, 2020) (unpublished). The Gala was a place open to the public or a public forum because the governor's inaugural committee advertised it to the public for anyone to purchase a ticket. 2 App. 253 (¶¶ 7–8). Similarly, while not free, newspapers and magazines are public forums because anyone can purchase them. OB 25–26; *see also Goldman*, 2020 WL 5633065, at *2 (the *Review-Journal* is a public forum).

In response, Yemenidjian argues that the Gala conversation did not concern an issue of public interest because it supposedly was a "private conversation" involving a personal grudge between competitors. AB 24–28.[4] He essentially

[4] Yemenidjian's characterization of the Gala conversation as a "private conversation" is misplaced. AB 3; 12; 27. Before speaking to Oceguera, Dr. Spirtos had the same conversation with nine other persons at his table. 1 App. 119 (¶ 20). Moreover, NRS 41.637(3) protects private conversations. *See, e.g.*, *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, 47 Cal. App. 4th 777, 784, 54 Cal. Rptr. 2d 830, 834–35 (1996) (CAL. CIV. CODE § 425.16(e)(2) protected a communication "made to other private citizens"); *see also Zhang v. Synder, Inc.*, 2007 WL 2069915, at *5 (Cal. Ct. App. July 20, 2007); *TP Link USA Corp. v. Careful Shopper LLC*, 2020 WL 3063956, at *8 (C.D. Cal. Mar. 23, 2020); *GA Telesis, LLC v. GKN Aerospace, Chem-Tronics, Inc.*, 2013 WL 1147951, at *4 (S.D. Cal. Mar. 19, 2013). So too does the litigation privilege. *See, e.g., Thimes Sols. Inc. v. TP Link USA Corp*., 2020 WL 4353681, at *7 (C.D. Cal. June 8, 2020) (the privilege can protect communications "between private parties."); *see also Dove Audio*, 54 Cal. Rptr. 2d at 833 (the privilege protected a letter "between private parties").

argues that governmental corruption is not an issue of public interest if a speaker accuses their commercial competitor of participating in it. That is incorrect.

Governmental corruption is an issue of public interest even if private actors are involved. *See, e.g.*, *Vilutis v. N.R.G. Solar Alpine LLC*, 2018 WL 1724830, at *1–6 (Cal. Ct. App. Apr. 10, 2018) (the public had an interest in a conspiracy between town council members, a solar company, and nurseries owned by council members); *see also Healthsmart Pac., Inc. v. Kabateck*, 7 Cal. App. 5th 416, 429, 212 Cal. Rptr. 3d 589, 599 (2016) (the public had an interest in a private hospital's owner's bribery of a politician to require insurers to pay for spinal implants, the establishment of a company to sell implants at inflated prices, and kickbacks to physicians to use the implants); *Berisha v. Lawson*, 378 F. Supp. 3d 1145, 1160 (S.D. Fla. 2018), *aff'd*, 973 F.3d 1304 (11th Cir. 2020) (the public had an interest in a defense contractor's use of corrupt Albanian officials to sell ammunition).[5] It also is an issue of public interest even if the speaker's commercial competitor is involved. *See, e.g.*, *Vilutis*, 2018 WL 1724830, at *1 (the plaintiff and nurseries owned by town council members were competitors who wanted the same tree contract).

Yemenidjian argues that the Gala was not a place open to the public because only ticketed persons could attend. AB 26–27. A forum does not need to be

[5] The 2016 film *War Dogs* depicts the facts in *Berisha*.

available for free to every citizen to be protected by NRS 41.637(4). Only "community members" could attend and speak at the *Kosor* HOA meeting. 478 P.3d at 394; *see also* NRS 116.31085. The "international gaming conference" in *Taylor v. Colon* was limited to persons admitted to the 2018 Global Gaming Expo at the Sands Convention Center. 136 Nev. Adv. Op. 50, 468 P.3d 820, 826 (2020); *see also* No. A-18-782057-C, 2019 WL 10749698, at *1 (Nev. Dist. Ct. Feb. 26, 2019). In *Stark v. Lackey*, only persons with internet access and Facebook accounts could read the Facebook page. 136 Nev. 38, 39, 458 P.3d 342, 344 (2020).[6] In *Goldman*, only *Review-Journal* subscribers could read the "public comments" about the investigation and the plaintiff's employment. 2020 WL 5633065, at *1.[7]

Like an HOA meeting, a trade convention, or a Facebook page, the Gala was "a place where [attendees] could communicate their ideas," including about the license application process. *Kosor*, 478 P.3d at 394–95 (quoting *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 475, 102 Cal. Rptr. 2d 205, 209 (2000)); *see also Nielsen*, 2020 WL 5230591, at *1 (citing *Damon*, 102 Cal. Rptr.

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[6] *See* https://www.facebook.com/NDoW-Watch-Keeping-them-transparent-156710098070019/ (last visited Feb. 11, 2021).

[7] *See* https://www.reviewjournal.com/local/education/investigation-of-ccsd-official-goldman-halts-after-50k-spent-1591441/ (last visited Feb. 11, 2021).

2d at 209) (a public forum is a place "that is open to the public or where information is freely exchanged, regardless of whether it is uninhibited or controlled[.]").

3. *Dr. Spirtos's Alleged "Knee Deep" Remark Was Truthful or Made Without Knowledge of a Falsehood.*

a. *A Reasonable Listener Would Not Understand the Alleged Remark to be an Assertion of an Existing Fact.*

Dr. Spirtos's alleged remark that Yemenidjian "was knee deep in the corruption at the center of the licensing process," 1 App. 209 (¶ 8), is too colloquial, vague, and devoid of facts for a reasonable listener to interpret it as an assertion of an existing fact. Therefore, it is an opinion "made without knowledge of [any] falsehood[.]" *Abrams v. Sanson*, 136 Nev. 83, 89, 458 P.3d 1062, 1068 (2020).

Opinions are statements with "no provably false factual connotation" that "a reasonable person" would likely not understand to be "a statement of existing fact." *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 2 (1990); *Nevada Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 410, 664 P.2d 337, 342 (1983).[8] An accusation of corruption or a crime can be an opinion depending on its diction and circumstances. *See, e.g.*,

[8] Yemenidjian urges this Court not "to resort to the reasonable man standard" because Oceguera purportedly "did not understand Spirtos' statements to be opinions[.]" AB 18. The question is not how Oceguera—a paid lobbyist for and business associate of Yemenidjian (and law school graduate) whose declaration is on Yemenidjian's counsel's pleadings paper—supposedly understood the alleged remark; rather, it is how a reasonable listener would have understood it.

600 W. 115th St. Corp. v. Von Gutfeld, 603 N.E.2d 930, 936–37 (N.Y. 1992) (comments about fraud, bribery, and corruption were opinions); *see also Smith v. Lackey*, No. 74461, 462 P.3d 254, 2020 WL 2306317, at *2 (Nev. May 7, 2020) (unpublished) (the remark that wildlife officials were "criminals against nature" was an opinion); *but see Bentley v. Bunton*, 94 S.W.3d 561, 583–84 (Tex. 2002) (accusations of corruption were statements of existing facts).

Dr. Spirtos supposedly 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 (¶ 8). Even if Dr. Spirtos made that remark (which he denies, 1 App. 119 (¶ 21)), it would be an opinion. *Bentley*, 94 S.W.3d 561 (Tex. 2002) (cited at OB 28 and AB 19) and *600 West*, 603 N.E.2d 930 (N.Y. 1992) (cited at OB 28–31) support that conclusion.[9]

In *Bentley*, the defendant accused a judge of corruption in two matters. In the first matter, he claimed the judge released a criminal defendant without bond while keeping the case pending to extort the accused's father. *Id.* at 568. In truth, the district attorney did not object to the release without bond, and "the case had remained pending because neither [the accused's] probation officer nor the district attorney believed that [the accused], who suffered from learning disabilities, should

[9] Yemenidjian fails to address *600 West* in his brief.

be incarcerated." *Id.* In the second matter, the sheriff refused to arrest his deputy based on a warrant procured without the district attorney's approval. *Id.* at 569. The defendant accused the judge of "failing to convene a court of inquiry to determine whether [the deputy] had violated the law and to have him arrested." *Id.* In truth, "the district attorney had had the warrant recalled," and the judge "had not issued the warrant and was in no way involved in the matter[.]" *Id.* The Texas Supreme Court said the accusations were statements of existing facts because the defendant "constantly insisted" that "objective, provable facts" supported them and "repeatedly" cited "evidence he had seen but had not disclosed[.]" *Id.* at 583–84.

In contrast, in *600 West*, a restaurant applied for a city permit to open a sidewalk café. *Id.* at 931. The city rejected its first application because it did not show permission from the building's managers. *Id.* The city errantly granted a second application but later revoked the permit. *Id.* Before the city revoked the permit, the defendant attended a public hearing and called the permit "fraudulent," said the restaurant had an "illegal lease," and said the issuance of the permit was "as fraudulent as you can get" and "smells of bribery and corruption." *Id.* at 931–32.

New York's highest court said the "colloquial and loose" phrases "smells of" and "fraudulent as you can get" did not invite "reasonable persons at a heated public hearing to find specific factual allegations in [the] remarks"; instead, the phrases signaled that the speaker had "no hard facts, only generalized suspicions." *Id.* at

937. Having occurred at a heated public debate, the defendant's remarks "could not reasonably be heard as a factual presentation on what the plaintiff was doing to get its permit as much as an angry, unfocused diatribe[.]" *Id.*

Yemenidjian compares this case to *Bentley*, AB 19, but it is more analogous to *600 West*. Unlike the detailed, fact-intensive accusations in *Bentley*, Dr. Spirtos's alleged remark did not mention any specific actions, transactions, or events. Nor did it "impl[y] knowledge of a specific criminal transaction" or make any "provably false factual" assertions. *600 West*, 603 N.E.2d at 937; *Milkovich*, 497 U.S. at 2. Like the language in *600 West*, the colloquial and loose phrase "knee deep" did not invite a reasonable listener to construe the alleged remark as an assertion of an existing fact. As in *600 West*, no reasonable listener would understand a loose and colloquial comment made while socializing at the Gala "with a long-time friend," AB 25, to be an assertion of an existing fact.

b. *Oceguera's Declaration Does Not Establish that Dr. Spirtos Made a Statement of an Existing Fact that Yemenidjian Had Committed a Crime.*

Yemenidjian argues that Dr. Spirtos cannot satisfy the first prong because he supposedly accused him of having "committed a crime." AB 13; 17–18; 20. That argument fails for at least two reasons. *First*, as explained *supra*, an accusation of criminal conduct can satisfy the first prong if it is an opinion. *See, e.g.*, *600 West*, 603 N.E.2d at 931–32 (accusations that the plaintiff had "an illegal lease" and

obtained a city permit through "bribery and corruption"—which would be a felony under N.Y. PENAL LAW §§ 200.00, 200.03, and 200.04—were opinions).

Second, Oceguera's declaration does not establish that Dr. Spirtos asserted as an existing fact that Yemenidjian had committed a crime. Nowhere does it state that Dr. Spirtos said Yemenidjian had committed a crime.[10] Yemenidjian argues that "[t]he corruption Spirtos alleged Yemenidjian engaged in—without any factual basis—would have been a crime." AB 14 n.7. That argument is wrong because Dr. Spirtos did not make any "provably false factual" assertions that, if true, could establish a violation of a criminal statute. *Milkovich*, 497 U.S. at 2.

"[C]orruption by itself is not an offense" unless it violates a criminal statute. *See, e.g.*, Ellen Podgor, *Symposium: Corruption is Not a Crime*, (Sep. 25, 2019), https://www.scotusblog.com/2019/09/symposium-corruption-is-not-a-crime/ (last visited Feb. 9, 2021).[11] For example, in *Kelly v. United States*, the district court

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[10] Because Oceguera's declaration does not state Dr. Spirtos said Yemenidjian had committed a crime, it does not contradict the gist of Dr. Spirtos's declaration—i.e., that he did not accuse Yemenidjian of having committed a crime. *See, e.g.*, *Nielsen*, 2020 WL 5230591, at *1 (NRS 41.637(4) protected comments to the media about Steve Wynn's alleged harassment. The defendant's affidavit "demonstrated that the gist of his communication was truthful or made without knowledge of its falsehood" even though he denied saying Wynn had "chased a manager" and "Wynn presented some evidence of alleged falsities" in his comments).

[11] Podgor is a Stetson University professor and criminal law scholar. *See* https://www.stetson.edu/law/faculty/podgor-ellen-s/ (last visited Feb. 10, 2021).

convicted state officials for disrupting traffic in Fort Lee, New Jersey, to retaliate for the mayor's refusal to support the governor's reelection. 140 S. Ct. 1565, 1571 (2020). The criminal statutes required the scheme to seek money or property. *Id.* at 1571. Reversing the convictions, the Supreme Court of the United States said no crime occurred "[b]ecause the scheme here did not aim to obtain money or property[.]" *Id.* at 1574. While the record "no doubt shows wrongdoing—deception, *corruption*, abuse of power," "the federal fraud statutes at issue do not criminalize all such conduct." *Id.* (emphasis added).

Oceguera's declaration does not attribute any factual assertions to Dr. Spirtos that, if true, could establish a violation of a criminal statute. Nevada does not criminalize being "knee deep"; rather, it criminalizes giving, offering, or promising any compensation, gratuity, or rewards to an official. NRS 197.010–020. Oceguera attributes no such factual assertions to Dr. Spirtos.[12] To conclude that Yemenidjian violated those statutes, one would have to rely on facts, details, or transactions that Dr. Spirtos never mentioned to Oceguera. Based on the absence of any factual assertions in Dr. Spirtos's' alleged remark, no reasonable listener would understand it to be a statement of an existing fact that Yemenidjian had committed a crime.

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[12] Yemenidjian cites Dr. Spirtos's deposition testimony from the Licensing Suits that he is unaware of any facts showing Yemenidjian committed a crime. AB 16. That testimony is immaterial because Oceguera's declaration does claim Dr. Spirtos made any factual assertions supposedly showing Yemenidjian committed a crime.

c. *While Evidence Supports His Opinion About Corruption in the Application Process, Dr. Spirtos Does Not Contend that Evidence Shows Yemenidjian Committed a Crime.*

There is no merit to Yemenidjian's argument that Dr. Spirtos's alleged remark is not an opinion because Dr. Spirtos supposedly cites supporting evidence. AB 19–20. In *Bentley*, the defendant admittedly accused the judge of corruption and insisted evidence supposed his accusations. In contrast, while he believes evidence supports his opinion about general corruption in the Department's application process, Dr. Spirtos does not contend that evidence shows Yemenidjian committed a crime. Instead, he denies mentioning Yemenidjian to Oceguera. 1 App. 119 (¶ 21).

d. *To Rebut Yemenidjian's Argument that Oceguera's Declaration Prevents Him from Satisfying the First Prong, Dr. Spirtos Argued Below that His Alleged Remark is an Opinion.*

There also is no merit to Yemenidjian's assertion that Dr. Spirtos is arguing for the first time on appeal that his alleged remark was made without knowledge of a falsehood because it is an opinion. AB 17. When he opposed Dr. Spirtos's motion, Yemenidjian argued below that Oceguera's declaration prevents Dr. Spirtos from satisfying the first prong. *See, e.g.*, 1 App. 200 (6:17–20). In response, Dr. Spirtos argued below that Oceguera's "declaration fails to establish that a reasonable person would have understood Dr. Spirtos's remarks to be a statement of existing fact rather than an expression of opinion." 2 App. 230–31 (8:18 – 9:12); 2 App. 324 (9:1–4).

C. Yemenidjian Cannot Demonstrate a Probability of Success.

1. *The Litigation Privilege Bars Yemenidjian's Claims.*[13]

Claims barred by the litigation privilege have no probability of success. *Flatley v. Mauro*, 139 P.3d 2, 17 (Cal. 2006). The privilege bars Yemenidjian's claims. The privilege "is quite broad," and courts "should resolve any doubt in favor of" applying it. *Fink v. Oshins*, 118 Nev. 428, 433, 49 P.3d 640, 644 (2002); *Clark Cty. Sch. Dist.*, 125 Nev. at 382. It "precludes liability even where the defamatory statements are published with knowledge of their falsity and personal ill will toward the plaintiff." *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101, 104 (1983). To be privileged, a statement (1) "need have only 'some relation' to the proceeding; so long as the material has some bearing on the subject matter of the proceeding, it is absolutely privileged"; and (2) "must be made to a recipient who has a significant interest in the outcome of the litigation or who has a role in the litigation." *Circus Circus*, 99 Nev. at 61; *Shapiro*, 133 Nev. at 41.

The district court erred by not applying the privilege. The Gala conversation had some relation to D.H. Flamingo's allegations about corruption. 1 App. 187 (¶

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[13] If this Court were to conclude that Dr. Spirtos's alleged remark was an opinion, then it would not even need to consider the litigation privilege or Rule 12(b)(5) in relation to the second prong because as a matter of law, "statements of opinion as opposed to statements of fact are not actionable." *Nevada Indep. Broad. Corp.*, 99 Nev. at 410, 664 P.2d at 341; see also 2 App. 230–31 (8:18 – 9:12).

81). Oceguera had a significant interest in the Licensing Suits. Yemenidjian argues that "Oceguera's general involvement in the marijuana industry is not enough" to invoke the privilege. AB 32. Rather than having just a "general involvement" in the industry, Oceguera "worked in the cannabis industry with" Yemenidjian, 1 App. 4 (¶ 17), lobbied for his marijuana companies (some of which were parties to the Licensing Suits), and sat on the board of an unsuccessful license applicant that could have benefitted from the litigation. Oceguera therefore had a clear and substantial interest in the case. *See, e.g., Crestmont Capital*, 2020 WL 5887014, at *5 (while "strangers" to the case, "individuals within the lending community who share[d] an ongoing economic relationship with" the plaintiffs "possessed a substantial interest in the" case); *see also Abraham v. Lancaster Cmty. Hosp.*, 217 Cal. App. 3d 796, 823, 266 Cal. Rptr. 360 (1990) (the privilege protected statements to members of the Antelope Valley medical community because "the local medical community" had "a substantial interest in" an anti-trust and anti-competition suit).[14]

2. *Yemenidjian's Conspiracy Claim and Prayer for Punitive Damages Have No Probability of Success*.

Yemenidjian's conspiracy claim and prayer for punitive damages cannot satisfy the second prong because they are not "legally sufficient." *Taylor*, 468 P.3d

[14] Yemenidjian fails to address *Abraham* in his brief.

at 824.[15] The conspiracy claim fails because it does not identify a single co-conspirator, does not identify any agreement to conspire, and likewise fails to allege any concerted actions. Similarly, the prayer for punitive damages fails because it lacks factual allegations that, even if true, could establish oppression under NRS 42.001. The punitive damages claim lacks facts showing 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 avoid them.

A complaint must "give fair notice of" its claim. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 846, 858 P.2d 1258, 1260 (1993). Yemenidjian's conspiracy claim does not do so because Dr. Spirtos has no idea with whom he allegedly conspired. Yemenidjian argues that his reference to "others" in the claim is sufficient. AB 33; 1 App. 6 (¶ 26). He distinguishes *Morris v. Bank of America*, 110 Nev. 1274, 886 P.2d 454 (1994) because the conspiracy claim dismissed in that case supposedly failed "to identify any party to the conspiracy or the unlawful objective of the conspiracy." AB 33. The *Morris* claim failed "to identify any combination between two or more persons," *id.* at 1276 n.1, and so does Yemenidjian's claim because it does not identify two or more persons. As drafted,

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[15] The amended opinion in *Taylor* dated December 31, 2010, reaffirms that a claim must be legally sufficient to satisfy the second prong.

the claim involves a conspiracy of one identified person. *See, e.g.*, 15A C.J.S. *Conspiracy* § 9 (Feb. 2021) (a person cannot "conspire with himself or herself.").

Yemenidjian argues that Dr. Spirtos's remaining attacks on his conspiracy claim rely on cases applying "a heightened pleading burden" that "does not exist" in Nevada. AB 33 n.11. Nevada requires "sufficient facts" to establish the "necessary elements of a" claim. *Sell v. Diehl*, No. 74916 and 75231, 431 P.3d 38, 2018 WL 6264754, at *3 (Nev. Nov. 28, 2018) (unpublished). So too do the cases cited by Dr. Spirtos. *See, e.g.*, *Chavez v. California Reconveyance Co.*, 2010 WL 2545006, at *5 (D. Nev. June 18, 2010) (the conspiracy claim did not "identify the parties to any conspiracy" or allege "facts regarding concerted action"); *see also Galicki v. New Jersey*, 2015 WL 3970297, at *9 (D.N.J. June 29, 2015) (the conspiracy claim had "conclusory allegations" of "concerted activity" and no factual allegations of a "joint action."); *Baldonado v. Avrinmeritor, Inc*., 2014 WL 2116112, at *10 (D. Del. May 20, 2014) (the conspiracy claims were "made up of legal conclusions."); *Feliz v. Kintock Grp*., 2007 WL 9751961, at *1 n.1 (E.D. Pa. Mar. 14, 2007) (the conspiracy claim had "conclusory allegations" of concerted action); *Gunderson v. Uphoff*, 2000 WL 854283, at *6 (10th Cir. 2000) (the conspiracy claim lacked "specific facts" of an agreement to conspire).

As for his prayer for punitive damages, Yemenidjian did not allege any facts in his complaint that, if true, could establish oppression under NRS 42.001. AB 34–

35; *see also Patel v. Am. Nat'l Prop. & Cas. Co.*, 367 F. Supp. 3d 1186, 1193 (D. Nev. 2019) ("allegations regarding punitive damages" that consisted of "legal conclusions" without "requisite facts" did not afford "fair notice" to the defendant). Accordingly, Yemenidjian's conspiracy claim and prayer for punitive damages have no probability of success because they are legally insufficient.

III. CONCLUSION.

Wherefore, this Court should reverse the denial of Dr. Spirtos's motion.

DATED March 19, 2021.

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CERTIFICATE OF SERVICE

Under NRAP 25, I certify that I am an employee of MCNUTT LAW FIRM and on March 19, 2021, I caused a copy of the **APPELLANT'S REPLY BRIEF** to be served electronically to the following recipients:

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