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**DISTRICT COURT
CLARK COUNTY, NEVADA**

DAN BRANDON BILZERIAN, an Individual

Plaintiff,

vs.

DIRTY WORLD, LLC, a Delaware limited
liability company, d/b/a THEDIRTY.COM;
HOOMAN KARAMIAN, an individual,
d/b/a Nik Richie; TMZ PRODUCTIONS,
INC., a California Corporation; DOES I-X,
inclusive; and ROE BUSINESS ENTITIES I-X,
inclusive

Defendants.

Case No.: A-15-722801-C
Dept. No.: XXXII

**REPLY IN SUPPORT OF DEFENDANT
TMZ'S ANTI-SLAPP SPECIAL MOTION
TO DISMISS UNDER NRS 41.660**

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Defendant, TMZ Productions, Inc. ("TMZ"), respectfully files its Reply in Support of its Special Motion to Dismiss under the Nevada Anti-SLAPP statute.

1.0 INTRODUCTION

Plaintiff Dan Bilzerian ("Bilzerian") appears to misunderstand the purpose and effect of an Anti-SLAPP motion. It is not, contrary to his mistaken assumption, a motion to dismiss under Rule 12(b)(5). This reply will endeavor to correct that assumption and ensure that the Court is not misled.

In 2013, when the Nevada Legislature passed the nation's strongest Anti-SLAPP statute, it made a strong pronouncement that freedom of expression occupies an exalted place in this state, and that Nevada will not abide SLAPP suits.¹ "A SLAPP lawsuit is characterized as a meritless suit filed primarily to discourage the named defendant's exercise of First Amendment rights." S.B. 286, 2013 Leg., 77th Sess. (Nev. 2013). The Nevada legislature acted to protect these rights by forcing defamation plaintiffs to front-load their cases to provide far more than a mere recitation of allegations as a precondition to allowing those cases to go forward.

Bilzerian's opposition ignores most of this history and seeks to incorrectly treat it as a 12(b)(5) motion. Indeed, prior to the 2013 amendments to the Anti-SLAPP law, defamation plaintiffs in Nevada were free to file unsupported complaints, which might then entitle them to use discovery and motion processes to chill free speech while facing no greater consequences than the eventual loss of the case.

¹ An Anti-SLAPP motion is a special creature, both substantively and procedurally, created by the Nevada legislature in 1993. See S.B. 405, 1993 Leg. Sess., 67th Sess. (Nev. 1993). The legislature then amended it in 1997. See A.B. 485, 1997 Leg. Sess., 69th Sess. (Nev. 1997). The legislature then gave the Nevada Anti-SLAPP law real teeth in 2013 when it passed Senate Bill 286. See S.B. 286, 2013 Leg., 77th Sess. (Nev. 2013). It further refined it in 2015. See S.B. 444, 2015 Leg. Sess., 78th Sess., (Nev. 2015).

Bilzerian's opposition ignores the significant legal hurdles placed in his path by the Anti-SLAPP law, providing no evidence to support his assertions that the statements in question are false, or TMZ's alleged knowledge of such supposed falsity. He provides nothing to refute TMZ's privilege defense. He simply says that he believes that he will be able to prove his claims *after discovery*. Bilzerian fundamentally misunderstands how the Anti-SLAPP statute works.

The Anti-SLAPP statute reflects the Legislature's recognition that the chill to free speech is primarily caused by permitting baseless lawsuits to proceed. The process is the punishment. "This is why the Anti-SLAPP statute provides for immunity from suit, not just immunity from liability.² The statute provides a crystal clear procedure for the legitimate defamation plaintiff to follow – he must have his evidence *in hand* when he files his case. If he comes to this court with an opposition that makes it clear that he does not have this support, or he simply elects to hold back his cards, he loses.

Bilzerian's assertions to the contrary notwithstanding, an Anti-SLAPP motion is not a motion to dismiss under Nev. R. Civ. P. 12(b)(5),³ but is rather treated as a special motion for summary judgment. Despite this, Bilzerian has consciously chosen not to provide any evidence in support of his claims. There is only one explanation for this decision: Bilzerian recognizes that he has no substantive case against TMZ and his only recourse is to resort to procedural delay. As such, his

² Prior to the 2013 amendments, Nevada's Anti-SLAPP act was an "immunity from liability" statute, and not an "immunity from suit" statute. See *Metabolic*, 693 F.3d at 796 n.1. One of the key updates in the 2013 legislation was to bring Nevada's statute in line with California and Oregon, and to make it an "immunity from suit" statute. See Senate Committee on Judiciary hearing on Nev. SB 286, at 3 (Mar. 28, 2013); see also Journal of the Senate, 77th Leg. Sess., Day 78 at 600 (Apr. 22, 2013).

³ Bilzerian devotes a few pages of his Opposition discussing the standard for a motion to dismiss under Nev. R. Civ. P. 12(b)(5). (See Opposition at 7-9.) This discussion is irrelevant and the Court should ignore it; TMZ did not file a motion to dismiss under this rule, and this is not the applicable standard.

claims must be stricken, he must pay TMZ's costs and fees, and should further be required to pay \$10,000 to deter him from filing future SLAPP suits. See NRS 41.670(1)(a)-(b).

2.0 ARGUMENT

2.1 An Anti-SLAPP Motion is Not Simply a Motion to Dismiss by Another Name, and Imposes a Much Greater Burden on a Plaintiff

The Nevada legislature passed and progressively strengthened our Anti-SLAPP law because it found that plaintiffs were abusing the litigation process to censor critics who dared to speak ill of them in public. It recognized that lawsuits targeted at such speech are abusive and chilled free speech. See Senate Committee on Judiciary hearing on Nev. SB 286, at 4 (Mar. 28, 2013); Assembly Committee on Judiciary hearing on Nev. SB 286 at 4-7 (May 5, 2013). "Winning" for a SLAPP plaintiff means either silencing a defendant or using litigation as its own punishment. In litigation that does not implicate First Amendment rights, these tactics are permitted, as the standards under Nev. R. Civ. P. 12(b)(5) allow a plaintiff to survive a motion to dismiss with little more than rote recitations of the elements of his claims which he or she can attempt to prove as litigation wears on. Nevada's Anti-SLAPP statute imposes a more rigorous process.

Before the 2013 amendments to the Anti-SLAPP statute, a case such as this one possibly could have survived a 12(b)(5) motion, and the defendant would have been effectively punished for exercising its First Amendment rights. "The hallmark of a SLAPP lawsuit is that it is filed to obtain a financial advantage over one's adversary by increasing litigation costs until the adversary's case is weakened or abandoned." S.B. 286, 2013 Leg., 77th Sess. (quoting *Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 796 n.1 (9th Cir. 2012)).

Such a result not only intimidates the defendant from any further speech, but stands to chill other speakers or journalists. The 2013 amendments were a

specific legislative act to put an end to this, and to largely harmonize our statute with those of neighboring states.⁴ In states without an Anti-SLAPP statute, defendants with the means and wherewithal to successfully move for summary judgment after discovery find themselves significantly burdened despite “winning” the case, because there are rarely any mechanisms available to afford recovery of attorneys’ fees in the successful defense of SLAPP suits.⁵

Nevada’s Anti-SLAPP statute is, like its California predecessor, a burden-shifting statute; once a defendant shows that the plaintiff’s claims are based upon protected communications, it is the **plaintiff’s burden** to demonstrate that his claims have merit. See NRS 41.660(3)(b)). A plaintiff cannot simply make factual *allegations*, but rather must provide competent and admissible evidence that supports those allegations. *Id.* Failing this, his claims must be dismissed, and he must pay the defendant’s attorneys’ fees, as well as an award of up to \$10,000 in statutory damages. See *id.* at 41.670(1)(a)-(b).

2.2 TMZ Met its Burden of Showing That Bilzerian’s Claims are Based Upon TMZ’s Protected Speech

In the Anti-SLAPP Motion, TMZ provided voluminous evidence establishing Bilzerian’s celebrity status as a professional poker player, millionaire serial playboy, and presidential candidate. (See Exhibits 1-12 to Anti-SLAPP Motion.) Bilzerian claims that he disputes “each and every one of the[se] facts,” but

⁴ See Cal. Code Civ. Proc. § 425.16 (California Anti-SLAPP statute); see also ORS 31.150 (Oregon Anti-SLAPP statute).

⁵ As a prime example of a SLAPP defendant’s pyrrhic victory, see *Vandersloot v. The Foundation for National Progress*, 7th District Court for Bonneville County, Idaho, Case No. CV-2013-532 (granting summary judgment for journalist organization defamation defendant after two years of litigation and \$2.5 million in defense costs, but declining to award any attorneys’ fees or sanctions); see also **Exhibit 1**, Monika Bauerlein and Clara Jeffrey, *We Were Sued by a Billionaire Political Donor. We Won. Here’s What Happened*, MOTHER JONES (Oct. 8, 2015), available at: <<http://www.motherjones.com/media/2015/10/mother-jones-vandersloot-melaleuca-lawsuit>> (last visited November 9, 2015).

these are nothing more than empty words, as he neither provides the basis for his “dispute” nor any countervailing evidence. (See Opposition at 3.)

An Anti-SLAPP motion is treated as a motion for summary judgment, and simply making a flat denial of a factual assertion supported by evidence has no effect. See *Stubbs v. Strickland*, 297 P.3d 326, 329 (Nev. 2013); see also *John v. Douglas County Sch. Dist.*, 125 Nev. 746, 753-54 (Nev. 2009) (stating that “the nonmoving party” to an Anti-SLAPP motion “must provide more than general allegations and conclusions; it must submit **specific factual evidence**”). Bilzerian may insist that his public figure status is irrelevant to this case,⁶ but not only is he mistaken, he fails to refute TMZ’s facts establishing him as a public figure. With his status unrebutted (and therefore conclusively established), Bilzerian must overcome the *New York Times v. Sullivan* “actual malice” standard if he has any hope to prevail, something he cannot do. Since he could not prevail even were he a private figure, he most certainly cannot prevail under *Sullivan*’s exacting standard. See *Miller v. Jones*, 114 Nev. 1291, 1298 (Nev. 1998).

As initially explained in the Motion, TMZ’s article is a good faith “[c]ommunication made in direct connection with an issue of public interest in a place open to the public or in a public forum.” NRS 41.637(4). The article discusses (1) a lawsuit (2) filed by a famous person known for, among other things, claiming to have sex with scores of women (3) alleging that a statement claiming the public figure gave a woman chlamydia following a sexual encounter was defamatory, when (4) the alleged encounter took place immediately following the **public figure’s presidential campaign kickoff party**.

⁶ Bilzerian argues that “this is not a First Amendment rights case, but rather, a defamation per se case.” (Opposition at 3.) This argument is a non sequitur. Defamation cases are *per se* First Amendment cases. The only question is whether the First Amendment will abide the speech being punished. To argue otherwise is to deliberately ignore the majority of First Amendment jurisprudence over the past 50 years.

This is obviously a matter of public interest. In fact, the issue is not even remotely a close one, as the standard for “public interest” is well below what the facts show here. See *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1042 (2008) (finding that “an issue of public interest” under California’s Anti-SLAPP statute is “any issue in which the public is interested. In other words, the issue need not be ‘significant’ to be protected by the anti-SLAPP statute – it is enough that it is one in which the public takes an interest”) (emphasis added).⁷ The public is certainly interested in litigation that takes place in its courts, particularly when it involves a public figure. See, e.g., *Richmond Newspapers, Inc. v. Va.*, 448 U.S. 555, 559, 580 (1980); *Suen v. Las Vegas Sands, Inc.*, District Court, Clark County, Nevada, Case No. A493744-C (Apr. 16, 2013).

Even if Bilzerian were only a limited public figure, TMZ’s article is the very type of story Bilzerian is known for. Whether a self-declared presidential candidate and “sexual philanthropist” with millions of online followers spread a sexually transmitted disease at a campaign event is indeed something in which the public has an interest. See, e.g., *Seelig v. Infinity Broadcasting Corp.*, 97 Cal. App. 4th 798 (2002) (finding radio show mocking contestant on television show “Who Wants to Marry a Millionaire” was protected under California Anti-SLAPP statute); *Sipple v. Foundation for Nat. Progress* (71 Cal. App. 4th 226 (1999) (finding that article on nationally known political consultant’s custody battle was protected under California Anti-SLAPP statute). Having purposefully cultivated millions of followers by flaunting his out-sized lifestyle, Bilzerian has no cause to complain when those followers become curious as to all of his affairs.

⁷ Nevada Courts look to California courts in interpreting its Anti-SLAPP statute. See *John*, 125 Nev. at 756 (stating that “we consider California caselaw because California’s anti-SLAPP statute is similar in purpose and language to Nevada’s anti-SLAPP statute”).

Bilzerian also asserts that the NRS 41.660 does not apply because TMZ did not write its article in good faith. He claims that TMZ knew that the statement was false when it published the story. In what proves to be the overriding theme of his opposition, Bilzerian provides no evidence to establish the falsity of the article, much less TMZ's alleged knowledge of falsity. He just says the words – unsupported by even an affidavit – expecting the Court to accept his unsupported assertions and move on. By failing to proffer any competent evidence in support of his bare assertions, the first prong of the Anti-SLAPP statute stands un rebutted and is deemed satisfied. See *John*, 125 Nev. at 762 (finding that SLAPP plaintiff failing to provide “any evidence that the communications were untruthful or made with knowledge of falsehood,” and merely “disagree[ing] in narrative form with the DCSD’s credible evidence” was insufficient to oppose Anti-SLAPP motion).

TMZ has never claimed to know whether Bilzerian has chlamydia or not. TMZ only reported that Bilzerian filed a lawsuit over a claim that he gave a woman chlamydia. TMZ’s article is not only indisputably true, it also sets forth Bilzerian’s position that the chlamydia claim is false. As to TMZ, the truth of the “chlamydia” story is legally irrelevant. But even assuming its accuracy was relevant, Bilzerian has notably failed to come forward with any evidence to demonstrate its alleged falsity, such as providing evidence from a medical provider that he was free from chlamydia at the relevant time. Nevertheless, for TMZ to report that Bilzerian filed a lawsuit over the statement is no more defamatory than Bilzerian’s own attorneys asserting that Bilzerian denies the statement.

And while Bilzerian reluctantly concedes that TMZ’s website is a public forum (Opposition at 11-12), some further discussion of this issue is necessary to underscore the nature of Bilzerian’s attempted censorship. Bilzerian is

attempting to use the litigation process to ensure that no one discusses his lawsuit against The Dirty except his own public relations staff. But it is well-established that “legal proceedings and particularly trials are inherently public affairs.” *Richmond Newspapers*, 448 U.S. at 559, 580 (1980). The public has an inherent interest in knowing about this litigation, and the press plays an important role in this process by serving as the public’s eyes and ears. As this very court has held: “*What better way to demonstrate the public that its courts are fair and just than to say to the public, ‘come and view the proceedings yourself and judge for yourself?’*” *Suen v. Sands*, Case No. A493744-C, at 8 (Bare, J.). Bilzerian would turn this logic on its head to state “*what better way to demonstrate to the public that its courts are fair and just than to let Dan Bilzerian provide them with his version, and only his version, of the story?*”

The article is clearly a protected communication under Nevada’s Anti-SLAPP statute, and Bilzerian failed to meet his burden of showing a probability of prevailing on the merits of his defamation claim.

2.3 Bilzerian Has Provided No Evidence Showing a Likelihood of Prevailing on the Merits of His Defamation Claim

While none of the arguments in Bilzerian’s Opposition are meritorious, it is in Section C(3) where it becomes abundantly clear that Bilzerian misconprehends his burden.⁸ A SLAPP plaintiff must make a *prima facie* **evidentiary showing** that he has a probability of prevailing on the merits of his claims. In Senate Bill 444, the legislature pointed litigants to the precise body of case law that describes what *prima facie* means in this context:

⁸ Bilzerian’s disregard of this standard is inexcusable. The statute’s language is clear, TMZ’s Motion exhaustively lays out a SLAPP plaintiff’s burden under Nevada’s statute, and even Bilzerian’s Opposition pays lip service to the relevant legal standard (aside from citing to an older version of the statute) before otherwise ignoring it entirely.

1 “the Legislature intends that in determining whether the plaintiff
2 ‘has demonstrated with prima facie evidence a probability of
3 prevailing on the claim’ the plaintiff must meet the same burden of
4 proof that a plaintiff has been required to meet pursuant to
5 California’s Anti-Strategic Lawsuits Against Public Participation law
6 as of the effective date of this act.”

7 S.B. 444, 2015 Leg. Sess., 78th Sess. § 12.5(2) (Nev. 2015) (attached as Exhibit 15 to
8 the Anti-SLAPP Motion).

9 That California authority requires significantly more than the type of
10 unsupported narrative Bilzerian relies on here, holding that **“the plaintiff ‘must
11 demonstrate that the complaint is both legally sufficient and supported by a
12 sufficient prima facie showing of facts to sustain a favorable judgment if the
13 evidence submitted by the plaintiff is credited.’”** *Burrill v. Nair*, 217 Cal. App. 4th
14 357, 379 (Cal. App. 3d Dist. 2013) (citing *Oasis West Realty, LLC v. Goldman*, 51
15 Cal. 4th 811, 820 (Cal. 2011) (emphasis added). Mere assertions and
16 unsupported narrative simply will not suffice. See *John*, 125 Nev. at 753-54.

17 Bilzerian mistakenly argues that the Court is required to accept the
18 allegations in his Complaint as true. He writes: “Plaintiff has alleged that TMZ
19 published a false and defamatory statement,” that “Plaintiff has not and never
20 had the sexually-transmitted disease,” and that “TMZ never investigated this
21 matter before making its publication and either knew or should have known that
22 the defamatory statements were not true prior to publishing them.” (Opposition
23 at 13.) Again, this is all irrelevant, but even if it were not, Bilzerian provides no
24 evidence to support any of these positions.

25 Bilzerian asserts – without legal citation, supporting facts or argument –
26 that TMZ’s “publication . . . was unprivileged.” This is insufficient. Bilzerian must
27 provide **evidence** to support his claim. Yet, he proceeds as if this burden does
not exist. For this reason alone, which amounts to a complete failure to oppose
TMZ’s Motion, the Court must grant the Motion and dismiss Bilzerian’s claims.

1 See *Francis v. Wynn Las Vegas, LLC*, 262 P.3d 705, 715 (Nev. 2011) (affirming
2 grant of summary judgment when non-movant failed to provide any “contrary
3 evidence” provided in movant’s motion “that created genuine issues of
4 material fact”).

5 Even assuming, contrary to fact, that Bilzerian’s arguments were
6 supported by actual admissible evidence, this would still not salvage his claims
7 against TMZ. TMZ’s article is a fair report of a judicial proceeding, namely the
8 lawsuit Bilzerian filed against The Dirty. As such, TMZ’s publication of the article is
9 thus absolutely privileged. See *Sahara Gaming Corp. v. Culinary Workers Union*
10 *Local 226*, 115 Nev. 212 (Nev. 1999); see also *Circus Circus Hotels, Inc. v.*
11 *Witherspoon*, 657 P.2d 101, 105 (Nev. 1983). TMZ became aware of Bilzerian’s
12 lawsuit, observed that it was vague as to the precise allegedly defamatory
13 statements, investigated the statements Bilzerian was suing on, and then
14 accurately reported on the lawsuit to the public. The facts establishing privilege
15 are clear, and reduce to the following: (i) Bilzerian sued because someone
16 claimed he had chlamydia; and (ii) TMZ reported that Bilzerian sued because
17 someone claimed he had chlamydia. This is a quintessential example of a fair
18 report privilege in action.

19 Bilzerian cannot impose defamation liability on a media outlet for simply
20 doing its job in reporting on a lawsuit. Bilzerian’s argument in opposition to this
21 insurmountable legal hurdle is that TMZ’s article is not a fair report because it
22 went beyond providing a verbatim recitation of the allegations in Bilzerian’s
23 complaint, and recited the allegedly defamatory statements. This never has
24 been, and likely never will be, the standard for the fair report privilege.⁹
25

26 ⁹ Bilzerian appears to simultaneously complain both that TMZ did not do a full investigation, but
27 also that TMZ did a full investigation. He cannot have it both ways.

1 And even if, contrary to fact, TMZ's article went beyond the boundaries of
2 the fair report privilege, Bilzerian is a public figure who must demonstrate actual
3 malice to prevail on a defamation claim. See *New York Times Co. v. Sullivan*,
4 376 U.S. 254 (1964) (holding that a public figure defamation plaintiff must show
5 that the defendant acted with "actual malice," i.e., affirmative knowledge of
6 the statement's falsity or "reckless disregard" for the truth of the statement).

7 All of this authority was available to Bilzerian when he filed his Opposition,
8 and it is telling that he chose to completely ignore it. He claims that "whether or
9 not Plaintiff is a public figure is irrelevant to this Court's inquiry in deciding
10 whether Plaintiff has a valid claim for relief for defamation per se" because
11 "being a public figure and actual malice are not evident in any of these
12 elements" for defamation under Nevada law. (Opposition at 15.) This is simply
13 and completely wrong. Actual malice is a **constitutional requirement**
14 established and reaffirmed over and over again by both the Supreme Court of
15 the United States and the Nevada Supreme Court. See *Sullivan*, 376 U.S. at 279;
16 see also *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); and see *Pegasus v.*
17 *Reno Newspapers, Inc.*, 118 Nev. 706, 719 (Nev. 2002). It is indefensible to claim
18 that it does not apply here.

19 Bilzerian then makes a number of assertions, again unsupported by
20 evidence, which he claims show TMZ's *actual malice*. For example, Bilzerian
21 presents the mere allegations of his own Complaint as evidence establishing
22 that "TMZ has a history of targeting the Plaintiff in its various media."
23 (Opposition at 15.) Similarly, Bilzerian also asserts, once again without support,
24 that TMZ "failed to investigate and recklessly, and maliciously, published the
25 defamatory article." (*Id.*) These assertions are neither evidence nor a proper
26 response to an Anti-SLAPP motion. In the context of responding to an Anti-SLAPP
27

1 motion, factual assertions *must* be supported by **evidence**, or they are
2 disregarded.

3 Bilzerian failed to establish actual malice. He has done nothing to show
4 the falsity of TMZ's statements, nor has he has done anything to show that TMZ
5 knew or should have known its statements were false.¹⁰ His Opposition is
6 premised on precisely the sort of "general allegations and conclusions" that
7 have long been held insufficient to withstand summary judgment. *Pegasus*, 118
8 Nev. at 713. By failing to submit *any* evidence, Bilzerian has not raised even the
9 faintest possibility that he might prevail on the merits of his defamation claim.

10 **2.4 It is Too Late for Bilzerian to Request Discovery**

11 At several points in his opposition, Bilzerian claims that he will be able to
12 prove his allegations during the course of discovery. In fact, the entire basis for
13 Bilzerian asserting that he has met his burden under the Anti-SLAPP statute's
14 second prong is the assertion that "since Plaintiff, at this stage, believes that all
15 of the allegations set forth in the First Amended Complaint are true and will be
16 proven through discovery, Plaintiff has demonstrated, by clear and convincing
17 evidence, a probability of prevailing" (Opposition at 13.)

18 But this is not how Nevada's Anti-SLAPP statute works. The Anti-SLAPP
19 statute expressly stays all discovery. Indeed, its purpose is to require a SLAPP
20 plaintiff to make an evidentiary showing that his claims have merit **before**
21 burdening the defendant with discovery. See NRS 41.660(3)(e). Bilzerian cannot
22 rely on speculative claims of what he might be able to prove once he deposes
23 TMZ. He must show these things *now*. See *John*, 125 Nev. at 753-54.

24 There is a procedure for a plaintiff, upon a proper showing, to conduct
25 **limited** discovery in order to oppose an Anti-SLAPP motion. (See NRS 41.660(4);

26 ¹⁰ Again, they were not, since TMZ did not report that Bilzerian has the sexually transmitted
27 disease, but merely that he sued over an accusation that he has it. But, for the sake of
argument, let us presume that TMZ cooked up the chlamydia story out of whole cloth.

1 see also Exhibit 15 to Anti-SLAPP Motion.) Bilzerian failed to avail himself of that
2 opportunity. The 2015 amendment to the statute provides that:

3 [u]pon a showing by a party that information necessary to meet or
4 oppose the burden pursuant to paragraph b of subsection 3 is in
5 the possession of another party or a third party and is not
6 reasonably available without discovery, the court shall allow limited
7 discovery for the purpose of ascertaining such information.

8 (NRS 41.660(4); Exhibit 15 to Anti-SLAPP Motion.) This request that had to be
9 made before opposing the Anti-SLAPP motion. See *Tuchshner Development*
10 *Enterprises, Inc. v. San Diego Unified Port Dist.*, 106 Cal. App. 4th 1219, 1248
11 (2003) (finding that a request for discovery under similar provision in California
12 Anti-SLAPP statute “requires **both** a timely motion and a showing of good cause.
13 Absent either, the request must fail”) (emphasis added). Had Bilzerian not
14 waived this opportunity, it would still be of no benefit. Any request would have
15 been futile, as he would have been unable to demonstrate good cause.

16 To avail himself of the Anti-SLAPP statute’s discovery procedure, Bilzerian
17 would have had to show that TMZ or a third party actually possessed specific
18 relevant evidence necessary to oppose TMZ’s Motion. See, e.g., *Schroeder v.*
19 *Irvine City Council*, 97 Cal. App. 4th 174, 191 (2002) (good cause to allow SLAPP
20 discovery requires that the plaintiff show that evidence needed to support his
21 claims is neither “readily available from other sources” nor “irrelevant as a
22 matter of substantive law”). Bilzerian chose not to invoke that procedure.
23 Instead, he doubled down on the unsupported allegations of his Complaint.

24 Even had Bilzerian requested discovery, he would not have been entitled
25 to it on the issue of *actual malice*. Once again, Nevada looks to California case
26 law to provide guidance on the scope and procedure of permissible discovery
27 in Anti-SLAPP proceedings. That body of law establishes that a plaintiff must
show that he can establish all the elements of his claim *other than actual malice*

1 before a court will permit Anti-SLAPP discovery on that issue. Indeed,
 2 “permitting discovery on the issue of actual malice before first determining, after
 3 briefing and argument, whether the plaintiffs had a reasonable probability of
 4 establishing the other elements of their libel cause of action [is an] abuse of
 5 discretion.” *Garment Workers Center v. Superior Court*, 117 Cal. App. 4th 1156,
 6 1159 (2004); see also *Paterno v. Superior Court*, 163 Cal. App. 4th 1342, 1351
 7 (2008) (finding it was error for trial court to permit discovery on the issue of actual
 8 malice when plaintiff “ha[d] not introduced sufficient evidence to establish a
 9 prima facie case of falsity or unprivileged statements”).

10 Bilzerian failed to provide any evidence establishing the falsity of TMZ’s
 11 article, or suggesting that TMZ’s article is not privileged as a fair report, and thus
 12 failed to make a prime facie showing as to these elements. Thus, even had he
 13 timely requested limited discovery under Nevada’s Anti-SLAPP statute, he would
 14 have been precluded from conducting discovery on the issue of actual malice.

15 **2.5 Aside From Referring to the Wrong Statute, Bilzerian’s Argument that**
 16 **TMZ’s Anti-SLAPP Motion is Moot is Nonsensical**

17 Bilzerian makes the unfounded argument that since TMZ failed to compel
 18 the Court to rule on its Anti-SLAPP Motion within seven judicial days, TMZ’s Motion
 19 is now moot. This argument is completely frivolous.

20 First, Bilzerian is citing to the wrong statute. The 7-day period was
 21 amended in 2015 to 20 judicial days. See NRS 41.660(f). Bilzerian has no excuse
 22 for his ignorance of this timing, as TMZ expressly included it with its motion. (See
 23 Exhibit 15 to Anti-SLAPP Motion.)

24 By the terms of the statute, “the court shall . . . [r]ule on the motion” by
 25 November 10, 2015, more than two weeks after Bilzerian filed his opposition. The
 26 Court is not strictly bound by this timeline, however. NRS 41.660(6) provides that
 27 “[t]he court shall modify any deadlines pursuant to this section or any other

deadlines relating to a complaint filed pursuant to this section if such modification would serve the interests of justice." By calendaring the hearing date for its Anti-SLAPP motion as beyond the 20-day period prescribed by the statute, TMZ presumes that the Court saw fit to extend its deadline, as it was absolutely entitled to do. Bilzerian, however, appears to take the position that by scheduling the motion beyond the 20-day period, the Court implicitly denied the motion without comment.

Bilzerian's argument is beside the point. The statute does not place any burden on a SLAPP defendant to ensure that the court rules on a motion within a specific time. TMZ's Motion is not moot, and should be decided in TMZ's favor. But if a ruling is actually required by November 10th as Bilzerian claims, TMZ is not opposed to the Court ruling by that date, particularly as the issues presented here are sufficiently straight-forward to warrant a decision without a hearing.¹¹

3.0 CONCLUSION

Bilzerian claims that TMZ's article is not on a matter of public interest without challenging any of the evidence establishing his general nationwide celebrity. He claims that he has met his evidentiary burden under the Anti-SLAPP statute, while providing no evidence. His opposition to TMZ's Anti-SLAPP opposition is based on willful ignorance or deliberate disregard of Nevada's Anti-SLAPP statute. He has failed at every level to meaningfully respond to TMZ's Motion, and cannot possibly survive dismissal under NRS 41.660.

For the foregoing reasons, the Court should grant TMZ's Anti-SLAPP Motion, dismiss all of Bilzerian's claims against TMZ with prejudice, award TMZ its reasonable attorneys' fees and costs incurred in defending itself against this

¹¹ To the extent that the court believes that TMZ should make such a request, TMZ hereby makes that request, but trusts the Court to manage its own deadlines under NRS 41.660(6).

meritless suit, and award TMZ \$10,000 in statutory damages under NRS 41.670(1)(b).

Dated: November 9, 2015.

Respectfully Submitted,

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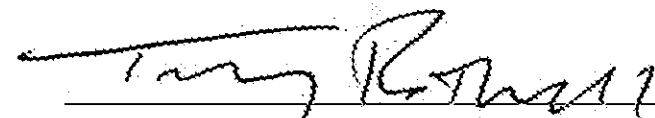
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 9, 2015, I served a true and correct copy of the foregoing document via electronic mail and U.S. Mail to:

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Respectfully Submitted



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EXHIBIT 1

Monika Bauerlein and Clara Jeffrey,

We Were Sued by a Billionaire
Political Donor. We Won.
Here's What Happened.

MOTHER JONES (Oct. 8, 2015)

We Were Sued by a Billionaire Political Donor. We Won. Here's What Happened.

The backstory of the massive lawsuit against Mother Jones.
By [Monika Bauerlein](#) and [Clara Jeffery](#) | Thu Oct. 8, 2015 3:51 PM EDT

Title Image:

October 8, 2015

We Were Sued by a Billionaire Political Donor. We Won. Here's What Happened.

The backstory of the massive lawsuit against Mother Jones. By Monika Bauerlein and Clara Jeffery

Social Title:

A billionaire political donor sued Mother Jones. We won. Here's what happened.

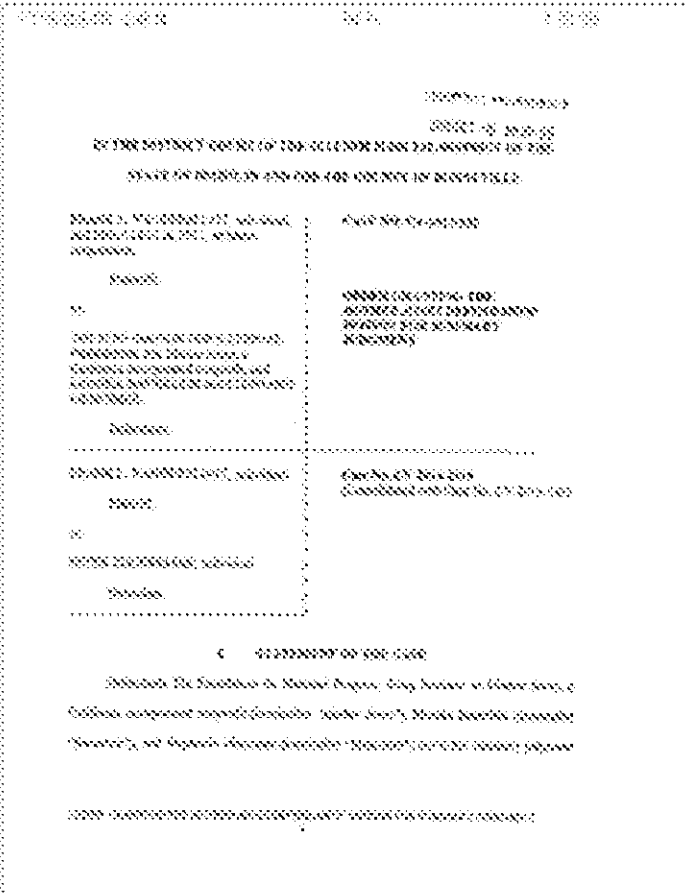
Today we are happy to announce a monumental legal victory for *Mother Jones*: A judge in Idaho has ruled in our favor on all claims in a defamation case filed by a major Republican donor, Frank VanderSloot, and his company, Melaleuca Inc. In a [decision](#) [1] issued Tuesday, the court found that *Mother Jones* did not defame VanderSloot or Melaleuca because "all of the statements at issue are non-actionable truth or substantial truth." The court also found that the statements were protected as fair comment under the First Amendment.

This is the culmination of a lengthy, expensive legal saga that began three years ago when the 2012 presidential primaries were in full swing. On February 6, 2012, we [published](#) [2] an article about VanderSloot after it emerged that his company, Melaleuca, and its subsidiaries had given \$1 million to Mitt Romney's super-PAC. The piece noted that VanderSloot had gone to unusual lengths to oppose gay rights in Idaho, and that Melaleuca had run into trouble with regulators.

VanderSloot's lawyers sent us a letter complaining about the article. We reviewed their concerns and posted a correction about a few details. So far, not an uncommon scenario; it's something every newsroom deals with from time to time.

But that September, we broke the story of Romney's 47 percent comments, which some have argued cost the GOP the White House. Four months later, VanderSloot—who was also one of Gov. Romney's national finance chairs—filed a defamation lawsuit against *Mother Jones* as well as Stephanie Mencimer, the reporter of the article, and Monika personally (for her tweet about the piece).

People have asked us whether we think these two things were connected, and the honest answer is that we have no idea. What we do know is that the take-no-prisoners legal assault from VanderSloot and Melaleuca has consumed a good part of the past two and a half years and has cost millions (yes, millions) in legal fees. In the course of the litigation, VanderSloot sued a former small-town Idaho newspaper reporter whose confrontation with him we mentioned in our article. His lawyers asked a judge to let them rifle through the internal records of the Obama campaign. They deposed a representative of the campaign in pursuit of a baseless theory that *Mother Jones* conspired with Obama's team to defame VanderSloot. They tried to get one of our lawyers



[1]
[Read the full ruling here.](#) [1]

disqualified because his firm had once done work for Melaleuca. They intrusively questioned our employees — our reporter was grilled about whether she had attended a Super Bowl party the night she finalized the article.

This was not a dispute over a few words. It was a push, by a superrich businessman and donor, to wipe out news coverage that he disapproved of.

Legally, what we fought over was what, precisely, the terms "bashing" and "outing" meant in the context of our article. ([Read the decision for yourself](#) [1].) But make no mistake: This was not a dispute over a few words. It was a push, by a superrich businessman and donor, to wipe out news coverage that he disapproved of. Had he been successful, it would have been a chilling indicator that the 0.01 percent can control not only the financing of political campaigns, but also media coverage of those campaigns.

Throughout this lawsuit, VanderSloot appeared to be engaged in rewriting his own history of opposing the expansion of civil rights to LGBT people. His complaint focused on two things: He asserted that we defamed him by "falsely stating that Mr. VanderSloot 'bashed' and 'publicly out[ed] a reporter.'" He also claimed that Monika's tweet about the article defamed him by referring to "gay-bashing."

In a way, there was something ironically hopeful about this: A conservative Republican — someone who not long ago was quoted saying it was "child abuse" to put a film about gay parents on public television — had apparently come to believe that to call him a gay-basher was so damaging to his reputation that he must fight the argument at virtually any cost. It's a sign of just how far America has moved in just a few years that this entire case felt like something from a time capsule.

To be sure, VanderSloot has much at stake in reworking his public profile. He's now widely recognized as one of the megadonors who will help determine who wins the 2016 GOP nomination. He has [vowed](#) [3] to be even more "financially active" than he was in 2012, when he raised between \$2 million and \$5 million for Romney. In burnishing his image as a national figure, he might like people to forget about certain aspects of his past, such as the fact that he financed an ad campaign to amend the state constitution to ban marriage equality. (One of the ads pointed out that such an amendment would also prevent marriages between "a person and an animal.")

"I have learned a great deal about the debate of homosexuality and sexual orientation," he wrote in [an op-ed](#) [4] this past February. "I believe that gay people should have the same freedoms and rights as any other individual."

That's a fascinating story. But it's also a frightening one. If VanderSloot had prevailed, he would have proven that with enough money to throw at lawyers, you can wipe the slate. You can go after those who document the past and the present, and if you can't make them cry "uncle" you can at least append a legal asterisk to their work forevermore.

That's why we've pushed back. Frank VanderSloot may have evolved along with America. We respect that. But it doesn't erase the past.

Perhaps fittingly, a major element in this case about the right of the press to afflict the powerful was a piece of investigative journalism. In 2005, a young reporter at the 26,000-circulation *Post Register* in Idaho Falls got a tip about a pedophile in the local Boy Scouts. The reporter, Peter Zuckerman, dug into the story and discovered legal documents indicating that scout leaders had received multiple warnings about a camp employee but had not removed him. The documents also indicated that the man's bishop in the Mormon Church had been warned about him as early as 1988 and had sent him to counseling, but had told the Scouts years later that he saw no reason the man should not be a camp leader. In one case, according to a court [decision](#) [5], a 10-year-old's parents told scout leaders they were concerned about the man's behavior. When he was arrested the following year, scout leaders learned that he had molested the child, but decided not to tell the parents.

The series made a huge splash. It won a string of prestigious journalism [awards](#) [6]. It became the subject of a PBS [documentary](#) [7]. But there were also angry phone calls to the paper. Advertisers pulled out. And Frank VanderSloot got involved.

VanderSloot is reportedly the [richest man in Idaho](#) [8], and among the most powerful. His company, Melaleuca, sells tea-tree oil supplements and personal-care products via an Avon-like system of individual marketers who recruit others to sell. His net worth has been estimated as \$1.2 billion, and for decades he has been a major power in Idaho politics, especially on LGBT issues. He financed an ad campaign that helped defeat a state Supreme Court justice on grounds that she might vote to legalize same-sex marriage. His wife [gave](#) [9] \$100,000 to the campaign to pass the anti-

gay-marriage Proposition 8 in California.

Throughout this lawsuit, VanderSloot appeared to be engaged in rewriting his own history of opposing the expansion of civil rights to LGBT people.

In the late 1990s, he helped pay for billboards across the state [10] protesting Idaho public television's plan to air a film [11] intended to teach kids respect for different kinds of families. The government, he said, should not "be spending our tax dollars to bring the homosexual lifestyle into the classroom and introduce it to our children as being normal, right, acceptable, and good and an appropriate lifestyle for them or anyone else to be living."

VanderSloot has long been active in the Mormon Church, and he was a strong supporter of the Boy Scouts. When the *Post Register's* series ran, he swung into action. He took out full-page ads [12] in the paper attacking the investigation and Peter Zuckerman, the 26-year-old lead reporter on the series. One of the ads noted that Zuckerman had written an article about his sexual orientation for a journalism site while on a fellowship in Florida. The ad said he had declared "that he is homosexual and admitted that it is very difficult for him to be objective on things he feels strongly about."

"Much has been said on a local radio station and throughout the community," VanderSloot's ad continued, "speculating that the Boy Scouts' position of not letting gay men be Scout Leaders,

and the LDS Church's position that marriage should be between a man and a woman may have caused Zuckerman to attack the scouts and the LDS Church through his journalism."

"We think it would be very unfair for anyone to conclude that is what is behind Zuckerman's motives," the ad continued. "It would be wrong to do. The only known facts are, that for whatever reason, Zuckerman chose to weave a story that unfairly, and without merit, paints scout leaders and church leaders to appear unscrupulous, and blame[s] them for the molestation of little children." Decoding the message between the lines is left as an exercise for the reader.

The ads had a dramatic impact. Though Zuckerman had been open about his sexual orientation before he came to Idaho, his editor Dean Miller later wrote [14] that in Idaho Falls the reporter "was not 'out' to anyone but family, a few colleagues at the paper (including me), and his close friends." Zuckerman had already gotten some negative reactions after a local talk show with a tiny audience discussed his sexual orientation. But according to Miller's article and Zuckerman's testimony in the litigation, things got much worse after VanderSloot's ads. "Strangers started ringing Peter's doorbell at night," Miller said. "Despite the harassment, Peter kept coming to work and chasing down leads on other pedophiles in the Grand Teton Council. I spoke at his church one Sunday and meant it when I said that I hope my son grows into as much of a man as Peter had." (Later that year, Zuckerman moved to Portland, where he took a job with the *Oregonian* while his partner was elected [15] the city's first openly gay mayor.)

Fast forward to 2012. Miller's article about the Boy Scouts controversy was one of the stories that our reporter Stephanie Mencimer found after VanderSloot's name popped up in the January campaign finance filings. It was the first presidential election of the dark-money era, and *Mother Jones'* politics team had zeroed in on the huge new super-PACs being created to pump unrestricted money into campaigns of both parties. VanderSloot stood out because Melaleuca was among the top contributors to Restore Our Future [16], the super-PAC supporting Romney. Mencimer wrote an article about him that included a few paragraphs on his history of anti-gay-rights activism and his run-in with the *Post Register*.

Those paragraphs are what VanderSloot and Melaleuca sued us over. They filed the suit in

Bonneville County, Idaho, and asked for damages of up to \$74,999—exactly \$1 under the amount at which the lawsuit could have been removed to federal court. That ensured the case would be decided by jurors from the community where his company is the biggest employer and the sponsor of everything from the minor league ballpark to the Fourth of July fireworks.

Since then, *Mother Jones* and our insurance company have had to spend at least \$2.5 million defending ourselves. That's money we can't get back, since Idaho doesn't have an anti-SLAPP statute that might open the door for recovering attorney's fees in a case like this. We also paid for the defense of Zuckerman, whom VanderSloot sued halfway through the case for talking to Rachel Maddow about his experience. (VanderSloot did not sue MSNBC or its deep-pocketed parent company, Comcast. Make of that what you will.)

Here's a moment that gives you a sense of what it was like. At one point, Zuckerman was subjected to roughly 10 hours of grilling by VanderSloot's lawyers about every detail of the controversy in Idaho Falls, including the breakup with his boyfriend of five years. (VanderSloot also threatened to sue the ex-boyfriend, backing off only after he recanted statements he'd made about the Boy Scouts episode.) As the lawyers kept probing, Zuckerman broke down and cried as he testified that the time after the ads appeared was one of the darkest periods of his life.

VanderSloot, who had flown to Portland for the occasion, sternly looked on. (His lawsuit against Zuckerman is ongoing.)

And that wasn't the end of it. VanderSloot's legal team subpoenaed the Obama campaign, which had run ads naming him as a major Republican donor. Apparently they believed we had somehow fed the campaign that information—never mind that our article, and the Federal Election Commission data that prompted it—was on the internet for anyone to read.

When officials from the Obama campaign refused to turn over their records—offering to confirm under oath that there had been no communication between them and *Mother Jones*—VanderSloot's lawyers dragged them into court, resulting in the spectacle of a major GOP donor seeking access to the Democratic campaign's emails. His lawyers did the same thing to a political researcher who had gathered information on VanderSloot and who also had no connection to *Mother Jones*.

This kind of legal onslaught is enormously taxing. Last spring, Lowell Bergman, the legendary *60 Minutes* producer (whose story of exposing Big Tobacco was chronicled in the Oscar-nominated film *The Insider*), talked about a "chill in the air [17]" as investigative reporters confront billionaires who can hurt a news organization profoundly whether or not they win in court: "There are individuals and institutions with very deep pockets and unaccountable private power who don't like the way we report. One example is a case involving *Mother Jones*...A superrich plaintiff is spending millions of dollars while he bleeds the magazine and ties up its staff."

Litigation like this, Bergman said, is "being used to tame the press, to cause publishers and broadcasters to decide whether to stand up or stand down, to self-censor."

Over the past three years, we've had to face that decision over and over again. Should we just cave in—retract our article or let VanderSloot get a judgment against us—and make this all go away? It wasn't an easy choice, but we decided to fight back. Because it's not just about us. It's about everyone who relies on *Mother Jones* to report the facts as we find them. It's about the Fourth Estate's check on those who would use their outsized influence and ability to finance political campaigns to control the direction of the country. It's about making sure that in a time when media is

Mother Jones

**We stood up to
a billionaire
political donor
with a record
of intimidating
journalists.**

AND WE WON.

**But our legal
defense has put
a big hole in
our budget.**

**Please make a
tax-deductible
donation today
to help us cover
the \$650,000
in out-of-pocket
legal fees
we're left with.**

DONATE

[13]

always under pressure to buckle to politicians or big-money interests, you can trust that someone will stand up and go after the truth.

And it's about one more thing. Just a few years ago, no one thought that America could move so far, so fast, toward respecting the rights of gays and lesbians. No one thought that by 2015 same-sex couples would have a constitutional right to marry or, for that matter, that the Boy Scouts would rescind their ban against gay troop leaders and the Mormon Church would back them up. That happened because a lot of people stood up to threats and discrimination. They came out to their families and communities. They declared their love for everyone to see. They didn't let themselves be intimidated. Nor will we.

Postscript: In her decision [1] Tuesday, the district court judge found in our favor on every single claim VanderSloot had made. She also included a passage expressing her own opinion of Mother Jones, and of political news coverage in general. For his part, Vandersloot issued a statement saying he had been "absolutely vindicated" and announced that he was setting up a \$1 million fund to pay the legal expenses of people wanting to sue Mother Jones or other members of the "liberal press." We'll leave it with the reaction [18] from our lawyer, James Chadwick [19]: This was "a little like the LA Clippers claiming they won the NBA Finals. I think everyone can see what's going on here."

Source URL: <http://www.motherjones.com/media/2015/10/mother-jones-vandersloot-melaleuca-lawsuit>

Links:

- [1] <http://www.motherjones.com/documents/2451499-vanderslootdecision>
- [2] <http://www.motherjones.com/politics/2012/02/mitt-romney-melaleuca-frank-vandersloot>
- [3] <http://www.washingtontimes.com/news/2015/sep/9/republican-presidential-candidates-court-idahos-me/?page=all>
- [4] <http://www.idahostatesman.com/2015/02/01/3622190/gay-people-deserve-same-freedoms.html>
- [5] <http://www.motherjones.com/documents/2454070-melaleuca>
- [6] <http://www.postregister.com/story.php?accnum=1056-03102006&today=2006-03-10>
- [7] http://www.pbs.org/wnet/expose/expose_2007/episode215/
- [8] <http://www.vox.com/2014/8/1/5957119/whos-the-richest-person-in-your-state>
- [9] <http://projects.latimes.com/prop8/donation/6903/>
- [10] <http://www.pridedepot.com/?p=1415>
- [11] <http://groundspark.org/our-films-and-campaigns/elementary>
- [12] http://media.salon.com/media/pdf/2005_0605_ResponsibleJournalism.pdf
- [13] https://secure.motherjones.com/fnp/?action=SUBSCRIPTION&list_source=7H50RA1A&extra_don=1&abver=A
- [14] http://www.pbs.org/wnet/expose/expose_2007/episode215/essay.html
- [15] <http://www.advocate.com/news/2009/01/06/portland-gay-mayor-sam-adams-sworn>
- [16] <http://docquery.fec.gov/cgi-bin/forms/C00490045/763780/sa/ALL>
- [17] http://library.fora.tv/2015/04/25/Logan_Symposium_Introductory_Remarks
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