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DISTRICT COURT

CLARK COUNTY, NEVADA

DAN BRANDON BILZERIAN, an Individual

Plaintiff,

v.

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

**PLAINTIFF'S OPPOSITION TO TMZ
PRODUCTIONS, INC'S MOTION FOR
COSTS, FEES AND DAMAGES**

DATE OF HEARING: January 14, 2016
TIME OF HEARING: 9:00 a.m.

Plaintiff DAN BRANDON BILZERIAN ("Plaintiff"), by and through his attorneys of record, the law firm of Holley, Driggs, Walch, Fine, Wray, Puzey & Thompson, hereby files his Opposition to TMZ's Motion for Costs, Fees and Damages. This Opposition is based upon the Points and Authorities set forth below, the papers and pleadings on file herein, and any argument of counsel that the Court entertains on TMZ's Motion.

POINTS AND AUTHORITIES

I. INTRODUCTION

TMZ inexplicably attempts to mislead this Court in several key areas in an effort to try to recover a completely unreasonable sum of damages and fees from this Court. First, the purpose of the Anti-SLAPP laws are to discourage litigants from filing dilatory and vexatious litigation in

1 an effort to suppress First Amendment rights. While the Plaintiff's claims against TMZ were
 2 ultimately dismissed by this Court, there was no evidence presented to the Court that the Plaintiff
 3 pursued these claims with ill motive or for the purpose of suppressing TMZ's First Amendment
 4 rights to publish information. Plaintiff pursued the claim because TMZ published defamatory
 5 information about the Plaintiff. TMZ did not have to go the extra yard and actually disclose the
 6 disease that the Dirty specifically identified, but it did. While the Court ultimately found that the
 7 claims should be dismissed because TMZ simply re-published what the Dirty had already said,
 8 there was no evidence presented of any dilatory motive by the Plaintiff against TMZ, nor was
 9 there any dispute that TMZ actually published the defamatory statement. Thus, discretionary
 10 damages are not appropriate here.

11 Also, TMZ and its counsel make several inconsistent statements in support of their
 12 request for attorneys' fees that should preclude anything but a nominal award of fees should the
 13 Court determine that fees are warranted. On the one hand, counsel claims to be an expert in this
 14 field, helping the Nevada Legislature draft the current Anti-SLAPP statutes. But, a cursory
 15 review of the billing records show that over \$3,500 of actual fees, not the inflated fees sought in
 16 the Motion, was spent researching these same statutes that counsel claims to be an expert in.

17 Additionally, TMZ argues that it could not file the Anti-SLAPP Motion sooner than it did
 18 because, "it was not prepared to file its Anti-SLAPP motion within 20 days of service of
 19 Bilzerian's Amended Complaint." *See* Motion, pg.7, ll. 13-15. However, a cursory review of
 20 the pleadings in this case shows that Plaintiff's counsel gave TMZ an extension of time to
 21 respond to the Amended Complaint, as denoted in a joint stipulation to extend time filed in this
 22 Court on September 4, 2015 by TMZ's counsel. If TMZ needed more time and would have
 23 asked, counsel would have agreed to more time. However, another cursory review of the billing
 24 records provided by TMZ shows that counsel was working on the Anti-SLAPP Motion on
 25 September 3, 2015, prior to even asking counsel for an extension to file a response to the
 26 Amended Complaint. As the Court knows, pursuant to NRS 41.660 (3), the filing of a special
 27 motion to dismiss stays the rest of the proceedings, including discovery. Thus, had TMZ filed
 28 the Anti-SLAPP motion immediately, instead of inexplicably waiting until several weeks after it

1 answered the Amended Complaint, nothing else would have happened until the Anti-SLAPP
 2 Motion was decided. Thus, there would have been no fees expended by TMZ for answering the
 3 Complaint, attending the Early Case Conference, providing initial disclosures, or interjecting
 4 itself into the Protective Order pleadings between Plaintiff and the Dirty. Thus, any fees not
 5 dealing with the Anti-SLAPP Motion briefing and hearing should be denied for that reason.

6 **II. STATEMENT OF FACTS AND PROCEEDINGS**

7 Most of the facts of this case are not disputed, but the procedural history is important in
 8 light of what TMZ is not seeking compensation for. The Complaint in this case was filed on
 9 August 7, 2015 against the Dirty for defamation relating to publication of a false statement
 10 regarding Plaintiff transmitting a sexually-transmitted disease. On August 10, 2015, TMZ
 11 posted an article not just about the lawsuit being filed, but also specifically re-publishing the
 12 false, defamatory statement originally published by the Dirty. Plaintiff immediately filed an
 13 Amended Complaint, now bringing TMZ into the case as a party due to the re-publication of the
 14 specific defamatory statement about the specific disease allegedly transmitted by the Plaintiff.
 15 Notably, Plaintiff has not sued any other news organizations or websites that commented on this
 16 lawsuit because no other publisher has specifically identified the disease in question or re-
 17 published the defamatory statement. Plaintiff would submit that this clearly shows that there was
 18 no intent to suppress free speech in filing the instant action.

19 TMZ did not file the Anti-SLAPP Motion until October 12, 2015. In the interim, TMZ
 20 filed an Answer, attended the early case conference (without ever raising the Anti-Slapp issue or
 21 settlement), provided an initial disclosure of documents and witnesses, apparently spent hours
 22 and hours researching statutes that counsel now claims to have helped draft, and filed pleadings
 23 relating to Protective Order issues between Plaintiff and the Dirty that had nothing to do with
 24 TMZ. TMZ claims in the Motion that it could not file the Anti-SLAPP Motion sooner because it
 25 was not prepared, but that statement runs contrary to the other statements in the Motion,
 26 including counsel's representations about his expertise in this filed and the billing records that
 27 show that counsel began working on the Anti-SLAPP Motion on September 3, 2015, almost
 28 forty (40) days prior to its filing, and prior to TMZ requesting, and being granted, an extension of

time by the Plaintiff to respond to the Amended Complaint on September 4, 2015.

No mention of an Anti-SLAPP Motion was ever made during the correspondence relating to the extension to respond to the Amended Complaint, nor was the Motion discussed at the early case conference, which would not have happened had the Anti-SLAPP motion been filed in early September when TMZ's attorneys were working on it, per their billing records. Counsel did not call Plaintiff's counsel to confer about the Anti-SLAPP motion prior to spending the countless hours and fees researching and drafting it. Despite that, TMZ's counsel now comes to this Court seeking not just the actual fees allegedly expended, but additional "Loadstar" fees above and beyond what was billed to TMZ. Further, TMZ does not even bother articulating how these fees are reasonable or compliant with the other *Brunzell* factors that the Court needs to look at prior to making a fee award in this situation. Finally, TMZ has provided this Court with no evidence showing any actual damages, outside of attorneys' fees which are handled separately, or dilatory intent by Plaintiff that would entitle TMZ to statutory damages. Thus, TMZ's Motion should be denied.

III. LEGAL ARGUMENT

A. TMZ IS NOT ENTITLED TO STATUTORY DAMAGES

In the Motion, TMZ talks about "equity and deterrence" and the fact that the Plaintiff is a "multi-millionaire" and asks the Court to "level the playing field" by awarding statutory damages. *See* Motion, pg.12. First, TMZ has provided no evidence at any point in this proceeding that there is any conduct to deter. As noted, Plaintiff did not file this action against TMZ in any way to suppress First Amendment rights. The case was only amended to add TMZ once TMZ published the defamatory statement. While the Court disagreed that TMZ was a proper party, TMZ's argument that this, "was never a close case" is not accurate, and TMZ has provided this Court with no evidence that Plaintiff had any intent other than deter publication of defamatory statements that have harmed the Plaintiff and caused him damage. In the absence of some evidence of ill intent by the Plaintiff toward TMZ, there is no justifiable reason for this Court to award statutory damages.

...

1 The Legislature had an opportunity to make statutory damages mandatory as opposed to
 2 giving the courts discretion, and it chose not to do that. The Nevada legislature implemented this
 3 new language in the 2013 Legislative Session under bill SB 286. In reviewing the legislative
 4 history regarding the issue of statutory damages, it is clear that the standard is one of “frivolous
 5 or vexatious,” which per our Senators “makes a big difference.” *See* Minutes of the Senate
 6 Committee on Judiciary Seventy-Seventh Session March 28, 2013, a copy of which is attached
 7 hereto as **Exhibit “1”**. Moreover, the legislative history shows that the frivolous and vexatious
 8 standard is a difficult standard, which is not part of Nevada statute. In further discussion of the
 9 \$10,000 award, the Senators discussed the up to language, and as such that \$10,000 is the
 10 maximum, to the award. *See id.* Moreover, when discussing other states having the \$10,000
 11 award, it was noted that only Washington state has such provision, and that California, Oregon
 12 and Texas did not. *See id.* Interestingly, Mr. Randazza in his Report to Senate on proposed
 13 changes to Nevada’s Anti-Slapp Laws dated March 28, 2013 and presented at the Senate
 14 Committee on Judiciary on March 28, 2013 note that California and Washington are states with
 15 “robust Anti-Slapp statutes that protect a wide range of free speech,” and goes on to note that he
 16 advises clients to rely on California, Oregon, Washington and Texas statutes. *See id.* at Exhibit
 17 D.

18 This case is a classic example why courts should have discretion, because this is a case
 19 where TMZ, though ultimately dismissed out of the case, has failed to provide this Court with
 20 any evidence of ill intent to freeze free speech or censor TMZ with the filing of the Amended
 21 Complaint. Quite the contrary, as shown in the prior pleadings, Plaintiff only brought TMZ into
 22 the case after TMZ re-published the specific defamatory statement that gave rise to the claim
 23 against the Dirty. Because there is no ill intent, and because the Legislature has seen fit to give
 24 courts discretion on statutory damages, Plaintiff submits that this is a perfect example of a
 25 situation where the Court should exercise that discretion and deny the request for statutory
 26 damages.

27 Additionally, whatever money the Plaintiff does or does not have is irrelevant to the
 28 Court’s analysis as to damages. Again, TMZ is talking out of both sides of its mouth. If the

1 intent really is to deter vexatious litigation, which is clearly what the Legislature intended with
 2 the Anti-SLAPP statutes, then the wealth of the Plaintiff has no relevance to this Motion.
 3 Further, TMZ is clearly asking this Court to award additional sanctions for no other reason than
 4 because they could be “written off” by the Plaintiff. There is no competent evidence before this
 5 Court as to the actual wealth of the Plaintiff. Nor is there evidence before this Court that the
 6 Plaintiff will ultimately be responsible for any sanction awarded by this Court. The decision to
 7 bring TMZ into the case was a strategic, legal decision made by counsel. Whether or not any
 8 award is passed on to the Plaintiff directly has not been decided, but there certainly is no
 9 evidence that would support the bold assertion that “Mr. Bilzerian was trying to censor the
 10 press.” *See* Motion, pg. 13.

11 Bringing TMZ into this case was neither “blatantly frivolous” nor a decision made by the
 12 Plaintiff to try to censor TMZ. TMZ published a false statement about the Plaintiff that cause
 13 him harm and damage, and while the Court ultimately determined that TMZ was not a proper
 14 party to this action, there is no basis for statutory damages against the Plaintiff.

15 **B. TMZ’S FEES AND COSTS ARE NOT REASONABLE UNDER THE**
 16 **CIRCUMSTANCES**

17 As with much of the Motion, TMZ chose to emphasize one part of the statute while
 18 essentially ignoring the other half. NRS 41.670 does provide that the Court “shall” award fees
 19 and costs to a successful Anti-SLAPP movant, but that statute also provides that those fees and
 20 costs must be “reasonable.” *See* NEV. REV. STAT. §41.670. In this case, there is nothing
 21 reasonable about the fees sought by TMZ in this Motion.

22 First, if the Court takes time to go through and add up the time actually expended drafting
 23 and revising the Anti-SLAPP motion and reply, as well as reviewing Plaintiff’s Opposition, and
 24 all of the time all of the attorneys spent preparing for a hearing where one of them argued, is
 25 approximately \$12,663.50. *See* Motion, Exhibit 5. Even one case cited by TMZ in its Motion on
 26 page 5, *Wanland v. Law Offices of Mastagni, Holstedt & Chiurazzi*, holds that under the ANTI-
 27 SLAPP statutes, a defendant, such as TMZ, can only recover fees and costs associated with the
 28 motion, and not for fees and costs incurred in connection with the entire case. *Wanland v. Law*

1 *Offices of Mastagni, Holstedt & Chiurazzi*, 45 Cal.Rptr. 3d 633, 636 (Cal. Ct. App. 2006).
 2 Additionally, despite purportedly being an expert in this field and participating in the creation of
 3 the statutes, counsel for TMZ spent, again according to their billing records, approximately
 4 \$3,617 performing legal research on the Anti-SLAPP laws in this state. *Id.*¹ All of the other
 5 time expended by TMZ was spent on matters that could have, and should have, been unnecessary
 6 had it timely filed the Anti-SLAPP Motion early in the case.

7 TMZ argues that it could not file the motion sooner because it was not prepared, but its
 8 billing records suggest otherwise. On September 3, 2015, counsel was already looking at the
 9 issues for the Anti-SLAPP motion and beginning preparation of that motion. Shortly thereafter,
 10 TMZ asked Plaintiff for an extension of time to respond to the Amended Complaint, which was
 11 obviously granted by counsel. Given that counsel for TMZ is such an expert in this field, two
 12 weeks should have been plenty of time to file the Anti-SLAPP motion. Instead, TMZ chose to
 13 file an answer. The billing records are clear that counsel was working on the Anti-SLAPP
 14 motion and the answer simultaneously and there was no reason, other than churning attorneys'
 15 fees and costs, to file an answer, especially given that counsel had already agreed to an
 16 extension.

17 Then, the billing records also show that while counsel is still researching and working on
 18 the Anti-SLAPP motion, they were preparing for the early case conference and also preparing
 19 initial disclosures of documents and witnesses. Counsel appeared at the early case conference,
 20 but did not say anything about the Anti-SLAPP motion that their office had been preparing for
 21 several weeks at that point. Then, after the Anti-SLAPP Motion was filed, counsel for TMZ
 22 inexplicably decided to interject themselves into an unrelated dispute between Plaintiff and the
 23 Dirty relating to disclosure of communications between counsel regarding draft documents, none
 24 of which had anything to do with TMZ. Then, three lawyers billed to prepare for the hearing on
 25 the motion that only one of them argued, and only two attended the hearing.

26
 27 ¹ That is the cumulative total for legal research. Many of the entries are improperly redacted, as TMZ did not
 28 submit a Motion to Redact its exhibit pursuant to the Nevada Rules of Sealing and Redacting Court Records
 (“SRCR”).

1 Had TMZ filed the Anti-SLAPP motion in early September when they started working on
 2 it, there would have been no need for counsel to draft an answer, no need to appear at an early
 3 case conference (which would have been stayed under the statute), no need to disclose
 4 documents or witnesses, and certainly no need to interject itself in a dispute having nothing to do
 5 with TMZ. Counsel made a decision as to when to file the Anti-SLAPP motion, and that
 6 decision was clearly geared toward churning additional attorneys' fees out of the file before it
 7 filed a dispositive motion. TMZ and its counsel should not be rewarded for unnecessarily
 8 prolonging the proceedings prior to filing its motion.

9 Additionally, the Nevada Supreme Court has directed courts to consider the following
 10 factors in determining whether or not to award attorneys' fees and costs:

- 11 1. The qualities of the advocate (ability, training, experience, professional
standing, and skill);
- 12 2. The character of the work to be done (difficulty, intricacy, importance,
13 time and skill required);
- 14 3. The work actually performed by the lawyer (skill, time, and attention
15 given to the work); and
- 16 4. The result (success and benefits derived).

17 *See Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 829, 192 P.3d 730, 736
 18 (2008) (citations omitted); *see also Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455
 19 P.2d 31, 33 (1969).

20 In this case, Plaintiff is not going to quarrel with the qualities or experience of TMZ's
 21 counsel. All of the attorneys are accomplished and experienced. However, in conjunction with
 22 factor #1, the Court must also look at the reasonableness of the hourly rates charged by counsel.
 23 Almost incredibly, TMZ's attorneys are not only seeking the fees actually charged to TMZ, they
 24 are seeking fees at a **higher** rate than actually charged to the client. While counsel can submit all
 25 of the declarations it wants from other attorneys as to the reasonableness of the fees sought, that
 26 discretion is ultimately left to this Court, and Plaintiff would submit that the rates and fees
 27 charged by counsel are not reasonable in this market.

28 . . .

1 While the attorneys at Mr. Randazza’s office may be very skilled at what they do, that
2 skill does not justify seeking fees at billing rates well in excess of the rates of most, if not all, of
3 the best-known and most-respected counsel in this state. No attorney at Holley Driggs has a
4 billing rate over \$500/hr, and certainly nowhere close to the \$650/hr “Loadstar” rate Mr.
5 Randazza allegedly charges clients. What counsel at Mr. Randazza’s office charges its clients
6 and is paid is a matter between those lawyers and their clients, but this Court must determine
7 what rate is reasonable for a case like this in this jurisdiction. Plaintiff would submit that the
8 hourly rates charged by counsel for TMZ are already over \$100/hr higher than is the norm in Las
9 Vegas and certainly nowhere close to the “Loadstar” rates sought, but not charged to TMZ, by
10 counsel in the Motion. *See Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (noting that an
11 attorney should not claim “hours that are excessive, redundant, or otherwise unnecessary” and as
12 such, a court should not award such claimed hours).

13 With respect to *Brunzell* factor #2, the Court must look at the reasonableness of the work
14 performed for the fees sought. Again, this factor goes back to the issue of why TMZ waited as
15 long as it did to file the Anti-SLAPP motion. The motion could/should have been filed in early
16 September, negating the need to file an answer, attend an early case conference, submit
17 disclosures, or participate in peripheral disputes between Plaintiff and the Dirty. Also, as noted
18 earlier, TMZ’s counsel’s billing records show that they spent thousands of dollars doing legal
19 research into an area of the law that counsel later claimed to be an expert in. Such charges are
20 also not reasonable.

21 Similarly, factor #3 works against TMZ as well. The work actually performed with
22 respect to the Motion and related briefing totaled less than \$13,000, even at counsel’s inflated
23 billing rates. Yet, TMZ comes to this Court seeking over \$43,000 in fees and another \$10,000 in
24 damages. Counsel for TMZ made the decision as to when to file the Anti-SLAPP motion, and if
25 counsel decided to wait until after they had time to file other, unnecessary pleadings and attend a
26 case conference that should not have transpired had TMZ timely filed its motion, they should not
27 be rewarded by this Court with a fee award confirming that it is acceptable to unnecessarily
28 churn fees and costs to the detriment of the other party. This is precisely why the Supreme Court

1 in *Brunzell* set forth the factors and incorporated reasonableness into the courts' analysis of
 2 when/if to award fees.

3 As to factor #4, Plaintiff acknowledges that TMZ prevailed on its motion to dismiss, but
 4 given that the vast majority of the fees expended in this case had nothing to do with the Anti-
 5 SLAPP motion, those fees had nothing to do with the ultimate result in the case and should not
 6 be considered in any fee award given to TMZ.

7 As such, based upon the *Brunzell* factors and the billing records submitted by counsel for
 8 TMZ, coupled with the fact that counsel's billing rates are clearly excessive in comparison to the
 9 rates charged in this jurisdiction, Plaintiff submits that should the Court determine that an award
 10 of attorneys' fees and costs is warranted, that amount should not exceed \$10,000, the amount of
 11 fees a firm charging reasonable rates would have charged to file the Anti-SLAPP motion at the
 12 outset of the case, brief that motion, attend the hearing and submit the motion. Anything more
 13 would be rewarding TMZ and its counsel for unnecessarily delaying the proceedings and
 14 unreasonably driving up fees and costs in this case.

15 CONCLUSION

16 For the reasons set forth above, Plaintiff submits that TMZ's Motion should be denied
 17 and TMZ not awarded any fees or damages. TMZ certainly has not made any evidentiary
 18 showing supporting any award of statutory damages, and thus statutory damages should be
 19 denied per the discretion that this Court expressly has under the statute.

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1 Should the Court determine that TMZ is entitled to an award of reasonable attorneys'
2 fees, Plaintiff would respectfully request that upon consideration of the *Brunzell* factors and the
3 circumstances of this case, the fees TMZ should be entitled to should be capped at no more than
4 \$10,000. The motion should have been filed much earlier than it was, and the briefing associated
5 with that motion, at reasonable billing rates and taking out of consideration all of the peripheral
6 fees and costs expended in the case that were unnecessary, would not have exceeded \$10,000.

7 Dated this 11th day of December, 2015.

8
9 **HOLLEY, DRIGGS, WALCH,**
10 **FINE, WRAY, PUZEY & THOMPSON**

11 
12 BRIAN W. BOSCH, ESQ. (NBN 7612)
13 KIMBERLY P. STEIN, ESQ. (NBN 8675)
14 WILLIAM N. MILLER, ESQ. (NBN 11658)
15 400 South Fourth Street, Third Floor
16 Las Vegas, Nevada 89101
17 Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the **PLAINTIFF’S OPPOSITION TO TMZ PRODUCTIONS, INC’S MOTION FOR COSTS, FEES AND DAMAGES** was served in accordance with Administrative Order 14-2, this 11th day of December, 2015, addressed to the following:

Lewis Brisbois Bisgaard & Smith LLP

Contact	Email
Josh Cole Aicklen	Josh.Aicklen@lewisbrisbois.com
Pamela January	Pamela.January@lewisbrisbois.com
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Randazza Legal Group

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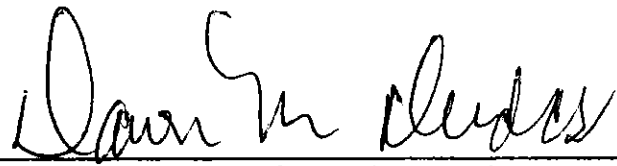

An employee of Holley Driggs Walch
Fine Wray Puzey & Thompson

EXHIBIT 1

EXHIBIT 1

**MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY**

**Seventy-Seventh Session
March 28, 2013**

The Senate Committee on Judiciary was called to order by Chair Tick Segerblom at 9:05 a.m. on Thursday, March 28, 2013, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Tick Segerblom, Chair
Senator Ruben J. Kihuen, Vice Chair
Senator Aaron D. Ford
Senator Justin C. Jones
Senator Greg Brower
Senator Scott Hammond
Senator Mark Hutchison

GUEST LEGISLATORS PRESENT:

Senator Joseph P. Hardy, Senatorial District No. 12
Senator Michael Roberson, Senatorial District No. 20

STAFF MEMBERS PRESENT:

Mindy Martini, Policy Analyst
Nick Anthony, Counsel
Lynn Hendricks, Committee Secretary

OTHERS PRESENT:

Marc Randazza, Randazza Legal Group
Allen Lichtenstein, American Civil Liberties Union
Wayne Carlson, Executive Director, Nevada Public Agency Insurance Pool
Steve Balkenbush, Nevada Public Agency Insurance Pool
Rebecca Bruch, Nevada Public Agency Insurance Pool

Senate Committee on Judiciary
March 28, 2013
Page 2

Kenneth A. Carabello, Vice President Operations, Liberty Healthcare Corporation
Jayne Shale, Liberty Healthcare Corporation
Richard Whitley, M.S., Administrator, Division of Mental Health and
Developmental Services, Department of Health and Human Services
Elizabeth Neighbors, Ph.D., Director, Mental Health Developmental Services,
Lake's Crossing Center
Christy Craig, Office of the Public Defender, Clark County
Robert Compan, Farmers Insurance Group
David Goodheart, American Insurance Association
Jeanette K. Belz, Property Casualty Insurers Association of America
George Ross, Las Vegas Metro Chamber of Commerce
Tray Abney, The Chamber, Reno-Sparks-Northern Nevada
Mark C. Wenzel, President, Nevada Justice Association
Diana Alba, Clerk, Clark County
Nancy Parent, Chief Deputy Clerk, Washoe County
Margaret Flint

Chair Segerblom:

Today we have Senate Bill (S.B.) 286.

SENATE BILL 286: Provides immunity from civil action under certain
circumstances. (BDR 3-675)

Senator Justin C. Jones (Senatorial District No. 9):

I am presenting S.B. 286. The First Amendment of the United States Constitution guarantees the right to petition the government for redress and is one of the most important rights the citizens possess. Nevada addresses, upholds and protects this right to petition. Chapter 41 of *Nevada Revised Statutes* (NRS) protects citizens from civil liability for claims based upon protected communication. Protected communication must be made in good faith and be truthful. The provisions of NRS 41 are meant to deter frivolous lawsuits commonly known as Strategic Lawsuits Against Public Participation (SLAPP). These SLAPP lawsuits are primarily used to stop someone from exercising his or her First Amendment rights. When a plaintiff files a SLAPP suit, NRS 41 allows the defendant to file a special motion to dismiss the lawsuit. If the court grants a special motion, it must also award attorney's fees to the defendant. The defendant may also file a new lawsuit for compensatory damages, punitive damages, and attorney's fees and costs. In a recent decision, the Ninth Circuit Court of Appeals held that Nevada's anti-SLAPP provision in NRS 41 only

protects communications made directly to a governmental agency. The Court also held that Nevada provisions only protect defendants from liability and not trial. Finally, the Ninth Circuit Court concluded that in Nevada, there is no right to immediately appeal an order denying a special motion to dismiss a SLAPP suit.

The purpose of S.B. 286 is to address concerns raised by the Ninth Circuit Court of Appeals with regard to NRS 41. Marc Randazza will address how this legislation is good for defendants as well as businesses wanting to move into Nevada. He will also propose additional language to strengthen S.B. 286.

I have submitted my written testimony (Exhibit C).

Marc Randazza (Randazza Legal Group):

As a First Amendment attorney who practices nationwide, I have much exposure to anti-SLAPP legislation. I have also had much exposure to victims of SLAPP litigation. I defend defamation suits and bring SLAPP suits as a plaintiff's attorney. Frivolous lawsuits must be eliminated. Lawsuits often bankrupt the defendant.

For example, I had a case involving a gentleman who wrote an online newspaper for his community. He wrote some articles about how he did not like the plants that the community had planted at the entrance. This article offended the person who ran the homeowners' association. He sued the author of the article for defamation. We did win this case and were granted attorney's fees. The article's author and I thought we were vindicated; however, the plaintiff dissolved his LLC. The \$186,000 attorney's fee award is a nice trophy but has meant nothing because the newspaper author's bank account was depleted. The costs, monetarily and psychological, were significant.

Chair Segerblom:

Will this bill make us like California?

Mr. Randazza:

Yes. As it is written, S.B. 286 is a fantastic bill.

I have some proposed amendments which will improve it more. I have imported some provisions from other states with similar laws. For example, Florida has a presuit notice requirement before a defamation claim can be filed. This is not a

new concept; Florida Statute 770.01 has been in place for 50 or 60 years. This would help by adding a degree of alternative dispute resolution and, therefore, lessen a burden on the courts.

I have also suggested utilizing some portions of California Civil Procedure Code 1030, which allows the defendant to seek a bond from the plaintiff if he or she has a reasonable probability of prevailing in the anti-SLAPP motion.

As it stands, this a great bill.

Chair Segerblom:

Does a party have to initiate a lawsuit, and then this anti-SLAPP law comes into play? Or does the party being threatened with the lawsuit go into court with the claim of the threat of the SLAPP lawsuit and stop the suit before it starts?

Mr. Randazza:

This is a special motion to strike or to dismiss, so the plaintiff would still have to initiate the litigation.

Chair Segerblom:

For example, you, Mr. Randazza, are sued. You think this is a frivolous lawsuit because it is enacted to prevent you from expressing your First Amendment rights, and that is when your attorney initiates the anti-SLAPP litigation?

Mr. Randazza:

Correct. The lawyer would quickly initiate the anti-SLAPP law so that the First Amendment mettle of the case could be tested. Otherwise a motion to dismiss, if pleaded correctly, is easily achieved; then comes an expensive and long-standing discovery, and by the time the win comes to the defendant, it is a Pyrrhic victory.

Chair Segerblom:

Absolutely.

Senator Ford:

Why was that complaint about the plants considered a public concern?

Senate Committee on Judiciary
March 28, 2013
Page 5

Mr. Randazza:

It is a public concern if it is important to one's community. It was a matter of governance for his community.

Senator Ford:

Does caselaw define the issue of public concern for purposes of anti-SLAPP statutes?

Mr. Randazza:

Yes. Nevada's courts would be able to rely upon robust caselaw in California, Washington and Oregon in order to define those terms.

Senator Ford:

Is there a federal counterpart to anti-SLAPP?

Mr. Randazza:

Congressman Steve Cohen from Tennessee has proposed federal anti-SLAPP legislation. It has not passed. There may be issues of separation of powers with this federal legislation. Nevada should consider the benefit to business as well. Tech start-ups, for example, are not as attracted to Nevada as to California, Washington or Oregon because of these states' strong anti-SLAPP laws.

Senator Ford:

What is the definition of public concern relative to the caselaw definition?

Mr. Randazza:

Public concern is broadly defined. Public concern is a matter of interest to multiple people. It does not necessarily have to be a matter of governance. Public concern can even be said to be matters of local importance, local governments, local news. It would not be a narrow definition. Any statute needs to make the term public concern broad. There is caselaw in the handout I have provided to you (Exhibit D). I can also provide the Committee with follow-up research if that is something that concerns you.

Chair Segerblom:

In response to Senator Ford's questions, is this based on other states that have already enacted anti-SLAPP laws?

Senate Committee on Judiciary
March 28, 2013
Page 6

Mr. Randazza:
Right.

Senator Hutchison:

If the issue of public concern is defined so broadly, it seems that any lawsuit could be defined that way. For example, partner disputes in commercial litigation could be a matter of public concern, right? Then we are now modifying the motion to dismiss standards for almost anything. Will we now have a lot of cases under this definition?

Mr. Randazza:

This bill drafted with the proposed amendments is not so broad that it encompasses every method of conduct in the State. It will just encompass whether a citizen is exercising his or her First Amendment rights.

Senator Hutchison:

In exercising a citizen's First Amendment rights on an issue of public concern, you admit the definition is very broad?

Mr. Randazza:

Correct. If I am speaking out about how an investigation is going, of course that is a matter of public concern. If I am speaking about the lack of a traffic light at an intersection, that is a matter of public concern. If I am speaking out about how a neighbor can mow his or her lawn, then that is not a matter of public concern.

Senator Hutchison:

What about how I treat my partners in my law firm? Is that a matter of public concern? Could it be construed that way?

Mr. Randazza:

You may not have the privilege of making that a private matter. If it is a matter of internal politics at your law firm, that is a matter of private concern. However, if the *Las Vegas Sun* begins to report on a strike at your law firm and your associates are picketing in front of the building, then it has become a matter of public concern.

Senator Hutchison:

Why is there a clear and convincing evidence standard? For example, the moving party initially starts by preponderance of the evidence that in fact the claim is based on free speech-First Amendment rights. Then if the court determines the moving party has met that burden of proof, the court then has to determine by clear and convincing evidence a probability of prevailing on the claim. Now the burden shifts to the plaintiff. The defendant points out the First Amendment right demonstrated by preponderance of the evidence. Is that correct?

Mr. Randazza:

Correct.

Senator Hutchison:

The burden shifts now to the plaintiff who wants to win this lawsuit by clear and convincing evidence to the court in that early stage, which is a fraud standard—a very high standard in the law. What is the rationale for setting the standard that high?

Mr. Randazza:

The way it has worked in California, Washington and Oregon cases, the plaintiff needs to front load his or her case. The plaintiff needs to show this evidence is going beyond the motion-to-dismiss standard. It is a burden-shifting statute. But without that important element, defendants can be quieted and punished for exercising free speech rights simply by winning a case. That burden-shifting is important, necessary and proper.

Chair Segerblom:

Is the lawsuit for defamation? Or is the lawsuit characterized as being something designed to suppress First Amendment rights?

Mr. Randazza:

The lawsuit is anything designed to quash First Amendment rights. This proposed law will be most frequently used in defamation lawsuits. Possibly, this proposed law could also be used in intellectual property lawsuits. For example, the company Righthaven, which operates in southern Nevada, has over 200 cases on the federal docket. Some of the cases involved Righthaven suing bloggers for exercising their right to free speech.

Senate Committee on Judiciary
March 28, 2013
Page 8

Chair Segerblom:

So this anti-SLAPP law could be used against Righthaven?

Mr. Randazza:

Senate Bill 286 could have been used for those cases, yes.

Senator Jones:

Concerning section 3, subsection 3, paragraph (f) of S.B. 286, I received a request from District Judge Elizabeth Goff Gonzales that the rule be 7 days after notice. I agree with that. We do not want a circumstance in which motions are scheduled in the courts before someone has received notice of the motion.

If Nevada wants to attract tech start-up companies from other states, particularly California and Washington, S.B. 286 models those states that are properly using anti-SLAPP laws.

Mr. Randazza:

Texas has recently added anti-SLAPP legislation similar to those states on the West Coast. We are now competing with Texas as well to attract tech start-up companies for their business.

Senator Hutchison:

Can this law be narrowed to relate more specifically to the tech companies and what Nevada is trying to protect as opposed to the law being so broad concerning the definition of public interest?

Senator Jones:

We can discuss that.

Chair Segerblom:

Is there anyone else who would like to speak in support of S.B. 286?

Allen Lichtenstein (American Civil Liberties Union):

The question was raised of the public interest standard being so broad that that standard might swallow the rule. This issue was present when the ruling on *New York Times Co. v. Sullivan* 376 U.S. 254 (1964) became the standard for proving actual malice for public officials or public figures and matters of public interest. People dealing with these cases assumed that every defamation case would come under that ruling and require the actual malice standard. That has

not been the case. Far more of these cases are between particular individuals within a company or within a small business where the regular negligence standard does exist. I am less sanguine about the field of defamation law in general because it is so often used for the purpose of hurting a defendant with a lawsuit rather than having a real claim in the lawsuit. Senate Bill 286 progresses the lessening of using SLAPP lawsuits to hurt defendants—all of which amounts to an abuse of the court system. The public interest standard can be far-reaching and broad, but it is incorrect to say that that phrase swallows the entire rule.

Chair Segerblom:

Would anyone in opposition like to speak?

Wayne Carlson (Executive Director, Nevada Public Agency Insurance Pool):

With me are two attorneys who have defended anti-SLAPP cases, and they will both comment on S.B. 286.

Steve Balkenbush (Nevada Public Agency Insurance Pool):

Nevada Revised Statutes 41.635 through 41.670 have worked well. The NRS 41 requires that a special motion to dismiss be filed within 60 days. If the motion is granted, the case is over. Pursuant to the legislative history, that is the purpose for which this anti-SLAPP statute was crafted by the Legislature.

Chair Segerblom:

You are speaking from experience of defending a city or county?

Mr. Balkenbush:

Yes. As an attorney, I have defended a number of individuals who are public officials.

The NRS 41 has worked seamlessly. The concern is in regard to these shifting burdens of proof in amending this law. We do not have an objection if the Committee wants to expand NRS 41 to include the new provision to whom it relates. As it says in section 1, subsection 4 of S.B. 286: "Communication made in direct connection with an issue of public interest in a place open to the public or in a public forum."

The one objection we do have is having the \$10,000 damage award which would be levied upon the defendant if he or she does not prevail in a motion to

dismiss. These motions to dismiss have been valuable tools in defending these lawsuits. This penalty would conflict with the idea of an anti-SLAPP statute. Anti-SLAPP statutes were created to provide the opportunity to extricate the defendant from the lawsuit at the very beginning of the case. This penalty would be a disincentive for filing these motions to dismiss. The provision in S.B. 286, section 4, subsection 2 should be removed from the bill.

I am concerned with how the courts will struggle with the shifting burdens of proof. Three cases have passed through the Nevada Supreme Court and the Justices have had no problems with any provisions in the existing statute. The Supreme Court had no problem interpreting the provisions and breadth of the statute. The Court has found no irregularities in the statute. If the statute works, keep it the way it is.

Senator Ford:

There is a clear and convincing standard in S.B. 286 that the defendant must meet to dismiss a SLAPP suit, is that correct?

Mr. Balkenbush:

Yes, that is correct. That is a confusing provision. Under existing statute, the defendant files a motion to dismiss and provides the proof to the court. Then the plaintiff provides proof to the court as a motion for summary judgment standard. Then the court decides the case.

The proposed change in the law is that the defendant files the motion to dismiss, which is treated as a motion for summary judgment. The court would determine whether there was a good faith communication, a matter of public concern. If so, as the law stands now, the defendant has won. Senate Bill 286 goes beyond that. The burden shifts to the plaintiff to prove that his or her case would be sustained on clear and convincing evidence standard. This unduly complicates NRS 41. Under S.B. 286, the plaintiff would have a higher burden of proof than he or she currently has. This whole provision becomes murky.

Senator Ford:

That is my question. If the plaintiff actually prevails upon the clear and convincing standard, which is a high standard, why should he or she not receive a \$10,000 award if he or she won?

Mr. Balkenbush:

He or she would not get a reward just by proving through clear and convincing evidence. The motion to dismiss would be defeated. In order to get the \$10,000 award, he or she would have to win the case. The provision of the clear and convincing evidence applies to the motion to dismiss at the beginning of the case. The defendant must prove his or her motion to dismiss; the plaintiff, in order to defeat that, must prove his or her case by clear and convincing evidence. That does not end the case, though. That is just the motion to dismiss. That is all this provision applies to: a special motion to dismiss. If the plaintiff proves by clear and convincing evidence a probability of prevailing on the claim, then the case will continue on to discovery. It may go to a trial. All that the clear and convincing evidence standard does is relate to the special motion to dismiss.

Senator Ford:

So if the plaintiff defeats the motion to dismiss on the clear and convincing evidence standard and ultimately wins the case, he or she can get \$10,000?

Mr. Balkenbush:

That is correct.

Senator Ford:

But if the defendant wins on a special motion to dismiss, he or she gets \$10,000?

Mr. Balkenbush:

That is correct. The defendant gets \$10,000 if he or she wins on the motion to dismiss. There is a provision for attorney's fees and costs for the plaintiff, if he or she prevails.

Senator Ford:

But my question remains the same. If a defendant wins and proves that the plaintiff has brought a SLAPP lawsuit against the defendant, why should the defendant not get \$10,000?

Mr. Balkenbush:

The defendant should get \$10,000. We do not object to the defendant getting paid \$10,000. This is what we object to: the defendant files the motion to dismiss and that motion is defeated; although the defendant does not lose the

Senate Committee on Judiciary
March 28, 2013
Page 12

case, yet the defendant is still subjected to a \$10,000 award to the court because he or she lost the motion to dismiss.

That, however, is not the existing law. The concern is that S.B. 286 would be a disincentive for defendants to extricate themselves early in the case by filing these motions to dismiss.

Senator Brower:

This needs to be clear: are the lawsuits SLAPP suits and the Nevada statutes are anti-SLAPP statutes, right?

Mr. Balkenbush:

That is correct.

Senator Brower:

Can you give an example of a typical SLAPP lawsuit from your own experience?

Mr. Balkenbush:

I can. One case that I handled involved a former employee of a district attorney's office who did certain things involving drugs and alcohol. This employee was also working at a school as an intern to be a counselor. The district attorney learned of those problems and made those problems known to the school district. The district attorney was then sued by the former employee for defamation. I raised the concern of the anti-SLAPP statutes to the court. The district attorney had learned of this employee's problems and believed that these problems were issues of public concern, mainly, that a person with problems concerning drugs and alcohol was in a school studying to be a counselor. Those problems were raised as part of the defense to the defamation lawsuit.

Senator Brower:

The district attorney's response to the defamation lawsuit was to describe it as a SLAPP lawsuit?

Mr. Balkenbush:

That is correct.

Senator Brower:

And you utilized the anti-SLAPP statutes as the district attorney's defense?

Mr. Balkenbush:

That is correct. The district attorney said it was a matter of public concern. He believed these problems that the employee had were truthful or, at least, had no knowledge of their falsity. The judge agreed and granted the motion. The case went to the Nevada Supreme Court and the Justices affirmed the ruling.

Senator Brower:

Your view is that the current anti-SLAPP statute worked properly in this case?

Mr. Balkenbush:

That is correct. And the Supreme Court Justices have had no trouble with the current anti-SLAPP statute. Nor have they had any trouble applying NRS 41 in any of the cases in which I have used it. I have had two cases go to the Nevada Supreme Court, and the Court has affirmed both of the decisions. The Court has not had any trouble interpreting any of the provisions in NRS 41. Some of the provisions proposed in S.B. 286 are cumbersome.

Senator Brower:

Might the outcome of the case be different if it is an individual not working for a county who could hire a lawyer experienced with these anti-SLAPP litigations? Would the current statute be just as logical and workable as in the case you just described?

Mr. Balkenbush:

The statute would be just as logical. What the statute does not do now is cover these private individuals. That is an expansion of the language proposed in S.B. 286. We are not opposed to keeping the language covering private individuals. The rest of S.B. 286 seems unduly cumbersome by penalizing people who file motions to dismiss, if they do not prevail on the motions. It prolongs the amount of time required to litigate these cases. Legislative history says cases should not be unduly lengthy. The existing anti-SLAPP statute works well as a practical matter.

Rebecca Bruch (Nevada Public Agency Insurance Pool):

I was one of the attorneys on the *John v. Douglas Cnty. Sch. Dist.*, 125 Nev. 746, 219 P.3d 1276 (2009) case that went before the Supreme Court, and the statute was upheld.

Mr. John filed union grievances along with a lawsuit. Every time someone at various stages of the grievance level would offer testimony, Mr. John would amend the lawsuit and add new parties. He did this trying to intimidate those who would offer testimony.

I had come across the anti-SLAPP statute and knew that the *John v. Douglas County School District* was the perfect case. Mr. John was clearly trying to intimidate people from participating in the serious claims made against him. District Judge David R. Gamble ruled in our favor. It then went to the Nevada Supreme Court on the issue of whether Nevada's anti-SLAPP statutes could apply to federal claims in State court. The Court ruled and upheld the Ninth Judicial District Court's ruling.

There were attorney's fees awarded because of the existing NRS 41.670.

I join in Mr. Balkenbush's comments on the chilling effect of the \$10,000 award. I often file the special motion to dismiss on behalf of large entities that can absorb the cost if they must. But a serious conversation takes place warning the clients that if the motion to dismiss is lost, it could cost them \$10,000. That is still a lot of money. The chilling effect comes because of a provision in NRS 41.670 subsection 1 that: "the court shall award reasonable costs and attorney's fees."

The 7-day provision in S.B. 286 is also problematic for judges and their calendars. The idea is to speed along or, possibly, stop litigation from the beginning. That places an undue burden on the courts. In our case, the judges know they must rule within 30 days, and they request an excusal from that time limit.

Chair Segerblom:
So they work around that?

Ms. Bruch:
Yes.

Chair Segerblom:
Would you like to point out anything else?

Ms. Bruch:

There was a question regarding whether a federal caselaw equivalent exists. It is called the *Noerr-Pennington* doctrine. I refer to that on federal claims and when I am in federal court.

Senator Ford:

I am still stuck on the \$10,000 award. Looking at S.B. 286, section 4, subsection 2, "If the court denies a special motion to dismiss filed pursuant to NRS 41.660 and finds that the motion was frivolous or vexatious"; that last phrase "finds that the motion was frivolous or vexatious" makes a big difference. That makes the defendant more contemplative before they file a motion to dismiss. Those are hard standards to meet. The court seldom calls a motion frivolous or vexatious. The \$10,000 award does not seem to be an automatic award just because the defendant does not win the motion to dismiss. The question now is why should the defendant not be penalized \$10,000 for filing a motion to dismiss that was frivolous or vexatious?

Mr. Balkenbush:

You are correct. The frivolous and vexatious standard does exist in the proposed bill. But that standard exists regardless of S.B. 286. Under Rule 11 of the *Federal Rules of Civil Procedure*, a defendant cannot file frivolous and vexatious motions. There does not seem to be any other statute in Nevada law with a \$10,000 penalty if the defendant loses the motion to dismiss. I agree that the frivolous and vexatious standard is a difficult standard. The \$10,000 award is not a part of Nevada statute and can cause the defendant to pause moving forward with filing the special motion to dismiss.

Chair Segerblom:

What if S.B. 286 was amended to say "up to \$10,000"?

Mr. Balkenbush:

I do not believe that \$10,000 penalty should be levied on the defendant if he or she loses the motion to dismiss.

Chair Segerblom:

But the \$10,000 award is only if the motion to dismiss is frivolous.

Mr. Balkenbush:

I understand.

Senate Committee on Judiciary
March 28, 2013
Page 16

Senator Brower:

I hear what you are saying, Mr. Balkenbush. Nowhere in the NRS or the *Nevada Rules of Civil Procedure* is a dollar amount penalty levied toward something someone does in litigation. This would be very unusual. Not to say that it should not be considered. There is still much work to be done on S.B. 286.

Senator Jones:

I am willing to work with Mr. Balkenbush and Ms. Bruch to resolve the concerns raised.

I do want to emphasize Senator Ford's point: the standard for award of attorney's fees on the plaintiff's side is clear and convincing evidence. On the defendant's side the standard is frivolous and vexatious. Both are very high standards.

With regard to Mr. Balkenbush's statement that NRS 41 has worked well in Nevada, I do not contest that. However, in light of the Ninth Circuit Court's decision last year, there is cause for concern. I echo Mr. Randazza's comments. If Nevada wants to compete for businesses which want to move in, we must compete with those states which have sufficient protection against SLAPP lawsuits: California, Washington and Texas.

Chair Segerblom:

Do these other states have the \$10,000 award?

Senator Jones:

Senate Bill 286 came from the Washington statute. I will have to check with Mr. Randazza on that amount.

Mr. Balkenbush:

The \$10,000 provision only exists in Washington. California, Oregon and Texas do not have this provision.

Chair Segerblom:

We will close the hearing on S.B. 286. Senator Hardy is presenting S.B. 323.

SENATE BILL 323: Revises provisions relating to incompetent defendants.
(BDR 14-1063)

<u>EXHIBITS</u>				
Bill	Exhibit		Witness / Agency	Description
	A	1		Agenda
	B	6		Attendance Roster
S.B. 286	C	3	Senator Justin C. Jones	Opening Remarks for Senate Bill 286
S.B. 286	D	72	Marc Randazza	Report to Senate on Proposed Changes to Nevada's Anti-SLAPP Laws
S.B. 323	E	1	Senator Joseph P. Hardy	Senate Bill 323 Suggested Amendment
S.B. 323	F	2	Ken Carabello	Jail-Based Restoration of Competency Program Fact Sheet
S.B. 323	G	2	Elizabeth Neighbors	Testimony in support
S.B. 296	H	1	Senator Michael Roberson	Government and Industry Affairs: Nevada
S.B. 296	I	1	Assemblyman Pat Hickey	Testimony in support
S.B. 296	J	2	Robert Compan	Testimony in support
S.B. 296	K	1	Property Casualty Insurers Association of America	Letter in support from Mark Sektnan
S.B. 296	L	4	National Association of Mutual Insurance Companies	Written testimony from Christian J. Rataj
S.B. 419	M	1	Diana Alba	Letter in support
S.B. 419	N	2	Amy Harvey	Letter in support

OPENING REMARKS FOR SENATE BILL 286

SENATOR JUSTIN C. JONES

Thursday, March 28, 2013

Senate Committee on Judiciary

- Good morning Mr. Chair and members of the Committee. I am Justin Jones representing Senate District No. 9 from Clark County.
- I am here today to present Senate Bill 286 for your consideration.
- As guaranteed by the First Amendment, the right to petition our government for redress is arguably one of the most important rights we have.
- Nevada recognizes this right and protects people who exercise their First Amendment right to petition.
- Specifically, Chapter 41 of *Nevada Revised Statutes* protects people from civil liability for claims based on protected communication.
- Generally speaking, protected communication must be made in good faith and be truthful, or at least made without knowing it is false.
- The provisions of Chapter 41 are meant to deter frivolous lawsuits, commonly known as a Strategic Lawsuit Against Public Participation, or SLAPP.
- A SLAPP is a meritless lawsuit that a plaintiff initiates primarily to stop someone from exercising their First Amendment rights.

EXHIBIT C Senate Committee on Judiciary

Date: 3/28/13 page 1 of 3

- When a plaintiff files a SLAPP, Chapter 41 allows the defendant to file a special motion to dismiss the lawsuit.
- If the court grants a special motion, it must also award attorney's fee to the defendant.
- The defendant may also file a new lawsuit for:
 - Compensatory damages;
 - Punitive damages; and
 - Attorney's fees and costs for bringing the new lawsuit.
- In a recent decision, the 9th Circuit Court of Appeals held that the anti-SLAPP provisions of Chapter 41 only protect communications made directly to a governmental agency.
- The Court also held that the Nevada provisions only protect defendants from liability, not from trial.
- Finally, the 9th Circuit Court concluded that in Nevada there is no right to immediately appeal an order denying a special motion to dismiss a SLAPP.
- I am introducing Senate Bill 268 to resolve those limitations.
- Beginning with Section 1, the bill expands the type of protected communication to include the right to free speech if it is about an issue of public concern.

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- Section 1 also protects communications about an issue of public interest made in public places.
- Next, Section 2 expands the anti-SLAPP provisions to cover any civil action, not just liability.
- Section 3 specifies standards of proof for motions to dismiss a SLAPP, and requires the court to rule on those motions within seven days.
- If a court grants a motion to dismiss a SLAPP, Section 4 requires the court to grant the defendant, in addition to attorney's fees and costs, \$10,000.
- If a court denies a motion to dismiss and finds that it was frivolous, the bill requires the court to grant the plaintiff:
 - Reasonable costs and attorney's fees for responding to the motion;
 - \$10,000; and
 - Any additional relief the court thinks will punish and deter the filing of frivolous or vexatious motions.
- Finally, S.B 286 creates an immediate right to appeal if a special motion to dismiss is denied.
- Chair Segerbloom and Committee Members, I thank you for your time and I'd be happy to answer any questions.

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**Reply to Las Vegas Office
via Email or Fax**

March 28, 2013

Nevada State Senate
Senate Chamber
Nevada State Legislative Building
401 S. Carson Street
Carson City, Nevada 89701

Re: Report to Senate on Proposed Changes to Nevada's Anti-SLAPP Laws

Dear Esteemed Senators:

Nevada stands among the states with largely ineffective Anti-SLAPP laws. NRS 41.635-670 (the "Anti-SLAPP Laws"). It stands in the shadows of California, Oregon, Washington, and Texas, which have passed far more effective legislation that acts not only to protect freedom of expression in those states, but which also act as an attraction to the establishment of business in those states.

Nevada's Anti-SLAPP Laws protects only "good faith communication in furtherance of the right to petition." NRS 41.650. This limits its scope to speech made to a government agency, or directly in connection with a matter under consideration by one of the government's arms. NRS 41.637. This is not enough.

With the dawn of the Internet's user-generated content era, individuals have found themselves in the crosshairs of SLAPPs brought over Constitutionally protected speech. Reviews on sites like Yelp! and Avvo beget crushingly expensive litigation by subjects of factual but unflattering reviews. These lawsuits primarily serve to harass and intimidate small defendants and the websites themselves while pummeling them with significant legal fees. Caught in the crossfire are Nevada's already backlogged and overburdened Courts, which must referee these one-sided fights.

Similarly, businesses have been faced with lawsuits over their own First Amendment protected activity, ranging from advertising and marketing practices to the management of their employees. This drives down the profits of these businesses and interferes with their ability to grow and hire new employees. Once again, Nevada's courts suffer the costs of these suits as well.

Broadened Anti-SLAPP Laws serve numerous public services. First, it protects the public – individuals and businesses alike – from going broke fighting meritless claims. Meritorious claims will still proceed; new Anti-SLAPP Laws will not mean the end of defamation law in Nevada. Anti-SLAPP statutes have had no impact upon meritorious defamation cases in California, Oregon, Texas, or Washington. It will, however, mean that marginal cases are kept out of the courts – and if they are brought, the costs will fall on the plaintiff who filed suit.

Second, the proposed changes to Nevada's Anti-SLAPP Laws create new safeguards to ensure the laws have effect. At any time, a defendant may require a plaintiff to post a bond for the estimated value of his or her attorneys' fees, provided the defendant can show a reasonable possibility of succeeding on an Anti-SLAPP motion. If the plaintiff cannot post a bond, the case is dismissed. This ensures that defendants who win Anti-SLAPP motions do not merely obtain pyrrhic victories.

Expanding the scope of Nevada's Anti-SLAPP Laws to apply to *all* speech about matters of public concern – not merely speech seeking government action – will benefit individuals and Nevada's courts. Abusive uses of the judicial process will be resolved privately with these motions, rather than requiring the courts to exercise close control over every single case before it. Businesses will be able to truncate or at least significantly limit questionable litigation, making more funds available for expansion and hiring. While there are numerous factors affecting the technology sector's growth over the last 20 years, it is not an accident that social media companies such as Yelp, Avvo, Twitter, Zynga, Facebook, and others are based in California and Washington – states with robust Anti-SLAPP statutes that protect a wide range of speech.

My law firm represents a large number of journalists and tech startups. Despite the fact that we are headquartered in Las Vegas, we reluctantly advise clients to organize or incorporate in California, Oregon, and Washington so that they can benefit from those states' Anti-SLAPP statutes. Most significantly, individuals will be spared from personal bankruptcy and financial destruction arising from all-consuming litigation against a more powerful party.

The trend of litigation against Constitutionally protected speech within Nevada cannot be denied. Military veterans have been sued for expressing opposition to a Las Vegas family law attorney's position on the disposition of military benefits upon divorce. Anonymous commenters have been brought into court, and sought to be deprived of their Constitutional right to anonymity, for comments left on *Las Vegas Review-Journal* online articles. Nevada's own Righthaven LLC filed more than 200 lawsuits in Nevada's courts – and whenever attorneys stepped forward to litigate the issue of "Fair Use," or whether the interests of the First Amendment trumped Righthaven's dubious copyright claims, Righthaven lost *every single time*.¹

Broadening Nevada's Anti-SLAPP Laws serves multiple public interests. While an increasing number of state and federal lawsuits feature litigants who are *pro se*, or not represented by an attorney, new Anti-SLAPP Laws will encourage access to justice. Because of the proposed fee-

¹ Because the proposed amendments to Nevada's Anti-SLAPP Laws are substantive, rather than procedural, they will apply in the United States District Court for the District of Nevada – where Righthaven filed its actions – as well as Nevada's state courts.

Ltr. Re Proposed Changes to Nevada's Anti-SLAPP Laws

March 28, 2013

Page 3 of 3

shifting and bond provisions, attorneys will compete to take these cases and vindicate their clients' free speech rights, rather than accept it – and quarantine it – in their pro bono allotment for the year. Most importantly, though, it will memorialize to Nevadans and the nation this State's commitment to truly open debate, free expression, and the sacrosanct principles enshrined in the First Amendment of the United States Constitution and Article I of the Nevada State Constitution.

Best regards,

A handwritten signature in black ink, reading "Marc J. Randazza". The signature is fluid and cursive, with a long horizontal line extending from the end of the name.

Marc J. Randazza

(b) If the court determines that the moving party has met the burden pursuant to paragraph (a), determine whether the plaintiff has established by clear and convincing evidence a probability of prevailing on the claim;

(c) If the court determines that the plaintiff has established a probability of prevailing on the claim pursuant to paragraph (b), ensure that such determination will not:

(1) Be admitted into evidence at any later stage of the underlying action or subsequent proceeding; or

(2) Affect the burden of proof that is applied in the underlying action or subsequent proceeding;

(d) Consider such evidence, written or oral, by witnesses or affidavits, as may be material in making a determination pursuant to paragraphs (a) and (b);

(e) Stay discovery pending:

(1) A ruling by the court on the motion; and

(2) The disposition of any appeal from the ruling on the motion; and

~~[(e)]~~ *(f) Rule on the motion within ~~[30]~~ 7 judicial days after the motion is ~~[filed.]~~ served upon the plaintiff.*

4. If the court dismisses the action pursuant to a special motion to dismiss filed pursuant to subsection 2, the dismissal operates as an adjudication upon the merits.

Sec. 4. NRS 41.670 is hereby amended to read as follows:

41.670 1. If the court grants a special motion to dismiss filed pursuant to NRS 41.660:

~~[(1)]~~ *(a) The court shall award reasonable costs and attorney's fees to the person against whom the action was brought, except that the court shall award reasonable costs and attorney's fees to this State or to the appropriate political subdivision of this State if the Attorney General, the chief legal officer or attorney of the political subdivision or special counsel provided the defense for the person pursuant to NRS 41.660.*

~~[(2)]~~ *(b) The court may award, in addition to reasonable costs and attorney's fees awarded pursuant to paragraph (a), an amount of up to \$10,000 to the person against whom the action was brought.*

(c) The person against whom the action is brought may bring a separate action to recover:

~~[(a)]~~ *(1) Compensatory damages;*

~~[(b)]~~ *(2) Punitive damages; and*

~~[(c)]~~ *(3) Attorney's fees and costs of bringing the separate action.*

2. *If the court denies a special motion to dismiss filed pursuant to NRS 41.660 and finds that the motion was frivolous or vexatious, the court shall award to the prevailing party reasonable costs and attorney's fees incurred in responding to the motion.*

3. *In addition to reasonable costs and attorney's fees awarded pursuant to subsection 2, the court may award:*

(a) An amount of up to \$10,000; and

(b) Any such additional relief as the court deems proper to punish and deter the filing of frivolous or vexatious motions.

4. *If the court denies the special motion to dismiss filed pursuant to NRS 41.660, an interlocutory appeal lies to the Supreme Court.*