

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.

On Appeal from the
United States District Court for the District of Nevada
No. 2:21-cv-01773-JCM-EJY, consolidated with
No. 2:22-cv-00740-JCM-EJY
Honorable James C. Mahan, United States District Judge

APPELLEES' PRINCIPAL AND RESPONSE BRIEF

Marc J. Randazza
Alex J. Shepard
RANDAZZA LEGAL GROUP, PLLC
4974 S. Rainbow Blvd., Suite 100
Las Vegas, Nevada 89118
Tel: 702-420-2001
ecf@randazza.com
Attorneys for Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Defendants and the undersigned counsel of record, certify that Cornelia Holdings, LLC is the parent company of Cornelia Media, LLC. There are no other parent corporations or publicly held corporations owning ten percent of Defendants' stock.

Date: April 22, 2024.

RANDAZZA LEGAL GROUP, PLLC

/s/ Marc J. Randazza

Marc J. Randazza

Alex J. Shepard

RANDAZZA LEGAL GROUP, PLLC

Attorneys for Appellees

TABLE OF CONTENTS

TABLE OF CONTENTS.....	III
TABLE OF AUTHORITIES	V
I. STATEMENT OF JURISDICTION	1
II. STATEMENT OF ISSUES FOR REVIEW.....	1
III. CONCISE STATEMENT OF THE CASE	2
<i>A. Facts of the Dispute.....</i>	<i>2</i>
1. Appellants’ Status as Public Figures.....	2
2. Buczkowski’s Involvement in an Illegal Marijuana Grow Operation.....	7
3. Larson Consulting	9
4. The Statements at Issue.....	11
5. Relevant Procedural History in the District Court and Disposition Below.....	23
IV. SUMMARY OF THE ARGUMENT	25
V. ARGUMENT	27
<i>A. Standard of Review.....</i>	<i>27</i>
<i>B. The District Court Correctly Granted Summary Judgment to Appellees on Appellants’ Lanham Act Claim</i>	<i>27</i>
1. The Complained-of Statements are Not Commercial Speech	29
2. The Statements Were Not Made to Influence Consumers to Purchase Appellees’ Goods or Services	37
3. The Statements Were Not Sufficiently Disseminated to the Relevant Purchasing Public	38
<i>C. The District Court Correctly Granted Summary Judgment to Appellees on Appellants’ Defamation Claim</i>	<i>39</i>
1. Appellants are Not Even Potentially Liable for the Majority of the Statements	39

2. Most of the Statements are Not Capable of Being Defamatory 40	
3. Appellants are Public Figures and Must Satisfy the Actual Malice Standard.....	51
4. Appellees Did Not Publish with Actual Malice.....	56
<i>D. The District Court Correctly Granted Summary Judgment in Appellees’ Favor on Appellants’ Intentional Infliction of Emotional Distress Claim</i>	<i>64</i>
<i>E. The District Court Correctly Granted Summary Judgment in Appellees’ Favor on Appellants’ Business Disparagement Claim</i>	<i>64</i>
<i>F. The District Court Correctly Denied Granting Summary Judgment to Appellants.....</i>	<i>69</i>
<i>G. The District Court Correctly Awarded Fees to Appellees</i>	<i>70</i>
<i>H. The District Court Erred in Denying Appellees’ Special Motion to Dismiss Under NRS 41.660.....</i>	<i>70</i>
1. Appellees’ Statements Were in Direct Connection to an Issue of Public Interest.....	71
2. Appellees’ Statements Were Published in a Public Forum	76
3. Appellees Published Their Statements in Good Faith.....	77
CONCLUSION.....	81
CERTIFICATE OF COMPLIANCE FOR BRIEFS	83
STATEMENT OF RELATED CASES.....	84
CERTIFICATE OF SERVICE.....	85

TABLE OF AUTHORITIES

CASES

<i>Alfasigma USA, Inc. v. First Databank, Inc.</i> , 525 F. Supp. 3d 1088 (N.D. Cal. 2021).....	37, 38
<i>Ariix, LLC v. NutriSearch Corp.</i> , 985 F.3d 1107 (9th Cir. 2021).....	29, 39
<i>Ayyadurai v. Floor64, Inc.</i> , 270 F. Supp. 3d 343 (D. Mass. 2017).....	51
<i>Balzaga v. Fox News Network, LLC</i> , 173 Cal. App. 4th 1325 (2009)	43
<i>Bolger v. Young Drugs Prods. Corp.</i> , 463 U.S. 60 (1983)	31, 34, 35
<i>Bongiovi v. Sullivan</i> , 122 Nev. 556 (2006).....	52
<i>Bose Corp. v. Consumers Union</i> , 466 U.S. 485 (1984)	57, 58
<i>Bosely Med. Inst., Inc. v. Kremer</i> , 403 F.3d 672 (9th Cir. 2005)	38
<i>Children’s Health Def. v. Facebook Inc.</i> , 2021 U.S. Dist. LEXIS 121314 (N.D. Cal. June 29, 2021)	30
<i>Christian Research Ins. v. Alnor</i> , 148 Cal. App. 4th 71 (2007)	65
<i>Church of Scientology v. Wollersheim</i> , 42 Cal. App. 4th 628 (1996)	73
<i>City of Las Vegas Downtown Redevelopment Agency v. Hecht</i> , 940 P.2d 134 (Nev. 1997)	42
<i>Clark Cty. Sch. Dist. v. Virtual Educ. Software, Inc.</i> , 125 Nev. 374 (2009).....	66
<i>Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.</i> , 173 F.3d 725 (9th Cir. 1999)	29, 38

<i>Corsi v. Infowars LLC</i> , No. A-20-CV-298-LY, 2021 U.S. Dist. LEXIS 98486 (W.D. Tex. May 24, 2021)	32, 33, 40
<i>Dastar Corp. v. Twentieth Century Fox Film Corp.</i> , 539 U.S. 23 (2003)	29
<i>Delucchi v. Songer</i> , 396 P.3d 826, 833 (Nev. 2017)	79
<i>Dex Media West, Inc. v. City of Seattle</i> , 696 F.3d 952 (9th Cir. 2012)	36
<i>Farah v. Esquire Mag.</i> , 736 F.3d 528 (D.C. Cir. 2013)	30
<i>Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.</i> , 314 F.3d 48 (2d Cir. 2002)	39
<i>Flowers v. Carville</i> , 310 F.3d 1118 (9th Cir. 2002)	42
<i>Geiser v. Kuhns</i> , No. S262032, 2022 Cal. LEXIS 5120 (Cal. Aug. 29, 2022)	74, 77
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974)	41, 52
<i>Gordon & Breach Sci. Publishers S.A. v. Am. Inst. of Physics</i> , 859 F. Supp. 1521 (S.D.N.Y. 1994)	36
<i>Herring Networks, Inc. v. Maddow</i> , 445 F. Supp. 3d 1042 (S.D. Cal. 2020)	45
<i>Hilton v. Hallmark Cards</i> , 599 F.3d 894 (9th Cir. 2009)	73
<i>Hunt v. City of L.A.</i> , 638 F.3d 703 (9th Cir. 2011)	31
<i>Information Control Group v. Genesis One Computer</i> , 611 F.2d 781 (9th Cir. 1980)	43
<i>James v. San Jose Mercury News, Inc.</i> , 17 Cal. App. 4th 1 (1993)	44

<i>Kosor v. Olympia Cos., LLC</i> , 478 P.3d 390 (Nev. 2020)	78
<i>Krinsky v. Doe 6</i> , 159 Cal. App. 4th 1154 (2008)	44
<i>Lewis v. Time, Inc.</i> , 710 F.2d 549 (9th Cir. 1983)	43, 48
<i>Lexmark Int’l, Inc. v. Static Control Components, Inc.</i> , 572 U.S. 118 (2014)	30, 35
<i>Maffick LLC v. Facebook, Inc.</i> , No. 20-cv-05222-JD, 2021 U.S. Dist. LEXIS 89930 (N.D. Cal. May 11, 2021)	29, 38
<i>Makaeff v. Trump Univ., LLC</i> , 715 F.3d 254 (9th Cir. 2013)	54
<i>Masson v. New Yorker Magazine, Inc.</i> , 501 U.S. 496 (1991)	41
<i>Mattes v. Ballys Las Vegas</i> , 227 Fed. Appx. 567 (9th Cir. 2007)	70
<i>McDougal v. Fox News Network, LLC</i> , No. 1:19-cv-11161 (MKV), 2020 U.S. Dist. LEXIS 175768 (S.D.N.Y. Sept. 23, 2020)	44
<i>Morningstar, Inc. v. Superior Court</i> , 23 Cal. App. 4th 676 (1994)	43
<i>Murray v. Bailey</i> , 613 F. Supp. 1276 (N.D. Cal. 1985)	64
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	32, 58, 81
<i>Newcal Indus., Inc. v. Ikon Office Sol.</i> , 513 F.3d 1038 (9th Cir. 2008)	39
<i>Nygaard, Inc. v. Uusi-Kerttula</i> , 159 Cal. App. 4th 1027 (2008)	72
<i>Olivero v. Lowe</i> , 116 Nev. 395 (2000)	65

<i>Pegasus v. Reno Newspapers, Inc.</i> , 118 Nev. 706 (2002)	41, 42, 52, 58
<i>People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.</i> , 895 P.2d 1269 (Nev. 1995)	42
<i>Phantom Touring v. Affiliated Publ'ns</i> , 953 F.2d 724 (1st Cir. 1992)	42, 51
<i>Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.</i> , 946 F. Supp. 2d 957 (N.D. Cal. 2013)	74, 75
<i>Pittsburgh Press Co. v. Pittsburgh Com'n on Human Relations</i> , 413 U.S. 376 (1973)	32
<i>Planet Aid, Inc. v. Reveal</i> , 44 F.4th 918 (9th Cir. 2022)	52, 54, 55
<i>Planned Parenthood Fed'n of Am. v. Ctr. for Med. Progress</i> , 890 F.3d 828 (9th Cir. 2018)	72
<i>Procter & Gamble Co. v. Amway</i> , 242 F.3d 539 (5th Cir. 2001)	35
<i>Reader's Digest Assn. v. Superior Court</i> , 690 P.2d 610 (Cal. 1984)	58, 59
<i>Rosen v. Tarkanian</i> , 453 P.3d 1200 (Nev. 2019)	78, 80, 81
<i>Rosenauro v. Scherer</i> , 88 Cal. App. 4th 260, 105 Cal. Rptr. 2d 674 (2001)	51
<i>Shapiro v. Welt</i> , 133 Nev. 35 (2017)	72, 74, 75
<i>Sipple v. Foundation For Nat. Progress</i> , 71 Cal. App. 4th 226 (2d Dist. 1999)	74
<i>St. Amant v. Thompson</i> , 390 U.S. 727 (1968)	58, 64
<i>Stark v. Lackey</i> , 458 P.3d 342 (Nev. 2020)	79

<i>Steaks Unlimited, Inc. v. Deaner</i> , 623 F.2d 264 (3d Cir. 1980)	54
<i>Stewart v. Rolling Stone LLC</i> , 181 Cal. App. 4th 664 (1st Dist. 2010)	73
<i>Taylor v. Colon</i> , 482 P.3d 1212, 1218 (Nev. 2020)	79
<i>U.S. Real Properties Located at 7215 Longboat</i> , 750 F.3d 968 (8th Cir. 2014)	9
<i>Underwager v. Channel 9 Australia</i> , 69 F.3d 361 (9th Cir. 1995)	57
<i>United States v. United Foods, Inc.</i> , 533 U.S. 405 (2001)	30
<i>Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.</i> , 425 U.S. 748 (1976)	36
<i>Wellman v. Fox</i> , 108 Nev. 83 (Nev. 1992)	42
<i>Williams v. Lazer</i> , 495 P.3d 93 (Nev. 2021)	79, 80
<i>Wynn v. A.P.</i> , 542 P.3d 751 (Nev. 2024)	62
<i>Wynn v. Bloom</i> , 852 Fed. Appx. 262 (9th Cir. 2021)	1
<i>ZL Techs., Inc. v. Gartner, Inc.</i> , 709 F. Supp. 2d 789 (N.D. Cal. 2010)	45
 STATUTES	
15 U.S.C. § 1125	29, 38, 39
NRS 41.637	27, 72, 78, 81

OTHER AUTHORITIES

Daniel Strauss, “Christopher Rufo Claims a Degree from ‘Harvard.’
Umm ... Not Quite,” NEW REPUBLIC (Feb. 17, 2023) 47

Restatement (Second) Torts § 566 cmt. c (1977)..... 48

RULES

Fed. R. Civ. P. 56..... 72

NRS 41.660 2, 83

I. STATEMENT OF JURISDICTION

Appellees agree with the Statement of Jurisdiction provided in Appellants' Principal Brief.

Appellees additionally state that this Court has jurisdiction over the District Court's denial of Appellees' Special Motion to Dismiss Under NRS 41.660 under the collateral order doctrine. *Wynn v. Bloom*, 852 Fed. Appx. 262, 262-63 (9th Cir. 2021).

II. STATEMENT OF ISSUES FOR REVIEW

a. Did the District Court err in granting summary judgment to Appellees on Appellants' Claims? This issue was first raised in Appellees' Motion for Summary Judgment (ECF Nos. 61 and 62), and ruled on in the District Court's Order granting that motion (ECF No. 247).

b. Did the District Court Err in denying summary judgment in favor of Appellants on their claims? This issue was first raised in Appellants' Motion for Partial Summary Judgment (ECF No. 60), and ruled on in the District Court's Order denying that motion (ECF No. 247).

c. Did the District Court err in awarding costs to Appellees as prevailing parties? This issue was first raised in Appellees' Bill of Costs

(ECF No. 252), and ruled on in the District Court’s Order awarding costs (ECF Nos. 264 & 265).

d. Did the District Court err in denying Appellees’ Special Motion to Dismiss under NRS 41.660? This issue was first raised in Appellees’ Special Motion to Dismiss Under NRS 41.660 (ECF Nos. 61 & 62), and ruled on in the District Court’s Order denying that motion (ECF No. 247).

III. CONCISE STATEMENT OF THE CASE

A. Facts of the Dispute

1. Appellants’ Status as Public Figures

Appellants are public figures by virtue of not only their own continued, aggressive campaign of self-promotion over the course of years, but also due to a widespread public controversy about the integrity of their business practices pre-dating Appellants’ complained-of statements, including prior publication of the very same statements at issue here. Appellant Dale Buczkowski “previously served as an Executive Coach and member of the Board of Directors of Real Social Dynamics, the **world’s largest dating coaching company**, since November 2003.” (ECF No. 1 at ¶ 13) (emphasis added). Appellant

Wealthy Inc. “is a leading entrepreneurship, finance, business, real-estate and self-improvement company owned and operated by Mr. Buczkowski, who operates the business under the federally registered trademark, Derek Moneyberg.” (*Id.* at ¶ 15). It offers “training programs to its clients” which prominently feature the name “Derek Moneyberg” and “focus on entrepreneurship, financial markets, and real-estate investing” at various price points going as high \$75,000 for “1-ON-1 Training” for some applicants. (*Id.* at ¶¶ 16-19). Wealthy “actively markets its courses on various social media channels,” its “Derek Moneyberg” YouTube channel “has approximately 23.7K subscribers and over 1.2 million views ... and targets an audience interested in self-improvement in the areas of entrepreneurship, finance, business, and real-estate.” (*Id.* at ¶¶ 20-21). Buczkowski “is focused on growing” clientele in these fields “through Wealthy and the Derek Moneyberg brand.” (*Id.* at ¶ 22). In addition to his work in these fields, he “continues to provide services to his base of over one hundred and fifty clients in the dating and lifestyle niche” (*Id.* at ¶ 23).

These are the admitted facts on which the District Court relied in finding that Appellants are public figures. The record goes far beyond

this, however. Appellants own and operate an Instagram account with 4 million followers and claim to provide “[c]oaching 10,000+ in over 50 countries,” showing they have a global presence in the wealth management and lifestyle coaching fields. (See “derekmoneyberg” Instagram account, 1-SER-68-174 at **Exhibit 1**);¹ Transcript of deposition of Dale Buczkowski [“Buczkowski Trans.”], 1-SER-175-177 at **Exhibit 2**, at transcript page 87:4-13).

Appellants’ website lists Buczkowski’s appearances on 35 different domestic, foreign, and international media outlets, including FOX News and ABC. (See home page of <moneyberg.com>, 1-SER-178-183 at **Exhibit 3**). Appellants’ YouTube channel, “Derek Moneyberg,” has over 130,000 subscribers. (See “Derek Moneyberg” YouTube channel, 1-SER-184-189 at **Exhibit 4**; 1-SER-175-177). Media outlets and news stations, including Fox, Bloomberg, *Playboy*, and *Maxim* magazine, have written about Buczkowski and had him appear on their news programs and podcasts regarding his reputation as a wealth management coach, both before and after the statements at issue were published. (See printouts

¹ In accordance with Circuit Rule 30-1.2(b), citations to Appellees’ Supplemental Excerpts of Record are in the following format: “[volume number]-SER-[page number(s)].”

of media articles regarding Appellants, 2-SER-191-443 at **Exhibits 5 & 5-A**; Buczkowski Trans. at 94:20-95:13; 1-SER-8-11 at WEALTHY002741 [providing dates of articles]). Appellants paid for some of these articles, making them voluntary public figures. Some may have been organic. (Buczkowski Trans. at 95:14-100:4). Buczkowski claims to be unable to recall which he paid for. *Id.* Appellants run paid advertising through various social media platforms and advertise directly through email lists and SMS texts. Transcript of deposition of Wealthy Inc. 30(b)(6) witness (“Wealthy Trans.”), 5-SER-932-934, at 55:17-57:21. Starting in approximately May 2020, Plaintiffs engaged in a marketing blitz to “unwind some of the damage” caused by statements John Mulvehill² published about them that were identical to the statements at issue here. 5-SER-946-948 at 172:10-174:3; Transcript of January 27, 2023, deposition of Dale Buczkowski (“Buczkowski 3rd Trans.”), 1-SER-36-38, at 130:4-22, 131:18-132:12.

Prior to using the Derek Moneyberg name, Buczkowski went by the alias “RSD Derek” in connection with services he provided as an

² As explained below, Mulvehill is the person Appellees interviewed for the YouTube videos at issue, and who made the vast majority of the allegedly actionable statements.

Executive Coach with Real Social Dynamics (“RSD”). (Buczowski Trans. at 37:10-38:24). Cornelia was aware of Buczowski’s reputation with this company as far back as 2013. (Transcript of deposition of Spencer Cornelia [“Cornelia Trans.”], 2-SER-454-455 at **Exhibit 6**, at 71:10-72:18). On the popular social media website Reddit, a search for the term “rsd derek” produces dozens of results, the majority of which are promoting Buczowski’s “dating coach” services, including his “Ten Commandments of Game.” (See Reddit search results for “rsd derek,” 2-SER-470-479 at **Exhibit 7**). Numerous third parties published statements on the internet claiming that Buczowski had an arrest record, that he stole marketing material from others, that he plagiarizes others, that he is a scammer, that he acts suspiciously by hiding his face in marketing material, that he does not have a real degree from a university, that he lies about his wealth as a marketing tactic, and that the seminars he provides primarily consist of him trying to up-sell more expensive products. (See “In Defense of Derek Moneyberg” Reddit thread, 2-SER-480-482 at **Exhibit 8**, 1-SER-6 at ¶ 6, 1-SER-12-13; see Feb. 24, 2019 Facebook post by John Anthony Lifestyle, 2-SER-483-484 at **Exhibit 9**; “Ex-RSD Employee Tells All – Lies, Corruption, And

Breaking Laws (RSD Insider Reveals Scams),” May 21, 2020, 2-SER-485-489 at **Exhibit 10** (YouTube video interviewing RSD employee and discussing Buczkowski at 19:50 to 25:40); “DEREK MONEYBERG SCAMMED THIS KID FOR 35K” Reddit post, 3-SER-491-493 at **Exhibit 11**, 1-SER-7 at ¶ 7, 1-SER-14-15; “Derek Moneyberg EXPOSED AGAIN” Reddit post, 3-SER-494-498 at **Exhibit 12**, 1-SER-7 at ¶ 8, 1-SER-16-17). This pre-existing bad reputation is relevant to Appellants’ current reputation, as Appellants still provide and advertise dating coach services and consider there to be overlap between these clients and wealth coaching clients. Wealthy Trans. at 51:1-13, 52:12-18, 59:17-60:12, 60:16-23, 62:3-13; Buczkowski 3rd Trans. at 119:25-121:20. Appellants were so interested in obtaining these clients that they even offered RSD clients wanting to switch to a different service a credit for RSD services they had purchased. Wealthy Trans. at 104:5-106:1.

Appellants focus solely on the evidence specifically mentioned in the District Court’s Order despite acknowledging that the standard of review is *de novo*, and so it is concerning that they do not engage with the majority of the record on this pivotal issue.

2. Buczkowski's Involvement in an Illegal Marijuana Grow Operation

In October 2012, the United States filed a civil forfeiture action against property involved in a marijuana grow operation. *See United States of America v. Real Property Located at 7212 Longboat Drive, Johnston, Polk County, Iowa*, Case No. 4:12-cv-00484-RAW (S.D. Iowa). Buczkowski's grandmother, Betty Mariani, owned the property. The government alleged, *inter alia*, that Buczkowski's father was likely involved in a marijuana grow operation utilizing this property. (Complaint in Longboat Case, 3-SER-499-506 at **Exhibit 13**, at ¶¶ 11-14). It further alleged that a neighboring property, owned by Timothy Lantz, a friend of Buczkowski,³ contained mail addressed to Buczkowski, credit cards in Buczkowski's name, Buczkowski's tax returns, and that the neighboring property was being used to operate a marijuana grow operation. (*Id.* at ¶¶ 15-20). A criminal complaint was filed against Mr. Lantz for his involvement in this operation. (Criminal complaint in *United States v. Lantz*, Case No. 4:12-MJ-216 (S.D. Iowa), 3-SER-507-521 at **Exhibit 14**). Buczkowski admitted that he knows Lantz and that the

³ Buczkowski testified that he was a college roommate of Lantz. (Buczkowski Trans. at 72:1-73:21).

DEA executed a search warrant at this property and found a marijuana grow operation. (See Appellants' responses to First Set of Requests for Admissions, 3-SER-522-535 at **Exhibit 15**, at Response Nos. 4 and 9-10).

Buczowski, along with his mother and Mariani's estate, filed claims for the property, all of which were stricken on timeliness grounds, resulting in an appeal of the decision granting forfeiture of the properties. See *U.S. Real Properties Located at 7215 Longboat*, 750 F.3d 968, 971 (8th Cir. 2014). During this appeal, Buczowski withdrew his claim and the court affirmed the judgment granting the requested forfeiture as to Buczowski. *Id.* at 971 n.3. After the forfeiture was affirmed as to Buczowski, the remaining claimants entered into a settlement to resolve the forfeiture claims. (Settlement Agreement in Longboat Case, 3-SER-536-542 at **Exhibit 16**).

Appellees were aware of these facts before publishing the videos and statements at issue in this case. (2-SER-458-460 at 76:5-78:4). Cornelia interpreted these facts to mean that Buczowski had knowledge of, and was likely involved in, an illegal marijuana grow operation, even if he avoided arrest for his knowledge and involvement. (*Id.*; 3-SER-542-548., 3-SER-546 at **Exhibit 17**, at ¶ 14).

3. Larson Consulting

Larson Consulting Inc. (“Larson”) is a Nevada corporation with only one officer, Dale Buczkowski. (3-SER-549-552 at **Exhibit 18**). There is no signage outside the building except for a “no soliciting” notice, but there are some vehicles outside it. (See Google Maps photograph for Larson address, 3-SER-553-555 at **Exhibit 19**). This is not surprising, because the address listed on the Secretary of State’s website is false; in its tax returns, Larson claims to be located at 275 Glen Way, Incline Village, Nevada, where Buczkowski claims to live. (See Buczkowski Trans. at 101:4-10, 147:14-23; 2019; 2020 Larson tax return, 3-SER-556-558 at **Exhibit 20**). This is especially sketchy, as the 275 Glen Way address is actually the home of an individual named Carlos Huerta, not Buczkowski, and Mr. Huerta has no involvement whatsoever with Larson. 1-SER-42-44 at 3-4; 1-SER-45-67.

The company has a Facebook page but has not posted since November 15, 2013, and has only 36 followers. (See Larson Facebook page, 3-SER-559-566 at **Exhibit 21**). The page lists a website, <larsonconsultinginc.com>, but the site is under construction and does not display any content. (See printout of <larsonconsultinginc.com>, 3-

SER-567-568 at **Exhibit 22**; Buczkowski Trans. at 119:3-5, 142:20-143:12). Again showing Buczkowski's enduring connection to the dating coach industry, RSD was Larson's biggest client. Wealthy Trans. at 181:10-17; Buczkowski 3rd Trans. at 110:24-111:7 & 113:4-9.

Appellees were aware of the apparent non-existence of Larson prior to publishing any of the videos or statements at issue in this case. (2-SER-463 at 83:15-85:4; 3-SER-545. at ¶ 10). It is certainly a reasonable conclusion, based on this information, that Larson Consulting is not a legitimate business. Based on this information, Appellees did not believe Larson Consulting was legitimate, as it does not provide any goods or services to the public. (3-SER-545-546. at ¶ 13). Considering the numerous credible and documented pre-existing allegations surrounding Buczkowski of shady business practices and hiding both his wealth and identity, Defendants believed there was a strong chance Larson Consulting was a front used for an improper purpose. (3-SER-546).

4. The Statements at Issue

Appellants' Complaint is premised on a handful of statements, primarily made by John Mulvehill, over the course of 3 videos with a total run time of 89 minutes published on December 19, 2020 (the "First

Video”), December 31, 2020 (the “Third Video”), and February 19, 2021 (the “Second Video”).⁴ Though Appellants did not provide evidence or argument as to the falsity of several of the statements referred to in the Complaint, Appellees will address all of them for the sake of completeness and to ensure the Court has the relevant context.

a) The First and Second Videos

The First and Second Videos consist of Cornelia interviewing Mulvehill regarding the latter’s views about Appellants. They were recorded around the same time, but were released two months apart. (2-SER-463 at 81:1-24). The First Video begins with a statement from Cornelia in which he discloses to viewers that Mulvehill “had all the sources. And every claim in this video is from information given to John from anonymous sources. For our defense, **make sure to do your own research, and everything is just allegations at this point.**” (ECF 3-SER-569-601 at **Exhibit 23**, at WEALTHY000059) (emphasis added).

⁴ A transcript of the First Video is found at 3-SER-569-601 at **Exhibit 23**. A transcript of the Second Video is found at 3-SER-602-659 at **Exhibit 24**. A transcript of the Third Video is found at 3-SER-660-676 at **Exhibit 25**.

The first category of statements is that Buczkowski was not forthcoming about his educational credentials and that he attended the University of Chicago Business School online instead of earning a degree from there. (ECF No. 1 at ¶ 59). All statements in this category were made exclusively by Mulvehill. (*Id.*) Defendants were initially suspicious of some of Mulvehill's claims in other contexts, but trusted friends of Cornelia vouched for Mulvehill's credibility, and so there was nothing that made Cornelia doubt this claim, particularly given how minor it was compared to the other information Mulvehill provided about Plaintiffs. (2-SER-449-452, 2-SER-453, 2-SER-456-457, 2-SER-461-462, 2-SER-468 at 7:16-10:3, 45:6-10; 74:2-75:6, 79:16-80:9, 86:3-20). Cornelia had already heard many of Mulvehill's claims stated in the First and Second Video in videos that Mulvehill had published previously, and the fact they were still available on YouTube and there had been no legal action taken against them made Mulvehill appear more credible to Cornelia. (*Id.* at 75:3-76:4, 79:16-80:9, 86:21-87:12). Furthermore, Buczkowski actually *did* take an online program to obtain his MBA. 1-SER-184-189 at **Exhibit 4**, transcript pages 12:9-13:13; Additional excerpts from Buczkowski 3rd Trans., attached as **Exhibit 8**, at 11:13-12:9. This is an

important distinction, as the acceptance rate for the school’s traditional, full-time MBA program was 14%, with an average GMAT score of 729. “Chicago Booth Full-Time MBA Class of 2024 Profile,” <chicagobooth.edu>.⁵ The part-time program had an average GMAT score of 691, 38 points lower than full-time students. “Part-Time MBA Class Profile,” <chicagobooth.edu>.⁶ It is well-known that part-time MBA programs are easier to get accepted into than full-time programs. *See, e.g.*, Maria Greeley, “Weigh if a Part-Time MBA Program Is the Right Fit,” U.S. News & World Report (Mar. 29, 2018)⁷ (“In general, even the most competitive part-time programs tend to be easier to get accepted to than their full-time counterparts”). Accordingly, for someone to claim that a graduate was not a “real” graduate, if they took an online course rather than being accepted to the “real” prestigious and selective program, is not inaccurate.

⁵ Available at: <https://www.chicagobooth.edu/mba/full-time/admissions/class-profile>.

⁶ Available at: <https://www.chicagobooth.edu/mba/part-time/admissions/class-profile>.

⁷ Available at: <https://www.usnews.com/education/best-graduate-schools/top-business-schools/articles/2018-03-29/weigh-if-a-part-time-mba-program-is-the-right-fit#:~:text=In%20general%2C%20even%20the%20most,percent%20of%20part%2Dtime%20applicants>.

The second category of statements is a brief exchange in which Mulvehill speculates that one of Buczkowski's companies, Larson Consulting, "very well *could be* a front for laundering money" because it "has like no you know substance behind it online." (ECF No. 1 at ¶ 63). Cornelia's only statement on this subject is "[y]eah the address is right down the street from my house here too in Vegas" before Mulvehill makes his money laundering comment. (*Id.*)

The third category of statements has Cornelia stating "[t]hat's shady yeah so the next on my notes is the drug house. So you believe, 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." (ECF No. 1 at ¶ 66). He also states, in response to Mulvehill claiming that Buczkowski has a lengthy arrest record,⁸ "it's public record too like it's known it's public." (*Id.*)

⁸ Buczkowski does indeed have an arrest record. (*See* <arrestfacts.com> arrest record for Buczkowski, 3-SER-675-679 at **Exhibit 26**).

The fourth category of statements consists of Mulvehill recounting an incident where he was arrested in 2013 in Las Vegas and accusing Buczkowski of setting him up for this arrest. (ECF No. 1 at ¶ 70). In his account, he includes specific details, such as Buczkowski telling Mulvehill to keep his presence in Vegas a secret, that he was using an alias, that he was using a burner phone, and that he implausibly claimed not to know one of the girls they met during Buczkowski's visit despite her "working like a block from where he lives in Chicago, and then that girl ended up dead." (*Id.*) Cornelia did not make any of these claims about Buczkowski. Because he found Mulvehill credible, and because Mulvehill was an eye witness to events where public records and other sources of information would be difficult, if not impossible, to obtain, Cornelia believed these statements to be true. (2-SER-463-465, 2-SER-468-469 at 81:17-83:8, 86:21-87:12; 3-SER-547 at ¶ 17).

The fifth category of statements consists of Mulvehill stating that the primary witness in Mulvehill's criminal case, the same girl Buczkowski implausibly claimed he did not know, died at age 28 and he could not find her cause of death, and that this "was the link to [Buczkowski]." (ECF No. 1 at ¶ 72). Cornelia did not make this claim,

instead only stating in a comment to the Second Video that he “looked up the women [sic] in Clark County records and she definitely passed. Tried to find the cause of death but they required a lawyer’s consent in order to attain to those documents.” (*Id.*) No one claimed or implied that Buczkowski killed this woman; they simply noted that the set of disclosed facts was odd. Based on the information Mulvehill provided and the research Cornelia conducted, it seemed plausible Buczkowski *knew something* about the woman’s death. (2-SER-460-461 at 78:5-79:11; 3-SER-546 at ¶ 16). Appellants testified that Mulvehill had previously published all five of these categories of statements before any of the videos at issue were published. 5-SER-946-948 at 172:10-174:3; Buczkowski 3rd Trans. at 130:4-22 & 131:18-132:12.

The final category of statements, as characterized by Plaintiffs, are “assertions that Mr. Buczkowski (1) engaged in illegal activity in helping his clients obtain credit; (2) did not author any of his own content; and (3) coerced his clients to provide testimonials.” (ECF No. 1 at ¶ 78). This category of statements is largely absent both from Appellants’ Brief and from their briefing below, and there is no record evidence that these statements are false. Discussing these statements is vital to show the

context of the videos, however, and why Cornelia believed Mulvehill to be a credible source.

In the First Video, Mulvehill discusses how his sources regarding Appellants informed him that Appellants were “getting guys to get these loans and these credit cards that can be given out to, like, anyone, even with bad credit” and that Buczkowski trained his sales team to engage in predatory practices to encourage clients to take out loans for Appellants’ services. (3-SER-569-601 at **Exhibit 23** at WEALTHY000069-70). Wealthy admitted that some customers took out credit and went on payment plans to afford Appellants’ courses. Wealthy Trans. at 94:18-95:20. Appellants also produced email correspondence with a customer who complained that he wanted a refund because he spent \$13,500 of his mother’s money “on the programs and bootcamps you never delivered on” and that Appellants allowed him to continue purchasing their courses despite knowing he did not have a job and couldn’t afford them. (See customer complaint emails, 3-SER-697-703 at **Exhibit 28**).

In the First Video, Mulvehill states that Buczkowski required his clients to provide testimonials that he would use for promotional purposes. 3-SER-569-601 at **Exhibit 23** at WEALTHY000065-66.

Buczowski admitted the substantial truth of this; part of the “homework” he requires his clients to take for his courses is to leave a review of the course. Transcript of December 9, 2022 deposition of Dale Buczowski (“Buczowski 2nd Trans.”), 5-SER-965-972 at 241:7-24, 242:9-15, 279:10-281:18, & 284:3-286:4. Appellants then used these compelled reviews as advertising material. 5-SER-972 at 286:8-18.

In the First Video, Mulvehill states that Buczowski’s real estate mentorship program was written by young individuals who knew nothing about real estate and simply recycled material they found online. *Id.* at WEALTHY000061-62. He then goes on to say that “the main goal when they write in their content is that they want to upsell everything. Okay? So he’s telling them, You need to create problems for these guys that the other courses are going to solve.” (*Id.* at WEALTHY000063). Again, Appellants admitted to the truth of much of these statements. Appellants testified that the written content for their courses is partly outsourced to a different company, White Coda, Inc. 5-SER-943-945 at 88:7-15, 89:6-10, 154:6-11; Buczowski 3rd Trans. at 175:11-176:23. Wealthy also testified that Appellants hardly review the qualifications of their “instructors”

because said instructors do little more than repeat these written materials. 5-SER-935-942 at 80:20-87:5.

The above statements make up a relatively small portion of the First and Second Videos. The videos primarily consist of Mulvehill discussing how Buczkowski and his various services are ineffective and that he makes false promises in the hope of having customers purchase increasingly expensive services. (*See, generally,* 3-SER-569-659 at **Exhibits 23** and **24**). Appellants do not allege these statements or any of their implications are false or otherwise actionable.

Prior to publishing the First Video, Mulvehill sent Cornelia an email from a third party who stated that he knew people who took a “Bootcamp” provided by Appellants and relayed their extremely negative account of events as well as his experience with Appellants. *See* text message exchange between Mulvehill and Cornelia, 3-SER-704-744 at **Exhibit 29**, at COR000011-12.

Mulvehill told Cornelia, prior to the First Video being published, that he talked to a 21 year-old who claimed to have written “100% of the business mentorship” program that Appellants offer “and half of the stocks one,” and that a Romanian 19 year-old wrote the other half of the

stocks program “and [the] entire real estate one” with instructions to overwhelm and confuse their audience. *Id.* at COR000016-24. He told Cornelia that he had sources who informed him that Buczkowski does essentially nothing during his coaching courses and merely allows sales associates to up-sell more expensive products to customers during them. *Id.* He shared with Cornelia a December 9, 2020, email from a third party who attended an RSD Derek bootcamp in 2018 and called the bootcamp “right on a full scam” (*Id.* at COR000033), and an email in which a third party said he lost around \$35,000 “on Derek and his dumb products. I really got tricked and sucked into their false expectations and sales tricks.” *Id.* at COR000034. Mulvehill told Cornelia that he heard from his sources that the content taught in Appellants’ courses was plagiarized. *Id.* at COR000037. He told Cornelia that Buczkowski made false representations to customers to increase the price for services he offered. *Id.* at COR000039.

In comments in response to the First Video, several third parties shared their accounts of their experience with Appellants, including that Buczkowski’s courses and instructional material are manipulative, harmful, ineffective, and a scam, and otherwise corroborating many of

the claims in the First Video and the information Mulvehill provided to Cornelia. *See* YouTube comments to First Video, 3-SER-745-779 at **Exhibit 30**.

Finally, prior to publishing the First Video, Cornelia watched a video of an interview Mulvehill conducted with a prior contractor of Appellants who corroborated the claims about Appellants' unethical business practices and using young, unqualified people to write the instructional and promotional material for Appellants' courses.⁹ *See* transcript of Mulvehill interview with "Rohit," 4-SER-781- at **Exhibit 31**. Cornelia found the interviewee and his statements to be credible. (2-SER-454-455. at 81:1-83:8.

Based on the information provided by Mulvehill and third parties, as well as his own experience in researching and analyzing various forms of self-professed gurus who turned out to be scammers, Cornelia believed that Mulvehill's statements that Buczkowski engage in high-pressure sales tactics to encourage customers to obtain credit they could not afford for his courses, that Buczkowski did not author his own content, and that

⁹ An example of this promotional material, which promises the moon to those who purchase Plaintiffs' courses, is found at 4-SER-801-847 at **Exhibit 32**).

he coerced his clients to provide testimonials were true. (2-SER-454-455. at 81:1-83:8; 3-SER-547. at ¶ 19).

b) The Third Video

The Third Video is a live broadcast of Cornelia’s “2020 Charlatan of the Year Awards,” an obviously satirical presentation with live commentary from users in which Cornelia “nominates” individuals for various “award” categories such as “best use of scam or fraudulent money” and the “silencing criticism award.” (3-SER-660-676 at **Exhibit 25**, at WEALTHY000449, 451). The only mention of Buczkowski is when Cornelia states “It’s Dan Bilzerian here but here’s the contender recently, Derrick [sic] Moneyberg. Derrick [sic] Moneyberg as number seven nominee for Charlatan of the Year. Derek Moneyberg, this one’s tough ... I’m thinking Dan Bilzerian is an absolute contender, but I’m thinking Derek Moneyberg. Derek Moneyberg fits all of the checkboxes for scammer of the year, Charlatan of the year.” (*Id.* at WEALTHY000460). Based on the information Cornelia had at the time the Third Video was published, as well as his own experience in exposing scammers, he felt it was reasonable and accurate to call Buczkowski a scammer and a charlatan. (3-SER-547 at ¶ 19).

5. Relevant Procedural History in the District Court and Disposition Below

On June 21, 2021, Appellants filed their Complaint, alleging causes of action for (1) unfair competition under the Lanham Act, 15 U.S.C. § 1125; (2) defamation; (3) intentional infliction of emotional distress; and (4) business disparagement. ECF No. 1. On September 30, 2022, Appellees filed their Special Motion to Dismiss Pursuant to NRS 41.660 (“Anti-SLAPP Motion”) and Motion for Summary Judgment. ECF Nos. 61 & 62.¹⁰ The same day, Appellants filed their Motion for Partial Summary Judgment (ECF No. 61), seeking summary judgment on their defamation claim. Appellants filed their Opposition to Appellees’ motion on October 28, 2022. ECF Nos. 78 & 79. Following additional discovery permitted by the District Court, Appellees filed their Opposition to Appellants’ Motion for Summary Judgment on March 3, 2023. ECF No. 162. Appellants filed their Reply in support of their Motion on March 17, 2023. ECF No. 172. Appellees then filed their Reply in support of their Motion on March 20, 2023. ECF No. 182.

¹⁰ As a practical matter, this was simply a motion for summary judgment as to all claims, but seeking relief under NRS 41.660 as to Appellants’ state law claims. For technical reasons, this was filed as two separate documents, but ECF Nos. 61 & 62 are substantively identical.

The District Court entered an Order on September 29, 2023 (ECF No. 247), (1) granting summary judgment in Appellees' favor as to all of Appellants' claims; (2) denying Appellees' motion for relief under NRS 41.660; and (3) denying Appellants' Motion for Partial Summary Judgment. On October 26, 2023, Appellants filed their notice of appeal. ECF No. 255. The following day, Appellees filed their Notice of Appeal, specifically appealing the denial of their Special Motion to Dismiss under NRS 41.660. ECF No. 256.

Appellees timely filed a bill of costs on October 13, 2023. ECF No. 252. Appellants filed an objection to the bill of costs on October 26, 2023. ECF No. 253. Appellees filed a response to the objection on November 2, 2023. ECF No. 257. On November 30, 2023, the District Court awarded Appellees \$7,526.26 in costs. ECF Nos. 264 & 265. Appellants filed their notice of appeal as to this award of costs on December 26, 2023. ECF No. 269.

IV. SUMMARY OF THE ARGUMENT

The District Court correctly found that Appellants' Lanham Act claim failed because the statements at issue did not constitute commercial speech. The statements were not advertisements, they made

no mention of Appellees' services, and Appellees received nothing more than an incidental economic benefit due to the statements' publication. The statements actually addressed below and in Appellants' Brief are not even about the qualities or characteristics of Appellants' goods or services, and there is no record evidence that the statements that actually do relate to their goods and services are false or misleading. There is nothing in the record suggesting that the YouTube videos in which the statements were directed at a sufficient portion of the relevant consumer public, either.

The District Court correctly found Appellants' defamation claim failed. Appellants are public figures due to their own deliberate efforts in seeking notoriety and media attention, which they succeeded in doing, and their millions strong, international base of followers on social media. Prior to Appellees' videos, there was online discourse about allegations substantially similar to the ones at issue here. Appellants also admitted that their advertising blitz was directly in response to Mulvehill previously posting the exact same statements at issue here. Appellants failed to show any evidence of actual malice, as Appellees believed the statements to be true, found Mulvehill and his third-party sources

credible, and performed research regarding what allegations they could research. The majority of the statements at issue were not even uttered by Appellees, and most of them are expressions of protected opinion that cannot be defamatory.

The District Court correctly found Appellants' remaining claims failed. There is no record evidence that Buczkowski suffered any degree of emotional distress as a result of Appellees' actions. There is also no non-speculative evidence regarding damages.

For the same reasons as those above, the District Court correctly denied granting summary judgment to Appellants on their defamation claim.

The District Court erroneously found that Appellees failed to show they made their statements in "good faith" under NRS 41.637. It is a legal and factual impossibility for a defendant to make their statements with an absence of actual malice, yet also not make them in good faith under that statute.

V. ARGUMENT

A. Standard of Review

Appellees agree with Appellants that the applicable standard of review is *de novo*. This is also the applicable standard of review for the District Court's denial of Appellees' Anti-SLAPP Motion. *Wynn v. Bloom*, *supra*, 852 Fed. Appx. at 262-63. This Court may affirm the grant of summary judgment on any basis presented in the record. *Portman v. County of Santa Clara*, 995 F.2d 898, 910 (9th Cir. 1993).

B. The District Court Correctly Granted Summary Judgment to Appellees on Appellants' Lanham Act Claim

This claim is brought to forum shop this case into federal court by adding a bogus Lanham Act claim to the defamation action. The theory being that the alleged defamation is also "false advertising" or "unfair competition." *See, e.g. Tobinick v. Novella*, 848 F.3d 935 (11th Cir. 2017). It was foolish there, and it is foolish here, when there is no credible argument that the statements at issue constitute commercial speech.

The Lanham Act prohibits any person from misrepresenting her or another person's goods or services in "commercial advertising or

promotion.” 15 U.S.C. § 1125(a)(1)(B).¹¹ The Ninth Circuit has adopted the following definition of “advertising or promotion”: (1) commercial speech, (2) by a defendant who is in commercial competition with plaintiff,¹² (3) for the purpose of influencing consumers to buy defendant's goods or services, and (4) that is sufficiently disseminated to the relevant purchasing public. *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 735 (9th Cir. 1999).¹³ The Lanham Act is concerned only

¹¹ While the first cause of action refers to violation of 15 U.S.C. § 1125 *et seq.*, the only statutory provision allegedly violated is § 1125(a)(1)(B). (ECF No. 1 at ¶ 120). This cause of action is thus solely for false advertising, as Section 43(a) of the Lanham Act “is not a boundless remedy for unfair trade practices in all their multivariate forms, or ‘a federal codification of the overall law of unfair competition,’ but only to the trade practices that it specifically prohibits.” *Maffick LLC v. Facebook, Inc.*, No. 20-cv-05222-JD, 2021 U.S. Dist. LEXIS 89930, *7 (N.D. Cal. May 11, 2021) (quoting *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 29 (2003)).

¹² This element of an unfair competition claim was likely abrogated by *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). This Court has not officially done so, but it has recently expressed skepticism that commercial competition is necessary for this claim. See *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1120 (9th Cir. 2021). This Brief thus will not address the commercial competition element.

¹³ A plaintiff must also show a “false or misleading description of fact, or false or misleading representation of fact.” For the reasons explained in Section V(C)(2), *infra*, the statements at issue are expressions of opinion that are not actionable under the Lanham Act. See *Ariix*, 985 F.3d at 1121 (noting that, in Lanham Act claim, “[s]tatements of opinion and puffery, however, are not actionable”). Furthermore, for the reasons

with commercial speech: “the Plaintiff’s injuries must fall within the ‘zone of interests’ the statute was intended to protect.” *Lexmark*, 572 U.S. at 130. “The mere fact that the parties may compete in the *marketplace of ideas* is not sufficient to invoke the Lanham Act.” *Children’s Health Def. v. Facebook Inc.*, 2021 U.S. Dist. LEXIS 121314, *54 (N.D. Cal. June 29, 2021) (quoting *Farah v. Esquire Mag.*, 736 F.3d 528, 541 (D.C. Cir. 2013)). The District Court granted summary judgment due to a lack of commercial speech, but Appellants also failed to establish any of the other elements.

1. The Complained-of Statements are Not Commercial Speech

Commercial speech is “usually defined as speech that does no more than propose a commercial transaction.” *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). Where there is a “close question” as to commercial speech, “‘strong support’ that the speech should be characterized as commercial speech is found where [1] the speech is an advertisement, [2] the speech refers to a particular product, and [3] the speaker has an economic motivation.” *Hunt v. City of L.A.*, 638 F.3d 703,

explained in Section V(E), *infra*, Appellants failed to provide any non-speculative evidence of damages.

715 (9th Cir. 2011) (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983)). The Court in *Bolger* found that the confluence of all three of these factors showed that pamphlets primarily promoting prophylactics were commercial speech, though it left open the possibility that speech could be commercial even if one of the elements was not present. 463 U.S. at 67 n.14. However, the presence of only a single factor is not sufficient to make speech commercial. *Id.* at 66-67 (noting that “the fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech”).

a) The Statements Were Not Advertisements

The First and Second Videos are concerned primarily with exposing Appellants as scammers who use high-pressure sales tactics to trick customers into purchasing overpriced coaching courses consisting of plagiarized material that do not deliver on any of their promises. The Third Video merely states in humorous fashion that Buczkowski is likely a scammer. In that sense, this case is remarkably similar to *Novella, supra*. There, the operator of a science-based medicine blog was sued under the Lanham Act for publishing articles about a doctor who made

dubious claims about the efficacy of a medical procedure. In finding that the articles were not advertisements, the Eleventh Circuit noted that “the first article makes no mention of Dr. Novella’s practice or medical services.” 848 F.3d at 951. Rather, “[t]he articles ‘communicate[] information, express[] opinion, [and] recite[] grievances, ...’ *Id.* at 950 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964)). Similarly here, none of Appellees’ videos make any reference to their services. Appellants point out that the “About Us” page on Appellees’ YouTube channel promotes his services, but do nothing to explain how this transforms the videos into advertisements. “[S]peech is not rendered commercial by the mere fact that it relates to an advertisement.” *Pittsburgh Press Co. v. Pittsburgh Com’n on Human Relations*, 413 U.S. 376, 384 (1973).

Another comparable case is *Corsi v. Infowars LLC*, No. A-20-CV-298-LY, 2021 U.S. Dist. LEXIS 98486 (W.D. Tex. May 24, 2021) (report and recommendations adopted in 2021 U.S. Dist. LEXIS 208688 (June 25, 2021)). There, radio show host Alex Jones and his companies were sued under the Lanham Act for statements uttered primarily by Roger Stone, who appeared on Jones’s program but was not affiliated with

Jones or his companies, criticizing the plaintiffs with insults and expressions of opinion. The court found that the statements were not “commercial speech or advertising, but rather expressions of opinions as commentary during a radio show. The complained of conduct at issue does not fall within the zone of interest that the Lanham Act was intended to protect.” *Id.* at *10.

Just as in *Infowars*, the statements at issue are criticisms of Buczkowski on a personal level and expressions of opinion about Appellants’ conduct. There is not a single mention of Appellees’ goods or services. Nor have Appellants provided any argument or evidence that the statements about their services identified in the Complaint are false or misleading. This leaves us with the five categories of statements Appellants actually do address in their Brief, which are criticisms of Buczkowski alone and do not relate to Appellants’ goods or services in any way.

b) The Statements Do Not Refer to a Particular Product of Appellees

Just as the statements at issue are not advertisements, they do not refer to any of Appellees’ products or services. Mulvehill refers to his own products at a few points in the First and Second Videos, but Appellees

make no reference to them and Appellants do not allege that they are agents of one another. Appellants also do not identify how any such references are actionable.

Appellants do, however, argue that this requirement of the commercial speech test was altered in a 1989 amendment to the Lanham Act, such that speech may be commercial where it makes no reference to the speaker's goods or services. Appellants' Br. at ECF p.51-52. This amendment to the Lanham Act did not change the constitutional test for what constitutes commercial speech, however, and Appellants cite no authority suggesting it did. *See Novella*, 848 F.3d at 951 (finding that second *Bolger* factor was not present where articles did not refer to defendant's services aside from providing context, but did refer to plaintiff's services).

Even if Appellants were correct on this issue, however, they fail to explain how the statements actually addressed in their Brief, which are exclusively about Buczkowski on a personal level, are statements about Appellants' services. Just because Appellants' services consist of dating and wealth coaching does not mean Buczkowski himself, and everything related to him, is a good or service as the Lanham Act uses these terms.

Otherwise, there would always be a complete overlap between defamation and Lanham Act claims for people like Buczkowski, which is not the law. Appellees cannot refer to different statements in the videos which they do not claim are actionable to show that the statements they actually do address constitute commercial speech.

c) Appellees Did Not Have an Economic Motivation

The third *Bolger* factor is concerned with whether the speaker acted *primarily* out of economic motivation; the mere presence of *any* motivation is not sufficient. *Procter & Gamble Co. v. Amway*, 242 F.3d 539, 552-53 (5th Cir. 2001), *abrogated on other grounds by Lexmark*, 572 U.S. 118 (stating that “[t]he question whether an economic motive existed is more than a question whether there was an economic incentive for the speaker to make the speech; the *Bolger* test also requires that the speaker acted *substantially* out of economic motivation”). The kind of profit motive endemic to every commercial enterprise does not, without more, make something commercial speech. *See Novella*, 848 F.3d at 952 (finding that “[e]ven if Dr. Novella receives some profit for his quasi-journalistic endeavors as a scientific skeptic, the articles themselves, which never propose a commercial transaction, are not commercial

speech simply because extraneous advertisements and links for membership may generate revenue”); *see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (holding that “Speech ... is protected ... even though it may involve a solicitation to purchase or otherwise pay or contribute money”). Without this limitation, any publication sold in commerce would constitute commercial speech. *See, e.g., Dex Media West, Inc. v. City of Seattle*, 696 F.3d 952, 960 (9th Cir. 2012) (finding that the financial benefit obtained from publishing yellow pages directories could not characterize the publication as commercial); *Gordon & Breach Sci. Publishers S.A. v. Am. Inst. of Physics*, 859 F. Supp. 1521, 1541 (S.D.N.Y. 1994) (holding that “[t]he fact that AIP and APS stood to benefit from publishing Barschall’s results—even that they *intended* to benefit—is insufficient by itself to turn the articles into commercial speech”).

The only products or services other than Appellants’ mentioned in any of the videos are Mulvehill’s.¹⁴ Appellees do not have any kind of financial relationship with Mulvehill. They do not obtain any

¹⁴ Again, Mulvehill has been sued under this theory, which may have merit as to him. But that analysis does not apply to Defendants.

commissions from him and do not receive any form of compensation for sales of any of Mulvehill's goods or services. (3-SER-548 at ¶ 22). Mulvehill testified that he has never had any kind of financial relationship with Appellees, he never paid Appellees, and he has never been paid by Appellees. ECF No. 182-8, transcript of deposition of John Mulvehill ("Mulvehill Trans."), at 285:5-25. He did propose an affiliate relationship with Appellees, but Cornelia declined. *Id.* at 285:13-19.

Appellants do not allege that such a relationship exists, either, instead merely identifying advertisements for Appellees' products and services found on Appellees' YouTube channel but not mentioned in any of the videos. This is exactly the kind of incidental economic benefit that cannot constitute commercial speech. *See Alfasigma USA, Inc. v. First Databank, Inc.*, 525 F. Supp. 3d 1088, 1099 (N.D. Cal. 2021); *Novella*, 848 F.3d at 952. The District Court correctly found there was no commercial speech.

2. The Statements Were Not Made to Influence Consumers to Purchase Appellees' Goods or Services

None of the statements in the videos were made to entice consumers to purchase Appellees' services. These services are mentioned nowhere

in the videos. The Complaint does not even contain this allegation, and thus the Lanham Act claim fails. *See Alfasigma*, 398 F. Supp. 3d at 591 (finding allegation that defendant influencing decisions of consumers on whether to purchase the plaintiff's goods, rather than the defendant's goods, did not satisfy third element of unfair competition/false advertising claim under Lanham Act). The Lanham Act is only concerned with "commercial transactions in which a person tries to profit by unfairly trading on the good will another has built up in her goods or services, or by mischaracterizing goods and services to divert sales *to himself*." *Maffick LLC*, 2021 U.S. Dist. LEXIS 89930 at *7-8 (citing *Bosely Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 679 (9th Cir. 2005) (emphasis added)).

3. The Statements Were Not Sufficiently Disseminated to the Relevant Purchasing Public

The last element of a Section 1125(a) claim is whether the publication was sufficiently disseminated to the relevant purchasing public. *Coastal Abstract Serv. v. First Am. Title Ins. Co.*, 173 F.3d 725, 735 (9th Cir. 1999). "To be 'sufficiently disseminated,' the actions must be 'part of an organized campaign to penetrate the relevant market,' which typically involves 'widespread dissemination within the relevant

industry.” *Ariix*, 985 F.3d at 1121 (quoting *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48, 57 (2d Cir. 2002)); see *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1054 (9th Cir. 2008) (concluding that allegedly false statements were sufficiently disseminated because they were made in promotional literature distributed to thousands of sales accounts).

Appellees merely published the videos on their YouTube account. There is no evidence that Appellees engaged in an advertising campaign to ensure widespread market penetration. There is no evidence that any significant portion of Appellants’ potential audience actually viewed or was likely to view these videos. There is simply publication on a single internet website. This is not adequate to show sufficient dissemination to the relevant purchasing public.

None of the elements for a claim under 15 U.S.C. § 1125(a)(1)(B) are met, and thus Appellants’ Lanham Act claim fails.

C. The District Court Correctly Granted Summary Judgment to Appellees on Appellants' Defamation Claim

1. Appellants are Not Even Potentially Liable for the Majority of the Statements

Appellees did not utter the vast majority of allegedly defamatory statements. Mulvehill did. Appellants do not allege that Appellees uttered these statements themselves or adopted them as their own in some subsequent publication. Rather, they try to impute liability for Mulvehill's statements onto Appellees because Cornelia was interviewing Mulvehill. This does not establish liability for Appellees. An interviewer is not liable for the statements made by an interviewee. The interviewee's statements are his own responsibility.

The plaintiffs in *Corsi v. Infowars, LLC*, No. A-20-CV-298-LY, 2021 U.S. Dist. LEXIS 98486 at *12-15 (W.D. Tex. May 25, 2021) made the same argument, to no success, only there they made some attempt to allege an agency relationship between the defendants and the party who actually uttered the allegedly actionable statements, along with them acting "in concert" with one another. The court there found such allegations conclusory and thus insufficient on a motion to dismiss. *Id.* Here, there are not even threadbare allegations of a legally significant

relationship between Mulvehill and Appellees that would make Appellees liable for his statements. Accordingly, Appellees cannot be liable for essentially any of the statements in the First and Second Videos.

2. Most of the Statements are Not Capable of Being Defamatory¹⁵

A statement must include a false assertion of fact to be defamatory. “[M]inor inaccuracies do not amount to falsity unless the inaccuracies ‘would have a different effect on the mind of the reader from that which the pleaded truth would have produced.’” *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 715 n.17 (2002). If the “gist” or “sting” of a story is true, it is not defamatory even if some details are incorrect. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991).

A statement of opinion cannot be defamatory. *See Pegasus*, 118 Nev. at 714; *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). In Nevada, “a statement is not defamatory if it is an exaggeration or

¹⁵ Appellants do not address the falsity of the complained-of statements at all, apparently taking it for granted that they are false and defamatory. As explained below, though, most of them are non-actionable statements of opinion or rhetorical hyperbole, or are simply not addressed anywhere in Appellants’ Brief.

generalization that could be interpreted by a reasonable person as ‘mere rhetorical hyperbole.’” *Pegasus*, 118 Nev. at 715 (citing *Wellman v. Fox*, 108 Nev. 83, 88 (Nev. 1992) (finding that “exaggerated statements are permissible in contexts in which the statements would be interpreted by a reasonable person as mere rhetorical hyperbole”)); *see also Flowers v. Carville*, 310 F.3d 1118, 1127 (9th Cir. 2002) (finding that references to tabloid articles as “trash,” “crap,” and “garbage” were not actionable); *and see Phantom Touring v. Affiliated Publ’ns*, 953 F.2d 724, 728, 730-31 (1st Cir. 1992) (finding that theatre review calling a production “a rip-off, a fraud, a scandal, a snake-oil job” was “obviously protected hyperbole” or incapable of being proven false). “[B]road, unfocused and wholly subjective comment[s]” are protected as opinion. *Fletcher v. San Jose Mercury news*, 216 Cal. App. 3d 172, 191 (1989) (finding that calling someone a “crooked politician” was not actionable).

An “evaluative opinion” cannot be false or defamatory. *See People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 895 P.2d 1269, 1275-76 (Nev. 1995) (modified on unrelated grounds in *City of Las Vegas Downtown Redevelopment Agency v. Hecht*, 940 P.2d 134 (Nev. 1997) (finding that claiming depictions of violence towards animals

shown in video amounted to “abuse” was protected as opinion). Such an opinion is one that “convey[s] the publisher’s judgment as to the quality of another’s behavior, and as such, it is not a statement of fact.” *Id.* at 1275.

The context of a statement is important in determining whether it is actionable. *See Balzaga v. Fox News Network, LLC*, 173 Cal. App. 4th 1325, 1339 (2009) (finding that “the fact that a statement ‘[s]tanding alone’ could be construed as false is not sufficient to support a defamation claim”); *see also Lewis v. Time, Inc.*, 710 F.2d 549, 553 (9th Cir. 1983) (stating “even apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when made [under] circumstances in which ‘an audience may anticipate efforts by the parties to persuade others to their position by use of epithets, fiery rhetoric or hyperbole”) (quoting *Information Control Group v. Genesis One Computer*, 611 F.2d 781, 784 (9th Cir. 1980)). If a publication containing an allegedly defamatory statement is surrounded by “loose, figurative, or hyperbolic language,” then any allegedly defamatory meaning may be negated by the publication’s overall tenor. *See Morningstar, Inc. v. Superior Court*, 23 Cal. App. 4th 676, 689 (1994).

It is particularly important to keep in mind that the statements at issue were published on an online forum, YouTube, a context in which there is a lesser expectation that statements will be factual. *See Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1173, 1178 (2008) (finding that in a chat room setting, anonymous post that corporate officers consisted of a “cockroach,” “losers,” “boobs,” and “crooks” were “crude, satirical hyperbole which ... constitute protected opinion”); *see also James v. San Jose Mercury News, Inc.*, 17 Cal. App. 4th 1, 12, 14 (1993) (finding that article describing lawyer as engaging in “sleazy, illegal, and unethical practice” fell into “protected zone of ‘imaginative expression’ or ‘rhetorical hyperbole’”).

As a review of the transcripts of the videos shows, they are filled with hyperbolic language and disparaging remarks about Appellants. The existence of such language and insults makes it far more likely that the average viewer will interpret these statements as being expressions of opinion or rhetorical hyperbole, rather than statements of objective fact. *See McDougal v. Fox News Network, LLC*, No. 1:19-cv-11161 (MKV), 2020 U.S. Dist. LEXIS 175768, *14-16 (S.D.N.Y. Sept. 23, 2020) (finding that Tucker Carlson’s claim that plaintiff was an extortionist was

protected opinion and rhetorical hyperbole because statements are especially likely to be viewed as hyperbole “in the context of commentary talk shows like the one at issue here, which often use ‘increasingly barbed’ language to address issues in the news”); *see also Herring Networks, Inc. v. Maddow*, 445 F. Supp. 3d 1042, 1053 (S.D. Cal. 2020) (finding that “[f]or [MSNBC host Rachel Maddow] to exaggerate the facts and call OAN Russian propaganda was consistent with her tone up to that point, and the Court finds a reasonable viewer would not take the statement as factual given this context. The context of Maddow’s statement shows reasonable viewers would consider the contested statement to be her opinion”). Furthermore, Cornelia provides an opening statement in the First Video telling viewers to “make sure to do your own research, and everything is just allegations at this point.” ECF No. 62-3 at **Exhibit 23**, WEALTHY000059. This disclaimer is fatal to the claims. *See ZL Techs., Inc. v. Gartner, Inc.*, 709 F. Supp. 2d 789, 797 (N.D. Cal. 2010) (finding that disclaimer in allegedly defamatory publication that defendant’s “opinions expressed herein are subject to change” “contribute[d] to a ‘general tenor of the entire work [that] negates the impression that [defendant] was asserting an objective fact’”).

a) Statements Regarding Buczkowski's Lack of Degree

Buczkowski may technically have an MBA from the Chicago Booth School of Business, but there is a very large asterisk next to this credential. The record shows that he did not attend Chicago Booth as an admitted student in a competitive program, but rather attended its online part-time version which took him longer to complete than the traditional in-person program most students take. The part-time program Buczkowski graduated from was easier to get admitted to than the traditional full-time program. *See* Section III(A)(4)(a), *supra*. While it may be the result of academic snobbery, most reasonable people would consider there to be a notable distinction between a full-time graduate and a part-time graduate in terms of which these credentials mean and how hard it was to obtain them. Though Buczkowski does have an MBA from this school, it is fair to believe that this is not a “real” degree comparable to that of a full-time student. *See* Daniel Strauss,

“Christopher Rufo Claims a Degree from ‘Harvard.’ Umm ... Not Quite,”
NEW REPUBLIC (Feb. 17, 2023).¹⁶

b) Statements Regarding Alleged Money Laundering

The allegation by Mulvehill that Larson Consulting was a money laundering front is not an assertion of fact. In fact, Buczkowski is not being truthful when he even says that this was the defamatory statement. Mulvehill actually stated that the business “*has like no substance behind it online.*” (ECF No. 1 at ¶ 63). This is an accurate assessment of that company’s presence, as its social media profiles have not been updated in years, it has not had an active website since 2019, and the address it provided to the Nevada Secretary of State was fake. (ECF No. 62-3 at **Exhibits 17-21**). Mulvehill then concluded, based on this disclosed fact, that it “*very well ... could be a front for laundering money.*” (ECF No. 1 at ¶ 63). Appellants can disagree with the reasonableness of Mulvehill’s conclusion, but it is an opinion based on true disclosed facts. A statement of opinion “based on disclosed or

¹⁶ Available at: https://newrepublic.com/article/170647/christopher-rufo-harvard-degree-misleading?utm_medium=social&utm_source=Twitter&utm_campaign=SF_TNR

assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is.” *Lewis v. Time, Inc.*, 710 F.2d 549, 555 (9th Cir. 1983) (quoting Restatement (Second) Torts § 566 cmt. c (1977)). These statements cannot be defamatory.

Appellants do not dispute the truth of any of these underlying facts in their Motion. Instead, they ignore or mischaracterize the above evidence, claiming it was “illogical” to conclude that Larson is involved in money laundering. But, first of all, it certainly is logical given everything we know. Second, even if it were not, an illogical conclusion based on disclosed facts is still protected. And again, it is Mulvehill who drew this conclusion, not Cornelia.

Aside from these statements being protected expressions of opinion, Larson’s legitimacy is very much in dispute. Appellants provided false information to the Nevada Secretary of State, meaning the general public is led to believe the business is located in Las Vegas. Larson’s tax returns claim that the business is located at 275 Glen Way, Incline Village, Nevada, which is (1) Buczkowski’s claimed address of residence, even though he doesn’t live there; and (2) actually the residential address of a

third party, Carlos Huerta, who has no involvement in Larson. (ECF No. 69 at 3-4; ECF No. 69-3). One would expect a legitimate business to have its own physical space, rather than falsely claim to operate out of an unaffiliated person's home.

c) Statements Regarding Buczkowski's Involvement in an Illegal Drug Operation

Just as with the statements regarding Larson Consulting, these statements are protected opinion based on true disclosed facts. Cornelia looked at the civil asset forfeiture case in which Buczkowski was involved and the related criminal case against Timothy Lantz. From these documents, he saw that Buczkowski allegedly was friends with Lantz and that his father was allegedly involved in the marijuana grow operation, and that his personal items and a shocking number of Buczkowski's intimate records and documents were found at the seized properties that were part of the operation. (3-SER-507-521 and 3-SER-536-541 at **Exhibits 14 and 16**). He mentioned in the Second Video that this was a matter of public record. (ECF No. 1 at ¶ 66).

Appellants do not, and cannot, dispute the procedural posture of the civil forfeiture case and that the allegations in those complaints are matters of public record. Appellants do not even contend that it was not

reasonable for Cornelia to conclude from this information that Buczkowski was involved in a drug operation. Instead, they simply provide the conclusory statement that Cornelia drew “illogical inferences” based on these facts. Appellants’ Br. at ECF p. 57. That does not make his statements factual.

d) Statements Regarding Appellants’ Business Practices

The statements allegedly accusing Appellants of using illegal means in helping clients obtain credit, not authoring their own content, and coercing clients to provide testimonials are either statements of opinion or factual statements without any rebuttal. Appellees did not make any of these claims, instead at most opining that the representations Mulvehill was making were consistent with the conduct of other scammers.

Appellants provided no argument or evidence at the District Court that these statements were false. Even in their Opening Brief, they barely acknowledge these statements. They are estopped from taking the position that these statements are actionable in any respect, particularly when, during the course of discovery at the District Court, they took the position that the accuracy of such statements is irrelevant to their claims,

provided no information regarding these allegations, and asked no questions regarding them during depositions. (3-SER-522-535 at **Exhibit 15**, Response Nos. 19-26; 3-SER-680-696 at **Exhibit 27**, Answer No. 4). The record conclusively establishes these statements are not actionable.

e) Cornelia Nominating Buczkowski for the “Charlatan of the Year” Award

Nominating someone for a “charlatan of the year” award in an obviously light-hearted video is a classic expression of opinion, and is no different from calling someone a snake-oil salesman or a crook. *See Phantom Touring*, 953 F.2d at 730-31; *see also Rosenaur v. Scherer*, 88 Cal. App. 4th 260, 280, 105 Cal. Rptr. 2d 674 (2001); *and see Ayyadurai v. Floor64, Inc.*, 270 F. Supp. 3d 343, 361-62 (D. Mass. 2017) (finding that calling someone a “fraud” or a “charlatan” in blog post was mere use of colorful and figurative language, rather than “any fact-based accusation that plaintiff has actually committed a fraud”). This statement is not actionable, and Appellants, neither at the District Court nor in their Opening Brief, argue otherwise.

3. Appellants are Public Figures and Must Satisfy the Actual Malice Standard

A limited purpose public figure “voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.” *Gertz*, 418 U.S. at 351; *see also Pegasus*, 118 Nev. at 720. This is a question of law, and a court’s determination is based “on whether the person’s role in a matter of public concern is voluntary and prominent.” *Bongiovi v. Sullivan*, 122 Nev. 556, 572 (2006). In determining whether a plaintiff is a limited-purpose public figure, a court should consider (1) “whether a public controversy existed when the statements were made”; (2) whether the statements were related to this controversy; and (3) whether the plaintiff voluntarily injected himself into the controversy. *Planet Aid, Inc. v. Reveal*, 44 F.4th 918, 925 (9th Cir. 2022).

Appellants are limited-purpose public figures. They aggressively marketed their services and have actively sought media attention, boasting of their dozens of interviews with prominent national and international media outlets. (See 1-SER-68-174 and 1-SER-178-183 at **Exhibits 1 and 3**; 2-SER-191-446 at **Exhibit 5**; 2-SER-192 and 2-SER-470-479 at **Exhibits 5-1 and 7**). They have a millions-strong social media

following. (See ECF No. 1 at ¶¶ 20-21; 1-SER-68-174 and 1-SER-184-189 at **Exhibits 1 and 4**). There were pre-existing stories and accusations leveled at Buczkowski for shady and unethical business practices, his credibility, and his educational credentials before any of the videos at issue were published. (See 2-SER-483 to 3-SER-498 at **Exhibits 9-12**). Indeed, Mulvehill had already published substantively identical statements prior to Appellees releasing any videos, and Appellants' media blitz was in direct response to those publications. 5-SER-946-948 at 172:10-174:3; Buczkowski 3rd Trans. at 130:4-22 & 131:18-132:12. There was thus an existing controversy on all these issues by December 2020.

The statements in the Videos primarily concern Appellants' credibility as a businessman, potential ethical and legal problems with the services they provide, and the quality of the services they provide. These statements are unquestionably of significant interest to the millions of people who follow Appellants on social media as well as all people to whom they advertise their services. Not everyone in America may have heard of Appellants, but a sufficiently large international

community has, and this community has a significant interest in hearing about how Appellants are scamming their customers.

A public debate regarding the quality of Appellants' services existed because Appellants themselves made this an issue and these media outlets shone a spotlight on their claims. Multiple Circuit Courts, including this Circuit, have found that such an "advertising blitz" makes one a public figure. *See Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 268-69 (9th Cir. 2013) (plaintiff was a limited-purpose public figure because its "aggressive advertising campaign ... invited public attention, comment, and criticism"); *see also Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 273-74 (3d Cir. 1980) (widespread advertising campaign by plaintiff showed that it "voluntarily injected itself into a matter of public interest – indeed, it appears to have created a controversy – for the purpose of influencing the consuming public").

Indeed, the case on which Appellants rely most strongly for their public figure argument, *Planet Aid, Inc. v. Reveal*, does them no favors. It found that the plaintiffs were public figures because they "actively engaged in conduct that invited public comment and attention. Planet Aid regularly engages with the press in an effort to cultivate a public

image, including by issuing press releases, hosting galas, and publicizing itself to thousands of followers through social media. Additionally, Planet Aid aggressively solicits donations from the public.” 44 F.4th 918, 927 (9th Cir. 2022). “By actively seeking attention from the press, promoting themselves through social media, employing public relations staff, and soliciting donations and grants, Planet Aid and Thomsen assumed a risk of public scrutiny. By regularly providing statements to the press, Planet Aid and Thomsen both demonstrate a greater access to channels of effective communication than private individuals, and therefore an ability to counteract false statements through self-help.” *Id.* As for the relationship between the statements and the controversy for which they were public figures, the court found there was a pre-existing controversy about the plaintiffs’ misuse of charitable funds. It also found it important that “Planet Aid and Lisbeth Thomsen invited public attention regarding their use of charitable funds through press releases, promotion of charitable programs, soliciting donations from the public, and other activities.” *Id.* at 928. This case is on all-fours with *Reveal*, and Appellants are public figures.

Appellants cannot seriously claim that, with a millions-strong international following, they are not at least limited-purpose public figures in the context of whether they are fraudsters and scammers. Yet they claim exactly this, complaining about the level of detail in the District Court’s analysis but not grappling with any of the evidence.¹⁷ Appellants argue that Appellees failed to identify a relevant public controversy below, which is a baffling failure to read the record. Presumably, they are trying to rehash their argument at the District Court that the five statements they actually addressed in their summary judgment briefing (ignoring the statements about their business practices) were not related to whether they scammed their customers.

¹⁷ Appellants falsely claim that Appellees “only cited evidence that post-dated the statements published by Defendants” to establish public figure status. Appellants’ Br. at ECF p. 36. This is a blatant mischaracterization of the record. The vast majority of the articles Appellees cited below were published either before any of the videos or in between the first and last of them. ECF No. 182 at 5 provides a breakdown of the publication dates. Furthermore, except perhaps in the case of an involuntary public figure, public figure status does not happen overnight, and press coverage does not by itself make one a public figure. Appellants made deliberate, sustained efforts to seek out fame. The press coverage about them is *evidence* of their success in this, not the *cause* of it. Accordingly, press coverage following the publication of the videos at issue is relevant to Appellants’ public figure status, at the very least for articles that were published shortly after the videos.

But that is incompatible with the arguments they made below. Appellants claimed that the statements about Buczkowski's involvement in a drug operation, money laundering, and his education credentials are all directly related to the quality of Appellants' services, and Appellants' status as a scam artist – a public controversy in which Appellants voluntarily placed themselves, because they implicate Appellants' business qualifications and trustworthiness. ECF No. 78 at 28. Why else would Appellants engage in a corrective advertising blitz? They cannot avoid public figure status by trying to cherry-pick an artificially narrow public controversy while ignoring the surrounding context and their own legal arguments.

4. Appellees Did Not Publish with Actual Malice

As public figures, Appellants must prove that they can overcome the actual malice standard with clear and convincing evidence. *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 511 (1984); *Underwager v. Channel 9 Australia*, 69 F.3d 361, 365 (9th Cir. 1995). It is a question of law whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice. *See Underwager*, 69 F.3d at 365.

Actual malice may be found only when a statement is made with knowledge of falsity or with reckless disregard for the truth. *New York Times Co. v. Sullivan*, *supra*, 376 U.S. at 279-80. Cornelia did not know or believe that any statement in any of the videos at issue, whether uttered by him or Mulvehill, was false. 3-SER-547 at ¶ 20. Appellees thus did not publish any statements with knowing falsity. This leaves only reckless disregard, which requires that a publisher “entertained serious doubts as to the truth of his publication.” *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *see also Bose Corp.*, 466 U.S. at 511 n.30. Reckless disregard only exists when the defendant “acted with a ‘high degree of awareness of ... [the] probable falsity’ of the statement or had serious doubts as to the publication’s truth.” *Pegasus*, 118 Nev. at 719. The question is not “whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.” *Reader’s Digest Assn. v. Superior Court*, 690 P.2d 610, 617-18 (Cal. 1984); *see also Thompson*, 390 U.S. at 731. Moreover, “[a] publisher does not have to investigate personally, but may rely on the investigation and conclusions

of reputable sources.” *Reader’s Digest*, 690 P.2d at 619. Appellants cannot show evidence of knowing falsity or reckless disregard for the truth.

First, regarding the statements about Appellants’ unethical and possibly illegal business practices, Cornelia was relying on Mulvehill and his sources. Mulvehill shared statements from several of these sources with Cornelia prior to publication of the First video, and Cornelia even watched a lengthy interview with a first-hand witness who corroborated these claims. (2-SER-454-455. at 81:1-83:8; 3-SER-544-545 at ¶¶ 8 and 9. Cornelia found all these sources credible. 3-SER-545 at ¶ 10. The behavior reported by Mulvehill and these sources was consistent with patterns of behavior engaged in by other scammers that Cornelia had observed and reported on. *Id.* at ¶ 10. He was not in possession of any information contradicting these claims when he published. *Id.* at ¶ 17. Appellants did not address these statements below and don’t in their Brief, but it is crucial to consider that Cornelia, in evaluating Mulvehill’s credibility as to all his other statements, knew of this substantial evidence which Appellants did not rebut.

As for the statements regarding Larson Consulting as a front for money laundering, the factual bases for this opinion are already laid out

in Section III(A)(4), *supra*. Appellees never called it a front for money laundering, but there was reason to believe this was a possibility based on its non-existent online presence and connection to Buczkowski, who had a long history of obscuring his face and identity. (2-SER-454-455 at 83:15-85:4; 3-SER-545-546 at ¶ 13. Discovery only made it more apparent that there is something extremely suspicious about this entity, as it claims to be located at the personal residence of an unaffiliated person.

Similarly, Section III(A)(2) discusses Cornelia's factual bases for stating that Buczkowski was likely involved in an illegal marijuana grow operation, namely the allegations in the civil asset forfeiture case. Cornelia reasonably believed these allegations were accurate, and there was never a statement from law enforcement clearing Buczkowski of any wrongdoing in relation to these cases. (2-SER-454-455 at 76:5-78:4; 3-SER-546 at ¶ 14.

Mulvehill's statement that Buczkowski was lying about his education credentials is an incredibly minor, off-handed comment that Cornelia barely thought about given the other statements that were the subjects of the First and Second Videos. (2-SER-454-455 at 86:3-20. And Buczkowski admitted that he attended an unconventional online part-

time program at the University of Chicago business school in which he attended classes on his own schedule. Buczkowski Trans. at 12:24-13:13. Given that Mulvehill appeared credible to Cornelia regarding every other statement, including by providing documentary support for statements about Plaintiffs' shady business practices, there was no reason for Cornelia to doubt the accuracy of this statement. (2-SER-454-455 at 86:3-87:12). Further, there is a wide gulf, at least to the average reader, between attending the prestigious University of Chicago school of business as a full-time matriculated student and attending a correspondence course through the same institution.

Finally, we have Mulvehill's statements regarding Buczkowski setting him up to be arrested in 2013 and allegedly being involved in the death of a 28 year-old woman around this time. Mulvehill's statements are about an encounter he had with Buczkowski himself, who was trying to be very secretive and instructed Mulvehill not to tell anyone of his whereabouts.¹⁸ Under such circumstances, there is little to no research

¹⁸ Appellants provided no evidence rebutting Mulvehill's assertions about these background facts, including that Buczkowski was using an alias, that he was using a burner phone, and that he instructed Mulvehill not to tell anyone he was coming to Las Vegas.

Cornelia could have performed to verify Mulvehill's claims, not that he was obligated to perform any investigation at all. The Nevada Supreme Court recently found that in such circumstances, where there is no further investigation a reporter can conduct, publishing with incomplete information does not evidence actual malice. *Wynn v. A.P.*, 542 P.3d 751, 758-59 (Nev. 2024) (finding that newspaper did not report on allegedly improbable allegations in police report not subject to privilege with actual malice where police report had all identifying information redacted, and thus "it was not possible to meaningfully investigate further as long as that information was unknown"). Cornelia, who had already found that Mulvehill's other claims about Buczkowski were backed up by documentary evidence and corroborating sources, found Mulvehill credible and decided to trust him regarding these statements. (2-SER-454-455 at 7:16-10:3, 45:6-10, 74:2-76:4, 79:16-80:9, 86:21-87:12; 3-SER-547 at ¶ 20. That trust does not constitute actual malice.

In the face of this evidence, Appellants refer to Mulvehill's alleged animosity toward Buczkowski, calling him an unreliable source because of this, but Cornelia testified that this animosity did not affect his opinion of Buczkowski's credibility. 2-SER-456-457 at **Exhibit 6**, transcript

pages 74:22-75:6. Despite Mulvehill's alleged bias, Cornelia found Mulvehill's statements believable because Mulvehill's prior videos about Plaintiffs, which contain the same statements, were still available on YouTube months after publication. 2-SER-457-458, 461-462, and 468-469 at **Exhibit 6**, transcript pages 75:3-76:4, 79:16-80:9, 86:21-87:12.¹⁹ Appellants also failed to address Cornelia's reasonableness in finding Mulvehill credible because of Mulvehill's claims and evidence regarding the poor quality and fraudulent nature of Appellants' services. By failing to show that any of these statements were false or that any of this evidence was unreliable, Appellants admit that Mulvehill was a credible source, and they fail to explain how this evaluation of credibility should not apply to Cornelia trusting him as to the other statements at issue. Appellants also claim, without explanation, that none of the other sources (such as the former contractor of Appellants and their former clients) were reliable, but the lack of evidence or even *argument* refuting the claims of these sources nullifies this argument.

¹⁹ Mulvehill also testified that he provided no false or unreliable information to Cornelia, and that Cornelia had no reason not to trust him. Mulvehill Trans. at 284:2-285:4 & 286:1-3.

Appellants rest their argument almost entirely on the alleged bias or animosity of Cornelia's primary source, but that does not establish actual malice. "A publisher's failure to make an independent investigation of a story, even when the publisher is aware of the possible bias of its source, does not amount to reckless disregard in the absence of serious doubts about the story's truthfulness." *Murray v. Bailey*, 613 F. Supp. 1276, 1280 (N.D. Cal. 1985); see *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (finding that defendant's reliance solely on a possibly hostile source when making accusations of criminal conduct did not constitute actual malice). Appellants also claim there is evidence of Cornelia himself having bias toward Buczkowski, citing a portion of a single text message. 2-ER-224. However, a speaker's hostility towards a plaintiff is only relevant to the actual malice inquiry "to the extent it impacts the defendant's actual belief concerning the truthfulness of the publication. The focus is thus on the 'defendant's attitude toward the truth or falsity of the material published ... [not] the defendant's attitude toward the plaintiff." *Christian Research Ins. v. Alnor*, 148 Cal. App. 4th

71, 92 (2007). Without any explanation as to how Cornelia's alleged bias affected his belief in Mulvehill's claims, it is irrelevant.²⁰

D. The District Court Correctly Granted Summary Judgment in Appellees' Favor on Appellants' Intentional Infliction of Emotional Distress Claim

There is no need to address the majority of Appellants' argument as to Buczkowski's IIED claim. Damages are not presumed for an IIED claim, and the tort is only established where the plaintiff shows he has suffered severe emotional distress. *Olivero v. Lowe*, 116 Nev. 395, 398-99 (2000). There is no record evidence that Buczkowski suffered *any* emotional distress of any kind. We do not have so much as declaration testimony from Buczkowski claiming he suffered a headache. By itself, this is fatal to Buczkowski's claim.

E. The District Court Correctly Granted Summary Judgment in Appellees' Favor on Appellants' Business Disparagement Claim

A defamation action concerns statements that injure a plaintiff's personal reputation, while a business disparagement claim concerns

²⁰ Aside from lack of actual malice, Appellants' defamation claim fails because it is completely unsupported by evidence of damages, as explained in Section V(E), *infra*. Appellants did not bring a claim for defamation *per se* and their Complaint at no point alleges any statement was defamatory *per se*. They were thus required to prove damages.

statements regarding the quality of the plaintiff's goods or services. *Clark Cty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 385-86 (2009). A business disparagement claim requires falsity and a lack of privilege, in addition to a higher malice requirement that incorporates the actual malice standard and proof of special damages. *See id.* at 386.

Appellants' business disparagement claim is completely duplicative of their defamation claim, and thus Appellants must prove actual malice under *Falwell*. The business disparagement claim fails for the same reasons the defamation claim fails.

In addition to this defect, there is a lack of any non-speculative evidence of damages. Their only evidence is the expert report of Ian K. McDonough, which they reference without discussion. Appellants' Br. at ECF p.58.²¹ The rebuttal expert report of Richard S. Hoffman identifies the numerous deficiencies of McDonough's report, including but not limited to: not using the highest quality of data available; calculating lost revenue instead of profits; making unsupported assumptions about

²¹ Appellants also falsely claim Appellees did not argue as to lack of damages at the District Court, ignoring the opposition to Appellants' Motion for Partial Summary Judgment (ECF No. 162 at 26-28) and incorporated by reference in Appellees' Reply (ECF No. 182 at 19 n.29).

Plaintiffs' growth; and making other unwarranted assumptions. *See* redacted Hoffman report, 4-SER-870-926.

In addition to these problems, Appellants and Dr. McDonough provided testimony especially harmful to their damages claims. Wealthy testified that some of the documents underlying McDonough's report were either modified by or created by McDonough and that such documents, as produced in discovery, could "easily be taken out of context" and have "incomplete data." 5-SER-949-955, at 207:23-209:1, 211:14-212:23, & 213:23-214:17. It also testified that it does not calculate or report its profits in the normal course of business, necessarily making any damages calculation based on lost profits purely speculative. 5-SER-956-958 at 220:10-20 & 221:22-222:7.

McDonough's testimony showed his damages calculation is fatally flawed in numerous ways. First, his calculation was based solely on an assumed loss in the growth of the number of Appellants' clients, with no regard for how much these assumed customers would spend or whether this would actually result in a loss of revenue. 5-SER-974-1004, Transcript of deposition of Ian McDonough ("McDonough Trans."), at 54:6-55:6. He admitted that the period of loss of customers in his report

was not based on anything specific and was “somewhat arbitrary.” *Id.* at 36:1-17. He did not review any profit and loss statements, nor did he consider such obviously important information relevant to his calculation. *Id.* He did not review any information regarding Appellants’ costs and admitted that such information would have been useful in calculating damages. *Id.* at 58:5-60:16 & 62:17-64:19. He did not review any of Appellants’ tax returns, had no explanation for why Wealthy’s significant claimed deductions were not considered in calculating damages, and testified it may have been useful to review these returns in calculating damages. *Id.* at 65:3-67:19 & 71:25-72:14. He acknowledged that there were significant discrepancies in the information he was given by Appellants underlying his calculation and Appellants’ tax documents. *Id.* at 78:24-80:7 & 80:18-81:13. Even with this discrepancy, McDonough did nothing to verify the accuracy of the information Appellants provided him. *Id.* at 80:8-17. He assumed, for the sake of simplicity, that all projected lost customers would spend the same amount on Appellants’ services, despite acknowledging that there are significant disparities in how much a given customer spends. *Id.* at 70:6-71:9 & 77:9-78:5.

Most importantly, McDonough made no attempt at all to apportion Appellants' alleged damages to any particular complained-of statement, instead attributing the claimed damages to the videos in their entirety. *Id.* at 87:18-88:5. He was not provided any evidence that any clients had actually seen the videos (*id.* at 92:16-19) and did not consider the viewership of the videos (*id.* at 37:5-10, 39:1-7). With this testimony, and the report's complete silence on which particular statements caused damage (or even that *any* of the complained-of statements caused any damage), causation is impossible to show.

Appellants did not identify or provide any testimony from *any* individuals who viewed Cornelia's videos. There is no evidence that any actual or potential customers did not purchase Appellants' services or even changed their consuming habits in response to any statement in the videos. The complained-of statements make up only a small portion of the videos, which are otherwise replete with statements that criticize Appellants, but which Appellants have not claimed are actionable. Appellants have made no attempt to disambiguate any claimed harm caused by the complained-of statements from damages caused by all

other statements in the videos, making any damages calculation untenably speculative.

This speculation is fatal to any calculation of damages when paired with Appellants' failure to provide any evidence or argument that the statements about their services, or Appellees' nomination of Buczkowski for a "Charlatan of the Year" award, are false or actionable. Appellants are silent as to the only statements that may have a tendency to harm their business, and Appellants make no attempt to tie their alleged damages to any of the remaining statements. The business disparagement claim (as well as the Lanham Act and defamation claims) must be dismissed for lack of damages. *See Mattes v. Ballys Las Vegas*, 227 Fed. Appx. 567, 571-72 (9th Cir. 2007) (finding summary judgment in defendant's favor appropriate on fraud and defamation claims due to speculative nature of evidence related to damages).

F. The District Court Correctly Denied Granting Summary Judgment to Appellants

For the same reasons the District Court correctly granted summary judgment in Appellees' favor, it correctly denied summary judgment in Appellants' favor. The arguments on the two points are essentially identical, except that Appellants have an even tougher climb showing

they were entitled to summary judgment. At the bare minimum, Appellants failed to show clear and convincing evidence, as a matter of law, that Appellees published their statements with actual malice (or even negligence), and thus are not entitled to summary judgment on their defamation claim.

G. The District Court Correctly Awarded Fees to Appellees

For the reasons explained above, the District Court correctly found that Appellants were prevailing parties and thus entitled to an award of costs. Appellants argue that some of the awarded costs were not properly supported and that the clerk awarded some non-taxable costs. Appellants' Br. at ECF p.60. They provide no examples of or argument regarding such improperly awarded costs, however. This issue is not adequately presented on appeal, and thus the Court should affirm the full award of costs if it finds that Appellees were prevailing parties.

H. The District Court Erred in Denying Appellees' Special Motion to Dismiss Under NRS 41.660

Nevada's Anti-SLAPP law presents a two-prong analytical framework. First, the moving party must show, by a preponderance of the evidence, that the claims sought to be dismissed are "based upon a

good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern.” NRS 41.660(3). As relevant, here, Appellees were required to show that their statements were “made in direct connection with an issue of public interest in a place open to the public or in a public forum,” and that they were “truthful or [] made without knowledge of its falsehood” to be protected. *Shapiro v. Welt*, 389 P.3d 262, 267 (Nev. 2017). In federal court, the second prong of the analysis is simply collapsed into the summary judgment standard under Fed. R. Civ. P. 56. *See Planned Parenthood Fed’n of Am. v. Ctr. for Med. Progress*, 890 F.3d 828, 833-34 (9th Cir. 2018).

This cross-appeal is thus concerned only with the District Court’s erroneous finding that Appellees did not meet their burden under the first prong of this analysis, specifically that they failed to show they published their statements in “good faith” under NRS 41.637.

1. Appellees’ Statements Were in Direct Connection to an Issue of Public Interest

“Issue of public interest” is defined broadly as “any issue in which the public is interested.” *Nygaard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1042 (2008). “The issue need not be ‘significant’ to be protected by

the anti-SLAPP statute – it is enough that it is one in which the public takes an interest.” *Id.* “Although matters of public interest include legislative and governmental activities, they may also include activities that involve private persona, and entities, especially when a large, powerful organization may impact the lives of many individuals.” *Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 650 (1996) (emphasis added). An activity does not need to “meet the lofty standard of pertaining to the heart of self-government” to qualify for Anti-SLAPP protection; “social or even low-brow topics may suffice.” *Hilton v. Hallmark Cards*, 599 F.3d 894, 905 (9th Cir. 2009).

The lifestyles and conduct of well-known public figures and celebrities constitute an issue of public interest. *See Hilton v. Hallmark Cards*, 599 F.3d 894, 908 (9th Cir. 2011) (celebrity Paris Hilton acknowledging that her “privileged lifestyle and her catchphrase (‘that’s hot’) are matters of widespread public interest”). “[T]here is a public interest which attaches to people who, by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities.” *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 667-68 (1st Dist. 2010). Issues that involve even

private conduct by public figures may be of public interest. *See Sipple v. Foundation For Nat. Progress*, 71 Cal. App. 4th 226, 238 (2d Dist. 1999) (finding that lawsuit based on reported allegations against nationally prominent media strategist for political figures, accusing him of physically and verbally abusing his wife, involved a matter of public interest). And recently, the California Supreme Court found that picketing a local land developer, even when arguably animated by a personal grievance and attended by only a few dozen people, satisfies the first prong when outside observers would view their speech as relating to the broader issues of inadequate housing and foreclosures. *Geiser v. Kuhns*, 13 Cal. 5th 1238, 1251-52 (2022). While not co-extensive with the public figure analysis regarding Appellants' defamation claim, there is significant overlap with this analysis.

The Nevada Supreme Court has also adopted the five “guiding principles” laid out in *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F. Supp. 2d 957 (N.D. Cal. 2013). *Shapiro v. Welt*, 133 Nev. 35, 39 (2017). These principles are:

- (1) “public interest” does not equate with mere curiosity;

- (2) a matter of public interest should be something of concern to a substantial number of people; a matter of concern to a speaker and a relatively small specific audience is not a matter of public interest;
- (3) there should be some degree of closeness between the challenged statements and the asserted public interest – the assertion of a broad and amorphous public interest is not sufficient;
- (4) the focus of the speaker’s conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy; and
- (5) a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.

Id. at 968. These “guiding principles” are not a formulation of new law, but rather a distillation of California and U.S. Supreme Court decisions on what constitutes an issue of public interest. *See Piping Rock*, 946 F. Supp. 2d at 968. Nothing in *Welt* suggests that Nevada courts use this as an exclusive checklist. Instead, the cases cited above and in the Anti-SLAPP Motion also guide the public issue analysis and the application of the *Piping Rock* factors.

As explained in Section III(A)(1), *supra*, Appellants are public figures. They aggressively marketed their services and actively sought and attained international media attention. 1-SER-68-174, 178-183, 184-189 at **Exhibits 1, 3 & 4**; 2-SER-191-446 at **Exhibit 5**; 2-SER-192-200 and 2-SER-470-479 at **Exhibits 5-1** and **7**. They have a millions-strong social media following. ECF No. 1 at ¶¶ 20-21; 1-SER-68-174 and 1-SER-184-189 at **Exhibits 1 and 4**. There was a pre-existing dispute regarding the statements at issue here 2-SER-483-498 at **Exhibits 9-12**. This dispute included Mulvehill previously publishing the same statements at issue in the Complaint, which spurred on the aforementioned advertising blitz. 5-SER-946-948 at 172:10-174:3; Buczkowski 3rd Trans. at 130:4-22 & 131:18-132:12.

And similar to the public figure analysis above, the statements in the Videos are directly connected to this issue of public interest. Whether Appellants are unethical scammers is of significant interest to the millions of people who follow Appellees on Instagram and to whom they advertise their services, as well as their thousands of customers. They are not part of any private dispute between Appellees and Appellants, as no such dispute existed.

Geiser v. Kuhns is instructive here. The plaintiff evicted the defendants. 13 Cal. 5th at 1243-44. The defendants protested outside the plaintiff's property. *Id.* at 1244-45. The purpose was "to protest unfair and deceptive practices" used by the plaintiff. *Id.* at 1245. The Court enunciated the rule that, for the first prong of the analysis, speech implicates a matter of public interest so long as it, "considered in light of its context, may reasonably be understood to implicate a public issue, even if it also implicates a private dispute." *Id.* at 1253-54. Because the purpose of the demonstration was to protest the plaintiff's business practices, rather than *only* the defendants' specific grievance, it implicated broader concerns of unfair foreclosure practices and was thus connected to an issue of public interest. *Id.* at 1250-51. The demonstration furthered discussion on these broader public issues, and was thus protected under the Anti-SLAPP statute. *Id.* at 1255. If a small eviction protest is connected to an issue of public interest because it implicates broader public issues, then certainly Appellees' videos, which directly concern an issue of interest to millions of people internationally, is also connected to an issue of public interest.

2. Appellees' Statements Were Published in a Public Forum

Appellees published their videos on YouTube, a publicly accessible website with a well-known and robust comment system which allows any member of the general public to have discussions both with the uploader of a video and other members of the community. Appellees' statements were thus published in a public forum. *Kosor v. Olympia Cos., LLC*, 478 P.3d 390 (Nev. 2020). Appellants did not dispute this below, and cannot do so now.

3. Appellees Published Their Statements in Good Faith

For a statement to be made in "good faith," it must be either true or made without actual knowledge of falsity. NRS 41.637. "In determining whether the communications were made in good faith, the court must consider the 'gist or sting' of the communications as a whole, rather than parsing individual words in the communications." *Rosen v. Tarkanian*, 453 P.3d 1200, 1222 (Nev. 2019). Statements of opinion can never be made with knowledge of falsity for purposes of the prong one analysis. *Abrams v. Sanson*, 458 P.3d 1062, 1068 (Nev. 2020). A defendant meets this standard simply by providing a declaration that they did not know

any of the statements at issue were false. *Stark v. Lackey*, 458 P.3d 342, 347 (Nev. 2020). It then falls to the opposing party to provide contravening evidence. *Id.* Such contravening evidence must show that defendant had *actual knowledge* that the statements were false. See *Delucchi v. Songer*, 396 P.3d 826, 833 (Nev. 2017) (holding that a defendant demonstrated that his communication was true or made without knowledge of its falsehood when, in a declaration, he stated that the information contained in his communication “was truthful to the best of his knowledge, and he made no statements he knew to be false”); see also *Taylor v. Colon*, 482 P.3d 1212, 1218 (Nev. 2020) (holding that a declarant’s assertion that he made a communication he believed to be true and accurate constituted a showing of good faith).

The case of *Williams v. Lazer*, 495 P.3d 93 (Nev. 2021), provides a clear example of this standard. That case dealt with a woman who purchased a condo and made statements about the real estate agent on the other side of the transaction. The Court found that “[w]hile Lazer provided several declarations that allege some of Williams’s statements are factually wrong, such declarations do not constitute contrary evidence to refute Williams’s affidavit because they do not allege, much

less show, that *Williams knew* any of the statements were false when she made them.” *Id.* at 98 (emphasis in original).

Cornelia did not know or believe any statement in any of the videos at issue, whether uttered by him or Mulvehill, was false. 3-SER-547 at ¶ 20. Rather, he reviewed significant evidence provided by Mulvehill regarding Plaintiffs and their business practices, in addition to his own research concerning Mulvehill’s claims, and found Mulvehill and his sources to be credible. (2-SER-454-455 at 7:16-10:3, 45:6-10, 74:2-80:9, 81:1-85:4, 86:3-87:12; 3-SER-547. at ¶ 20. Cornelia published the videos in good faith.

In its Order, the District Court recited the legal standard for finding good faith as: “defendants must demonstrate that ‘the statements were made in good faith ... because the gist or sting of the statements were substantively true.’” 1-ER-6-19 at 7 (quoting *Rosen v. Tarkanian*, 453 P.3d 1220, 1223 (Nev. 2019)). This is an incorrect reading of both the Anti-SLAPP statute and *Tarkanian*, resulting in the application of an incorrect legal standard. The District Court’s standard improperly requires an Anti-SLAPP defendant to show that the “gist or sting” of a statement is true. While that is *one* way of showing good faith, and the

basis of the Nevada Supreme Court's order in *Tarkanian*, it is not the only way. A defendant may also show that they did not publish with knowing falsity, in which case there is no need to show that the statements at issue are true. Indeed, the court in *Tarkanian* acknowledged this, noting that “the plaintiffs [sic] high burden of proof for actual malice indicates a low burden of proof for the defendant to show he or she did not have knowledge of falsity of his or her statements and made them in good faith” and **“the standard for ‘actual malice’ is essentially the same as the test for ‘good faith’ in prong one”** *Id.* at 1224 (emphasis added).

Actual malice can be met with a showing of “reckless disregard” for the truth of a statement. *Sullivan, supra*, 376 U.S. at 280. However, even reckless disregard is not enough to show an absence of good faith under NRS 41.637. It is thus a legal and logical impossibility for a defendant to publish without actual malice but not in good faith. The District Court's finding that Defendants failed to show good faith because they failed to “provide sufficient proof that [Cornelia] was unaware such statements by Mulvehill concerning Buczkowski *could be false*” is contrary to the

language of the Anti-SLAPP statute and every single case that has ever interpreted its “good faith” requirement. 1-ER-6-19.

Whether or not Cornelia was aware of the possibility that Mulvehill’s statements were false, Appellees provided significant evidence that he did not have *actual knowledge* the statements were false. Cornelia provided a declaration testifying that “[a]t no point prior to publishing any of the videos at issue in this case did I have any significant doubt as to the accuracy of my or Mulvehill’s statements about Plaintiffs. I was not in possession of any evidence that contradicted the statements about Plaintiffs, and I considered Mulvehill to be a credible source and his own sources to be credible.” 2-SER-447-469 at p.116, ¶20. Cornelia also testified that he believed each individual statement at issue to be true when he published his videos, or at least that the statements were reasonable interpretations of available facts. 2-SER-447-469 at ¶¶10, 13-19. Cornelia also testified during his deposition that he believed each of the statements at issue to be true, or at least that he did not have any knowledge of falsity. 2-SER-447-469 **Exhibit 6** at 7:16-10:3, 45:6-10, 74:2-78:4, 79:16-80:9, 81:1-83:8, 83:15-85:4, and 86:3-87:12. In response, Appellants provided *nothing* showing knowledge of falsity.

Appellees satisfied their burden under the first prong of the Anti-SLAPP analysis, and the second prong of the analysis is identical to the summary judgment analysis above. The District Court should have granted Appellees' Anti-SLAPP Motion.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's orders granting summary judgment in Appellees' favor on all claims, denying Appellants' Motion for Partial Summary Judgment, and granting Appellees' costs. The Court should reverse the District Court's Order denying Appellees' Special Motion to Dismiss Under NRS 41.660 and remand with instructions for the District Court to grant that motion.

Date: April 22, 2024.

RANDAZZA LEGAL GROUP, PLLC

/s/ Marc J. Randazza

Marc J. Randazza

Alex J. Shepard

RANDAZZA LEGAL GROUP, PLLC

Attorneys for Appellees

CERTIFICATE OF COMPLIANCE FOR BRIEFS

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 16,162 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Century Schoolbook 14-point font.

Date: April 22, 2024.

RANDAZZA LEGAL GROUP, PLLC

/s/ Marc J. Randazza

Marc J. Randazza

Alex J. Shepard

RANDAZZA LEGAL GROUP, PLLC

Attorneys for Appellees

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellees certify that Case No. 23-3390, styled as *Wealthy Inc., et al. v John Mulvehill, et al.* is pending before this Court and arises out of the consolidated case below.

Date: April 22, 2024.

RANDAZZA LEGAL GROUP, PLLC

/s/ Marc J. Randazza

Marc J. Randazza

Alex J. Shepard

RANDAZZA LEGAL GROUP, PLLC

Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate ACMS system.

Participants in the case who are registered ACMS users will be served by the appellate ACMS system.

Date: April 22, 2024.

RANDAZZA LEGAL GROUP, PLLC

/s/ Marc J. Randazza

Marc J. Randazza

Alex J. Shepard

RANDAZZA LEGAL GROUP, PLLC

Attorneys for Appellees