IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK E. SMITH, an individual, dba LAKE TAHOE WALL OF SHAME

Appellant,

vs.

CARL LACKEY, an individual,

Respondent.

Case No. 74461

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 Mark E. Smith's ("Smith") 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 Smith 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 Smith's motion to dismiss pursuant to NRS 41.660 and NRCP 12(b)(5). This case involves Smith's outrageous, 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 declined to consider the additional evidence presented by the parties.

The district court did not abuse its discretion in denying the motion to dismiss pursuant to NRS 41.660 based solely upon the FAC. Even if this Court concludes that the FAC does 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 *Order*

Regarding Mark E. Smith's Special Motion to Dismiss/Motion to Dismiss ("*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.

Smith incorrectly states that Lackey's burden of proof pursuant to NRS 41.660 was "clear and convincing." Appellant's Opening Brief at 12 ("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).

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

Although Smith moved to dismiss based upon NRS 41.660 and NRCP 12(b)(5), Volume 1 Joint Appendix 0030-0051 (hereinafter "__JA__"), he 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 26 (citing *Baral v. Schnitt,* 376 P.3d 604 (Cal. 2016)); *see also* AOB at 14-15.

The pleadings filed with the district court show that this argument was never raised below. 1JA0030-0113, 2JA0114-0128, 3JA0129-0174, 4JA0175-0209 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.* Smith does business as Lake Tahoe Wall of Shame ("LTWS") 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 LTWS, NDOW Watch Keeping Them Transparent, and Bear League. 1JA0013 Bear League volunteers and members of the online forums of LTWS and NDOW Watch Keeping Them Transparent 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 Keeping Them Transparent 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 Smith 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* 1JA0111-0123. Smith also ignores the undisputed fact that a number of the

posts inciting violence or illegal conduct were posted on LTWS. 2JA0125-0128 and 3JA0129-0130

Lackey brought suit against Smith and others asserting defamation, intentional infliction of emotional distress, negligent infliction of emotional distress and civil conspiracy.[1] 1JA0011-0021 Smith moved to dismiss pursuant to NRS 41.660 and NRCP 12(b)(5). 1JA0030-0051 To support his motion, Smith provided the district court with his declaration and other supporting exhibits. 1JA0081-0084 Lackey filed his opposition with supporting exhibits and a supplemental opposition with additional supporting exhibits. 1JA0085-0113, 2JA0114-0128, 3JA0129-0174, 4JA0175-0183, 0198-0209

The district court issued its ruling October 23, 2017 and declined to consider the evidence presented by both parties relying solely upon the FAC. 4JA0226-0240 Appellant filed the instant appeal.

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[1] Smith appears to suggest that the initial complaint and the FAC are defective because Lackey did not verify the allegations and did not provide a declaration or affidavit in support of his claims. AOB at 2. Smith, however, failed to cite to any authority to support this contention.

IV. ARGUMENT

A. The District Court's Order Denying Smith's NRS 41.660 Motion to Dismiss Should Be Affirmed.

Although the parties submitted additional evidence to the district court for consideration, the court did not consider it and relied solely upon the FAC. 4JA0248-0250 The district court identified the one statement attributed to Smith (1JA0016 ¶ 14.p.) and made the following conclusions: (1) the conduct was not illegal; (2) the statement was made in a public forum; (3) Smith's "articulated public interest is . . . the preservation and treatment of bears, as well as bribery of a public official. . . [and] this interest does not equate with mere curiosity"; (4) in evaluating the statement at issue with this articulated public interest and focusing "on the specific nature of the speech rather than the generalities[,]" there is an insufficient "degree of closeness between this statement and purported public interest of preserving wildlife or bribery of a public official"; and (5) even if the statement at issue fell with the stated public interest, there is no evidence that the statement is truthful or was made without knowledge of its falsehood.[2] 4JA0250 Contrary to Smith's erroneous contention, the district

[2] Because the district court concluded that Smith 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. 4JA0250

court acknowledged that his articulated interest in the preservation and treatment of bears as well as the bribery of public officials involve issues of public interest. *Id.*

The district court's conclusions are sound, supported by the record, and should be affirmed pursuant to an abuse of discretion standard. 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). In viewing only the FAC, there is no evidence that the statement that the department has "no real interest in wildlife other than to make it available for hunters and trappers" and that the department's employees are "criminals against nature" is truthful or made without knowledge of its falsehood. 1JA0011-0021

Smith urges this Court to consider the declaration he submitted as grounds to reverse the district court's *Order*. His declaration, however, does not support a reversal of the *Order*. Smith states in his declaration that he had no role in drafting or publishing the one comment. 1JA0082 If he had no role in drafting or publishing this one comment, then how can he know whether the statement is truthful or made without knowledge of its falsehood.

Even 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).

The district court further correctly ruled that the Communications Decency Act ("CDA") does not insulate Smith from liability. 1JA0042-0043 In relying solely upon the FAC, the allegations set forth in the FAC support this ruling.

The FAC alleges that Smith conducts business as LTWS and therefore Smith and LTWS are one and the same. 1JA0012 ¶ 4 The FAC further alleges that LTWS itself made and continues to make false statements about Lackey. 1JA0013-0014 ¶¶ 13-14 Because the FAC alleges that LTWS itself made and continues to make false statements about Lackey, Smith as LTWS is an "information content provider" who cannot be insulated from liability. 47 U.S.C. § 230(f)(3).

B. The Additional Evidence Presented by the Parties Warrant a Denial of the NRS 41.660 Motion.

SLAPP is an acronym for "strategic lawsuit against public participation". Smith relies upon *City of Montebello v. Vasquez,* 376 P.3d 624, 632 (Cal. 2016), and *Delucchi v. Songer,* __ Nev. __, 396 P.3d 826,

832-833 (2017), for the proposition that this Court should not consider First Amendment law but only the statutory definitions of NRS 41.637 in addressing an NRS 41.660 motion. AOB at 13.

Smith, however, fails to acknowledge the exception noted by the court in *Vasquez*: "There is an important exception . . . [because the anti-SLAPP statute] was expressly intended to protect **valid** speech and petitioning activity[, the anti-SLAPP statutes] cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition." 376 P.3d at 634 (emphasis in original). 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).

In his opposition, Lackey identified the following statements published by Smith:

> 1. "we Must rid Nevada of this monster who lives and is paid to kill bears[,]" 1JA0111-0123;
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> 2. Posts encouraging harassing and threatening posts and thanking individuals for posting harassing and bullying statements about and photographs of Lackey and his family, 3JA0162-0168;
>
> 3. Posts encouraging others to post information on Lackey so that a "psychological profile" could be prepared on him so that everyone can better understand "what makes [Lackey] tick[,]" 4JA0180

4. Post stating that an expert has declared Lackey to be a narcissist and misogynist who has "feelings of persecution and grandiosity[.]" *Id.*

These statements do not fall within the protection afforded by NRS 41.637.

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.*

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 made by Smith and that they are "true threats". Pursuant to the objective standard for true threats, when Smith'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. 1JA0007 ("time for an assassination"); 2JA0125-0128 (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!")); 3JA0129-0130 (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!!!!")).

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., 3JA0157-0160 Smith knew or should have known that these threatening posts, coupled with the posts by various individuals on LTWS encouraging everyone to post pictures of Lackey's wife and their children, would incite their followers to take action against him. 3JA0138-0155; *see also* 3JA0157-0160 (postings of pictures of Lackey and his children on LTWS).

Smith's own post on LTWS specifically encouraged the harassing and threatening posts:

> We've found that reporting bad acts by NDOW employees never results in action. But exposing them to public scrutiny gets the attention of senior NDOW management and sometimes even Governor Sandoval's office. This is one of the core reasons that the Wall of Shame was created.

3JA0162; *see also* 3JA0164-0168. Smith's posts on LTWS also thanked individuals for posting harassing and bullying statements about and photographs of Lackey. 3JA0164-0168

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 Smith's statements and conduct, as well as the statements and conduct of others, would be viewed as a threat of bodily harm or would incite others to cause Lackey bodily harm. Smith failed to make a sufficient showing of First Amendment protection below and on appeal under an objective standard for identifying true threats.

The statements at issue 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 Smith's conduct and speech were intended to harass and intimidate Lackey and to cause him substantial emotional distress in violation of 18 U.S.C. § 2261A. Smith's speech is not protected by the First Amendment for this additional reason.

Smith contends on appeal that he supplied a declaration unequivocally stating that he is neither the creator nor administrator of LTWS. 1JA0081-0084 Nothing in this declaration states that Smith did not author the posts by LTWS and that they were authored by someone else. *Id.* and 4JA0184-0197. Although Smith had the opportunity to provide a supplemental declaration to resolve this issue definitely, it is significant that he did not avail himself of this opportunity. 4JA0184-0197

It should further be noted that during this early stage of the proceedings, Lackey did not have the opportunity to conduct discovery to determine the veracity of Smith's declarations. Nevertheless, Lackey had the opportunity to locate various articles to refute or at the very least place into question the veracity of these declarations. 4JA0203-0209 By way of example, one article refers to Smith as the spokesman for LTWS. 4JA0204 A second article refers to Smith as LTWS' administrator. 4JA0206 A third

article refers to Smith as the group leader of LTWS. 4JA0207 A fourth article refers to Smith as the co-founder of LTWS. 4JA0208

Smith also declared that he is not responsible for the management of the content on LTWS. *Id.* Smith should bear responsibility for the content on LTWS where he encouraged others to make harassing and threatening posts as well as posts pictures of Lackey and his family. 3JA0162, 0164-0168

If this Court considers Smith's declaration as urged, then this Court should likewise consider the additional evidence presented by Lackey. The additional evidence and the fact that Smith never declared that he did not author any of the posts by LTWS, despite having the opportunity to make such a declaration, support the allegation that Smith is the voice of LTWS and therefore any posts made by LTWS is essentially made by Smith. Even if this Court considers only Smith's declaration, questions still remain as to whether Smith authored the posts by LTWS as he never stated that he did not author them.

For these reasons alone, this Court should affirm the denial of Smith'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.

C. Smith's Statements Do Not Fall within the Ambit of NRS 41.637.

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 Smith 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 Smith 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). Smith 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 of or made without knowledge of its falsehood.'" *Id.*, 389 P.3d at 268 (citing NRS 41.637).

In analyzing the statements at issue and as pled in the FAC, this Court is compelled to conclude that the statements simply do not involve an issue of public interest as contemplated by NRS 41.637. "'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.

Smith claims that the harassing communications regarding Lackey are protected because they involve a matter of public concern and he 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 challenged statements and the asserted public interest." *Shapiro*, __ Nev. at __, 389 P.3d at 268.

The communications posted on LTWS and by LTWS falsely accused Lackey of corruption, illegally torturing and killing the bears, and most disturbingly of all, incited and encouraged violence towards Lackey. 1JA0007, 2JA0125-0128, 3JA0170-0174 and 4JA0175-0176 (May 18, 2013 Post from Debbie Glantz ("Which bear is this the dead one??? That Carl Lackey murdered???"); May 21, 2013 Post from LTWS(". . . The Killing MUST stop!"); Unknown Date Post from Linda Larson Amundson ("These pictures have to be illegal . . ."); Unknown Date Post from LTWS ("At a minimum they violate both the rules of his employment . . . and NDOW rules . . ."); and Unknown Date Post from LTWS on NDOW Watch Keeping Them Transparent's Facebook Page (". . .It seems everyone but NDOW knows that this is wrong."); Unknown Date Post from Lillian Mae Lang ("He is despicable and should be removed from his job . . . Immediately . . . He is a murderer . . ."); Unknown Date Post from Danielle Prichard ("Wtf? This Lackey guy has crossed the line many times . . .")).

There is even a post on LTWS accusing Lackey of murdering his first wife: "There is evidence that Lackey 'accidentally' killed his first wife. ('accidentally' . . . ummmm, where have we heard that before with deaths he's caused?")" 4JA0178 There is also a post by LTWS contending that an interesting psychological profile of Lackey had been submitted by a

professional who stated the following as to Lackey: "Besides the [obvious] narcissist, controlling nature, [Lackey] likes conflict, has misogynistic tendencies, is oppositional, and carries some feelings of persecution and grandiosity. . ." *Id.*

In addition to falsely accusing Lackey of illegal activity, Smith also encouraged others to post information on Lackey so that a "psychological profile" could be prepared on him so all can acquire a better understanding of "what makes [Respondent] tick":

> [I]n fact the profiler wants to hear feedback from people who know him better so that the profile can be improved. There is zero chance Lackey will submit to a proper psych interview so this is the only reasonable way a profile can be done; understanding what makes him tick should help us interact with him. Those of us who know him well see a lot of truth in this profile, as the post from The BEAR League attests. So while you might call it a crock, those of us that must work with or around him are finding it both accurate and helpful.

4JA0180

These posts made by LTWS and others cannot as a matter of law involve an issue of public interest. 3JA0138-0160 Accusing Lackey of corruption and illegally torturing and killing bears and his first wife in addition with threatening both violence and murder towards him has absolutely no degree of closeness to Smith's claimed public concern of the preservation and treatment of bears. Nor does LTWS' post setting forth a

purported expert's psychological profile of Lackey as being a narcissist and misogynistic with feelings of persecution and grandiosity have any degree of closeness to this public concern. 4JA0178

It is further unclear how posting Lackey's home address and photographs of Lackey, his wife, and children, and encouraging others to do the same has any degree of closeness to Smith's claimed public concern of the preservation and treatment of bears. 1JA007 ¶ 14.v.; 3JA0138-0155, 0157-0160 Instead, the focus of Smith'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 Smith 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, Smith 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).

Smith proffered no evidence to establish that the following have any truth or were made without the knowledge of their falsehood: (1) Lackey accepted bribes; (2) Lackey killed his first wife; (3) Lackey killed bears illegally; (4) Lackey is a narcissist and misogynistic harboring feelings of persecution and grandiosity; and (5) Lackey violated the rules of his employment with NDOW. The record is devoid of any evidence to support these falsehoods. None of the communications fall within the purview of NRS 41.637.

D. The CDA Does Not Insulate Appellant from Liability.

Smith incorrectly contends that the CDA insulates him 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.*

Smith erroneously contends that he is not an "information content provider" and therefore the CDA protects him from liability. The record does not support this. For the reasons discussed above, any postings made by LTWS is Smith's postings. Smith is "an information content provider" as contemplated by the CDA where he made the posts under the guise of LTWS.

Smith's reliance upon *Ascentive, LLC v. Opinion Corp.* is misplaced. 842 F.Supp.2d 450 (E.D. N.Y. 2011). In considering the FAC and the additional evidence presented by both parties, Smith did more than encourage harassing and threatening posts towards Lackey. As discussed above, Smith as LTWS made his own posts. *Anthony v. Yahoo Inc.,* 42 F.Supp.2d 1257, 1262-1263 (N.D. Cal. 2006) ("No case of which this court is aware has immunized a defendant from allegations that *it* created tortious content.") (citations omitted) (emphasis in original).

Smith should not be shielded from liability based upon the contention that LTWS made the posts, particularly where he failed to provide any evidence that he did not author any of the posts by LTWS despite having the opportunity to do so. While Smith may have declared under the penalty of perjury that he had no role in drafting or publishing Sean Stansfield's comment on LTWS, he never declared under the penalty of perjury that he

was not the author of or had any role in drafting or publishing the comments posted by LTWS itself. 1JA0081-0084 and 4JA0184-0197 The record on appeal, therefore, does not support a finding from this Court that the CDA insulates Smith from liability.

Where he also participated in the process of developing information by encouraging specific posts as to Lackey so that a psychological profile could be created on Lackey, encouraged harassing and threatening posts, and encouraged postings of pictures of Lackey and his family, Smith is an "information content provider". 3JA0162-0168, 4JA0180 In *MCW, Inc. v. Badbusinessbureau.com, LLC,* the Court declined to find that the defendant was insulated from liability pursuant to the CDA where it was alleged that the defendant actively encouraged a consumer to take photos of a business owner, his car, and his license plate in front of his store, so that the defendant could include these photos on his website. 2004 WL 833595 at *10 & n.10 (N.D. Tex. 2004).

The court concluded that the defendant had acted as an "information content provider":

> The defendants cannot disclaim responsibility for disparaging material that they actively solicit. Furthermore, actively encouraging and instructing a consumer to gather specific detailed information is an activity that goes substantially beyond the traditional publisher's editorial role. The defendants are clearly doing more than making minor alterations to a

> consumer's message. They are participating in the process of developing information. Therefore, the defendants have not only incurred responsibility for the information developed and created by consumers, but have also gone beyond the publisher's role and developed some of the defamatory information posted on the websites.

Id.

Likewise, Smith cannot disclaim responsibility for disparaging material that he actively solicits. Actively encouraging others to gather specific information about Lackey so that a psychological profile could be prepared and encouraging postings of pictures of Lackey and his family go substantially beyond the traditional publisher's editorial role. Smith has not only incurred responsibility for the information developed and created by others, but has also gone beyond the publisher's role and developed some of the defamatory information posted.

Smith, therefore, is an "information content provider" where he himself made a number of postings and participated in the process of developing information. The CDA does not shield Smith from liability under these circumstances.

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

Because Smith cannot carry his 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 Smith 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[3] a probability of prevailing on his claims, Lackey can meet this burden and for the same reasons the claims are legally cognizable and not subject to an NRCP 12(b)(5) dismissal.

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

> 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.

1. Defamation.

A claim for defamation requires Lackey to establish: (1) Smith made a false and defamatory statement concerning Lackey; (2) an unprivileged publication of this statement was made to a third person; (3) Smith 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 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) Smith does business as LTWS and therefore Smith and LTWS are one and the same, 1JA0012; (2) LTWS 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) LTWS encourage others "to shame and harass Lackey so that he will lose his job and/or feel threatened enough to leave the community," 1JA0013; (4) LTWS 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) LTWS "published and encouraged the statements despite having actual knowledge that such statements were false, or with reckless disregard for their veracity, *id.*; (7) LTWS 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. These allegations in conjunction with the specific comments set forth in the FAC, *id.*, 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). In applying this liberal standard, the district court correctly concluded that "[t]hese general allegations, especially when read together with the specific examples provided, give Smith notice of the nature of the defamation claim." 4JA0256 The district court correctly concluded that the pleadings place into issue matters which are fairly noticed to Smith. *Hay,* 100 Nev. at 196, 678 P.2d at 672.

On appeal, it does not appear that Smith takes issue with this conclusion. Instead, Smith focuses on the fact that the statement attributable to him (statement P as alleged in the FAC) was not made by him but by someone else and that this statement constitutes an opinion. AOB at 20-22. It is unclear why Smith makes such an argument where the district court found "as a matter of law, statement P is not actionable in this case for

defamation." 4JA0256 Because the district court found that statement P was not actionable, whether it constitutes an opinion is irrelevant.

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 Smith's specific interest and LTWS 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 Keeping Them Transparent "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, 0111-0113, 2JA0114-0128, 3JA0129-0174, 4JA0175-0183 The evidence also supports the allegation that these conspirators conspired with their followers to harass, bully, and intimidate Lackey. *Id.*

Smith incorrectly contends that the FAC failed to specify how Smith 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). Smith does not appear to challenge this legal proposition. Smith, therefore, cannot demand a heightened pleading requirement from Lackey. Second, the FAC further alleges that Smith as LTWS "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 Smith. *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) Smith's conduct was extreme and outrageous; (2) Smith either intended or recklessly disregarded to cause emotional distress; (3) Lackey suffered severe or extreme emotional distress; and (4) Smith'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 Smith and others acted with extreme and outrageous conduct. The FAC further alleges that Smith as LTWS "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 Smith'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, Smith's contention that Lackey failed to allege any specific conduct on Smith's part is unsupported when this Court views the FAC in its entirety.

Smith nevertheless contends that the record does not support this ruling because "Smith is not doing business as [LTWS]." AOB at 27. Smith did not provide a citation to the record to support this allegation. It would

appear that Smith is relying upon his declaration. The district court, however, considered solely the FAC in addressing Smith's NRCP 12(b)(5) motion and declined to consider the additional evidence presented by the parties.

The FAC specifically alleges that Smith is doing business as LTWS and the district court was obligated to accept this allegation as true for the purposes of the NRCP 12(b)(5) motion. 1JA0012 The record, therefore, supports the conclusion for purposes of an NRCP 12(b)(5) motion that Smith does business as LTWS.

Smith and others undertook conduct of posting false information and personal information (including his home address) about Lackey on their Facebook pages with the apparent sole purpose of harassing, intimidating and bullying Lackey. 1JA0011-0021 The postings also impugned Lackey's reputation and viciously accused him of criminal conduct. More egregiously of all, the postings incited violence towards Lackey. *Id.* Smith's and the others' acts as alleged in the FAC undoubtedly amounted to extreme and outrageous conduct causing Lackey severe emotional distress where he remains fearful of physical harm and violence directed at him and his family. *Id.* Lackey will likely prevail on his claim for intentional infliction of emotional distress.

If this Court concludes that the district court erred in denying Smith'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 Smith 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. Smith'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, killed his first wife and made it appear to look like an accident, and profits from his treatment of bears.

Smith'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 Smith'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.

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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 9,352 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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