IN THE SUPREME COURT OF THE STATE OF NEVADA

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STEVEN C. JACOBS, Appellant, v. LAS VEGAS SANDS CORP., a Nevada corporation; SANDS CHINA LTD., a Cayman Islands corporation; SHELDON ADELSON, in his individual and representative capacity, Respondents.	Sup. Ct. Case No. 58740 District Court Case No. A-10-627691-B

STEVEN C. JACOBS' REPLY BRIEF

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I. INTRODUCTION

Respondent Sheldon Adelson's ("Adelson") Answering Brief rests upon a demonstratively false premise: That Appellant Steven C. Jacobs ("Jacobs") needs the litigation privilege to be "narrowed or abrogated" to sue for Adelson's false statements to the media. (Ans. Br. at 2.) Jacobs does not. It is Adelson who ignores Nevada law, attempts to recast his defamatory statements, and urges a position that both courts and commentators have long rejected. There is no way to sugar coat it –Adelson's position on what the law is and what it should be are simply wrong.

The same is true for Adelson's characterization about what he said and did. His false statements were not in reply to Jacobs or made to those with an interest in the legal proceedings. Jacobs' allegations in the litigation were pending and the subject of extensive motion practice, which is where any attempts to rebut them may be properly addressed. But when that motion practice proved unsuccessful, Adelson needed a public relations spin, and thus he issued an email falsely branding Jacobs as a liar and a fabricator who was fired for cause.

Jacobs is eager to prove just who has employed lies and fabrication. And it is no accident that Adelson now resorts to overreaching in seeking avoidance of accountability. Adelson's false statements are defamatory, and the law accords him no immunity from suit.

II. ARGUMENT

A. The Privilege For Judicial Communications Is Limited To Matters Published To Those With A Legal Interest In The Proceeding.

In advancing his false premise, Adelson pretends as though this Court has not already rejected his legal position. But, it has:[1] "[S]tatements to someone who is not directly involved with the actual or anticipated judicial proceeding will be covered by the absolute privilege only if the recipient of the communication is 'significantly interested' in the proceedings." Fink v. Oshins, 118 Nev. 428, 436, 49 P.3d 640, 645-46 (2002) (emphasis added) (quoting Andrews v. Elliot, 426 S.E.2d 430, 433 (N.C. Ct. App. 1993)). Fink concerned defamation claims by an independent trustee against a trust attorney. This Court rejected the trust attorney's claim to absolute protection for defamatory comments he made about the trustee to another client, one having no interest or involvement in the underlying judicial proceedings. Id. at 436-37, 49 P.3d at 645-46.

In explaining the legitimate scope of the privilege and rejecting the position Adelson now advances—that a statement is privileged so long as it "concerns" the litigation—this Court cited and quoted from the North Carolina Court of Appeals decision in *Andrews v. Elliot*. *Id.* at 437, n. 20, 49 P.3d at 646. Notably, *Andrews*

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[1] Like Adelson's characterization of Nevada law, his purported quoting from Jacobs' brief is fiction. Nowhere is the phrase "black letter law" found within Jacobs' Opening Brief.

addresses facts similar to Adelson's acts. There, an attorney claimed the privilege's protections for a letter he delivered to the press, disputing fraud and perjury allegations made against his clients and further stating an intent to sue his clients' accusers. 426 S.E.2d at 431. While the court recognized the absolute privilege for attorneys making communications "preliminary to a proposed judicial proceeding, . . . this privilege applies only when the material is relevant to the anticipated litigation and ***only when it is published to persons significantly interested in the litigation***." *Id.* at 432-33 (emphasis added). According to the court, "[i]t is clear . . . that ***statements given to the newspapers*** concerning the case are not part of the judicial proceeding, and are not absolutely privileged." *Id.* at 433 (emphasis added).

Ignoring *Fink v. Oshins*, Adelson instead clings to *Clark County School District v. Virtual Education Software, Inc.*, 125 Nev. 374, 213 P.3d 496 (2009) (*"VESI"*), as though it is the white-horse case of all analyses on the point. It is not. *VESI*'s significance is on a somewhat different point; namely, when privilege attaches to communications by a non-lawyer that precede the actual commencement of litigation. In *VESI*, the alleged defamatory communication was still between parties interested and affected by the subject matter in dispute. As this Court noted, the statement "was in response to [the plaintiff's] threat to initiate legal action against CCSD" and drafted by "a party involved in a dispute where

judicial proceedings were under serious consideration." *Id.* at 384, 213 P.3d at 503. *VESI* in no way dispenses with *Fink v. Oshins'* holding that the privilege attaches only to statements made to those with an interest in the dispute, not the general public or media.

The same error underlies Adelson's reliance on *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 657 P.2d 101 (1983), which addresses the statutory privilege "for all oral or written communications from an employer to the Employment Security Department, provided that the communications are made pursuant to Chapter 612." *Id.* at 60, 657 P.2d at 104. Again, the statements at issue there were made to those having an interest in the underlying dispute. Indeed, even a cursory review of Chapter 612's permitted recipients underscores that the privilege only extends to communications made to an interested party, such as the Internal Revenue Service, public assistance programs and law enforcement officials or the like. *See* NRS 612.265. Once again, there is no immunity for statements to those having no actual interest in the proceedings.

Hoping to distract from what Nevada law actually provides, Adelson criticizes Jacobs' reference to the numerous other jurisdictions applying this well-settled principle, claiming that those courts "require the presence of additional elements that Nevada does not." (Ans. Br. at 10.) Again, Adelson is wrong. These jurisdictions, like Nevada, follow the lead of the Restatement (Second) of

Torts § 586, which requires "(1) a judicial proceeding must be contemplated in good faith and under serious consideration, and (2) the communication must be ***related to the litigation***." *VESI*, 125 Nev. at 383, 213 P.3d at 503 (citing *Fink*, 118 Nev. at 433-34, 49 P.3d at 644 (citing, among others, Restatement (Second) of Torts § 586 (1977))) (emphasis added).[2]

As those jurisdictions following the Restatement hold, "since '[p]ublication to the news media is not ordinarily ***sufficiently related to a judicial proceeding*** to constitute a privileged occasion,' the absolute privilege should not immunize such publication to the media." *Green Acres Trust v. London*, 688 P.2d 617, 622 (Ariz. 1984) (emphasis added) (quoting *Asay v. Hallmark Cards, Inc.*, 594 F.2d 692, 697 (8th Cir. 1979)); *Kennedy v. Cannon*, 182 A.2d 54, 58 (Md. Ct. App. 1962) ("[T]he extension of this absolute privilege to statements not made in the judicial proceeding itself is limited both by the comments on the rule of the Restatement itself, and by the decisions.").

Searching about for anywhere that would provide him protection, Adelson flees Nevada and the law of virtually everywhere else for the perceived greener

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[2] As a note to the 1981 Appendix to the Restatement makes clear, "[t]he absolute privilege does not extend to a press conference." Restatement (Second) of Torts, Appendix § 586 at 517 (1981). "As an immunity which focuses on the status of the actor, the privilege immunizes an attorney for statements made 'while performing his function as such.'" *Green Acres Trust*, 688 P.2d at 613-14 (quoting Restatement (Second) of Torts § 586, cmt (c)).

pastures of Texas. Specifically, Adelson now embraces the decisions in *Dallas Independent School District v. Finlan*, 27 S.W.3d 220 (Tex. Ct. App. 2000), and *Hill v. Herald-Pot Publishing Co.*, 877 S.W.2d 774 (Tex Ct. App. 1994), for his theory of privilege. (Ans. Br. at 11-12.) But there are at least two problems with Adelson's fondness for Texas law.

First, as the New Mexico Supreme Court recently observed about these Texas decisions, "[t]hese cases . . . represent a minority view on the issue" and are outside of the privilege recognized under the Restatement. *Helena Chem. Co. v. Uribe*, 255 P.3d 367, 373-74 (N.M. 2011). Pointing out the flaws in the Texas decisions, the New Mexico Supreme Court rejected the assertion that these cases "necessarily stand[] for the proposition that the occasion of the defamatory communication or the relationship or interest of the recipient to the judicial proceeding is not relevant or part of the absolute-privilege analysis." *Id.* at 375. It further branded as "inadequate" any standard "allow[ing] the defense on the sole ground that the content of the statement relates to a judicial proceeding . . . ." *Id.*

Second, even if the thin reed of these Texas decisions applied here, which it does not, it provides no secure sanctuary for Adelson. As the New Mexico Supreme Court pointed out, "*Finlan* relied substantially on *Hill*" which "distinguished *Green Acres* by pointing out that *Hill* 'involve[d] the mere delivery of documents previously filed in . . . criminal proceedings and available to the

public.'" *Helena Chem. Co.*, 255 P.3d at 373 (quoting *Hill*, 877 S.W.2d at 783.) "The [*Hill*] court also held that the attorney's statement to the reporter 'in response to an inquiry about [the attorney's] motions . . . bore a substantial relationship to the criminal proceedings and was made in furtherance of his representation[,]' in that the attorney was 'merely affirming the allegations in his motion and brief and his belief that he could prove them,' and indicating that this response was one that 'many if not most attorneys would make if queried by the news media about the allegations in petition or an indictment.'" *Id.*

Obviously, Adelson did far more than merely deliver publicly-filed documents or reaffirm a pleading. Adelson attacked Jacobs in the press by issuing a false email statement. This was not an attorney giving an off the cuff statement describing the proceedings. No, this is a litigant who issued a false statement after an adverse court decision because he desired a public relations spin after the District Court refused to dismiss Jacobs' lawsuit. Even in Adelson's preferred forum, other Texas appeals courts have recognized that such public relations moves are unbefitting of judicial protection: The litigation privilege "cannot be enlarged into a license to go about in the community and make false and slanderous charges against his court adversary and escape liability for damages caused by such charges on the ground that he had made similar charges in his court pleadings." *Levingston Shipbuilding Co. v. Inland West Corp.*, 688 S.W.2d 192,

196 (Tex. Ct. App. 1985) (quoting *De Mankowski v. Ship Channel Dev. Co.*, 300 S.W. 118, 122 (Tex. Civ. App. 1927)).

It is thus unremarkable that jurisdiction after jurisdiction, as well as commentators, reject Adelson's assertion that his public relations campaign merits protection under the absolute privilege. *Uribe*, 255 P.3d at 373 n.1 (citing, among others, *Seidl v. Greentree Mortg. Co.*, 30 F. Supp. 2d 1292, 1315 (D. Colo. 1998) ("Since the reporter lacked a sufficient connection to the proposed proceedings, public policy would be ill served if we immunized the communications made to the reporter by the lawyer defendants."); *Kennedy v. Zimmermann*, 601 N.W.2d 61, 66 (Iowa 1999) ("Our decision to exclude interviews with news reporters not only conforms to the purpose and policy of the absolute privilege, but is in line with other jurisdictions who have considered the issue."); *Brown v. Gatti*, 99 P.3d 299, 305 (Or. Ct. App. 2004) ("A few courts have held that statements made to the press can qualify for the privilege . . . [h]owever, the great weight of authority is to the contrary."); Prosser & Keeton on The Law of Torts § 114, at 820 (5th ed. 1984) (stating that "[i]t is clear . . . that statements given to the newspapers concerning the case are no part of a judicial proceeding, and are not absolutely privileged."); Grace M. Giesel, *Defamation Liability for Attorney Speech: A Policy–Based and Civility–Oriented Reconsideration of the Absolute Privilege for Attorneys*, 10 Ga. St. U.L.Rev. 431, 469 (1994) (stating that "[f]ortunately, courts and commentators

agree that letters and other communications to the media do not benefit from an absolute privilege.")).[3]

The lengths to which Adelson will go culminate in his mischaracterization of the law by reference to *Hall v. Smith*, 152 P.3d 1192, 1196-99 (Ariz. Ct. App. 2007), the actual holding of which appears lost on Adelson. As that court explained, "on the appropriate standard to apply in this area, in our view the recipient must have had a ***close or direct relationship to the proceeding*** for the privilege to apply." *Id.* at 1196 (emphasis added). As such, *Hall* specifically confirms Jacobs' point: "[C]ourts have routinely rejected privileged claims when the recipient of the allegedly defamatory communication had no relation to the litigation . . . ." *Id.* at 1198.

The *Hall* court addressed when a defendant's parent company has a sufficient relationship to the litigation of a subsidiary to receive communications protected by the privilege. Although a separate legal entity from its subsidiary, the

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[3] While Adelson claims that Jacobs' "own cases demonstrate that his letter-law is not as 'black' as he represents," Adelson's selective quoting from these cases again shows his need to overreach. (Ans. Br. at 11.) Jacobs does not claim that publication to the news media could *never* be a privileged communication. Obviously, in instances where the media is more than an observer, such as when it is a party or has an actual stake in the proceedings, communications may well implicate the privilege. But, as Jacobs has shown, it is not ordinarily privileged and is not privileged where, as here, the media lacks any legal interest in the proceedings.

parent still was "significantly involved in the . . . litigation" and even selected the attorneys who defended the case. *Id.* at 1197. Furthermore, the settlement agreement that was ultimately reached included language releasing the parent from liability. *Id.* at 1198. Based upon this, and other facts, the court held that the communications by a litigant devoted to the parent are "more analogous to those where the privilege has been applied than to those where it has not." *Id.* But unlike the parent company in *Hall*, Adelson's audience—the media—had no relationship with the pending litigation beyond that of any other observer.

Finally, Adelson concludes his argument by conflating the absolute privilege with cases involving the "excessive publication" rule. While Adelson may want a pat on the back for sending only a single defamatory email to the media when it was already reporting on this case[4], those facts do not alter the legal consequences of his acts. His statements are not protected in the first instance. Under the "excessive publication" rule, and "communications that are ***otherwise*** privileged lose their privilege if the statement is excessively published, that is, published to more persons than the scope of the privilege requires to effectuate its purpose."

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[4] Of course, Adelson's assertion that he has limited his defamation to only a single emailed statement is simply untrue. Adelson continues to defame Jacobs to anyone who will listen including his peers in the resort industry and the press. *See* www.macaubusiness.com/news/sheldon-adelson-opens-fire-on_steve-jacobs/8351/; *see also* www.macaubusiness.com/news/let%e2%80%99s-sit-and-talk/12455/.

Pratt v. Nelson, 164 P.3d 366, 377 (Utah 2007) (emphasis added). A publication is excessive if the statement:

> was published to more persons than necessary to resolve the dispute or further the objectives of the proposed litigation, in other words, if the [statement] was published to those who did not have a legitimate role in resolving the dispute, or if it was published to persons who did not have an adequate legal interest in the outcome of the proposed litigation.

Id. (quoting *Krouse v. Bower*, 20 P.3d 895, 900 (Utah 2001)).

It is not the frequency or the opportune timing of Adelson's defamation that is the point here. Adelson sought to defame and malign Jacobs because he wanted a public relations spin after the District Court refused to dismiss Jacobs' litigation. Adelson did not make those assertions in the context of litigation to those having an interest. Rather, Adelson made the statements to the media because he wanted them to have wide publication as part of his public relations campaign to smear Jacobs. There is no privilege that attaches even if Adelson's degree of publication were minimal, which it was not. The claimed infrequency and timing of Adelson's defamation cannot save him from accountability.[5]

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[5] Adelson's claim to the absolute privilege is also undermined by the common law and historical precedent surrounding this privilege. In *Buckley v. Fitzsimmons*, the United States Supreme Court summarized this common law as follows: "while prosecutors, like all attorneys, were entitled to absolute immunity from defamation liability for statements made during the course of judicial proceedings relevant to them, . . . most statements made out of court received only good-faith immunity."

1. The policy supporting the absolute privilege requires the rejection of Adelson's plea for protection.

There is a good reason that Nevada, other jurisdictions, and commentators have long rejected attempts to afford an absolute privilege to defamatory statements made to the media: The privilege's purpose is to protect the judicial process, not a litigant's public relations agenda. The "policy underlying the [litigation] privilege is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements." *Circus Circus Hotels, Inc.*, 99 Nev. at 61, 657 P.2d at 104. "The privilege is 'intended to promote the integrity of the adjudicatory proceeding and its truth finding process.'" *Pratt*, 164 P.3d at 376 (quoting *Allen v. Ortez*, 802 P.2d 1307, 1311 (Utah 1990)). "Because absolute immunity immunizes absolutely, it is reserved for 'those situations where the public interest is so vital and apparent that it mandates complete freedom of expression without inquiry into a defendant's motives." *Sobol v. Alarcon*, 131 P.3d 487, 490 (Ariz. Ct. App. 2006).

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509 U.S. 259, 277 (1993). "The common-law rule was that '[t]he speech of a counsel is privileged by the occasion on which it is spoken . . . ." *Id.* (citation omitted).

Providing a privilege for false statements to the press is counterproductive to these important policy choices. It only undermines the litigation process and the search for the truth. It would encourage parties to issue false and defamatory press releases under the guise that they "relate" to existing litigation which would then trivialize the judicial process, undermine public confidence in it and breed public cynicism. In the well-reasoned words of the New Mexico Supreme Court, recognizing such a privilege "would be tantamount to unqualifiedly allowing defamatory statements by attorneys and parties to news reporters for dissemination to the general public as long as they could show that the content of the statements related to the subject matter of the judicial proceeding." *Helena Chem. Co.*, 255 P.3d at 376.

The policy for which the privilege exists is not as perverse as Adelson urges or desires. The law affords him no protection for issuing a false and defamatory e-mail in retaliation over an adverse court decision. *See also Kelley v. Bonney*, 606 A.2d 693, 707 (Conn. 1992) ("[t]he saluatory policy of allowing freedom of communication in judicial proceedings does not warrant or countenance the dissemination and distribution of defamatory accusations outside of the judicial proceedings'") (quoting *Asay*, 594 F.2d at 697).

B. Adelson's Urging Of Alternative Grounds For Dismissal Is Equally Untenable.

Cognizant that he led the District Court into error with unfounded claims of absolute privilege, Adelson now proffers two different theories purportedly justifying dismissal. Yet, neither of his alternatives has merit.

1. Questions of qualified privilege cannot be determined on this record.

Adelson claims that his false statements are protected under the qualified privilege reserved for "invited" or "reply" statements. Of course, there is an obvious flaw in Adelson's position. The District Court dismissed Jacobs' defamation claim on an NRCP 12(b)(5) motion. Adelson's proposed qualified privilege is an affirmative defense that turns on facts and a record not yet developed. *See, e.g.*, *Fariello v. Gavin*, 873 So.2d 1243, 1245 (Fla. App. Ct. 2004) ("[T]he affirmative defense of qualified immunity presents a fact intensive issue that should ordinarily not be resolved by a motion to dismiss."); *Pelegatti v. Cohen*, 536 A.2d 1337, 1343 (Super. Ct. Penn. 1987) ("[I]t is a question of fact for the jury as to whether a qualified privilege has been abused.").

Indeed, a qualified or conditional privilege "differs from the defense of absolute privilege in that the interest which the defendant is seeking to vindicate is regarded as having an intermediate degree of importance, so that the immunity conferred is not absolute, but is conditioned upon publication in a reasonable manner and for a proper purpose." *Green Acres Trust*, 688 P.2d at 624 (citation

omitted). "Absent a proper purpose or reasonable manner of publication, the defense fails." *Id.* Like other jurisdictions, Nevada applies a two-part analysis for determining when the qualified privilege applies. First, a court must decide as a matter of law "[w]hether a particular communication is conditionally privileged by being published on a 'privileged occasion.'" *Circus Circus Hotels, Inc.*, 99 Nev. at 62, 657 P.2d at 105 (citations omitted). If so, "the burden then shifts to the plaintiff to prove to the jury's satisfaction that the defendant abused the privilege by publishing the communication with malice in fact." *Id*.; *Green Acres Trust*, 688 P.2d at 624 ("Whether a privileged occasion arose is a question of law for the court, and whether the occasion for the privilege was abused is a question of fact for the jury."); s*ee also Miller v. Jones*, 114 Nev. 1291, 970 P.2d 571 (1998) (holding that genuine issues of material fact regarding falsity of statement and defendant's actual malice precluded summary judgment).

In the context of "invited" or "reply" defamation, a court must first determine whether a privileged occasion actually exists. Thereafter, any claim to the privilege is lost if the reply: "(1) includes substantial defamatory matter that is irrelevant or non-responsive to the initial statement; (2) includes substantial defamatory material that is disproportionate to the initial statement; (3) is excessively publicized; or (4) is made with malice in the sense of actual spite or ill will." *State v. County of Clark*, 118 Nev. 140, 149-50, 42 P.3d 233, 239 (2002).

Of course, the District Court here did not address any of these issues, nor has any factual record been developed concerning Adelson's affirmative defense. At this stage, Jacobs' allegations establishing Adelson's malicious and purposeful intent to harm Jacobs' reputation and good name are deemed true and foreclose any qualified privilege defense.[6] Thus, there is no record upon which this Court can address Adelson's alternative defense as a part of this appeal. *Lubin v. Kunin*, 117 Nev. 107, 115, 17 P.3d 422, 428 (2001) ("At the NRCP 12(b)(5) stage . . . the

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[6] To the extent that Adelson is suggesting that application of the qualified privilege for "reply" is purely an issue of law, he is mistaken. As this Court knows, this privilege was adopted in *State v. County of Clark*, 118 Nev. 140, 42 P.3d 233. Although labeled a motion to dismiss, the defendants' brief to the district court contained "[s]everal affidavits and other matters outside of the pleadings." *Id.* at 145 n.1, 42 P.3d at 246. Therefore, "the motion [was] . . . treated as one for summary judgment." *Id.* As the Court concluded:

> the instant case is one of the very few instances that warrant extraordinary [writ] relief. The underlying case has been pending for nearly four years and involves important questions of law and serious, well-publicized allegations against the Attorney General's office. If petitioners' contention that Anzalone's claims are meritless is correct, the entire case must be dismissed. Petitioners have already been subjected to four years of litigation, and should not be subjected unnecessarily to four more years. We therefore conclude that judicial economy militates in favor of our intervention.

Id. at 147, 42 P.3d at 238. Of course, no such factual record exists here and no extraordinary circumstances militate in favor of this Court's intervention into the District Court's discretion or the jury's purview.

[defendants] have not alleged the privilege by answer, let alone established facts to show that the privilege applies. If the district court determines that the privilege is applicable, the action for defamation will be presented 'to the jury only if there is sufficient evidence for the jury reasonably to infer that the publication was made with malice in fact.'") (quoting *Circus Circus Hotels*, 99 Nev. at 62, 657 P.2d at 105).[7]

2. Adelson's statements were false statements of fact, and he knows it.

By now, it is more than apparent that Adelson will argue almost anything so as to avoid responsibility for his false statements. To do so, Adelson goes so far as to claim that his false and defamatory e-mail merely expressed his opinions. Not so. Adelson's press statement made false statements of fact concerning the reasons for Jacobs' termination and calling Jacobs a liar. Court after court recognizes that these are actionable statements of fact.

Adelson's "words must be reviewed in their entirety and in the context to determine whether they are susceptible of a defamatory meaning." *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 484, 851 P.2d 459, 463 (1993). Thus, "where a

[7] Although a question of fact, it bears noting that Adelson's comments do not qualify for the conditional privilege for "reply" or "invited" defamation. Adelson was not named as a defendant in Jacobs' case at the time of his statements to the press. Moreover the defendants' interest in replying to Jacobs' claims is not properly accomplished by Adelson's issuance of a press release. The proper forum for their response is the judicial proceedings. The District Court was the proper recipient of the communication, not the media.

statement is susceptible of different constructions, one of which is defamatory, resolution of the ambiguity is a question of fact for the jury." *Lubin*, 117 Nev. at 111, 17 P.3d at 425-26 (citation omitted); *see also Posadas v. City of Reno*, 109 Nev. 448, 453, 851 P.2d 438, 442 (1993) (summary judgment on defamation claim was error because the statement "is capable of a defamatory construction").

Here, the factual record is undeveloped. And, Jacobs' allegations are currently accepted as true, including that Adelson made false statements of fact by claiming that he and his companies "have a substantial list of reasons why Jacobs was fired for cause and that Jacobs has failed to "refute[] a single one of them." (JA 0032, ¶¶ 62-63, 65.) Additionally, Adelson claimed that Jacobs had used "outright lies and fabrications" to "explain his termination." *Id.* Now called to answer for these falsehoods, Adelson tellingly wants to rewrite what he said and characterize it merely as "rhetorical hyperbole". (Ans. Br. at 21.) Yet, there is nothing abstract or metaphoric about Adelson's false claim that Jacobs' was fired for cause or that Jacobs lacks a defense to his termination.

Courts recognize that false claims that a former employee was fired for "cause" is understood as being fact and, therefore, actionable. *See, e.g., Carney v. Mem'l Hosp. & Nursing Home of Greene Cnty.*, 475 N.E.2d 451, 453 (N.Y. 1985) ("It cannot be said as a matter of law that the average reader of the statement that plaintiff was discharged 'for cause' would not interpret it as meaning that plaintiff

had actually been derelict in his professional duties."); *Linkage Corp. v. Trustees of Boston Univ.*, 679 N.E.2d 191, 206, n.30 (Mass. 1997) ("[T]he jury would have been warranted in finding that Westling's statements to Linage employees on the day of the termination, that the termination was 'for cause,' were defamatory . . .").

Similarly, calling someone a "liar" in the press – as Adelson did of Jacobs – is a statement of fact, not opinion. *See, e.g., Cook v. Winfrey*, 141 F.3d 322, 330 (reversing dismissal of defamation claim based upon defendant's statements to National Enquirer that plaintiff was "a liar" and characterizing lawsuit as "all a pack of lies."); *Vinson v. Linn-Mar Cmty. Sch. Dist.*, 360 N.W.2d 108, (Iowa 1984) (finding "no meaningful distinction between being called a liar and being accused of falsifying information"); *Pease v. Int'l Union of Operating Eng'rs Local*, 150, 567 N.E.2d 614, 619 (Ill. App. 1991) (statements "he simply lied" and "lied to us and lied to you" were not reasonably susceptible to an innocent construction and were therefore libelous per se); *see also Edwards v. Nat'l Audubon Soc'y, Inc.*, 556 F.2d 113, 121 (2d Cir. 1977) (no allegation could be better calculated to ruin academic reputations than to call university professors "paid liars").

III. CONCLUSION

The privilege of making statements in a judicial proceeding provides no sanctuary for false press releases by litigants desiring to score public relations points. Jacob agrees with Adelson on thing: Someone in this case is fabricating,

and the jury will determine who it is. Knowing that fact, Adelson now desperately wants the judiciary to protect him from the consequence of his falsehoods. Yet, there is no privilege here, and there are no alternative grounds that permits Adelson to escape a jury assessing his actions.

The District Court's dismissal is in error and must be reversed.

DATED this 6th day of March, 2012.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2007 in size 14 font in Times New Roman.

I further that I have read 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), it is proportionately spaced, has a typeface of 14 points or more and contains 4,887 words.

Finally, I hereby certify that 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 that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 this 6th day of March, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice, PLLC, and pursuant to NRAP 25(b) and NEFR 9(d), that on this date I electronically filed the foregoing Appellant's Reply Brief with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Courts E-Filing system (Eflex), Participants in the case who are registered with Eflex as users will be served by the Eflex system as follows:

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DATED this 6th day of March, 2012.

/s/ Z. Sotelo

Employee of Pisanelli Bice, PLLC