IN THE SUPREME COURT OF THE STATE OF NEVADA

***

MARK E. SMITH, an individual, D/B/A LAKE TAHOE WALL OF SHAME,
Appellant,
vs.
CARL LACKEY,
Respondent.

Supreme Court Case No.:74461

District Court Case No.: CV17-00434

APPELLANT'S REPLY BRIEF

Appeal from the Second Judicial District Court's denial of Appellant's Anti-SLAPP Special Motion to Dismiss pursuant to NRS 41.660.

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NRAP 26.1 DISCLOSURE

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

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: None

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

Winter Street Law Group*

(*formerly Hardy Law Group)

Molsby & Bordner, LLP

Sean P. Rose, Esq.

Durney & Brennan, Ltd.

Hall Jaffee & Clayton, LLP

3. If litigant is using a pseudonym, the litigant's true name: None; however, the First Amended Complaint **erroneously** names Appellant, MARK E. SMITH, as an individual and doing business as the LAKE TAHOE WALL OF SHAME.

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IV.
SUMMARY OF ARGUMENT

The United States Supreme Court has long recognized that expression can "stir people to anger … strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminiello v. Chicago,* 337 U.S. 1, 4 (1949). Speech may not be curtailed "simply because the speaker's message may be offensive to his audience." *Hill v. Colorado,* 530 U.S. 703, 716 (2000). The reasoning for such protections, which LACKEY ignores, is "[t]he vitality of civil and political institutions in our society depends on free discussion... Accordingly, a function of free speech under our system of government is to invite dispute." 337 U.S. at 4. Allowing indiscriminate punishment of speech that someone claims is offensive would "effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen v. California,* 403 U.S. 15, 21 (1971).

In attempting to hold SMITH liable for a statement made by someone else and on a Facebook page that SMITH did not create, LACKEY seeks to silence wildlife advocates, like SMITH, by suing anyone associated with viewpoints he does not agree with, in violation of Nevada's Anti-SLAPP statute.

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V.
ARGUMENT

A. Standard of Review.

Appellant agrees that under NRS 41.660's 2015 Amendments, the burden of proof changed to reflect a plaintiff must show "a prima facie case of a probability of prevailing on the merits..." This change returns the standard of review to de novo. LACKEY's FAC and the "additional information" this Court is urged to consider are fatally flawed as a matter of law. *First*, LACKEY asserts third-party statements to distract from the lack of defamatory statements attributable to SMITH. *Second*, many of the third-party statements are time barred. NRS§11.190(4)(c)(defamation actions subject to two-year statute of limitations). Many of the third-party comments raised by LACKEY, don't include a date. RAB, 14-16. Comments made prior to the 2015 amendments effective date are subject to the previous standard.

B. Preliminary matters.

LACKEY incorrectly alleges SMITH's argument that all claims should have been dismissed pursuant to NRS 41.660 because the claims all arise under acts in furtherance of the right of petition or free speech, was not previously raised before the District Court. RAB, 3.

However, this argument was raised before the District Court. See, 1JA0032-0033, (LACKEY "premises his entire suit on comments purportedly posted by…

various third parties" ... "As such, the FAC is subject to dismissal under Nevada's Anti-SLAPP statutes"). Accordingly, these arguments are appropriate for review herein. *Delgado v. Am. Fam. Ins. Group*, 125 Nev. 564, 570 (2009).

C. The District Court erred in refusing to dismiss the FAC, finding SMITH failed to prove truth or falsity of a statement he did not make.

In his FAC, LACKEY attributed only one comment to SMITH; a comment by an unrelated third-party posted to LAKE TAHOE WALL OF SHAME's ("LTWS") page: "'A department with no real interest in wildlife other than to make it available to hunters and trappers ... some might say they are criminals against nature ... they are certainly ignorant about it.' Commenter Sean Stansfield ...." 4JA0229:12-15.

The entirety of LACKEY's claims against SMITH are premised on this lone comment posted on the LTWS's page, that doesn't even reference LACKEY, let alone defame him. 1JA0016, ¶p.[1]

In his FAC, LACKEY alleges SMITH, "is an individual, residing in Incline Village, Washoe County, State of Nevada and is doing business as LAKE TAHOE WALL OF SHAME." 1JA0012. However, SMITH's Declaration refutes this stating, "I was named herein erroneously as MARK E. SMITH, an individual dba

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[1] This statement is also clearly the poster's own opinion, which are not actionable. *Lubin v. Kunin,* 117 Nev. 107, 112 (2001).

LAKE TAHOE WALL OF SHAME" and, "I am neither the creator nor an administrator for LAKE TAHOE WALL OF SHAME's Facebook page." 1JA0082; 1JA0030 at Fn. 1.

With respect to this lone statement (based on the incorrect assertion that SMITH and LTWS are the same), "the district court acknowledged that [SMITH's] articulated interest in the preservation and treatment of bears as well as the bribery of public officials involve issues of public interest." RAB, 7-8.

Denying SMITH's Motion, the District Court erroneously concluded,

> "[T]here is no evidence provided that shows the statement is truthful or was made without knowledge of its falsehood...**Smith attests that he had no role in drafting or publishing the comment of Sean S[ar]sfield on the Lake Tahoe Wall of Shame Facebook's page**...."

[Emphasis]. 4JA0230:16-21. This finding is fundamentally flawed. The District Court's holding essentially holds SMITH is somehow required to provide evidence as to truth or falsity of a statement, that SMITH didn't make, draft, publish or even know about it until this lawsuit.[2] 1JA0082. There is no such legal requirement and SMITH provided as much evidentiary support as he could. *Id.* LACKEY apparently agrees, conceding, "Smith states in his declaration that he had no role in drafting or publishing the one comment. If he had no role in drafting or publishing

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[2] This third-party statement clearly constitutes an opinion. "Statements of opinion are protected speech under the First Amendment... and are not actionable at law." *Lubin v. Kunin*, 117 Nev. 107, 112 (2001). This post does not contain a statement of fact and any reasonable reader would understand this to be the commenter's opinion.

this one comment, then how can he know whether the statement is truthful or made without knowledge of its falsehood." RAB, 8.

D. Despite general, unsupported allegations, LACKEY has failed to allege one single statement made by SMITH.

Even though the uncontroverted evidence provided by SMITH demonstrates SMITH is not responsible for comments posted to LTWS and, although not raised in the FAC, LACKEY now identifies four statements, allegedly made by "SMITH:"

> 1. "we Must rid Nevada of this monster who lives and is paid to kill bears[,] 1JA0111-0123";
>
> 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.*

RAB, 10-11. These statements all constitute the opinions of those who wrote them and are thus, "not actionable at law." *Lubin*, 117 Nev. at 112 (2001). None of these posts contain a statement of fact, let alone a false one, as required to sustain a defamation action.

The first statement, "'we Must rid Nevada of this monster who lives and is paid to kill bears[,]' 1JA0111-0123," was NOT made by SMITH or the LTWS. RAB, 10; 2JA0112. It was made by the "Bear League" and posted to the LTWS. *Id.*[3]

As to the second statement, purportedly found at 3JA0162-0168, nothing in those pages contain anything regarding "photographs of LACKEY and his family."[4]

As to the third and fourth statements regarding a psychological profile and an expert declaration of LACKEY, both were made by LTWS, not SMITH. 4JA0180. The fourth statement is a direct quote, but the post is cut off, so the record does not contain the entire quote. *Id.* Recently, the Ninth Circuit held "republishers" of information provided by another cannot be held liable for purported defamatory nature of that information. *Caraccioli v. Facebook*, 700 F. App'x 588, 590 (9th Cir. 2017); *Carafano v. Metrosplash.com*, 339 F.3d 1119, 1122 (9th Cir. 2003) (CDA provides immunity from liability for publishing false or defamatory material when the information was provided by another party). As

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[3] In addition to this comment not being made by SMITH or LTWS, this comment was posted May 21, 2013; therefore, a defamation action is clearly time barred. 2JA0112; NRS §11.190(4)(c)(Defamation action must be brought within two years).

[4] In all candor to the Court, 3JA0162 is illegible. As such, it is uncertain what is actually contained on that page.

such, LTWS would have no liability for the post anyway because the post is essentially a direct quote from someone else.

LACKEY's entire theory of liability is premised on his unsupported assumption that SMITH is doing business as LTWS. 1JA0002. However, SMITH is not doing business as LTWS, is not a creator or administrator of LTWS, and is not responsible for LTWS's content management. 1JA0082. Therefore, SMITH cannot be held responsible for content produced by LTWS. Despite SMITH's declaration, LACKEY still relies on his false assertion that SMITH and LTWS are one and the same. RAB, 18-19. In doing so, LACKEY's claims not only fail as a matter of law, but illustrate that LACKEY brought this suit for the sole purpose of silencing and chilling SMITH's wildlife advocacy efforts in violation of the anti-SLAPP statute.

The only evidence LACKEY produces in support of his position are un-authenticated articles from 2011-2013, years before LACKEY filed his complaint, referencing undisputed involvement SMITH allegedly had with LTWS years ago. RAB, 18-19; 4JA0104-0207. The 2013 article referring to SMITH as a "spokesman" for the page, doesn't even cite SMITH as the source, instead indicating the information was obtained from an unidentified "previous article." 4JA0204. The second 2013 article connects SMITH to the "Tahoe Wall of

Shame," not LTWS.[5] 4JA0206. The 2011 article refers to SMITH as a group leader referring to bear advocacy efforts regarding Incline Village trash, but doesn't state SMITH leads the LAKE TAHOE WALL OF SHAME. 4JA0207.

This un-authenticated "evidence" does not establish SMITH is doing business as LTWS. It merely indicates SMITH participates in LTWS's public page like any other person who posts comments under a personal profile. LACKEY's unsupported position doesn't constitute evidence and is certainly insufficient to overcome SMITH's declaration that he is not doing business as LTWS, is not a creator/administrator of the page, and is not responsible for content management of the page. 1JA0082. Further, SMITH's declaration also indicates, as to the only comment in the FAC attributable to SMITH that he, "had no role in drafting or publishing the comment," and didn't even know about it until this lawsuit. 1JA0082. LACKEY failed to submit a declaration/affidavit or other admissible evidence contradicting SMITH's declaration. As such, LACKEY's unsupported accusations fail to establish that SMITH and the LTWS are one and the same.

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[5] This reference may be referring to LTWS or may be a typographical error, it is difficult to tell from the un-authenticated document. 4JA0206.

E. The conduct LACKEY complains about is protected by Nevada's anti-SLAPP statute and the First Amendment.

Putting aside for a moment the fact that SMITH is not doing business as LTWS as alleged, LACKEY has not alleged any defamatory statements made by either the LTWS or SMITH.

LACKEY argues extensively that the conduct alleged amounts to "true threats" and constitutes incitement of violence; thus, exempting them from Anti-SLAPP protection. RAB, 13, 16-18. However, long-standing case precedent fails to support such arguments.

In support of his argument that the comments posted to LTWS's page should be excluded from anti-SLAPP protection, LACKEY argues, "Many of these published comments incite violence or illegal conduct. 1JA0017 (post urging Lackey's assignation)."[6] RAB, 5. However, prevailing case law holds otherwise.

In *NAACP v. Claiborne Hardware Co.*, 458 US 886, 902 (1982) speaker Charles Evers, organizer of civil-rights boycotts, spoke out against boycott breakers during public rallies. At one rally, he stated boycott breakers would be "disciplined;" at another he said, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck" and that the sheriff would be

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6 The comment "urging Lackey's assignation," was not made by SMITH **OR** LTWS and was not posted on LTWS's page. This was a third-party comment, posted on Bear League's Facebook page. No court has held an individual liable for a comment, made by a stranger, to a webpage the individual has no ownership or control over and for LACKEY to urge this Court to so, is absurd.

unable to protect boycott violators. *Id.* The United States Supreme Court acknowledged Evers' public statements "might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence." *Id.* at 927. However, even though isolated instances of violence occurred after Evers' "emotionally charged rhetoric," the Court found "Evers' speeches did not transcend the bounds of protected speech." *Id.* at 928. The Court noted the acts of violence occurred long after the challenged speech and the speech did not therefore carry with it an imminent threat of violence. *Id.* Ultimately, the Court held Evers' statements amounted to constitutionally-protected advocacy. *Id.* at 927–29.

The seminal case addressing the "incitement" of violence exception to First Amendment protection is *Brandenburg v. Ohio*, 395 U.S. 444-45 (1969), which arose out of a speech at a Ku Klux Klan rally. In that speech, Brandenburg criticized Blacks and Jews and threatened "revengeance" if the "suppression" of the white race continued. *Id.* at 445–47.

The Supreme Court held "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. In holding Brandenburg's speech did not fall within this limited

incitement exception, the Court emphasized "the mere abstract teaching ... of the moral propriety or even moral necessity for a resort to force and violence, **is not the same as** preparing a group for violent action and steeling it to such action." [Emphasis]. *Id.* at 448.

In *Citizen Publ'g Co. v. Miller*, 210 Ariz. 513, 115 P.3d 107 (2005), the Court held the incitement exception to First Amendment protection for political speech did not apply to a letter to the editor protesting the Iraq war and stating, "Whenever there is an assassination or another atrocity [in Iraq] we should proceed to the closest mosque and execute five of the first Muslims we encounter." The Court held these statements were not, given the content and context of the statements, constitutionally proscribable true threats because the letter involved statements with a plainly political message, the conduct of the war in Iraq, and the expression occurred in the letters to the editor section of a newspaper, hardly a traditional medium for making threats. *Id.* The Court further held, however offensive, the letter did not incite or advocate imminent lawless action and the projected violence was premised on the occurrence of some future "assassination or another atrocity." *Id.*

The third-party posts LACKEY refers to herein fall far short of those set forth above, which the United States Supreme Court has already affirmed clearly warrant First Amendment protection.

LACKEY further argues, "Smith also ignores the undisputed fact that a number of the posts inciting violence or illegal conduct were posted on LTWS. 2JA0125..." RAB, 5-6. The citation in the record LACKEY directs us to states, "He's an arrogant, incompetent POS." 2JA0125. First, this post in no way appears to "incit[e] violence" as alleged.

Second, and again, despite being posted by LTWS, not SMITH, even this statement, arguably about LACKEY, enjoys concrete anti-SLAPP protection. *Krinsky v. Doe 6,* 159 Cal. App. 4th 1154, 1173, 1178 (2008) (finding in a chat room setting, anonymous post that corporate officers consisted of a "cockroach," "losers," "boobs," and "crooks" were "crude, satirical hyperbole which...constitute protected opinion"); *Global Telemedia Internat, Inc. v. John Doe 1,* 132 F. Supp. 2d 1261, 1267 (C.D. Cal. 2001) (finding Internet postings "are full of hyperbole, invective, short-hand phrases and language not generally found in fact-based documents, such as corporate press releases or SEC filings"). Consequently, this opinion that LACKEY is "arrogant" and an "incompetent POS" clearly warrants the same First Amendment, anti-SLAPP protection.

Alleging "a number of the posts inciting violence or illegal conduct were posted on LTWS," LACKEY cites to 3JA0130 (RAB, 6), a comment stating,

> "NDOW has set a bear trap at Marlette Lake. If bears can't just exist in the forest, remote from towns and even roads, where are they supposed to be? NDOW has too much free time, too much taxpayer money to waste, and not enough competence to be allowed to manage

> our precious wildlife. Carl Lackey has argued repeatedly in the past that they must trap bears and move them to remote locations to perform aversion training (or to kill them). But Marlette Lake IS REMOTE! Why can't Lackey's team just do aversion training there? Because they don't' actually do aversion work, it's a sham, because Lackey doesn't know how. NDOW's own consulting biologist (a real biologist) has said that NDOW's bear management program doesn't work. No shit – NDOW has the highest kill rate as a percent of population of any jurisdiction in North America. #LackeyMustGo #HireRealBiologist #NDOW". 2JA0125-0128 and 3JA0129-0130"

While LACKEY's citation to appears misplaced as it does not in any way incite "violence or illegal conduct," this comment also expressly constitutes protected speech.

In *Atlanta Humane Soc. v. Mills*, 274 Ga. App. 159, 160 (2005), a television station aired a series investigating the Atlanta Humane Society. The series criticized the Humane Society's management of Fulton County animal control, its euthanasia policies, failure to place animals for adoption, and failure to assist in investigating animal cruelty cases.

Mills operated an internet animal rescue website called Kitty Village. *Id.* After the television series aired, Mills participated in an online discussion of the programs. During that discussion, she made inflammatory statements about the Humane Society and its director, including referring to the director as "Mr. Kill," stating he "was not worthy to lick the dog or cat poop off our shoes" and he was "evil." *Id.* She speculated the Humane Society's policies with regard to euthanasia, adoption, and cruelty investigations was calculated to "maximize profits," and

stated she was withdrawing support for another organization led by the same director "until they get a leader who does not delight in slaughtering pets for fun and profit." *Id.* The Court held "A writer cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperous the expressing of it may be." *Id.* at 166. On point herein, again LACKEY's claim that the subject statement does not warrant protection fails as a matter of law.

LACKEY (relying on the inaccurate assertion SMITH and LTWS are the same) argues "Smith's own post on LTWS specifically encouraged the harassing and threatening posts: 'We've found that reporting bad acts by NDOW employees never resulted 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". RAB, 16. However, encouraging public debate and seeking the attention of government officials, like the Governor, to address and effectuate change with respect to these important wildlife concerns, expressly constitutes protected activities.[7] *Dove*

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[7] These specific actions LACKEY complains of have led to changes in LACKEY's conduct in his capacity with NDOW as the Nevada Ethics Commission recently entered a Deferral Agreement with LACKEY for using his NDOW title to raise funds for private use and failing to disclose his pecuniary and private interests associated with a private business when referencing that business in his NDOW capacity. https://nvethics.pdi.online/cm/dbo_DocumentsPublic/list?orderby=dDocYear;aCaseNumber, Opinion 17-27C. While this occurred after the District Court entered its Order herein and thus, it is not part of the record, "A

Audio, Inc. v. Rosenfeld, Meyer & Susman, 47 Cal. App. 4th 777, 784 (1996). In *Dove Audio,* the communication at issue was the act of proposing a complaint to the Attorney General seeking an investigation of whether money designated for charities was being received by those charities. *Id.* The Court held the communication was made in connection with an issue of public concern as well as an official proceeding authorized by law holding, "The constitutional right to petition ... includes the basic act of filing litigation or otherwise **seeking administrative action**." [Emphasis]. *Id.* The *Dove Audio* Court explicitly held, "The fact that the communication was made to other private citizens rather than to the official agency does not exclude it from the shelter of the anti-SLAPP suit statute." *Id*; *Harkins v. Atlanta Humane Soc.*, 273 Ga. App. 489 (2005) (Statements by animal rights activist relating to animal control services were privileged, and thus defamation lawsuit initiated in response to statements was subject to dismissal under anti-SLAPP statute; issue was matter of public concern, and statements were made in good faith **attempt to influence or persuade government officials and public to change problems**). [Emphasis].

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court may take judicial notice of matters of public record." *Lee v. City of Los Angeles,* 250 F.3d 668, 689 (9th Cir.2001); *Breliant v. Preferred Equities Corp.,* 109 Nev. 842, 847 (1993) (court may consider matters of public record in ruling on a motion to dismiss). The Ethics Commission's findings also support the truthfulness of the comments LACKEY references herein.

While the expressions made by LTWS and other unrelated third-parties may have been provocative, offensive, and even disrespectful at times, those expressions fall squarely within the realm of public discourse. Notwithstanding the procedural issues and failures of LACKEY to identify anything allegedly defamatory attributable to SMITH, allowing tort liability in this case would create a liability scheme that would justify content-based censorship of any type of passionate advocacy efforts. Such a scheme turns the First Amendment on its head by allowing punishment of speech based on its content. *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it Constitutional protection.").

This Court has expressly held "Nevada's anti-SLAPP statute seeks to promote and protect a citizen's exercise of his or her constitutional rights." *John v. Douglas Cty. Sch. Dist.*, 219 P.3d 1276 (Nev. 2009).

The third-party (and time-barred) comments LACKEY complains of do not give rise to liability, not for defamation or any other cause of action. However abhorrent some of the comments may be, the scope of Constitutional freedom of expression may not turn upon the acceptability of the message. The Supreme Court's rulings have consistently held "the first amendment protects from state

interference the expression in a public place of the unpopular as well as the popular." *Nat'l Socialist White People's Party v. Ringers,* 473 F.2d 1010, 1015 (4th Cir. 1972). For example, deeply offensive racial stereotyping have received First Amendment protection from courts, despite the hateful nature and hurtful impact of such vile imagery. *Berger v. Battaglia,* 779 F.2d 992 (4th Cir. 1985).

Further, in *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235 (1991), a libel action was brought against the chairperson of an animal rights group who wrote a letter to the editor of a scientific journal critical of a plan to establish a facility for hepatitis research using chimpanzees. The court noted that, by examining the context of the letter and the underlying controversy, "it would be plain to the reasonable reader that [the writer] was voicing no more than a highly partisan point of view" and, by implication, was not making factual assertions. *Id.* at 255. The same analysis applies here. The reasonable reader of the alleged defamatory comments referred to by LACKEY— surrounding the subject matter that he and NDOW are not handling bears in the Lake Tahoe region appropriately or humanely—would recognize they represented opinion, expressed as part of an ongoing controversy and designed primarily to persuade and effectuate change. No reasonable person reading the subject comments in their entirety would find these conclusions to be anything other than highly partisan expressions of opinion

by wildlife advocates concerned for bears in the local area not being afforded appropriate independence and humane treatment.

The *Immuno* Court further noted, the letters to the editor gave citizen advocates access to the media they could not otherwise afford, and the dissemination of information to the public and the expression of opinions by advocates on the basis of such information serves to encourage public debate (*Id.*, 252–253), which is crucial in animal protection matters and such communications, **should not be hypercritically scrutinized for the extraction of possible assertions of fact from what in context is a clear expression of opinion**. [Emphasis]. *Id.* at 256.

While some of the third-party comments referred to herein may seem even more deeply abhorrent than others that have previously tested the scope of constitutional freedom of expression before this Court, the basic principles that have shaped the outcome are no less clearly applicable here.

F. The third-party comments referenced or directed to by LACKEY all relate to matters of public concern.

Although, LACKEY concedes SMITH's "articulated interest in the preservation and treatment of bears as well as the bribery of public officials involve issues of public interest" (RAB, 7-8); LACKEY later appears to take the opposite position stating, "In analyzing the statements at issue 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." RAB, 22. In the abundance of caution, Appellant explains why all posts cited and referenced by LACKEY (albeit posted by those *other than* SMITH and absent from the FAC) directly relate to matters of public concern.

The comments addressed herein relate to the handling and treatment of bears and related wildlife advocacy efforts. Courts have long held that similar wildlife advocacy efforts constitute protected matters of public concern. *Huntingdon Life Sci., Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 129 Cal.App.4th 1228, 1246 (2005) ("Animal testing is an area of widespread public concern and controversy, and the viewpoint of animal rights activists contributes to the public debate."); *Harkins v. Atlanta Humane Soc.*, 273 Ga.App. 489, 490-91 (2005) (statements of animal rights activists about human society protected by First Amendment); *Farm Sanctuary, Inc. v. Dep't of Food & Agric.*, 63 Cal.App.4th 495, 504 (1998) (ritual slaughter exception to statute requiring animals be treated humanely involves issue of public concern); *McGill v. Parker*, 179 A.D.2d 98, 106-107 (1992) ("treatment of carriage horses has been a matter of public concern and controversy"); *Safarets, Inc. v. Gannett Co., Inc.*, 80 Misc.2d 109, 113 (1974) (article dealing with humane treatment of animals and birds involves subject of general public concern).

In addition, the fact that the Nevada Ethics Commission heard and ultimately found LACKEY in violation of Nevada's ethic's rules based on failing to disclose his pecuniary and private interests when presenting in his official NDOW capacity and other similar matters that are a central topic of many of the alleged third-party comments raised by LACKEY herein. See, FN. 5, herein. This not only supports the truthfulness of such statements but also substantiates the fact that the comments LACKEY complains of are in fact related to issues of public concern.

The third-party comments described by LACKEY are undeniably expressive, however distasteful they may be. The clear focus of such expressions address matters of utmost public interest and concern - specifically wildlife advocacy efforts and the handling and treatment of bears in the greater Lake Tahoe area.[8]

In fact, LACKEY explicitly admits "This action arises out of Defendants' outrageous, harassing, intimidating and threatening conduct towards Plaintiff, an innocent third party in Defendants' **crusade to change the way the Nevada Department of Wildlife ("NDOW") deals with problem bears in the Lake Tahoe area**.". [Emphasis]. RAB, 7-8. As such, LACKEY's contradicting

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[8] The District Court held SMITH's "articulated public interest [of] conservation of natural resources, specifically the preservation and treatment of bears, as well as bribery of a public official" … "does not equate with mere curiosity." 4JA0230:3-5.

arguments that the third-party comments aren't related to matters of public concern, fail as a matter of law and fact.

G. LACKEY incorrectly applies CDA immunity to the facts of this case.

In addition to the First Amendment, Congress created special immunity from liability for internet-related persons from lawsuits related to the transmission or display of information originating from a third party. "Section 230 of the Communications Decency Act ('CDA') immunizes providers of interactive computer services against liability arising from content created by third parties: 'No provider... of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.'" *Ki v. Yelp, Inc.*, 21 F.Supp.3d 1120, 1122-1123 (W.D. Wash 2014).

In his Answering Brief, LACKEY continues to erroneously argue that SMITH and LTWS are the same (RAB, 27); and, as such, SMITH is an "information content provider," thus, not protected by CDA immunity. RAB, 26-27. This argument fails as SMITH and the LTWS are not one in the same. 1JA0082, ¶2.

As LACKEY admits, "An 'information content provider' is someone who is 'responsible in whole or in part, for the creation or development of "**the offending content**."'" [Emphasis]. RAB, 26. LACKEY has not identified any defamatory comments or "offending conduct" that was created or developed by SMITH.

1JA0011-0021. To the contrary, LACKEY continues to attempt to hold SMITH liable for comments made by unrelated third-parties on public Facebook pages.

In any event, assuming arguendo that LACKEY could show SMITH has posted comments on Facebook from time to time and thus, would be an "information content provider" under this hypothetical; even if a person is an "information content provider," CDA immunity still extends to "any information provided by another information content provider...." *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003). Here, the comments identified by LACKEY, whether defamatory or not, were made by those *other than* SMITH and as such, SMITH is entitled to immunity for **all** such comments. *Id.*

Additionally, Courts have uniformly held, "Section 230 immunity **should be broadly construed**." [Emphasis]. *Universal Commc'n. Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007).

Here, despite evidence to the contrary, the District Court held,

> "Here, the FAC alleges that Smith is doing business as Lake Tahoe Wall of Shame. The FAC alleges a specific comment of a person **(not Smith)** on Lake Tahoe Wall of Shame's Facebook page as well as ***generally states*** that members of Lake Tahoe Wall of Shame, and Lake Tahoe Wall of Shame (itself) has made and continues to make false statements regarding Lackey and initiates public comment threads on Facebook slandering Lackey including accusing him of criminal conduct (accepting bribes and conspiracy). **It further alleges that Smith and Lake Tahoe Wall of Shame published and encouraged statements**. . . . **[T]he Court cannot conclude** for the purposes of a motion to dismiss, **that Smith did not encourage the third party user's statement.** Therefore, at this time, ***the Court***

> ***cannot find Smith is immunized from liability*** **for the third party comments** under the CDA."

[Emphasis]. 4JA0042:14-0043:8. However, SMITH declared under penalty of perjury that he "**had no role** in drafting or publishing the comment of Sean S[ar]sfield on the LTWS page ... [and] ... **was not even aware of the comment until ... this lawsuit**." [Emphasis]. 1JA0082. If SMITH had "no role" in drafting or publishing the subject statement identified in the FAC and didn't even know about it at the time, SMITH could not have encouraged it. Therefore, the District Court's finding that it could not conclude "SMITH did not encourage the third-party user's statement," is an unequivocal mistake of fact. To hold otherwise would allow every plaintiff who alleged a defendant encouraged third party comments to survive a Special Motion to Dismiss, obliterating Nevada's anti-SLAPP statute.

Assuming arguendo only, the District Court was in someway able to arrive at a finding that SMITH somehow did encourage the third-party statement, if the CDA excluded from immunity websites that "encouraged" negative or potentially defamatory statements, then websites like Yelp and other websites that elicit reviews would otherwise be exempt from CDA immunity, which is not the case. *Kimzey v. Yelp! Inc.*, 836 F.3d 1263 (9th Cir. 2016); *Reit v. Yelp!, Inc.*, 29 Misc. 3d 713, 907 N.Y.S.2d 411 (Sup. Ct. 2010). Virtually all such websites of this nature

seeking reviews and public comment, which are often negative, have consistently been entitled to CDA immunity protections. *Id.*

There are no allegations in the FAC that allege that SMITH or even the LTWS, either "authored or created" any of the content of the alleged defamatory statements identified therein. 1JA0011-0021. The District Court erred in finding that SMITH was not protected by CDA immunity.

H. The District Court abused its discretion in failing to dismiss the other causes of action asserted against SMITH arising out of protected activities.

A special motion may be used to strike 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 ...." [Emphasis]. *Baral v. Schnitt*, 1 Cal. 5th 376, 376 P.3d 604 (2016). The District Court erred in failing to dismiss the FAC, including the two remaining claims for Intentional Infliction of Emotional Distress and Civil Conspiracy, as both arise directly out of protected activities.

i. Intentional Infliction of Emotional Distress

LACKEY argues, "The example of the statements set forth in the FAC rise to the level of outrageous conduct." RAB, 40. However, inherently problematic with this assertion is the fact that, not only has LACKEY failed to allege any statements made by SMITH in the FAC, but even under the most generous hypothetical taking LACKEY's erroneous assertion that SMITH and the LTWS

are one in the same as true, LACKEY has also failed to allege any specific defamatory comments made by the LTWS in the FAC. 1JA0014-0017.

In line with Nevada's anti-SLAPP statute, as to LACKEY's claim for Intentional Infliction of Emotional Distress, the Supreme Court has refused to allow liability based purely on outrageousness standards because "outrageousness ... has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988). Eliminating protection for advocacy efforts or political speech simply because it offends or disrespects others would eviscerate the First Amendment by allowing individuals to censor speech by filing a tort claim, just like LACKEY has done here. This is exactly what the Anti-SLAPP statute is designed to protect.

LACKEY has failed to allege any specific conduct on the part of SMITH at all- let alone intentional, extreme and outrageous conduct as required for a claim of Intentional Infliction of Emotional Distress. 1JA0011-0021. As such, the District Court clearly erred in finding LACKEY to have sufficiently alleged a claim for Intentional Infliction of Emotional Distress against SMITH.

ii. Civil Conspiracy

In response to SMITH's arguments that "the FAC failed to specify how Smith has acted in concert with the others," relying on *Flowers v. Carville*, 266 F.

Supp.2d 1245 (D. Nev. 2003), LACKEY argues "a civil conspiracy claim predicated upon defamation is not subject to a heightened pleading requirement." RAB, 38. However, LACKEY attempts to stretch the *Flowers'* holding beyond what is provided for under the law.

While the Court in *Flowers* held there is no heightened pleading requirement for a conspiracy claim based upon defamation, the *Flowers* facts are inapposite here. The *Flowers* Court held Flowers sufficiently pled a claim for civil conspiracy **based on the facts that**: 1) "Flowers claims that in 1992 Clinton organized and directed a conspiracy with Carville and Stephanopoulos to defame her;" 2) Flowers "further **cite[d] specific examples of allegedly defamatory statements made by Carville and Stephanopoulos**;" 3) "Flowers allege[d] that as a result of the conspiracy she was damaged; and, 4) The alleged defamatory statements made from 1998—2000 [were] arguably consistent with such a conspiracy." [Emphasis]. *Id.* at 1251.

Here, LACKEY has not alleged when the conspiracy allegedly took place or the connection, if any, the Defendants have with one another or with the unidentified followers of the respective pages. Most critically, LACKEY has not alleged one single defamatory statement made by SMITH. The Complaint in *Flowers* clearly contained significantly more detailed allegations as to the alleged conspiracy, than alleged by LACKEY herein.

The District Court erroneously held,

> The FAC sets forth that defendants continuously over the past several years have acted in concert with one another to accomplish the goals of harassing and threatening Lackey. The FAC alleges Lackey feels the defendants and their supporters post a threat to his safety and as a result he has suffered damages…

4JA0236:14-19. To prevail in a civil conspiracy action, LACKEY **must** allege an agreement between alleged tortfeasors, whether explicit or tacit. *Eikelberger v. Tolotti*, 96 Nev. 525, 528 n. 1 (1980); An agreement between conspirators is essential to a civil conspiracy claim; yet, LACKEY's bare bones allegations have not even alleged that much. The FAC fails to articulate even a generic agreement, let alone one to survive even Nevada's generous "notice pleading" standard.[9]

Notwithstanding the foregoing, LACKEY has failed to rebut the anti-SLAPP arguments as they relate to LACKEY's claim for civil conspiracy set forth in SMITH's Opening Brief; therefore, SMITH's arguments should be deemed

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[9] LACKEY's claims cannot survive under the shield that Nevada is a notice-pleading State. LACKEY has not and cannot identify one single false and defamatory statement made by SMITH. LACKEY argues the rules do "not require Lackey to set forth every fact that supports his claims for relief"(RAB, 40); however, LACKEY must set forth allegations to satisfy each element of the cause of action. As to defamation, LACKEY must allege "a false and defamatory statement of fact by the defendant concerning the plaintiff," which LACKEY fails to identify herein. *Hay v. Hay*, 100 Nev. 196, 678 P.2d 672 (1984).

meritorious.[10] Further, because there is no separate cause of action for "civil conspiracy"—the cause of action must be based on some independent, underlying wrong. See, *Eikelberger, supra.* Because LACKEY has failed to sufficiently allege a claim against SMITH for defamation, LACKEY's conspiracy claim fails as a matter of law.

VI.
CONCLUSION

One of the challenges here is that LACKEY brought this action against SMITH based solely on comments made by third-parties, rendering it difficult to properly analyze the allegations the way traditional Anti-SLAPP cases are analyzed. Inherently problematic is the fact that LACKEY has brought this action against SMITH, instead of those who made the alleged defamatory statements, to censor, silence and force SMITH to disassociate from those who share similar wildlife advocacy concerns. This is the exact conduct the First Amendment and Nevada's anti-SLAPP statute protects. These factual and procedural difficulties seem to have distracted from the critically important and fundamental First Amendment based protections guaranteed to every person.

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[10] Failure to oppose a matter may be deemed an admission the matter is meritorious and consent that the requested relief be granted. *Foster v. Dingwall,* 126 Nev. Adv. Op. 6 (2010).

In *Snyder v. Phelps,* 562 U.S. 443, 444 (2011) the Supreme Court held, "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection" and "**A statement's arguably inappropriate or controversial character ... is irrelevant to the question whether it deals with a matter of public concern**." [Emphasis].

In *Snyder,* the Plaintiff's marine son was killed in the line of duty and set to be buried in his hometown. *Id.* Phelps, the Westboro Baptist Church founder and his followers, picketed near the funeral, displaying signs reading, "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You." *Id.* The Plaintiff's description of the emotional toll the defendants' actions had on him led to a substantial judgment in his favor. However, the Fourth Circuit reversed; 580 F.3d 206 (2009); and the Supreme Court, affirming, made it clear 1. the First Amendment has a far reach in protecting speech and can be raised defensively against private lawsuits demanding relief in tort; 2. ***once speech is determined to be protected, a court will not further scrutinize it with respect to its content or tone***; and 3. the touchstone which defines protected speech is that it be uttered about matters of public concern. *Id.*

The *Snyder* Court **explicitly rejected the argument that the crude and egregiously offensive messages on the anti-gay protesters' signs—including "Fag Troops" and "Thank God for Dead Soldiers"—should affect the inquiry into whether the signs addressed a matter of public concern**. *Id.* at 454. According to the Court, "[w]hile these messages may fall short of refined social or political commentary, the issues they highlight ... are matters of public import." *Id.*

The egregious and offensive nature and context of the speech LACKEY complains of pales in comparison to the speech at issue in *Snyder*. Yet, the high Court expressly held that Snyder, just like every other individual with guaranteed First Amendment rights, is entitled to his own opinions and to freely and publically express them.

Despite LACKEY failing to identify any posts made by SMITH, let alone a defamatory one, even the third-party posts LACKEY has identified fit squarely within the confines of protected speech.

Wildlife advocacy and the humane treatment of bears are clearly issues of public import. Just as the Court held in *Snyder,* even if some of the comments were crude and contained violent imagery, that does "not change the fact that the overall thrust and dominant theme of spoke to broader public issues." *Id.*

Based on the foregoing, it is respectfully requested that this Court reverse the District Court's Order, dismissing LACKEY's FAC as to SMITH and the

LTWS in its entirety and remand with instructions to award reasonable costs and attorney's fees and additional damages up to $10,000 per party as mandated by NRS 41.670.

Dated this 20th day of June, 2018.

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VII.
ATTORNEY'S CERTIFICATE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, size 14 font; or

[ ] This brief has been prepared in a monospaced typeface using *[state name and version of word processing program] with [state number of characters per inch and name of type style]*.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRCP 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a typeface of 14 points or more and contains 6,996 total words; or,

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains ___ words or ___ lines of text; or

[ ] Does not exceed ___ pages.

3. Finally, I hereby certify that I have read this appellate 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 20th day of June, 2018.

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VIII.
PROOF OF SERVICE

I hereby certify pursuant to NRAP 25(c), that on the 20th day of June, 2018, I caused service of a true and correct copy of the above and foregoing **APPELLANT'S REPLY BRIEF** on all parties to this action by the method(s) indicated below:

X by using the Supreme Court Electronic Filing System:

Sean P. Rose, Esq.
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150 W. Huffaker Lane, Suite 101
Reno, NV 89511
Attorneys for Respondents

X by placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, postage paid, following ordinary business practices addressed to:

Thomas R. Brennan, Esq.
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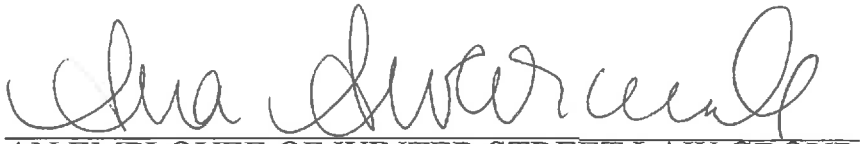
DATED this 20th day of June, 2018.



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