NO. 85804

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVE WYNN,

Plaintiff-Appellant,

v.

THE ASSOCIATED PRESS AND REGINA GARCIA CANO,

Defendants-Respondents.

Appeal from the Eighth Judicial District Court
The Honorable Ronald J. Israel, District Judge
District Court No. A-18-772715-C

RESPONDENTS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Respondent The Associated Press discloses that it has no parent company and no entity owns more than 10% percent of its stock. There are no corporations to disclose with regard to Respondent Regina Garcia Cano.

The law firm BALLARD SPAHR LLP is the only law firm that has appeared or is expected to appear on Respondents' behalf in the district court and in this Court.

DATED this 14th day of June 2023.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

COUNTER-STATEMENT OF ISSUES PRESENTED

1. Did the Defendants-Respondents satisfy their burden under the first prong of Nevada's anti-SLAPP statute to establish by a preponderance of the evidence that the Challenged Article is "a good faith communication . . . in direct connection with an issue of public concern"? NRS 41.660(3)(a). The district court correctly held that they did.

2. Did Plaintiff-Appellant satisfy his burden under the second prong of Nevada's anti-SLAPP statute to "demonstrat[e] with prima facie evidence a probability of prevailing on the claim," NRS 41.660(3)(b), by presenting clear and convincing evidence of constitutional "actual malice" fault? The district court correctly held that he did not.

COUNTER-STATEMENT OF THE CASE

This case arises from a 2018 article written and published by Defendants-Respondents Regina Garcia Cano and The Associated Press (together, "The AP") that reported on, and summarized, two complaints to the Las Vegas Metropolitan Police Department ("LVMPD") by women accusing Plaintiff-Appellant Steve Wynn of sexual assault. The police complaints were submitted in the weeks after a series of national news reports revealed that dozens of Wynn employees had alleged decades of sexual misconduct by Wynn at his famous properties on the Las Vegas Strip, and after Wynn Resorts, the Nevada Gaming Control Board, and other regulators announced investigations into those allegations and the licenses held by his casinos. Wynn's defamation claim against The AP is based on details from just *one* of the two complaints summarized in the article: Wynn claims that (1) the alleged rape described in the complaint was a "private matter," "a mere curiosity," and his "personal affairs,"[1] and (2) despite a lack of actual evidence after discovery, he can meet his burden of showing The AP subjectively knew that particular complaint was inaccurate.

The district court disagreed with Wynn on both counts. Following more than a year of discovery, including the depositions of Garcia Cano and a corporate

[1] *See* Steve Wynn's Opening Brief ("Br.") at 5, 15-19.

representative for The Associated Press, Judge Ronald J. Israel granted The AP's special motion under Nevada's Anti-SLAPP statute, NRS 41.635 *et seq*., in light of a full record—a record largely mischaracterized in Wynn's opening brief.

The record below showed that Wynn was a central figure in business and politics in Las Vegas and nationally as he built and operated marquee casinos, including The Mirage, Treasure Island, Golden Nugget, Bellagio, Encore and Wynn Las Vegas, and served in leadership roles in the Republican Party. JA00007; JA00276; JA00336.[2] In early 2018, however, Wynn's professional life changed profoundly after the *Wall Street Journal* (WSJ) published an investigative report based on interviews with Wynn employees and others detailing a long-time pattern of alleged sexual misconduct committed by Wynn against female employees at his properties. JA00272-279. With respect to at least one of these women, Wynn had previously settled a civil lawsuit for $7.5 million after she alleged that Wynn forced her to have sex on a massage table in his office at the Wynn Resort, resulting, according to Bloomberg News, in a claim of paternity. JA00281-282.

Within a week of the WSJ report, Wynn resigned as CEO and Chairman of Wynn Resorts and as finance chairman of the Republican National Committee (RNC). JA00262; JA00309; JA00313. Wynn Resorts, the Nevada Gaming Control

[2] The materials submitted in support of this Motion appear in the Joint Appendix in Support of Steve Wynn's Opening Brief, filed on May 1, 2023, and can be found at the parallel citations to the Appendix in parentheticals herein.

Board, and regulators in Macau and Massachusetts announced investigations into Wynn's conduct and into the licenses held by his casinos to operate in the respective jurisdictions. JA00282. All the while, more women continued to come forward with further allegations of sexual misconduct purportedly committed by Wynn.

This was the broader context for The AP's news article that is the subject of this action (the "Challenged Article"), which itself discusses the then-ongoing controversy. JA00028-031. The Challenged Article was a follow-up to an initial article by The AP reporting that the LVMPD had issued a public statement disclosing that two women had reported alleged sexual assaults by Wynn, one of whom claimed to be an employee of a Wynn-owned casino. Wynn asserts his defamation claim based on the other complaint submitted to police, by a woman who alleged that Wynn raped her in Chicago on three occasions in the 1970s, resulting in the birth of a child. As the evidence developed during discovery made clear, because the LVMPD had redacted the identifying information of the alleged victim, no one at The AP—nor even Wynn—knew the identity of that woman until *well after* The AP had published the Challenged Article. Rather, The AP wrote and published the Challenged Article based on information Garcia Cano received in response to a public records request submitted to LVMPD, as well as reporting calls to the Chicago Police Department, a spokesperson for Wynn Resorts, and Wynn's personal spokesperson.

Wynn's Complaint, filed on April 11, 2018, alleged a single cause of action for defamation against The AP and Halina Kuta, the woman now known to be the person who submitted one of the complaints to the LVMPD in February 2018—and which Judge Israel much later determined to have been false. *See* JA00001-031; JA00211-213. At the time, The AP filed a Special Motion to Dismiss Pursuant to the Nevada Anti-SLAPP Statute, NRS 41.660. JA00038-JA00101. It argued that the Complaint should be dismissed on either of two bases: that the Challenged Article was a fair and accurate report of official police records and thus privileged, and/or that the Challenged Article was not published with knowledge of the falsity of the allegations made in what turned out to be Kuta's complaint to LVMPD. *Id*.

The district court entered a stipulated order bifurcating determination of these separate grounds for the anti-SLAPP motion, *see* June 29, 2018 Order at 5 (JA00103-107), and granted The AP's Anti-SLAPP Motion on the basis of the fair report privilege. *See* August 23, 2018 Order (JA00199-203). Wynn appealed, and this Court reversed on a question of first impression as to whether Nevada's fair report privilege applies to the type of police record at issue, absent any official investigation (here, because the alleged rape was beyond the statute of limitations). *See Wynn v. AP*, 475 P.3d 44 (Nev. 2020). This Court then remanded the case to the district court for determination of the application of the anti-SLAPP statute to the Challenged Article insofar as it reported on Kuta's complaint to the LVMPD and, if

so, "whether Wynn, a public figure, can demonstrate a probability of prevailing on his defamation claim." *Id*. at 52.

On remand, Wynn conducted extensive written discovery and deposed both Garcia Cano and The AP's corporate representative, Vice President and Editor at Large for Standards John Daniszewski. The AP then filed a Renewed Special Motion to Dismiss Pursuant to NRS 41.660, JA00366-395, and on October 26, 2022, Judge Israel granted the Renewed Special Motion in its entirety. JA00538-542. Judge Israel held that the Challenged Article addressed a matter of public concern given that "Wynn was a public figure and the sexual assault allegations are a matter of public concern given his ownership and title with Wynn Casinos, as well as the prior ongoing investigation and claims concerning female employees and other regarding inappropriate behavior." JA00541.[3] The Court proceeded, based on the full evidence, to conclude that "there was no way" for The AP "to verify the truthfulness of the complaints" submitted to LVMPD given that the complaints had been redacted prior their release, and that Wynn had failed to present *any* evidence

[3] Nevada's anti-SLAPP statute protects speech "in connection with an issue of public *concern*," which the statute defines, in part, as speech made "in direct connection with an issue of public *interest*." *See* NRS 41.637(4) (emphases added). Courts that have applied the statute use these phrases—public concern and public interest—interchangeably. Accordingly, The AP uses each as appropriate when in reference to a particular court's decision, but it otherwise uses "public interest" as the more precise statutory term in this context.

that The AP "published information knowing of its falsehood or . . . with reckless disregard of the truth." JA00541-42.

SUMMARY OF THE ARGUMENT

Wynn raises two issues on appeal. *First*, remarkably, he disputes that the Challenged Article relates to a matter of public interest such that it represents the type of speech protected by Nevada's anti-SLAPP statute. *Second*, he claims that that the record provides sufficient evidence that Garcia Cano *subjectively knew* that the second complaint, made by the woman we now know as Kuta, was false or likely false—the First Amendment "actual malice" standard incorporated into the anti-SLAPP statute—such that he has demonstrated a probability of prevailing on his claims by clear and convincing evidence. The district court, however, properly rejected both arguments and this Court accordingly should affirm judgment for The AP.

Nevada's anti-SLAPP statute extends statutory protection to speech that is a "good faith communication" "in direct connection with an issue of public concern." NRS 41.637, 41.660(3)(a). By any test, the matters reported in the Challenged Article undeniably constitute matters of public interest. *See, e.g.*, *Sipple v. Found. for Nat'l Progress*, 71 Cal. App. 4th 226, 236-39 (1999) (public figure's alleged

prior domestic abuse an issue of public concern).[4] The allegations that Wynn had committed additional crimes similar in nature to those of which he had already repeatedly been accused—regardless of the ultimate accuracy of these particular new allegations—came to light through a public statement released by the LVMPD that disclosed the two additional allegations of sexual assault, made just weeks after the WSJ's report, and as gaming authorities launched their own investigations. A public figure's dismissal of sexual assault allegations as "a mere curiosity" about his "personal affairs" is not just remarkably tone-deaf and contrary to the Challenged Article itself, but clearly incorrect as a legal matter. *See generally Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1292 (9th Cir. 2014) ("Public allegations that someone is involved in crime generally are speech on a matter of public concern.").

Further, the Challenged Article unquestionably was a "good faith communication," which, under the first prong of the anti-SLAPP statute, The AP was required to demonstrate by a "preponderance of the evidence." NRS 41.660(3)(a). As this Court has previously held, when a defendant presents an affidavit attesting to their belief in the truthfulness of a challenged statement at the

[4] In interpreting the Nevada anti-SLAPP statute, Nevada courts look to California, on whose statute the Nevada law is based. *See Shapiro v. Welt*, 133 Nev. 35, 39 (2017) (adopting "public interest" test from California courts); *see also* NRS 41.665(2) (adopting California standard for burden of proof); *Delucchi v. Songer*, 133 Nev. 290, 298 (2017) (adopting California reasoning because statute is "'similar in purpose and language' to our anti-SLAPP statute") (citation omitted).

time it was published, and that attestation is not contradicted by other evidence in the record, that is sufficient. *See Stark v. Lackey*, 136 Nev. 38, 40 (2020). The AP more than satisfied this burden.

Applying the second prong of Nevada's anti-SLAPP statute and evaluating whether Wynn could meet his burden of establishing a likelihood of prevailing—which, under the First Amendment requires clear and convincing evidence of actual malice fault by The AP—the district court correctly concluded that Wynn presented *no evidence* of such fault, and thus could not demonstrate a likelihood of prevailing. Although Wynn on appeal urges that he has evidence of The AP's motivation to publish the allegations and of its failure to investigate the complaints submitted to LVMPD, such arguments are not only mischaracterizations of the evidence and without support in the record, but also legally irrelevant to the subjective "actual malice" standard. Indeed, Wynn does not, and cannot, present *any* evidence to even suggest that The AP knew that the allegations of rape and paternity in the Challenged Article were false or so improbable that they must have been false. The allegations were made in the context of multiple other charges of sexual misconduct, and the identity of this particular alleged victim was at that time unknown to anyone except the LVMPD—including to *Wynn himself*—until well after The AP published the Challenged Article. Ultimately, Wynn's argument boils down to a claim that Garcia Cano *must have* doubted the allegation because of a description of a gas station birth

also included in the complaint to the police. While the logic of that theory is questionable, as discussed below, it is also irrelevant given Garcia Cano's unequivocal, and unimpeached, testimony that she did not believe the allegation was fabricated.[5]

STATEMENT OF THE FACTS

A. Steve Wynn

As this Court has recognized, Wynn is "a well-known public figure in Nevada." *Wynn v. Smith*, 117 Nev. 6, 9 (2001). Wynn's name is in many ways synonymous with Las Vegas: His own Complaint characterizes him as a "visionary," "well-known and recognized for his role in the revitalization of the Las Vegas Strip in the 1990s." JA00006-07. He is a prolific political donor and a billionaire; *Forbes* magazine last year estimated his net worth at over $3 billion. JA00374. He has also been a frequent defamation plaintiff, bringing legal claims against his critics, *e.g.*, *Smith*, 117 Nev. at 10 (defamation action over book profiling him)—including, in this case, a nonprofit news cooperative and an individual news

[5] Wynn in his Brief makes arguments regarding additional elements of defamation claims. Br. at 32-35. The parties, however, entered into a stipulated agreement that is reflected in the district court's Order to address *only* the application of the anti-SLAPP statute and the actual malice fault standard to the Challenged Article. Neither party presented these other issues regarding other elements of his claim to the district court, and the district court did not rule on them. Accordingly, this Court need not, and should not, consider them on this appeal.

reporter. On at least one occasion, Wynn was adjudicated to have violated a state's anti-SLAPP statute. *Wynn v. Chanos*, 2015 U.S. Dist. LEXIS 80062 (N.D. Cal. June 19, 2015), *aff'd*, 685 F. App'x 578 (9th Cir. 2017) (dismissing Wynn's complaint pursuant to California's anti-SLAPP statute and awarding more than $400,000 in fees and costs to defendant).

B. The AP

The Associated Press is a not-for-profit international news organization founded in 1846 that now has more than 200 bureaus in nearly 100 countries, producing an average of 2,000 news stories a day and publishing more than a million photographs each year. JA00374-75 (citing *generally* https://www.ap.org/about/). Its member news entities, including newspapers and broadcasters, republish its articles. *Id.* The Associated Press has been awarded 58 Pulitzer Prizes since the honor was established in 1917. JA00375.

Regina Garcia Cano has been a full-time journalist with The Associated Press for more than nine years, after earning her master's degree in journalism in public affairs reporting at the University of Illinois Springfield. JA00258-270 (Decl. of R. Garcia Cano). During her time as a news reporter, Garcia Cano has lived and worked in places as diverse as Ohio, Mexico, Baltimore, tribal lands in South Dakota, Las Vegas, and Venezuela. *Id.* ¶¶ 2, 4. At the time she reported and wrote the Challenged Article, Garcia Cano worked in the Las Vegas bureau of The Associated

Press as a gambling and tourism reporter, where she reported on casino-related stories, including labor, employment, and contract issues. *Id.* ¶ 3. She also covered breaking news, such as the tragic mass shooting at the Mandalay Bay casino that left hundreds injured and 60 dead. *Id.* She now works as Andes Correspondent for The Associated Press and is based in Caracas, Venezuela. *Id.* ¶ 4.

C. The Public Allegations About Wynn's Conduct

The context for the defamation claim in this case, arising from the Challenged Article published in late February 2018, was a public controversy that had emerged the month before. In late January 2018, a series of allegations and revelations about Wynn's personal conduct unraveled his professional life. On January 26, 2018, the WSJ reported that dozens of former employees alleged that Wynn had engaged in a "decades-long pattern of sexual misconduct," including "pressuring employees to perform sex acts." JA00273. According to one of the allegations, Wynn coerced a manicurist at his casino, the Wynn Las Vegas, to have sexual intercourse with him. JA00272-73. As the WSJ reported, and as court records revealed, Wynn paid the manicurist a $7.5 million settlement. JA00273.[6] Female employees allegedly hid in bathrooms or back rooms when Wynn visited the salons on his properties; others

[6] Subsequent reporting revealed that Wynn entered into another settlement with a different woman in 2006. Regina Garcia Cano, *Steve Wynn settled with second woman over sex allegations*, AP (Mar. 19, 2018), https://www.apnews.com/ba96b0e47ccb4dbdb6f42528a878b37f (JA00376).

reported being called to his office to provide massage services where Wynn would insist on sexual activities, and where one or more of his German shepherds were at times nearby. JA00275-276. Wynn denies these allegations. JA00003.

The week after publication of the WSJ's investigative report, Bloomberg News, on February 2, 2018, reported that the $7.5 million settlement agreement with the manicurist at the casino involved a paternity claim against Wynn. JA00281-283. Three days later, on February 5, 2018, the *Las Vegas Review Journal* (LVRJ) published two articles, including one regarding an allegation that Wynn had repeatedly pressured a waitress at his resort, The Mirage, to have sex "to keep her job," JA00298-306, and another report that, in 1998, LVRJ had killed a news report about sexual misconduct allegations against Wynn made by a woman who had passed a polygraph exam, and which was supported by court filings and other documents, JA00285-295; *see also* JA00261-62 (Garcia Cano Decl. ¶ 7).

The impact of the reporting was immediate. Shares in Wynn Resorts lost more than 17 percent of their value, and regulators in Nevada, Macau and Massachusetts announced they would look into the allegations, with the Massachusetts Gaming Commission saying it would consider suspending or revoking Wynn Resorts' license to operate in the state, JA00282, and the Nevada Gaming Control Board announcing it had opened an investigation, *id*. Wynn Resorts, too, launched an investigation and, within days, Wynn resigned as CEO and board chairman, citing "an avalanche

of negative publicity." JA00262. Wynn also resigned as finance chairman of the RNC, JA00309, 313, and several women filed civil lawsuits alleging sexual harassment or assault and the failure of Wynn-owned companies to act. JA00376, n.6. Through it all, AP reporters, including Garcia Cano, reported on these developments, including about the Nevada Gaming Control Board's investigation and Wynn's resignation as CEO and chairman of Wynn Resorts. JA00262.

D. The LVMPD Announcement of Sexual Assault Complaints Against Wynn and The AP's Reporting

On February 12, 2018, LVRJ published an article disclosing that, after the WSJ published its report, two women had filed complaints with LVMPD against Wynn for sexual assault decades earlier. JA00262; JA316-318. LVRJ's report quoted an LVMPD spokesman encouraging additional victims to come forward:

> Two women have reported to Las Vegas police that they were sexually assaulted by casino developer Steve Wynn in the 1970s, a spokesman said Monday.
>
> Metropolitan Police Department spokesman Larry Hadfield said the statute of limitations for sexual assault in Nevada is 20 years, but that should not discourage victims from speaking up.
>
> "We would encourage all victims to come forward," he said.

Id.

The next day, Garcia Cano began reporting on these allegations. JA00263. She learned from LVMPD that their Public Information Office had released a public statement via email, and obtained the statement. *Id.* It read as follows:

> The LVMPD has received two complaints against Steve Wynn alleging sexual assault. On January 29, 2018, a woman made a report from St. Louis stating the incident occurred in Las Vegas in the 1970's. A second woman filed a report February 5, 2018 at an LVMPD Substation in the Northwest part of the city. She stated the crime occurred in the 1970's in Chicago, IL. A courtesy report was taken and will be forwarded to Chicago authorities.
>
> Below is the Nevada Revised Statute (NRS) pertaining to the statute of limitations for Sexual Assault. Due to the fact that the report was not filed within the time frame allowed by NRS, an investigation cannot go forward.

JA00320.

Garcia Cano then contacted Michael Weaver, a spokesman for Wynn Resorts, seeking comment on these allegations. JA00263; JA00322. Weaver declined comment, but he told her to contact "Mr. Wynn's communications representative," whom he identified as Ralph Frammolino of PivotHound Communications. *Id*. Garcia Cano sent Frammolino an email asking whether Wynn had comment on "the reports that two women have filed with the Las Vegas Metropolitan Police Department saying that Mr. Wynn sexually assaulted them in the 1970s." JA00263; JA00325. Frammolino called and asked if they could speak "off the record," or without the conversation being used in a news article. JA00263-264. During their

call, Frammolino asked for the LVMPD statement, which she sent to him, and he told her that he would be back in touch. *Id*.

When Frammolino called back, he claimed for the first time that he was not Wynn's official "spokesperson," saying that Wynn spoke for himself. JA00264. Garcia Cano found Frammolino's disclaimer to be disingenuous given that Frammolino *acted* as a spokesperson, and the Wynn Resorts spokesperson identified him to Garcia Cano as Wynn's spokesperson on *two separate occasions*. *Id*.; *see also id*. at n.1. Frammolino, however, insisted that Garcia Cano could not even include in an article a statement that he or Wynn had declined to comment because their conversation had been off the record. *Id*.

Later that day, on February 13, 2018, The AP published an article written by Garcia Cano under the headline "Sexual assault reports against Wynn filed with Vegas Police." JA00264; JA00329-331. That article—over which Wynn did not assert a claim and which he ignores in his description of The AP's reporting—reads in its entirety:

> LAS VEGAS (AP) – Two more sexual misconduct allegations were leveled against embattled casino mogul Steve Wynn on Tuesday, when police in Las Vegas revealed they recently received two reports from women saying the billionaire sexually assaulted them in the 1970s.
>
> This was the first admission from police in Las Vegas about reports filed against Wynn since sexual misconduct allegations against him were revealed last month.

One woman reported Wynn assaulted her in Las Vegas and the other said she was assaulted in Chicago, the Las Vegas Metropolitan Police Department said in a statement. The Las Vegas case will not be investigated because the statute of limitations in Nevada is 20 years.

The victim of that alleged assault contacted the department from St. Louis on Jan. 29, three days after the Wall Street Journal reported that a number of women said Wynn harassed or assaulted them and that one case led to a $7.5 million settlement.

The other, filed in Las Vegas on Feb. 5, is being forwarded to the Chicago Police Department. Details of exactly what transpired during the alleged assaults was not disclosed.

The billionaire has vehemently denied the allegations, which he attributes to a campaign led by his ex-wife.

“In the last couple of weeks, I have found myself the focus of an avalanche of negative publicity,” Wynn said in a written statement that announced his resignation last week as chairman and CEO at Wynn Resorts. “As I have reflected upon the environment this has created – one in which a rush to judgment takes precedence over everything else, including the facts – I have reached the conclusion I cannot continue to be effective in my current roles.”

Wynn Resorts spokesman Michael Weaver on Tuesday said the company does not have a comment on the reports filed by the women “because this involved a company before the establishment of Wynn Resorts.”

Wynn is facing scrutiny by gambling regulators in Nevada and Massachusetts, where the company is building a roughly $2.4 billion casino just outside Boston. Regulators in Macau, the Chinese enclave where the company operates two casinos, are also inquiring about the allegations.

The Nevada Gaming Control Board on Monday set up on online form that allows people to report information on any of its active investigations. The reporting system was set up after the agency received numerous calls regarding the investigation against Wynn.

> Wynn Resorts has also created a committee to investigate the allegations. On Monday, the group announced it was expand[ing] its scope to review the company's internal policies and procedures to ensure a "safe and respectful workplace for all employees."

JA00329-331.

Next, on February 14, 2018, Garcia Cano submitted a request under the Nevada Open Records Act to the LVMPD Public Information Office for the two complaints to police referenced in the statement. JA00264; JA00333-34. The request sought expedited processing because "this information concerns a matter of intense public interest." JA00333.[7]

LVMPD produced copies of the two complaints to Garcia Cano roughly two weeks later, on February 27, 2018, identified as Case Report Nos. LLV180129002695 ("First Complaint") and LLV180207001836 ("Second Complaint"). JA00265; JA00336-340. Both alleged "sex assault" and identified Steve Wynn as the "suspect." JA00336, 337. The Public Information Office, however, redacted the "Victims" section of each report to remove identifying information about the alleged victims—including the name, date of birth, address

[7] While waiting for the public records, Garcia Cano and her colleagues continued to follow the news developments relating to Wynn. JA00264-65.

and phone number. *See id.*[8] The victim identifiers in the narratives of the report also were redacted. *Id.*

The First Complaint explained that, while employed as a dealer for the Golden Nugget in 1974, the victim claimed that "Steve Wynn and she had sex." JA00336. Although "consensual," the victim "felt coerced to perform the acts" and, after she ultimately refused following a third encounter "[s]he was soon after accused of stealing $40.00 and forced to resign." *Id.* The Second Complaint explained that the alleged victim said Wynn raped her three times in 1973-74 in her Chicago apartment. JA00337. She claimed she was impregnated during one of these assaults and included a graphic description of birthing a baby in a gas station bathroom. JA00337-338.

After reviewing the two redacted complaints, Garcia Cano called the LVMPD to determine whether it had any additional information to provide about them. It did not. JA00220-246 (excerpts of the Mar. 11, 2022 Dep. of R. Garcia Cano ("Garcia Cano Tr.")) at 164:20-166:23; JA00266. She also texted a supervisory colleague at The AP after reviewing the complaints that "[o]ne of them was crazy." JA00266 n.2; JA00342. But as Garcia Cano testified, she used the word colloquially in her

[8] For example, in the First Complaint, an "Offender Relationships" entry reads: "S – Wynn, Steve . . . Victim Was Employee." JA00336. For the Second Complaint, the entry read simply "S – Wynn, Stephan . . . [redacted]." JA00337.

text to describe an "[e]xplosive, impactful, [and] serious" story, not as an indication that she in any way doubted the accuracy of the statements in the Second Complaint. JA00228-230; JA00265-266 (Garcia Cano Tr. at 153:10–155; 185:23-186:23); *see also* JA00342. Indeed, Garcia Cano had "no reason to believe that either of the women were lying . . . especially given the multiple credible allegations" against Wynn in the news in recent weeks. JA00266. Rather, she "viewed these as impactful allegations in public records that provided additional details to a story about police complaints that, following the LVMPD announcement two weeks earlier, had already been reported in the press." *Id*.

The supervisory correspondent recommended that Garcia Cano work with editor Anna Jo Bratton to prepare a news report based on the complaints to LVMPD. JA00267. As a wire service, it is not uncommon for The Associated Press to post "to the wire" updates to a story as it is being written, and that happened here, with several versions posting within the span of a couple of hours.[9]

[9] Although Wynn attached to and quotes in his Complaint the final version of the story—the Challenged Article—in his appellate brief Wynn focuses solely on a short initial iteration of the article, which was available on-line for less than an hour, and which is not referenced at all in his Complaint. As with the omission of Garcia Cano's reporting for the initial story about the complaints on February 13, 2018, Wynn simply ignores the full version of the Challenged Article appended to his own Complaint and focuses solely on the initial news headline.

More specifically, working with Bratton, Garcia Cano wrote an initial iteration of the article about the complaints, which The AP published to its wire at 12:51 p.m. PT with an editor's notation that it "[w]ill be expanded." JA00267; JA00344. The next update, published at 1:31 p.m. PT, incorporated Wynn's previous denial—that he "vehemently denied the misconduct accusations and attributed them to a campaign led by his ex-wife"—near the top. JA00267; JA00346. Garcia Cano then emailed Frammolino at 2:24 p.m. PT to give Wynn another opportunity to respond specifically to the allegations made to LVMPD by the two women. JA00267-268; JA00349. She told Frammolino she was "working on a rolling deadline," which meant the story could be updated whenever he might respond. *Id.*

The next update to the article, published at 2:47 p.m. PT, included, among other things, more details about the First Complaint filed by the Golden Nugget employee. JA00268; JA00351-352. Throughout, the article also emphasized that both complaints were only allegations, and it noted that "Ralph Frammolino, spokesman for Wynn, did not immediately respond to an emailed request for comment." *Id.* Frammolino called later and told Garcia Cano that "we need to go off the record again." This time, she declined to agree to the request. JA00268. Frammolino responded that she "won't get a comment." *Id.* Garcia Cano updated the article at 3:38 PT, noting that "Ralph Frammolino, spokesman for Wynn, on

Tuesday declined comment on the latest allegations." *Id.*; JA00354-355. The AP published one final update to the article the following morning, adding an explanatory sentence about on the Second Complaint: "The woman, the child of the accuser and Wynn, now lives in Las Vegas, according to the [police] report." JA00268; JA00357-358. This final version is the Challenged Article on which Wynn bases his claim in his Complaint. It bears the headline "APNewsBreak: Woman tells police Steve Wynn raped her in '70s," and reads as follows:

> LAS VEGAS (AP) — A woman told police she had a child with casino mogul Steve Wynn after he raped her, while another reported she was forced to resign from a Las Vegas job after she refused to have sex with him.
>
> The Associated Press on Tuesday obtained copies of police reports recently filed by the two women about allegations dating to the 1970s. Police in Las Vegas revealed earlier this month that they had taken the statements after a news report in January revealed sexual misconduct allegations against the billionaire.
>
> The allegations are the latest leveled against Wynn by women. He resigned as chairman and CEO of Wynn Resorts on Feb. 6, less than two weeks after the Wall Street Journal reported that a number of women said he harassed or assaulted them and that one case led to a $7.5 million settlement.
>
> Wynn has vehemently denied the misconduct accusations the newspaper reported and he attributed them to a campaign led by his ex-wife, whose attorney has denied that she instigated the Jan. 26 news story.
>
> One police report obtained by the AP shows a woman told officers that Wynn raped her at least three times around 1973 and 1974 at her Chicago apartment. She reported she got pregnant and gave birth to a girl in a gas station restroom. The woman, the child of the accuser and Wynn, now lives in Las Vegas, according to the report.

> In one instance, the woman claimed that Wynn pinned her against the refrigerator and raped her. She said he then made a phone call, kissed her on the cheek and left. The report does not explain how Wynn is alleged to have entered the apartment or if they knew each other. The woman claimed she did not give him a key.
>
> The second police report shows a woman told police she had consensual sex with Wynn "several times" while she worked as a dealer at the downtown Las Vegas casino-hotel Golden Nugget, but "felt coerced to perform the acts." She reported she was forced to resign when she turned him down.
>
> "In the Summer of 1976, Wynn approached her in the back hall and wanted her to go with him," according to the report filed Jan. 29. "(S)he told him, 'no', she was done and had someone she was seeing. She was soon after accused of stealing $40.00 and forced to resign."
>
> The women's names are redacted on the reports, and police said they do not identify people who say they are victims of sex crimes.
>
> The Las Vegas case will not be investigated because the statute of limitations in Nevada is 20 years.
>
> Ralph Frammolino, spokesman for Wynn, on Tuesday declined comment on the latest allegations.
>
> Wynn Resorts is facing scrutiny by gambling regulators in Nevada and Massachusetts, where the company is building a roughly $2.4 billion casino just outside Boston. Regulators in Macau, the Chinese enclave where the company operates two casinos, are also inquiring about the allegations.
>
> In addition, groups of shareholders have filed lawsuits in state court in Las Vegas accusing Wynn and the board of directors of Wynn Resorts of breaching their fiduciary duties by ignoring what the lawsuits described as a longstanding pattern of sexual abuse and harassment by the company's founder.

JA00357-358; *see also* Compl. Ex. 3 (JA00028-031) (same).

Garcia Cano did not obtain comment from the alleged victim who submitted the Second Complaint because the copy released by the LVMPD redacted all identifying information. JA00265; JA00337. While the complainants were not "anonymous" to LVMPD, they were unknown to The AP because of the police department's redactions. As such, Garcia Cano contacted sources whose identities she *did* know, including seeking further information from the police, about both the alleged victim and the alleged child. JA00266.

A day later, a communications firm purporting to represent Wynn provided a written statement to Garcia Cano that stated, in part, that Wynn *himself* did not know the identities of his accusers because the LVMPD would not reveal their names to him. JA00269. Ultimately, as Garcia Cano testified, she did not learn the name of the alleged Chicago rape victim, Halina Kuta, until well after the Challenged Article had been published. JA00269-270. She believed at the time of publication, and continues to believe, that the Challenged Article "accurately recounted the two police reports [she] received from the LVMPD" and LVMPD's official statement. JA00269.

E. The Complaint In This Action

Wynn filed his Complaint on April 11, 2018 against The Associated Press, Garcia Cano, Kuta, and "Doe" defendants, alleging a single claim for defamation. JA00008-JA00012 (Compl. ¶¶ 72-102). Significantly, Wynn does not allege that

The AP's reporting on the First Complaint, involving the allegations of coerced sex by a former Golden Nugget dealer, provides a basis for his claim. To the contrary, Wynn in his Complaint specifically alleges only that the Second Complaint and the Challenged Article's account of it, including Kuta's allegations of rape and pregnancy, is actionable. JA00003 (Compl. ¶¶ 16-17).

As it relates to this special motion, Wynn originally alleged that The AP published the Challenged Article with "actual malice"—*i.e.*, with a "knowledge of falsity," JA00009 (Compl. ¶ 80)—for three reasons. *First*, he alleged that Kuta was an obviously unreliable source in light of a prior *pro se* lawsuit. JA00010 (Compl. ¶ 85) (alleging that "the AP Defendants knew or should have known about the existence of the Kuta lawsuit"); *see also* JA00002-04 (Compl. ¶¶ 4-12, 17-24). *Second*, he alleged that "[t]he AP Article falsely stated that it was unclear how Mr. Wynn and the claimant knew each other, intentionally omitting the undisputed fact that Defendant Kuta stated in the police report that she was Mr. Wynn's spouse." JA00005 (Compl. ¶ 32). Following discovery, which has made clear that "spouse" was redacted in the version of the document provided to The AP and that The AP did not know Kuta had filed the Second Complaint at the time of publication, Wynn abandoned the first two theories alleged in the Complaint, relying solely on his *third* theory: that the allegations contained in the Second Complaint were so "inherently

improbable" that The AP should have known at the time of publication they were false. JA00004-05; JA0001-12 (Compl. ¶¶ 30-31, 84-85).

Specifically, Wynn claims that the victim's description of giving birth in a gas station was "clearly fanciful or delusional," and therefore that, in light of the "bizarre narrative" of a traumatic birth experience included in the narrative section of the police complaint, the separate rape allegation was "unreliable and incredible on its face." JA00010-11 (Compl. ¶¶ 84, 88, 90-91). Tellingly, Wynn *fails* to allege that the victim's *charge of rape* itself—following then-recently published allegations in the WSJ, Bloomberg News, and LVRJ regarding the alleged decades-long pattern of sexual misconduct by Wynn and the fact that his $7.5 million settlement with a former Wynn Resorts employee involved a claim of paternity—was so inherently improbable that a subjective knowledge of falsity can be presumed.

F. Prior Proceedings In This Action

The AP in 2018 filed a Special Motion to Dismiss Pursuant to the Nevada Anti-SLAPP Statute, NRS 41.660. In that Motion, The AP argued that the Complaint should be dismissed on either of two bases: that the Challenged Article was a fair and accurate account of the two complaints filed with LVMPD and thus privileged, and/or that the Challenged Article was not published with "actual malice" fault. Because discovery was relevant only to the second ground, the district court entered a stipulated order bifurcating determination of these two separate grounds

for the Anti-SLAPP Motion. JA00103-107 (June 29, 2018 Order). The district court then held that the Challenged Article was a "[g]ood faith communication in furtherance of . . . the right to free speech in direct connection with an issue of public interest," granted The AP's Anti-SLAPP Motion on the basis of the fair report privilege and, pursuant to its Order, did not reach the second ground of constitutional actual malice. JA00199-203 (Aug. 23, 2018 Order Granting Defendants' Special Mot. to Dismiss).

Wynn appealed, and this Court reversed as to the scope of the fair report privilege under Nevada law, finding it inapplicable to complaints prior to official action by police. *Wynn*, 475 P.3d at 52. The Court remanded for determination of application of the anti-SLAPP statute to the Complaint, and of the second ground of The AP's anti-SLAPP motion—"whether Wynn, as a public figure, can demonstrate a probability of prevailing on his defamation claim." *Id.*

On remand, pursuant to the stipulated order, Wynn took document and deposition discovery on the issue of actual malice. Wynn deposed Garcia Cano and a corporate representative, and The AP produced records in response to various discovery requests. After the close of discovery, The AP filed a Renewed Special Motion to Dismiss Pursuant to NRS 41.660, JA00366-395, and the district court granted the motion in its entirety. The district court held that the Challenged Article addressed a matter of public concern given that "Wynn was a public figure and the

sexual assault allegations are a matter of public concern" because of Wynn's ownership of Wynn Las Vegas, the various ongoing investigations, and the claims from other women. The district court further held that "there was no way" for The AP "to verify the truthfulness of the complaints" given that the complaints had been redacted prior to their release; and it held that Wynn had failed to present *any* evidence that The AP "published information knowing of its falsehood or . . . with reckless disregard of the truth." JA00541-42 (Oct. 26, 2022 Order at 4-5). Wynn now appeals that Order.

ARGUMENT

"Nevada's anti-SLAPP statutes deter lawsuits targeting good-faith speech on important public matters." *Kosor v. Olympia Cos., LLC*, 478 P.3d 390, 393 (Nev. 2020). Pursuant to the law, a "person who engages in 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 is immune from any civil action for claims based upon the communication" and may file a special motion to strike a claim arising out of that speech. NRS 41.650. This Court reviews determination of "anti-SLAPP special motion[s] to dismiss de novo." *Smith v. Zilverberg*, 481 P.3d 1222, 1226 (Nev. 2021), and in so doing, this Court should affirm the district court's Order in its entirety for the reasons discussed below.

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE AP SATISFIED ITS BURDEN UNDER THE FIRST PRONG OF THE ANTI-SLAPP STATUTE

To prevail on a special motion to strike, a defendant must first make a two-part preliminary showing: (1) that the challenged speech was made "in furtherance of the right to petition or the right to free speech," which the statute defines to include several broad categories of speech, and (2) that it constituted a "good faith communication," which means that the statement at issue is either "truthful or is made without knowledge of its falsehood." NRS 41.637, 41.660; *see also John v. Douglas Cnty. Sch. Dist.*, 125 Nev. 746, 754 (2009); *Geiser v. Kuhns*, 13 Cal. 5th 1238, 1253-54 (2022) ("so long as the challenged speech or conduct, considered in light of its context, may reasonably be understood to implicate a public issue, even if it also implicates a private dispute," movants will satisfy their burden under the first prong of the anti-SLAPP statute).

Here, The AP was required to establish that the Challenged Article (1) was published "in direct connection with an issue of public interest in a place open to the public or in a public forum," and (2) that the Challenged Article was "truthful" or was "made without knowledge of its falsehood." NRS 41.637(4); *see also, e.g.*, *Zilverberg*, 481 P.3d at 1227; *Stark*, 136 Nev. at 40. Wynn does not dispute this standard. *See* Br. at 14-15.

The district court concluded that The AP had satisfied this burden as to both elements of the test. JA00541-542 (Oct. 26 Order at 4-5). Wynn argues on appeal that the district court erred in both respects. He is wrong.

A. The Challenged Article Directly Addresses A Matter of Public Interest

The anti-SLAPP statute, as relevant here, protects speech that (a) addresses a matter of "public interest" and (b) is made or published in a "place open to the public or a public forum." NRS 41.637(4). Wynn does not, and cannot, dispute that a news organization's publication of an article satisfies the public place/public forum requirement.[10]

Instead, Wynn argues only that the Challenged Article's discussion of allegations, by the person we now know to be Kuta, that one of the most powerful men in Nevada had raped her is not a matter of public interest. In an attempt to support this surprising claim, Wynn mischaracterizes the district court's ruling as holding "that statements regarding a public figure are per se statements related to a

[10] As this Court has instructed, where a publication is "a vehicle for communicating a message about public matters to a large and interested community," it qualifies under the anti-SLAPP statute as a public forum. *Kosor*, 478 P.3d at 395 (holding that pamphlet distributed to 8,000 homes was public forum and observing that public fora are "not limited to a physical setting" and include "other forms of public communication"); *see also*, *e.g.*, *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1029 (2008) (holding that "newspapers and magazines are public fora within the meaning of" the similar provision in California's anti-SLAPP statute); *Sonoma Media Invs., LLC v. Super. Ct.*, 34 Cal. App. 5th 24, 34 (2019) (same).

public concern," Br. at 1; *see also id.* at 5 (asserting that district court "concluded that the Article necessarily related to a public interest because Wynn is a public figure"); *id.* at 13 (arguing district court had "concluded that the Article necessarily related" to an issue of public concern because of Wynn's status as a public figure); *id.* at 16 n.6 (asserting district court had "relied solely on Wynn's status as a public figure to conclude that the Article relates to a matter of public interest").

Not so. The district court expressly cited multiple factors in reaching its conclusion:

> This Court finds that Mr. Wynn was a public figure and the sexual assault allegations are a matter of public concern *given* his ownership and title with Wynn Casinos, as well as the prior ongoing investigation and claims concerning female employees and [regarding other] inappropriate behavior.

JA00541 (emphasis added). While the district court did not explicitly discuss the five-part test in its Order, Br. at 16 n.6, that test was briefed by the parties in the district court, JA00385-386; JA00412, and the district court's summary of the *reasons* for its conclusion reflects consideration of those factors. But even if Wynn's critique of the district court's terse written decision were accurate, it would be beside the point because this Court reviews that decision *de novo*. *See Zilverberg*, 481 P.3d at 1226.

This Court applies five "guiding principles" for determining "an issue of public interest" under the statute. *Kosor*, 478 P.3d at 393-94. Those five factors reflect that:

> (1) "public interest" does not equate with mere curiosity;
>
> (2) a matter of public interest should be something of concern to a substantial number of people; a matter of concern to a speaker and a relatively small specific audience is not a matter of public interest;
>
> (3) there should be some degree of closeness between the challenged statements and the asserted public interest—the assertion of a broad and amorphous public interest is not sufficient;
>
> (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, 133 Nev. at 39 (quoting *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F. Supp. 2d 957, 968 (N.D. Cal. 2013), *aff'd*, 609 F. App'x 497 (9th Cir. 2015)).

Evaluation of those factors here demonstrates that the Challenged Article directly addressed an issue of public interest. The Challenged Article discusses the two new complaints lodged with the LVMPD within days of a WSJ report detailing allegations of a pattern of sexual misconduct and assault that spanned decades, and the significant public outrage and inquiry then facing Wynn and his businesses as a result of these allegations. The Challenged Report itself explains this context:

> The allegations [in the two new complaints submitted to the LVMPD] are the latest leveled against Wynn by women. He resigned as chairman and CEO of Wynn Resorts on Feb. 6, less than two weeks after the Wall Street Journal reported that a number of women said he harassed or assaulted them and that one case led to a $7.5 million settlement.
>
> * * *
>
> Wynn Resorts is facing scrutiny by gambling regulators in Nevada and Massachusetts, where the company is building a roughly $2.4 billion casino just outside Boston. Regulators in Macau, the Chinese enclave where the company operates two casinos, also are inquiring about the allegations.
>
> In addition, groups of shareholders have filed lawsuits in state court in Las Vegas accusing Wynn and the board of directors of Wynn Resorts of breaching they fiduciary duties by ignoring what the lawsuits describe as a longstanding pattern of sexual abuse and harassment by the company's founder.

JA00357-58 (Challenged Article). These allegations came in 2018, amidst the so-called "Me Too" movement, a national reckoning over abuse of power and particularly sexual misconduct against women. The subject addressed by the Challenged Article was therefore no "mere curiosity" over a "private controversy." *See, e.g., Fla. Star v. B.J.F.*, 491 U.S. 524, 536-37 (1989) (publication of rape allegation a "matter of paramount public import: the commission, and investigation, of a violent crime which had been reported to authorities"); *see also Sipple*, 71 Cal. App. 4th at 236-39 (alleged prior domestic abuse by public figure was issue of public concern). Indeed, courts routinely deem allegations of criminal behavior to be matters of public interest. *See, e.g., Zilverberg*, 481 P.3d at 1227 (accusations of businessman's bullying behavior were matter of public interest "especially … given

[businessman's] status in the community"); *Abrams v. Sanson*, 458 P.3d 1062, 1066-67 (Nev. 2020) (claims about attorney's behavior were matter of public interest, as a warning to any potential clients); *Montesano v. Donrey Media Grp.*, 99 Nev. 644, 655 (1983) (conviction for hit-and-run death of police officer a matter of public concern 20 years later); *Reuland v. Hynes*, 460 F.3d 409, 418 (2d Cir. 2006) ("crime rates are inherently a matter of public concern."); *Obsidian Fin. Grp.*, 740 F.3d at 1291-92 (allegation of tax fraud a matter of public concern); *Adventure Outdoors, Inc. v. Bloomberg*, 552 F.3d 1290, 1298 (11th Cir. 2008) (allegation that plaintiff violated federal gun laws a matter of public concern).

Wynn's behavior as alleged in the two complaints to the LVMPD was sufficiently serious that the LVMPD issued a public statement about the complaints and "encouraged all victims to come forward" regardless of any statute of limitations, as the LVRJ had reported two weeks before The AP published the Challenged Article. *See* JA00317. Simply put, it is indisputable that the alleged pattern of misconduct, including the two newest complaints, was "something of concern to a substantial number of people," *Shapiro*, 133 Nev. at 39, 389 P.3d at 268, rather than a purely "private matter," Br. at 5.

Continuing his tactic of disregarding context, Wynn repeatedly focuses his argument *only* on the portion of the Challenged Article that describes the complaint lodged by the woman who was later identified as Kuta:

> [T]he Article alleges that Wynn sexually assaulted a woman in Chicago in the 1970s, which resulted in the woman's pregnancy. While AP Respondents considered the Article to be "newsworthy," the Article *focuses solely* on the "prurient intrigue with scandal" that characterizes mere curiosities. To wit, the Article does not involve Wynn's professional life.

Br. at 18 (emphasis added). Wynn thus ignores not only the full context in which The AP published the Challenged Article—complaints made to LVMPD just three days after Bloomberg News reported that the $7.5 million settlement reached by Wynn with his former Wynn Resorts employee *involved a paternity allegation*, JA00281—but also a good portion of the Challenged Article itself.

As is apparent from the face of the Challenged Article, it reported on an additional complaint of workplace sexual abuse filed with the LVMPD at about the same time, and it placed both of those complaints in the broader story of his alleged pattern of sexual misconduct and the impact his actions had on his professional and political careers. While Kuta was not Wynn's employee, *see* Br. at 5, 17-18, that was not apparent from the information then available to The AP. And that fact is in any event irrelevant here, given the enormous impact the broader pattern of allegations had on Wynn's professional and political careers within a matter of days of their being exposed. *Geiser*, 13 Cal. 5th at 1253 (defendant moving under anti-SLAPP statute satisfies burden to show communication addressed matter of public concern "'so long as the challenged speech or conduct, *considered in light of its context*, may reasonably be understood to implicate a public issue, *even if it also*

implicates a private dispute'" (emphases added)); *Bishop v. Bishop's Sch.*, 86 Cal. App. 5th 893, 904-05 (4th Dist. 2022) (same).

Finally, and inexplicably, Wynn contends that The AP "failed to assert (and the district court failed to find) a public interest that the Article related to." Br. at 19 n.7. Wynn may be of the opinion that whether, and to what extent, he has sexually abused women in the workplace and outside of it is no one's business but his own. Indeed, many powerful men may feel that way. But that is not the law, and the "nexus between the Article and the public's interest," *id.*, is indisputable here. The district court's conclusion that the Challenged Article addressed an issue of public interest clearly was correct as a matter of law.

B. The AP Made The Required Showing That The Challenged Article Was Published Without Knowledge Of Falsity

Having moved for dismissal pursuant to the anti-SLAPP statute, The AP's second preliminary burden was to show by a preponderance of the evidence that, at the time of publication, the Challenged Article was either "truthful" *or* "made without knowledge of its falsehood." NRS 41.637(4). As this Court has explained, this is a modest burden:

> To meet [Defendant's] burden as the defendant in prong one, [Defendant] must establish only "by a preponderance of the evidence" that the statements were true or made without knowledge of their falsity. This is a far lower burden of proof than the plaintiff must meet under prong two to prevail on his defamation claims, which require a showing of "actual malice"—i.e., that [Defendant]

> made the statements with the "knowledge that [they were] false or with reckless disregard of whether [they were] false or not."

Rosen v. Tarkanian, 453 P.3d 1220, 1224 (Nev. 2019) (internal citations omitted).

First, with respect to whether the Challenged Article was "truthful," it accurately described the complaints filed by two women with LVMPD *as allegations*, and the Article was therefore "truthful" in the literal sense—The AP did not adopt or endorse Kuta's allegations as meritorious, but simply reported them as having been made to police, and this alone should be sufficient to satisfy the second preliminary burden.

However, as more fully set forth below, *see* Part II, *infra*, The AP also established that, when it reported that two women complained to LVMPD that they had been sexually assaulted by Wynn, The AP published the Challenged Article without knowledge that Kuta's rape allegation was false. As Garcia Cano testified, she did not have any reason to doubt the allegations "in the context of everything that was happening and police calling it a sexual assault allegation. It wasn't as if it came out of the blue, right? There had been other allegations against Mr. Wynn. So I had no reason to think that they were incredible." JA00236 (Garcia Cano Tr. 185:1-6).

As the district court recognized, although the trial court proceedings in this case ultimately demonstrated that Kuta's "allegations [about Wynn] were without merit," truth and fault are different inquiries under the First Amendment. JA00566

(Order at 4). The AP carried the initial burden to show lack of fault: "Defendants could not have known that Ms. Kuta's allegations were false when the article was published," given the redactions made by LVMPD in the released copies of the women's complaints, and there is thus "nothing in the record to suggest that Defendants knew or should have known that the allegations were false." *Id.*

Wynn now argues that the district court erred because the record purportedly shows that Garcia Cano recognized that some of the factual allegations set forth in the redacted copy of the Second Complaint regarding the circumstances of the alleged birth of a child conceived in the alleged rape were "crazy," and that because The AP purportedly made no effort to investigate the accuracy of those allegations, the Challenged Article therefore was published with knowledge that the allegation of rape in the complaint was false. Br. at 2, 5, 19-21.

As set forth in Part II, *infra*, these arguments fail as a matter of law. But they are noteworthy with regard to the initial showing required of The AP because Wynn concedes, quite correctly, that the only relevant question is whether the record evidence after more than a year of discovery demonstrates that Garcia Cano subjectively doubted the truth of what she reported at the time she drafted the article. *See* Br. at 20-21 (acknowledging that AP editors who reviewed Garcia Cano's draft for publication had no knowledge of the contents of Kuta's LVMPD complaint and therefore could not have known whether the Challenged Article was true or false).

As Wynn concedes, Br. at 20, a defendant may provide declarations or evidence of the underlying sources of information on which it relied to satisfy the Court that it has met its initial burden under this prong of the analysis. *Stark*, 136 Nev. at 40 (an "affidavit stating that the defendant believed the communications to be truthful or made them without knowledge of their falsehood is sufficient to meet the defendant's burden absent contradictory evidence in the record").

Garcia Cano testified in her original 2018 affidavit and in her declaration submitted in support of the renewed motion that she believed her reporting to be true and set forth the basis for her belief. JA00269; JA00362-365. Both she and The Associated Press' corporate representative testified that both Garcia Cano and The Associated Press were confident of the accuracy of the Challenged Article at the time of its publication. JA00235-237; JA00241-242 (Garcia Cano Tr. at 184:24–186:23, 256:20 – 257:7); JA00248-257 (AP Tr. at 38:23-40:7, 58:5-13, 108:16-110:18). This sworn testimony is undisputed—Wynn points to nothing other than his *belief* that Garcia Cano knew the "crazy" allegations were false—to undermine the otherwise unimpeached testimony.

What's more, the record contains the numerous documents on which Garcia Cano relied in drafting the Challenged Article, including the copies of the complaints released to her by LVMPD and that agency's public statement about those complaints—a statement in which LVMPD officials did *not* disparage the

allegations or the complainants, but, rather, in which they explained that, although the statute of limitations had lapsed, they nevertheless were forwarding what we now know was Kuta's complaint to law enforcement authorities in Chicago, and that they also urged all victims to come forward regardless of the statute of limitations. JA00263; JA00320. Simply put, there was nothing in the public reaction of the LVMPD to Kuta's complaint that should or would have put Garcia Cano on notice that any official doubted the core allegations of either the First Complaint or the Second Complaint, and Garcia Cano cited those official LVMPD statements in the Challenged Article. This, too, demonstrates that the district court was correct in finding that The AP had satisfied this portion of its initial burden. *Bulen v. Lauer*, 508 P.3d 417 (Nev. 2022) (truth prong satisfied where defendants "cited . . . their sources" in challenged publication) (citing *Stark*, 136 Nev. at 43, and *Abrams*, 458 P.3d at 1068); *see also, e.g.*, *Zilverberg*, 481 P.3d at 1228 (declaration and screenshots of materials relied upon for allegedly defamatory statements were sufficient to "show[] that the gist of [defendant's] statements was either true or made without knowledge of falsity" and this satisfied "good faith communication" requirement).

* * *

For these reasons, the district court's determination that The AP made the "initial showing" necessary to shift the burden to Wynn to demonstrate that he is likely to prevail on his claim should be affirmed.

II. WYNN FAILED TO SATISFY HIS BURDEN UNDER THE SECOND PRONG OF THE ANTI-SLAPP STATUTE

Once a moving party meets its initial burden, the court must then "determine whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim." NRS 41.660(3)(b); *see also Delucchi v. Songer*, 133 Nev. 290, 300 (2017). Put differently, once a defendant makes this "initial showing" of the statute's applicability, it becomes the *plaintiff's burden* to establish that the claim is likely to succeed. *Id.* at 296. If the court grants the special motion to strike and dismisses the action, it is an "adjudication upon the merits," NRS 41.660(5), and the court "shall award reasonable costs and attorney's fees to the person against whom the action was brought," NRS 41.670(1)(a).

To meet his burden of establishing a "probability of prevailing on the claim," NRS 41.660(3)(b), Wynn was required to marshal clear and convincing evidence of constitutional "actual malice" fault—the standard of proof for a public figure defamation claim, *Smith*, 117 Nev. at 9. As the district court correctly held, however, the record contains *no evidence* of actual malice, and "Wynn cannot prevail." JA00567 (Order at 5).

A. The Actual Malice Standard

Wynn was required to present clear and convincing evidence that The AP published the Challenged Article with "actual malice," *i.e.*, with actual knowledge of its falsity, or with "reckless disregard" as to its likely falsity. *Smith*, 117 Nev. at 16-17. Reckless disregard for the truth requires "'a *high degree of awareness* of the probable falsity of a statement. It may be found where the defendant entertained *serious* doubts as to the truth of the statement, but published it anyway.'" *Id.* (reversing jury verdict finding actual malice because instructions omitted "serious" before "doubts," leading the jury to apply a lower standard) (quoting *Posadas v. City of Reno*, 109 Nev. 448, 454 (1993) (emphases in original)). The standard purposefully creates a high barrier to recovery by public figure libel plaintiffs in order to guarantee "the national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). As such, it protects accidental, or even negligent, mistakes and permits liability over speech on matters of public interest about public figures only where there are knowing misstatements of defamatory fact. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 494 (1984).

As such, the "test is a subjective one, relying as it does on what the defendant believed and intended to convey, and not what a reasonable person would have understood the message to be." *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706,

722 (2002) (internal marks omitted). Accordingly, "the actual-malice determination rests entirely on an evaluation of [the author's] *state of mind when he wrote his initial report . . . .*" *Bose Corp.*, 466 U.S. at 494 (emphasis added). Wynn must therefore prove actual malice "at the time of publication." *Id.* at 497; *accord Pegasus*, 118 Nev. at 722 (assessing publisher's knowledge "*at the time it published the [challenged] review*") (emphasis added). Importantly, proof of falsity is not proof of actual malice; the relevant question is whether the publisher was *aware* of falsity at the time of publication. *Bose Corp.*, 466 U.S. at 511 ("there is a significant difference between proof of actual malice and mere proof of falsity.").

It is well-settled that whether the record is sufficient to support a finding of actual malice is a question of law. *Pegasus*, 118 Nev. at 721-722 ("question of actual malice goes to the jury only if there is sufficient evidence for the jury, by clear and convincing evidence, to reasonably infer that the publication was made with actual malice"). In order for Wynn to satisfy his burden under the second prong, therefore, he was required to present "*sufficient evidence* to conclude that 'the defendant *in fact* entertained serious doubts as to the truth of the publication.'" *Nevada Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 414 (1983) (emphasis added) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). Contrary to Wynn's assertion that the statute imposes on him a "low burden at the second prong," the requirement to present clear and convincing evidence imposes a burden on defamation plaintiffs that this Court

has described as far higher than defendants' burden on prong one. *See Tarkanian*, 453 P.3d at 1224 (recognizing the high burden imposed by the actual malice standard).

As the district court held, "there is *nothing in the record* to show The AP published information knowing of its falsehood or . . . with reckless disregard for the truth." JA00567 (Order at 5). For the following reasons, the district court's determination that "Wynn cannot prevail," *id*., should be affirmed.

B. The AP Did Not Subjectively Doubt The Truth Of The Challenged Article

As noted above, in his Complaint, Wynn alleged that The AP published the Challenged Article with actual malice for three principal reasons, two of which he has now abandoned in favor of various allegations that broadly attempt to portray The AP's reporting as rushed, and with no investigation into a single unreliable, "anonymous" source. Br. at 26-32. None of Wynn's allegations, however, are supported by the evidence in this case, and as a matter of law they cannot constitute proof of actual malice on the part of The AP.

1. The AP Did Not Know Kuta's Identity Until Well After Publication of the Challenged Article

Wynn argues that The AP acted with actual malice because it relied on an "anonymous" source whose identity could have been determined. Br. at 26-27; *see also* JA00002-04, 10 (Compl. ¶¶ 4-12, 17-24, 85). It bears emphasis that Wynn's

contention that the Challenged Article was based on a purely anonymous source misrepresents the evidence: Garcia Cano obtained a public statement issued by LVMPD's Public Information Office that stated that two "victims" had filed "complaints against Steve Wynn alleging sexual assault," including one that was filed by a woman who said "the crime occurred in the 1970's in Chicago, IL." JA00263; JA00320. That is, LVMPD was the source of the allegation that Wynn sexually assaulted a woman in Chicago in the 1970s, and LVMPD knew the identities of both women.

This is not the proverbial report "based wholly on an unverified anonymous telephone call" cited by the U.S. Supreme Court as an example of a situation where subjective knowledge of falsity might be inferred. *St. Amant*, 390 U.S. at 732. Indeed, that seminal case defining actual malice is instructive here. In *St. Amant*, a defendant had relied solely on allegations contained in a sworn affidavit. *Id*. The defendant "had no personal knowledge of [the plaintiff's] activities; he relied solely on [a third party's] affidavit although the record was silent as to [that person's] reputation for veracity" and the defendant also "failed to verify the information with those . . . who might have known the facts." *Id.* at 730. The Supreme Court held, as a matter of law, that actual malice—a subjective awareness of falsity, rather than adherence to an objective platonic ideal for repeating allegations of public concern—was not established in that situation. *Id.* (“These considerations fall short of proving

[the defendant's] reckless disregard for the accuracy of his statements about [the plaintiff]."). *St. Amant* thus underscores that, given the factual situation here—in which the Second Complaint had been submitted to LVMPD under penalty of a criminal offense if false, NRS 207.280, and it echoed numerous others being leveled, including by the other woman who complained at the same time to LVMPD and as discussed in prior news accounts—The AP had no reason to *know* that Kuta's complaint was false.

Similarly, the Supreme Court's holding in *Florida Star*, which addressed a state statute criminalizing the dissemination of rape victims' names, further illustrates the damage to journalists' ability to gather and report the news that could result if The AP were found to have acted with actual malice by publishing allegations that had been made public by the LVMPD:

> That appellant gained access to the information in question through a government news release makes it especially likely that, if liability were imposed, self-censorship would result. Reliance on a news release is a paradigmatically routine newspaper reporting technique. . . . The Government's issuance of such a release, without qualification, can only convey to recipients that the government considered the dissemination lawful, and indeed expected the recipients to disseminate the information further. Had appellant merely reproduced the news release prepared and released by the Department, imposing civil damages would surely violate the First Amendment. The fact that appellant converted the police report into a news story by adding the linguistic connecting tissue necessary to transform the report's facts into full sentences cannot change this result.

Fla. Star, 491 U.S. at 538-39.

Further, neither the Complaint nor the evidence obtained during discovery revealed any rationale for *how* The AP would have known Kuta's identity when her name and *all identifying information* were redacted from her complaint by LVMPD before it was released to the public. Rather, discovery *confirmed* that Garcia Cano did not know Kuta's identity when preparing the Challenged Article. JA00269 (Garcia Cano Decl. ¶ 24); JA00357-358 (Challenged Article noting that "[t]he women's names are redacted on the reports"); JA00231, JA00243-244 (Garcia Cano Tr. at 159:9-11, 261:2 – 262:4).

Indeed, *one day after* The AP published the initial iteration of the article, a communications firm sent an email to Garcia Cano with a statement attributed to Wynn that said, in part, that Wynn did not know the identities of his accusers—that is, Kuta's identity—because the LVMPD would not reveal their names to him. JA00269 (Garcia Cano Decl. ¶ 22). If Wynn himself, whom Kuta sued in 2017, could not immediately determine Kuta's identity, it begs credulity to allege that The AP must have known who she was and that she was unreliable.

2. Kuta's Allegations Were Not So Inherently Improbable As to Constitute Evidence of Actual Malice

Wynn also alleges that the allegations contained within the Second Complaint were so "inherently improbable" that The AP must have known they were false. JA00004-05; 10 (Compl. ¶¶ 30-31, 84-85); *accord* Br. at 28. For an accusation to be sufficiently improbable that its very publication *as an allegation* constitutes

evidence of actual malice, the accusation must be "so inherently improbable that only a reckless man would have put [it] in circulation." *St. Amant*, 390 U.S. at 732. In essence, Wynn argues that it is so "inherently improbable" that a woman could have had such a traumatic birth at a gas station that The AP should have known that he, a man whom *dozens* of former employees said had engaged in a *decades-long* pattern of sexual misconduct dating back to the 1970s, including sexual assault and at least one other paternity claim, could not possibly have raped and impregnated a woman in Chicago in the 1970s. Given this context, however, The AP had no obvious reason to disbelieve an allegation that Wynn raped and impregnated a woman in the 1970s.[11]

As Garcia Cano testified, she *did not* find the woman's allegations, including of birthing a child in a gas station, unreliable or unbelievable on their face and did

[11] Nor, as a matter of logic, does it necessarily follow that even if someone in 2018 told an implausible birth story that she is necessarily lying about a rape that allegedly occurred decades earlier. The occurrence of erratic behavior after suffering the trauma of a violent crime, including rape, is an acknowledged phenomenon. *E.g.*, *People v. Bledsoe*, 681 P.2d 291, 297-300 (Cal. 1984) (discussing rape trauma syndrome). Moreover, people who suffer from mental illness are sometimes victims of crimes, too—and indeed perhaps at a greater rate than the general population. *See, e.g.*, Hind Khalifeh et al., *Domestic and sexual violence against patients with severe mental illness*, 45 Psychological Med. 875, 882 (2015) (of women with severe mental illness surveyed for study, 40 percent had been victims of rape or attempted rape, compared to 7 percent of general population). But that is all legally irrelevant in an inquiry into what Garcia Cano *actually thought* at the time she prepared the Challenged Report.

not distrust them. JA00235-236 (Garcia Cano Tr. at 184:24–186:23) (testifying that the allegations against Wynn were not "out of the blue" and that details of the alleged birth alone did not make her disbelieve the report, given that babies are sometimes born in bathrooms and with the amniotic sac intact); JA00265-266 (Garcia Cano Decl. ¶¶ 14-15); *see also Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 271 (9th Cir. 2013) (no evidence of actual malice where defendant's statements were based on her own knowledge and experience).

Further, contrary to Wynn's emphasis on Garcia Cano's statement that the allegation was "crazy," that text cannot bear the weight Wynn places on it, and it is not evidence of subjective doubt. Garcia Cano testified that she thought the allegations were particularly explosive and impactful, and that this is what she meant by the colloquial "crazy" in a text message to a colleague. JA00228-230 (Garcia Cano Tr. at 153:10-155:9); JA00265-266 (Garcia Cano Decl. ¶¶ 14 n.2). The AP corporate representative similarly testified that reporters use the word "crazy" in conversation to describe "something out of the ordinary, unusual, remarkable," and that he "certainly can think in our news meetings when something unusual happens, someone will say, gee, that's crazy, you know, and again, they're not speaking as clinicians when they say that." JA00526-528 (J. Daniszewski Tr. at 112:14-114:5). Wynn has not, and cannot, point to any evidence in the record to contradict these statements—at most he points only to the alleged "age discrepancy." Br. at 27, n.11.

However, as he admits, the accuser's date of birth in the Second Complaint *was redacted* when given to Garcia Cano. *Id.* As such, this information cannot possibly be relevant to an argument about Garcia Cano's state of mind at the time of publication of the Challenged Article.

In addition, while Wynn repeatedly denied all allegations of sexual misconduct, a "generalized denial falls well short of demonstrating that [defendant reporter] acted with malice. '[A] reporter need not believe self-serving denials, as such denials are so commonplace in the world of polemical charge and countercharge.'" *Harris v. City of Seattle*, 152 F. App'x 565, 569 (9th Cir. 2005) (quoting *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 691, n.7 (1989)).

3. The AP Did Not Rush to Publish in a Manner that Evidences Actual Malice

Wynn also makes much of Garcia Cano's purported motivation in "hunting for a scoop." Br. at 7. Yet the fact that a news organization publishes on deadlines, or allegedly to get news posted before competitors, is the very definition of the news business and unrelated to any *subjective* awareness of falsity of such news. A defendant's "motive in publishing a story . . . cannot provide a sufficient basis for finding actual malice." *Connaughton*, 491 U.S. at 665; *see also Sullivan*, 376 U.S. at 266 ("the fact that newspapers and books are sold" is irrelevant to application of actual malice test); *Allen*, 99 Nev. at 414 ("the inquiry in 'actual malice' focuses

largely on the defendant's belief in truthfulness of the published material rather than on the defendant's attitude toward the plaintiff").

4. The AP Investigated the Allegations

Finally, Wynn alleges that The AP failed to investigate the allegations and violated its own standards. Br. at 29-32. This argument, like others by Wynn, fails on the law as well as the facts. As a matter of law, the "actual malice" standard does not ask "whether a reasonably prudent man would have published or would have investigated before publishing"; rather it asks whether "the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant*, 390 U.S. at 731. Indeed, it is irrelevant to the actual malice determination whether a publisher "could have" investigated further; what is relevant is whether the publisher had a subjective awareness of a statement's probable falsity at the time of publication. *Connaughton*, 491 U.S. at 666. As such, even in circumstances where a failure to investigate would constitute "an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers," that does not establish actual malice *unless* the publisher had "obvious reasons to doubt" the truth of the information. *Id*. at 666, 688; *see also Masson v. New Yorker Magazine, Inc.*, 960 F.2d 896, 901 (9th Cir. 1992) ("[A] publisher who does not already have 'obvious reasons to doubt' the accuracy of a story is not required to initiate an investigation that might plant such doubt.").

Nor does the evidence support Wynn's factual characterizations. Wynn ignores all of Garcia Cano's earlier reporting about Wynn, including her February 13, 2018, article about the LVMPD complaints, *which discussed* the complaint at issue in this action, *see* JA00329-331, and focuses now *only* on the first iteration of the article, published with an editor's note that said it "[w]ill be expanded," as it was 40 minutes later. JA00344. And the first iteration of the article is neither attached to or mentioned by Wynn in his Complaint. *See generally* JA00001-013; JA00028-031 (Ex. 3, the Challenged Article). As discussed above, *infra* at 13, Garcia Cano learned about the two new complaints on February 12 when the LVRJ published a news report about a public statement from LVMPD referencing two sexual assault allegations against Wynn. JA00262-263 (Decl. of R. Garcia Cano ¶ 9); JA00316-318. The next day, Garcia Cano obtained a copy of the police statement, contacted the spokesperson for Wynn Resorts to seek a comment, and contacted a person understood to be a spokesperson for Wynn to seek his comment. JA00263. She then published a news story about these allegations on February 13 that Wynn does not challenge. JA00262-264; JA00329-331. After that initial report, Garcia Cano *continued* to report on the matter, submitting a public records request for the two

complaints and following up with LVMPD, asking them to provide any additional information to her that they could about the allegations. JA00266.[12]

In other words, The AP *did investigate* the allegations to the extent it was able. But as the district court correctly held, "no additional information could have been obtained through further investigation," because "[i]t was only after Metro police disclosed the alleged victim's name that contact could be made with Ms. Kuta and it became apparent her allegations were without merit." JA00541 (Order at 4). And that disclosure happened *after* The AP published the Challenged Article.

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For all the foregoing reasons, Wynn has failed to produce any evidence, let alone clear and convincing evidence, that The AP doubted the accuracy of the Challenged Article at the time of publication, and therefore Wynn cannot demonstrate a likelihood of prevailing on his claim. *See generally* JA00235-237 (Garcia Cano Tr. at 184:24–186:23); JA00266, 269 (Garcia Cano Decl. ¶¶ 15, 24).

[12] Wynn also misrepresents the testimony of The AP's witnesses when he says they "admitted that if anyone actually thought that Wynn had fathered a child through rape, that is a news story that they would have pursued." Br. at 9 n.4. As Daniszewski testified, he *did not* think the identity of an alleged child of Wynn was newsworthy, but that "[i]f the identity could be determined, we might have looked into it." JA00476 (J. Daniszewski Tr. 54:17-21). The undisputed evidence shows that the LVMPD had redacted from the copy of the Second Complaint it provided to Garcia Cano all identifying information about the accuser and the alleged offspring. Accordingly, the identity of the purported child *could not* be determined from the information available to Garcia Cano.

The AP accurately reported on the contents of two complaints made to, and publicly disclosed by, the LVMPD, in the context of nationally reported investigations into allegations of Wynn's alleged sexual misconduct. The dispositive question presented for this Court's determination is whether Wynn can meet his burden to demonstrate by clear and convincing evidence that The AP seriously doubted whether the allegations contained in copy of the complaint provided to The AP by the LVMPD that we now know was made by Kuta were true when they published their report on that complaint. The answer to this question plainly is no, and this Court should affirm the district court's ruling in this regard.

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CONCLUSION

For the foregoing reasons, The AP respectfully requests that the Court affirm the district court's Order dismissing Wynn's Complaint with prejudice and remand the case to the district court for determination of an award to The AP of attorneys' fees and costs pursuant to NRS 41.660 and 41.670, as well as an additional award to The AP of $10,000 given Plaintiff's status as a serial SLAPP litigant.

DATED this 14th day of June 2023.

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NRAP 28.2 CERTIFICATE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the type-face requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman, 14 point. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), the brief is 13,357 words.

2. I certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this 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 transcript or 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 brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: June 14, 2023.

/s/ David Chavez, Esq.

CERTIFICATE OF SERVICE

I hereby certify that this **Respondents' Answering Brief** was filed electronically with the Nevada Supreme Court on June 14, 2023. Case participants who are registered with Eflex will be served by the Eflex system and other parties, listed below, who are not registered with the Eflex will be served with a copy of the foregoing via hand delivery or U.S. Mail.

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