No. 23-3227
Cross Appeal Case No. 23-3390
No. 24-159

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WEALTHY, INC. and DALE BUCZKOWSKI,
Plaintiffs- Appellants,
v.
SPENCER CORNELIA, CORNELIA MEDIA LLC, and CORNELIA EDUCATION LLC,
Defendants- Appellees,

and

JOHN MULVEHILL; et al.,
Defendants.

On Appeal from the United States District Court
for the District of Nevada
No. 2:21-cv-01173-JCM-EJY, consolidated with
No. 2:22-cv-00740-JCM-EJY
Honorable James C. Mahan, United States District Judge

APPELLANTS' OPENING BRIEF

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DISCLOSURE STATEMENT

Appellant Wealthy Inc. ("Wealthy") is a Texas corporation. Appellant Dale Buczkowski is the sole owner of Wealthy, which has no parent company. No publicly held corporation owns more than 10% of Wealthy's stock.

Dated this 16th day of February, 2024.

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I. INTRODUCTION

Without a care for truth and without any credible evidence, Spencer Cornelia ("Cornelia"), an ambitious influencer who, through his companies, Cornelia Media, LLC, and Cornelia Education, LLC, operates a YouTube channel with over 150,000 subscribers, published two videos replete with defamatory and disparaging statements about Plaintiffs. Under the auspices of seeking to "expose" Plaintiff as a "charlatan," and to monetize the resulting controversy, Cornelia and his companies ("Defendants") posted two videos on Defendants' YouTube channel that contained Cornelia's interviews of John Mulvehill - another defendant in the consolidated action below - whereby Cornelia extracted false and disparaging statements from Mulvehill. Cornelia, in addition to affirming those false and disparaging statements, also offered his own defamatory statements and conclusions about Plaintiffs.

In the case below, the district court set aside questions of truth or falsity, and instead engaged in victim blaming. By perfunctorily and unceremoniously declaring Plaintiffs Dale Buczkowski and Wealthy, Inc. "public figures," the district court erroneously deemed Plaintiffs fair targets for Defendants' extreme and defamatory conduct. And, as if that

were not enough, the district court then set aside the abundant evidence in the record that Cornelia acted with actual malice by eliciting the defamatory statements, by failing to research the content, by relying on unreliable, biased, and anonymous sources for the veracity of the statements, and then by publishing the two interviews containing a multitude of false statements.

This appeal concerns the district court's expansion of the public figure doctrine to grant a free pass to someone with the ability and the incentive (or lack of disincentive) to rapidly disseminate sensational and false information through social media, and concerns the district court's erroneous conclusion that Defendants did not act with reckless disregard for the truth of that information. Concluding that Cornelia's receipt of defamatory information *from Mulvehill* about Plaintiffs, together with Cornelia's lack of investigation and Cornelia's own "don't-ask" mentality was enough to find in favor of Defendants, the district court imposed an unreachable standard as to actual malice.

After reviewing *de novo* the district court's granting of summary judgment in favor of Defendants on Plaintiffs' claims for relief, this Court should conclude that Plaintiffs are not public figures, that the defamatory

statements are not germane to any preexisting public controversy into which Plaintiffs voluntarily injected themselves, that Defendants demonstrated a reckless disregard for the truth of the statements they published, and that Defendants' statements and publications constituted commercial speech under the Lanham Act. This Court should reverse and remand, and instruct the district court to allow Plaintiffs' claims to proceed to trial.

II. STATEMENT OF JURISDICTION

The district court had jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and under the Lanham Act, 15 U.S.C. §§ 1121(a) and 1125 (a)(1)(B), as Plaintiffs asserted a claim for relief for unfair competition and false advertising. The district court had supplemental jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367.

On September 29, 2023, the district court entered its Order granting summary judgment in favor of Defendants on each of Plaintiffs' claims for relief and denying Defendants' special motion to dismiss pursuant to NRS 41.660. 1-ER-6-19. Plaintiffs timely filed a Notice of Appeal with the district court on October 26, 2023. 2-ER-246-52.

The Clerk of the Court entered the Bill of Costs awarding

Defendants $7,526.26 in costs, 1-ER-4, and the Clerk's Memorandum Regarding Taxation of Costs, 1-ER-2-3, on November 30, 2023. Plaintiffs timely filed their Notice of Appeal, 2-ER-261-67, with the district court on December 26, 2023.

This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291 since the Order granting summary judgment in favor of Defendants, 1-ER-6-19, is a final decision. *Bullard v. Blue Hills Bank*, 575 U.S. 496, 506 (2015). This Court also has jurisdiction over the award of costs since an award of costs is a separate, final, appealable order. *In re Nguyen*, 2010 WL 6259976 at *6 (9th Cir. BAP 2010).

III. STATEMENT OF ISSUES FOR REVIEW

A. Did the district court err in finding that Dale Buczkowski and his company were public figures when neither the name Dale Buczkowski nor Wealthy, Inc. are household words and when neither is a well-known celebrity or a public official?

B. Did the district court err in finding that Dale Buczkowski and his company are limited purpose public figures, when neither thrust themselves into a public controversy but instead were thrust into the public domain by being defamed on social media, and when

the district court did not declare for what limited purpose Plaintiffs are public figures or how each defamatory statement related to said limited purpose?

C. Notwithstanding its erroneous determination that Plaintiffs were public figures, did the district court err in holding that no rational jury could find that Defendants acted with reckless disregard for the truth of the statements when Defendants relied upon unreliable and openly biased sources of information for the publication of the false statements?

D. Did the district court err in holding that Defendants did not engage in commercial speech under the Lanham Act when it only considered advertising in the defamatory videos themselves, disregarding Defendants' YouTube channel which actually hosted the videos and contained advertisements for services? And, did the district court err in holding that Defendants did not engage in commercial speech under the Lanham Act because the videos contained false statements about Plaintiffs' products only and did not mention Defendants' own competitive product and services in the video?

E. Did the district court err in requiring Plaintiffs to prove actual malice on their claim for Intentional Infliction of Emotional Distress?

F. Did the district court err in finding that Plaintiffs' Business Disparagement claim failed for want of actual malice?

G. Considering all of the errors made by the district court in granting summary judgment, did the district court err in awarding costs to Defendants?

IV. CONCISE STATEMENT OF THE CASE

A. Buczkowski Founds and Develops Wealthy, a Finance, Business, and Self-Improvement Firm that Provides Education and Training to its Clients.

Dale Buczkowski ("Mr. Buczkowski") graduated from the University of Chicago Booth School of Business with a Master of Business Administration (MBA) degree in 2015. 2-ER-232. He is the President and Co-Founder of Larson Consulting, a company founded in 2011 which is dedicated to helping leaders solve critical strategic issues, accelerate growth, and improve the reputation and brand of their organizations in the context of strongly held values. 2-ER-232.

Mr. Buczkowski founded Wealthy in 2019 approximately one year

before the videos at issue in this litigation were published. 2-ER-232. Wealthy is an entrepreneurship, finance, business, real-estate and self-improvement company owned and operated by Mr. Buczkowski. 2-ER-232. Mr. Buczkowski and Wealthy own Buczkowski's federally registered trademark, "Derek Moneyberg®." 1-ER-6-7; 2-ER-232.

Through Wealthy, Mr. Buczkowski, utilizing his moniker Derek Moneyberg, offers training programs focusing on entrepreneurship, financial markets, and real estate investing. 2-ER-232; 2-ER-242. These training programs can include monthly coaching with clients, forums for networking, and one-on-one coaching. 2-ER-232; 2-ER-242. Since founding Wealthy in 2019, Mr. Buczkowski has focused on growing his entrepreneurship, finance, business, and real-estate focused clientele through Wealthy and the Derek Moneyberg® brand. 2-ER-233.

Mr. Buczkowski has never been arrested, charged, or convicted of a drug crime, nor has he ever manufactured or sold drugs. 2-ER-93; 2-ER-233-34. He has not laundered money; he did not frame John Mulvehill for an arrest in Las Vegas; and he was not involved in the death of a woman. 2-ER-233-34. His extensive education and clean background is important to his qualifications and credibility as a coach and instructor

on various entrepreneurship and financial issues. 2-ER-242; 2-ER-47-48.

B. Defendants Use Their YouTube Channel to Publish Videos Containing Defamatory and Disparaging Statements About Plaintiffs and to Advertise Their Services.

Spencer Cornelia, the operator of an eponymous YouTube channel owned by Cornelia Media that publishes YouTube videos on a variety of topics, including real estate investing. 2-ER-124; 2-ER-243; 2-ER-239. On his YouTube channel, Cornelia cross-promotes his other social media sites, and provides links to his real estate investing e-book, called "the House Hack Expert". 2-ER-96; 2-ER-98.

As of May 11, 2022, Defendants had uploaded 250-300 videos on their YouTube channel. 2-ER-79. That is, Defendants did not utilize their YouTube channel only to defame Plaintiffs, but also to promote their services and e-books. 2-ER-74 (Cornelia testifying "I have made videos about [my house hacking strategies], yes. I have made, I believe, two videos on the topic."); 2-ER-71, 2-ER-79 (Cornelia testifying that he made a video to promote and sell e-books authored by Cornelia).

The first e-book "was how to grow your first 1,000 subscribers on YouTube, the second was called House Hacking, which is on the subject of house hacking" and both were published on Defendants' YouTube

channel in December of 2020. 2-ER-87; 2-ER-98; 2-ER-100-101; 2-ER-74. Mr. Cornelia highlights the importance of monetization of videos in his First 1,000 Subscriber's e-book, stating:

> If you're selling some kind of coaching or mentorship services, you may only get 3,000 views on a video, but if only a couple of people pay for your services, then that single video made you thousands of dollars. Now imagine putting out a new video every week. The important factor is treating YouTube like a business from the start.

2-ER-245.

To promote his YouTube channel, thereby driving viewers to his other products and services, Cornelia published a series of videos he calls "Authentic or Charlatan" where he seeks to expose "fake gurus" on social media. 2-ER-124. On December 13, 2020, Cornelia reached out to Mulvehill to encourage Mulvehill to agree to an interview about Plaintiff on Cornelia's YouTube channel. 2-ER-124; 2-ER-63. Cornelia specifically wanted Mulvehill to discuss Plaintiffs. *See* 2-ER-124 ("I reached out to Mulvehill and invited him to appear in a video regarding Buczkowski.").

Mulvehill agreed, and Cornelia recorded two videos (the "Cornelia Videos") in which Cornelia elicited disparaging statements about

Plaintiffs. 2-ER-224-25. Cornelia then reviewed and edited the videos, and subsequently published them on his YouTube channel. 2-ER-58; 2-ER-63-64.

In the Cornelia Videos, Cornelia himself made statements about Plaintiffs, including "I guess with public record, [Mr. Buczkowski] must have been running a drug operation. If it's a house tied to him, it was a house purchased using drug money." 2-ER-172. Additionally, despite no evidence substantiating the statements, Cornelia published a bevy of false, misleading, and defamatory statements made by Mulvehill and Cornelia about Plaintiffs.

The videos include assertions that:

- Mr. Buczkowski lied about his educational credentials *See, e.g.,* 2-ER-186 (Mulvehill stating "he never actually went to University of Chicago");
- Mr. Buczkowski laundered money *See, e.g.,* 2-ER-172 (Mulvehill stating "[Larson Consulting] looks -- it looks very well like it could be a front for laundering money.)";
- Mr. Buczkowski manufactured and/or sold illegal drugs *See, e.g.,* 2-ER-172 (Cornelia stating "well I guess with public

record, he must have been running a drug operation. If it's a house tied to him, it was a house purchased using drug money. Is there any reason to believe that it was him running a drug operation? Do you think that's how he made his money.");

- Mr. Buczkowski framed Mr. Mulvehill for his 2013 arrest in Las Vegas, leading to four felony and four misdemeanor charges *See, e.g.,* 2-ER-142-43 (Mulvehill stating "That's why I don't give a f- saying all this stuff. Like, they came after me, trying to set me up for an arrest in the past – in the past which we'll discuss in another video that motherf-er."); and
- Mr. Buczkowski was involved in the death of a woman who was a witness to the events leading to the arrest of Mr. Mulvehill *See, e.g.,* 2-ER-171 (Mulvehill stating "That girl, a 28-year-old living in Las Vegas was like the primary witness in the case, ended up dead. And then – and I couldn't find the cause of death. I searched for it. 28, doesn't make much sense … that was the link to him.").

Defendants uploaded and published the videos entitled "Authentic or Charlatan: Derek Moneyberg RSD Derek" on December 19, 2020 and

"Derek Moneyberg – Fake Guru?" on February 19, 2021, each containing the interviews with Mulvehill and containing the statements at issue in this litigation.

Cornelia testified that after filming the Cornelia Videos, he edited the videos. 2-ER-63-64. In the "maybe four hours" of editing, Cornelia made the executive decision not to remove any of the statements from the videos; he did not remove the defamatory statements made by himself or those made by Mulvehill. 2-ER-64.

C. Defendants Concede their Source was Biased.

Prior to December 2020, Cornelia never met Mulvehill. 2-ER-51; 2-ER-54. Nonetheless, he conceded that all of the emails that he reviewed about Plaintiffs were supplied to him by Mulvehill. *See* 2-ER-121 ("Q. … And do you remember, you know, any communications with Mr. Mulvehill of him telling you directly or sending you e-mails from third parties … about the plaintiffs …. A. Sure, all the emails."). Cornelia further conceded that "every claim in [The Authentic and Charlatan] video is from information given to [Mulvehill] from anonymous sources." 2-ER-131.

Cornelia's reliance on Mulvehill was reckless since Cornelia knew

of Mulvehill's bias against and hostility towards Plaintiffs. In speaking to Cornelia, Mulvehill expressed animosity and ill will toward Buczkowski, engaged in name-calling about Buczkowski, and Mulvehill implied that he would like to use his brass knuckles on Buczkowski. 2-ER-65-66. The transcripts of the published videos themselves are littered with obscenities and displayed animosity by Mulvehill for Mr. Buczkowski and Mulvehill's obvious bias and animosity continued throughout the videos. *See e.g.* 2-ER-132, 139, 151, 164, & 179.

Indeed, Defendants admitted that they "were initially suspicious of some of Mulvehill's claims." 2-ER-69. Without verifying the veracity of the statements, Defendants brushed off their suspicions because Cornelia "had two good friends that were associated with [Mulvehill]." 2-ER-117-19; 2-ER-69. And, inexplicably, Cornelia determined that Mulvehill's boasting about his sexual conquests was reason enough to believe everything Mulvehill said. 2-ER-77-78.

D. Defendants Fail to Conduct Reasonable Research into the Statements.

The information Cornelia received did not support the claims made in the videos. For example, Cornelia reviewed a video by a former contractor of Plaintiffs, Rohit Das, who refused to go along with

Mulvehill's claim that Plaintiff lied about his education:

> John: . . . he's always toting like Ohh Ivy League Business School degree all this stuff. Some people were saying that he doesn't, even that he never even went to the University of Chicago. They said that he attended some online classes or something.
>
> Rohit: I don't know. He says he went there.
>
> John: But basically saying
>
> Rohit: I don't know man.

2-ER-229-30. Cornelia relied on the Rohit Das video as evidence supporting some of the statements but conveniently ignored the video to the extent it called into question Mulvehill's accusation that Mr. Buczkowski lied about his educational credentials. 2-ER-125.

When asked if he performed any research related to Buczkowski's education, Cornelia testified "No, because I found it irrelevant … I didn't think much of it. Given everything else that was mentioned in the video, I thought it was a very minor detail."[1] 2-ER-60. To Defendants, the lie that Mr. Buczkowski did not obtain an MBA from the prestigious University of Chicago Booth School of Business, a relevant qualification

[1] It should not be lost on the Court that Cornelia claims his Authentic or Charlatan series is based on an impartial "deep dive into … whether [his subjects] were authentic to being a real guru or possibly not." 2-ER-56.

for consumers when choosing a wealth coach, is "an incredibly minor, off-handed comment that Cornelia barely thought about." 2-ER-111; *see also* 2-ER-127 (Cornelia's declaration that he "did not perform independent research prior to publishing the videos at issue in this case to confirm whether Buczkowski actually earned a degree from the University of Chicago business school" because he "considered this to be the least consequential assertion").

Cornelia discussed his research into Larson Consulting leading him to believe it was used for money laundering, noting that its "Facebook page … does not appear to have posted any content since November 15, 2013,"; only has one officer, Dale Buczkowski; has 1 share and a total authorized capital of $100; no signage outside the address listed on the Nevada Secretary of State's website for the company; and there is only a "no soliciting" sign on its door. 2-ER-103.

As for the statements that Buczkowski was involved in drug manufacturing and sales, Cornelia stated that Buczkowski made claims for a property that was subject to civil asset forfeiture claims, that Buczkowski's father had a criminal history and was the registered agent of a company whose vehicle was searched and found to have equipment

for growing marijuana, and that a neighboring property owned by a friend of Buczkowski contained Buczkowski's mail, credit cards, and tax returns. 2-ER-103-07. Accordingly, Cornelia concluded that Buczkowski manufactured and sold drugs. 2-ER-103-07.

E. The District Court Relied on Three Allegations in Holding Plaintiffs are Public Figures, None of Which Can Stand.

In conclusory fashion, and without analysis, the district court opined "that plaintiffs are, at the very least, limited-purpose public figures." 1-ER-15. However, the district court conflated limited-purpose public figures with public figures. 1-ER-14-16. The district court did not find – nor could it from the record – that Plaintiffs are celebrities, household names, employees of public officials, or public officials, and never engaged in any analysis of any limited "purpose" for which plaintiffs may be public figures. Instead, in conclusory fashion, the district court declared Plaintiffs public figures by expanding "public figure" status for anyone who (1) owned a successful business; (2) owned a trademark; and (3) had subscribers on social media. Notably, the district court even ignored that Cornelia himself conceded that Mr. Buczkowski isn't known in any space other than "[w]ithin the

entrepreneur space on Instagram specifically." 2-ER-120.

F. The District Court Erringly Held That Defendants Did Not Act with Actual Malice.

Compounding its error, the district court then found that "defendants did not act with actual malice" because "Cornelia published his videos based on reasonable information he received from reliable sources." 1-ER-16. The district court then failed to consider the falsity of the actual statements, instead meandering into an analysis of other irrelevant information received by Cornelia "from reliable sources" about several statements related to "allegedly unscrupulous business practices," "unethical business practices," and the use of "young, unqualified people to write the instructional and promotional material for plaintiffs' courses."[2] 1-ER-16. In placing the focus on these irrelevant statements, the district court ignored *all* of the actionable statements that were the focus of the litigation. That is, the district court failed to consider the source of the information for the statements that Mr. Buczkowski lied about his educational credentials; that he was involved

[2] Even the district court's treatment of these statements was one-sided and ignored that there was evidence in the record that Plaintiffs, for example, edited the instructional materials prior to releasing them. 2-ER-227-28.

in the sale and/or manufacturing of illegal drugs; that his company, Larson Consulting, was a front for money laundering; that he was involved in the death of a woman related to Mr. Mulvehill's 2013 arrest; and that he set up Mr. Mulvehill for his 2013 arrest. *See generally* 1-ER-6-19.

After its brief discussion of actual malice and the small subset of statements at issue in this litigation, the district court found that "[e]ven if Cornelia were mistaken, his conduct is not remotely close to constituting reckless disregard." 1-ER-16. However, in the same Order, the district court noted that "Cornelia does not provide sufficient proof that he was unaware such statements by Mulvehill concerning Buczkowski could be false." 1-ER-12. At a minimum, the district court's own contradictory findings demonstrate a genuine issue of material fact as to whether Defendants acted with a reckless disregard for the truth of the statements and, thus, actual malice.

G. Because Defendants Were Not Entitled to Summary Judgment on Plaintiffs' Claims, the District Court Erred by Awarding Costs to Defendants as Prevailing Parties.

On October 13, 2023, and pursuant to FRCP 54, Defendants submitted their Bill of Costs. 2-ER-28-45. Plaintiffs filed their Objection

to Cornelia's Bill of Costs on October 26, 2023, 2-ER-21-27. After briefing, the Clerk of the Court awarded Defendants $7,526.26 in costs. 1-ER-4; *see also* 1-ER-2-3 (Clerk's Memorandum Regarding Taxation of Costs).

H. This Court Consolidates the Appeals.

On October 26, 2023, Plaintiffs filed their Notice of Appeal, 2-ER-246-52, from the Order granting summary judgment in favor of Defendants, 1-ER-6-19, and the Judgment in a Civil Case, 1-ER-5. The next day, on October 27, 2023, Defendants filed their Notice of Appeal, 2-ER-246-252, from the Order denying their Special Motion to Dismiss Pursuant to NRS 41.660, 1-ER-6-19. On December 26, 2023, Plaintiffs filed their Notice of Appeal, 2-ER-261-67, from the Clerk of the Court's taxation of costs as set forth in the Bill of Costs, 1-ER-4, and the Clerk's Memorandum Regarding Taxation of Costs, 1-ER-2-3.

Upon Plaintiffs' unopposed motion, this Court consolidated the appeals from the Order, 1-ER-6-19, with the appeal on costs, on February 7, 2024.

V. SUMMARY OF ARGUMENT

The district court incorrectly determined that Plaintiffs are public

figures and, thus, were required to demonstrate actual malice to survive summary judgment on their defamation claim for relief. In making this determination, the district court noted that Plaintiff Buczkowski has a "growing ubiquity" on social media and concluded that prospective clients have a right to know about his background. In so stating, the district court created a public controversy that did not exist when the statements were made. That is, Defendants' publication of the statements at issue in this case, cannot by itself create a public controversy in assessing whether Plaintiffs are limited purpose public figures. The public controversy must have already existed at the time the statements were made. *Planet Aid, Inc. v. Reveal*, 44 F.4th 918, 925 (9th Cir. 2022).

Even so, public figures are those "who achieve such pervasive fame or notoriety that they become a public figure for all purposes and in all contexts." *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 719, 57 P.3d 82, 90-91 (Nev. 2002). The district court relied on three allegations in Plaintiffs' Complaint for its finding of public figure status: (1) that Wealthy is a "leading entrepreneurship, finance, business, real-estate and self-improvement company"; (2) that "Buczkowski also owns a federally registered trademark"; and (3) that "[Buczkowski] has amassed

a following of 23,700 subscribers on YouTube, and his videos have garnered over 1.2 million views on the platform." 1-ER-15. These facts are not enough to transcend a private individual into a public figure.

Notwithstanding its erroneous determination as to public figure status, the district court further erred in applying the standard of reckless disregard. The district Court cited *Reader's Digest Ass'n v. Sup. Ct. of Marin Cnty.*, 690 P.2d 610, 617-18 (Cal. 1984) for the premise that "[a] publisher does not have to investigate personally, but may rely on the investigation and conclusions of reputable sources." 1-ER-15. In doing so, the district court failed to recognize that the *Reader's Digest* court determined that the relied-upon sources in that case were reputable. The district court then ignored the factors listed by the *Reader's Digest* court for determining reckless disregard for truth, and that each of them weighs in favor of finding actual malice in this case.

As for Plaintiffs' claim under the Lanham Act, the district court erred by holding that Defendants did not engage in commercial speech. The district court's myopic view of modern-day modes of communication is evident in its misunderstanding that "[t]he subject of this action is the YouTube videos themselves, not the YouTube channel as a whole." 1-ER-

13.

Lastly, the district court erred when it applied its holding related to actual malice on Plaintiffs' defamation claim to Plaintiffs' Intentional Infliction of Emotional Distress and Business Disparagement claims. That is, Defendants demonstrated a reckless disregard for the truth of the statements by failing to conduct reasonable investigation into the statements and relied upon an unreliable source with demonstrated hostility towards and bias against Plaintiffs, thus establishing actual malice. This Court should reverse.

VI. ARGUMENT

A. Standard of Review

A district court's decision to grant summary judgment is reviewed *de novo*. *Desire, LLC v. Manna Textiles, Inc.*, 986 F.3d 1253, 1259 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 343 (2021). When conducting a *de novo* review, this Court views the case from the same position as the district court, *Lawrence v. Dep't of Interior*, 525 F.3d 916, 920 (9th Cir. 2008), and considers the matter anew, the same as if it had not been heard before, and as if no decision had been previously rendered by the district court, *Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006).

Whether a person is a public figure, and to what extent, is a determination of law, that is reviewed *de novo*. *Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966); *Planet Aid, Inc. v. Reveal*, 44 F.4th 918 (9th Cir. 2022).

B. The District Court Incorrectly Determined that Plaintiffs are Public Figures, When They Are Not Celebrities, Household Names, or Public Officials.

At the outset, the district court did not find that Plaintiffs had such pervasive fame or notoriety that they could qualify as public figures for all purposes and in all contexts. 1-ER-6-19; *Cf. Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 57 P.3d 82 (Nev. 2002). Nor could it have so found. Plaintiffs are not public officials, *cf. New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); do not work for elected officials, *cf. Rosenblatt v. Baer*, 383 U.S. 75 (1966); are not celebrities, *cf. Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010); and are not "household words," *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1294 (D.C. Cir.), cert denied, 449 U.S. 898 (1980) ("a person can be a general public figure only if he is a 'celebrity' his name a 'household word' whose ideas and actions the public in fact follows with great interest."). "Absent clear evidence of general fame or notoriety in the community and pervasive involvement in the affairs of society, an individual is not a

public figure for all purposes." *Makaeff v. Trump University, LLC*, 715 F.3d 254, 265 (9th Cir. 2013) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974)).

Rather, the district court found that Plaintiffs are public figures based on three mundane allegations contained in their Complaint: (1) that Wealthy is a "leading entrepreneurship, finance, business, real-estate and self-improvement company"; (2) that "Buczkowski also owns a federally registered trademark"; and (3) that "[Buczkowski] has amassed a following of 23,700 subscribers on YouTube, and his videos have garnered over 1.2 million views on the platform." 1-ER-15.

The district court's findings in this regard are flimsy, at best.[3] Running a company – even a successful one – does not confer all-purpose public figure status. *See Planet Aid, Inc. v. Reveal*, 44 F.4th 918 (9th Cir. 2022); *see also Comput. Aid. v. Hewlett-Packard Co.*, 56 F. Supp. 2d 526, 535 (E.D. Pa. 1999) (even though Hewlett Packard is one of the "largest

[3] Even if Dale Buczkowski qualifies as a "public figure", which he does not, his company Wealthy Inc. would not automatically be deemed to have "public figure" status unless a showing of alter ego were made. *Makaeff v. Trump University, LLC*, 715 F.3d 254 (9th Cir. 2013) (discussing *Schiavone Construction Co. v. Time, Inc.*, 619 F. Supp. 684 (D.N.J. 1985). Plaintiffs are not "alter egos" of each other and Defendants have not asserted otherwise.

and most influential corporations in the world with one of the most actively traded stocks on the New York Stock Exchange" it is not a public figure because it had not achieved such "pervasive fame or notoriety to be deemed a general purpose public figure"); *see also Enigma Software Grp. USA, LLC v. Bleeping Computer, LLC*, 194 F. Supp.3d 263, 289 (S.D.N.Y. 2016) ("the mere fact that a business enterprise is successful is an insufficient reason to deem it a public figure").

Further, owning a federally registered trademark is hardly sufficient evidence of "public figure" status. With an estimated 64.4 million trademark registrations worldwide in 2020, 2.6 million of them in the United States, this finding would confer public figure status on millions of otherwise private individuals.[4] Even so, owning intellectual property hardly confers all-purpose public figure status. *See Fleming v. Moore*, 275 S.E.2d 632 (Va. 1981) (property owner was not "public figure" by virtue of his owning property). The district court erred.

Nor can the district court's ruling stand based on Plaintiffs'

[4] *See* https://www.wipo.int/pressroom/en/articles/2021/article_0011.html#:~:text=There%20were%20an%20estimated%2064.4,and%202.4%20million%20in%20India (last visited on February 13, 2024).

"following" on social media. The district court found that because Plaintiffs have "amassed a following of 23,700 subscribers on YouTube", that Plaintiffs were public figures. 1-ER-15. Yet, there are over 4 billion active social media users worldwide. *Logan, Rescuing our Democracy by Rethinking New York Times Co. v. Sullivan*, 81 Ohio St. L.J. 759, 803 (2020). Collecting a mere fraction of one hundred thousandth of one percent of social media users hardly amounts to compelling evidence of meeting the standard of "public figure." *See Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967) (C.J. Warren, concurring) (reasoning that "public figures" are those that "by reason of their fame, shape events in areas of concern to **society at large**").[5]

Indeed, a party may be characterized as a public figure "only if he [] is a well-known celebrity, his name a household word." *Waldbaum*, 627 F.2d at 1294. The district court did not make this finding, nor could it since there was not "clear evidence of general fame or notoriety in the community and pervasive involvement in the affairs of society" by

[5] For example, the top fifty YouTube channels, in terms of subscribers, are numbered in the tens and hundreds of millions. *See* https://en.wikipedia.org/wiki/List_of_most-subscribed_YouTube_channels (last visited on February 13, 2024).

Plaintiffs. *Makaeff v. Trump University, LLC*, 715 F.3d at 265.

C. The District Court Incorrectly Determined that Plaintiffs are Limited Purpose Public Figures, When None of the Defamatory Statements Are Germane to a Public Controversy in which Plaintiffs Voluntarily Injected Themselves.

Defendants asserted that Plaintiffs were "limited purpose public figures," but the district court undertook no independent analysis in this regard and, rather, mischaracterized limited-purpose public figure status as just a point on a sliding scale of general-purpose public figure status. *See* 1-ER-15 ("The court has no apprehension in determining that plaintiffs are, at the very least, limited-purpose public figures."). Neither of the Plaintiffs "voluntarily inject[ed] themselves or was drawn into a particular public controversy," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and the district court made no findings in this regard. 1-ER-6-19.

This Court has articulated a three-prong test to determine whether or not an individual or entity qualifies as a "limited-purpose public figure."[6] *Planet Aid, Inc. v. Reveal*, 44 F.4th 918, 925 (9th Cir. 2022).

[6] The classification of "limited purpose public figures" is under increasing scrutiny. Justice Thomas questions limited purpose public figure classification – and any kind of heightened liability standard – in state law defamation suits. *McKee v. Cosby*, 139 S.Ct. 675 (2019) (denying certiorari) (J. Thomas concurring). Justice Gorsuch criticizes the

First, the district court must consider "whether a public controversy existed when the statements were made." *Id.* Second, the district court must consider whether the defamation was related to the pre-existing controversy. *Id.* And third, the district court must consider whether the plaintiff voluntarily injected himself or itself into the controversy. *Id.* The district court considered none of these factors.

As to the first factor, the district court summarily dismissed the timing of the statements, inexplicably reasoning that it was "irrelevant" that Defendants only cited evidence that post-dated the statements published by Defendants. 1-ER-15; 2-ER-90-91. It is canonical, however, that to qualify as a limited purpose public figure, a plaintiff must retain such status at the time of the alleged defamation. *Fitzgerald v. Penthouse Intern., Ltd.*, 691 F.2d 666, 668 (4th Cir. 1982). The district court turned this concept on its head, effectively allowing any person who is defamed to subsequently achieve limited-purpose public figure status – even if by

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"archaic" distinctions of the "pervasively famous" and "limited purpose public figure" tests that "seem increasingly malleable". *Berisha v. Lawson*, 141 S.Ct. 2424 (2012) (J. Gorsuch dissenting.) Indeed, the policy surrounding the "public figure" status sought to promote the goal of information about government. *Id.* Those ends are not met by giving a free pass to YouTubers like Cornelia who disseminate misinformation and a barrage of defamatory falsehoods about private individuals.

virtue of the defamatory statements. The district court did not identify a public controversy that existed at the time the statements were made and neither did Defendants. 1-ER-6-19; 2-ER-109-10.

Likewise, the district court provided no discussion of the second factor that the statements must be related to the public controversy. *Planet Aid*, 44 F.4th at 925. How could it when it failed to ever identify a public controversy or find that said controversy existed at the time the statements were published? Just like the district court, Defendants did not explain how each of the statements made about Plaintiffs were related to any controversy. 2-ER-109-10.

Similarly, the district court did not make any findings that Plaintiffs voluntarily injected themselves into a public controversy. When Plaintiffs asserted that evidence related to their public figure status post-dated the statements, the district court said this timing was irrelevant. 1-ER-15. However, the district court missed the mark because Plaintiffs must have already injected themselves into the public controversy at the time the statements were made. *Fitzgerald*, 691 F.2d at 668. Defendants also failed to assert that Plaintiffs injected themselves into an already-existing controversy by the time Defendants

published the statements. 2-ER-109-10.

The district court did not conduct any analysis of limited-purpose public figures and neither did Defendants. This Court should reverse the district court's holding that Plaintiffs were limited-purpose public figures.

D. The District Court Erred by Holding that Defendants Did Not Act with Actual Malice When Defendants Demonstrated a Reckless Disregard for the Truth.

Appellate courts conduct "independent review" of a determination of actual malice in a defamation case. *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186 (9th Cir. 2001). Under the rule of independent review, the reviewing court exercises "independent judgment in evaluating the lower court's opinion, rather than granting it any deference." *Suzuki Motor Corp. v. Consumers Union*, 330 F.3d 1110, 1132 (9th Cir. 2003) (internal quotation omitted).

Even if the district court's determination that Plaintiffs are public figures was correct – it was not – it nonetheless erred by holding that no rational jury could find that Defendants acted with reckless disregard for the truth of the statements. *See Posadas v. City of Reno*, 109 Nev. 448, 455, 851 P.2d 438, 444 (Nev. 1993) (actual malice is an issue of fact

properly left for resolution by a jury). Actual malice exists when the statement is made with knowledge that it was false or reckless disregard of whether it was true or not. *Id.* at 454, 443.

1. The district court erred in its analysis of the facts.

The district court erred in its recitation of the facts related to actual malice. First, the district court stated that "*all* of the allegedly defamatory statements were uttered by Mulvehill, not Cornelia." 1-ER-16 (emphasis added). Not true. At times, Cornelia would make a defamatory statement and then lead in with a question to Mulvehill. For example, as outlined in the evidence before the district court, Cornelia stated:

> So the next note on my notes is the – the drug house. So you – do you believe – **well, I guess with public record, [Buczkowski] must have been running a drug operation. If it's a house tied to him, it was a house purchased using drug money.** Is there any reason to believe that it was him running a drug operation? Do you think that's how he made his money?

2-ER-172 (emphasis added).

Additionally, the district court ignored that Cornelia's commentary affirmed some of the defamatory statements made by Mulvehill. For example, Mulvehill stated that "I did some research on him … and he

has, like a lengthy arrest record where he was involved with, you know, property forfeiture for – manufacturing illegal drugs, for battery. All kinds of stuff." 2-ER-165. Rather than continue in his "simple" role of interviewer, Cornelia followed up by affirming this lie and stated "It's public record too. Like it's – it's known. It's public." 2-ER-165.

Even so, the district court's assertion that "Cornelia was simply interviewing Mulvehill" and that "Cornelia did not act with reckless disregard in conducting his interview with Mulvehill," 1-ER-16, ignores the fact that the videos were not aired live but rather were viewed and edited by Cornelia and then published by Cornelia. 2-ER-63-64. That is, Cornelia had complete editorial control over the videos and went from "simply interviewing Mulvehill" to tortiously publishing the videos. *Id*.

2. The district court erred in finding that Cornelia relied on reasonable information.

The district court also erred in its analysis when concluding that "Cornelia did not act with reckless disregard" because he "published his videos based on reasonable information he received from reliable sources." 1-ER-16. The sum total of "reasonable information" referenced by the district court consisted of information provided to Cornelia by Mulvehill, himself:

- information about the plaintiffs' allegedly unscrupulous business practices, such as not authoring their own content;
- a video from a former employee[7] of plaintiffs who made claims about plaintiffs' unethical business practices and their using young, unqualified people to write the instructional and promotional material for plaintiffs' courses; and
- numerous emails about plaintiffs' character.

1-ER-16. All of the above information referenced by the district court was provided to Cornelia by Mulvehill. 2-ER-69. That is, Cornelia received this hand-picked, "reasonable information" from a biased and unreliable person whose credibility should have been questioned and, in fact, was questioned by Cornelia. *See infra.*

Additionally, although addressing some of the content of the statements related to Plaintiffs' business practices, the district court completely ignored the statements that have been the focal point of all briefings and all arguments in this litigation for over two years. *See generally* 1-ER-6-19. The district court did not, because it could not,

[7] The district court's characterization, here, was incorrect because Rohit, the person in the video, stated that he "didn't work for [Buczkowski]. I worked for the marketing agency." 2-ER-227.

reference any "reasonable information" supporting the statements that Mr. Buczkowski lied about his educational credentials; that he was involved in drug manufacturing and/or sales; that his company Larson Consulting was a front for money laundering; that he set up Mulvehill for his 2013 arrest; or that he was involved with the death of a woman related to Mulvehill's 2013 arrest.

3. The district court erred by ignoring Cornelia's reliance on anonymous sources, improbable allegations, and obvious reasons to doubt the veracity of Mulvehill.

When presenting the legal standard for reckless disregard, the district court quoted *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), stating that "[r]eckless disregard requires that a publisher 'entertained serious doubts as to the truth of his publication.'" 1-ER-15. However, the district court ignored the nuances to the appropriate analysis of reckless disregard as pronounced by the United States Supreme Court. That is

> The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is … based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would

> have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

St. Amant, 390 U.S. at 731. Here, Cornelia himself stated that "every claim in [The Authentic or Charlatan] video is from information given to [Mulvehill] from anonymous sources." 2-ER-131. Accordingly, summary judgment on Plaintiffs' claims was not appropriate to the extent they relied on statements made in the Authentic and Charlatan video.

Further, Defendants published statements that "are so inherently improbable that only a reckless man would have put them in circulation." *St. Amant*, 390 U.S. at 731. For example, Defendants' conclusion that Plaintiffs engaged in money laundering because Mr. Buczkowski owns a company that lacks an extensive internet presence and has only one officer is inherently improbable. *See* Section IV(D), *supra*. What's more, Defendants demonstrated recklessness by disregarding the obvious reasons to doubt Mulvehill, due to his bias, animosity and hostility as discussed below, and the accuracy of his information. *St. Amant*, 390 U.S. at 731 ("recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.").

Under *St. Amant* the district court had sufficient evidence before it supporting that Defendants acted with a reckless disregard for truth.

4. The district court erred in its application of Reader's Digest.

The district court's selective quotation of cases did not end with *St. Amant*. It further cited *Reader's Digest Ass'n v. Sup. Ct. of Marin Cnty.*, 690 P.2d 610, 617-18 (Cal. 1984) for the premise that "[a] publisher does not have to investigate personally, but may rely on the investigation and conclusions of reputable sources." 1-ER-15. However, the *Reader's Digest* court[8] actually explained that a failure to investigate, anger and hostility toward the plaintiff, reliance upon sources known to be unreliable, and reliance upon sources known to be biased against the plaintiff were factors demonstrating a reckless disregard for truth. *Id.* at 618-19.

When asked what investigation he conducted to ascertain the truthfulness of the statements, Cornelia stated that he was "provided this information from third parties including Mr. Mulvehill" and that he

[8] To the extent that the District Court relied on *Reader's Digest*, a California case, it quoted one sentence without providing the context of that sentence or the analytical framework provided by the California Supreme Court.

"reviewed a video Mr. Mulvehill published … which repeats many of the claims." 2-ER-107. That is, to corroborate statements made by Mulvehill during their interviews, Cornelia reviewed previous statements made by Mulvehill; it is nonsensical to use a person to corroborate their own statements. *See, e.g., Black's Law Dictionary* p. 435 (11th ed. 2019) (*corroborated*: "supported from independent evidence that is both credible and admissible"; *corroboration*: "1. Confirmation or support by additional evidence or authority").

As for the reliability of Cornelia's source of information, the district court skipped past any analysis on reliability. 1-ER-15 (citing *Reader's Digest Ass'n v. Sup. Ct. of Marin Cnty*, 690 P.2d 610, 617-18 (Cal. 1984)). The district court found that "Cornelia published his videos based on reasonable information he received from reliable sources," including "information from Mulvehill" such as "a video from a former employee of plaintiffs" and "numerous emails about plaintiffs' character." 1-ER-16; *see also* 2-ER-121 ("Q. … And do you remember, you know, any communications with Mr. Mulvehill of him telling you directly or sending you e-mails from third parties … about the plaintiffs …. A. Sure, all the emails."). What is more, the district court omitted the fact that many of

these "reliable sources" were anonymous, including the sources for "every claim in [The Authentic and Charlatan] video." 2-ER-131. How can a victim of defamation defend himself against anonymous sources when he cannot even confirm if they exist? *Reader's Digest Ass'n*, 690 P.2d at 618.

In *Reader's Digest*, the court found the sources of information to be reliable and reputable noting that the first source of information for the statements was "a professor of sociology at a leading university and the author of a number of studies on [the subject matter of the statements]" and the second source of information "received the Pulitzer Prize for their reports and editorials on [the subject matter of the statements]." 690 P.2d 610, 619. Unlike the "persons of unsullied reputation" in the *Reader's Digest* case, *id.*, Mulvehill has no credentials or expertise suggesting that he was a reputable source of information.

As for bias demonstrating a reckless disregard for truth, Cornelia himself demonstrated a bias towards Mr. Buczkowski when he expressed, prior to filming one of the videos, that he wanted to expose Mr. Buczkowski "[j]ust to ruin his reputation." 2-ER-226. Not only did Cornelia express a bias towards Plaintiffs, but his source of information for his supposed "research" was biased. Mulvehill's hostility and anger

towards and bias against Plaintiffs was on full display during the interviews and Cornelia demonstrated a reckless disregard for the truth by relying on Mulvehill for his information. *See Reader's Digest*, 690 P.2d at 618-19 (listing anger and hostility towards and bias against plaintiffs as factors demonstrating reckless disregard for the truth). Mulvehill repeatedly used obscenities about Plaintiffs, blamed Buczkowski for Mulvehill's arrest without any supporting evidence, and stated that Buczkowski deserves to be assaulted by Mulvehill with his brass knuckles. *See supra.* Each of the factors listed by the *Reader's Digest* court was met here, and Cornelia demonstrated a reckless disregard for the truth of the statements that he published.

Because actual malice can be demonstrated through a reckless disregard for the truth, the district court erred when it held that Defendants did not publish the statements with actual malice. This Court should reverse the district court's grant of summary judgment in favor of Defendants on Plaintiffs' claim for defamation and instruct the district court to allow the claim to proceed to trial.

E. The District Court Erred by Holding that Defendants' Publication of the Statements did not Constitute Advertisement Under the Lanham Act.

Under the Lanham Act, civil liability exists for a person or business that uses promotion and advertisement to disparage another business to obtain business and profit. 15 U.S.C. § 1125. Specifically, the Lanham Act provides, in part, that:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
>
> …
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1).

This Court has defined "advertising" or "promotion" as commercial speech; by a defendant who is in commercial competition with plaintiff; for the purpose of influencing consumers to buy defendant's goods or services; and that is sufficiently disseminated to the relevant purchasing

public. *Ariix, LLC v. Nutrisearch Corp.*, 985 F.3d 1107, 1115 (9th Cir. 2021) (citing *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 735 (9th Cir. 1999)).

Although commercial speech "is usually defined as speech that does no more than propose a commercial transaction," "courts view this definition as just a starting point." *Ariix*, 985 F.3d at 1115. District courts have been provided with guideposts that provide "strong support that the speech should be characterized as commercial speech …. [1] the speech is an advertisement, [2] the speech refers to a particular product, and [3] the speaker has an economic motivation." *Id.* at 1115-16 (citing cases). While these guideposts are to be considered, they are not determinative as to whether statements are commercial speech. *Bolger*, 463 U.S. at 67 n. 14; *Ariix*, 985 F.3d at 1116; *Dex Media*, 696 F.3d 952, 958 (9th Cir. 2012).

Here, the district court granted summary judgment in favor of Defendants after simply concluding that "Cornelia's speech was thus not an advertisement and therefore not commercial speech."[9] 1-ER-14. Even

[9] By limiting its analysis only to whether Cornelia's speech was an advertisement, the district court ignored the other two guideposts that provide "strong support that the speech should be characterized as

so, the whole is greater than the sum of its parts and the district court erred by stating that "[t]he subject of this action is the YouTube videos themselves, not the YouTube channel as a whole." 1-ER-13.

The district court disregarded that Defendants promoted their services on Spencer Cornelia's YouTube "About" Page, including his House Hack Expert program and his First 1,000 Subscribers program, each of which instructs readers to gain access to monthly coaching calls. 2-ER-96; 2-ER-98; 2-ER-100. Mr. Cornelia's monthly coaching on real-estate investing made him a direct competitor with Plaintiffs. *Compare* 2-ER-100-101 & 2-ER-72-75 *with* 2-ER-133-34, 2-ER-82, 88, & 90. Indeed, without a YouTube channel, Cornelia could not post videos on YouTube, such that the videos cannot be separated from the channel. *See* https://support.google.com/youtube/answer/1646861?hl=en#:~:text=You%20can%20watch%20and%20like,%2C%20comment%2C%20or%20make%20playlists (last visited on February 13, 2024). It is an undisputed

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commercial speech." *Ariix*, 985 F.3d at 1115-16. Because the published videos referred to specific products, 2-ER-132-36, 44, and because Cornelia, as a competitor of Plaintiffs in real estate instruction, 2-ER-232; 2-ER-244; 2-ER-96, had economic motivation, the other two guideposts providing "strong support" that speech is commercial speech were established. *Ariix*, 985 F.3d at 1115-16.

fact that Cornelia's YouTube channel, the same channel on which Cornelia hosts his videos, was utilized to advertise Cornelia's products and services by promoting Cornelia's House Hack Expert book and First 1,000 Subscribers mentoring program. 2-ER-87.

The district court, however, imposed an extra-statutory hurdle for Plaintiffs to jump over by imposing a requirement that the videos themselves mention Defendants' own products and services. The court remarked "[t]he subject of this action is the YouTube videos themselves, not the YouTube channel as a whole." 1-ER-13.

The district court's interpretation of 15 U.S.C. § 1125 as requiring that the videos mention Cornelia's own products runs contrary to the plain language and legislative history of the statute. The statutory language refers to "***his or another person's*** goods, services, or commercial activities." Here, there is no dispute that Cornelia's videos included statements about Plaintiffs' services, e.g. "another's goods, services, and/or commercial activities."

Plaintiffs' claims are also supported by the legislative history of 15 U.S.C. § 1125. This provision was amended in the Trademark Law Revision Act of 1988, Pub. L. No. 100-667, § 132, § 43(a), 102 Stat. 3935,

3946 to include false statements about a competitor's product. "Prior to revision, [15 U.S.C. § 1125] did not cover acts traditionally denominated as 'product disparagement' or 'trade libel'; that is, it 'was construed to cover only misrepresentations about one's own product and not misrepresentations concerning the products or services of a competitor.'" *Gordon & Breach Sci. Publrs. S.A. v. Am. Inst. of Physics*, 589 F.Supp. 1521 (S.D.N.Y. 1994); *See United States Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 922 (1990) ("The pre-amendment version, which controlled when the district court considered the matter, applied only to statements made by a defendant about its own products, not to statements about the plaintiff's products . . . As amended, however, [15 U.S.C. § 1125] encompasses statements made by a defendant about 'his or her or another person's' products. 15 U.S.C. 1125(a) (emphasis added)").

The district court erred by granting summary judgment in favor of Defendants based on a single, non-determinative, guidepost on whether speech is commercial. Nonetheless, the district court's holding that the statements were not advertisements, resulting from the district court's separation of the videos from Cornelia's YouTube channel, was an error

that this Court should reverse.

F. The District Court Erred When It Granted Summary Judgment in Favor of Defendants on Plaintiffs' Intentional Infliction of Emotional Distress Claim.

A claim for relief under Intentional Infliction of Emotional Distress ("IIED") requires extreme and outrageous conduct with the intention of, or reckless disregard for, causing emotional distress that causes plaintiff to suffer severe or extreme emotional distress and actual or proximate causation. *Olivero v. Lowe*, 116 Nev. 395, 398, 995 P.2d 1023, 1025 (Nev. 2000) (citing *Star v. Rabello*, 97 Nev. 124, 125, 625, P.2d 90, 91-92 (Nev. 1981)).

It is undisputed that Defendants published the videos containing the defamatory and disparaging statements about Plaintiffs. In doing so, their conduct was extreme and outrageous due to the shocking content of the statements that Plaintiffs launder money, were involved in a drug operation, and were linked to the death of a woman. *See, e.g., Posadas v. City of Reno*, 109 Nev. 448, 456, 851 P.2d 438, 444 (Nev. 1992) ("Whether the issuance of a press release which could be interpreted as stating that a police officer committed perjury is extreme and outrageous conduct is a question for the jury."). Because the statements contained accusations of

criminal conduct and were published globally, Defendants' conduct was extreme, and Plaintiffs did not need to demonstrate any physical injury or illness. *See Blige v. Terry*, 540 P.3d 421, 432 (Nev. 2023) (upholding district court's award of damages for IIED based on extortion that caused plaintiff to be "stressed" and who had "trouble sleeping, had to worry every second, and was afraid" and holding that defendant's "outrageous conduct was so extreme that [plaintiff] was not required to show more."); *Franchise Tax Bd. of Cal. v. Hyatt*, 130 Nev. 682, 697, 335 P.2d 125, 148 (Nev. 2014) (vacated and remanded on other grounds) ("while medical evidence is one acceptable manner in establishing that severe emotional distress was suffered for purposes of an IIED claim other objectively verifiable evidence may suffice to establish a claim when the defendant's conduct is more extreme."); *cf. Chowdry v. NLVH, Inc.*, 109 Nev. 478, 483, 851 P.2d 459, 462 (Nev. 1993) (citing *Nelson v. City of Las Vegas*, 99 Nev. 548, 555, 665 P.2d 1141, 1145 (Nev. 1983) ("the less extreme the outrage, the more appropriate it is to require evidence of physical injury or illness from the emotional distress").

The district court erred in imposing an additional requirement upon Plaintiffs for the tort of intentional infliction of emotional distress.

1-ER-17 (citing *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 56 (1988) for the premise that public figures must demonstrate actual malice in IIED claims). Because Plaintiffs are not household names, celebrities, public officials, or employees of public figures and, thus, are not public figures the district court imposed an element of actual malice upon Plaintiffs where none should exist. *See* Section VI(B), *supra*.

Nonetheless, Plaintiffs demonstrated that Defendants acted with actual malice by publishing the videos. *See* Section VI(D), *supra*. Defendants' failure to investigate, their reliance on an unreliable source for the statements, and their reliance on an openly hostile and biased source for the information all demonstrate a reckless disregard for the truth. *See* Section VI(D), *supra*.

Plaintiffs demonstrated, at the very least, that there is a genuine issue of material fact that Defendants acted with a reckless disregard for the truth when they published the statements at issue in this litigation. This Court should reverse the district court's granting of summary judgment in favor of Defendants on Plaintiffs' claim for IIED and instruct the district court to allow the claim to proceed to trial.

G. The District Court Erred When It Held that Plaintiffs Did Not Establish Actual Malice Despite Defendants' Reckless Disregard for the Truth, or Special Damages in Support of Their Claim for Business Disparagement.

To succeed in a claim for business disparagement, the plaintiff must prove a false and disparaging statement; the unprivileged publication by the defendant; malice; and special damages. *Clark Cnty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 386, 213 P.3d 496, 504–05 (Nev. 2009). As opposed to defamation, which merely requires some evidence of fault amounting to at least negligence, business disparagement requires malice. *Id.* Malice is proven when the plaintiff can show either that the defendant published the disparaging statement with the intent to cause harm to the plaintiff's pecuniary interests, or the defendant published a disparaging remark knowing its falsity or with reckless disregard for its truth. *Id.*

Defendants did not – and cannot – claim that their publications were privileged. *See, e.g., Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212, 215, 984 P.2d 164, 166 (Nev. 1999) ("The law has long recognized a special privilege of absolute immunity from defamation given to the news media and the general public to report newsworthy events in judicial proceedings."); *Pope v. Motel 6*, 121 Nev.

307, 317, 114 P.3d 277, 284 (Nev. 2005) (concluding that a qualified privilege applies to statements made to police in aid of law enforcement).

Additionally, Defendants concede that at least one of the statements is false, 2-ER-107, and provide only illogical inferences as support that the other statements were opinion. For example, Defendants attempt to connect Buczkowski to drug manufacturing and sales because of Buczkowski's father's connection to an illegal grow operation and because Buczkowski made a claim to a property, as the executor of an estate, that was civilly seized. 2-ER-103-07. What's more, Defendants showed a reckless disregard for the veracity of the statements by relying on a disreputable and biased source for information and by failing to conduct reasonable research into the statement before publishing them, *see* Section VI(D) *supra*, and the Court should reverse the district court's Order granting of summary judgment in favor of Defendants on Plaintiffs' claim for Business Disparagement.

Special damages under a claim for business disparagement can be established by demonstrating economic loss attributable to the defendants' conduct, either through the loss of specific sales or "a general decline of business." *CCSD v. Virtual Educ. Software, Inc.*, 125 Nev. 374,

387, 213 P.3d 496, 505 (Nev. 2009). Summarily, the district court held that "Plaintiffs further fail to show any proof of special damages." 1-ER-18. In so holding, the district court ignored Plaintiffs' expert report outlining the general decline in business suffered by Plaintiffs following the publication of the Cornelia Videos. 3-ER-311-341. Indeed, Plaintiffs' theory of the case, since the inception of this litigation, has been that "[a]s a proximate result of Defendants' publication of the statements set out above, Plaintiffs suffered pecuniary loss and also suffered a general decline in their business and income." 2-ER-244.

Defendants failed to demonstrate a lack of a genuine issue of material fact as to Plaintiffs' special damages. In fact, Defendants did not even argue a lack of special damages when moving for summary judgment and merely asserted that "[t]he business disparagement claim fails for the same reasons the defamation claim fails." 2-ER-113. As this Court well knows, a claim for defamation in Nevada has no requirement for special damages. *CCSD v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 385, 213 P.3d 496, 503 (Nev. 2009) (listing elements of defamation as (1) a false and defamatory statement; (2) an unprivileged publication to a third person; (3) fault, amounting to a at least negligence; and (4) actual

or presumed damages).

Because Plaintiffs demonstrated that Defendants acted with a reckless disregard for the truth, and thus actual malice, and because the district court did not even consider Plaintiffs' expert report as it relates to special damages, summary judgment on Plaintiffs' Business Disparagement claim was not appropriate. This Court should reverse the district court's granting of summary judgment in favor of Defendants on Plaintiffs' Business Disparagement claim and instruct the district court to allow it to proceed to trial where Plaintiffs will prove the amount of damages.

H. The District Court Erred When It Awarded Costs to Defendants.

The district court's award of costs is reviewed for an abuse of discretion. *Vazquez v. Cty. of Kern*, 949 F.3d 1153, 1159 (9th Cir. 2020).

Pursuant to FRCP 54, the Clerk of the Court awarded Defendants costs in the amount of $7,526.26 as prevailing parties. 1-ER-2-4. However, for the reasons discussed above, Defendants are not entitled to prevailing party status and should not have been awarded their costs of this litigation. *See* FRCP 54(d) ("… costs – other than attorney's fees – should be allowed to the prevailing party.").

Even so, not all of the costs awarded by the Clerk of the Court were supported by documentation or could be readily understood based on the documentation provided by Defendants. *See generally* 2-ER-21-27.

While the Clerk of the Court erred in awarding specific costs that were not taxable, this Court should reverse the award of any costs to Defendants because they should not have been granted summary judgment on Plaintiffs' claims and, thus, not be designated as prevailing parties.

VII. CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grant of summary judgment in favor of Defendants on each of Plaintiffs' claims for relief and instruct the district court to allow Plaintiffs' claims to proceed to trial. Further, because Defendants should

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not have been awarded summary judgment on Plaintiffs' claims, this Court should also reverse the award of costs to Defendants.

Dated this 16th day of February, 2024.

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By: /s/ Tamara Beatty Peterson

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number: 23-3227

I am the attorney or self-represented party.

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Date: February 16, 2024

Signature: s/ Tamara Beatty Peterson
*(use "*s/[typed name]*" to sign electronically-filed documents)*

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the Appellants state that Case No. 23-16132, styled as *Wealthy Inc., et al. v John Mulvehill, et al.* is pending before this Court and involved Appellants in this case and the defendants in the consolidated case below.

Dated this 16th day of February, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing APPELLANTS' OPENING BRIEF with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate ACMS system on February 16, 2024.

I further certify that all participants in the case are registered ACMS users and that service will be accomplished by the appellate ACMS system.

/s/ Julia L. Melnar
on behalf of Peterson Baker, PLLC