

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

LANCE GILMAN, AN INDIVIDUAL,
Appellant
vs.
SAM TOLL, AN INDIVIDUAL,
Respondent

No. 81583

Electronically Filed
Sep 02 2020 02:08 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

All appellants not in proper person must complete this docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to attach requested documents, fill out the statement completely, or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See KDI Sylvan Pools v. Workman*, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District First Department II
County Storey Judge James E. Wilson, Jr.
District Ct. Case No. 18-TRT-00001-1e

2. Attorney filing this docketing statement:

Attorney Gus W. Flangas Telephone 702-971-2252
Firm Flangas Law Group

Address
3275 S. Jones Blvd Suite 105
Las Vegas, NV 89146

Client(s) LANCE GILMAN

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondent(s):

Attorney Luke Busby, Esq Telephone 775-453-0112
Firm Luke Andrew Busby Ltd.

Address
316 California Ave.,
Reno Nevada 89509

Client(s) Sam Toll

Attorney John L. Marshall Telephone 775-303-4882
Firm _____

Address
570 Marsh Avenue
Reno, Nevada 89509

Client(s) _____

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- ☐ Judgment after bench trial
- ☐ Judgment after jury verdict
- ☐ Summary judgment
- ☐ Default judgment
- ☐ Grant/Denial of NRCP 60(b) relief
- ☐ Grant/Denial of injunction
- ☐ Grant/Denial of declaratory relief
- ☐ Review of agency determination

- ☒ Dismissal:
 - ☐ Lack of jurisdiction
 - ☐ Failure to state a claim
 - ☐ Failure to prosecute
 - ☒ Other (specify): Grant of Anti-SLAPP Motion
- ☐ Divorce decree:
 - ☐ Original ☐ Modification
- ☐ Other disposition (specify): _____

5. Does this appeal raise issues concerning any of the following?

- ☐ Child custody
- ☐ Venue
- ☐ Adoption

- ☐ Termination of parental rights
- ☐ Grant/Denial of injunction or TRO
- ☐ Juvenile matters

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

Toll v First Judicial District Court and Lance Gilman Case No 78333
Gilman v Toll Case No 81726

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:
Not applicable

8. Nature of the action. Briefly describe the nature of the action, including a list of the causes of action pleaded, and the result below:

Gilman filed a Complaint against Toll asserting one cause of action for Defamation Per Se. The Complaint listed several false and defamatory statements made by Toll against Gilman, including that Gilman committed perjury, a felony, by lying about his residency in Storey County when he filled out official paperwork in filing for election to the office of County Commissioner. Toll filed an Anti-SLAPP Special Motion to Dismiss which was granted by the Court.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):
See Exhibit "1"

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceeding presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket number and identify the same or similar issues raised:
Not applicable

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. **Other issues.** Does this appeal involve any of the following issues?

- ☐ Reversal of well-settled Nevada precedent (on an attachment, identify the case(s))
- ☐ An issue arising under the United States and/or Nevada Constitutions
- ☐ A substantial issue of first impression
- ☒ An issue of public policy
- ☒ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions
- ☐ A ballot question

If so, explain:

This is a Defamation action brought by a Public Official/Public Figure which requires a showing of actual malice, which is usually proved by inference because a defendant is not going to admit a culpable state of mind. Anti-SLAPP motions are being routinely granted and thus denying public plaintiffs any remedy for such wrongs.

13. **Trial.** If this action proceeded to trial, how many days did the trial last? _____

Was it a bench or jury trial? _____

14. **Judicial disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

TIMELINESS OF NOTICE OF APPEAL

15. **Date of entry of written judgment or order appeal from** 6/15/2020.

Attach a copy. If more than one judgment or order is appealed from, attach copies of each judgment or order from which this appeal is taken.

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

16. **Date written notice of entry of judgment or order served** 6/16/2020.

Attach a copy, including proof of service, for each order or judgment appealed from.

Was service by:

- ☐ Delivery
- ☒ Mail

17. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59),

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

- ☐ NRCP 50(b) Date served _____ By delivery ☐ or by mail ☐ Date of filing _____
- ☐ NRCP 52(b) Date served _____ By delivery ☐ or by mail ☐ Date of filing _____
- ☐ NRCP 59 Date served _____ By delivery ☐ or by mail ☐ Date of filing _____

Attach copies of all post-trial tolling motions.

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration do not toll the time for filing a notice of appeal.

(b) Date of entry of written order resolving tolling motion _____.

Attach a copy.

(c) Date written notice of entry of order resolving tolling motion served _____.

Attach a copy, including proof of service.

Was service by:

☐ Delivery

☐ Mail

18. Date notice of appeal filed July 9, 2020.

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

19. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a), NRS 155.190, or other NRAP 4(a).

SUBSTANTIVE APPEALABILITY

20. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

- | | |
|---|---|
| <input checked="" type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 155.190 (specify subsection) _____ |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input type="checkbox"/> NRS 38.205 (specify subsection) _____ |
| <input type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input type="checkbox"/> Other (specify) _____ | |

Explain how each authority provides a basis for appeal from the judgment or order:
A final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered.

COMPLETE THE FOLLOWING SECTION ONLY IF MORE THAN ONE CLAIM FOR RELIEF WAS PRESENTED IN THE ACTION (WHETHER AS A CLAIM, COUNTERCLAIM, CROSS-CLAIM, OR THIRD-PARTY CLAIM) OR IF MULTIPLE PARTIES WERE INVOLVED IN THE ACTION.

Attach separate sheets as necessary.

21. List all parties involved in the action in the district court:

If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other:

22. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims, and the trial court's disposition of each claim, and how each claim was resolved (i.e., order, judgment, stipulation), and the date of disposition of each claim. Attach a copy of each disposition.

23. Attach copies of the last-filed version of all complaints, counterclaims, and/or cross-claims filed in the district court.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action below?

- ☒ Yes
☐ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

If "Yes", attach a copy of the certification or order, including any notice of entry and proof of service.

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Lance Gilman

Name of appellant

September 2, 2020

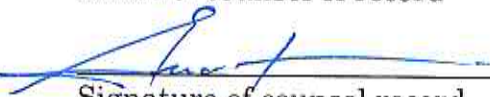
Date

Clark County, Nevada

State and county where signed

Gus W. Flangas

Name of counsel of record



Signature of counsel of record

CERTIFICATE OF SERVICE

I certify that on the 2nd day of September, 2020, I served a copy of this completed docketing statement upon all counsel of record:

- ☐ By personally serving it upon him/her; or
- ☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

John L. Marshall
570 Marsh Avenue
Reno, NV 89509

Luke A. Busby
Luke Andrew Busby, Ltd.
316 California Ave. Ste. 82
Reno, NV 89509

Dated this 2nd day of September, 2020.

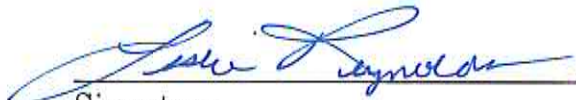

Signature

EXHIBIT “1”

ISSUES APPEAL

1. Did the District Court err in granting Defendant's Anti-SLAPP Motion and dismissed Plaintiff's case against Defendant for Defamation Per Se?
2. Did the District Court err when it struck specific allegations of false and defamatory statements made by Defendant about Plaintiff from Plaintiff's Complaint in ruling on Defendant's Anti-SLAPP Motion, based solely upon a self serving Affidavit submitted by Defendant, even though there was only one cause of action in Plaintiff's Complaint?
3. Did the District Court err in concluding that Defendant met his burden pursuant to NRS 41.660(3)(a) in that he made the false and defamatory statements about Plaintiff in good faith, meaning that the statements were either truthful or made without knowledge of their falsehood?
4. Did the District Court err in concluding that Defendant's Online Blog qualified as a newspaper for purposes of asserting the news shield privilege at the time Defendant made the false and defamatory statements about Plaintiff when (i) his blog had only been in existence for less than two months when Defendant began making his statements about Plaintiff and only in existence for less than 10 months when Defendant made other false and defamatory statements about Plaintiff; and (ii) when Defendant's stated purpose for his blog was to provide a source of irritation to the "Good Old Boys who operate The Biggest Little County in the World with selfish impunity forever," a conduit to express support for the Sheriff during a failed recall effort of him and counter the failed effort of several individuals including Plaintiff to oust the Sheriff?
5. Did the District Court err in concluding that Defendant's Online Blog qualified as a newspaper for purposes of asserting the news shield privilege when Defendant announced that he was running for public office including running for the Storey County Commission, when Defendant didn't use any type of separate website for his campaigns, and when Defendant used his blog to hammer Plaintiff and other members of the Storey County Commission to further his own ambitions?
6. Did the District Court err in concluding that Plaintiff failed to meet his burden pursuant to NRS 41.660(3)(b) in that he failed to demonstrate with prima facie evidence a probability of prevailing on his claim for Defamation Per Se because according to the District Court, Plaintiff failed to establish that his claim had "minimal merit" on the issue of Defendant's actual malice, even though Plaintiff submitted over 38 items of direct and circumstantial competent admissible evidence indicating that Defendant published the false and defamatory statements about Plaintiff with knowledge that his statements were false or with reckless disregard for their veracity?
7. Because Defendant invoked the media shield, did the Court err in allowing Defendant to use these privileged sources to show that he acted without actual malice, given that Defendant asserted in his Declarations and in his limited deposition testimony that he based virtually all his knowledge about his false and defamatory statement he made about Plaintiff on these privileged sources.

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8 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
9 IN AND FOR THE COUNTY OF WASHOE
10

11 LANCE GILMAN, an individual,)	Case No.:
12 Plaintiff,)	Dept No.:
13 vs.)	
14 SAM TOLL, an individual; DOES I-V,)	
15 inclusive; and ROE ENTITIES VI-X,)	
16 inclusive,)	
Defendants.)	

17 **COMPLAINT**

18 COMES NOW the Plaintiff, LANCE GILMAN, by and through his attorneys, GUS W.
19 FLANGAS, ESQ. and JESSICA K. PETERSON, ESQ., of the FLANGAS DALACAS LAW
20 GROUP, and for his causes of action against the Defendants, alleges as follows

21 **FIRST CLAIM FOR RELIEF**
22 (Defamation Per Se)

23 1. At all times material hereto, the Plaintiff, LANCE GILMAN (hereinafter referred to as
24 the "Plaintiff"), was and is a resident of Storey County, State of Nevada.

25 2. At all times material hereto, the Defendant, SAM TOLL, (hereinafter referred to as the
26 "Defendant"), was and is a resident of Storey County, Nevada.

27 3. The true names and capacities of the Defendants named herein as DOES I-X, inclusive,
28 and ROE ENTITIES VI-X, inclusive, whether individual, corporate, associate or otherwise, are

1 presently unknown to the Plaintiff who therefore sues the said Defendants by such fictitious names;
2 and when the true names and capacities of such DOES I through X, inclusive, and ROE ENTITIES
3 VI-X, inclusive, are discovered, the Plaintiff will ask leave to amend this Complaint to substitute the
4 true names of the said Defendants. The Plaintiff is informed, believes and therefore alleges that the
5 Defendants so designated herein are responsible in some manner for the events and occurrences
6 contained in this action.

7 4. At all times material hereto, the Defendant published and publishes a blog online under
8 the website address of <http://thestoreyteller.online> (hereinafter the "Storeyteller Website").

9 5. The Home page of the Storeyteller Website and every other section contained therein,
10 including the "News," "Editorial," "Letters to the Editor," "About the Storey Teller," and
11 "Community News," sections, all contain the statement: "Support the Teller and Keep **Fact Based**
12 **News** about Storey County Ad Free." (Emphasis added).

13 6. At all times material hereto, the Plaintiff was and is member of the Board of
14 Commissioners for Storey County, Nevada, an elected position.

15 7. The Plaintiff is a principal in and the Director of Marketing for the Tahoe Reno Industrial
16 Center (hereinafter "TRI"). Plaintiff's company, Lance Gilman Commercial Real Estate Services,
17 is and has been since the inception of TRI, the exclusive broker for this industrial park. TRI is a
18 massive 80,000 acre park that encompasses a 30,000 acre industrial complex approximately nine
19 miles east of Reno, Nevada in Storey County, Nevada, and is the largest industrial park of its kind
20 in the United States. TRI presently has over 16 million Square Feet of Industrial space in use by over
21 130 different companies, with over 6,000 permanent and temporary jobs created in 15 years.

22 8. The Plaintiff has been instrumental in attracting to TRI, such nationally recognized firms
23 as Tesla/Panasonic, who is building a "gigafactory," a massive 6 million square foot manufacturing
24 facility, SWITCH, who is building a huge data storage co-location campus comprised of a number
25 of buildings totaling 7 million square feet under roof, GOOGLE, who just purchased 1200 acres
26 earlier in 2017, as well as other global companies such as eBay, Wal-Mart, Tire Rack, Jet.com,
27 Petsmart, and US Ordinance, to name a few.

28 9. TRI has provided thousands of jobs for Northern Nevada and it is anticipated that

1 Tesla/Panasonic and SWITCH, alone will together generate 10,000 more jobs for Northern Nevada
2 and over \$400 million in payroll annually at full build out.

3 10. The Plaintiff's proven ability to attract nationally recognized firms to TRI was mainly
4 due to his business experience, his business acumen and his reputation in the business community
5 for honesty and his straight forward approach. He is the face of TRI and deals personally with all
6 incoming buyers from the time they first express interest in TRI up and through the close of escrow.

7 11. The Plaintiff first arrived in Reno, Nevada in 1985, and became a principal in and
8 exclusive broker for the 2,500 acre Double Diamond Ranch now known as the South Meadows
9 Business Park, which is located in southern portion of Reno, Nevada. The South Meadows Business
10 Park is an integrated single-family and multi-family residential, industrial, distribution and retail
11 development, and through the extensive efforts of the Plaintiff, the South Meadows Business Park
12 landed the government arms contractor, Lockheed Martin as the anchor tenant.

13 12. The Plaintiff has a long list of successes in retail businesses. Before the South Meadows
14 Business Park, the Plaintiff started his professional career in San Diego, California, operating the San
15 Diego Boatmart. His accomplishments in that industry included being Chairman of the prestigious
16 San Diego Boat Show and a member of the National Speaker Circuit for the Boat Show Educational
17 Series. He then worked as an agent for Grubb and Ellis, a major real estate brokerage in San Diego,
18 California, where he managed major accounts, including the development of the Murphy Canyon
19 Business Park, and assisted in the development of major shopping centers in San Diego County. In
20 1998, the Plaintiff opened the first Harley Davidson motorcycle showroom and maintenance facility
21 in Carson City, Nevada. The Plaintiff has received a number of awards such as the Reno Small
22 Business Entrepreneur of the year in 2009, Reno Man of the Year in 2000 and the Development
23 Award for Environmental Excellence in Development in 1997. In or around 2015, Governor Brian
24 Sandoval personally presented the Plaintiff and his two TRI partners, the EDAWN President's
25 Award for completing what the Governor called the "The Deal of the Century" in landing and
26 closing the Tesla deal.

27 13. In the early 2000s, the leaders of Storey County needed to take fast action to bolster
28 critically lacking tax revenues for the County, which was cash poor at the time. These leaders

1 approached the Plaintiff and requested him to open a brothel, which could immediately generate
2 greatly needed tax revenues for the County until TRI could begin bringing in more companies and
3 subsequently growing the tax base. As a result of these requests, the Plaintiff built and opened up
4 on his property, the Wild Horse brothel, a multimillion dollar facility, which eventually became the
5 Wild Horse Adult Resort and Spa.

6 14. In or around 2003, to further bolster lagging tax revenues for Storey County, the Plaintiff
7 purchased the Mustang Ranch brothel buildings and trademark on Ebay from the Federal
8 Government for \$145,100. Because of its historic value, the Plaintiff spent millions in moving the
9 buildings to a location adjacent to the Wild Horse, and in upgrading the facility. This move included
10 contracting a large heavy lift cargo helicopter to airlift a part of one of the Mustang Ranch's
11 structures. In or around 2012, the Mustang Ranch expanded into the Wild Horse brothel building
12 and today operates primarily out of that property.

13 15. The Mustang Ranch today sits in a short canyon outside of TRI and is surrounded by tall
14 iron gates, a berm, and hundreds of trees and shrubs. It is a multifaceted operation, with an award
15 winning steakhouse, gift shop with trademarked Mustang Ranch products, along with the traditional
16 Mustang Ranch entertainment. There are vaulted ceilings, a stone fireplace, hundreds of thousands
17 of dollars' worth of furnishings, decor, equipment, and artwork. It is a thriving business that
18 contributes significantly to Storey County revenues through taxes, fees and assessments.

19 16. Because of the Mustang Ranch's close proximity to TRI, because of the Plaintiff's
20 involvement in TRI, and because the Plaintiff highly values his reputation, the Plaintiff has taken
21 great measures to operate a first class and extremely safe establishment that protects its employees
22 and customers through thorough modern medical testing, extensive background checks of its
23 employees, extensive cutting edge security on the premises, and adherence to strict policies and
24 procedures, including but not limited to, obtaining proper medical clearances for the Mustang's
25 brothel employees. In addition, the facilities incorporate many modern design and operational
26 features to ensure a high-quality, professional business operation that provides a safe environment
27 for its employees and customers. Also, because the Plaintiff is the licensed owner and operator of
28 the Mustang Ranch, it's operations directly reflect on him, and his license.

1 17. The Mustang Ranch is also a great corporate citizen and annually donates tens of
2 thousands of dollars in weekly food donations and staff time, to provide for the needy school
3 children and elderly in Storey County.

4 18. Beginning in early 2017, the Defendant in an effort to embarrass, discredit and impugn
5 the Plaintiff, published blatantly defamatory statements about the Plaintiff, to wit:

6 a. The Plaintiff has engaged in reverse graft.

7 b. The Plaintiff committed perjury when he filled out official paperwork pertaining
8 to his residency.

9 c. The Plaintiff has lied about his residency in Storey County, Nevada.

10 d. The Plaintiff represented to the Defendant that the Plaintiff would reimburse the
11 expenses incurred by Storey County, Nevada for the recall election of the Sheriff of Storey County,
12 held in 2017, and other expenses incurred by Storey County, Nevada for the ethics investigation into
13 the Sheriff of Storey County.

14 e. The Plaintiff didn't follow the law when the Mustang Ranch was relicensed after
15 a related brothel was closed and then reopened as the Mustang Ranch.

16 f. The Plaintiff receives special considerations regarding the rules and regulations.

17 g. The Plaintiff is receiving land from Storey County with zero consideration.

18 h. The Plaintiff's trip to Washington, D.C. partly paid for by Storey County was not
19 work related and not a legitimate trip.

20 19. The Defendant's malicious and false statements were and are publications of false
21 statements of facts concerning the Plaintiff.

22 20. The Defendant's malicious and false statements were and are assertions of facts or
23 expressions of opinions that suggest that the Defendant knew certain facts to be true or implied that
24 certain facts existed, about the Plaintiff sufficient to render the Defendant's false statements
25 defamatory.

26 21. The statements by the Defendant were and are blatantly defamatory because they tend
27 to lower the Plaintiff in the estimation of the community, excite derogatory opinions about him, and
28 hold him up to contempt.

1 22. The Defendant's defamatory statements about the Plaintiff were and are unprivileged
2 publications to third parties.

3 23. The Defendant's defamatory statements were made with actual malice in that they were
4 made with the knowledge that they were false or made with reckless disregard of whether they were
5 false or not.

6 24. The Defendant's defamatory statements individually and or collectively falsely impute
7 that the Plaintiff engaged in criminal behavior, falsely imputes the Plaintiffs' lack of fitness for trade,
8 business or profession, falsely imputes the Plaintiffs' dishonesty, lack of fair dealing, want of
9 fidelity, integrity or business ability, and or tend to injure the Plaintiff in his trade, business or
10 profession.

11 25. The Defendant's defamatory statements individually and or collectively falsely impute
12 the recipient that the Plaintiff is unethical and or criminally predisposed.

13 26. The Defendant's malicious and false statements about the Plaintiff are so likely to cause
14 serious injury to reputation and pecuniary loss that they constitute defamation per se.

15 27. The Defendant's malicious and false statements are of certain classes of defamatory
16 statements that they are considered so likely to cause serious injury to reputation and pecuniary loss
17 that these statements are actionable without proof of damages.

18 28. As a direct result of the Defendant's improper actions, the Plaintiff has suffered damage
19 to his reputation and has suffered harm which normally results from such a defamation.

20 29. As a direct result of the Defendant's improper actions, the Plaintiff has been damaged
21 in amount in excess of \$15,000.

22 30. The Defendant is guilty of oppression, fraud or malice, express or implied; therefore, the
23 Plaintiff is entitled to recover damages for the sake of example and by way of punishing the
24 Defendant in an amount in excess of \$15,000.

25 31. It has become necessary for the Plaintiff to engage the services of an attorney to

26

27

28

1 commence this action and Plaintiff is, therefore, entitled to reasonable attorney's fees and costs as
2 damages.

3 **WHEREFORE**, the Plaintiff prays for judgment as follows:

- 4 1. For damages in an amount in excess of \$15,000;
5 2. For punitive damages in an amount in excess of \$15,000;
6 3. For reasonable attorney's fees and costs of suit; and
7 4. For such other and further relief as the Court may deem just and proper in the premises.

8 **AFFIRMATION**
9 **Pursuant to NRS 239B.030**

10 The undersigned hereby affirms that this document does not contain the social security
11 number of any person.

12 DATED this 7th day of December, 2017.

13
14 
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**IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE**

LANCE GILMAN ,

Plaintiff(s),

Case No. CV17-02272

vs.

SAM TOLL,

Dept. No. 15

Defendant(s).

ANSWER TO COMPLAINT

Defendant Sam Toll hereby answers the allegations of fact in Plaintiff's Complaint as follows.

1. Defendant denies the allegations of paragraph 1 based upon a lack of information and belief as where Plaintiff actually resides.

2. Defendant admits the allegations of paragraph 2.

1 3. Defendant denies the allegations of paragraph 3 based upon a lack of
2 information and belief.

3
4 4. Defendant admits the allegations of paragraph 4.

5 5. The allegations of paragraph 5 characterize the content of Defendant's website,
6 which speaks for itself and therefore no response is necessary.

7
8 6. Defendant admits the allegations of paragraph 6.

9 7. Defendant admits the allegations of the first two sentences of paragraph 7.
10 Defendant denies the remaining allegations of paragraph 7 based upon a lack of information
11 and belief.

12
13 8. Defendant denies the allegations of paragraph 8 based upon a lack of
14 information and belief.

15 9. In response to the allegations of paragraph 9, Defendant admits that business
16 located in the Tahoe Reno Industrial Center ("TRIC") and employ people in Northern
17 Nevada. Defendant denies the remaining allegations of paragraph 9 based upon a lack of
18 information and belief.

19
20 10. Defendant denies the allegations of paragraph 10 based upon a lack of
21 information and belief.

22
23 11. Defendant denies the allegations of paragraph 11 based upon a lack of
24 information and belief.

25
26 12. Defendant denies the allegations of paragraph 12 based upon a lack of
27 information and belief.

28 13. In response to the allegations of paragraph 13, Defendant admits that Plaintiff

1 opened the Wild Horse Brothel on his property, which is now known as the Wild Horse
2 Adult Resort and Spa. Defendant denies the remaining allegations of paragraph 13 based
3 upon a lack of information and belief.
4

5 14. In response to the allegations of paragraph 14, Defendant admits Plaintiff
6 purchased Mustang Ranch brothel buildings and trademark from the federal government.
7 Defendant denies the remaining allegations of paragraph 14 based upon a lack of information
8 and belief.
9

10 15. In response to the allegations of paragraph 15, Defendant admits that Mustang
11 Ranch is located near the TRIC. Defendant denies the remaining allegations of paragraph 15
12 based upon a lack of information and belief.
13

14 16. Defendant denies the allegations of paragraph 16 based upon a lack of
15 information and belief.
16

17 17. Defendant denies the allegations of paragraph 17 based upon a lack of
18 information and belief.
19

20 18. Defendant denies the allegations of paragraph 18.

21 19. Defendant denies the allegations of paragraph 19.

22 20. The allegations of paragraph 20 are legal conclusions to which no response is
23 required. To the extent these allegations are deemed factual, Defendant denies them.

24 21. The allegations of paragraph 21 are legal conclusions to which no response is
25 required. To the extent these allegations are deemed factual, Defendant denies them.

26 22. The allegations of paragraph 22 are legal conclusions to which no response is
27 required. To the extent these allegations are deemed factual, Defendant denies them.
28

23. The allegations of paragraph 23 are legal conclusions to which no response is required. To the extent these allegations are deemed factual, Defendant denies them.

24. The allegations of paragraph 24 are legal conclusions to which no response is required. To the extent these allegations are deemed factual, Defendant denies them.

25. The allegations of paragraph 25 are legal conclusions to which no response is required. To the extent these allegations are deemed factual, Defendant denies them.

26. The allegations of paragraph 26 are legal conclusions to which no response is required. To the extent these allegations are deemed factual, Defendant denies them.

27. The allegations of paragraph 27 are legal conclusions to which no response is required. To the extent these allegations are deemed factual, Defendant denies them.

28. Defendant denies the allegations of paragraph 28 based upon a lack of information and belief.

29. Defendant denies the allegations of paragraph 29 based upon a lack of information and belief.

30. The allegations of paragraph 30 are legal conclusions to which no response is required. To the extent these allegations are deemed factual, Defendant denies them.

31. The allegations of paragraph 31 are legal conclusions to which no response is required. To the extent these allegations are deemed factual, Defendant denies them.

AFFIRMATIVE DEFENSES

1. Plaintiff fails to state a claim for relief;
2. Defendant's actions are privileged from suit;
3. The doctrine of laches bars this action;

1 4. Defendant is immune from suit pursuant to NRS 41.635, et seq;

2 5. Venue is improper in this District;

3 6. This action is barred by the United States and the State of Nevada
4 Constitutions;

5 7. The statements of the Plaintiff complained of by the Defendant are satirical,
6 and as such, constitute protected speech under the United States and the State of Nevada
7 Constitutions;

8 8. The burden of proof for falsity is on the Plaintiff, and the Defendant avers that
9 statements made by the Plaintiff complained of by the Plaintiff are true until proven
10 otherwise;

11 9. Any complained-of statements allegedly made by the Defendant are
12 substantially true, and thus treated as true as a matter of law;

13 10. Because truth is an absolute defense, the Defendant cannot be liable to the
14 Plaintiff for defamation;

15 11. Any complained-of statements allegedly made by the Defendant are protected
16 by the fair report privilege, and thus the Defendant is immune from suit for making such
17 statements;

18 12. Any complained-of statements allegedly made by the Defendant are subject to
19 qualified privilege, as they were directed to parties having a common interest in the subject
20 matter of the statements, they were made in the course of a justifiable exercise of a moral
21 obligation, free of improper motive or malice, and were fair comment on the Plaintiff's
22 actions, which are matters of public and social interest;

1 13. At all times and places alleged in Plaintiff's Complaint, the negligence,
2 misconduct, and fault of Plaintiff exceed that of the Defendant, if any, and Plaintiff is thereby
3 barred from any recovery against Defendant;
4

5 14. It has been necessary for Defendant to employ the services of an attorney to
6 defend this action, and a reasonable sum should be allowed Defendants as and for attorney's
7 fees, together with its costs expended in this action;
8

9 15. Plaintiff is estopped from asserting any cause of action whatever against
10 Defendants;
11

12 16. Plaintiff has waived and abandoned any and all claims as alleged herein against
13 the Defendant by his acts and conduct; and
14

15 17. All possible affirmative defenses may not have been alleged herein insofar as
16 sufficient facts were not available after reasonable inquiry upon the filing of the Defendant's
17 answer, and therefore Defendant reserves the right to amend this answer to allege additional
18 affirmative defenses if subsequent investigation warrants.
19

20 **REQUEST FOR RELIEF**

- 21 1. That Plaintiff take nothing through this suit.
22 2. That judgment be entered on Defendant's behalf.
23 3. For reasonable attorneys' fees and costs of suit.
24 4. For such other and further relief the Court deems appropriate.
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NRS 239B.030(4) AFFIRMATION

Pursuant to NRS 239B.030 as well as Rule 10 of the Washoe District Court Rules, the undersigned hereby affirms that this document does not contain the social security number of any person.

Respectfully submitted:

By: Luke A. Busby
JOHN L. MARSHALL
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570 Marsh Avenue
Reno, Nevada 89509
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Dated: 12/28/2017

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Attorneys for the Defendant

CERTIFICATE OF SERVICE

I certify that on the date indicated below, I served the foregoing document on the following parties via US Mail and/or electronic service:

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By: Luke A. Busby

Dated: 12/28/2017

Luke Busby

FILED

APR - 0 2018

Storey Co. Clerk

Deputy

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR STOREY COUNTY

-000-

LANCE GILMAN, an individual,

CASE NO. 18 TRT 00001 1E

Plaintiff

DEPT. 2

vs.

SAM TOLL, an individual; DOES I-V,
inclusive; and ROE ENTITIES VI-X,
inclusive,ORDER GRANTING ANTI-SLAPP
SPECIAL MOTION TO DISMISS IN
PART, ALLOWING LIMITED
DISCOVERY, AND STAYING
FURTHER PROCEEDINGS

Defendant

I. PROCEDURAL BACKGROUND

Lance Gilman filed lawsuit against Sam Toll. He alleged a single claim for relief, defamation per se. Toll filed an Anti-SLAPP special motion to dismiss which Gilman opposed.

II. FINDINGS OF FACT

The following facts were either uncontested or proved by a preponderance of the evidence.

Gilman was elected to the Storey County Commission in 2012, took office in 2013 and has served as a county commissioner continuously since 2013. He

/////

1 admits he is a public official and a public figure. Opp. to Anti-Slapp Mot.
2 (Opp.), p. 2.

3 Gilman is a financially successful businessman. His company, Lance Gilman
4 Commercial Real Estate Services, is and has been the exclusive broker for the
5 Tahoe Reno Industrial Center (TRI) an 80,000 acre industrial park that
6 encompasses a 30,000 acre industrial complex. TRI has over 16,000,000
7 square feet of industrial space in use by over 130 companies. Each year he and
8 his businesses make over \$100,000 in food donations and labor to needy Storey
9 County seniors and to a school "food in a backpack" program. Gilman Aff. ¶ 20,
10 21, and 28.

11 The Court takes judicial knowledge of the fact that the Mustang Ranch is in
12 Storey County.

13 Toll established a website, the "Teller," in February 2017. The website is
14 open to the public. Toll posts stories on the website and invites and posts
15 reader's comments.

16 Toll admits publishing on the Teller website the articles which contain the
17 statements alleged by Gilman to be defamatory. Anti-Slapp Special Mot. to
18 Dismiss (Mot.), p. 5-6.

19 The initial focus of the Teller "was to provide a local news source where
20 people in Storey County could obtain the facts surrounding information
21 contained in pieces criticizing the Storey County Sheriff Gerald Antinoro
22 published by the proponents of the effort to recall the sheriff that was ongoing
23 at the time." Toll Aff., Mot. Ex. 8, ¶ 7. Toll believes Gilman was behind the recall
24 effort. Toll opposed the recall effort.

25 Additional facts will be included in the sections regarding the allegedly
26 defamatory statements. When the Court uses the phrase "the Court finds" it
27 means the Court finds the stated facts have been proved by a preponderance of
28 the evidence.

III. APPLICABLE LAW

A. Anti-SLAPP statutes and cases

To decide this special motion to dismiss the Court must:

- (1) Determine whether Toll established, by a preponderance of the evidence, that the defamation claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern; and
- (2) If the court determines that Toll has met the burden under paragraph (1), determine whether Gilman has demonstrated with prima facie evidence a probability of prevailing on the claim. NRS 41.660(3).

To demonstrate a probability of prevailing on his claim with prima facie evidence Gilman must meet the same burden of proof that a plaintiff has been required to meet under California's anti-Strategic Lawsuits Against Public Participation law as of June 8, 2015. NRS 41.665(2). California's anti-SLAPP statutes are found in its Code of Civil Procedure sections 425.16 through 425.18. The statutes do not establish the plaintiff's burden of proof regarding the prima facie evidence of a probability of prevailing on the claim so the Court must look to California case law.

California courts have held that the plaintiff opposing an anti-SLAPP special motion to dismiss must demonstrate that his complaint is legally sufficient, and supported by a prima facie showing of facts through competent, admissible evidence, to support a favorable judgment. "Whatever the complaint may allege, it is not sufficient to defeat an anti-SLAPP motion. The evidence is what counts." *Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190, 209, 222 Cal. Rptr. 3d 250 (2017). The plaintiff need only establish his claim has minimal merit. The Court must accept as true all evidence favorable to the plaintiff.

////

1 A "probability" in an anti-SLAPP context does not mean more probable than
2 not— only a cause of action that lacks even minimal merit constitutes a SLAPP.
3 *Healthsmart Pacific, Inc. v. Kabateck*, 7 Cal. App. 5th 416, 212 Cal. Rptr. 3d
4 589 (2016). Courts do not resolve the merits of the overall dispute on a special
5 motion to dismiss, but rather identify whether the pleaded facts fall within the
6 statutory purpose, which is to prevent and deter lawsuits brought primarily to
7 chill the valid exercise of the constitutional rights of freedom of speech and
8 petition for the redress of grievances. *Wilson v. Cable News Network, Inc.*, 6
9 Cal. App. 5th 822, 211 Cal. Rptr. 3d 724 (2016); see also *Cross v. Facebook, Inc.*,
10 14 Cal. App. 5th 190, 222 Cal. Rptr. 3d 250 (2017).

11 Courts do not pass on the weight of evidence, including the credibility of
12 witnesses in this analysis. Instead, courts accept as true the evidence favorable
13 to the plaintiff and evaluate the defendant's evidence only to determine if it has
14 defeated the plaintiff's evidence as a matter of law. *Cruz v. City of Culver City*, 2
15 Cal. App. 5th 239, 205 Cal. Rptr. 3d 736 (2016), citing *Soukup v. Law Offices of*
16 *Herbert Hafif*, 39 Cal.4th 260, 269, fn. 3, 46 Cal. Rptr. 3d 638, 139 P.3d 30
17 (2006).

18 The guiding principles for what distinguishes a public concern from a
19 private one are:

- 20 (1) "Public interest" does not equate with mere curiosity;
- 21 (2) A matter of public interest should be something of concern to a
22 substantial number of people; a matter of concern to a speaker and a
23 relatively small specific audience is not a matter of public interest;
- 24 (3) There should be some degree of closeness between the challenged
25 statements and the asserted public interest; the assertion of a broad
26 and amorphous public interest is not sufficient;

27 /////

28 /////

(4) The focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy; and

(5) A person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.

Shapiro v. Welt, 133 Nev. A.O. 6, 389 P.3d 262, 268 (2017).

Under NRS 41.637 a "good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern" means any:

(1) Communication that is aimed at procuring any governmental or electoral action, result or outcome;

(2) Communication of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity;

(3) Written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law; or

(4) Communication made in direct connection with an issue of public interest in a place open to the public or in a public forum; and

which is truthful or is made without knowledge of its falsehood.

B. Defamation per se

Defamation per se of a public official or public officer consists of four elements: (1) a false statement; (2) that is defamatory; (3) an unprivileged publication to a third person; and (4) actual malice. *Clark Co. Sch. Dist. v. Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 718, 57 P.3d 82 (2002).

1 A statement is defamatory when, under any reasonable definition, such
2 statement would tend to lower the subject in the estimation of the community,
3 excite derogatory opinions about the subject, and hold the subject up to
4 contempt. *Las Vegas Sun v. Franklin*, 74 Nev. 282, 287, 329 P.2d 867, 869
5 (1958). ; see *Posadas* at 453.

6 In reviewing an allegedly defamatory statement, the words must be reviewed
7 in their entirety and in context to determine whether they are susceptible of a
8 defamatory meaning. *Lubin v. Kunin*, 117 Nev. 107, 17 P.3d 422 (2001). If a
9 statement is susceptible of different constructions, one of which is defamatory,
10 resolution of the ambiguity is a question of fact for the jury. *Posadas v. City of*
11 *Reno*, 109 Nev. 448, 851 P.2d 438 (1993).

12 False statements that accuse a plaintiff of criminal conduct are defamatory
13 on their face. Statements cannot form the basis of a defamation action if they
14 cannot be reasonably interpreted as stating actual facts about an individual.
15 Thus, rhetorical hyperbole, vigorous epithets, lusty and imaginative expressions
16 of contempt and language used in a loose, figurative sense will not support a
17 defamation action. *Grenier v. Taylor*, 234 Cal. App. 4th 471, 183 Cal. Rptr. 3d
18 867 (2015)(and cases cited therein).

19 To promote free criticism of public officials, and avoid any chilling effect
20 from the threat of a defamation action, a defendant cannot be held liable for
21 damages in a defamation action involving a public official or public figure
22 unless "actual malice" is alleged and proven by clear and convincing evidence.
23 *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 719, 57 P.3d 8 (2002).

24 "Actual malice" means knowledge that the statement was false or with
25 reckless disregard of whether it was false or not. *Id.* "Reckless disregard" means
26 the publisher of the statement acted with a high degree of awareness of the
27 probable falsity of the statement or had serious doubts as to the publication's
28 truth. *Id.*

1 IV. ANALYSIS

2 The Court now turns to the statements Gilman alleged are defamatory in the
3 order Gilman addressed them in his brief.

4
5 A. Residence and perjury

6 1. "Resident" communications

7 In his Complaint Gilman simply alleged that Toll made statements that
8 Gilman is not a resident of Storey County and that Gilman lied and committed
9 perjury regarding his being a resident of Storey County. In his opposition,
10 Gilman pointed to five statements published by Toll about Gilman being a
11 resident of Storey County; in one of those communications Toll alleged Gilman
12 committed perjury regarding his address. The analysis for these
13 communications is the same and the Court will address them together and refer
14 to them as the "resident communications."

15
16 (a) Washoe County resident

17 Toll published the first resident communication, "Washoe County resident,"
18 on April 7, 2017. A copy of the communication is attached to Gilman's
19 Opposition as Exhibit 4. The specific statement is found in the last paragraph
20 on the second page of the exhibit:

21 Team Gilman would have never subjected the citizens to the
22 polarizing effect of the recall effort had it not been for the Washoe
23 County resident who thinks he knows what is best for the
24 taxpayers who shoulder the tax burden of Don Norman, Lance
Gilman and the rest of the tax escapers at the Center.

25 (b) If you believe he actually lives at 5 Wildhorse Canyon

26 Toll published the second resident communication on April 18, 2017. A copy
27 of the communication is attached to Gilman's Opposition as Exhibit 5. The

28 /////

1 specific statement is found in the paragraph below the text box on the third
2 page of the exhibit:

3 The debacle we emerged from a week ago today is not the kind of
4 thing our County should be making the news with. Sadly, the most
5 equal member of Storey County (if you believe he actually lives at
6 Wildhorse Canyon) cares more about himself than the County
7 he represents.

8 (c) Don't actually live here

9 Toll published the third resident communication on May 20, 2017. A copy of
10 the communication is attached to Gilman's Opposition as Exhibit 6. The specific
11 statement is found in the first full paragraph on the third page of the exhibit:

12 "I want the people of Storey County to know that I am a man of
13 integrity and my word is more valuable than gold. This County
14 has been very, very good to me and I want to deliver on promises I
15 made over and over to the good people of Storey County regarding
16 the cash that would be gushing around here. I want to thank them
17 along with the entire Team Storey Team for helping Mr. Norman
18 and me becoming the wealthiest people who do business in Storey
19 County but don't actually live here" said Mr. Gilman.

20 (d) Since they don't actually live at Wildhorse Canyon Drive (or
21 anywhere else in the county for that matter)

22 Toll published the fourth resident communication on October 16, 2017. A
23 copy of the communication is attached to Gilman's Opposition as Exhibit 7. The
24 specific statement is found in the fourth paragraph on the fourth page of the
25 exhibit:

26 The purpose of this complaint is to hold accountable County
27 Commissioner Gilman and Planning Commissioner Thompson for
28 committing perjury when they filed paperwork claiming to live
somewhere it is illegal to live. Since they took office illegally and
since they don't actually live at Wildhorse Canyon Drive (or
anywhere else in the county for that matter) and can't legally
reside where they claimed they did, we conclude and insist they be
prosecuted for perjury and removal from office.

(e) Failing to require Mr. Gilman to reside in the district he
represents within Storey County

Toll published the fifth and final resident communication on December 3,
2017. A copy of the communication is attached to Gilman's Opposition as

1 Exhibit 8. The specific statement is found on the third page of the exhibit under
2 the heading "Special Interests:"

3 The Commissioner Lance Gilman -TRIC Special Interest merry-
4 go-round that gives Mr. Gilman and TRIC access to the Storey
County checkbook, tax coffers, real property and special
5 consideration regarding rules and regulations.
6 ...

7 Failing to require Mr. Gilman to reside in the district he
represents within Storey County.

8 Gilman argued "[t]he clear inference" from each of these communications is
9 that Gilman is not a Storey County resident. Toll used a different word or
10 phrase in each of his resident communications: "resident," "lives at," "live here,"
11 "live," and "reside." The resident issue is potentially more significant than either
12 party presented. "Residence" has a specific meaning for purposes of eligibility
13 for public office. NRS 281.050. But neither side cited any law or made any
14 argument on the meaning of "residence" under the elections statutes or case
15 law, and therefore the Court will address the issue on the level presented by the
16 parties which is the every day meaning of "resident," "lives at," "live here,"
17 "live," and "reside."

18 The every day meaning of "resident" is dwelling or having an abode for a
19 continued length of time. Webster's Third New International Dictionary 1931
20 (2002). The every day meaning of "live" is to occupy a home. Id. 1323. The every
21 day meaning of "reside" is to settle oneself into a place, to dwell permanently or
22 continuously; have a settled abode for a time; have one's residence or domicile.
23 Id. 1931.

24
25 *2. Good faith communication*

26 The first issue is whether the resident communications are good faith
27 communications in furtherance of the right to petition or the right to free
28 speech in direct connection with an issue of public concern. NRS 41.660(3)(a).

1 To decide this issue the Court must determine whether the communication
2 falls within any of the four-part definition of "a good faith communication in
3 furtherance of the right to petition or the right to free speech in direct
4 connection with an issue of public concern" set out in NRS 41.637(1)-(4).

5
6 a. NRS 41.637(1): If the communication is aimed at procuring any
7 governmental or electoral action, result or outcome

8 A communication is "a good faith communication in furtherance of the right
9 to petition or the right to free speech in direct connection with an issue of public
10 concern" if the communication is aimed at procuring any governmental or
11 electoral action, result or outcome. NRS 41.637(1)

12 Toll published his first resident" communication on April 7, 2017. That
13 communication included the "Washoe County resident" statement. Toll
14 published that communication four days before the April 11, 2017 sheriff recall
15 vote. The aim of the communication was to blunt Gilman's political influence in
16 the effort to recall the sheriff by undermining Gilman's standing and credibility
17 in Storey County by claiming Gilman is a Washoe County resident. The Court
18 concludes the aim of the "Washoe County resident" communication was to
19 procure an electoral action, result or outcome, i.e., to weaken and defeat the
20 sheriff recall effort by undermining public and voter support for Storey County
21 Commissioner Gilman.

22 Toll's aim in the four resident communications after the April 7, 2017
23 communication was to keep Storey County voters' attention focused on
24 Gilman's alleged part in the sheriff recall "debacle" and undermine Gilman's
25 standing and credibility in Storey County by questioning where Gilman resided
26 or lived. The Court concludes the aim of the four resident communications after
27 the April 7, 2017 communication was to procure an electoral action, result or
28 outcome, i.e., undermining public and voter support for Storey County
Commissioner Gilman.

- 1 b. NRS 41.637(2): The communication is to a Legislator, officer or
2 employee of the Federal Government, this state or a political
3 subdivision of the state, regarding a matter reasonably of concern
4 to the respective governmental entity.

5 Toll did not produce a preponderance of evidence that any of the "resident"
6 communications were to a Legislator, officer or employee of the Federal
7 Government, this state or a political subdivision of the state, regarding a matter
8 reasonably of concern to the respective governmental entity. Gilman did not
9 allege the communications to the Storey County Sheriff and District Attorney,
10 and the Attorney General were defamatory. The Court concludes NRS 41.637(2)
11 has no application to the resident communications.

- 12 c. NRS 41.637(3): Written or oral statement made in direct
13 connection with an issue under consideration by a legislative,
14 executive or judicial body, or any other official proceeding
15 authorized by law.

16 The Court finds Toll made a report to the Storey County Sheriff and District
17 Attorney, and the Attorney General regarding Gilman's residence. Toll
18 published a story about his making the reports in the October 16, 2017
19 communication. The sheriff's office, district attorney's office, and attorney
20 general's office are executive bodies. The Court concludes the October 16, 2017
21 communication was made in direct connection with an issue under
22 consideration by an executive body.

23 The Court finds Toll did not produce evidence that any of the other resident
24 communications were made in direct connection with an issue under
25 consideration by a legislative, executive or judicial body, or any other official
26 proceeding authorized by law. The Court concludes NRS 41.637(3) does not
27 apply to the other resident communications.

28 /////

/////

/////

1 d. NRS 41.637(4): Communication made in direct connection with
2 an issue of public interest in a place open to the public or in a
3 public forum.

4 (I) Public interest

5 To determine whether the resident communications were made in direct
6 connection with an issue of public interest the court looks to the guiding
7 principles in *Shapiro*.

8 The first guiding principle is that "public interest" does not equate with
9 mere curiosity. The Court finds that whether Storey County Commissioner
10 Gilman lives or resides in Storey County is not a matter of mere curiosity. The
11 Court concludes this guiding principle weighs in favor of finding the resident
12 communications were made in direct connection with an issue of public
13 interest.

14 The second guiding principle is that a matter of public interest should be
15 something of concern to a substantial number of people; a matter of concern to
16 a speaker and a relatively small specific audience is not a matter of public
17 interest. The Court finds that whether Storey County Commissioner Gilman
18 lives or resides in Storey County is something of concern to the residents of
19 Storey County, a substantial number of people, and not simply a matter of
20 concern to Toll and a relatively small specific audience. The Court concludes
21 this guiding principle weighs in favor of finding the resident communications
22 were made in direct connection with an issue of public interest.

23 The third guiding principle is that there should be some degree of closeness
24 between the challenged statements and the asserted public interest – the
25 assertion of a broad and amorphous public interest is not sufficient. The Court
26 finds the resident communications have some degree of closeness to the
27 asserted public interest of whether Storey County Commissioner Gilman resides
28 in Storey County. The Court concludes this guiding principle weighs in favor of

1 finding the resident communications were made in direct connection with an
2 issue of public interest.

3 The fourth guiding principle is the focus of the speaker's conduct should be
4 the public interest rather than a mere effort to gather ammunition for another
5 round of private controversy. The Court finds the focus of Toll's resident
6 communications was the public interest in whether Storey County
7 Commissioner Gilman lives or resides in Storey County, and was not a mere
8 effort to gather ammunition for another round of private controversy. The
9 Court concludes this guiding principle weighs in favor of finding the
10 communications were made in direct connection with an issue of public
11 interest.

12 The fifth and final guiding principle is that a person cannot turn otherwise
13 private information into a matter of public interest simply by communicating it
14 to a large number of people. The Court finds that where Storey County
15 Commissioner Gilman lives or resides was not private information but a matter
16 of public interest because a county commissioner should reside in the county he
17 represents. The Court concludes this guiding principle weighs in favor of
18 finding the communications were made in direct connection with an issue of
19 public interest.

20 The Court has weighed the *Shapiro* guidelines and concludes the resident
21 communications were made in direct connection with an issue of public
22 interest.

23
24 (ii) Public forum

25 Gilman did not appear to contest that Toll's website is a public forum.
26 Even if Gilman did contest it, most if not all California courts that have
27 considered the issue have concluded a public website is a public forum. *Vogel v.*
28 *Felice*, 127 Cal. App. 4th 1006, 26 Cal. Rptr. 3d 350 (2005); *Wilbanks v. Wolk*

1 121 Cal.App.4th 883, 897, 17 Cal. Rptr. 3d 497 (2004); *ComputerXpress, Inc. v.*
2 *Jackson* 93 Cal.App.4th 993, 1007, 113 Cal. Rptr. 2d 625 (2001). The Nevada
3 Supreme Court has looked to California law for guidance on anti-SLAPP issues
4 because California's and Nevada's anti-SLAPP statutes are similar in purpose
5 and language. *Shapiro*, 268.

6 The Court finds Toll's is a website open to the public, on which he posts
7 political information, and receives and posts reader's comments. The Court
8 concludes Toll's website is a public forum for the purposes of NRS 41.637(4).

9 The Court concludes the resident communications were made in direct
10 connection with an issue of public interest in a place open to the public or in a
11 public forum.

12
13 3. *Truthful communications or made without knowledge of falsehood*

14 The last issue on the question of whether the communications were good
15 faith communications is whether the communications were truthful or made
16 without knowledge of its falsehood. In his first affidavit Toll testified that he
17 conducts research for the pieces he writes. Mot. Ex. 11, ¶ 18. In his second
18 affidavit Toll testified more directly and fully regarding his due diligence. He
19 testified "that for each statement I made that Gilman claims is defamatory, I
20 investigated the facts before making the statement." Reply Ex. 2, ¶ 10(a). The
21 Court finds Attachment 3 to Toll's affidavit is a true and correct copy of his
22 October 16, 2017 website communication. In his first affidavit paragraph 15 Toll
23 testified he believes the contents of his stories, including the October 16, 2017
24 communication, were true. In the October 16, 2017 communication Toll stated
25 he made a public records request to the Storey County Assistant Manager
26 requesting the zoning of the Mustang Ranch compound. Toll alleged the
27 Assistant County Manager failed to provide the requested information for six
28 months. Toll also stated in the communication that he made a request of the

1 Storey County Clerk before his first resident communication requesting proof of
2 Gilman's resident and received a response that Gilman resides at 5B Wildhorse
3 Canyon Drive. Toll asked the Storey County Assessor where 5B Wildhorse
4 Canyon Drive was physically located and was informed that Gilman resides in a
5 double wide mobile home located behind the swimming pool at the Mustang
6 Ranch. The statements of the Storey County Clerk and Assessor are not
7 considered here as proof of the matter asserted but only to show what
8 knowledge Toll had when he made the communication. Based upon the
9 information he had, Toll did not believe that "Lance Gilman, one of the
10 wealthiest men in Northern Nevada, lives in a mobile home behind the
11 swimming pool with his employee and roommate Kris Thompson."

12 Toll did not prove that Gilman is a resident of Washoe County or that
13 Gilman is not a resident of Storey County, but he, Toll, did not have to prove
14 either. Based upon the information Toll had regarding Gilman's residence, the
15 Court concludes Toll proved by a preponderance of evidence that he did not
16 knowingly make a false statement when he published the resident
17 communications.

18 The Court concludes Toll met the burden under NRS 41.660(3)(a). The
19 Court concludes the communications were made in furtherance of the right to
20 free speech in direct connection with an issue of public concern.

21
22 *4. Burden of proof shifts to Gilman*

23 Because Toll met the burden of proof under NRS 41.660(3)(a) the burden
24 shifts to Gilman to demonstrate with prima facie evidence a probability of
25 prevailing on his defamation per se claim. The elements of defamation per se of
26 a public official or public officer are: (1) a false statement; (2) that is
27 defamatory; (3) an unprivileged publication to a third person; and (4) actual
28 malice.

1 Gilman need only establish his claim has minimal merit, but he must
2 establish it with competent, admissible evidence. As the *Cross v. Facebook*
3 court stated, "the evidence is what counts." *Cross* at 209. The Court cannot
4 resolve the merits of the overall dispute on a special motion to dismiss. The
5 Court cannot and therefore does not weigh the evidence, including the
6 credibility of witnesses in its analysis. Instead, the Court accepts as true the
7 evidence favorable to Gilman and evaluates Toll's evidence only to determine if
8 it has defeated Gilman's evidence as a matter of law. The Court must accept as
9 true all competent, admissible evidence favorable to Gilman.

10
11 (a) A false statement

12 The first element of defamation per se requires a false statement. To prove
13 the resident communications were false Gilman must produce some minimal
14 evidence that he resides in Storey County. The Court now turns to the evidence
15 produced on the resident issue. Gilman testified in his affidavit:

16 (1) "I have never been officially notified by any law enforcement or
17 governmental organization about any investigation whatsoever
18 challenging my residency in Storey County." Opp. Ex. 3, ¶ 39.

19 (2) "Contrary to the Defendant's assertions, I do live in Storey
20 County, Nevada. My address is 5 Wild Horse Canyon, and I have
21 lived there for 12 years or more." Opp. Ex. 3, ¶ 42.

22 (3) "I certainly never committed perjury as alleged by the Defendant.
23 The Defendant's statements are not true." Opp. Ex. 3, ¶ 43.

24 Gilman provided a copy of his driver's license which shows his address is 5
25 Wild Horse Canyon, Sparks, Nevada. Opp. Ex. 9.

26 Toll testified the Storey County Assessor informed him that 5 Wild Horse
27 Canyon is on the Mustang Ranch property. Although this statement is hearsay if
28 offered for the truth of the matter asserted, Toll did not in any way limit or

1 attempt to limit the use of his testimony. But the Court need not and does not
2 consider the Assessor's statement to decide this issue.

3 The Court concludes Gilman's testimony under oath that he lives in Storey
4 County is sufficient prima facie evidence that he lives in Storey County.

5

6 (b) A defamatory statement

7 The second element of defamation per se is that the false statement was
8 defamatory. "A statement is defamatory when it would tend to lower the subject
9 in the estimation of the community, excite derogatory opinions about the
10 subject, and hold the subject up to contempt. In reviewing an allegedly
11 defamatory statement, 'the words must be reviewed in their entirety and in
12 context to determine whether they are susceptible of a defamatory meaning.'
13 Whether a statement is defamatory is generally a question of law; however,
14 where a statement is 'susceptible of different constructions, one of which is
15 defamatory, resolution of the ambiguity is a question of fact for the jury.'" *Lubin*
16 *v. Kunin*, 117 Nev. 107, 111, 17 P.3d 422 (2001)(internal citations omitted).

17 The Court finds the resident communications were intended to and
18 would tend to cause Storey County residents to question or doubt whether
19 Storey County Commissioner Gilman lives in Storey County. Voters generally
20 and reasonably want their elected officials to live in the area the elected official
21 represents. The Court finds that Toll's statements suggesting, implying, or
22 outright accusing Storey County Commissioner Gilman of not residing or living
23 in Storey County and lying and perjuring himself about it would tend to lower
24 Gilman in the estimation of the community, excite derogatory opinions about
25 Gilman, and hold Gilman up to contempt. The Court concludes the resident
26 statements were defamatory.

27 /////

28 /////

1 (c) An unprivileged publication to a third person

2 The third element of defamation per se is an unprivileged publication to a
3 third person. Toll argued that insofar as the alleged defamatory statements
4 relate to media reporting on judicial proceedings the fair report privilege
5 applies. Toll failed to produce evidence of judicial proceedings. There cannot be
6 media reporting on judicial proceedings without judicial proceedings. Toll's
7 argument lacks factual or legal support.

8 The Court concludes the resident statements were unprivileged publications
9 to third persons.

10
11 (d) Actual malice

12 The fourth element of defamation per se of a public official or public figure
13 is actual malice. "Actual malice" means knowledge that the statement was false
14 or with reckless disregard of whether it was false or not. "Reckless disregard"
15 means the publisher of the statement acted with a high degree of awareness of
16 the probable falsity of the statement or had serious doubts as to the
17 publication's truth. "This test is a subjective one, relying as it does on 'what the
18 defendant believed and intended to convey, and not what a reasonable person
19 would have understood the message to be.'" *Pegasus* at 722.

20 Gilman's points and authorities in support of his opposition to Toll's anti-
21 SLAPP motion offers little of substance on the actual malice element. Beginning
22 on page 35 of Gilman's points and authorities at line 16 Gilman asserts there is
23 solid proof of actual malice. He then talks about Toll being unhappy about
24 Gilman opposing the sheriff; that Toll has continuously criticized and impugned
25 Gilman in the website communications; that Toll has a deep dislike of Gilman;
26 and that Toll has a private vendetta against Gilman. Gilman argued these
27 "facts" show Toll's negligence, motive and intent. The *Pegasus* court noted that

28 /////

1 recklessness or malice may be established through cumulative evidence of
2 negligence, motive, and intent.

3 On page 36 of his opposition, beginning at line 20, Gilman argued Toll did
4 little or no due diligence before making the statements; and made up the
5 assertions out of thin air through an overwrought imagination. Gilman did not
6 support these assertions with competent, admissible evidence.

7 Toll testified he investigated the facts before making the statements Gilman
8 alleged are defamatory, and that he believes the contents of his stories were
9 true, including his October 16, 2017 communication. In his October 16, 2017
10 communication, which was made nearly two months before Gilman filed this
11 action, Toll stated:

- 12 (1) He made a public records request to the Storey County Assistant
13 Manager requesting the zoning of the Mustang Ranch compound and
14 that the Assistant County Manager failed to provide the requested
15 information for six months;
- 16 (2) He made a request of the Storey County Clerk before his first resident
17 communication requesting proof of Gilman's residence and received a
18 response that Gilman resides at 5B Wild Horse Canyon Drive;
- 19 (3) He asked the Storey County Assessor where 5B Wild Horse Canyon
20 was physically located and was informed that Gilman resides in a
21 double wide mobile home located behind the swimming pool at the
22 Mustang Ranch.

23 Again, the statements of the Storey County Clerk and Assessor are not
24 considered here as proof of the truth of the matter asserted but only to show
25 what knowledge Toll had when he made the communications.

26 Toll included as part of his October 16, 2017 a letter he sent to the Storey
27 County District Attorney and Nevada Attorney General. In the letter Toll relates
28 that he received information from the Storey County Community Development

1 Department that none of the property on which the Mustang Ranch sits is
2 zoned residential. Toll continued, "In other words neither 5 nor 56 Wild Horse
3 Canyon Drive are legal residences; nobody can legally reside there or claim
4 either address as their legal residence." Opp. Ex. 9.

5 Toll also knew, as any informed Northern Nevadan would, that Gilman is a
6 financially successful businessman.

7 Based upon the information he had, Toll did not believe Gilman the-
8 successful-businessman lives in a trailer. Toll stated in his October 16, 2017
9 communication: "Lance Gilman, one of the wealthiest men in Northern Nevada,
10 lives in a mobile home behind the swimming pool with his employee and
11 roommate Kris Thompson."

12 The Court finds Toll did conduct some research on Gilman's residence
13 before he published the resident communications and that the information he
14 received as a result of that research caused him to disbelieve that Gilman lives
15 in a trailer behind the Mustang Ranch pool.

16 The Court concludes Gilman has not produced prima facie evidence that Toll
17 knew any of his resident communications were false or acted with a high degree
18 of awareness of the probable falsity of the statement or had serious doubts as to
19 the publication's truth. The Court concludes Gilman failed to produce prima
20 facie evidence that Toll published the resident communications with actual
21 malice.

22

23 5. *Discovery request*

24 Gilman requested an opportunity to conduct discovery under NRS 41.660(4)
25 which requires a court to allow limited discovery upon a showing that
26 information necessary to meet or oppose the burden under NRS 41.660(3)(b) is
27 in the possession of another party or a third party and is not reasonably
28 available without discovery. Gilman failed to make the showing required by

1 NRS 41.660(3)(b) on the issue of actual malice. The Court concludes that here,
2 information as to whether Toll knew the resident statements were false or
3 whether he acted with a high degree of awareness of the probable falsity of the
4 statement or had serious doubts as to the publication's truth, is necessary for
5 Gilman to meet or oppose the burden under NRS 41.660(3)(b), and that
6 information is in the possession of Toll or a third party and is not reasonably
7 available without discovery. Therefore Gilman's request to conduct discovery is
8 granted. Gilman will be allowed to conduct discovery limited solely to
9 information as to whether Toll knew the resident statements were false or
10 whether he acted with a high degree of awareness of the probable falsity of the
11 statement or had serious doubts as to the publication's truth.

12
13 **B. Reverse graft**

14
15 *1. Reverse graft communication*

16 The reverse graft statements come from a communication published on
17 August 6, 2017. A copy of the communication is attached to Gilman's
18 Opposition as Exhibit 10. The specific statement quoted by Gilman is found in
19 the first paragraph on the fifth page of the exhibit:

20 When this deal is approved by Marshall McBride and Jack McGuffey,
21 TRIC will have accomplished another spectacular job of bamboozling
22 Storey County officials. It will mean that Storey County and Nevada
23 taxpayers have dumped \$100 million dollars of what can only be
24 described as "reverse graft" directly into the pockets of the band of merry
25 TRICsters.

26 Gilman argued there was no reverse graft and explained that there is no
27 payment of \$100 million going into Gilman's pockets.

28 *2. Good faith communication*

The first issue is whether the statement is a good faith communication in
furtherance of the right to petition or the right to free speech in direct

1 connection with an issue of public concern. NRS 41.660(3)(a). The Court turns
2 to the definition set out in NRS 41.637.

3
4 (a) Communication aimed at procuring any governmental or electoral
5 action, result or outcome

6 NRS 41.637(1) requires the communication be aimed at procuring any
7 governmental or electoral action, result or outcome. The aim of Toll's
8 hyperbolic communication including his use of the term "reverse graft" is that
9 the multimillion dollar pipeline deal is bad for Storey County residents but good
10 for Gilman, and therefore Storey County residents should take political action
11 and oust Gilman. Specifically, Toll stated on page 8 of the communication:

12 This pipeline "deal" is the latest effort to benefit TRIC at the
13 expense of every person in Storey County and should make
14 everyone stand up and voice outrage.

15 If our current County Leadership fail to recognize this for what it
16 is and approve it, it's time to demand a change of those leaders.

17 Marshall McBride is our only hope to shoot this hustle down. If
18 you think Lance should finance his own projects, call or email
19 Marshall and let him know.

20 After these calls to political action Toll included an email address and
21 telephone number for Commissioner McBride.

22 The Court concludes this communication and the use of "reverse graft" was
23 aimed at procuring an electoral action, result or outcome – voicing outrage over
24 the deal that would allegedly hurt Storey County residents and benefit Gilman,
25 demanding a change of leaders if they approved the deal, and encouraging
26 residents to call or email Commissioner McBride to encourage him to shoot
27 down the deal.

28 (b) Directed to a government officer

NRS 41.637(2) requires the communication be directed to a government
officer. The reverse graft communication was directed at all Storey County

1 residents but not to a specific government officer so the communication did not
2 fit within this part of the definition.

3
4 (c) Direct connection with an issue under consideration by a
5 legislative body

6 NRS 41.637(3) requires the statement be made in direct connection with an
7 issue under consideration by a legislative body. The instant statement was made
8 in direct connection with the pipeline deal which was under consideration by
9 the Storey County Commission, a legislative body. The Court concludes the
10 statement was made in direct connection with an issue under consideration by a
11 legislative body.

12 (d) Direct connection with an issue of public interest

13 NRS 41.637(4) requires the communication be made in direct connection
14 with an issue of public interest. To determine whether the communication was
15 made in direct connection with an issue of public interest the court looks to the
16 guiding principles set forth in *Shapiro*.

17
18 (i) Public interest

19 The first guiding principle is that "public interest" does not equate with
20 mere curiosity. The Court concludes that the multimillion dollar pipeline deal
21 had potential effects on all Storey County residents and was not a matter of
22 mere curiosity. This guiding principle weighs in favor of finding the
23 communication and the reverse graft statement were made in direct connection
24 with an issue of public interest.

25 The second guiding principle is that a matter of public interest should be
26 something of concern to a substantial number of people; a matter of concern to
27 a speaker and a relatively small specific audience is not a matter of public
28 interest. The pipeline deal had potential effects on every Storey County resident

1 and was not just a matter of concern to Toll and a relatively small specific
2 audience. This guiding principle weighs in favor of finding the communication
3 and the reverse graft statement were made in direct connection with an issue of
4 public interest.

5 The third guiding principle is that there should be some degree of closeness
6 between the challenged statement and the asserted public interest – the
7 assertion of a broad and amorphous public interest is not sufficient. The instant
8 communication was made before the Storey County Commission voted on the
9 pipeline deal. The communication criticized Gilman's part in the deal including
10 the use of the "reverse graft" phrase, and expressed outrage at the use of Storey
11 County tax dollars for the project. The Court concludes there is a degree of time
12 and subject matter closeness between the challenged statement and the
13 asserted public interest, and that the communication is not an assertion of a
14 broad and amorphous public interest. This guiding principle weighs in favor of
15 finding the communication and the statement were made in direct connection
16 with an issue of public interest.

17 The fourth guiding principle is the focus of the speaker's conduct should be
18 the public interest rather than a mere effort to gather ammunition for another
19 round of private controversy. The focus of Toll's communication was killing the
20 pipeline deal and the reverse graft statement was intended to criticize Gilman
21 for his part in the deal. Toll published the communication before the
22 Commission voted on the deal. The Court concludes Toll's statement was in the
23 public interest and not a mere effort to gather ammunition for another round of
24 private controversy. This guiding principle weighs in favor of finding the
25 communication and the statement were made in direct connection with an issue
26 of public interest.

27 The fifth and final guiding principle is that a person cannot turn otherwise
28 private information into a matter of public interest simply by communicating it

1 to a large number of people. The Court concludes the information regarding the
 2 pipeline deal and Gilman's involvement in the deal was not private information
 3 but a matter of public interest. This guiding principle weighs in favor of finding
 4 the communication and the statement were made in direct connection with an
 5 issue of public interest.

6 The Court concludes the communication and the statement were made in
 7 direct connection with an issue of public interest.

8
 9 (ii) Public forum

10 The Court concluded above that Toll's website is a public forum.

11
 12 (3) *Truthful statement or made without knowledge of its falsehood*

13 The last issue on the question of whether the communication was a good
 14 faith communication is whether the communication was truthful or made
 15 without knowledge of its falsehood. The Court concludes Toll did not prove the
 16 statement was truthful.

17 The Court looks to the facts to see if Toll proved the statement was made
 18 without knowledge of its falsehood. Toll referenced in his communication, a
 19 communication prepared and published by Nicole Barde on her blog about the
 20 August 1, 2017 Commissioner meeting. Toll stated in his communication:

21 Nicole Barde has been the Lone Ranger in her reporting of County
 22 Commissioner Meetings since she started in 2015. In her
 23 breakdown of the August 1st meeting (which I encourage you
 24 to read here (<http://www.bardeblog.com/so-what's-going-on/212-summary-of-the-august-1-2017-storey-county-commission-meeting>)), she delivers a lengthy in-depth and dead on point
 25 dissection of the latest effort of Brothel Owner, TRIC Executive
 26 and self-serving crony County Commissioner Lance Gilman to
 once again have Storey County Taxpayers forfeit \$35 Million
 Dollars of future tax revenue from a "special tax area" so he and
 Don Norman can make even more money.

27 (Emphasis in original.) Opp. Ex. 10, p. 2-3.

28 /////

1 Toll stated "Ms. Barde accurately called this Corporate Welfare, I call it
2 reverse graft. In the alternate reality call [sic] that exists in the Courthouse, it's
3 a 'public-private partnership-investment thingy.'" Opp. Ex. 10, p. 3.

4 Neither party included Barde's communication as an exhibit and so the
5 Court has not reviewed it. Gilman did not testify or argue that Barde's
6 communication was false, incorrect, incomplete, or defamatory.

7 Toll's communication contains many extravagant exaggerations including:

- 8 - We [Storey County residents] and our pocketbooks serve at the pleasure
9 and plunder of Lance Gilman
- 10 - Storey County Taxpayers gleefully divert tax revenue directly into the
11 band of merry TRICsters pockets.
- 12 - ... you have to admire the ginormity of the brass balls these hucksters
13 clang around in broad daylight.
- 14 - [Referring to charts contained in the communication] I call these
15 projections speculative fantasy mindful that we are one Orange Tweet or
16 North Korean Missile into Seoul away from a major deviation from the
17 ice cream and lollypops [sic] shown in the charts above.
- 18 - The last point I want to make is to remind sober minded residents of
19 Storey County that encumbering us with this debt takes the cream off the
20 top of the annual flood of mythical revenue from the Oceans of Cash in
21 the Sea of TRIC.

22 No reasonable person would believe any of these statements is true.

23 With this context the Court turns to the phrase "reverse graft," a phrase Toll
24 apparently made up. The phrase has no relevant defined meaning. Looking at
25 the words individually, the adjective "reverse" means opposite or contrary to a
26 specified thing; operating in opposite or contrary fashion to what is usual.
27 Webster's Third New International Dictionary 1943 (2002). One meaning of
28 "graft" is the acquisition of money or property by dishonest or questionable
means, as by taking advantage of a public office to obtain profit; or illegal or
unfair practice for profit or personal gain. Id. 985. Using the dictionary
definitions "reverse graft" means operating in an opposite or contrary fashion to
what is the usual acquisition of money or property by dishonest or questionable
means, as by taking advantage of a public office to obtain profit; or illegal or

1 unfair practice for profit or personal gain. The Court is unable to make sense of
2 the term "reverse graft." "Graft" sounds bad, but Toll used the term "reverse
3 graft" and the words have to be taken together. In *Greenbelt Cooperative*
4 *Publishing Assn., Inc. v. Bresler*, 398 U.S. 6, 26 L. Ed. 2d 6, 90 S. Ct. 1537
5 (1970) a real estate developer had engaged in negotiations with a city for a
6 zoning variance on land he owned, while simultaneously negotiating with the
7 city on other land the city wanted to buy from him. A local newspaper published
8 articles that included statements that some people had characterized the
9 developer's negotiating position as "blackmail." The developer sued for libel.
10 The court rejected a contention that liability could be premised on the notion
11 that the word "blackmail" implied the developer had committed the actual
12 crime of blackmail and held that "the imposition of liability on such a basis was
13 constitutionally impermissible – that as a matter of constitutional law, the word
14 'blackmail' in those circumstances" was not defamation, but just rhetorical
15 hyperbole, a vigorous epithet used by those who considered the developer's
16 negotiating position extremely unreasonable. *Id.* 12-13.

17 The facts in the instant case have some similarity to the *Greenbelt* facts.
18 Gilman is the exclusive broker for, a principal in and marketing director for
19 TRI. TRI sought a multi-million dollar deal with the Storey County Commission
20 for a pipeline. Gilman is also a Storey County Commissioner. Toll considered
21 Gilman's position with TRI and his position with Storey County to be extremely
22 unreasonable. As a result Toll lashed out with a communication that included
23 the meaningless phrase "reverse graft," which he intended as a vigorous epithet,
24 and what is in fact rhetorical hyperbole. The Court concludes the term, taken in
25 the context of the full communication, is nonsensical and not reasonably
26 susceptible to a defamatory construction.

27 /////

28 /////

1 The Court concludes Toll met the burden under NRS 41.660(3)(a). The
2 Court concludes the communication and statement were made in furtherance of
3 the right to free speech in direct connection with a issue of public concern.
4

5 *4. Burden shifts to Gilman*

6 Because Toll met the burden under NRS 41.660(3)(a) the Court must
7 determine whether Gilman has demonstrated with prima facie evidence a
8 probability of prevailing on the his defamation per se claim. Gilman
9 acknowledges he must prove the allegedly defamatory statement was made with
10 actual malice, that is, with knowledge that it was false or with reckless disregard
11 of whether it was false or not.

12 In his affidavit, Opp. Ex. 3, ¶ 47-64, Gilman denied reverse graft and
13 explained the pipeline and infrastructure deals. Because "reverse graft" is a
14 nonsensical phrase Gilman did not and cannot prove it was false or made with
15 reckless disregard of whether it was false or not.
16

17 *5. Discovery request*

18 Gilman requested an opportunity to conduct discovery under NRS 41.660(4)
19 which requires a court to allow limited discovery upon a showing that
20 information necessary to meet or oppose the burden under NRS 41.660(3)(b) is
21 in the possession of another party or a third party and is not reasonably
22 available without discovery. Gilman failed to make the showing required by
23 NRS 41.660(3)(b). He made no showing that any information regarding reverse
24 graft is in the possession of another party or a third party *and* is not reasonably
25 available without discovery. Therefore the request to conduct discovery is
26 denied.

27 Based upon the foregoing the special motion to dismiss must be granted as
28 to the "reverse graft" statement.

1 C. Re-licensing Mustang Ranch

2 The statements regarding re-licensing the Mustang Ranch come from a
3 communication Toll published on February 26, 2017. Toll says the
4 communication was submitted by a Storey County resident who wanted to
5 remain anonymous. A copy of the communication is attached to Gilman's
6 Opposition as Exhibit 11. The specific statement quoted by Gilman is found in
7 the last paragraph on the second page of the exhibit.

8 Funny thing is, the courts didn't agree and the investor won. But,
9 in the meantime, because Lance had shut down the Wildhorse and
10 reopened it as the Mustang, he thought he didn't need to go
11 through the investigation that the Nevada Revised Statutes
12 require for the opening of a new brothel. He didn't want to follow
13 the law. The County Commissioners even agreed with him. Why
14 should Lance, the man who's been a virtual Santa Claus (at least
15 he tries to convince people he is) for Storey County, have to follow
16 the law? Sheriff Antinoro said the law had to be followed and that
17 the Mustang had to be closed for the required number of days, per
18 state statute, for the investigation with which ALL brothels must
19 comply. King Lance was furious. He secretly plotted pay back.

20 Gilman's Complaint (p. 5, ¶ 18(e), the heading for this section of his brief
21 (Opp. p. 12, sec. B(2)©, and his argument regarding the quoted language is that
22 the communication said Gilman didn't follow the law when re-licensing the
23 Mustang Ranch. Opp. p. 12. Toll's communication does not say Gilman did not
24 follow the law. The communication says Gilman "thought he didn't need to go
25 through the investigation that the Nevada Revised Statutes require for the
26 opening of a new brothel," and that "[h]e didn't want to follow the law." Opp.
27 Ex. 11, p. 2-3.

28 Gilman failed to set forth any facts, cite any law, or argue that the actual
statements made in the communication were defamatory or that the statements
were made with actual malice. The Court concludes the actual statements are
not defamatory and will dismiss this portion of Gilman's claim.

////

////

1 D. Receiving land with zero consideration

2 The statements regarding special consideration regarding rules and
3 regulations come from a communication Toll published on December 3, 2017. A
4 copy of the communication is Exhibit 8 to Gilman's opposition. The language at
5 issue is:

6 Special Interests

7 The Commissioner Lance Gilman – TRIC Special Interest merry-
8 go-round that gives Mr. Gilman and TRIC access to the Storey
9 County checkbook, tax coffers, real property and special
consideration regarding rules and regulations.

10 ...

11 • Repeatedly reconvening Storey County property to TRIC with
12 zero consideration or payment that TRIC has turned around and
13 included the free property into lucrative land deals, including the
14 one that gave a portion of the USA Parkway to TRIC (for free)
which Mr. Gilman and TRIC turned around and sold to NDOT for
\$43 Million Dollars (without giving us a single penny or paying
down the \$47 Million Dollars Storey County credit card balance).

15 Gilman admitted under oath that Storey County reconveyed land to TRI as
16 part of the NDOT extension right of way, and TRI did not get all of the USA
17 Parkway back from the County for free. Gilman Aff. p. 8, ¶ 81 and 85. It is clear
18 from Gilman's testimony that Storey County did reconvey land to TRI for which
19 TRI did not pay Storey County. The Court concludes Gilman's own testimony
20 proves that Toll's statement is true and therefore not defamatory, and therefore
21 this portion of Gilman's claim will be dismissed on that ground.

22 D. Washington, D.C. trip

23 1. Washington, D.C. trip communication

24 The statements regarding Gilman traveling to Washington, D.C. come from
25 communications Toll published on April 29, 2017 and May 2, 2017. A copy of
26 the April 29, 2017 communication is Exhibit 12 to Gilman's opposition, and the
27 May 2, 2017 communication is Exhibit 13. Gilman did not quote specific
28

1 language related to this portion of his claim, or refer the Court to any particular
2 page of the 41 pages that make up Exhibits 12 and 13.

3 On the first page of the April 29, 2017 communication Toll reported that
4 Storey County sent Gilman and a Storey County lobbyist to Washington, D.C.
5 from January 17 to 22, 2017. Toll stated the purpose of the trip was to lobby for
6 a zip code bill to prevent Storey County from losing out on substantial sales tax
7 revenue. Toll opined that it is a good idea to get the zip code issue resolved.

8 Toll continued his communication by relating he realized Donald Trump
9 was inaugurated on January 21, 2017. After he realized this, Toll, on February
10 16, 2017, made a records request for receipts from the trip. On March 7, 2017
11 the Storey County lobbyist that had accompanied Gilman to Washington, D.C.
12 addressed the Storey County Commission and provided information about
13 lobbying for Storey County. At this point in his communication Toll provided a
14 link that would take a reader to the Commission recording of the lobbyist's
15 report. Toll then stated: "To recap, we paid \$,7611.50 for them to attend Donald
16 Trump's Inauguration." Opp., Ex. 12, p. 3.

17 Toll continued, "I have been to D.C. several times, but never on
18 Inauguration Week. My sources tell me it is pretty much like the week that
19 precedes Super Bowl; business as unusual. If you want to schedule meaningful
20 work, you're in Fantasyland." Toll suggests the lobbying could have been done
21 by Skype. He pointed out that government spending is all about priorities; that
22 \$7,611.50 represents just under one quarter of the annual salary of a new
23 deputy or a new patrol vehicle. He then asks, "What are the priorities in Storey
24 County? "

25 The next pages are Gilman's and the lobbyist's Marriott receipts from the
26 trip. Each receipt includes a hand written statement: "DC trip to Trump
27 inauguration." Documentation of airfare is also posted to the website.

28 The website then has pages of chat posts.

1 Exhibit 13 appears to consist of a series chat posts between Toll and a person
2 he describes as a Gilman spokesman.

3
4 *2. Good faith communication*

5 The first issue is whether the statement is a good faith communication in
6 furtherance of the right to petition or the right to free speech in direct
7 connection with an issue of public concern. NRS 41.660(3)(a). To determine
8 that, the Court must determine whether the statement falls within any of the
9 four definitions set out in NRS 41.637.

- 10
11 (a) Communication aimed at procuring any governmental or
12 electoral action, result or outcome

13 NRS 41.637(1) requires the communication be aimed at procuring any
14 governmental or electoral action, result or outcome. The primary focus of Toll's
15 communication is accountability for Storey County spending – the legitimacy of
16 Storey County paying Gilman's room and airfare expenses to lobby in
17 Washington D.C. during the week of the U.S. presidential inauguration. The
18 Court concludes these stories and the specific statements were aimed at
19 procuring an electoral action, result, or outcome regarding Storey County's use
20 of tax funds and Gilman's continuing as a Storey County Commissioner.

- 21
22 (b) Communication directed to a government officer or in
23 direct connection with with an issue under consideration
by a government body or official

24 NRS 41.637(2) requires the communication be directed to a government
25 officer, and subsection (3) requires the statement be made in direct connection
26 with an issue under consideration by a government body or official. The instant
27 statements do not meet either of these requirements.

1 (c) Direct connection with an issue of public interest

2 NRS 41.637(4) requires the communication be made in direct connection
3 with an issue of public interest. To determine whether the communication was
4 made in direct connection with an issue of public interest the court looks to the
5 guiding principles for set forth in *Shapiro*.

6 The first guiding principle is that "public interest" does not equate with
7 mere curiosity. The Court concludes the public has an interest in how tax
8 dollars are spent. The effort to inform the public about Storey County's
9 spending for the Washington, D.C. trip was not a matter of mere curiosity. This
10 guiding principle weighs in favor of finding the communication and the
11 statement were made in direct connection with an issue of public interest.

12 The second guiding principle is that a matter of public interest should be
13 something of concern to a substantial number of people; a matter of concern to
14 a speaker and a relatively small specific audience is not a matter of public
15 interest. How Storey County tax dollars are spent is an important matter to all
16 Storey County taxpayers and not just a matter of concern to Toll and a relatively
17 small specific audience. This guiding principle weighs in favor of finding the
18 communication and the statement were made in direct connection with an issue
19 of public interest.

20 The third guiding principle is that there should be some degree of closeness
21 between the challenged statements and the asserted public interest – the
22 assertion of a broad and amorphous public interest is not sufficient. The
23 communication criticized Gilman and other county officials about the spending
24 for the trip. The Court concludes there is a degree of closeness between the
25 asserted public interest – responsible spending of taxpayer dollars – and
26 information regarding the Washington, D.C. trip. The Court concludes these
27 communications are not an assertion of a broad and amorphous public interest.
28 This guiding principle weighs in favor of finding the communication and the

1 statement were made in direct connection with an issue of public interest.

2 The fourth guiding principle is the focus of the speaker's conduct should be
3 the public interest rather than a mere effort to gather ammunition for another
4 round of private controversy. The focus of Toll's communication was whether
5 the use of tax dollars for the trip was legitimate, and in the best interests of
6 Storey County taxpayers. The Court concludes Toll's statement was in the
7 public interest and not a mere effort to gather ammunition for another round of
8 private controversy. This guiding principle weighs in favor of finding the
9 communication and the statement were made in direct connection with an issue
10 of public interest.

11 The fifth and final guiding principle is that a person cannot turn otherwise
12 private information into a matter of public interest simply by communicating it
13 to a large number of people. The Court concludes the information regarding the
14 spending of taxpayer dollars on the Washington, D.C. trip was not private
15 information but a matter of public interest in Storey County. This guiding
16 principle weighs in favor of finding the communication and the statement were
17 made in direct connection with an issue of public interest.

18 The Court concludes the communication and the statement were made in
19 direct connection with an issue of public interest.

20

21 *3. Truthful statement or made without knowledge of falsehood*

22 The last issue on the question of whether the communication was a good
23 faith communication is whether the communication was truthful or made
24 without knowledge of its falsehood. In his first affidavit Toll testified that he
25 conducts research for the pieces he writes. In this communication, Toll related
26 that the Storey County lobbyist reported on the lobbying efforts during the
27 Washington, D.C. trip and Toll provided a link for readers to listen to the
28 lobbyist's report. Toll downplayed the lobbying efforts. He included

1 information that the week of the U.S. presidential inauguration is not the best
2 week to do business in Washington, D.C. Gilman does not deny attending the
3 inauguration. Toll included receipts he received from the County which
4 included the handwritten notation "DC trip to Trump inauguration." Toll
5 suggested an alternative to traveling to Washington to lobby – Skype. This
6 probably should not be taken too seriously. But neither should the statement,
7 "we paid \$7,611.50 for them to attend the inauguration" be taken out of context
8 and understood literally. Read in the context of the full communication, which
9 includes statements about who Gilman and the lobbyist talked to, a link to the
10 lobbyist's report to the County Commission, the receipts indicating "DC trip to
11 Trump inauguration," a reasonable person would read the statement "we paid
12 \$7,611.50 for them to attend the inauguration" to mean that the big event
13 during the lobbying trip was the inauguration, not that nothing was done in
14 connection with the zip code issue. The Court concludes the statement in
15 context is not false or susceptible to a defamatory construction.

16 The Court concludes Toll met the burden under NRS 41.660(3)(a). The
17 Court concludes the communication and statement were made in furtherance of
18 the right to free speech in direct connection with a issue of public concern.
19

20 *4. Burden shifts to Gilman*

21 Because Toll met the burden under NRS 41.660(3)(a) the Court must
22 determine whether Gilman demonstrated with prima facie evidence a
23 probability of prevailing on the his defamation per se claim.

24 Gilman's evidence is his affidavit testimony, Opp. Ex. 3, ¶ 97-98. Gilman
25 testified the trip was on behalf of Storey County and there was significant
26 lobbying. As stated above, a reasonable reader of this communication would not
27 take the statement, "we paid \$7,611.50 for them to attend the inauguration"
28 literally. Read in the context of the full communication, which includes

1 statements about who Gilman and the lobbyist talked to, a link to the lobbyist's
2 report to the County Commission, the receipts indicating "DC trip to Trump
3 inauguration," a reasonable person would read the statement "we paid
4 \$7,611.50 for them to attend the inauguration" to mean that the big event
5 during the lobbying trip was the inauguration, not that nothing was done in
6 connection with the zip code issue. The Court concludes Gilman failed to
7 produce prima facie evidence that the communication was false or defamatory.
8 The Court concludes Gilman also failed to prove actual malice – that Toll made
9 the communication knowing it was false or the statement acted with a high
10 degree of awareness of the probable falsity of the statement or had serious
11 doubts as to the publication's truth.

12 The Court concludes Gilman failed to demonstrate with prima facie evidence
13 a probability of prevailing on the his defamation per se claim.
14

15 *5. Discovery*

16 Gilman requested an opportunity to conduct discovery under NRS
17 41.660(4). Gilman failed to make the showing required by NRS 41.660(3)(b).
18 The information which allegedly supports Toll's accusations came from the
19 Storey County manager's office and is reasonably available without discovery.
20 Therefore the request to conduct discovery is denied.

21 Based upon the foregoing the special motion to dismiss must be and is
22 granted as to the Washington, D.C. trip communication.
23

24 **E. Special consideration regarding rules and regulations**

25 The statement regarding special consideration regarding rules and
26 regulations come from a communication Toll published on December 3, 2017. A
27 copy of the communication is Exhibit 8 to Gilman's opposition. The language at
28 issue is:

1 Special Interests

2 The Commissioner Lance Gilman – TRIC Special Interest merry-
3 go-round that gives Mr. Gilman and TRIC access to the Storey
4 County checkbook, tax coffers, real property and special
5 consideration regarding rules and regulations.

6 After this opening paragraph Toll lists five examples of the alleged special
7 consideration. Gilman's challenge to the Storey County reconveying land to
8 TRIC without consideration was addressed above. Gilman does not argue any of
9 the other items on the list are defamatory.

10 Taken in context, which is that Gilman receives special consideration and
11 here are five examples of special consideration, one that was addressed above
12 and four that Gilman does not challenge, Gilman has failed to show that the
13 statement is defamatory. Rather the communication is rhetorical hyperbole,
14 vigorous epithets, and lusty and imaginative expressions of contempt and
15 language used in a loose, figurative sense. Such language will not support a
16 defamation action. *Grenier*.

17 The Court concludes the special motion to dismiss must be granted as to this
18 portion of Gilman's claim.

19 F. Reimbursing the ethics fine and recall expenses

20 The statement regarding reimbursing the County for recall expenses comes
21 from a communication Toll published on December 3, 2017. A copy of the
22 communication is Exhibit 6 to Gilman's opposition. The language at issue is:

23 Brothel Owner Lance Gilman told thestoryteller.online he will
24 cover the 1000.00 fine incurred by his ethics investigation request
25 filed against Sheriff Gerald Antinoro.

26 In the spirit of moving peacefully and constructively forward, we
27 have pledged to not only pay the \$1,000 fine imposed on the
28 Sheriff as a result of our petty complaint but also reimburse
Storey County for the estimated \$30,000 spend on the Recall
Election.

Gilman argues these statements are not true.

1 Statements cannot form the basis of a defamation action if they cannot be
2 reasonably interpreted as stating actual facts about an individual. Thus,
3 rhetorical hyperbole, vigorous epithets, lusty and imaginative expressions of
4 contempt and language used in a loose, figurative sense will not support a
5 defamation action. *Grenier*.

6 The Court concludes this communication and the specific statements are
7 rhetorical hyperbole and cannot be reasonably interpreted as stating actual
8 facts about Gilman. Therefore the Court concludes the special motion to
9 dismiss must be granted as to this portion of Gilman's claim.

10
11 V. ORDER

12 IT IS ORDERED:

13 Gilman may conduct discovery limited solely to information as to whether
14 Toll knew the resident communications were false or whether he acted with a
15 high degree of awareness of the probable falsity of the statement or had serious
16 doubts as to the publication's truth.

17 Gilman's discovery must be completed by May 11, 2018. Gilman will have
18 until May 25, 2018 to file and serve a supplemental opposition to the anti-
19 SLAPP motion. Toll will have until June 8, 2018 to file a supplemental reply.
20 Toll will file a request to submit the matter for decision on or before June 8,
21 2018.


22 The decision on the Anti-SLAPP Special Motion to Dismiss regarding the
23 resident statements and Toll's request for attorney's fees and costs will be
24 delayed until Gilman completes the limited discovery and the parties complete
25 the ordered briefing.

26 Other activity in this case is stayed until the Court rules on the anti-SLAPP
27 motion regarding resident communications.

28 /////

1 The special motion to dismiss is granted as to the statements related to
2 reverse graft, re-licensing Mustang Ranch, receiving land with zero
3 consideration, the Washington, D.C. trip, special consideration regarding rules
4 and regulations, and reimbursing ethics fine and recall expenses.

5 April 9, 2018.

6
7 
James E. Wilson Jr.
District Judge
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the First Judicial District Court, and I certify that on April 9, 2018, I served the foregoing Order by:

____ Placing a true and correct copy of it in a sealed, envelope, postage prepaid, and depositing the envelope in the U.S. Post Office mail box at 1111 South Roop Street, Carson City, Nevada; or


X Placing a true and correct copy of it in the pick up box located in the Carson City Court Clerk's office.

I used the following addresses:

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Case No. 18-trt-00001-1e

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Attorneys for the Defendant

**IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR STOREY COUNTY**

LANCE GILMAN,

Plaintiff(s),

vs.

SAM TOLL,

Defendant(s).

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE: The Court has entered an Order in the above captioned matter.

A true and correct copy of which is attached hereto as Exhibit 1.

FILED ✓

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STOREY COUNTY CLERK

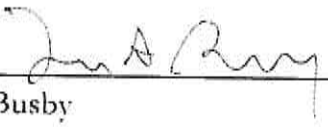
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UB

CERTIFICATE OF SERVICE

I certify that on the date indicated below I served the foregoing document on the following parties via US Mail, postage prepaid, and/or electronic service.

GUS W. FLANGAS
JESSICA K. PETERSON
Flangas Dalacas Law Group
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Las Vegas, NV 89164
702-307-9500
F - 702-382-9452

By: 
Luke Busby

Dated: 4-16-18

FILED

APR - 0 2018

Storey Co. Clerk

Deputy

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR STOREY COUNTY

-000-

LANCE GILMAN, an individual,

CASE NO. 18 TRT 00001 1E

Plaintiff

DEPT. 2

vs.

SAM TOLL, an individual; DOES I-V,
inclusive; and ROE ENTITIES VI-X,
inclusive,ORDER GRANTING ANTI-SLAPP
SPECIAL MOTION TO DISMISS IN
PART, ALLOWING LIMITED
DISCOVERY, AND STAYING
FURTHER PROCEEDINGS

Defendant

I. PROCEDURAL BACKGROUND

Lance Gilman filed lawsuit against Sam Toll. He alleged a single claim for relief, defamation per se. Toll filed an Anti-SLAPP special motion to dismiss which Gilman opposed.

II. FINDINGS OF FACT

The following facts were either uncontested or proved by a preponderance of the evidence.

Gilman was elected to the Storey County Commission in 2012, took office in 2013 and has served as a county commissioner continuously since 2013. He

/////

1 admits he is a public official and a public figure. Opp. to Anti-Slapp Mot.
2 (Opp.), p. 2.

3 Gilman is a financially successful businessman. His company, Lance Gilman
4 Commercial Real Estate Services, is and has been the exclusive broker for the
5 Tahoe Reno Industrial Center (TRI) an 80,000 acre industrial park that
6 encompasses a 30,000 acre industrial complex. TRI has over 16,000,000
7 square feet of industrial space in use by over 130 companies. Each year he and
8 his businesses make over \$100,000 in food donations and labor to needy Storey
9 County seniors and to a school "food in a backpack" program. Gilman Aff. ¶ 20,
10 21, and 28.

11 The Court takes judicial knowledge of the fact that the Mustang Ranch is in
12 Storey County.

13 Toll established a website, the "Teller," in February 2017. The website is
14 open to the public. Toll posts stories on the website and invites and posts
15 reader's comments.

16 Toll admits publishing on the Teller website the articles which contain the
17 statements alleged by Gilman to be defamatory. Anti-Slapp Special Mot. to
18 Dismiss (Mot.), p. 5-6.

19 The initial focus of the Teller "was to provide a local news source where
20 people in Storey County could obtain the facts surrounding information
21 contained in pieces criticizing the Storey County Sheriff Gerald Antinoro
22 published by the proponents of the effort to recall the sheriff that was ongoing
23 at the time." Toll Aff., Mot. Ex. 8, ¶ 7. Toll believes Gilman was behind the recall
24 effort. Toll opposed the recall effort.

25 Additional facts will be included in the sections regarding the allegedly
26 defamatory statements. When the Court uses the phrase "the Court finds" it
27 means the Court finds the stated facts have been proved by a preponderance of
28 the evidence.

III. APPLICABLE LAW

A. Anti-SLAPP statutes and cases

To decide this special motion to dismiss the Court must:

- (1) Determine whether Toll established, by a preponderance of the evidence, that the defamation claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern; and
- (2) If the court determines that Toll has met the burden under paragraph (1), determine whether Gilman has demonstrated with prima facie evidence a probability of prevailing on the claim. NRS 41.660(3).

To demonstrate a probability of prevailing on his claim with prima facie evidence Gilman must meet the same burden of proof that a plaintiff has been required to meet under California's anti-Strategic Lawsuits Against Public Participation law as of June 8, 2015. NRS 41.665(2). California's anti-SLAPP statutes are found in its Code of Civil Procedure sections 425.16 through 425.18. The statutes do not establish the plaintiff's burden of proof regarding the prima facie evidence of a probability of prevailing on the claim so the Court must look to California case law.

California courts have held that the plaintiff opposing an anti-SLAPP special motion to dismiss must demonstrate that his complaint is legally sufficient, and supported by a prima facie showing of facts through competent, admissible evidence, to support a favorable judgment. "Whatever the complaint may allege, it is not sufficient to defeat an anti-SLAPP motion. The evidence is what counts." *Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190, 209, 222 Cal. Rptr. 3d 250 (2017). The plaintiff need only establish his claim has minimal merit. The Court must accept as true all evidence favorable to the plaintiff.

/////

1 A "probability" in an anti-SLAPP context does not mean more probable than
2 not— only a cause of action that lacks even minimal merit constitutes a SLAPP.
3 *Healthsmart Pacific, Inc. v. Kabateck*, 7 Cal. App. 5th 416, 212 Cal. Rptr. 3d
4 589 (2016). Courts do not resolve the merits of the overall dispute on a special
5 motion to dismiss, but rather identify whether the pleaded facts fall within the
6 statutory purpose, which is to prevent and deter lawsuits brought primarily to
7 chill the valid exercise of the constitutional rights of freedom of speech and
8 petition for the redress of grievances. *Wilson v. Cable News Network, Inc.*, 6
9 Cal. App. 5th 822, 211 Cal. Rptr. 3d 724 (2016); see also *Cross v. Facebook, Inc.*,
10 14 Cal. App. 5th 190, 222 Cal. Rptr. 3d 250 (2017).

11 Courts do not pass on the weight of evidence, including the credibility of
12 witnesses in this analysis. Instead, courts accept as true the evidence favorable
13 to the plaintiff and evaluate the defendant's evidence only to determine if it has
14 defeated the plaintiff's evidence as a matter of law. *Cruz v. City of Culver City*, 2
15 Cal. App. 5th 239, 205 Cal. Rptr. 3d 736 (2016), citing *Soukup v. Law Offices of*
16 *Herbert Hafif*, 39 Cal.4th 260, 269, fn. 3, 46 Cal. Rptr. 3d 638, 139 P.3d 30
17 (2006).

18 The guiding principles for what distinguishes a public concern from a
19 private one are:

- 20 (1) "Public interest" does not equate with mere curiosity;
- 21 (2) A matter of public interest should be something of concern to a
22 substantial number of people; a matter of concern to a speaker and a
23 relatively small specific audience is not a matter of public interest;
- 24 (3) There should be some degree of closeness between the challenged
25 statements and the asserted public interest; the assertion of a broad
26 and amorphous public interest is not sufficient;

27 /////

28 /////

1 (4) The focus of the speaker's conduct should be the public interest
2 rather than a mere effort to gather ammunition for another round of
3 private controversy; and

4 (5) A person cannot turn otherwise private information into a matter of
5 public interest simply by communicating it to a large number of
6 people.

7 *Shapiro v. Welt*, 133 Nev. A.O. 6, 389 P.3d 262, 268 (2017).

8 Under NRS 41.637 a "good faith communication in furtherance of the right
9 to petition or the right to free speech in direct connection with an issue of public
10 concern" means any:

11 (1) Communication that is aimed at procuring any governmental or
12 electoral action, result or outcome;

13 (2) Communication of information or a complaint to a Legislator, officer
14 or employee of the Federal Government, this state or a political
15 subdivision of this state, regarding a matter reasonably of concern to
16 the respective governmental entity;

17 (3) Written or oral statement made in direct connection with an issue
18 under consideration by a legislative, executive or judicial body, or any
19 other official proceeding authorized by law; or

20 (4) Communication made in direct connection with an issue of public
21 interest in a place open to the public or in a public forum; and

22 which is truthful or is made without knowledge of its falsehood.

23
24 **B. Defamation per se**

25 Defamation per se of a public official or public officer consists of four
26 elements: (1) a false statement; (2) that is defamatory; (3) an unprivileged
27 publication to a third person; and (4) actual malice. *Clark Co. Sch. Dist. v.*
28 *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 718, 57 P.3d 82 (2002).

1 A statement is defamatory when, under any reasonable definition, such
2 statement would tend to lower the subject in the estimation of the community,
3 excite derogatory opinions about the subject, and hold the subject up to
4 contempt. *Las Vegas Sun v. Franklin*, 74 Nev. 282, 287, 329 P.2d 867, 869
5 (1958). ; see *Posadas* at 453.

6 In reviewing an allegedly defamatory statement, the words must be reviewed
7 in their entirety and in context to determine whether they are susceptible of a
8 defamatory meaning. *Lubin v. Kunin*, 117 Nev. 107, 17 P.3d 422 (2001). If a
9 statement is susceptible of different constructions, one of which is defamatory,
10 resolution of the ambiguity is a question of fact for the jury. *Posadas v. City of*
11 *Reno*, 109 Nev. 448, 851 P.2d 438 (1993).

12 False statements that accuse a plaintiff of criminal conduct are defamatory
13 on their face. Statements cannot form the basis of a defamation action if they
14 cannot be reasonably interpreted as stating actual facts about an individual.
15 Thus, rhetorical hyperbole, vigorous epithets, lusty and imaginative expressions
16 of contempt and language used in a loose, figurative sense will not support a
17 defamation action. *Grenier v. Taylor*, 234 Cal. App. 4th 471, 183 Cal. Rptr. 3d
18 867 (2015)(and cases cited therein).

19 To promote free criticism of public officials, and avoid any chilling effect
20 from the threat of a defamation action, a defendant cannot be held liable for
21 damages in a defamation action involving a public official or public figure
22 unless "actual malice" is alleged and proven by clear and convincing evidence.
23 *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 719, 57 P.3d 8 (2002).

24 "Actual malice" means knowledge that the statement was false or with
25 reckless disregard of whether it was false or not. *Id.* "Reckless disregard" means
26 the publisher of the statement acted with a high degree of awareness of the
27 probable falsity of the statement or had serious doubts as to the publication's
28 truth. *Id.*

1 IV. ANALYSIS

2 The Court now turns to the statements Gilman alleged are defamatory in the
3 order Gilman addressed them in his brief.

4
5 A. Residence and perjury

6 1. "Resident" communications

7 In his Complaint Gilman simply alleged that Toll made statements that
8 Gilman is not a resident of Storey County and that Gilman lied and committed
9 perjury regarding his being a resident of Storey County. In his opposition,
10 Gilman pointed to five statements published by Toll about Gilman being a
11 resident of Storey County; in one of those communications Toll alleged Gilman
12 committed perjury regarding his address. The analysis for these
13 communications is the same and the Court will address them together and refer
14 to them as the "resident communications."

15
16 (a) Washoe County resident

17 Toll published the first resident communication, "Washoe County resident,"
18 on April 7, 2017. A copy of the communication is attached to Gilman's
19 Opposition as Exhibit 4. The specific statement is found in the last paragraph
20 on the second page of the exhibit:

21 Team Gilman would have never subjected the citizens to the
22 polarizing effect of the recall effort had it not been for the Washoe
23 County resident who thinks he knows what is best for the
24 taxpayers who shoulder the tax burden of Don Norman, Lance
Gilman and the rest of the tax escapers at the Center.

25 (b) If you believe he actually lives at 5 Wildhorse Canyon

26 Toll published the second resident communication on April 18, 2017. A copy
27 of the communication is attached to Gilman's Opposition as Exhibit 5. The

28 /////

1 specific statement is found in the paragraph below the text box on the third
2 page of the exhibit:

3 The debacle we emerged from a week ago today is not the kind of
4 thing our County should be making the news with. Sadly, the most
5 equal member of Storey County (if you believe he actually lives at
6 Wildhorse Canyon) cares more about himself than the County
7 he represents.

8 (c) Don't actually live here

9 Toll published the third resident communication on May 20, 2017. A copy of
10 the communication is attached to Gilman's Opposition as Exhibit 6. The specific
11 statement is found in the first full paragraph on the third page of the exhibit:

12 "I want the people of Storey County to know that I am a man of
13 integrity and my word is more valuable than gold. This County
14 has been very, very good to me and I want to deliver on promises I
15 made over and over to the good people of Storey County regarding
16 the cash that would be gushing around here. I want to thank them
17 along with the entire Team Storey Team for helping Mr. Norman
18 and me becoming the wealthiest people who do business in Storey
19 County but don't actually live here" said Mr. Gilman.

20 (d) Since they don't actually live at Wildhorse Canyon Drive (or
21 anywhere else in the county for that matter)

22 Toll published the fourth resident communication on October 16, 2017. A
23 copy of the communication is attached to Gilman's Opposition as Exhibit 7. The
24 specific statement is found in the fourth paragraph on the fourth page of the
25 exhibit:

26 The purpose of this complaint is to hold accountable County
27 Commissioner Gilman and Planning Commissioner Thompson for
28 committing perjury when they filed paperwork claiming to live
somewhere it is illegal to live. Since they took office illegally and
since they don't actually live at Wildhorse Canyon Drive (or
anywhere else in the county for that matter) and can't legally
reside where they claimed they did, we conclude and insist they be
prosecuted for perjury and removal from office.

(e) Failing to require Mr. Gilman to reside in the district he
represents within Storey County

Toll published the fifth and final resident communication on December 3,
2017. A copy of the communication is attached to Gilman's Opposition as

1 Exhibit 8. The specific statement is found on the third page of the exhibit under
2 the heading "Special Interests:"

3 The Commissioner Lance Gilman -TRIC Special Interest merry-
4 go-round that gives Mr. Gilman and TRIC access to the Storey
County checkbook, tax coffers, real property and special
5 consideration regarding rules and regulations.

6 ...

7 Failing to require Mr. Gilman to reside in the district he
8 represents within Storey County.

9 Gilman argued "[t]he clear inference" from each of these communications is
10 that Gilman is not a Storey County resident. Toll used a different word or
11 phrase in each of his resident communications: "resident," "lives at," "live here,"
12 "live," and "reside." The resident issue is potentially more significant than either
13 party presented. "Residence" has a specific meaning for purposes of eligibility
14 for public office. NRS 281.050. But neither side cited any law or made any
15 argument on the meaning of "residence" under the elections statutes or case
16 law, and therefore the Court will address the issue on the level presented by the
17 parties which is the every day meaning of "resident," "lives at," "live here,"
18 "live," and "reside."

19 The every day meaning of "resident" is dwelling or having an abode for a
20 continued length of time. Webster's Third New International Dictionary 1931
21 (2002). The every day meaning of "live" is to occupy a home. Id. 1323. The every
22 day meaning of "reside" is to settle oneself into a place, to dwell permanently or
23 continuously; have a settled abode for a time; have one's residence or domicile.
24 Id. 1931.

25 2. *Good faith communication*

26 The first issue is whether the resident communications are good faith
27 communications in furtherance of the right to petition or the right to free
28 speech in direct connection with an issue of public concern. NRS 41.660(3)(a).

1 To decide this issue the Court must determine whether the communication
2 falls within any of the four-part definition of "a good faith communication in
3 furtherance of the right to petition or the right to free speech in direct
4 connection with an issue of public concern" set out in NRS 41.637(1)-(4).

5
6 a. NRS 41.637(1): If the communication is aimed at procuring any
7 governmental or electoral action, result or outcome

8 A communication is "a good faith communication in furtherance of the right
9 to petition or the right to free speech in direct connection with an issue of public
10 concern" if the communication is aimed at procuring any governmental or
11 electoral action, result or outcome. NRS 41.637(1).

12 Toll published his first resident" communication on April 7, 2017. That
13 communication included the "Washoe County resident" statement. Toll
14 published that communication four days before the April 11, 2017 sheriff recall
15 vote. The aim of the communication was to blunt Gilman's political influence in
16 the effort to recall the sheriff by undermining Gilman's standing and credibility
17 in Storey County by claiming Gilman is a Washoe County resident. The Court
18 concludes the aim of the "Washoe County resident" communication was to
19 procure an electoral action, result or outcome, i.e., to weaken and defeat the
20 sheriff recall effort by undermining public and voter support for Storey County
21 Commissioner Gilman.

22 Toll's aim in the four resident communications after the April 7, 2017
23 communication was to keep Storey County voters' attention focused on
24 Gilman's alleged part in the sheriff recall "debacle" and undermine Gilman's
25 standing and credibility in Storey County by questioning where Gilman resided
26 or lived. The Court concludes the aim of the four resident communications after
27 the April 7, 2017 communication was to procure an electoral action, result or
28 outcome, i.e., undermining public and voter support for Storey County
Commissioner Gilman.

- 1 b. NRS 41.637(2): The communication is to a Legislator, officer or
2 employee of the Federal Government, this state or a political
3 subdivision of the state, regarding a matter reasonably of concern
 to the respective governmental entity.

4 Toll did not produce a preponderance of evidence that any of the "resident"
5 communications were to a Legislator, officer or employee of the Federal
6 Government, this state or a political subdivision of the state, regarding a matter
7 reasonably of concern to the respective governmental entity. Gilman did not
8 allege the communications to the Storey County Sheriff and District Attorney,
9 and the Attorney General were defamatory. The Court concludes NRS 41.637(2)
10 has no application to the resident communications.

- 11 c. NRS 41.637(3): Written or oral statement made in direct
12 connection with an issue under consideration by a legislative,
13 executive or judicial body, or any other official proceeding
 authorized by law.

14 The Court finds Toll made a report to the Storey County Sheriff and District
15 Attorney, and the Attorney General regarding Gilman's residence. Toll
16 published a story about his making the reports in the October 16, 2017
17 communication. The sheriff's office, district attorney's office, and attorney
18 general's office are executive bodies. The Court concludes the October 16, 2017
19 communication was made in direct connection with an issue under
20 consideration by an executive body.

21 The Court finds Toll did not produce evidence that any of the other resident
22 communications were made in direct connection with an issue under
23 consideration by a legislative, executive or judicial body, or any other official
24 proceeding authorized by law. The Court concludes NRS 41.637(3) does not
25 apply to the other resident communications.

26 /////

27 /////

28 /////

1 d. NRS 41.637(4): Communication made in direct connection with
2 an issue of public interest in a place open to the public or in a
3 public forum.

4 (I) Public interest

5 To determine whether the resident communications were made in direct
6 connection with an issue of public interest the court looks to the guiding
7 principles in *Shapiro*.

8 The first guiding principle is that "public interest" does not equate with
9 mere curiosity. The Court finds that whether Storey County Commissioner
10 Gilman lives or resides in Storey County is not a matter of mere curiosity. The
11 Court concludes this guiding principle weighs in favor of finding the resident
12 communications were made in direct connection with an issue of public
13 interest.

14 The second guiding principle is that a matter of public interest should be
15 something of concern to a substantial number of people; a matter of concern to
16 a speaker and a relatively small specific audience is not a matter of public
17 interest. The Court finds that whether Storey County Commissioner Gilman
18 lives or resides in Storey County is something of concern to the residents of
19 Storey County, a substantial number of people, and not simply a matter of
20 concern to Toll and a relatively small specific audience. The Court concludes
21 this guiding principle weighs in favor of finding the resident communications
22 were made in direct connection with an issue of public interest.

23 The third guiding principle is that there should be some degree of closeness
24 between the challenged statements and the asserted public interest – the
25 assertion of a broad and amorphous public interest is not sufficient. The Court
26 finds the resident communications have some degree of closeness to the
27 asserted public interest of whether Storey County Commissioner Gilman resides
28 in Storey County. The Court concludes this guiding principle weighs in favor of

1 finding the resident communications were made in direct connection with an
2 issue of public interest.

3 The fourth guiding principle is the focus of the speaker's conduct should be
4 the public interest rather than a mere effort to gather ammunition for another
5 round of private controversy. The Court finds the focus of Toll's resident
6 communications was the public interest in whether Storey County
7 Commissioner Gilman lives or resides in Storey County, and was not a mere
8 effort to gather ammunition for another round of private controversy. The
9 Court concludes this guiding principle weighs in favor of finding the
10 communications were made in direct connection with an issue of public
11 interest.

12 The fifth and final guiding principle is that a person cannot turn otherwise
13 private information into a matter of public interest simply by communicating it
14 to a large number of people. The Court finds that where Storey County
15 Commissioner Gilman lives or resides was not private information but a matter
16 of public interest because a county commissioner should reside in the county he
17 represents. The Court concludes this guiding principle weighs in favor of
18 finding the communications were made in direct connection with an issue of
19 public interest.

20 The Court has weighed the *Shapiro* guidelines and concludes the resident
21 communications were made in direct connection with an issue of public
22 interest.

23

24 (ii) Public forum

25 Gilman did not appear to contest that Toll's website is a public forum.
26 Even if Gilman did contest it, most if not all California courts that have
27 considered the issue have concluded a public website is a public forum. *Vogel v.*
28 *Felice*, 127 Cal. App. 4th 1006, 26 Cal. Rptr. 3d 350 (2005); *Wilbanks v. Wolk*

1 121 Cal.App.4th 883, 897, 17 Cal. Rptr. 3d 497 (2004); *ComputerXpress, Inc. v.*
2 *Jackson* 93 Cal.App.4th 993, 1007, 113 Cal. Rptr. 2d 625 (2001). The Nevada
3 Supreme Court has looked to California law for guidance on anti-SLAPP issues
4 because California's and Nevada's anti-SLAPP statutes are similar in purpose
5 and language. *Shapiro*, 268.

6 The Court finds Toll's is a website open to the public, on which he posts
7 political information, and receives and posts reader's comments. The Court
8 concludes Toll's website is a public forum for the purposes of NRS 41.637(4).

9 The Court concludes the resident communications were made in direct
10 connection with an issue of public interest in a place open to the public or in a
11 public forum.

12
13 3. *Truthful communications or made without knowledge of falsehood*

14 The last issue on the question of whether the communications were good
15 faith communications is whether the communications were truthful or made
16 without knowledge of its falsehood. In his first affidavit Toll testified that he
17 conducts research for the pieces he writes. Mot. Ex. 11, ¶ 18. In his second
18 affidavit Toll testified more directly and fully regarding his due diligence. He
19 testified "that for each statement I made that Gilman claims is defamatory, I
20 investigated the facts before making the statement." Reply Ex. 2, ¶ 10(a). The
21 Court finds Attachment 3 to Toll's affidavit is a true and correct copy of his
22 October 16, 2017 website communication. In his first affidavit paragraph 15 Toll
23 testified he believes the contents of his stories, including the October 16, 2017
24 communication, were true. In the October 16, 2017 communication Toll stated
25 he made a public records request to the Storey County Assistant Manager
26 requesting the zoning of the Mustang Ranch compound. Toll alleged the
27 Assistant County Manager failed to provide the requested information for six
28 months. Toll also stated in the communication that he made a request of the

1 Storey County Clerk before his first resident communication requesting proof of
2 Gilman's resident and received a response that Gilman resides at 5B Wildhorse
3 Canyon Drive. Toll asked the Storey County Assessor where 5B Wildhorse
4 Canyon Drive was physically located and was informed that Gilman resides in a
5 double wide mobile home located behind the swimming pool at the Mustang
6 Ranch. The statements of the Storey County Clerk and Assessor are not
7 considered here as proof of the matter asserted but only to show what
8 knowledge Toll had when he made the communication. Based upon the
9 information he had, Toll did not believe that "Lance Gilman, one of the
10 wealthiest men in Northern Nevada, lives in a mobile home behind the
11 swimming pool with his employee and roommate Kris Thompson."

12 Toll did not prove that Gilman is a resident of Washoe County or that
13 Gilman is not a resident of Storey County, but he, Toll, did not have to prove
14 either. Based upon the information Toll had regarding Gilman's residence, the
15 Court concludes Toll proved by a preponderance of evidence that he did not
16 knowingly make a false statement when he published the resident
17 communications.

18 The Court concludes Toll met the burden under NRS 41.660(3)(a). The
19 Court concludes the communications were made in furtherance of the right to
20 free speech in direct connection with an issue of public concern.

21

22 *4. Burden of proof shifts to Gilman*

23 Because Toll met the burden of proof under NRS 41.660(3)(a) the burden
24 shifts to Gilman to demonstrate with prima facie evidence a probability of
25 prevailing on his defamation per se claim. The elements of defamation per se of
26 a public official or public officer are: (1) a false statement; (2) that is
27 defamatory; (3) an unprivileged publication to a third person; and (4) actual
28 malice.

1 Gilman need only establish his claim has minimal merit, but he must
2 establish it with competent, admissible evidence. As the *Cross v. Facebook*
3 court stated, "the evidence is what counts." *Cross* at 209. The Court cannot
4 resolve the merits of the overall dispute on a special motion to dismiss. The
5 Court cannot and therefore does not weigh the evidence, including the
6 credibility of witnesses in its analysis. Instead, the Court accepts as true the
7 evidence favorable to Gilman and evaluates Toll's evidence only to determine if
8 it has defeated Gilman's evidence as a matter of law. The Court must accept as
9 true all competent, admissible evidence favorable to Gilman.

10
11 (a) A false statement

12 The first element of defamation per se requires a false statement. To prove
13 the resident communications were false Gilman must produce some minimal
14 evidence that he resides in Storey County. The Court now turns to the evidence
15 produced on the resident issue. Gilman testified in his affidavit:

16 (1) "I have never been officially notified by any law enforcement or
17 governmental organization about any investigation whatsoever
18 challenging my residency in Storey County." Opp. Ex. 3, ¶ 39.

19 (2) "Contrary to the Defendant's assertions, I do live in Storey
20 County, Nevada. My address is 5 Wild Horse Canyon, and I have
21 lived there for 12 years or more." Opp. Ex. 3, ¶ 42.

22 (3) "I certainly never committed perjury as alleged by the Defendant.
23 The Defendant's statements are not true." Opp. Ex. 3, ¶ 43.

24 Gilman provided a copy of his driver's license which shows his address is 5
25 Wild Horse Canyon, Sparks, Nevada. Opp. Ex. 9.

26 Toll testified the Storey County Assessor informed him that 5 Wild Horse
27 Canyon is on the Mustang Ranch property. Although this statement is hearsay if
28 offered for the truth of the matter asserted, Toll did not in any way limit or

1 attempt to limit the use of his testimony. But the Court need not and does not
2 consider the Assessor's statement to decide this issue.

3 The Court concludes Gilman's testimony under oath that he lives in Storey
4 County is sufficient prima facie evidence that he lives in Storey County.

5
6 (b) A defamatory statement

7 The second element of defamation per se is that the false statement was
8 defamatory. "A statement is defamatory when it would tend to lower the subject
9 in the estimation of the community, excite derogatory opinions about the
10 subject, and hold the subject up to contempt. In reviewing an allegedly
11 defamatory statement, 'the words must be reviewed in their entirety and in
12 context to determine whether they are susceptible of a defamatory meaning.'
13 Whether a statement is defamatory is generally a question of law; however,
14 where a statement is 'susceptible of different constructions, one of which is
15 defamatory, resolution of the ambiguity is a question of fact for the jury.'" *Lubin*
16 *v. Kunin*, 117 Nev. 107, 111, 17 P.3d 422 (2001)(internal citations omitted).

17 The Court finds the resident communications were intended to and
18 would tend to cause Storey County residents to question or doubt whether
19 Storey County Commissioner Gilman lives in Storey County. Voters generally
20 and reasonably want their elected officials to live in the area the elected official
21 represents. The Court finds that Toll's statements suggesting, implying, or
22 outright accusing Storey County Commissioner Gilman of not residing or living
23 in Storey County and lying and perjuring himself about it would tend to lower
24 Gilman in the estimation of the community, excite derogatory opinions about
25 Gilman, and hold Gilman up to contempt. The Court concludes the resident
26 statements were defamatory.

27 /////

28 /////

1 (c) An unprivileged publication to a third person

2 The third element of defamation per se is an unprivileged publication to a
3 third person. Toll argued that insofar as the alleged defamatory statements
4 relate to media reporting on judicial proceedings the fair report privilege
5 applies. Toll failed to produce evidence of judicial proceedings. There cannot be
6 media reporting on judicial proceedings without judicial proceedings. Toll's
7 argument lacks factual or legal support.

8 The Court concludes the resident statements were unprivileged publications
9 to third persons.

10
11 (d) Actual malice

12 The fourth element of defamation per se of a public official or public figure
13 is actual malice. "Actual malice" means knowledge that the statement was false
14 or with reckless disregard of whether it was false or not. "Reckless disregard"
15 means the publisher of the statement acted with a high degree of awareness of
16 the probable falsity of the statement or had serious doubts as to the
17 publication's truth. "This test is a subjective one, relying as it does on 'what the
18 defendant believed and intended to convey, and not what a reasonable person
19 would have understood the message to be.'" *Pegasus* at 722.

20 Gilman's points and authorities in support of his opposition to Toll's anti-
21 SLAPP motion offers little of substance on the actual malice element. Beginning
22 on page 35 of Gilman's points and authorities at line 16 Gilman asserts there is
23 solid proof of actual malice. He then talks about Toll being unhappy about
24 Gilman opposing the sheriff; that Toll has continuously criticized and impugned
25 Gilman in the website communications; that Toll has a deep dislike of Gilman;
26 and that Toll has a private vendetta against Gilman. Gilman argued these
27 "facts" show Toll's negligence, motive and intent. The *Pegasus* court noted that

28 /////

1 recklessness or malice may be established through cumulative evidence of
2 negligence, motive, and intent.

3 On page 36 of his opposition, beginning at line 20, Gilman argued Toll did
4 little or no due diligence before making the statements; and made up the
5 assertions out of thin air through an overwrought imagination. Gilman did not
6 support these assertions with competent, admissible evidence.

7 Toll testified he investigated the facts before making the statements Gilman
8 alleged are defamatory, and that he believes the contents of his stories were
9 true, including his October 16, 2017 communication. In his October 16, 2017
10 communication, which was made nearly two months before Gilman filed this
11 action, Toll stated:

- 12 (1) He made a public records request to the Storey County Assistant
13 Manager requesting the zoning of the Mustang Ranch compound and
14 that the Assistant County Manager failed to provide the requested
15 information for six months;
- 16 (2) He made a request of the Storey County Clerk before his first resident
17 communication requesting proof of Gilman's residence and received a
18 response that Gilman resides at 5B Wild Horse Canyon Drive;
- 19 (3) He asked the Storey County Assessor where 5B Wild Horse Canyon
20 was physically located and was informed that Gilman resides in a
21 double wide mobile home located behind the swimming pool at the
22 Mustang Ranch.

23 Again, the statements of the Storey County Clerk and Assessor are not
24 considered here as proof of the truth of the matter asserted but only to show
25 what knowledge Toll had when he made the communications.

26 Toll included as part of his October 16, 2017 a letter he sent to the Storey
27 County District Attorney and Nevada Attorney General. In the letter Toll relates
28 that he received information from the Storey County Community Development

1 Department that none of the property on which the Mustang Ranch sits is
2 zoned residential. Toll continued, "In other words neither 5 nor 56 Wild Horse
3 Canyon Drive are legal residences; nobody can legally reside there or claim
4 either address as their legal residence." Opp. Ex. 9.

5 Toll also knew, as any informed Northern Nevadan would, that Gilman is a
6 financially successful businessman.

7 Based upon the information he had, Toll did not believe Gilman the-
8 successful-businessman lives in a trailer. Toll stated in his October 16, 2017
9 communication: "Lance Gilman, one of the wealthiest men in Northern Nevada,
10 lives in a mobile home behind the swimming pool with his employee and
11 roommate Kris Thompson."

12 The Court finds Toll did conduct some research on Gilman's residence
13 before he published the resident communications and that the information he
14 received as a result of that research caused him to disbelieve that Gilman lives
15 in a trailer behind the Mustang Ranch pool.

16 The Court concludes Gilman has not produced prima facie evidence that Toll
17 knew any of his resident communications were false or acted with a high degree
18 of awareness of the probable falsity of the statement or had serious doubts as to
19 the publication's truth. The Court concludes Gilman failed to produce prima
20 facie evidence that Toll published the resident communications with actual
21 malice.

22

23 5. *Discovery request*

24 Gilman requested an opportunity to conduct discovery under NRS 41.660(4)
25 which requires a court to allow limited discovery upon a showing that
26 information necessary to meet or oppose the burden under NRS 41.660(3)(b) is
27 in the possession of another party or a third party and is not reasonably
28 available without discovery. Gilman failed to make the showing required by

1 NRS 41.660(3)(b) on the issue of actual malice. The Court concludes that here,
2 information as to whether Toll knew the resident statements were false or
3 whether he acted with a high degree of awareness of the probable falsity of the
4 statement or had serious doubts as to the publication's truth, is necessary for
5 Gilman to meet or oppose the burden under NRS 41.660(3)(b), and that
6 information is in the possession of Toll or a third party and is not reasonably
7 available without discovery. Therefore Gilman's request to conduct discovery is
8 granted. Gilman will be allowed to conduct discovery limited solely to
9 information as to whether Toll knew the resident statements were false or
10 whether he acted with a high degree of awareness of the probable falsity of the
11 statement or had serious doubts as to the publication's truth.
12

13 **B. Reverse graft**
14

15 *1. Reverse graft communication*

16 The reverse graft statements come from a communication published on
17 August 6, 2017. A copy of the communication is attached to Gilman's
18 Opposition as Exhibit 10. The specific statement quoted by Gilman is found in
19 the first paragraph on the fifth page of the exhibit:

20 When this deal is approved by Marshall McBride and Jack McGuffey,
21 TRIC will have accomplished another spectacular job of bamboozling
22 Storey County officials. It will mean that Storey County and Nevada
23 taxpayers have dumped \$100 million dollars of what can only be
24 described as "reverse graft" directly into the pockets of the band of merry
25 TRICsters.

26 Gilman argued there was no reverse graft and explained that there is no
27 payment of \$100 million going into Gilman's pockets.
28

29 *2. Good faith communication*

30 The first issue is whether the statement is a good faith communication in
31 furtherance of the right to petition or the right to free speech in direct

1 connection with an issue of public concern. NRS 41.660(3)(a). The Court turns
2 to the definition set out in NRS 41.637.

3
4 (a) Communication aimed at procuring any governmental or electoral
5 action, result or outcome

6 NRS 41.637(1) requires the communication be aimed at procuring any
7 governmental or electoral action, result or outcome. The aim of Toll's
8 hyperbolic communication including his use of the term "reverse graft" is that
9 the multimillion dollar pipeline deal is bad for Storey County residents but good
10 for Gilman, and therefore Storey County residents should take political action
11 and oust Gilman. Specifically, Toll stated on page 8 of the communication:

12 This pipeline "deal" is the latest effort to benefit TRIC at the
13 expense of every person in Storey County and should make
14 everyone stand up and voice outrage.

15 If our current County Leadership fail to recognize this for what it
16 is and approve it, it's time to demand a change of those leaders.

17 Marshall McBride is our only hope to shoot this hustle down. If
18 you think Lance should finance his own projects, call or email
19 Marshall and let him know.

20 After these calls to political action Toll included an email address and
21 telephone number for Commissioner McBride.

22 The Court concludes this communication and the use of "reverse graft" was
23 aimed at procuring an electoral action, result or outcome – voicing outrage over
24 the deal that would allegedly hurt Storey County residents and benefit Gilman,
25 demanding a change of leaders if they approved the deal, and encouraging
26 residents to call or email Commissioner McBride to encourage him to shoot
27 down the deal.

28 (b) Directed to a government officer

NRS 41.637(2) requires the communication be directed to a government
officer. The reverse graft communication was directed at all Storey County

1 residents but not to a specific government officer so the communication did not
2 fit within this part of the definition.

3
4 (c) Direct connection with an issue under consideration by a
5 legislative body

6 NRS 41.637(3) requires the statement be made in direct connection with an
7 issue under consideration by a legislative body. The instant statement was made
8 in direct connection with the pipeline deal which was under consideration by
9 the Storey County Commission, a legislative body. The Court concludes the
10 statement was made in direct connection with an issue under consideration by a
11 legislative body.

12 (d) Direct connection with an issue of public interest

13 NRS 41.637(4) requires the communication be made in direct connection
14 with an issue of public interest. To determine whether the communication was
15 made in direct connection with an issue of public interest the court looks to the
16 guiding principles set forth in *Shapiro*.

17
18 (i) Public interest

19 The first guiding principle is that "public interest" does not equate with
20 mere curiosity. The Court concludes that the multimillion dollar pipeline deal
21 had potential effects on all Storey County residents and was not a matter of
22 mere curiosity. This guiding principle weighs in favor of finding the
23 communication and the reverse graft statement were made in direct connection
24 with an issue of public interest.

25 The second guiding principle is that a matter of public interest should be
26 something of concern to a substantial number of people; a matter of concern to
27 a speaker and a relatively small specific audience is not a matter of public
28 interest. The pipeline deal had potential effects on every Storey County resident

1 and was not just a matter of concern to Toll and a relatively small specific
2 audience. This guiding principle weighs in favor of finding the communication
3 and the reverse graft statement were made in direct connection with an issue of
4 public interest.

5 The third guiding principle is that there should be some degree of closeness
6 between the challenged statement and the asserted public interest – the
7 assertion of a broad and amorphous public interest is not sufficient. The instant
8 communication was made before the Storey County Commission voted on the
9 pipeline deal. The communication criticized Gilman's part in the deal including
10 the use of the "reverse graft" phrase, and expressed outrage at the use of Storey
11 County tax dollars for the project. The Court concludes there is a degree of time
12 and subject matter closeness between the challenged statement and the
13 asserted public interest, and that the communication is not an assertion of a
14 broad and amorphous public interest. This guiding principle weighs in favor of
15 finding the communication and the statement were made in direct connection
16 with an issue of public interest.

17 The fourth guiding principle is the focus of the speaker's conduct should be
18 the public interest rather than a mere effort to gather ammunition for another
19 round of private controversy. The focus of Toll's communication was killing the
20 pipeline deal and the reverse graft statement was intended to criticize Gilman
21 for his part in the deal. Toll published the communication before the
22 Commission voted on the deal. The Court concludes Toll's statement was in the
23 public interest and not a mere effort to gather ammunition for another round of
24 private controversy. This guiding principle weighs in favor of finding the
25 communication and the statement were made in direct connection with an issue
26 of public interest.

27 The fifth and final guiding principle is that a person cannot turn otherwise
28 private information into a matter of public interest simply by communicating it

1 to a large number of people. The Court concludes the information regarding the
 2 pipeline deal and Gilman's involvement in the deal was not private information
 3 but a matter of public interest. This guiding principle weighs in favor of finding
 4 the communication and the statement were made in direct connection with an
 5 issue of public interest.

6 The Court concludes the communication and the statement were made in
 7 direct connection with an issue of public interest.

8
 9 (ii) Public forum

10 The Court concluded above that Toll's website is a public forum.

11
 12 (3) *Truthful statement or made without knowledge of its falsehood*

13 The last issue on the question of whether the communication was a good
 14 faith communication is whether the communication was truthful or made
 15 without knowledge of its falsehood. The Court concludes Toll did not prove the
 16 statement was truthful.

17 The Court looks to the facts to see if Toll proved the statement was made
 18 without knowledge of its falsehood. Toll referenced in his communication, a
 19 communication prepared and published by Nicole Barde on her blog about the
 20 August 1, 2017 Commissioner meeting. Toll stated in his communication:

21 Nicole Barde has been the Lone Ranger in her reporting of County
 22 Commissioner Meetings since she started in 2015. In her
 23 breakdown of the August 1st meeting (which I encourage you
 24 to read here (<http://www.bardeblog.com/so-what's-going-on/212-summary-of-the-august-1-2017-storey-county-commission-meeting>)), she delivers a lengthy in-depth and dead on point
 25 dissection of the latest effort of Brothel Owner, TRIC Executive
 26 and self-serving crony County Commissioner Lance Gilman to
 once again have Storey County Taxpayers forfeit \$35 Million
 Dollars of future tax revenue from a "special tax area" so he and
 Don Norman can make even more money.

27 (Emphasis in original.) Opp. Ex. 10, p. 2-3.

28 /////

1 Toll stated "Ms. Barde accurately called this Corporate Welfare, I call it
2 reverse graft. In the alternate reality call [sic] that exists in the Courthouse, it's
3 a 'public-private partnership-investment thingy.'" Opp. Ex. 10, p. 3.

4 Neither party included Barde's communication as an exhibit and so the
5 Court has not reviewed it. Gilman did not testify or argue that Barde's
6 communication was false, incorrect, incomplete, or defamatory.

7 Toll's communication contains many extravagant exaggerations including:

- 8 - We [Storey County residents] and our pocketbooks serve at the pleasure
9 and plunder of Lance Gilman
- 10 - Storey County Taxpayers gleefully divert tax revenue directly into the
11 band of merry TRICsters pockets.
- 12 - ... you have to admire the ginormity of the brass balls these hucksters
13 clang around in broad daylight.
- 14 - [Referring to charts contained in the communication] I call these
15 projections speculative fantasy mindful that we are one Orange Tweet or
16 North Korean Missile into Seoul away from a major deviation from the
17 ice cream and lollypops [sic] shown in the charts above.
- 18 - The last point I want to make is to remind sober minded residents of
19 Storey County that encumbering us with this debt takes the cream off the
20 top of the annual flood of mythical revenue from the Oceans of Cash in
21 the Sea of TRIC.

22 No reasonable person would believe any of these statements is true.

23 With this context the Court turns to the phrase "reverse graft," a phrase Toll
24 apparently made up. The phrase has no relevant defined meaning. Looking at
25 the words individually, the adjective "reverse" means opposite or contrary to a
26 specified thing; operating in opposite or contrary fashion to what is usual.
27 Webster's Third New International Dictionary 1943 (2002). One meaning of
28 "graft" is the acquisition of money or property by dishonest or questionable
means, as by taking advantage of a public office to obtain profit; or illegal or
unfair practice for profit or personal gain. Id. 985. Using the dictionary
definitions "reverse graft" means operating in an opposite or contrary fashion to
what is the usual acquisition of money or property by dishonest or questionable
means, as by taking advantage of a public office to obtain profit; or illegal or

1 unfair practice for profit or personal gain. The Court is unable to make sense of
2 the term "reverse graft." "Graft" sounds bad, but Toll used the term "reverse
3 graft" and the words have to be taken together. In *Greenbelt Cooperative*
4 *Publishing Assn., Inc. v. Bresler*, 398 U.S. 6, 26 L. Ed. 2d 6, 90 S. Ct. 1537
5 (1970) a real estate developer had engaged in negotiations with a city for a
6 zoning variance on land he owned, while simultaneously negotiating with the
7 city on other land the city wanted to buy from him. A local newspaper published
8 articles that included statements that some people had characterized the
9 developer's negotiating position as "blackmail." The developer sued for libel.
10 The court rejected a contention that liability could be premised on the notion
11 that the word "blackmail" implied the developer had committed the actual
12 crime of blackmail and held that "the imposition of liability on such a basis was
13 constitutionally impermissible – that as a matter of constitutional law, the word
14 'blackmail' in those circumstances" was not defamation, but just rhetorical
15 hyperbole, a vigorous epithet used by those who considered the developer's
16 negotiating position extremely unreasonable. *Id.* 12-13.

17 The facts in the instant case have some similarity to the *Greenbelt* facts.
18 Gilman is the exclusive broker for, a principal in and marketing director for
19 TRI. TRI sought a multi-million dollar deal with the Storey County Commission
20 for a pipeline. Gilman is also a Storey County Commissioner. Toll considered
21 Gilman's position with TRI and his position with Storey County to be extremely
22 unreasonable. As a result Toll lashed out with a communication that included
23 the meaningless phrase "reverse graft," which he intended as a vigorous epithet,
24 and what is in fact rhetorical hyperbole. The Court concludes the term, taken in
25 the context of the full communication, is nonsensical and not reasonably
26 susceptible to a defamatory construction.

27 /////

28 /////

1 The Court concludes Toll met the burden under NRS 41.660(3)(a). The
2 Court concludes the communication and statement were made in furtherance of
3 the right to free speech in direct connection with a issue of public concern.

4
5 *4. Burden shifts to Gilman*

6 Because Toll met the burden under NRS 41.660(3)(a) the Court must
7 determine whether Gilman has demonstrated with prima facie evidence a
8 probability of prevailing on the his defamation per se claim. Gilman
9 acknowledges he must prove the allegedly defamatory statement was made with
10 actual malice, that is, with knowledge that it was false or with reckless disregard
11 of whether it was false or not.

12 In his affidavit, Opp. Ex. 3, ¶ 47-64, Gilman denied reverse graft and
13 explained the pipeline and infrastructure deals. Because "reverse graft" is a
14 nonsensical phrase Gilman did not and cannot prove it was false or made with
15 reckless disregard of whether it was false or not.

16
17 *5. Discovery request*

18 Gilman requested an opportunity to conduct discovery under NRS 41.660(4)
19 which requires a court to allow limited discovery upon a showing that
20 information necessary to meet or oppose the burden under NRS 41.660(3)(b) is
21 in the possession of another party or a third party and is not reasonably
22 available without discovery. Gilman failed to make the showing required by
23 NRS 41.660(3)(b). He made no showing that any information regarding reverse
24 graft is in the possession of another party or a third party *and* is not reasonably
25 available without discovery. Therefore the request to conduct discovery is
26 denied.

27 Based upon the foregoing the special motion to dismiss must be granted as
28 to the "reverse graft" statement.

1 C. Re-licensing Mustang Ranch

2 The statements regarding re-licensing the Mustang Ranch come from a
3 communication Toll published on February 26, 2017. Toll says the
4 communication was submitted by a Storey County resident who wanted to
5 remain anonymous. A copy of the communication is attached to Gilman's
6 Opposition as Exhibit 11. The specific statement quoted by Gilman is found in
7 the last paragraph on the second page of the exhibit.

8 Funny thing is, the courts didn't agree and the investor won. But,
9 in the meantime, because Lance had shut down the Wildhorse and
10 reopened it as the Mustang, he thought he didn't need to go
11 through the investigation that the Nevada Revised Statutes
12 require for the opening of a new brothel. He didn't want to follow
13 the law. The County Commissioners even agreed with him. Why
14 should Lance, the man who's been a virtual Santa Claus (at least
15 he tries to convince people he is) for Storey County, have to follow
16 the law? Sheriff Antinoro said the law had to be followed and that
17 the Mustang had to be closed for the required number of days, per
18 state statute, for the investigation with which ALL brothels must
19 comply. King Lance was furious. He secretly plotted pay back.

20 Gilman's Complaint (p. 5, ¶ 18(e), the heading for this section of his brief
21 (Opp. p. 12, sec. B(2)©), and his argument regarding the quoted language is that
22 the communication said Gilman didn't follow the law when re-licensing the
23 Mustang Ranch. Opp. p. 12. Toll's communication does not say Gilman did not
24 follow the law. The communication says Gilman "thought he didn't need to go
25 through the investigation that the Nevada Revised Statutes require for the
26 opening of a new brothel," and that "[h]e didn't want to follow the law." Opp.
27 Ex. 11, p. 2-3.

28 Gilman failed to set forth any facts, cite any law, or argue that the actual
statements made in the communication were defamatory or that the statements
were made with actual malice. The Court concludes the actual statements are
not defamatory and will dismiss this portion of Gilman's claim.

////

////

1 D. Receiving land with zero consideration

2 The statements regarding special consideration regarding rules and
3 regulations come from a communication Toll published on December 3, 2017. A
4 copy of the communication is Exhibit 8 to Gilman's opposition. The language at
5 issue is:

6 Special Interests

7 The Commissioner Lance Gilman – TRIC Special Interest merry-
8 go-round that gives Mr. Gilman and TRIC access to the Storey
9 County checkbook, tax coffers, real property and special
consideration regarding rules and regulations.

10 ...

11 • Repeatedly reconvening Storey County property to TRIC with
12 zero consideration or payment that TRIC has turned around and
13 included the free property into lucrative land deals, including the
14 one that gave a portion of the USA Parkway to TRIC (for free)
which Mr. Gilman and TRIC turned around and sold to NDOT for
\$43 Million Dollars (without giving us a single penny or paying
down the \$47 Million Dollars Storey County credit card balance).

15 Gilman admitted under oath that Storey County reconveyed land to TRI as
16 part of the NDOT extension right of way, and TRI did not get all of the USA
17 Parkway back from the County for free. Gilman Aff. p. 8, ¶ 81 and 85. It is clear
18 from Gilman's testimony that Storey County did reconvey land to TRI for which
19 TRI did not pay Storey County. The Court concludes Gilman's own testimony
20 proves that Toll's statement is true and therefore not defamatory, and therefore
21 this portion of Gilman's claim will be dismissed on that ground.

22 D. Washington, D.C. trip

23
24 1. Washington, D.C. trip communication

25 The statements regarding Gilman traveling to Washington, D.C. come from
26 communications Toll published on April 29, 2017 and May 2, 2017. A copy of
27 the April 29, 2017 communication is Exhibit 12 to Gilman's opposition, and the
28 May 2, 2017 communication is Exhibit 13. Gilman did not quote specific

1 language related to this portion of his claim, or refer the Court to any particular
2 page of the 41 pages that make up Exhibits 12 and 13.

3 On the first page of the April 29, 2017 communication Toll reported that
4 Storey County sent Gilman and a Storey County lobbyist to Washington, D.C.
5 from January 17 to 22, 2017. Toll stated the purpose of the trip was to lobby for
6 a zip code bill to prevent Storey County from losing out on substantial sales tax
7 revenue. Toll opined that it is a good idea to get the zip code issue resolved.

8 Toll continued his communication by relating he realized Donald Trump
9 was inaugurated on January 21, 2017. After he realized this, Toll, on February
10 16, 2017, made a records request for receipts from the trip. On March 7, 2017
11 the Storey County lobbyist that had accompanied Gilman to Washington, D.C.
12 addressed the Storey County Commission and provided information about
13 lobbying for Storey County. At this point in his communication Toll provided a
14 link that would take a reader to the Commission recording of the lobbyist's
15 report. Toll then stated: "To recap, we paid \$,7611.50 for them to attend Donald
16 Trump's Inauguration." Opp., Ex. 12, p. 3.

17 Toll continued, "I have been to D.C. several times, but never on
18 Inauguration Week. My sources tell me it is pretty much like the week that
19 precedes Super Bowl; business as unusual. If you want to schedule meaningful
20 work, you're in Fantasyland." Toll suggests the lobbying could have been done
21 by Skype. He pointed out that government spending is all about priorities; that
22 \$7,611.50 represents just under one quarter of the annual salary of a new
23 deputy or a new patrol vehicle. He then asks, "What are the priorities in Storey
24 County? "

25 The next pages are Gilman's and the lobbyist's Marriott receipts from the
26 trip. Each receipt includes a hand written statement: "DC trip to Trump
27 inauguration." Documentation of airfare is also posted to the website.

28 The website then has pages of chat posts.

1 Exhibit 13 appears to consist of a series chat posts between Toll and a person
2 he describes as a Gilman spokesman.

3
4 *2. Good faith communication*

5 The first issue is whether the statement is a good faith communication in
6 furtherance of the right to petition or the right to free speech in direct
7 connection with an issue of public concern. NRS 41.660(3)(a). To determine
8 that, the Court must determine whether the statement falls within any of the
9 four definitions set out in NRS 41.637.

10
11 (a) Communication aimed at procuring any governmental or
12 electoral action, result or outcome

13 NRS 41.637(1) requires the communication be aimed at procuring any
14 governmental or electoral action, result or outcome. The primary focus of Toll's
15 communication is accountability for Storey County spending – the legitimacy of
16 Storey County paying Gilman's room and airfare expenses to lobby in
17 Washington D.C. during the week of the U.S. presidential inauguration. The
18 Court concludes these stories and the specific statements were aimed at
19 procuring an electoral action, result, or outcome regarding Storey County's use
20 of tax funds and Gilman's continuing as a Storey County Commissioner.

21
22 (b) Communication directed to a government officer or in
23 direct connection with with an issue under consideration
by a government body or official

24 NRS 41.637(2) requires the communication be directed to a government
25 officer, and subsection (3) requires the statement be made in direct connection
26 with an issue under consideration by a government body or official. The instant
27 statements do not meet either of these requirements.

1 (c) Direct connection with an issue of public interest

2 NRS 41.637(4) requires the communication be made in direct connection
3 with an issue of public interest. To determine whether the communication was
4 made in direct connection with an issue of public interest the court looks to the
5 guiding principles for set forth in *Shapiro*.

6 The first guiding principle is that "public interest" does not equate with
7 mere curiosity. The Court concludes the public has an interest in how tax
8 dollars are spent. The effort to inform the public about Storey County's
9 spending for the Washington, D.C. trip was not a matter of mere curiosity. This
10 guiding principle weighs in favor of finding the communication and the
11 statement were made in direct connection with an issue of public interest.

12 The second guiding principle is that a matter of public interest should be
13 something of concern to a substantial number of people; a matter of concern to
14 a speaker and a relatively small specific audience is not a matter of public
15 interest. How Storey County tax dollars are spent is an important matter to all
16 Storey County taxpayers and not just a matter of concern to Toll and a relatively
17 small specific audience. This guiding principle weighs in favor of finding the
18 communication and the statement were made in direct connection with an issue
19 of public interest.

20 The third guiding principle is that there should be some degree of closeness
21 between the challenged statements and the asserted public interest – the
22 assertion of a broad and amorphous public interest is not sufficient. The
23 communication criticized Gilman and other county officials about the spending
24 for the trip. The Court concludes there is a degree of closeness between the
25 asserted public interest – responsible spending of taxpayer dollars – and
26 information regarding the Washington, D.C. trip. The Court concludes these
27 communications are not an assertion of a broad and amorphous public interest.
28 This guiding principle weighs in favor of finding the communication and the

1 statement were made in direct connection with an issue of public interest.

2 The fourth guiding principle is the focus of the speaker's conduct should be
3 the public interest rather than a mere effort to gather ammunition for another
4 round of private controversy. The focus of Toll's communication was whether
5 the use of tax dollars for the trip was legitimate, and in the best interests of
6 Storey County taxpayers. The Court concludes Toll's statement was in the
7 public interest and not a mere effort to gather ammunition for another round of
8 private controversy. This guiding principle weighs in favor of finding the
9 communication and the statement were made in direct connection with an issue
10 of public interest.

11 The fifth and final guiding principle is that a person cannot turn otherwise
12 private information into a matter of public interest simply by communicating it
13 to a large number of people. The Court concludes the information regarding the
14 spending of taxpayer dollars on the Washington, D.C. trip was not private
15 information but a matter of public interest in Storey County. This guiding
16 principle weighs in favor of finding the communication and the statement were
17 made in direct connection with an issue of public interest.

18 The Court concludes the communication and the statement were made in
19 direct connection with an issue of public interest.

20

21 *3. Truthful statement or made without knowledge of falsehood*

22 The last issue on the question of whether the communication was a good
23 faith communication is whether the communication was truthful or made
24 without knowledge of its falsehood. In his first affidavit Toll testified that he
25 conducts research for the pieces he writes. In this communication, Toll related
26 that the Storey County lobbyist reported on the lobbying efforts during the
27 Washington, D.C. trip and Toll provided a link for readers to listen to the
28 lobbyist's report. Toll downplayed the lobbying efforts. He included

1 information that the week of the U.S. presidential inauguration is not the best
2 week to do business in Washington, D.C. Gilman does not deny attending the
3 inauguration. Toll included receipts he received from the County which
4 included the handwritten notation "DC trip to Trump inauguration." Toll
5 suggested an alternative to traveling to Washington to lobby – Skype. This
6 probably should not be taken too seriously. But neither should the statement,
7 "we paid \$7,611.50 for them to attend the inauguration" be taken out of context
8 and understood literally. Read in the context of the full communication, which
9 includes statements about who Gilman and the lobbyist talked to, a link to the
10 lobbyist's report to the County Commission, the receipts indicating "DC trip to
11 Trump inauguration," a reasonable person would read the statement "we paid
12 \$7,611.50 for them to attend the inauguration" to mean that the big event
13 during the lobbying trip was the inauguration, not that nothing was done in
14 connection with the zip code issue. The Court concludes the statement in
15 context is not false or susceptible to a defamatory construction.

16 The Court concludes Toll met the burden under NRS 41.660(3)(a). The
17 Court concludes the communication and statement were made in furtherance of
18 the right to free speech in direct connection with a issue of public concern.
19

20 *4. Burden shifts to Gilman*

21 Because Toll met the burden under NRS 41.660(3)(a) the Court must
22 determine whether Gilman demonstrated with prima facie evidence a
23 probability of prevailing on the his defamation per se claim.

24 Gilman's evidence is his affidavit testimony, Opp. Ex. 3, ¶ 97-98. Gilman
25 testified the trip was on behalf of Storey County and there was significant
26 lobbying. As stated above, a reasonable reader of this communication would not
27 take the statement, "we paid \$7,611.50 for them to attend the inauguration"
28 literally. Read in the context of the full communication, which includes

1 statements about who Gilman and the lobbyist talked to, a link to the lobbyist's
2 report to the County Commission, the receipts indicating "DC trip to Trump
3 inauguration," a reasonable person would read the statement "we paid
4 \$7,611.50 for them to attend the inauguration" to mean that the big event
5 during the lobbying trip was the inauguration, not that nothing was done in
6 connection with the zip code issue. The Court concludes Gilman failed to
7 produce prima facie evidence that the communication was false or defamatory.
8 The Court concludes Gilman also failed to prove actual malice – that Toll made
9 the communication knowing it was false or the statement acted with a high
10 degree of awareness of the probable falsity of the statement or had serious
11 doubts as to the publication's truth.

12 The Court concludes Gilman failed to demonstrate with prima facie evidence
13 a probability of prevailing on the his defamation per se claim.

14

15 *5. Discovery*

16 Gilman requested an opportunity to conduct discovery under NRS
17 41.660(4). Gilman failed to make the showing required by NRS 41.660(3)(b).
18 The information which allegedly supports Toll's accusations came from the
19 Storey County manager's office and is reasonably available without discovery.
20 Therefore the request to conduct discovery is denied.

21 Based upon the foregoing the special motion to dismiss must be and is
22 granted as to the Washington, D.C. trip communication.

23

24 **E. Special consideration regarding rules and regulations**

25 The statement regarding special consideration regarding rules and
26 regulations come from a communication Toll published on December 3, 2017. A
27 copy of the communication is Exhibit 8 to Gilman's opposition. The language at
28 issue is:

1 Special Interests

2 The Commissioner Lance Gilman – TRIC Special Interest merry-
3 go-round that gives Mr. Gilman and TRIC access to the Storey
4 County checkbook, tax coffers, real property and special
5 consideration regarding rules and regulations.

6 After this opening paragraph Toll lists five examples of the alleged special
7 consideration. Gilman's challenge to the Storey County reconveying land to
8 TRIC without consideration was addressed above. Gilman does not argue any of
9 the other items on the list are defamatory.

10 Taken in context, which is that Gilman receives special consideration and
11 here are five examples of special consideration, one that was addressed above
12 and four that Gilman does not challenge, Gilman has failed to show that the
13 statement is defamatory. Rather the communication is rhetorical hyperbole,
14 vigorous epithets, and lusty and imaginative expressions of contempt and
15 language used in a loose, figurative sense. Such language will not support a
16 defamation action. *Grenier*.

17 The Court concludes the special motion to dismiss must be granted as to this
18 portion of Gilman's claim.

19 F. Reimbursing the ethics fine and recall expenses

20 The statement regarding reimbursing the County for recall expenses comes
21 from a communication Toll published on December 3, 2017. A copy of the
22 communication is Exhibit 6 to Gilman's opposition. The language at issue is:

23 Brothel Owner Lance Gilman told thestoryteller online he will
24 cover the 1000.00 fine incurred by his ethics investigation request
25 filed against Sheriff Gerald Antinoro.

26 In the spirit of moving peacefully and constructively forward, we
27 have pledged to not only pay the \$1,000 fine imposed on the
28 Sheriff as a result of our petty complaint but also reimburse
Storey County for the estimated \$30,000 spend on the Recall
Election.

Gilman argues these statements are not true.

1 Statements cannot form the basis of a defamation action if they cannot be
2 reasonably interpreted as stating actual facts about an individual. Thus,
3 rhetorical hyperbole, vigorous epithets, lusty and imaginative expressions of
4 contempt and language used in a loose, figurative sense will not support a
5 defamation action. *Grenier*.

6 The Court concludes this communication and the specific statements are
7 rhetorical hyperbole and cannot be reasonably interpreted as stating actual
8 facts about Gilman. Therefore the Court concludes the special motion to
9 dismiss must be granted as to this portion of Gilman's claim.

10
11 V. ORDER

12 IT IS ORDERED:

13 Gilman may conduct discovery limited solely to information as to whether
14 Toll knew the resident communications were false or whether he acted with a
15 high degree of awareness of the probable falsity of the statement or had serious
16 doubts as to the publication's truth.

17 Gilman's discovery must be completed by May 11, 2018. Gilman will have
18 until May 25, 2018 to file and serve a supplemental opposition to the anti-
19 SLAPP motion. Toll will have until June 8, 2018 to file a supplemental reply.
20 Toll will file a request to submit the matter for decision on or before June 8,
21 2018.

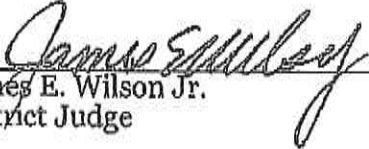
22 The decision on the Anti-SLAPP Special Motion to Dismiss regarding the
23 resident statements and Toll's request for attorney's fees and costs will be
24 delayed until Gilman completes the limited discovery and the parties complete
25 the ordered briefing.

26 Other activity in this case is stayed until the Court rules on the anti-SLAPP
27 motion regarding resident communications.

28 /////

1 The special motion to dismiss is granted as to the statements related to
2 reverse graft, re-licensing Mustang Ranch, receiving land with zero
3 consideration, the Washington, D.C. trip, special consideration regarding rules
4 and regulations, and reimbursing ethics fine and recall expenses.

5 April 9, 2018.

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7 
8 James E. Wilson Jr.
9 District Judge
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the First Judicial District Court, and I certify that on April 9, 2018, I served the foregoing

Order by:

 Placing a true and correct copy of it in a sealed, envelope, postage prepaid, and depositing the envelope in the U.S. Post Office mail box at 1111 South Roop Street, Carson City, Nevada; or

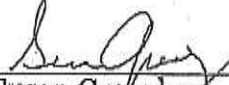
X Placing a true and correct copy of it in the pick up box located in the Carson City Court Clerk's office.

I used the following addresses:

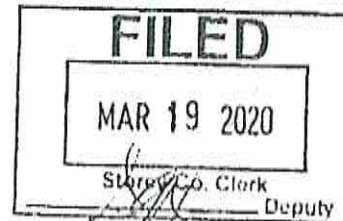
John L. Marshall, Esq.
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Luke Busby, Esq.
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Gus W. Flangas, Esq.
Jessica K. Peterson, Esq.
3275 South Jones Blvd., Suite 105
Las Vegas, NV 89146



Susan Greenburg
Judicial Assistant



IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR STOREY COUNTY

LANCE GILMAN, an individual,
Plaintiff,

CASE NO. 18 TRT 00001 1E
DEPT. 2

vs.

SAM TOLL, an individual; DOES I-V,
inclusive; and ROE ENTITIES VI-X,
inclusive,

Defendants.

ORDER AFTER REMAND

The Supreme Court remanded this matter with instructions to determine whether Toll qualifies for protection under the news shield statute, and to reconsider the decision on the motion to compel in light of the decision on whether Toll qualifies.

Does Toll qualify for protection under the news shield statute?

Under Nevada's news media privilege no reporter of any newspaper may be required to disclose in a legal proceeding any information obtained or prepared by the reporter in his professional capacity in gathering, receiving, or processing information for communication to the public, or the source of any information procured or obtained by the reporter. To determine whether Toll qualified for protection under the news shield statute the court must determine whether his blog is a newspaper.

The Supreme Court agreed Toll is a reporter. Toll is a reporter because of the substance of his published articles, namely, reports of facts or alleged facts, opinions,

commentary, and/or satire.

Gilman alleged that from February into December 2017 Toll libeled him in 11 articles. There is no question Toll targeted Gilman for criticism, accusations, and satire. Toll began publishing articles on his blog in February 2017. For the five plus months from February 24, 2017 to August 2, 2017, Toll published, in addition to the Gilman articles, fifteen articles on a variety of local current events. A report of recent or current events is news. <https://www.merriam-webster.com/dictionary/news>. Toll published at least one current-event-article every month from February 2017 through August 2017, and multiple articles during some months. Joint Trial Stmt., Exs. g, h, and l-z. Toll regularly, at least monthly, and consistently, every month from February 2017 until at least August 2017, published both Gilman and current-event-articles.

The topics of the current-event-articles Toll published include: the arts, sports, elections, an Easter egg hunt, arrests, a criminal preliminary hearing, Lockwood, a life memorial, a musical group, a new sheriff's office car, a county employee's retirement, a wild horse conference, a county job opening, and National Night Out. These articles reported current events and activities—the kind of current events and activities one would expect to see in a small town newspaper. The articles on Toll's blog provided news and other information local readers and others might find useful, interesting, and/or humorous.

To prepare to write all 26 articles Toll obtained, gathered, and received information. Some of the information Toll procured and received about Gilman came from unnamed sources. Toll obtained, gathered, received, procured, and processed information, including the information from unnamed sources for the purpose of writing the articles, in other words, in his professional capacity as a reporter. He wrote the articles for communication to the public by publishing them on his blog.

Because (1) Toll is a reporter; (2) he regularly and consistently published current-event-articles; (3) the articles published on his blog provided information regarding current events—news; (4) Toll obtained, gathered, received, procured, and processed

1 information, including the information from unnamed sources, in his professional
2 capacity as a reporter; (5) he wrote the articles for communication to the public by
3 publishing them on his blog; and (6) he did communicate the articles to the public by
4 publishing them on his blog; the Court finds and concludes Toll's blog was the
5 functional equivalent of a traditional printed newspaper and therefore is a newspaper.

6 Based upon the facts in the preceding paragraph, and because the blog is a
7 newspaper, the court further concludes Toll qualified for protection under the news
8 shield statute at the time the allegedly libelous articles were published.

9
10 *Should Gilman be allowed to depose the experts that provided affidavits for Toll's*
11 *motion?*

12 The Court did not find the affidavits submitted by Toll to be helpful in deciding
13 whether Toll qualified for the news media privilege and did not rely on any information
14 contained in the affidavits. Because the Court did not rely on the affidavits submitted by
15 Toll in making its decision, Gilman's request to depose the affiants is denied.

16
17 *Should the decision on the motion to compel be changed?*

18 Because the court concluded Toll qualified for protection under the news shield
19 statute at the time the allegedly libelous articles were published Gilman's motion to
20 compel must be denied.

21
22 *What is the next step?*

23 In the order granting Gilman's request for discovery the court limited the scope of
24 the discovery to information relevant on the issue of whether Toll knew the "resident
25 communications" were false, or whether he acted with a high degree of awareness of the
26 probable falsity of the statement, or had serious doubts as to the publication's truth. The
27 court delayed decision on the Anti-SLAPP special motion to dismiss until Gilman
28 completed his discovery. Gilman deposed Toll. Gilman will not be allowed to receive

1 information about Toll's unnamed sources. The special motion to dismiss is ripe for
2 decision.

3
4 **THE COURT ORDERS:**

5 Gilman's motion to compel is denied.

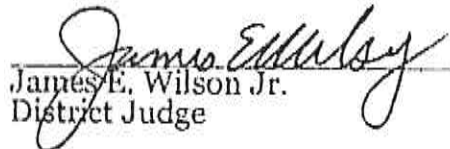
6 Gilman's motion to conduct discovery is denied.

7 Gilman may file by **April 8, 2020**, a supplemental points and authorities on the
8 special motion to dismiss. The purpose of the supplemental points and authorities is to
9 give the parties an opportunity to provide the court with any facts gleaned during Toll's
10 deposition that are relevant to the issue of whether Toll knew the "resident
11 communications" were false, or whether he acted with a high degree of awareness of the
12 probable falsity of the statement, or had serious doubts as to the publication's truth. The
13 content of the points and authorities must address only the issue stated above. If Gilman
14 does not file a points and authorities the court will consider the special motion to
15 dismiss submitted for decision based on the original points and authorities.

16 Opposing points and authorities must be filed by **April 24, 2020**. A reply may
17 be filed **May 8, 2020**.

18 The parties will comply with FJDCR 3.10 and 3.23 or sanctions will be imposed.

19 March 18, 2020.

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22 James E. Wilson Jr.
23 District Judge
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CERTIFICATE OF SERVICE


I certify that I am an employee of the First Judicial District Court of Nevada; that on March 19, 2020, I faxed and served a copy of this document by placing a true copy in an envelope addressed to:

Gus Flangas, Esq.
Jessica Peterson, Esq.
3275 South Jones Blvd., Suite 105
Las Vegas, NV 89146

John Marshall
570 Marsh Ave.
Reno, NV 89509

Luke Andrew Busby, LTD
316 California Ave., #82
Reno, NV 89509

the envelope sealed and then deposited in the Court's central mailing basket in the Court Clerk's Office for delivery to the United States Post Office at 1111 South Roop Street, Carson City, Nevada for mailing.



Susan Greenburg
Judicial Assistant

Case No. 18-trt-00001-1e

Dept. No. II

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Attorneys for the Defendant

**IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR STOREY COUNTY**

LANCE GILMAN,

Plaintiff,

vs.

SAM TOLL,

Defendant.

NOTICE OF ENTRY OF ORDER

Please Take Notice: On March 19, 2020 the Court entered an Order After Remand in the above captioned matter, a true and correct copy of which is attached hereto as Exhibit 1.

///

///

///

FILED ✓

2020 MAR 23 PM 3:01

ST. CLAY COUNTY, NV

BY ADuke

NRS 239B.030(4) AFFIRMATION

I certify that the attached filing includes no social security numbers or other personal information.

Respectfully submitted this Friday, March 20, 2020:

By: 
JOHN L. MARSHALL
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570 Marsh Avenue
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Attorneys for the Defendant

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Exhibit List

1. Order After Remand

CERTIFICATE OF SERVICE

I certify that on the date indicated below I served the foregoing document on the following parties via US Mail, postage prepaid, and/or electronic service.

GUS W. FLANGAS
JESSICA K. PETERSON
Flangas Dalacas Law Group
3275 South Jones Blvd. Suite 105
Las Vegas, NV 89146
702-307-9500
F - 702-382-9452

By: _____

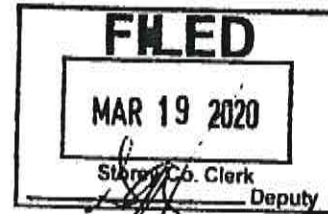
Luke Busby

Dated: _____

3-20-20

Exhibit 1

Exhibit 1



6 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
7 **IN AND FOR STOREY COUNTY**

9 **LANCE GILMAN, an individual,**
10 **Plaintiff,**

CASE NO. 18 TRT 00001 1E
 DEPT. 2

11 **vs.**

12 **SAM TOLL, an individual; DOES I-V,**
13 **inclusive; and ROE ENTITIES VI-X,**
14 **inclusive,**

15 **Defendants.**
_____ /

16 **ORDER AFTER REMAND**

17 The Supreme Court remanded this matter with instructions to determine whether
18 Toll qualifies for protection under the news shield statute, and to reconsider the decision
19 on the motion to compel in light of the decision on whether Toll qualifies.

20
21 *Does Toll qualify for protection under the news shield statute?*

22 Under Nevada's news media privilege no reporter of any newspaper may be
23 required to disclose in a legal proceeding any information obtained or prepared by the
24 reporter in his professional capacity in gathering, receiving, or processing information
25 for communication to the public, or the source of any information procured or obtained
26 by the reporter. To determine whether Toll qualified for protection under the news
27 shield statute the court must determine whether his blog is a newspaper.

28 The Supreme Court agreed Toll is a reporter. Toll is a reporter because of the
 substance of his published articles, namely, reports of facts or alleged facts, opinions,

1
2 commentary, and/or satire.

3 Gilman alleged that from February into December 2017 Toll libeled him in 11
4 articles. There is no question Toll targeted Gilman for criticism, accusations, and satire.
5 Toll began publishing articles on his blog in February 2017. For the five plus months
6 from February 24, 2017 to August 2, 2017, Toll published, in addition to the Gilman
7 articles, fifteen articles on a variety of local current events. A report of recent or current
8 events is news. <https://www.merriam-webster.com/dictionary/news>. Toll published at
9 least one current-event-article every month from February 2017 through August 2017,
10 and multiple articles during some months. Joint Trial Stmt., Exs. g, h, and l-z. Toll
11 regularly, at least monthly, and consistently, every month from February 2017 until at
12 least August 2017, published both Gilman and current-event-articles.

13 The topics of the current-event-articles Toll published include: the arts, sports,
14 elections, an Easter egg hunt, arrests, a criminal preliminary hearing, Lockwood, a life
15 memorial, a musical group, a new sheriff's office car, a county employee's retirement, a
16 wild horse conference, a county job opening, and National Night Out. These articles
17 reported current events and activities—the kind of current events and activities one
18 would expect to see in a small town newspaper. The articles on Toll's blog provided news
19 and other information local readers and others might find useful, interesting, and/or
20 humorous.

21 To prepare to write all 26 articles Toll obtained, gathered, and received
22 information. Some of the information Toll procured and received about Gilman came
23 from unnamed sources. Toll obtained, gathered, received, procured, and processed
24 information, including the information from unnamed sources for the purpose of
25 writing the articles, in other words, in his professional capacity as a reporter. He wrote
26 the articles for communication to the public by publishing them on his blog.

27 Because (1) Toll is a reporter; (2) he regularly and consistently published current-
28 event-articles; (3) the articles published on his blog provided information regarding
current events—news; (4) Toll obtained, gathered, received, procured, and processed

1 information, including the information from unnamed sources, in his professional
2 capacity as a reporter; (5) he wrote the articles for communication to the public by
3 publishing them on his blog; and (6) he did communicate the articles to the public by
4 publishing them on his blog; the Court finds and concludes Toll's blog was the
5 functional equivalent of a traditional printed newspaper and therefore is a newspaper.

6 Based upon the facts in the preceding paragraph, and because the blog is a
7 newspaper, the court further concludes Toll qualified for protection under the news
8 shield statute at the time the allegedly libelous articles were published.

9
10 *Should Gilman be allowed to depose the experts that provided affidavits for Toll's*
11 *motion?*

12 The Court did not find the affidavits submitted by Toll to be helpful in deciding
13 whether Toll qualified for the news media privilege and did not rely on any information
14 contained in the affidavits. Because the Court did not rely on the affidavits submitted by
15 Toll in making its decision, Gilman's request to depose the affiants is denied.

16
17 *Should the decision on the motion to compel be changed?*

18 Because the court concluded Toll qualified for protection under the news shield
19 statute at the time the allegedly libelous articles were published Gilman's motion to
20 compel must be denied.

21
22 *What is the next step?*

23 In the order granting Gilman's request for discovery the court limited the scope of
24 the discovery to information relevant on the issue of whether Toll knew the "resident
25 communications" were false, or whether he acted with a high degree of awareness of the
26 probable falsity of the statement, or had serious doubts as to the publication's truth. The
27 court delayed decision on the Anti-SLAPP special motion to dismiss until Gilman
28 completed his discovery. Gilman deposed Toll. Gilman will not be allowed to receive

1 information about Toll's unnamed sources. The special motion to dismiss is ripe for
2 decision.

3
4 **THE COURT ORDERS:**

5 Gilman's motion to compel is denied.

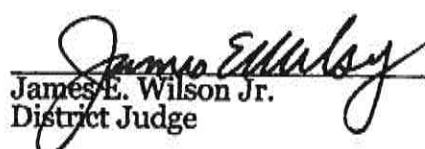
6 Gilman's motion to conduct discovery is denied.

7 Gilman may file by **April 8, 2020**, a supplemental points and authorities on the
8 special motion to dismiss. The purpose of the supplemental points and authorities is to
9 give the parties an opportunity to provide the court with any facts gleaned during Toll's
10 deposition that are relevant to the issue of whether Toll knew the "resident
11 communications" were false, or whether he acted with a high degree of awareness of the
12 probable falsity of the statement, or had serious doubts as to the publication's truth. The
13 content of the points and authorities must address only the issue stated above. If Gilman
14 does not file a points and authorities the court will consider the special motion to
15 dismiss submitted for decision based on the original points and authorities.

16 Opposing points and authorities must be filed by **April 24, 2020**. A reply may
17 be filed **May 8, 2020**.

18 The parties will comply with FJDCR 3.10 and 3.23 or sanctions will be imposed.

19 March 18, 2020.

20
21 
22 James E. Wilson Jr.
23 District Judge
24
25
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27
28

1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of the First Judicial District Court of Nevada; that
3 on March 19, 2020, I faxed and served a copy of this document by placing a true
4 copy in an envelope addressed to:

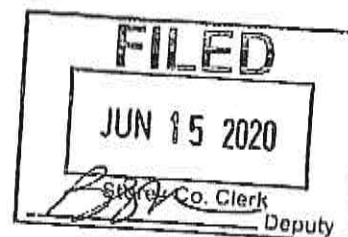
5 Gus Flangas, Esq.
6 Jessica Peterson, Esq.
7 3275 South Jones Blvd., Suite 105
Las Vegas, NV 89146

John Marshall
570 Marsh Ave.
Reno, NV 89509

8 Luke Andrew Busby, LTD
9 316 California Ave., #82
Reno, NV 89509

10
11 the envelope sealed and then deposited in the Court's central mailing basket in the Court
12 Clerk's Office for delivery to the United States Post Office at 1111 South Roop Street,
13 Carson City, Nevada for mailing.

14 
15 Susan Greenburg
16 Judicial Assistant
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6 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
7 **IN AND FOR STOREY COUNTY**

8 * * *

9 LANCE GILMAN,

10 Plaintiff,

11 vs.

12 SAM TOLL,

13 Defendant.

Case No. 18 TRT 000011E

Dept. II

14
15 **ORDER GRANTING TOLL'S ANTI-SLAPP**
16 **SPECIAL MOTION TO DISMISS**

17 This Court issued its Order After Remand on March 8, 2020. The Court directed
18 the parties, if necessary, to file supplemental points and authorities to address only the
19 specific issue of facts gleaned during Toll's deposition that show whether Toll knew the
20 "resident communications" were false, or whether he acted with a high degree of
21 awareness of the probable falsity of the statements, or had serious doubts as to the
22 publication's truth. Before the Court is the parties' points and authorities.

23 There is no evidence that Toll's alleged belief that Gilman does not live where he
24 claims to live, i.e. at a building adjacent to the Mustang Ranch Brothel, was not held in
25 good faith or was made with knowledge that the statement was false.

26 Gilman argued Toll did not conduct sufficient investigation regarding Gilman's
27 residence. Toll testified he believed Gilman does not live at the Mustang Ranch based
28 upon the following information: the zoning of the property; the unusual nature of

1 Gilman's claimed residence given his wealth and stature; the fact that numerous other
2 persons claimed addresses at the Mustang Ranch were their residence; the fact that
3 Gilman owned other residential property in Washoe County; and that confidential
4 sources told Toll that Gilman did not actually live at the Mustang Ranch.

5 Gilman argued Toll had a motive and intent to make false statements about
6 Gilman with reckless disregard for their veracity. There is no evidence that the resident
7 communications were made with actual malice, that is, with knowledge that the
8 statement was false. In the August 9, 2018 Order, this Court concluded that Gilman
9 failed to produce prima facie evidence that Toll published the resident communications
10 with actual malice, and nothing presented by Gilman that was gleaned from Toll's
11 deposition moves the Court from its prior conclusion on this issue.

12 Gilman bore the burden of showing under prong two of an anti-SLAPP analysis
13 that his claims have minimal merit. See *Abrams v. Sanson*, 458 P.3d 1062, 1069 (Nev.
14 2020) citing NRS 41.665(2) stating that a plaintiff's burden under prong two is the same
15 as a plaintiff's burden under California's anti-SLAPP law and *Navellier v. Sletten*, 29
16 Cal. 4th 82, 124 Cal. Rptr. 2d 530, 52 P.3d 703, 712-13 (Cal. 2002), which established
17 the "minimal merit" burden for a plaintiff.

18 There is no credible evidence that Toll published the resident communications
19 with actual malice. The Court concludes Gilman has failed to show that his defamation
20 claim against Toll has minimal merit. There is no credible evidence that Toll's
21 communications were not in good faith and in furtherance of the right to petition or the
22 right to free speech in direct connection with an issue of public concern, and therefore
23 it must be dismissed.


24 **THE COURT ORDERS:**

25 Gilman's complaint is dismissed.

26 Under NRS 41.670(1)(a), Toll may make an application to the Court for
27 reasonable attorney's fees and costs within **ten (10) days** of the date of entry of this
28 order;

1 Gilman will show cause by **June 29, 2020** why he should not be ordered to pay
2 Toll \$10,000 in statutory damages under NRS 41.670(1)(b).

3 **DATED** this 15, June, 2020

4
5 
6 James E. Wilson, Jr.
7 District Judge

8
9 **CERTIFICATE OF SERVICE**


10 I certify that I am an employee of the First Judicial District Court of Nevada; that
11 on the 15 day of June 2020, I served a copy of this document by placing a true copy
12 in an envelope addressed to:

13
14 John L. Marshall, Esq.
15 570 Marsh Avenue
16 Reno, NV 89509

16
17 Luke Andrew Busby, Ltd.
316 California Ave., #82
Reno, NV 89509

Gus W. Flangas, Esq.
3275 South Jones Blvd., Suite 105
Las Vegas, NV 89146

18 the envelope sealed and then deposited in the Court's central mailing basket in the court
19 clerk's office for delivery to the USPS at 1111 South Roop Street, Carson City, Nevada, for
20 mailing.

21
22 
23 Billie Shadron
24 Judicial Assistant
25
26
27
28

Case No. 18-trt-00001-1e

Dept. No. II

FILED JUN 17 AM 9:13

JOHN L. MARSHALL

SBN 6733

570 Marsh Avenue

Reno, Nevada 89509

Telephone: (775) 303-4882

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Nevada State Bar No. 10319

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Reno, NV 89509

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Attorneys for the Defendant

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR STOREY COUNTY

LANCE GILMAN,

Plaintiff,

vs.

SAM TOLL,

Defendant.

NOTICE OF ENTRY OF ORDER

Please Take Notice: On June 15, 2020 the Court entered an Order Granting Toll's Anti-SLAPP Special Motion to Dismiss in the above captioned matter, a true and correct copy of which is attached hereto as Exhibit 1.

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NRS 239B.030(4) AFFIRMATION

I certify that the attached filing includes no social security numbers or other personal information.

Respectfully submitted this Tuesday, June 16, 2020:

By:


JOHN L. MARSHALL

SBN 6733

570 Marsh Avenue

Reno, Nevada 89509

Telephone: (775) 303-4882

Luke Andrew Busby, Ltd.

Nevada State Bar No. 10319

316 California Ave #82

Reno, NV 89509

775-453-0112

luke@lukeandrewbusbyltd.com

Attorneys for the Defendant

Exhibit List

1. Order Granting Toll's Anti-SLAPP Special Motion to Dismiss

CERTIFICATE OF SERVICE

I certify that on the date indicated below I served the foregoing document on the following parties via US Mail, postage prepaid, and/or electronic service.

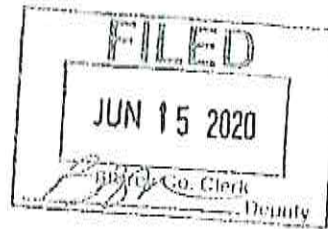
GUS W. FLANGAS
JESSICA K. PETERSON
Flangas Dalacas Law Group
3275 South Jones Blvd. Suite 105
Las Vegas, NV 89146
702-307-9500
F - 702-382-9452

By: 
Luke Busby

Dated: 6-16-20

Exhibit 1

Exhibit 1



IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR STOREY COUNTY

LANCE GILMAN,

Plaintiff,

vs.

SAM TOLL,

Defendant.

Case No. 18 TRT 00001 1E

Dept. II

ORDER GRANTING TOLL'S ANTI-SLAPP
SPECIAL MOTION TO DISMISS

This Court issued its Order After Remand on March 8, 2020. The Court directed the parties, if necessary, to file supplemental points and authorities to address only the specific issue of facts gleaned during Toll's deposition that show whether Toll knew the "resident communications" were false, or whether he acted with a high degree of awareness of the probable falsity of the statements, or had serious doubts as to the publication's truth. Before the Court is the parties' points and authorities.

There is no evidence that Toll's alleged belief that Gilman does not live where he claims to live, i.e. at a building adjacent to the Mustang Ranch Brothel, was not held in good faith or was made with knowledge that the statement was false.

Gilman argued Toll did not conduct sufficient investigation regarding Gilman's residence. Toll testified he believed Gilman does not live at the Mustang Ranch based upon the following information: the zoning of the property; the unusual nature of

1 Gilman's claimed residence given his wealth and stature; the fact that numerous other
2 persons claimed addresses at the Mustang Ranch were their residence; the fact that
3 Gilman owned other residential property in Washoe County; and that confidential
4 sources told Toll that Gilman did not actually live at the Mustang Ranch.

5 Gilman argued Toll had a motive and intent to make false statements about
6 Gilman with reckless disregard for their veracity. There is no evidence that the resident
7 communications were made with actual malice, that is, with knowledge that the
8 statement was false. In the August 9, 2018 Order, this Court concluded that Gilman
9 failed to produce prima facie evidence that Toll published the resident communications
10 with actual malice, and nothing presented by Gilman that was gleaned from Toll's
11 deposition moves the Court from its prior conclusion on this issue.

12 Gilman bore the burden of showing under prong two of an anti-SLAPP analysis
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17 the "minimal merit" burden for a plaintiff.

18 There is no credible evidence that Toll published the resident communications
19 with actual malice. The Court concludes Gilman has failed to show that his defamation
20 claim against Toll has minimal merit. There is no credible evidence that Toll's
21 communications were not in good faith and in furtherance of the right to petition or the
22 right to free speech in direct connection with an issue of public concern, and therefore
23 it must be dismissed.

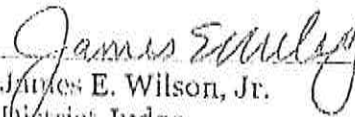
24 **THE COURT ORDERS:**

25 Gilman's complaint is dismissed.

26 Under NRS 41.670(1)(a), Toll may make an application to the Court for
27 reasonable attorney's fees and costs within ten (10) days of the date of entry of this
28 order;

1 Gilman will show cause by June 29, 2020 why he should not be ordered to pay
2 Toll \$10,000 in statutory damages under NRS 41.670(1)(b).

3 DATED this 15, June, 2020

4
5 
6 James E. Wilson, Jr.
7 District Judge
8
9

10 CERTIFICATE OF SERVICE

11 I certify that I am an employee of the First Judicial District Court of Nevada; that
12 on the 15 day of June 2020, I served a copy of this document by placing a true copy
13 in an envelope addressed to:

14 John L. Marshall, Esq.
15 570 Marsh Avenue
16 Reno, NV 89509

17 Luke Andrew Busby, Ltd.
18 316 California Ave., #82
19 Reno, NV 89509

20 Gus W. Plangas, Esq.
21 3275 South Jones Blvd., Suite 105
22 Las Vegas, NV 89146

23 the envelope sealed and then deposited in the Court's central mailing basket in the court
24 clerk's office for delivery to the USPS at 1111 South Roop Street, Carson City, Nevada, for
25 mailing.
26
27
28

29 
30 Billie Shadron
31 Judicial Assistant



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Email: gwf@fdlawlv.com
JESSICA K. PETERSON, ESQ.
Nevada Bar No. 10670
Email: jkp@fdlawlv.com
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3275 South Jones Blvd., Suite 105
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Telephone: (702) 307-9500
Facsimile: (702) 382-9452
Attorneys for Plaintiff

IN THE FIRST JUDICIAL DISTRICT COURT
IN AND FOR STOREY, COUNTY, NEVADA

LANCE GILMAN, an individual,
Plaintiff,

Case No.: 18-TRT-00001-1c
Dept No.: II

v.

CASE APPEAL STATEMENT

SAM TOLI, an individual; DOES I-V,
inclusive; and ROE ENTITIES VI-X,
inclusive,

Defendants.

COMES NOW the Plaintiff, LANCE GILMAN, by and through his attorneys, GUS W. FLANGAS, ESQ., and JESSICA K. PETERSON, ESQ., of the FLANGAS LAW GROUP, and hereby submits this Case Appeal Statement.

1. Name of Appellant filing this Case Appeal Statement: Plaintiff, LANCE GILMAN.

2. Identify the Judge issuing the decision, judgment, or order appealed from: the Honorable District Court Judge, JAMES E. WILSON, JR., in and for the First Judicial District Court, Storey County, Nevada. The following Orders are being appealed:

a. The Court's "Order Granting Anti-SLAPP Special Motion to Dismiss in Part, Allowing Limited Discovery, and Staying Further Proceedings," which was filed on April 9, 2018.

b. The Court's "Order After Remand," filed on March 19, 2020, which found that Defendant's internet Blog constituted a newspaper and which then concluded that Defendant qualified for protection under the news shield statute at the time he published the alleged defamatory remarks about Plaintiff.

c. The Court's "Order Granting Toll's Anti-SLAPP Special Motion to Dismiss," which was filed on June 15, 2020.

3. Identify each Appellant and the name and address of counsel for each Appellant: the Appellant is LANCE GILMAN. The Appellant's attorneys are GUS W. FLANGAS, ESQ., and JESSICA K. PETERSON, ESQ., of the FLANGAS LAW GROUP, 3275 South Jones Boulevard, Suite 105, Las Vegas, Nevada, 89146.

4. Identify each Respondent and the name and address of Appellate counsel, if known, for each Respondent (if the name of a Respondent's Appellate counsel is unknown, indicate as much and provide the name and address of that Respondent's trial counsel): the Respondent is SAM TOLL. The Respondent's attorneys are LUKE BUSBY, ESQ., 316 California Ave., Reno, Nevada, 89509, and JOHN MARSHALL, ESQ., 570 Marsh Avenue, Reno, Nevada, 89509.

5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed to practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission): N/A.

6. Indicate whether Appellant was represented by appointed or retained counsel in the District Court: Appellant was represented by retained counsel in the District Court.

7. Indicate whether Appellant is represented by appointed or retained counsel on Appeal: Appellant is being represented by retained counsel on Appeal.

8. Indicate whether Appellant was granted leave to proceed in forma pauperis, and the date of entry of the District Court Order granting such leave: N/A.

9. Indicate the date the proceedings commenced in the District Court (e.g., date complaint, indictment, information, or petition was filed): Plaintiffs' Complaint was filed on December 7, 2017.

10. Provide a brief description of the nature of the action and result in the District Court, including the type of judgment or order being appealed and the relief granted by the

District Court: Plaintiff filed a Complaint against Defendant alleging one cause of action for Defamation Per Se. The Complaint listed several false and defamatory statements made by Defendant about Plaintiff, including that Plaintiff committed perjury, a felony, by lying about his residency in Storey County when he filled out official paperwork in filing for election to the office of County Commissioner (hereinafter the "Residency Allegation"). Defendant was a blogger who published the false and defamatory and statements online about Plaintiff.

Defendant filed an Anti-Slapp Special Motion to Dismiss. The Court granted the Anti-Slapp Special Motion to Dismiss in Part (hereinafter the "Order"). In the Order, the Court struck several of the individual allegations contained in the Complaint, and only allowed the Residency Allegation to go forward. In the Order, the Court found that Appellant failed to produce prima facie evidence that Defendant made the Residency Allegation with actual malice. However, the Court allowed for limited discovery because "whether Toll knew the resident statements were false or whether he acted with a high degree of awareness of the probable falsity of the statement or had serious doubts as to the publications truth, is necessary for Gilman to meet or oppose the burden under NRS 41.660(3)(b)." The Court then allowed Plaintiff to conduct limited discovery to determine whether Defendant knew the statements were false or acted with a high degree of awareness of the probable falsity of the statements or had serious doubts as the publication's truth, and gave Plaintiff a deadline in which to file a supplemental opposition to Defendant's Anti-SLAPP Motion. Plaintiff is appealing the Order primarily on the grounds that Defendant failed to meet his burden under NRS 41.660(3)(a) and the Court erred in striking the individual allegations.

At his Deposition, Defendant invoked the news shield privilege and refused to answer questions about how he arrived at his so-called knowledge pertaining to the Residency Allegation. Plaintiff subsequently filed a Motion to Compel Defendant's testimony. Defendant in his Opposition alleged that he was a reporter and his blog was a newspaper, and he therefore fell under the protection of the news shield privilege. After briefings by the Parties, the Court issued its "Order on Plaintiff's Motion to Compel, for Sanctions, to Extend Discovery Period, and for Summary

1 Judgment and Order Vacating Hearing" (hereinafter the "Discovery Order"). In the Discovery Order,
2 the Court ruled that because Defendant was a reporter of a press association since August of 2017,
3 he is covered by the news media privilege as to any source of information obtained or procured
4 during or after August, 2017. The Court also concluded that because Defendant doesn't print his
5 blog, his blog was a newspaper and therefore, "the News Media Privilege is not available to
6 [Defendant] under the 'reporter of a newspaper provision' of the media shield statute. The Court
7 also ruled that Defendant became a member of news association in August of 2017, and was
8 therefore entitled to the protection of the news shield privilege after August of 2017. The Court then
9 Ordered that Plaintiff's Motion to compel was granted as to sources of information procured or
10 obtained by Defendant before August, 2017, and denied as to sources of information procured or
11 obtained by Defendant during and after August, 2017. The Court further ordered that Defendant
12 "will not be allowed to rely on the privileged information as a defense."

13 Defendant subsequently filed a Petition for Writ of Mandamus with the Nevada Supreme
14 Court (hereinafter the "Supreme Court") seeking to have the Supreme Court reverse the Court's
15 Order compelling Defendant to reveal his confidential news sources, and require the Court to either
16 dismiss this action or rule on Defendant's Anti-SLAPP Motion. In addition, Defendant sought to
17 have the Supreme Court reverse the Court's ruling allowing for limited discovery by Plaintiff, and
18 also reverse the Court's ruling that Defendant will not be allowed to rely on the privileged
19 information as a defense.

20 The Supreme Court ruled that Defendant was a reporter; however, the Supreme Court
21 disagreed with the Court's reasoning that because Defendant's blog is not physically printed, it
22 cannot be considered a newspaper, and sent it back down for the Court to determine whether
23 Defendant's blog is afforded protection under Nevada's news shield statute. The Supreme Court
24 ignored Defendant's argument that it should either order the Court to dismiss this action or the
25 Supreme Court should itself rule on Defendant's Anti-SLAPP Motion, and further ignored
26 Defendant's argument that it should reverse the Court's ruling that Defendant "will not be allowed
27 to rely on the privileged information as a defense. In other words, the Supreme Court let the Court's
28 ruling stand that Defendant would not be allowed to rely on the privileged information as a defense.

1 After receiving additional briefing on the Motion to Compel, the Court its order, "Order after
2 Remand" (hereinafter the "Remand Order"), ruled that Defendant qualified for protection under the
3 news shield statute. In the Remand Order, the Court held that "[t]here is no question Toll targeted
4 Gilman for criticism, accusations, and satire." The Court then held that because Toll is reporter, he
5 regularly and consistently published current-event-articles, the articles Toll published on his blog
6 provided information regarding current-event-news, Toll obtained, gathered, received, procured, and
7 processed information, including the information from unnamed sources, in his professional capacity
8 as a reporter, wrote articles for communication to the public by publishing them on his blog, and he
9 did communicate the articles to the public by publishing on his blog, Toll was the functional
10 equivalent of a traditional printed newspaper and therefore is a newspaper. The Court then
11 concluded that Defendant was entitled to the protection of the news shield privilege at the time he
12 published the "allegedly libelous articles," and denied the Motion to Compel. Plaintiff is appealing
13 this Order on the grounds that at the time Defendant published the false and defamatory statements
14 about Plaintiff, Defendant's blog was not a newspaper for purposes of asserting the news shield
15 privilege. Under the Court's ruling, virtually any and every blogger could assert false and
16 defamatory statements about anyone and then hide behind the news shield privilege to avoid liability.

17 After receiving additional briefs on Defendant's Anti-Slapp Special Motion to Dismiss, the
18 Court granted the Motion in its "Order Granting Toll's Anti-SLAPP Special Motion to Dismiss"
19 (hereinafter the "Dismissal Order"), and dismissed Plaintiff's Complaint. In the Dismissal Order,
20 the Court found that there was no credible evidence that Defendant published the Residency
21 Allegations with actual malice, and concluded that Plaintiff failed to show his defamation claim
22 against Defendant had minimal merit. The Court further found there was no credible evidence that
23 Defendant's communications were not in good faith and in furtherance of the right to petition or the
24 right to free speech in direct connection with an issue public concern.

25 The Court made its finding and conclusions even though Plaintiff set forth 13 pages with 38
26 sections of evidentiary facts in his brief showing that Defendant acted with actual malice. Plaintiff
27 is appealing the Dismissal Order primarily on the grounds that (1) Defendant failed to meet his
28 burden under NRS 41.660(3)(a) and (2) Plaintiff met his burden of establishing that his claim had

1 minimal merit, especially given the amount of factual evidence Plaintiff provided to the Court.
2 Plaintiff is also appealing the Dismissal Order primarily on the grounds that the Court allowed
3 Defendant to use information in his defense, that he obtained from his confidential sources.

4 11. Indicate whether the case has previously been the subject of an Appeal to or
5 original Writ proceeding in the Supreme Court and, if so, the caption and Supreme Court
6 docket number of the prior proceeding: Defendant filed a "Petition for Writ of Prohibition or
7 Mandamus," to the Nevada Supreme Court, entitled *SAM TOLL, Petitioner vs. THE FIRST*
8 *JUDICIAL COURT FOR THE STATE OF NEVADA, IN AND FOR STOREY*
9 *COUNTY, AND THE HONORABLE JUDGE WILSON, JR., DISTRICT COURT*
10 *JUDGE, Respondents, and LANCE GILMAN, Real Party in Interest,* Supreme Court
11 Docket Number: 78333.

12 12. Indicate whether this Appeal involves child custody or visitation: This Appeal
13 does not involve child custody or visitation.

14 13. If this is a civil case, indicate whether this Appeal involves the possibility of
15 settlement: Appellant is not opposed to settlement discussions.

16 Dated this 4th day of August, 2020.

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CERTIFICATE OF SERVICE

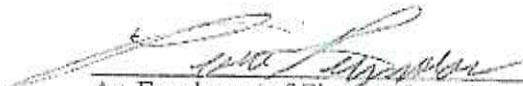
I hereby certify that I am an employee of the FLANGAS LAW GROUP, and that on this 4th day of August, 2020 served a true and correct copy of CASE APPEAL STATEMENT as indicated below:

 X By depositing the same in the United States mail, first-class, postage prepaid in a sealed envelope, at Las Vegas, Nevada pursuant to N.R.C.P. 5(b) addressed as follows

 X By electronic mail.

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