**Case No. 81859**

IN THE SUPREME COURT OF THE STATE OF NEVADA



SARAH JANEEN ROSE,

Appellant,

vs.

DAVID JOHN ROSE,

Respondent.

District Court Case No. A-20-815750-C, Department XI

# RESPONDENT DAVID JOHN ROSE'S ANSWERING BRIEF

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## NRAP 26.1 DISCLOSURE

Pursuant to Nevada Rule of Appellate Procedure 26.1, Respondent David John Rose submits this Disclosure Statement:

The undersigned counsel of record certifies that the following are persons and entities as described in Nevada Rule of Appellate Procedure 26.1(a) and must be disclosed. These representations are made so that the justices of this Court may evaluate possible disqualification or recusal.

1. Appellant is an individual party. Therefore, he has no parent corporations or corporations owning 10 percent or more stock to disclose pursuant to Nevada Rule of Appellate Procedure 26.1(a).

2. Appellant is represented by Cohen Johnson, LLC in this appeal and in the district court proceedings.

3. Appellant is not using a pseudonym for the purposes of this appeal.

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## I. JURISDICTIONAL STATEMENT

Because Respondent agrees with Appellants' jurisdictional and routing statements, and statement of the issues, Respondent does not include these portions in its answering brief. NRAP 28(b)(1)-(4).

## II. STATEMENT OF THE CASE

On May 29, 2020, Respondent David John Rose ("David" or "Respondent") initiated this lawsuit against Appellant Sarah Janeen Rose ("Sarah" or "Appellant") and others. (1 JA 1.) On July 6, 2020, Sarah filed a Special Motion to Dismiss Pursuant to NRS 41.660 (Anti-SLAPP), or, in the Alternative, Motion to Dismiss Pursuant to NRCP 12(b)(1) and NRCP 12(b)(5) (the "Special Motion to Dismiss"). (1 JA 6.) On August 27, 2020, the Eighth Judicial District Court, Clark County, Nevada, entered an Order Granting in Part, and Denying in Part, Defendant Sarah Janeen Rose's Special Motion to Dismiss Pursuant to NRS 41.660 (anti-SLAPP) (the "Order"). (2 JA 15.) Notice of Entry of the Order was filed and served on August 27, 2020. (2 JA 16.) Sarah filed a Notice of Appeal of the Order on September 25, 2020. (2 JA 19.)

## III. STATEMENT OF THE FACTS

### A. The Divorce Action.

#### *1. Sarah and David are Married; David Files for Divorce.*

Sarah and David were married on June 17, 2006. (1 JA 1, at 17; 1 JA 6, at 127.) On February 22, 2017, David filed a Complaint for Divorce (the "Divorce Action") against Sarah in the Eighth Judicial District Court, Family Division (the "Family Court"). (1 JA 1, at 17; 1 JA 6, at 127.)

#### *2. Sarah and David Attend Mediation.*

On March 23, 2018, Sarah and David, along with their respective counsel, participated in a mediation in an effort to resolve the Divorce Action. (1 JA 6, at 127.) At that time, David was represented by Regina McConnell ("McConnell") of McConnell Law Ltd. ("McConnell Law") (jointly, the "McConnell Parties"), and Sarah was represented by Shelly Booth Cooley, Esq. ("Cooley") of The Cooley Law Firm ("Cooley Law") (the "Cooley Parties"). (Id.; see also 1 JA 1, at 2-3.) David alleges that during the course of the mediation Sarah requested that David name her as the survivor beneficiary of David's PERS pension. (1 JA 1, at 3.) David alleges, and Sarah denies, that David specifically refused to grant survivor benefits to Sarah. (Compare id. with 1 JA 6, at 127-128.)

***3. Sarah and David Execute a Memorandum of Understanding.***

The mediation was successful. (1 JA 6, at 128.) The mediator drafted a three-page memorandum of understanding (the "MOU"), which memorialized the material terms of Sarah and David's agreement. (1 JA 1, at 3; id. at 12-14; 1 JA 6, at 128.) The MOU provided that its purpose was "to memorialize" the parties' agreement. (1 JA 1, at 12.) The MOU stated it included the "material terms" of their agreement and was intended to bind the parties to those material terms. (Id.) The MOU provided "that counsel for Sarah shall draft a final formal agreement incorporating the terms herein," and that final formal agreement (not the MOU) "shall be ratified by the Court, but shall not merge and shall retain its separate nature as a contract." (Id.) The MOU did not address survivor benefits. (Id. at 12-14.)

***4. Sarah Breaches the MOU and the Parties Execute the Stipulated Divorce Decree.***

After Sarah and David executed the MOU, Sarah (through her counsel) drafted a 39-page Stipulated Decree of Divorce (the Divorce Decree). (1 JA 1, at 16-54; 1 JA 6, at 128.) Sarah, through her counsel, breached the MOU at this point in time by adding terms which were not included or agreed to in the MOU. (1 JA 1 at 3.) Sarah breached the MOU before the Divorce Decree was executed, and thus the Agreements had not yet merged. (1 JA 1, at 3). The Parties executed the Divorce Decree. (1 JA 1, at 4; id. at 54.)

***5. The Divorce Action Remains Pending.***

On April 25, 2018, David filed a Motion to Set Aside the Paragraph Regarding Survivor Benefits in the Decree of Divorce Based Upon Mistake (the "Motion to Set Aside") in the Divorce Action. (1 JA 1, at 82-85.) The Family Court initially granted David's Motion to Set Aside. (2 JA 15, at 337.) However, on October 9, 2018, Sarah filed a Motion to Alter or Amend Judgment, or, in the Alternative, for New Trial Pursuant to NRCP 59(a)(7). (Id.) On January 16, 2019, the Family Court entered an order granting Sarah's motion and setting aside its prior order granting David's Motion to Set Aside. (Id.) The Family Court then set David's Motion to Set Aside (among other motions and issues) for an evidentiary hearing. (Id.) The Family Court case has not yet concluded. (Id.) A claim for Breach of the MOU Agreement is not pending in the Family Court.

## B. PROCEDURAL HISTORY

***1. David Initiates a Separate Civil Action (the Matter) Against Sarah.***

In May 2020, David filed this suit. (1 JA 1, at 1). David sued Sarah, his own former counsel (the McConnell Parties), and Sarah's former counsel in the Divorce Action (the Cooley Parties). (Id.)

David asserted two causes of action against Sarah and the Cooley Parties. First, David asserted a claim for civil conspiracy against Sarah and the Cooley Parties, alleging they "acted in concert to intentionally defraud [David] into signing

the legally binding Decree of Divorce with terms that were not agreed to" and that they "had no intention of abiding to the agreed upon terms as outlined in the MOU." (Id. at 8.) Second, David asserted that Sarah and the Cooley Parties breached the MOU by adding unagreed terms into the final Decree of Divorce. (Id. at 8-9.)

***2. Sarah Files a Special to Dismiss; the District Court Grants the Motion in Part and Denies the Motion in Part.***

On July 6, 2020, Sarah filed a Special Motion to Dismiss Pursuant to NRS 41.660 (Anti-SLAPP), or, in the Alternative, Motion to Dismiss Pursuant to NRCP 12(b)(1) and NRCP 12(b)(5) (the "Special Motion to Dismiss"). (1 JA 6.)

On August 27, 2020, the district court entered an Order Granting in Part, and Denying in Part, Defendant Sarah Janeen Rose's Special Motion to Dismiss Pursuant to NRS 41.660 (anti-SLAPP) (the "Order"). (2 JA 15.) The district court granted Sarah's Special Motion to Dismiss as to David's civil conspiracy claim but denied it as to the breach of contract claim. (Id. at 341.)

As to the breach of contract claim, the Court found it was "not based on '[w]ritten or oral statement[s] made in direct connection with an issue under consideration by a . . . judicial body,'" and thus was "not subject to a special motion to dismiss under Nevada's anti-SLAPP statute." (2 JA 15, at 339-40.)

***3. Sarah Files an NRCP 12(b) Motion to Dismiss; the District Court Stays the Action Pending Resolution of the Divorce Action.***

On September 10, 2020, Sarah filed a Motion to Dismiss pursuant to NRCP 12(b)(1) and 12(b)(5). (2 JA 17.) The district court denied the Motion to Dismiss, without prejudice, but stayed the matter pending resolution of the Divorce Action. (2 JA 30.) As of the submission of this Opening Brief, the Divorce Action is still pending, and the Matter remains stayed. (2 JA 33.)

## IV. SUMMARY OF THE ARGUMENT

The District Court did not err in denying Sarah's Special Motion to Dismiss as to David's breach of contract claim. The Court properly found that Sarah's breach of the MOU is a not a communication which is protected by the anti-SLAPP statutes but is an action unrelated to any of the categories of protected communications in NRS 41.637.

David's Breach of Contract claim is premised on Sarah's breach of the terms of the MOU, specifically the addition of unagreed terms into the Decree of Divorce. This breach occurred before the execution of the Decree of Divorce, before the agreements were merged. Therefore, the MOU still retained its independent nature at the time of breach. In this present action, David is not attacking the divorce decree directly, but instead seeks remedy for Sarah's breach of the MOU.

The District Court agreed that Sarah's acts could not be considered communications which are protected. So, finding, the Court did not consider whether

David had made a prima facie showing of his probability to prevail on his breach of contract claim.

First, Sarah argues that the district court lacks subject matter jurisdiction to address the breach of contract claim because the agreements merged when the Decree of Divorce was signed, and the Family Court has exclusive jurisdiction over Decrees of Divorce. However, the breach of the MOU occurred at the moment when the additional terms were drafted into the Decree of Divorce (the "Decree"). At that moment, the Decree had not been executed and the agreements were not merged. That breach of contract exists outside and independent of the Decree, and thus has not been merged with the Decree, and is not under the jurisdiction of the Family Court.

Second, David's breach of contract claim is not barred by the parol evidence rule because David's claim is not attempting to alter or interpret the Decree, but rather show that the MOU was breached. David is only seeking to compare the two documents to show that additional terms were added to the Decree, not to alter the Decree, but to show that the terms of the MOU were breached in the drafting of the Decree.

Third, Sarah argues that David's claims are not ripe. As stated above, the breach of contract occurred when Ms. Rose's counsel drafted the Decree which did not reflect the terms of the MOU. Therefore, the cause of action for breach of

contract is ripe. A case is ripe for review when "the degree to which the harm alleged by the party seeking review is sufficiently concrete, rather than remote or hypothetical, [and] yield[s] a justiciable controversy." *Herbst Gaming, Inc. v. Sec'y of State*, 122 Nev. 877, 887-88, 122 Nev. 877, 141 P.3d 1224, 1230-31 (2006). David was damaged at the time of breach, regardless of the outcome of the Family Court case.

Finally, David pled his case with particularity and made a prima facie showing of evidence that he is likely to prevail on his breach of contract claim. David specifically identified the breach of the contract, the language added in violation of the MOU, and attached all documents as evidence to the Complaint.

In conclusion, Sarah's acts are not protected by the anti-SLAPP statutes and the District Court did not err in this determination. The District Court does not lack subject matter jurisdiction, the claim is not barred by the parol evidence rule, David's claims are ripe, and David pled his claim with particularity and made a prima facie showing of evidence that he is likely to prevail on said claim. Therefore, David respectfully requests this Court to affirm the District Court's Order denying Sarah's Special Motion to Dismiss as to David's breach of contract claim.

## V. STANDARD OF REVIEW

This Court reviews "a decision to grant or deny an anti-SLAPP special motion to dismiss de novo." *Smith v. Zilverberg*, 137 Nev. Adv. Op. 7, 481 P.3d 1222, 1226 (2021).

## VI. ARGUMENT

### A. THE BREACH OF CONTRACT DOES NOT INVOLVE A PROTECTED COMMUNICATION OR ACTION

NRS 41.660 states "[i]f an action is brought against a person 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 . . . the person against whom the action is brought may file a special motion to dismiss." NRS 41.660(1)(a). The Court must use a two-step framework to determine whether a defendant is protected under the anti-SLAPP legislation. First, the Court must "(a) Determine whether the moving party has established, by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern;" NRS 41.660(3)(a). Then, if the Defendant is successful in this showing, then the Court must " …determine whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim;". NRS 41.660(3)(b).

### *1. Respondent's Breach of Contract Claim is Based Upon Appellant's Actions, Not Communications.*

To determine if the communication is one which is protected, we must consider NRS 41.637 which defines the phrase "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". The communication must fall under one of the following categories:

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

Appellant argues in their Opening Brief that their actions are protected by the third category of communications, that being a "Written or oral statement made in direct connection with an issue under consideration by a… judicial body…". Appellant cites cases from California that seek to protect a Defendant's right to petition a Court without incurring an oppressive suit against them for doing so. Appellant claims that her actions of "…drafting of the Divorce Decree (through her counsel), and her submission of the Divorce Decree to the Family Court (through

her counsel)" are such communications. See *Appellant Sarah Janeen Rose's Opening Brief (*"Opening Brief"*)* at 21.

In *Panicaro v. Crowley*, the Nevada Court of Appeals affirmed the dismissal of two causes of action and allowed a breach of contract claim to proceed despite an Anti-SLAPP defense being raised. The Court of Appeals found that the breach of contract claim alleged failure to perform work pursuant to an agreement, "which does not constitute an anti-SLAPP "communication" at all." *Panicaro v. Crowley*, 2017 Nev. App. Unpub. LEXIS 4, *4, 133 Nev. 1058. This is similar to the matter at hand. Several of Respondent's causes of action were dismissed by the District Court, but the Court found that the Breach of Contract claim alleged failure to draft the Decree pursuant to the MOU, an action, not a "communication". As Appellant's Breach was an action and not a communication, Appellant's actions cannot be protected under the anti-SLAPP statutes.

When Respondent brought their claim of Breach of Contract, the contract which was breached was the Memorandum of Understanding (hereafter as "MOU"). The MOU did not contain a provision granting or denying Public Employees Retirement System ("PERS") benefits to the Appellant. It did contain very specific language wherein the Appellant, through her attorney, "…shall draft a final formal agreement ***incorporating the terms herein***. That agreement shall be ratified by the Court, but shall not merge and shall retain its separate nature as a contract." (1 JA 1,

at 12, emphasis added). The brunt of Respondent's Breach of Contract claim is that the Appellant breached this provision by adding additional provisions not found in the MOU into the Decree of Divorce ("Decree"). Following the signing of the MOU, Appellant's attorney drafted the Decree, wherein terms granting PERS benefits to the Appellant were added. These terms were not agreed to in the MOU. Therefore, Appellant breached the MOU when she, through her attorney, added the PERS provisions. It wasn't any communication from the Appellant, the text of the Decree, or even the filing of the Decree which breached the MOU Agreement, but Appellant's actions which breached the MOU.

The District Court agreed and rightfully found that Respondent's Breach of Contract claim was not based upon any written or oral communications and that the Breach of Contract claim is not subject to dismissal under Nevada's anti-SLAPP statute. (2 JA 15, at 339-340). The Court correctly discerned that Nevada's anti-SLAPP requires that the Appellant show that the Plaintiff brought a cause of action in response to a "Written or oral statement…". The Court ruled that Appellant had failed to do so. Respondent's Breach of Contract claim was in response ***to the act*** of inserting additional provisions into the Decree, and not the communications or statements themselves.

The District Court's findings are supported by California Courts. The Court of Appeals in *Navellier II* on remand rejected the defendant's argument that the anti-

SLAPP statutes, often referred to as the litigation privilege, barred the breach of contract cause of action. *Navellier v. Sletten*, 106 Cal. App. 4th 763, 773, 131 Cal. Rptr. 2d 201, 209 (2003). The court offered several reasons for its conclusion. Although recognizing that the litigation privilege has in some cases barred breach of contract claims, the court observed that "the privilege is generally described as one that precludes liability in tort, not liability for breach of contract." Id. at p. 773. The court further reasoned that if the privilege were applied to certain contracts "it 'may frustrate the very purpose of the contract' if there were a privilege to breach the covenant." *Id.* at 774. The Court in *Navellier I* goes further to say, "that a cause of action arguably may have been 'triggered' by protected activity does not entail that it is one arising from such." *Navellier v. Sletten*, 29 Cal. 4th 82, 89, 124 Cal. Rptr. 2d 530, 536, 52 P.3d 703, 709 (2002). Further, the California Supreme Court's has emphasized "…the distinction between activities that form the basis for a claim and those that merely lead to the liability-creating activity or provide evidentiary support for the claim. *Park v. Bd. of Trs. of Cal. State Univ.*, 2 Cal. 5th 1057, 1064, 217 Cal. Rptr. 3d 130, 135, 393 P.3d 905, 909 (2017).

After the District Court made this first finding, it did not need to go further to consider the second step in the anti-SLAPP framework or determine whether the Plaintiff was likely to Prevail on the Claim. It rightly concluded that the Appellant is asking this Court to conclude that her actions, amounting to breaching a contract,

are somehow a protected activity under the first amendment. Respondent asks that this Court also reject this overreach of the anti-SLAPP protections and affirm the District Court's decision.

### B. RESPONDENT HAS DEMONSTRATED A PRIMA FACIE SHOWING THAT PLAINTIFF IS LIKELY TO PREVAIL ON THE CLAIM.

#### *1. The Parol Evidence Rule is Not Applicable to the Breach of Contract Claim.*

The Parol Evidence Rule is not applicable in this instance. The rule prohibits a court from considering evidence outside of the four corners of the contract in order to interpret the meaning of the contract. Respondent's Breach of Contract claim does not require the interpretation of the Decree of Divorce as Appellant suggests, because Respondent does not assert that the Decree was breached. Instead, it was the MOU that Appellant breached.

It is important to consider when the breach occurred and what exact provision of the MOU was breached. As stated above, the MOU contains a provision in which the Appellant agreed to draft the Decree with the terms included in the MOU. As Appellant added additional terms, the breach occurred ***in the drafting*** of the Decree and before the Decree was even executed. In that brief period between drafting and execution of the Decree, Appellant breached the terms of the MOU. Respondent's Breach of Contract claim therefore existed before the executed Decree and therefore before any alleged merger clauses of the Decree could come into effect.

Respondent's cause of action for Breach of Contract was perfected at the point of drafting, before the Decree was executed, and any supposed merger of the Agreements took place. In a way, Respondent's claim has very little to do with the Decree. This Court need not interpret the Decree or understand its terms. This Court is only being asked to compare the terms between the Decree and the MOU to determine if they are different, and if Appellant added additional terms. And if Appellant added additional terms, then Appellant Breached the MOU before the Decree was executed.

***a. Exceptions to Parol Evidence Rule***

Alternatively, if this Court determines that the Parol Evidence Rule applies, there are exceptions to the rule in which a court will consider outside evidence to interpret a contract:

> (a) To resolve ambiguities in the contract; (*Lowden Inv. Co. v. Gen. Elec. Credit Co.*, 103 Nev. 374, 741 P.2d 806 (1987)).
> (b) When the contract is silent as to a particular matter; (*Golden Press v. Pac. Freeport Warehouse*, 97 Nev. 163, 625 P.2d 578 (1981)).
> (c) When the contract was fraudulent; (*Sierra Diesel Injection Serv. v. Burroughs Corp.*, Inc., 651 F.Supp. 1371, 1377 (D. Nev. 1987)).
> (d) When the contract fails to specify what the consideration received would be; (*Dixon v. Miller*, 43 Nev. 280, 285, 184 P. 926, 927 (1919)).

First, the MOU was referenced and attached as an exhibit in the Decree of Divorce, so the MOU is considered to be within the four corners of the contract and

should not be considered outside evidence. Second, because of the MOU is part of the DOD, the meaning of the DOD becomes ambiguous. The DOD states that Sarah Janeen Rose (SJR) has an interest in Mr. Rose's PERS account whereas the MOU states that SJR does not have an interest in the account. Because both terms are considered to be part of the same document and are contradictory, the term of the DOD is ambiguous. Therefore, under Lowden, the court may consider outside evidence, such as statements made during the settlement negotiations, to determine the meaning of the DOD.

### *2. The District Court Does Not Lack Subject Matter Jurisdiction Over Respondent's Breach of Contract Claim.*

Appellant argues that because divorce decree allegedly destroys the independent contractual nature of merged pre-decree agreements, then the Divorce Court should have sole jurisdiction over any breaches of the MOU and therefore Respondent's cause of action. See *Opening Brief* at 24. To support their argument, Appellant cites to *Day v. Day*, 80 Nev. 386, 395 P.2d 321 (1964) and *Vaile v. Porsboll*, 128 Nev. 27, 268 P.3d 1272 (2012) to support their argument that the MOU is unenforceable once merged with the Decree. Yet these two cases are distinguished from the current matter, as the plaintiffs attempted to enforce the pre-divorce agreements after the execution of the decrees of divorce. The plaintiffs in those cases

attempted to retroactively enforce breaches of the pre-divorce agreements which occurred after the decrees of divorce were executed.

However, as explained above, the Breach of the MOU in the present matter occurred before the Decree was executed. The Breach of the MOU could not be merged with the Decree because the Decree did not exist as a binding legal document when the breach occurred. The Decree and MOU had not yet merged, and the MOU still retained its independent nature as a full-fledged agreement at the moment of breach.

As the breach occurred when the contracts were unmerged, the Breach of Contract claim retains its nature as a standard breach of contract claim. See *Renshaw v. Renshaw*, 96 Nev. 541, 543, 611 P.2d 1070, 1071 (1980) (An unincorporated, unmerged pre-divorce agreement is considered a typical breach of contract claim under jurisdiction of Nevada State Courts; *Paine v. Paine*, 71 Nev. 262, 263, 287 P.2d 716, 716 (1955), (unmerged agreement continues in full force and effect).

It is clear by the nature of the MOU, that this Court may exercise jurisdiction over this Agreement. The MOU does not grant relief to either party in the context of the divorce proceedings. The Respondent is not attempting to alter alimony or child support. Essentially, the actionable terms that could be breached in the MOU are the terms directing the Appellant to draft the final agreement, and in fact, that is what was breached.

As the Breach of Contract occurred before the Decree of Divorce was signed, and thus no merger of the agreements had yet occurred, the breach of the MOU should be considered a typical breach of contract claim, under jurisdiction of this Court.

### *3. Respondent's Claim is Ripe*

As stated above, the breach of contract occurred when Ms. Rose's counsel drafted a DOD which did not reflect the terms of the MOU. While it is true that Plaintiff is attempting to remedy the breach in family court, the breach already occurred, and Plaintiff was damaged. Therefore, the cause of action for breach of contract is ripe. Even if the terms of the MOU are ultimately upheld, David has been damages by having to litigate the issue, pay additional attorney fees and suffer through additional litigation that should have ended if Ms. Rose and her attorney had abided by the MOU. A case is ripe for review when "the degree to which the harm alleged by the party seeking review is sufficiently concrete, rather than remote or hypothetical, [and] yield[s] a justiciable controversy." *Herbst Gaming, Inc. v. Sec'y of State*, 122 Nev. 877, 887-88, 122 Nev. 877, 141 P.3d 1224, 1230-31 (2006). The Court should conclude that the harm to Plaintiff is sufficiently concrete to yield a justiciable controversy. The contract (MOU) was clearly breached by Ms. Rose and Mr. Rose has been damaged, regardless of the outcome of the hearing in family court, the breach has occurred, and Mr. Rose has incurred damage.

### C. Respondent Pled His Case with Specificity and is Supported by a Prima Facie Showing of Evidence.

The California case of *Navellier* makes clear that the anti-SLAPP statute does not bar a plaintiff from litigating an action for breach of contract or fraud that arises from the defendant's free speech or petitioning. *Navellier, supra*, 29 Cal.4th at p. 93. "Where a complaint is legally sufficient and supported by a sufficient *prima facie* showing of facts to sustain a favorable judgment if the plaintiff's evidence is credited, it is not subject to being stricken under the anti-SLAPP statute." *Id.*

Respondent pled his fifth cause of action for Breach of Contract with specificity and supported his cause of action with a *prima facie* showing of evidence. As stated above, Respondent's Breach of Contract claim alleges that the Appellant breached the MOU Agreement by adding terms to the Divorce Decree which were not included in the MOU. This was pled in the Complaint:

> Over the course of several hours, the parties reached a resolution as to division of community assets and other issues. Plaintiff and SARAH agreed that SARAH would NOT have any survivorship benefits to Plaintiff's PERS account. Mediator Rhonda W. Forsberg, Esq., drafted a Memorandum of Understanding ("MOU") memorializing the terms of the agreement. A copy of the March 23, 2018, MOU is attached hereto as Exhibit "1" and incorporated herein by this reference.

1 JA 1, at 3 ¶ 14. In paragraphs 15-17 of the Complaint, Respondent continues to plead with specificity how the terms of the MOU were not mirrored in the Decree and that a provision was added which granted an interest in his PERS retirement

account to the Appellant in violation of the MOU. The provision was included in full in the text of the Complaint. Furthermore, the full Memorandum of Understanding and Decree of Divorce were included in their entirety as exhibits to the Complaint. 1 JA 1, at 11-54. The Complaint specifically identifies that the Breach of the MOU occurred when the extra provision regarding the PERS account was inserted into the Decree and even specified and included the provision in the text of the Complaint. The Complaint was pled with specificity.

Furthermore, the Complaint included the full MOU and Decree as exhibits which would allow any finder of fact to compare the two documents and determine that the Decree contains more provisions not agreed to in the MOU, and therefore the MOU was breached. This fulfills the requirement for a *prima facie* showing of evidence which indicates that the Defendant is likely to prevail in this matter.

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## VII. CONCLUSION

David's breach of contract claim is not subject to Nevada's anti-SLAPP statute. The District Court was correct in allowing the claim to survive, as Sarah's actions of breaching the MOU cannot be considered a communication which should be protected under the anti-SLAPP statutes. Accordingly, this Court should affirm the District Court's Order denying Sarah's Special Motion to Dismiss as to David' breach of contract claim.

DATED this 7th day of September, 2021.

COHEN JOHNSON, LLC

By: *H. Stan Johnson*
H. STAN JOHNSON, ESQ.
RYAN D. JOHNSON, ESQ.
*Attorneys for Respondent David John Rose*

## NRAP 32(a)(9) CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Answering Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because this Answering Brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in Times New Roman font 14.

2. I further certify that this Answering Brief complies with the type volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 4,805 words.

3. I further hereby certify that I have read this Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. I further certify that this Answering Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying Answering Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 7th day of September, 2021.

COHEN JOHNSON, LLC

By: *H. Stan Johnson*
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RYAN D. JOHNSON, ESQ.
*Attorneys for Respondent David John Rose*

## CERTIFICATE OF SERVICE

I certify that I am an employee of Cohen Johnson, LLC and that on the 7th day of September, 2021, service of the foregoing was made by electronic service through Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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