IN THE SUPREME COURT OF NEVADA

EDGEWORTH FAMILY TRUST; AMERICAN GRATING, LLC; BRIAN EDGEWORTH AND ANGELA EDGEWORTH, INDIVIDUALLY, AND AS HUSBAND AND WIFE; ROBERT DARBY VANNAH, ESQ.; JOHN BUCHANAN GREENE, ESQ.; AND ROBERT D. VANNAH, CHTD, d/b/a VANNAH & VANNAH, and DOES I through V and ROE CORPORATIONS VI through X, inclusive,

Appellants,

v.

LAW OFFICE OF DANIEL S. SIMON, A PROFESSIONAL CORPORATION; DANIEL S. SIMON,

Respondents.

Supreme Court Case No. 82058

Dist. Ct. Case No. A-19-807433-C

EDGEWORTH APPELLANTS' REPLY BRIEF

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I. SUMMARY OF ARGUMENT

This Court's recent decision in *Williams v. Lazer* reaffirms that the district court erred in refusing to credit the unrebutted declarations offered by the Edgeworths showing that they filed *Simon I* in the good faith belief that they had been damaged by Simon withholding settlement funds from them. 137 Nev. Adv. Op. 44 *4, ___ P.3d ___ (Sept. 16, 2021) Their unrebutted declarations offered to the district court also demonstrated that the out-of-court statements Simon complained of in his rogue amended complaint were statements of opinion made in places open to the public in anticipation of litigation and concerned attorney conduct, a subject this Court has recognized is a matter of public interest. *Abrams v. Sanson*, 136 Nev. 83, 87, 458 P.3d 1062, 1066 (2020).

These good faith out-of-court statements are not actionable under Nevada's anti-SLAPP statute. NRS 41.650. *Lazer* also confirms that the district court erred in refusing to consider and apply the applicable privileges to those statements, which would negate Simon's probability of success on the merits. *Lazer,* 137 Nev. Adv. Op. 44 at *6 ___ P.3d at ___. Statements made in the course of or in anticipation of litigation are absolutely privileged, and cannot be the basis for defamation or for other tort actions. *Id*. (absolute privilege applies to claims of abuse of process and intentional interference with prospective business relationships); *see also Greenberg Traurig v. Frias Holding Co.*, 130 Nev. 627, 630, 331 P.3d 901, 903 (2014); *Omerza v. Fore Stars, Ltd.*, 455 P.3d 841 at *1 (Nev. 2020) (Table) (other tort claims are subject to the anti-SLAPP statute, which protects the defendant's activity regardless of the form of plaintiff's claim). The

privileges recognized in *Lazer* negated any probability of success by Simon in this case. 137 Nev. Adv. Op. 44 at *4, ___ P.3d at ___.

Simon's overwrought and turgid answering brief confirms that his retaliatory lawsuit arises from the good faith filing of the complaint in *Simon I* and three out-of-court statements made in anticipation or during the course of that proceeding. Ans. Br. at 3:21 – 26. Consequently, his defense against dismissal rests exclusively on his erroneous contention that the district court's decision in *Simon I* in and of itself precludes a finding of the Edgeworths' good faith under the first prong of the anti-SLAPP analysis, ***and*** satisfies his burden to demonstrate a probability of success on the merits. *Id.* at 5:24; 35:21 – 22. This mistaken reliance overlooks the Court's precedent requiring a plaintiff in anti-SLAPP to present admissible *evidence* to negate the claim of good faith *and* support the plaintiff's probability of success. It also overlooks the important fact that the primary purpose of the evidentiary proceeding in *Simon I* was, as Judge Jones said, to contest Simon's lien. AA000033 ¶25; AA001098. Judge Jones did not attribute bad faith to the Edgeworths in adjudicating the lien. AA004147:13 – 15.

Although the Edgeworths' claims in the underlying suit were dismissed as a matter of law, they were asserted upon the advice of counsel. The district court's order in *Simon I* states that "the Edgeworths ***believed*** the settlement proceeds [Simon had withheld] were solely theirs." AA000034:6-8 (emphasis added). That should resolve the good-faith issue in the Edgeworths' favor, notwithstanding Simon's self-serving arguments based on *his* own testimony. Simon's personal views as to the Edgeworths' state of mind, as well his factual assertions made without record support, should be disregarded. Simon's attempt to relitigate or recast the court's decision in *Simon I* is an improper effort to revise the court's decision to bolster his

impertinent contention that the first prong of the anti-SLAPP statute, NRS 41.660(3)(a), has not been satisfied by the Edgeworths. Likewise, Simon's assertions of issue or claim preclusion are red-herrings, as even Judge Crockett recognized below. AA004194 (these issues "have nothing to do with an anti-SLAPP Special Motion to Dismiss").

Judge Crockett's initial inclination to grant the special motion to dismiss, announced ***after*** summarizing each of the claims and evidence offered, was correct. AA004188-97. This is a classic SLAPP suit brought in retaliation for the Edgeworths' rejection of Simon's demand for more fees than he was entitled to. When Simon threatened to derail the multi-million settlement and refused to provide a final bill so that the Edgeworths could pay the balance of the fees owed him, the Edgeworths exercised their constitutionally protected right to consult legal counsel and defend against Simon's threats. In the process of seeking advice of counsel, they spoke to their long-term attorney and later discussed the resulting lawsuit with a retired Justice. They also spoke to a volleyball coach that Simon had foolishly and gratuitously brought into the dispute by making libelous accusations against Brian Edgeworth. In all of these conversations, the Edgeworths shared personal opinions that are unquestionably constitutionally protected speech.

Since protected speech and petitioning activity are the basis for Simon's entire complaint in this case, the special anti-SLAPP motion was dispositive of all causes of action. The entire lawsuit should have been dismissed, irrespective of the fact the Edgeworths – in response to Judge Crockett's expressed frustration with the voluminous briefing that was initially filed in support of dismissal – chose to defer renewing their NRCP

12(b)(5) motion to dismiss until after their special anti-SLAPP motion was considered.[1]

Simon's contention that NRS 41.660(4) discovery is needed should be disregarded. No evidence that could be elicited by the limited discovery permitted under the statute could overcome the protections due the Edgeworths under the anti-SLAPP statute and applicable privileges, which preclude liability. Simon also mistakenly relies on the old "summary judgment" standard language in NRS 41.660 that the Legislature removed in 2013. He also ignores the fact he failed to offer the district court any admissible evidence to negate the Edgeworths' declarations demonstrating their good faith. Of the three out of court statements that Simon offers to support his claims, two are outside the statute of limitations. But in any event all are protected and/or privileged speech. Discovery would not render these statements actionable.

For these reasons, the Court should reverse the district court's order denying their special anti-SLAPP motion to dismiss and remand with instructions to the district court to dismiss all claims.

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[1] Simon's specious contention that all issues raised are not appealable is merely another distraction (Ans. Br. at 7). All of his claims are premised on protected speech and privileged conduct. The district court's denial of the Edgeworths' anti-SLAPP motion is appealable under NRS 41.670(4). The record shows that the Edgeworths and the Vannah defendants each initially filed NRCP 12(b)(5) motions in addition to their special anti-SLAPP motions to dismiss. After Judge Crockett expressed frustration with the volume of the briefing and ordered the parties to rebrief (AA002878A-B), the Edgeworths deferred renewing their 12(b)(5) motion but joined in the Vannah Defendants' reply to their renewed 12(b)(5) motion to dismiss, which Judge Crockett also denied.

II. ARGUMENT

In preface to this argument, we wish to point out that Simon's brief is larded with statements of fact that are not supported by citations to the record and with citations that when examined do not support the fact asserted.[2] *See* NRAP 28 (requiring record citations for assertions of fact). These unsupported allegations should be disregarded, along with his attempt to relitigate *Simon I*. Ans. Br. at 25.

Judge Crockett erred in changing course and accepting Simon's argument that *Simon I* was dispositive of both the first and second prongs of the anti-SLAPP analysis. *Williams v. Lazer* confirms his reversible error in doing so.

A. *WILLIAMS V. LAZER* CONFIRMS THAT THE EDGEWORTHS' UNREBUTTED DECLARATIONS SHOULD HAVE BEEN CREDITED *AND* THEIR LITIGATION PRIVILEGES RECOGNIZED

Simon is wrong that *Simon I, **alone**,* defeats the first prong of anti-SLAPP analysis by invalidating the sworn testimony offered by the Edgeworths. *E.g.,* Ans. Br. at 5:24 (saying *Simon I* defeats the first prong); at 35:21-22 (claiming prima facie showing is established by *Simon I)*; at 42:18-19 (same). *Lazer* reaffirms the authority cited in the Edgeworths' opening brief and confirms that to satisfy the first prong of the anti-SLAPP the Edgeworths ***only*** had to demonstrate that their comments and activity were in good faith and fell within one of the four categories of protected communications in NRS 41.637, *Lazer,* 137 Nev. Adv. Op. 44 at *3, __ P.3d at __; NRS 41.660(3)(a).

[2] Examples of unsupported allegations are discussed in this reply. Because many distract more than they inform, this reply does not attempt to address all of them.

It cannot be reasonably disputed that the Edgeworths' judicial activity was in furtherance of their right to petition NRS 41.637(1). *Bonni v. St. Joseph Health System*, on which Simon mistakenly relies,[3] in fact confirms that "[t]he filing of a lawsuit is an exercise of the First Amendment right to petition the government," and "claims that arise out of the filing of a suit arise from protected activity for purposes of the anti-SLAPP statute." 491 P.3d 1058, 1076 (Cal. 2021). *Bonni* applied the very analysis described in the Edgeworths' opening brief. *Id.* at 1065-66. In the first step of the analysis, *Bonni* confirms that "courts are to consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." *Id.* (internal quotations and citations omitted). Had Judge Crockett done that, he would have confirmed that each of Simon's claims is based on the filing of the *Simon I* complaint and three protected communications.

The three out-of-court statements by the Edgeworths that Simon alleges were defamatory, two of which were to lawyers, constitute free speech in direct connection with an issue of public interest in a place open to

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[3] *Bonni* does not stand for the proposition for which Simon cites it, and its facts are inapposite. *See* Ans. Br. at 6, 8. *Bonni* involved the hospitals' anti-SLAPP motion to strike a physician's entire retaliation claim because parts of the claim were based on protected peer review communications. 491 P.3d at 1064. The issue was whether the physician's claims that the hospitals retaliated against him – including suspension and termination of his staff privileges after he voiced concerns about patient safety – arose from the hospitals' protected activity. *Id.* at 1066. The California Supreme Court concluded each of the grounds underlying the retaliation claim had to be examined to see if they arose from protected communications. *Id*. at 1065 – 66. The court reversed in part, and remanded for further proceedings so that the superior court could consider whether the hospitals could overcome protection of the statements at issue under the second prong of the anti-SLAPP analysis.

the public. NRS 41.637(4). They were made after the Edgeworths' relationship with Simon had broken down and litigation was reasonably contemplated or in progress. These communications concerned their feelings about Simon's demand for fees beyond what were due – and had been paid, to the extent billed – under their agreement. This Court has previously recognized that attorney conduct is a matter of public interest. *Abrams,* 136 Nev. at 87, 458 P.3d at 1066. Thus the protected speech concerning the fee dispute is protected not only by the anti-SLAPP statute, but also by the absolute litigation privilege. *See Lazer*, 137 Nev. Adv. Op. 44 at *6, __ P.3d at __ (absolute privilege applies to statements made by a lawyer or non-lawyer while judicial proceedings are ongoing or "contemplated in good faith," where the communication is "related to the litigation").

The Edgeworths offered unrebutted sworn testimony that Simon discounts simply because it was more expansive than declarations offered in *Simon I*—all without recognizing that the earlier statements were provided for a different purpose and made in a different procedural posture. In point of fact, Simon did not present any evidence to refute the Edgeworths' sworn testimony about their opinions and subjective beliefs when they initiated *Simon I.* AA003062 – 82 (Brian's); AA003616 – 22 (Angela's). The district court in *Simon I* rejected the notion that it was filed in retaliation for Simon filing his lien, AA004147:13 – 15, although he continues to advance that argument even today. Ans. Br. at 28:20 – 21.

That the district court in *Simon I* (and this Court) determined that *one* of several claims advanced on the advice of their counsel was not maintained on reasonable grounds does not negate the Edgeworths' testimony that when they initiated suit and discussed the fee dispute, they did so on the

basis of their own feelings and opinions and on factual statements they believed to be truthful. *Lazer* is directly on point on this issue.

In *Lazer*, the Court held that the purchaser's sworn declaration confirming her *belief* that the statements she made were her own feelings and opinion based on her personal dealings with the realtor, and were truthful, was "sufficient to show that her statements were truthful or made without knowledge of their falsehood." *Lazer*, 137 Nev. Adv. Op. 44 at *4, __ P.3d at __. The Court recognized that although the realtor offered declarations alleging some of the purchaser's statements were factually wrong, the Court concluded that the realtor's "declarations do not constitute contrary evidence to refute Williams' statements because they do not allege, much less show, that *Williams knew* any of the statements were false ***when she made them***." *Id*. (emphasis added). The same is true here of Simon's heedless attack on the Edgeworths' anti-SLAPP declarations.

Although Simon maintains in his response that whether the words used by the Edgeworths were opinion is irrelevant at this stage of the proceedings (Ans. Br. at 37:23 - 24), *Lazer* and other case law say otherwise: "[O]pinion statements are incapable of being false, because 'there is no such thing as a false idea.'" 137 Nev. Adv. Op. 44 at *3, __ P.3d at ___ (*quoting Abrams*, 136 Nev. 83, 89, 458 P.3d 1062, 1068 (2020)). The *Lazer* Court concluded the purchaser's statements that a real estate agent was racist, sexist, unprofessional and unethical were ***not*** actionable. *Id.* So even if the Edgeworths used some variation of the word "extort" to describe their feelings in the challenged statements (which they deny in sworn statements), courts recognize that the mere use of this word is opinion, not actionable speech. *Blevins v. W.F. Barnes Corp.*, 768 So. 2d 386, 391 (Ala. Civ. App. 1999); *see also Abrams*, 136 Nev. at 90, 458 P.3d. at 1068-69 (the gist, rather than the

literal meaning of specific words, should be considered). Simon offers no contrary authority.

The Edgeworths met their burden to show that their speech and conduct fell within the sphere of protection provided by the anti-SLAPP statute. Their declarations confirm that the statements at issue were opinion, truthful, and made without knowledge of their falsity. And their litigation statements were privileged and made upon the advice of counsel, all of which Judge Crockett erroneously failed to consider.

B. SIMON'S OVER-RELIANCE ON *SIMON I* DOES NOT STAND UP

In *Lazer*, a purchaser stood up to the seller's realtor and notified him via text that she was considering filing a complaint with NRED due to his conduct. *Lazer*, 137 Nev. Adv. Op. 44 at *1, __ P.3d at __. Despite the fact the purchaser sent her text only to the realtor, the realtor demanded the purchaser pay him "several thousand dollars and [provide] an apology" in exchange for him not suing her for defamation. She refused, and he filed suit, claiming defamation, negligence, business disparagement, and intentional infliction of emotional distress." *Id.* at 2. The purchaser responded with an anti-SLAPP motion to dismiss, which this Court concluded the district court erroneously denied. *Id.*

Similarly, after the Edgeworths stood up to Simon's demands for over a million dollar windfall in fees, he threatened to withdraw, prompting the Edgeworths to seek other counsel to finalize the settlement that had been reached on their underlying products case. AA00307:13 – 20.[4] (At this point,

[4] Simon's answering brief disputes that the demand for his proposed bonus was presented as "agree to it or else" (Ans. Br. at 15:6 – 7); but his statement that "[i]f you are not agreeable, then I cannot continue to lose money to help

they had already paid $367,606.25 in fees billed at the rate Simon proposed (AA000008:27) plus billed costs). And despite having ignored the Edgeworths' requests to provide a statement of outstanding fees, which the district court recognized the Edgeworths had made even before the relationship broke down (AA000031 – 32 ¶14; AA003077 ¶ 140), Simon immediately filed a lien, threatened to tie them up in court for years (which he has done), slow-played the settlement, and then did not promptly notify them that the $6M+ settlement checks had been made available for earlier pick-up. Furthermore, Simon employed these strong-arm tactics knowing that the Edgeworths were anxiously awaiting the settlement funds to pay off high-interest loans they had obtained to pay Simon's substantial fees. He refused to turn over the checks to them, which the district court acknowledged the Edgeworths ***believed*** belonged to them (AA000034:6 – 8), and refused to state the amount he claimed was due on his final invoice unless they first endorsed the settlement checks (AA003076 ¶134). That prompted legal action on the advice of counsel (AA003078 ¶ 149; AA003619 ¶ 44), which the district court said *was not* commenced to retaliate for Simon filing his lien. AA004147:13 – 15.[5]

Simon I came before the district court on his 12(b)(5) motion to dismiss; the evidentiary hearing, however, was convened to adjudicate Simon's lien.

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you" could reasonably be interpreted to mean just that. AA003110 – 14 (penultimate sentence); *see also* AA003070 ¶77.

[5] Simon claims that "The Edgeworth Parties did not rely on counsel when they testified the case was filed to punish Simon." Ans. Br. at 37:11 – 12. Nothing in the record supports Simon's claim that the Edgeworths *filed Simon I* to punish him. Their sworn declarations demonstrate they relied on counsel's advice in filing and managing the litigation. Ans. Br. at 37:11 – 12. This is another example of Simon making assertions unsupported by the record.

AA000028-37; AA001098. The Edgeworths were not permitted to elicit testimony not directly related to the amounts owed for Simon's legal work. The district court emphasized that the only purpose of the evidentiary proceeding was the lien adjudication. AA004173:2 – 7 ("I am here to make a call about the legal work that was done by Mr. Simon and what is owed to him. That is the only thing I am here to pass judgment on."); AA004173:12 – 13 ("I'm just here to decide what is going to be done with what's owed to them [the Edgeworths], what's owed to Mr. Simon, who needs to get paid."); *see also* AA004170:18 (Simon's counsel acknowledged that "this is a lien adjudication hearing"); RA000920:1 – 9 (precluding inquiry into Simon's violation of professional rules).

Simon's repeated efforts to enlarge the scope of that proceeding in an effort to salvage this retaliatory SLAPP suit should be firmly rejected.[6] *See, e.g.,* Ans. Br. at 20 (contending "all facts" at issue in *Simon II* were adjudicated in *Simon I)*; Ans. Br. at 21 ("this Court does not need to look beyond *Simon I* . . ."); Vannah Ans. Br. at 28 (contending this case is "unique" because "prior admissions and filings [have] already established Simon's case").

Adjudicating Simon's lien was the purpose of the evidentiary hearing; it was not convened to inquire into the Edgeworths' motives in filing the litigation. And although the district court found the ***form* of the lien** was

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[6] As even Judge Crockett recognized, issue and claim preclusion are distractions in this case. AA004194:15 – 18. The claims in this case were not part of *Simon I*; the issues here were not litigated in *Simon I*. *See Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 197 P.3d 709 (2008) (setting out elements of claim and issue preclusion, and requiring, among other elements, the same parties or privies and identical issues litigated to final judgment). In *Simon I*, the Edgeworths' affirmative claims were dismissed as a matter of law, without any findings concerning their state of mind when the case was filed ***or*** at the time the allegedly defamatory statements were made.

appropriate (AA000010:6-7), it rejected the exorbitant amount claimed by Simon. *Compare* AA000025: 3 – 8 (maximum amount the district court determined was due) *with* A000008:26 – 28 (amount Simon claimed). Following the lien adjudication hearing, the district court dismissed the Edgeworths' claims ***as a matter of law***, which necessarily meant without factual findings. Thus, the Edgeworths' motives in initiating litigation were neither examined nor determined. AA000028 – 36. In fact, in her order of dismissal, Judge Jones recognized that "the Edgeworths believed that the settlement proceeds [Simon had liened] were solely theirs." AA000034:6-8. And although the district court later concluded the conversion claim was not "maintained on reasonable grounds" for purpose of adjudicating the attorney fees motion filed by Simon(AA004264), and awarded related fees and costs, it ***rejected*** Simon's request for fees and costs incurred to defend the other claims and prosecute the lien adjudication. AA000678 ¶2. In other words, a substantial portion of the Edgeworths' litigation strategy was sustained, which guts Simon's claim of bad faith. *See also* Judge Jones's statement that *Simon I* was not a retaliatory filing. AA004147:13 – 15.

Simon contends his claims arise out of allegedly defamatory statements made in bad faith by the Edgeworths to third-parties he says were disinterested, contrary to Judge Jones's view that the Edgeworths did not sue him in bad faith for filing a lien. Ans. Br. at 3:21 – 26; *but see* AA004147:13 – 15 (rejecting Simon's argument that the Edgeworths sued him for filing a lien).

The crux of Simon's answering brief, like his argument to Judge Crockett, is that the *Simon I* district court's dismissal of the conversion claim equates to a finding of bad faith, which the *Simon II* court was required to accept. *See, e.g.,* Ans. Br. at 20 ("[Edgeworths] ignore the final order

adjudicating *all* facts . . ."); at 21 ("this Court does not need to look beyond *Simon I* . . ."); at 25 ("conduct has already been determined to be in bad faith . . ."). This argument ignores the limited purpose of the evidentiary hearing and fails to point to any findings in the dismissal order to support his meritless proposition. In fact, ***the dismissal order does not include any language suggesting bad faith***; the only finding in that order bearing on any party's state of mind is the acknowledgment of the Edgeworths' "belief" that their claims were justified. AA000034:6-8; *see generally* AA000028 – 37. That should be conclusive of the good-faith issue.

Without reference to the showings required in the anti-SLAPP framework and ignoring the Edgeworths' declarations, district court Judge Crockett accepted Simon's contention that *Simon I* is dispositive in this litigation. This Court, however, has previously rejected similar arguments and should do so again here. In *Omerza*, like in this case, the developer claimed homeowners challenging his development "procured signatures on the form declarations and/or signed those declarations based on information that they knew to be false," and supported that assertion by pointing to district court orders filed in other litigation involving the development. *Omerza*, 455 P.3d 841 at *3. But although the orders in the related litigation were adverse to the homeowners, this Court recognized that "[n]one of those orders directly draw into doubt appellants' declaration in this case as to whether the communications in connection with procuring signatures . . . were in good faith." *Id.*

Similarly, the *Simon I* order on Simon's motion for fees concluding that the conversion claim "was not maintained on reasonable grounds" does not call into question the Edgeworths' good faith in seeking judicial relief, nor does it address the veracity of any of their statements. Simon offers nothing

more than the *Simon I* fee order, which ***does not*** contradict the Edgeworths' declarations in any way. *See Lazer*, 137 Nev. Adv. Op. 44 at *2, __ P.3d at __ (citing *Stark v. Lackey*, 136 Nev. 38, 43, 458 P.3d 342, 347 (2020) (holding that a defendant's affidavit affirming her statements were true or statements of opinion, in the absence of contradictory evidence in the record, is sufficient to show good faith)).

The Edgeworths clearly satisfied prong one by showing that their speech and conduct fell within one or more of the protected categories in NRS 41.637. *Lazer,* 137 Nev. Adv. Op. 44 at *3, __ P.3d at __; *Omerza*, 455 P.3d 841 at *2.

C. SIMON IGNORES THE 2013 AMENDMENTS TO THE ANTI-SLAPP STATUTE

Simon argues that the summary judgment standard applies to anti-SLAPP motions to dismiss. *See, e.g.,* Ans. Br. at 42:10 – 11 (invoking summary judgment standard); 33:3 – 4 (same). But in 2013, the Nevada Legislature *deleted* the summary judgment language from the second prong analysis, and again amended the standard in 2015. NRS 41.660(3)(b) now requires that in prong two, the plaintiff must "demonstrate[] with prima facie evidence a probability of prevailing on the claim." And in NRS 41.665, the Legislature further clarified the plaintiff's burden of proof by stating that: "in determining whether the plaintiff 'has demonstrated with prima facie evidence a probability of prevailing on the claim' the plaintiff must meet the same burden of proof that a plaintiff has been required to meet pursuant to California's anti-Strategic Lawsuits Against Public Participation law as of June 8, 2015," that is, a plaintiff must not only state a legally sufficient claim but must also show admissible evidence of facts to demonstrate minimal

merit. *Omerza*, 455 P.3d 841 at *3. Simon has failed to meet his burden under the current statute.

D. SIMON'S ARGUMENTS RELY ON UNSUPPORTED ASSERTIONS OR SOUND BITES TAKEN OUT OF CONTEXT.

1. Simon's Repeated Reference to "Sham-Affidavits" Ignores the Record.

Without citation to the record, Simon attempts to justify Judge Crockett's change of course by contending that "the district court compared the new Edgeworth declarations with prior declarations in *Simon I*. Ans. Br. at 33:12 – 13.[7] Simon also leans heavily on out-of-context snippets of *Simon I* testimony and alleged inconsistencies with the Edgeworths' sworn testimony in *Simon I* to suggest malice and denounce their anti-SLAPP declarations as "sham affidavits." Ans. Br. at 58:15-16. These contentions, however, not only lack evidentiary support, but they wholly ignore the dissimilarity between this case and *Simon I*. The style of the declarations in the two cases necessarily differ because they were offered at different points in time for different purposes, and assisted by different attorneys. They are consistent on the substance and do not, as Simon suggests, demonstrate deception, nor does Simon offer any evidence to support such an allegation. For instance, in *Simon I*, Simon claimed there was never any agreement as to fees, and tried to prove he was terminated by saying that the Edgeworths stopped even returning his calls. Brian Edgeworth offered a declaration in that proceeding to explain that the true reason he broke off communications with Simon was due to Simon's disgusting suggestion to the volleyball coach Herrera that Brian was somehow a threat to children. AA003179 ¶ 26. In

[7] There is no evidence in the record of Judge Crockett undertaking such a comparison. *See* AA004188-97 for his statement of what he reviewed.

defending against Simon's retaliatory SLAPP complaint in *Simon II*, Brian elaborated on that discussion and reiterated that he met with the coach to respond to Simon's outrageous comments to Herrera and expressed his opinion as to how and why his relationship with Simon had broken down. He also confirmed that one word (*i.e.*, extort) used in the earlier declaration to characterize his *feelings about the conversation* with the coach was not among the actual words spoken in conversation with the coach. AA3062 – 3082 ¶¶ 110 – 125. But even if the conversations with the volleyball coach used words Simon objects to those words would be mere statements of opinion that are not actionable.

The discussions in issue all concerned Simon's conduct as a lawyer, a topic that this Court has previously acknowledged is a matter of public interest. *See Abrams*, 136 Nev. at 87, 458 P.3d at 1066; *see also Smith v. Zilverberg*, 137 Nev. Adv. Op. 7, 481 P.3d 1222, 1227 (2021) (citing *Abrams* on this issue); *Veterans in Politics Int'l v. Willick*, 457 P.3d 970 (Table) (Nev. 2020) (attorney fee eligibility, which was at issue in *Simon I*, is "a topic that implicates public policy concerns of interest to the public generally"); *see also* NRS 41.637.

Although Simon disputes whether the locale of the communications was a public forum (Ans. Br. at 39), he cannot dispute that the restaurants where these communications took place are places open to the public, which is all the plain language of the statute requires. NRS 41.637 ("Communication made in direct connection with an issue of public interest [1] ***in a place open to the public*** or [2] in a public forum") (emphasis added). Thus, not only are the conversations with the coach and two lawyers protected under the

absolute litigation privilege, all of the conversations are protected speech under NRS 41.637.

2. Simon Fabricates Admissions.

Simon's response regarding Angela Edgeworth misstates the record and ignores the context of her testimony that establishes Angela identified Lisa Carteen and Justice Shearing as lawyers she knew and consulted, *and* as friends to whom she was expressing her feelings and opinions. *See* Opening Br. at 14 – 16 (*citing* AA003394:1-7 (identifying Ms. Carteen as one of two lawyers she consulted for advice); AA003371 (confirming that in her November 27, 2017 email exchange with Simon, she informed him she "would like to have our attorney [Ms. Carteen] look at [his proposed] agreement before signing"; *contra* Ans. Br. at 23:5 – 6 (falsely suggesting Angela "concealed" Carteen's involvement as counsel)); AA003394:1-7; AA003395:24 – AA003397:15 (identifying Justice Shearing as the second of two lawyers with whom she discussed the Simon matter). Angela did not claim she retained Justice Shearing or had a "legal consultation" with her as Simon now suggests to justify useless discovery. Ans. Br. at 34:9 – 14. Angela was seeking advice on legal options from a trusted friend who is a lawyer and retired jurist. AA003396:21 – 22 (testifying that her conversation with Justice Shearing "gave [her] confidence . . . we were in the right.").

Simon also twists Angela's cross-examination testimony during the lien adjudication into an admission that seeking punitive damages to "punish" Simon transmutes *Simon I* into a purely retaliatory lawsuit to avoid paying Simon what he was due and punish him for filing the lien, which the record contradicts. *See e.g.,* Ans. Br. at 21:5 – 6; 37:12; 46:26; *see also* AA004147:13 – 15 (Judge Jones rejecting Simon's argument that the Edgeworths sued him for filing his lien). In fact, punitive damages by

definition, *are* intended to punish outrageous conduct, but Angela's testimony acknowledging that unremarkable fact in no way supports Simon's overblown contention that her testimony is an admission that the litigation was a "sham" filed only to improperly punish Simon. *Id*.; *see also* AA003941:21 – 3942:23 (cross-examination about reason for seeking punitive damages); AA004147:13 – 15 (Edgeworths' *Simon I* suit not retaliatory).

Simon also pounds on his contention that the Edgeworths "falsely" claimed he was not owed anything more for his services. *See e.g.,* Ans. Br. at 18:11 – 13; at 24:20 and 26-27; and at 25:7 – 8, which the record also refutes. AA3933:17 (Angela testified: "I want to pay [Simon] what we owe him."). The Edgeworths knew fees and costs were outstanding and repeatedly asked Simon for a bill in order to pay him what he was owed. AA000031 – 32 ¶14; AA003077 ¶ 140.

Simon also says, without substantiation, that "Vannah demanded Simon provide his attorney lien for the services provided." Ans. Br. at 13. In truth, which Simon would like to avoid, Vannah was simply requesting that Simon provide the amount he claimed under the lien filed weeks before so that the Edgeworths could settle the balance. He also falsely says the Edgeworths and their lawyers "did not even know the lien amount" when *Simon I* was filed, which is also disproven by the record. Simon's amended lien was filed on January 2, 2018. AA00003144. The Edgeworths filed their complaint in *Simon I* on January 4, 2018. AA001289.[8] The Court acknowledged in open court that the very purpose of the lien hearing was

[8] Again demonstrating his disregard of record facts, Simon contends the specific sum he asserted in his amended lien filed January 2, 2018, (AA003144) was based on the opinion of Will Kemp, which is dated almost a month later, January 31, 2018. AA001414 - 21.

to determine what was owed to Simon so that the Edgeworths and Simon could both be paid. AA004173:12 – 13. Simon also falsely contends that the Edgeworths did not dispute the amount of the lien (Ans. Br. at 17:24 – 25), which the record does not support. AA004173:12 – 13.

Finally, Simon now disputes the timing of when he asked for the unauthorized windfall fee payment, but his own prior testimony confirms when he made that request. *See* RA000782 ("I mean, here we are at the end of the case. I've got an amazing result, and now it's time to figure out a fair fee . . . ."). Judge Jones figured out that for the most part, his "fair fee" was the hourly rate which he agreed to before *Simon I* was initiated.

E. SIMON NEVER SOUGHT LEAVE TO FILE AN AMENDED COMPLAINT AND CANNOT POINT TO ANY ORDER AUTHORIZING IT

Simon attempts to avoid the extensive California authority that forbids amendment of a complaint once an anti-SLAPP motion to dismiss is pending by pointing to distinguishable federal authority. Ans. Br. at 43 – 44. But *Verizon Delaware, Inc. v. Covad Commc'ns, Company* supports the Edgeworths' argument and confirms that California law does not permit amendment after a special anti-SLAPP motion is filed. 377 F.3d 1081, 1091 (9th Cir. 2004). The Ninth Circuit concluded the district court should not have applied California procedural law regarding amendment only because it conflicted with a Federal Rule of Civil Procedure. *Id.*

Permitting an amended complaint to evade a special motion to dismiss undermines Nevada's anti-SLAPP statute by allowing mean-spirited litigants like Simon to thwart the statute's quick dismissal remedy. *Salma v. Capon*, 74 Cal. Rptr. 3d 873, 888-89 (Ct. App. 2008); *Lazer,* 137 Nev. Adv. Op.

44 at *4, __P.3d at __ ("California authority is instructive in deciding anti-SLAPP cases").

Simon never sought leave to file the amended complaint. That Judge Crockett in his frustration orally stated that Simon's rogue amended complaint "supersede[d]" the original complaint does not make that statement an order, does not excuse Simon's belated amendment without even seeking leave of Court, and does not overcome the sound policy reasons holding amendment is improper once an anti-SLAPP motion has been filed.

Simon's effort to present Judge Crockett's in-court statement as an "order" is another example of his distortion of the record. Ans. Br. at 44:14; *see Rust v. Clark County Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987) ("The district court's oral pronouncement from the bench, the clerk's minute order, and even an unfiled written order are ineffective for any purpose . . . ."). His presumptuous response (Ans. Br. at 44:17 – 18) that the Edgeworths' opening brief concedes the sufficiency of the Amended Complaint is also nonsense. Simon's dissembling notwithstanding, it was unmistakable error for Judge Crockett to entertain Simon's unauthorized amended complaint and frustrate the fair and prompt adjudication of the pending anti-SLAPP motions to dismiss under the initial complaint. *Salma*, 74 Cal. Rptr. 3d at 888-89; *Enwere v. Hiller*, No. C 11-00645 JSW, 2011 WL 2175497, at *2 (N.D. Cal. June 3, 2011).

F. SIMON HAS NOT, AND CANNOT, DEMONSTRATE A PROBABILITY OF PREVAILING ON THE MERITS

Simon also relies only on his assertion – unsupported other than by inappropriately pointing to the *Simon I* fee order – that he satisfied the

second prong of the anti-SLAPP analysis. This defect is fatal to prong-two. Simon did not demonstrate with prima facie evidence a probability of prevailing on the merits. NRS 41.660(3)(b). "[I]n addition to stating a legally sufficient claim," Simon "must demonstrate that the claim is supported by a prima facie showing of facts that, if true, would support a favorable judgment." *Omerza* 455 P.3d 841 at *3. He must do this with competent facts that are admissible evidence, *id*., which he has not done.

When the applicable privileges are appropriately considered, as this Court so recently held they must be, it is impossible for Simon to demonstrate a probability of prevailing on the merits of any of his claims, which are all premised on protected communications. *Lazer,* 137 Nev. Adv. Op. 44 at *4, ___ P.3d at ___.[9] Although Simon's answering brief glibly posits that the litigation privileges do not apply, or that privileges should be considered only as affirmative defenses (Ans. Br. at 40:8 – 9), he is wrong on both counts. This Court's recent *en banc* decision in *Lazer* reaffirmed that the applicable privileges must be considered in the second step of the anti-SLAPP analysis. *Id.* The Court made clear what had been implicit in *Shapiro*: "that the absolute litigation privilege applies at the second prong of the anti-SLAPP analysis because a plaintiff cannot show a probability of prevailing

[9] *Lazer* also makes clear that Simon's contention that the litigation privilege protects only statements and not conduct is also incorrect (Ans. Br. at 47:9 – 10). *Lazer,* 137 Nev. Adv. Op. at *6, ___ P.3d at ___. *Bonni* also confirms that "claims that arise out of the filing of a suit arise from protected activity for purposes of the anti-SLAPP statute." 491 P.3d at 1076.

on his claim if a privilege applies to preclude the defendant's liability." *Id.* at *6 (*citing Shapiro v. Welt*, 133 Nev. 35, 36-37, 389 P.3d 262, 265-66 (2017)).

It cannot reasonably be disputed that the Edgeworths' judicial filings and testimony are absolutely privileged. *Fink v. Oshins*, 118 Nev. 428, 433, 49 P.3d 640, 644 (2002) ("the privilege applies not only to communications made during actual judicial proceedings, but also to communications preliminary to a proposed judicial proceeding.") (citation and internal quotation marks omitted). This means the Edgeworths' out-of-court statements are not actionable because they were related to the fee dispute. *Jacobs v. Adelson*, 130 Nev. 408, 413. 325 P.3d 1282, 1285 (2014) (privilege applies to lawyers and non-lawyers alike. *Id.; accord Lazer*, 137 Nev. Adv. Op. 44 at *6, ___ P.3d at ___.

Judge Crockett just plainly erred in refusing to consider the applicable privileges to defeat the second-prong of the analysis. *See* AA003500 (asserting anti-SLAPP immunity); AA003503 (asserting litigation privilege); AA003505 and AA004009 (asserting conditional reply privilege). The district court erroneously accepted Simon's mistaken representations that the privileges and anti-SLAPP protection applied only to defamation, and that it was premature to consider them. AA004202; AA004205; AA003551:7 – 9. When the Nevada Legislature amended the prong-two standard in 2015, NRS 41.660(3)(b), it also enacted NRS 41.665, which explains that the new standard requires the plaintiff to carry the burden of proof required under California's anti-SLAPP statute. This means that Judge Crockett was required to consider whether Simon had demonstrated that his "complaint [was] both legally sufficient *and* supported by a sufficient prima facie

showing of facts to sustain a favorable judgment if Plaintiff's ***evidence*** [not rhetoric] is credited." *Omerza*, 455 P.3d 841 at *3-4 (quoting *Bikkina v. Mahadevan*, 193 Cal. Rptr. 3d 499, 511 (Ct. App. 2015) (emphasis added). Simon did not provide such evidence, and the district court erred in concluding that he had shown minimal merit by invoking *Simon I*, ***and*** in refusing to apply the privileges that preclude liability for the Edgeworths.

III. CONCLUSION

It is ironic that Simon continues to play the victim card when his thirst for a "fee" to which he is not – and was not – entitled drove him to file this spin-off SLAPP litigation to compensate for his disappointment with the outcome in *Simon I*. All of the claims in this retaliatory suit against the Edgeworths and their counsel are based on protected first amendment activity and protected speech and are privileged. Judge Crocket should have rejected Simon's rogue amended complaint and promptly dismissed Simon's SLAPP suit at the outset, as the anti-SLAPP statute contemplates and case law requires.

The Edgeworths respectfully ask this Court to REVERSE the district court's denial of their Special Anti-SLAPP Motion and remand with instructions to dismiss this action against them and their counsel.

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CERTIFICATE OF COMPLIANCE

1. I certify that I have read the **EDGEWORTH APPELLANTS' REPLY BRIEF**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

2. I also certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), the type style requirements of NRAP 32(a)(6), and limitations in NRAP 32(a)(7) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Palatino 14 point font. Excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 6,705 words.

3. Finally, I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e), which requires every section of the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied is to be found.

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CERTIFICATE OF SERVICE

I certify that I am an employee of MORRIS LAW GROUP; I am familiar with the firm's practice of collection and processing documents for mailing; that, in accordance therewith, I caused the following document to be e-served via the Supreme Court's electronic service process. I hereby certify that on the 2nd day of September, 2020, a true and correct copy of the foregoing **THE EDGEWORTH APPELLANTS' REPLY BRIEF** was served by the following method(s):

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