IN THE SUPREME COURT OF THE STATE OF NEVADA

CAROLYN STARK, an individual, dba NDOW WATCH KEEPING THEM TRANSPARENT

Appellant,

vs.

CARL LACKEY, an individual,

Respondent.

Case No. 74449

APPEAL

from the Second Judicial District Court, Department 4
The Honorable Connie Steinheimer, District Court Judge
District Court Case No. CV17-00434

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

Winter Street Law Group, formerly Hardy Law Group
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ROUTING STATEMENT

The Nevada Supreme Court should assign this case to the Court of Appeals where it does not fall within any of the categories set forth in NRAP 17(a)(1) through (a)(11). While NRS 41.670(4) provides that an appeal from an order denying a motion to dismiss filed pursuant to NRS 41.660 lies with the Supreme Court, that statute was enacted before the Court of Appeals was formed. NRS 41.670(4). In fact, similar appeals have been routinely assigned to the Court of Appeals. Contrary to Appellant Carolyn Stark's ("Stark") contention, this appeal does not involve a question of statewide public importance.

ISSUES PRESENTED

1. Did the district court abuse its discretion when it held that Stark failed to establish by a preponderance of the evidence that Respondent Carl

Lackey's ("Lackey") claims are based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern and therefore the burden did not shift to Lackey to demonstrate with prima facie evidence a probability of prevailing on his claims for purposes of a motion to dismiss pursuant to NRS 41.660?

2. Did the district court err when it accepted the allegations in the First Amended Complaint ("FAC") as true and concluded that it does not appear beyond a doubt that Lackey can prove no set of facts in support of his claims for purposes of a motion to dismiss pursuant to NRCP 12(b)(5)?

I. SUMMARY OF ARGUMENTS

This appeal stems from Stark's motion to dismiss pursuant to NRS 41.660 and NRCP 12(b)(5). This case involves Stark's harassing, intimidating and threatening conduct towards Lackey related to his employment duties with the Nevada Department of Wildlife ("NDOW"). In denying the motion, the district court relied solely upon the FAC and Stark's affidavit and declined to consider the additional evidence presented by Lackey.

The district court did not abuse its discretion in denying the motion to dismiss pursuant to NRS 41.660 based solely upon the FAC and Stark's affidavit. Even if this Court concludes that the FAC and Stark's affidavit do not support the district court's ruling, the record on appeal, including the additional evidence presented by the parties, support the district court's denial of the NRS 41.660 motion to dismiss. *Saavedra-Sandoval v. Wal-Mart Stores, Inc.,* 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason.").

A *de novo* review of the motion to dismiss pursuant to NRCP 12(b)(5) compels a conclusion from this Court that it does not appear beyond a doubt that the FAC could prove no set of facts, which if true, would entitle Lackey

to relief. This Court should therefore affirm the district court's *October 20, 2017 Order* ("*Order*").

II. STANDARDS OF REVIEW

A. NRS 41.660 Dismissal.

This Court reviews an NRS 41.660 motion to dismiss for an abuse of discretion standard. *Shapiro v. Welt,* 133 Nev. __, __, 389 P.3d 262, 266 (2017). Under this standard, this Court "provide[s] greater deference to the lower court's findings of fact . . ." *Id.* at __, 389 P.3d at 266.

Stark incorrectly states that Lackey's burden of proof pursuant to NRS 41.660 was "clear and convincing." Appellant's Opening Brief at 7 ("AOB"). Prior to 2013, an NRS 41.660 motion was treated as one for summary judgment. *Delucchi v. Songer,* __ Nev. __, __, 396 P.3d 826, 830 (2017). In 2013, NRS 41.660(3)(b) was amended and the plaintiff was required to establish by clear and convincing evidence a probability of success on the merits. *Id.* at __, 396 P.3d at 831. The Legislature, however, amended the burden of proof again in 2015 and the statute now only requires the plaintiff to demonstrate "with prima facie evidence a probability of prevailing on the claim." NRS 41.660(3)(b).

/ / /

B. NRCP 12(b)(5) Dismissal.

Although Stark moved to dismiss based upon NRS 41.660 and NRCP 12(b)(5), Volume 1 Joint Appendix 0030-0051 (hereinafter "__JA__"), she now contends for the first time on appeal that the district court should have dismissed Lackey's claims for intentional infliction of emotional distress and conspiracy based upon NRS 41.660 because dismissal is appropriate for any "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech . . ." AOB at 23 (citing *Baral v. Schnitt,* 376 P.3d 604 (Cal. 2016)).

The pleadings filed with the district court show that this argument was never raised below. 1JA0026-0075, 0084-0123, 2JA0124-0164, 3JA0165-0177, 0188-0225, 4JA0178-087 This Court need not consider arguments raised for the first time on appeal. *Delgado v. Am. Fam. Ins. Group,* 125 Nev. 564, 570, 217 P.3d 563, 567 (2009). "A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown,* 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

Even if this Court were to consider this new argument, the causes of action for intentional infliction of emotional distress and conspiracy are still not subject to dismissal. That is because only the allegations of protected

activity are stricken when relief is sought based upon allegations of both protected and unprotected activity. *Baral,* 376 P.3d at 617.

An order granting an NRCP 12(b)(5) motion to dismiss is reviewed *de novo*. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227–28, 181 P.3d 670, 672 (2008). Dismissing a complaint is appropriate "only if it appears beyond a doubt that [the complaint] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.,* 181 P.3d at 672.

III. STATEMENT OF FACTS

NDOW employs Lackey as a Biologist III. 1JA0013 Biologist III duties are to "manipulate fish and wildlife populations and habitats by introducing species into suitable habitats consistent with biological and social constraints; bait and trap, tranquilize, radio collar or band wildlife and transport to selected locations" and "investigate and assess damage caused by wildlife upon private property and public lands; recommend appropriate courses of action to mitigate or resolve the problem." *Id.* Citizens are encouraged to contact NDOW when there is a human-bear conflict. *Id.* Stark does business as NDOW Watch Keeping Them Transparent ("NDOW Watch") and is its voice. 1JA0012

In performing his employment duties, Lackey has become the victim of continuing vicious online and in person threatening and harassing conduct

from members of Bear League and the online forums Lake Tahoe Wall of Shame ("LTWS"), NDOW Watch, and Bear League. 1JA0013 Bear League volunteers and members of the online forums of LTWS and NDOW Watch have made and continue to make false statements regarding Lackey's character in a vicious and calculated effort to damage his reputation and jeopardize his employment. *Id.* Bear League, LTWS, and NDOW Watch have and continue to initiate public comment threads on their Facebook pages and other Facebook pages slandering Lackey and urging and encouraging others to shame and harass him. *Id.*

The FAC alleges and the posts show that Stark and others published false and vicious comments about Lackey rising to the level of slander per se by accusing him of criminal conduct and attacking his livelihood, including allegations that he purportedly accepted payments from hunters to disclose locations of bears, purportedly accepted payments from hunters to place bears in hunt zones, and allegedly conspired with others to commit illegal acts. 1JA0014-0018 Many of these published comments incite violence or illegal conduct. 1JA0017 (post urging Lackey's assassination); *see also* 1JA0115-0119 and 3JA0178-0187.

Lackey brought suit against Stark and others asserting defamation, intentional infliction of emotional distress, negligent infliction of emotional

distress and civil conspiracy. 1JA0011-0021 Stark moved to dismiss pursuant to NRS 41.660 and NRCP 12(b)(5). 1JA0030-0051 To support her motion, Stark provided the district court with her affidavit and other supporting exhibits. 1JA0076-0079 Lackey filed his opposition with supporting exhibits. 1JA0084-0123, 2JA0124-0164, 3JA0165-0187

The district court issued its ruling October 20, 2017. 4JA0247-0261 Appellant filed the instant appeal.

IV. ARGUMENT

A. The District Court Correctly Held that the Statements Attributed to Stark Do Not Fall within the Ambit of NRS 41.637.

SLAPP is an acronym for "strategic lawsuit against public participation". Nevada's anti-SLAPP statutes apply only to a "[g]ood faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern" and defines such communication as any "[c]ommunication made in direct connection with an issue of public interest in a place open to the public or in a public forum, . . . which is truthful or is made without knowledge of its falsehood." NRS 41.637(4). Nevada's anti-SLAPP statutes permit a defendant to file a special motion to dismiss. NRS 41.660.

The standard for dismissal under NRS 41.660 is different from that applicable to a standard NRCP 12(b)(5) motion and involves a two-part test.

The first part requires Stark to show "by a preponderance of the evidence," that the claim is based upon a "good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern . . . which is truthful or is made without knowledge of its falsehood." NRS 41.660(3)(a) and NRS 41.637. If Stark makes this initial showing, the burden shifts to Lackey to show "with prima facie evidence a probability of prevailing on the claims." NRS 41.660(3)(b). Stark cannot show by a preponderance of the evidence that the statements fall within the purview of NRS 41.637.

The court in *Shapiro* looked to California law for guidance on the question as to what constitutes "an issue of public interest" and "adopt[ed] California's guiding principles, as enunciated in *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.,* 946 F. Supp.2d 957, 968 (N.D. Cal. 2013), for determining whether an issue is of public interest under NRS 41.637(4)." __ Nev. at __, 389 P.3d at 268. The court adopted the following guiding principles.

> (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.

Id., 389 P.3d at 268 (citing *Piping Rocks Partners,* 946 F. Supp.2d at 968).

Once the court determines that the issue is of public interest, it must next determine whether the communication was made "in a place open to the public or in a public forum." *Id.*, 389 P.3d at 268 (citing NRS 41.637). "Finally, no communication falls within the purview of NRS 41.660 unless it is 'truthful or made without knowledge of its falsehood.'" *Id.*, 389 P.3d at 268 (citing NRS 41.637). The district court correctly concluded that Stark was not able to show with any evidence that the statements attributed to her as alleged in the FAC were truthful or made without knowledge of its falsehood. 41JA0251-252

"'In evaluating the first [step] of the anti-SLAPP statute, we must focus on 'the *specific nature of the speech* rather than the generalities that might be abstracted from it. . . .'" *D.C.*, 106 Cal. Rptr.3d at 418 (brackets in original) (emphasis in original). In other words, the Court must look at the

specific speech, not simply the fact that it may have some remote relationship to a public concern. In viewing the five statements attributed to Stark as alleged in the FAC, the district court correctly applied this standard.

Although the parties submitted additional evidence to the district court for consideration, the court considered only the FAC and Stark's affidavit.[1] 4JA0249-0252 The district court identified five statements attributed to Stark (1JA0016-0017 ¶¶ 14(q), (r), (s), (u)and (y)).[2] 4JA0250 The district court identified Stark's articulated public interest as "the treatment of wildlife in Lake Tahoe, specifically the concern of the trapping and euthanizing bears by NDOW." 4JA0251 In analyzing these five statements, the district court made the following conclusions.

1. Statement Q.

Statement Q states the following:

> He and his family directly benefit by him moving bears to a hunting area if they are issued a license and the killing of them in the name of public safety must simply be something that excites him-all of it in conflict with NDOW's mission. Additionally, if we can establish that he or his family benefits financially from selling bear parts or selling the location where he recently released a bear-he should go to jail.

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[1] For reasons discussed later, Stark's affidavit has no probative value where it contains mere conclusions.

[2] Because the district court concluded that Stark did not carry the initial burden of proof, the burden did not shift to Lackey and the court did not address the remainder of the parties' arguments related to Nevada's anti-SLAPP statutes. 4JA0249-0252

1JA0016

The district court concluded that statement Q is not directly related to the stated public interest because the "main focus concerns potential benefits Lackey may receive, and hypothesizes that Lackey should go to jail if they prove he sells bears parts." 4JA00251 Statement Q attacks Lackey's reputation by blatantly stating that Lackey gets "excited" when he and his family benefits from illegally killing bears and falsely accuses him of corruption because he and his family financially benefit from selling bear parts and selling the locations of released bears. This statement is nothing more than a personal attack upon Lackey's character and reputation and the district court correctly concluded that statement Q is not directly related to Stark's stated public interest.

2. Statement R.

Statement R provides:

> Yes he should go to jail! The treatment of our bears is paramount cruelty. Moving mothers without their cubs, moving them to hunt zones, moving them great distances knowing full well there are no food sources or water and that they will try to return home! Animal cruelty is a felony in all 50 states. Him and his NDOW murderers need to go to jail and stay there.

1JA0016.

The district court concluded that while this statement "contains some assertions that relate to the public interest[,] . . .] its main focus appears to be an attack on Lackey's character, by calling him a murderer and demanding he go to jail." 4JA0251 The district court correctly concluded that accusing Lackey of being a murderer and attacking Lackey's character and reputation have no degree of closeness to Stark's stated public interest.

3. Statement S.

Statement S states: "It's time for the NV ENGINEERED bear hunt." 1JA0016 The district court concluded that this statement arguably bears some degree of closeness to Stark's stated public interest. 4JA0251

4. Statement U.

The district court concluded that statement U benefits Lackey and therefore this statement is not at issue for the purposes of this appeal.

5. Statement Y.

Statement Y states: "Lakey is such an incompetent asshole!! Fire his ass!!". 1JA0017 The district court concluded that this statement was nothing more than a personal attack on Lackey and bears no degree of closeness with Stark's stated public interest. 4JA0251 This conclusion is sound.

In order to fall within the purview of NRS 41.637(4)'s protection, the communication at issue must be "truthful or is made without knowledge of its falsehood." NRS 41.637(4). Because the district court concluded that the only statements containing any degree of closeness with Stark's stated public interest were R and S, the court proceeded to determine whether Stark proved by a preponderance of the evidence that statements R and S were true or made without knowledge of its falsehood. 4JA0251-0252

In giving Stark the benefit of the doubt, the district court considered Stark's affidavit. 4JA0252 In doing so, the district court correctly concluded that "Stark has failed to meet her burden to prove statement R's truthfulness or that it was not made without knowledge of its falsity. Stark does not specifically address the factual allegations in R nor make any specific indication as to why the statement made by JoAnn Jill is true, or made without knowledge of its falsity." *Id.* The district court further correctly concluded that "Stark's affidavit does not specifically address statement S." *Id.* The district court correctly concluded that Stark's statement that she "believes" the statements posted by others contain substantial truth was insufficient for the court to find by a preponderance of the evidence that the claim is based upon a good faith communication in

furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern. *Id.*

In viewing the FAC and Stark's affidavit, there is no evidence that the statements that either Lackey or NDOW relocates bears to hunt zones knowing "full well" that there are no food sources or water and that he and others at NDOW are murderers are truthful or made without knowledge of their falsehood. 1JA0016 In viewing the FAC and Stark's affidavit, there is no evidence that Lackey engineers bear hunts in Nevada.

The district court did not consider the evidence presented by Lackey but only the evidence presented by Stark. If this Court considers the additional evidence the parties submitted below, this Court is compelled to reach the same conclusion - the NRS 41.660 motion must be denied. NRS 41.660(3)(d) permits the court to consider additional evidence presented "as may be material in making a determination" regarding dismissal. NRS 41.660(3)(d).

B. Even If This Court Were to Consider the Additional Evidence Presented by Both Parties, Dismissal Is Still Warranted Pursuant to NRS 41.660.

In addition to the comments identified in the FAC, Lackey provided the district court with additional comments that were posted on Bear League, NDOW Watch, and LTWS. 1JA0115-0123, 2JA0124-0164, 3JA0165-0187

Some of these postings are disturbing as they incite violence or illegal conduct. 1JA0007 ("time for an assassination"); 2JA0115-0119 (May 21, 2013 Post from LTWS ("we Must rid Nevada of this monster who lives and is paid to kill bears"); July 4, [year unknown] Post from Carolyn Ford ("Carl Lackey is disgrace!! I wish someone would shoot him with a tranquilizer and let him see how it feels!"); June 22, [year unknown] Post from Cindy Pollard McAyeal ("I agree lackey needs to be darted in a trap and driven far far away. hard release. bring in the dogs shot guns pellet bags rock salt."); April 17, [year unknown] Post from Kathy Compton ("Lets put both of them [referring to Plaintiff and his wife] in the trap."); Date Unknown Post from Sunni Enciso ("I would rather see human traps, and get them out of the bears backyard"); Date Unknown Post from Jayne Forman (in response to a post where someone reported seeing a truck carrying a bear trap, Ms. Forman posted the following: ". . . Should have run it off the road . . ."); Date Unknown Post from Dave Waltz ("Wonder what happens if these traps get vandalized??"); August 23, [year unknown] Post from Carolyn D Bennett Ford ("Carl Lackey needs to be relocated, preferably to someplace HOT for eternity!!!!"); August 24, [year unknown] Post from Edward Wodeshick ("Let's use Carl as bait"); August 24, [year unknown] Post from Vicki Brown ("How about putting Carl lackey in that trap and roll it into bear

territory"); August 24, [year unknown] Post from Aron Jones ("I'd love to run into Carl at a bar. I'll ram a fist full of marshmallows and a pie up his backside, tie him to a trailer and let the bears climb on in, then take him to Iraq and drop him off in a hunting zone"); August 24, [year unknown] Post from Jillian Torrez ("Can we push this trap into the forest and light it on fire?!! . . ."); August 24, [year unknown] Post from Lorene Cole ("Let's trap Carl Lackey and ship him off!")); (July 3, [year unknown] Post from Carolyn D. Bennett Ford ("Carl Lackey is a disgrace!! I wish someone would shoot him with tranquilizer's and let him see how it feels!!!"); May 17, 2013 Post from Ava Sands ("Oh please beat the crap out of this guy."); May 18, 2013 Post from Cheryl Gibson (". . . Need to put Lackey and the guy who killed Sunny in a firing squad and start shooting!"); May 23, 2013 Post from Janis Hallert (". . . This poor excuse of a man, needs to be taken out!! Way out, . . ."); May 30, 2013 Post from Cheryl Gibson ("I just want someone to put Carl Lackey out of our misery!"); June 21, [year unknown] Post from Patricia Miller ("Has anyone thought of the obvious? Relocate Carl Lackey . . ."); June 22, [year unknown] Post from Cindy Pollard McAyeal (". . . I agree lackey needs to be darted in a trap and driven far far away. hard release. bring in the dogs shot guns pellet bags rock salt. . ."); June 21, [year unknown] Post from Mary Morton-Johnson ". . . Lackey has

to be stopped, removed, relocated! What an idiot!!!!")); *see also* 3JA0178-0187.

When this Court views these postings along with the postings made by Stark and NDOW Watch in their totality,[3] this Court should conclude that a reasonable person would perceive these communications in their totality as a threat to cause him harm. As such, none of the communications, in addition to those made by Stark and NDOW Watch are subject to First Amendment protection.

If the declared speech is illegal as a matter of law, then that speech is not protected by Nevada's anti-SLAPP statutes. *Stubbs v. Strickland,* __ Nev. __, 297 P.3d 236 (2013). Not all speech and petition activities are constitutionally protected. *United States v. Alvarez,* 132 S. Ct. 2537, 2544 (2012). Obscenity, libel and "fighting words" have long been recognized as falling outside the scope of the First Amendment protection because they lack any social value. *Id.*

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[3] Stark and NDOW Watch made approximately 50 or so posts on NDOW Watch, Bear League, and LTWS. *See generally* 1JA0115-0123, 2JA0124-0164, 3JA0165-0187. Stark's and NDOW Watch's posts should be analyzed in the entire factual context, including the surrounding circumstances. This means that this Court should not view Stark's and NDOW Watch's posts in isolation but view them in totality with all the posts that have been made.

If the subject communication is such that a reasonable person would perceive it as a threat to cause him harm or it could incite others to cause harm, it is not subject to First Amendment protection. In *D.C. v. R.R.*, the California Court of Appeals was called upon to determine if California's anti-SLAPP statutes applied to threaten cyber-bullying statements by high school students toward another student they believed to be gay. 106 Cal.Rptr.3rd 399 (Cal. Ct. App. 2010).

The victim and his parents filed an action against the perpetrators. *Id.* at 405. One of the defendants filed an anti-SLAPP motion to dismiss. *Id*. In denying the motion to dismiss, the court set out a well-reasoned discussion of the application of California's anti-SLAPP statutes and First Amendment free speech rights to speech involving threats and incitement:

> [T]he First Amendment does not protect true threats--"statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black,* 538 U.S. 343, 358-360 (2003) "The speaker **need not actually intend to carry out the threat**." *Id.* "'A true threat is a serious one, not uttered in jest, idle talk, or political argument.'" *U.S. v. Fuller*, 387 F.3d 643, 646 (7th Cir. 2004).

Id. at 419 (emphasis added).

The court noted that an objective standard is applied to determine if a statement is a "true threat" unworthy of protection.

> "In the context of a threat of physical violence, '[w]hether a particular statement may properly be considered to be a threat is governed by an **objective standard**--whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault. . . . Although a threat must be distinguished from what is constitutionally protected speech ... this is not a case involving statements with a political message. A true threat, where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, is unprotected by the first amendment.' ... Moreover, '**[a]lleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners.**' . . ."
>
> Under an objective standard, the court's inquiry focuses on whether a reasonable person would foresee that the speaker's or author's statement would be interpreted by the recipient as a serious expression of intent to inflict bodily harm.

Id. (emphasis added) (citations omitted); *see also Uss-Posco Industries v. Edwards*, 111 Cal.App.4th 436, 444-446 (Ca. Ct. App. 2003) (First Amendment does not protect threats that cause listeners to fear for their safety); *Planned Parenthood v. American Coalition of Life Activists*, 290 F.3d 1058, 1070 (9th Cir. 2002) ("while advocating violence is protected, threatening a person with violence is not") (citations omitted).

In *Planned Parenthood,* the court noted that "a true threat, that is one 'where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, is unprotected by the First Amendment.'" *Planned Parenthood,* 290 F.3d at 1075 (citations

omitted). "[A] true threat is: a statement which, in the **entire context and under all circumstances**, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person." *Id.* at 1077 (emphasis added) (citations omitted). The court further noted that "it is not necessary that the defendant intend to, or be able to carry out his threat; the only intent requirement for a true threat is that the defendant intentionally or knowingly communicate the threat." *Id*. (citations omitted).

It is indisputable that the First Amendment does not protect the subject communications and that they are "true threats". Pursuant to the objective standard for true threats, when Stark's actions and statements are considered under the "entire context and under all circumstances" it is undeniable that a reasonable person would interpret the statements as conveying a serious intent for individuals to cause physical harm to Lackey or that they were inciting others to inflict physical harm on him.

These posts, along with a post depicting Lackey's home address and posts of pictures of Lackey and his family, undeniably establish that a reasonable person would interpret the statements as inciting others to inflict physical harm on him. 1JA007 ¶14.v., 2JA0127-0139 Stark knew or should

have known that these threatening posts would incite her followers to take action against him.

The overwhelming evidence, when "**considered in light of their entire factual context, including the surrounding events and reaction of the listeners**" supports the conclusion that a reasonable person would foresee that the threatening posts would be viewed as a threat of bodily harm or would incite others to cause Lackey bodily harm. Stark cannot make a sufficient showing of First Amendment protection below and on appeal under an objective standard for identifying true threats.

The posts inciting violence are also illegal pursuant to 18 U.S.C. § 2261A. Communications that are intended to injure, harass and intimidate and reasonably cause fear of injury or substantial emotional distress in violation of 18 U.S.C. § 2261A are not protected by First Amendment. *United States v. Petrovic,* 701 F.3d 849 (8th Cir. 2012); *see also United States v. Osinger*, 753 F.3d 939 (9th Cir. 2014) (defendant's threatening messages to victim and to victim's co-workers and friends unquestionably evinced defendant's intent to harass and intimidate victim and to cause substantial emotional distress, and thus, defendant's course of conduct unmistakably proscribed by this section, and any related speech not afforded First Amendment protection).

When the facts alleged by Lackey are taken as true, as the Court must, and combined with the additional facts contained in the exhibits, it is indisputable that Lackey has alleged sufficient facts from which the trier of fact could conclude that Stark's conduct and speech[4] were intended to harass and intimidate Lackey and to cause him substantial emotional distress in violation of 18 U.S.C. § 2261A. Stark's speech, as well as the speech of others, is not protected by the First Amendment for this additional reason.

For these reasons alone, this Court should affirm the denial of Stark's NRS 41.660 motion. Even assuming this Court could conclude that the declared speech falls within the First Amendment protections, Nevada's anti-SLAPP statutes still have no application as a matter of law.

Stark claims that the harassing communications regarding Lackey are protected because they involve a matter of public concern and she and others have a right to petition for a change in the manner in which black bears are handled by NDOW. In order for communications to enjoy First Amendment protection, "there should be some degree of closeness between the

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[4] Repeated statements by Stark and NDOW Watch that Lackey has lied and continues to lie to the public, has executed and continues to execute bears, and refused to perform nepcropsies on certain bears constitute nothing more than harassing and intimidating conduct. *See generally* 1JA0115-0123, 2JA0124-0164, 3JA0165-0187.

challenged statements and the asserted public interest." *Shapiro,* __ Nev. at __, 389 P.3d at 268.

The communications posted by Stark and NDOW Watch, as well as the posts of others, falsely accuse Lackey of corruption, illegally torturing and killing the bears, and most disturbingly of all, incited and encouraged violence towards Lackey. 1JA0007, 21JA0115-0123, 2JA0124-0164, 3JA0165-0187 These posts made by Stark, NDOW Watch, and others cannot as a matter of law involve an issue of public interest. Accusing Lackey of corruption and illegally torturing and killing bears in addition with threatening both violence and murder towards him has absolutely no degree of closeness to Stark's claimed public concern of the preservation and treatment of bears.

It is further unclear how posting Lackey's home address and photographs of Lackey, his wife, and children has any degree of closeness to Stark's claimed public concern of the preservation and treatment of bears. 1JA007 ¶ 14.v.; 2JA0130, 0139, 0162 Instead, the focus of Stark's statements and conduct, as well as the statements and conduct of others, was "a mere effort to gather ammunition for another round of private controversy . . ." *Shapiro,* __ Nev. at __, 389 P.3d at 268. That private controversy is

nothing more than harassing and defaming Lackey and inciting violence against him.

Because Stark cannot establish that the subject communications involve a matter of public interest, the communications do not, as a matter of law, fall within the purview of NRS 41.637. Even assuming that this Court could conclude that the harassing and defaming statements concerning Lackey and statements encouraging violence, including killing Lackey, involve a matter of public interest, Stark cannot show that the subject communications are truthful or made without knowledge of their falsehood to justify dismissal. NRS 41.637; *see also Shapiro,* __ Nev. at __, 389 P.3d at 268 ("no communication falls within the purview of [NRS 41.637] unless it is 'truthful or is made without knowledge of its falsehood'") (quoting NRS 41.637).

Other than her affidavit stating a legal conclusion that all of her posts are true and made without the knowledge of their falsehood, Stark proffered no evidence to establish that the following have any truth or were made without the knowledge of their falsehood: (1) Lackey executes bears illegally or in violation of NDOW policies; (2) Lackey intentionally lies to the public; and (3) Lackey intentionally does not perform nepcropsies when

he should.[5] *See, e.g., Acquadro v. Bergeron,* 851 So.2d 665, 672 (Fla. 2003) (explaining that defendant's statement in her affidavit that she "did not make defamatory statements" about plaintiff insufficient to shift burden back to plaintiff); *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1215 (11th Cir. 1999) (explaining that conclusory assertions of ultimate fact in defendant's supporting affidavit do not "trigger duty for Plaintiffs to respond with evidence of their own supporting jurisdiction"); *Ticketmaster–New York, Inc. v. Alioto*, 26 F.3d 201, 203 (1st Cir.1994) (deciding jurisdictional issue by drawing "facts from the pleadings and the parties' supplementary filings, including affidavits, taking facts affirmatively alleged by plaintiff as true and construing disputed facts in the light most hospitable to plaintiff," but refusing to "credit conclusory allegations or draw farfetched inferences"); *Benton–Volvo–Metairie, Inc. v. Volvo Southwest, Inc.*, 479 F.2d 135, 139 (5th Cir.1973) ("affidavits containing mere conclusions have no probative value"). Stark's affidavit is therefore deficient and insufficient because the declarations she made contain conclusory denials and failed to contest all relevant allegations. 1JA0076-0079

The record is devoid of any evidence to support the falsehoods asserted by Stark and NDOW Watch. *See generally* 1JA0115-0123,

[5] These are the statements attributed to Stark and NDOW Watch. *See generally* 1JA0115-0123, 2JA0124-0164, 3JA0165-0187.

2JA0124-0164, 3JA0165-0187. None of the communications, therefore, fall within the purview of NRS 41.637.

C. The CDA Does Not Insulate Stark from Liability.

Stark incorrectly contends that the CDA insulates her from liability. The CDA immunizes providers of interactive computer services against liability arising from content created by third parties. 47 U.S.C. § 230(c). This grant of immunity applies only if the interactive computer service provider is **not** an "information content provider". 47 U.S.C. § 230(f)(3). An "information content provider" is someone who is "responsible in whole or in part, for the creation or development of" the offending content. *Id.*

Stark erroneously contends that she is not an "information content provider" and therefore the CDA protects her from liability. Stark's reliance upon *Ascentive, LLC v. Opinion Corp.* and a number of other cases is misplaced. 842 F.Supp.2d 450 (E.D. N.Y. 2011).

As discussed above, Stark made her own posts in her name and in the name of NDOW Watch. *See, e.g.,* 2JA0142 ("strange that NDoW has performed nepcropsies under less suspicious deaths but not on these two"); 2JA0146 ("They just can't help themselves from misstating, embellishing and distorting facts and information . . ." and the post proceeds to discuss Lackey's specific lies); 2JA0155 ("She became NDoW's casualty when they

executed her . . ."); 2JA0155 ("He has no soul."). There is "[n]o case of which this court is aware [that] has immunized a defendant from allegations that *it* created tortious content." *Anthony v. Yahoo Inc.*, 42 F.Supp.2d 1257, 1262-1263 (N.D. Cal. 2006) (citations omitted) (emphasis in original).

As the district court correctly concluded, the FAC also alleges that Stark and NDOW Watch have made and continue to make false statements regarding Lackey and initiates public comment threads on various Facebook pages slandering him. 1JA0013 and 4JA0254 It further alleges that Stark and NDOW Watch published false and slanderous statements. 1JA0018 and 4JA0254 In other words, the FAC does not merely allege that Stark and NDOW Watch encourage false and slanderous postings, the FAC specifically alleges that Stark and NDOW Watch made their own postings. As such, the district correctly concluded that the CDA does not insulate Stark from liability. 4JA0254-0255; *see also Whitney Info. Network, Inc. v. Xcentric Venture, LLC,* 199 Fed.Appx. 738, 744 (11th Cir. 2006) (holding "Defendant's declarations do not adequately rebut the allegations of the amended complaint insofar as it pleads Defendants' involvement in creating or developing the alleged defamatory content . . . Thus, whether Defendants were entitled to CDA immunity remained in question, as did the issue of whether their conduct was tortious."); *Hy Cite Corp. v. badbusinessbureau,*

L.L.C., 418 F. Supp.2d 1142, 1148-1149 (D. Ariz. 2005) (declining to grant defendants' motion to dismiss based on CDA immunity because plaintiffs alleged that defendants added editorial comments, titles, and original content to third-party complaints posted on defendants' website). Simply put, where the complaint in this case specifically alleges that Stark and NDOW Watch made their own postings, the CDA does not insulate Stark from liability.

D. Lackey Will Likely Prevail on His Claims and the District Court's *Order* Denying Stark's NRCP 12(b)(5) Should Be Affirmed.

Because Stark cannot carry her burden of establishing that the conduct and statements were protected as being in the subject of public concern, the burden has not shifted to Lackey to demonstrate that he will likely prevail on his claims. "[T]he plaintiff . . . has no obligation to demonstrate [a] probability of success if the defendant fails to meet [his] threshold burden [at the first step]." *D.C.,* 182 Cal. App. 4th at 1225, 106 Cal. Rptr. 3d at 425. Even assuming for argument sake that Stark can establish by a preponderance of the evidence that the claims fall within the purview of NRS 41.637 and the burden shifts to Lackey to establish with prima facie evidence[6] a probability of prevailing on his claims, Lackey can meet this

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[6] Black's Law Dictionary defines "prima facie evidence" as follows:

burden and for the same reasons the claims are legally cognizable and not subject to an NRCP 12(b)(5) dismissal.

1. Defamation.

A claim for defamation requires Lackey to establish: (1) Stark made a false and defamatory statement concerning Lackey; (2) an unprivileged publication of this statement was made to a third person; (3) Stark was at least negligent in making the statement; and (4) Lackey sustained actual or presumed damages as a result of the statement. *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 57 P.3d 82 (2002).

Defamation per se are false statements made involving any of the following: (1) the imputation of a crime; (2) the imputation of having a loathsome disease; (3) imputing a person's lack of fitness for trade, business, or profession; and (4) imputing serious sexual misconduct. *K-Mart Corp. v. Washington*, 109 Nev. 1180, 866 P.2d 274 (1993). No proof of any actual

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> Evidence good and sufficient on its face. Such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain unrebutted or contradicted. Evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence.

BLACK'S LAW DICTIONARY.

harm to reputation or any other damage is required for these four types of defamation. *Id.*, 866 P.2d at 274.

"A statement is defamatory when it would tend to lower the subject in the estimation of the community, excite derogatory opinions about the subject, and hold the subject up to contempt." *Id.* at 1191, 866 P.2d at 281-282 (citation omitted). In reviewing the defamatory statements, "[t]he words must be reviewed in their entirety and in 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).

The allegations set forth in the FAC plead a cognizable claim for defamation: (1) Stark does business as NDOW Watch and therefore Stark and NDOW Watch are one and the same, 1JA0012; (2) Stark and others have made and continue "to make false statements regarding Carl Lackey's character in a vicious and calculated effort to damage his reputation and jeopardize his employment[,]" 1JA0013-0019; (3) Stark encourages others "to shame and harass Lackey so that he will lose his job and/or feel threatened enough to leave the community," 1JA0013; (4) Stark and others "acted intentionally and with malice with the primary purpose being to harm, threaten, intimidate, cause fear, anxiety, embarrassment and damage to [Lackey's] reputation by publishing false and vicious comments accusing

[him] of criminal conduct (including accepting bribes and conspiracy), designed to incite public outrage[,]" 1JA0014-0019; (5) Lackey "is either a limited purpose figure or a private individual thrust into an area of public concern[,]" 1JA0018; (6) Stark "published and encouraged the statements despite having actual knowledge that such statements were false, or with reckless disregard for their veracity, *id.*; (7) Stark and others "knew that the inflammatory false information they were posting was malicious, false, and accusatory of criminal conduct and had the purpose of harming, threatening, intimidating and/or harassing [Lackey] and his livelihood[,]" *id.*; and (8) Lackey suffered damages as a result, *id.*

In accepting these allegations as true, which this Court must, it does not appear beyond a doubt that Lackey can prove no set of facts in support of his defamation claim. When this Court views these allegations in conjunction with the specific comments set forth in the FAC, 1JA0014-0018, the allegations meet the liberal notice pleading requirements of NRCP 8(a)(1) and the district court correctly concluded as such. 4JA0255-0258 These allegations in conjunction with the specific comments set forth in the FAC compel a conclusion that these defamatory statements would tend to lower Lackey in the estimation of the community, excite derogatory opinions about him, and hold him to contempt.

Pursuant to NRCP 8(a)(1), Nevada is a notice pleading jurisdiction and liberally construes pleadings to place into issue matters which are fairly noticed to the adverse party. *Chavez v. Robinson Steel Co.,* 94 Nev. 597, 584 P.2d 159 (1978). NRCP 8(a)(1) provides that a pleading need only set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." NRCP 8(a)(1). This rule does not require Lackey to set forth every fact that supports his claims for relief. *Id.* Additionally, defamation is not subject to the heightened pleading requirement of NRCP 9(b).

The claim for defamation need only set forth sufficient facts to establish all the necessary elements of a claim for relief. *Hay v. Hay,* 100 Nev. 196, 678 P.2d 672 (1984). Even pleading of conclusions, either of law or fact, is sufficient so long as the pleading gives fair notice of the nature and basis of the claim. *Crucil v. Carson City,* 95 Nev. 583, 600 P.2d 216 (1979). These general allegations, especially when read together with the specific examples provided, give Stark notice of the nature of the defamation claim. The pleadings place into issue matters which are fairly noticed to Stark. *Hay,* 100 Nev. at 196, 678 P.2d at 672.

When this Court views the specific examples set forth in the FAC, 4JA0014-000017, these statements are not non-actionable opinions.

"Statements of opinions are protected speech under the First Amendment . . . and are not actionable at law." *Lubin v. Kunin,* 117 Nev. 107 112, 17 P.3d 422, 426 (2001). To determine whether a statement constitutes fact or opinion, the test is "whether a reasonable person would be likely to understand the remark as an expression of the source's opinion or as a statement of existing fact." *Nevada Independent Broadcasting Corp. v. Allen,* 99 Nev. 404, 410, 664 P.2d 337, 342 (1983) A statement could be of a "mixed type," meaning "an opinion, which gives rise to the inference that the source has based the opinion on underlying, undisclosed defamatory facts." *Id.*, 664 P.2d at 342.

Accusations that Lackey is (1) killing bears illegally; (2) delivering bears illegally to his hunting friends; (3) illegally accepting money from hunters in exchange for bear hunts and locations of bears; and (4) lying about euthanizing bears when he is actually "stocking up for the bear hunt/slaughter", would cause a reasonable person to understand these accusations as statements of existing fact rather than opinions. As noted in *Lubin,* "it may be actionable to state an opinion that plaintiff is a thief, if the statement is made in such a way as to imply the existence of information which would prove plaintiff to be a thief." 117 Nev. at 113, 17 P.3d at 426 (quoting RESTATEMENT (SECOND) OF TORTS § 566 cmt. b (1977)). Similarly,

it is likewise actionable to state an opinion that Lackey is illegally accepting bribe and is corrupt where the statements were made in such a way as to imply the existence of information which may prove Lackey to be corrupt. In these cases, "the question of whether it is a fact or evaluative opinion is left to the jury." *Id.*, 17 P.3d at 426.

A photograph displaying Lackey's home address does not amount to a non-actionable opinion. 1JA0018 ¶ 14.v. Additionally, this photograph when evaluated in context with the suggestion that Lackey should be assassinated, *id.* ¶ 14.z., cannot be viewed as a non-actionable opinion.

If this Court concludes that the statements are ambiguous and of a "mixed type," then the question as to whether the statements constitute an opinion or not should be left for the jury. In *Lubin,* the court held that the district court erred in holding that the statements at issue were non-actionable opinions and therefore erred in granting a NRCP 12(b)(5) motion to dismiss. 117 Nev. at 107, 17 P.3d at 422.

In any event, "no protection is warranted when 'the speech is wholly false and clearly damaging to the victim's business reputation." *Bongiovi v. Sullivan,* 122 Nev. 556, 572, 138 P.3d 433, 445 (2006) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders,* 472 U.S. 749, 762 (1985)). The allegations that Lackey accepted bribes, illegally conspired to kill bears and

lied about euthanizing bears so that he could save them for hunters are not only false, but clearly impugns his reputation.

There is also no public issue when the speech is "solely in the individual interest of the speaker and [the speaker's] specific . . . audience." *Dun & Bradstreet, Inc. v. Greenmoss Builders,* 472 U.S. 749, 762 (1985). The defamatory statements solely promote Stark's specific interest and Bear League's, LTWS', and NDOW Watch's followers' interest to harass, intimidate, and threaten Lackey. Why else would one post Lackey's home address and pictures of him and his family? There is no public issue.

The district court correctly ruled that Lackey's defamation claim should not be dismissed pursuant to NRCP 12(b)(5). Lackey has established with prima facie evidence that he is likely to prevail on his claim.

2. Civil conspiracy.

An actionable civil conspiracy claim is defined as a combination of two or more persons who by some concerted action intend to accomplish some unlawful objective for the purpose of harming another which results in damage. *Guilfoyle v. Olde Monmouth Stock Transfer Company, Co., Inc.*, __ Nev. __, 335 P.3d 190 (2014). Lackey alleges that Bear League, Anne Bryant, Mark E. Smith, LTWS, Carolyn Stark, and NDOW Watch "acted in concert with one another to accomplish the goals of harassing and

threatening Plaintiff and causing him fear, anxiety, embarrassment and damaging his reputation." 1JA0020 As shown by the FAC and additional evidence presented, these conspirators post on each other's Facebook pages. 1JA0014-0017, 0084-0123, 2JA0124-0164, 3JA0165-0187 The evidence also supports the allegation that these conspirators conspired with their followers to harass, bully, and intimidate Lackey. *Id.*

Stark incorrectly contends that the FAC failed to specify how Stark has acted in concert with the others. First, a civil conspiracy claim predicated upon defamation is not subject to a heightened pleading requirement. *Flowers v. Carville,* 266 F. Supp.2d 1245 (D. Nev. 2003). Stark does not appear to challenge this legal proposition. Stark, therefore, cannot demand a heightened pleading requirement from Lackey. Second, the FAC further alleges that Stark as NDOW Watch "have and continue to initiate public comment threads . . . slandering Carl Lackey in his official capacity as a state employee and urging and encouraging the public at large to shame and harass [Lackey] so that he will lose his job and/or feel threatened enough to leave the community." 1JA0013

The allegations are sufficient to withstand an NRCP 12(b)(5) request for dismissal. These allegations place into issue matters involving civil conspiracy which are fairly noticed to Stark. *Hay,* 100 Nev. at 196, 678 P.2d

at 672. Lackey has established with prima facie evidence that he will likely prevail on his claim for civil conspiracy.

3. Intentional Infliction of Emotional Distress.

The elements of a claim for intentional infliction of emotional distress are: (1) Stark's conduct was extreme and outrageous; (2) Stark either intended or recklessly disregarded to cause emotional distress; (3) Lackey suffered severe or extreme emotional distress; and (4) Stark's conduct actually or proximately caused the distress. *Nelson v, City of Las Vegas,* 99 Nev. 548, 665 P.2d 1141 (1983). "[E]xtreme and outrageous conduct is that which is 'outside all possible bounds of decency' and is regarded as 'utterly intolerable in a civilized community.'" *Maduikie v. Agency Rent-A-Car,* 114 Nev. 1, 4, 953 P.2d 24 26 (1998) (quoting California Book of Approved Jury Instructions (hereinafter "BAJI") No. 12.74). Whether a defendant engaged in extreme and outrageous conduct is a question of fact for the jury. *Posadas v. City of Reno,* 109 Nev. 448, 456 (1993); *Branda v. Sanford,* 97 Nev. 643, 645 (1981).

In accepting the allegations of the FAC as true, a jury could easily find that Stark and others acted with extreme and outrageous conduct. The FAC further alleges that Stark as NDOW Watch "have and continue to initiate public comment threads . . . slandering Carl Lackey in his official

capacity as a state employee and urging and encouraging the public at large to shame and harass [Lackey] so that he will lose his job and/or feel threatened enough to leave the community." 1JA0013 The example of the statements set forth in the FAC rise to the level of outrageous conduct. 1JA0014-0017 Stark's conduct as well as the conduct of others caused Lackey to suffer emotional distress. 1JA0019 In accepting the allegations of the FAC as true, the district court correctly concluded that Lackey has sufficiently pled a cognizable claim for intentional infliction of emotional distress pursuant to the liberal pleading standards of NRCP 8(a)(1). For these same reasons, Stark's contention that Lackey failed to allege any specific conduct on Stark's part is unsupported when this Court views the FAC in its entirety.

If this Court concludes that the district court erred in denying Stark's NRS 41.660 and NRCP 12(b)(5) motion to dismiss, this Court should concomitantly conclude that leave to amend is warranted. *Stephens v. So. Nev. Music Co.*, 89 Nev. 104, 507 P.2d 138 (1973) (absent undue delay, bad faith or dilatory motive, leave to amend should be freely given). There is nothing in the record to suggest that Lackey has acted in bad faith by bringing this lawsuit against Stark and others. Nor is there any evidence to

suggest that Lackey has acted with undue delay. In summary, it is not clear that the FAC could not be saved by any amendment.

V. CONCLUSION

Nevada's anti-SLAPP statutes do not protect speech that is illegal as a matter of law. Stark's speech and conduct, as well as the speech and conduct of others, are illegal as a matter of law.

Nevada's anti-SLAPP statutes also do not protect speech that is untruthful. There is no evidence in the record to support the accusations that Lackey illegally kills bears, violates NDOW policies when it comes to his treatment of bears, accepts bribes from hunters to disclose locations of bears, transports bears to hunting zones, and profits from his treatment of bears.

Stark's statements and actions as well as the statements and actions of others do not fall within the purview of NRS 41.637 to justify a dismissal of the FAC pursuant to NRS 41.660. The district court correctly concluded as such.

In ruling on Stark's NRCP 12(b)(5) motion, the district court declined to convert the motion to dismiss to one for summary judgment and therefore did not consider the additional evidence presented by the parties. In accepting the allegations of the FAC as true, which this Court must, the FAC meets the liberal pleading requirements of NRCP 8(a)(1) and alleged

cognizable claims for defamation, conspiracy, and intentional infliction of emotional distress. The district court correctly concluded as such.

This Court should affirm the district court's *Order* in its entirety. Even if this Court considers the additional evidence presented and converts the NRCP 12(b)(5) motion to one for summary judgment, questions of material issues of fact exist to preclude dismissal. No matter how this Court views the record, an affirmance of the district court's *Order* is warranted. If this Court is inclined to reverse the district court's *Order*, this Court should likewise conclude that leave to amend is also warranted.

VI. VERIFICATION

Under the penalty of perjury, the undersigned declares that he is the attorney for Respondent named in the instant Answering Brief and knows the contents of the Answering Brief. The pleading and facts stated therein are true of his own knowledge, excepts as to those matters stated on information and belief, and that as such matters he believes them to be true. This verification is made by the undersigned attorney pursuant to NRAP 21(a)(5).

VII. CERTIFICATE OF COMPLIANCE

1. I certify that this Answering Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP

32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in proportionally spaced typeface using Word in 14 point Times New Roman font.

2. I further certify that this Answering Brief complies with the page-or type-volume limitations of NRAP 32(a)(7), excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface font of 14 points or more, and contains 8,304 words.

3. I certify that I have read this Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. 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 this 15th day of May, 2018.

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CERTIFICATE OF SERVICE

I certify and affirm that Respondent's Answering Brief was filed electronically with the Nevada Supreme Court on May 15th, 2018. Electronic service of the foregoing documents shall be made in accordance with the Master Service List as follows:

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