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' REPLY BRIEF

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INTRODUCTION

Appellants' arguments as to their Lanham Act claim are faulty and veer away from their District Court briefing and Opening Brief, but this brief is limited by Circuit Rule 28.1(c)(4) to the issues in the cross-appeal.

Appellants' arguments as to their state law claims, the merits of which are at issue in the cross-appeal, continue to be faulty as well. They refer to cursory and frivolous evidentiary objections they made below, with no supporting authority or explanation. They make no attempt to substantiate their intentional infliction of emotional distress claim. Their arguments as to their lack of evidence of damages misses entirely the deficiencies in their evidence. Appellants are public figures and still cannot show evidence of actual malice.

Appellants also fail to show that the District Court's findings as to the first prong of the Anti-SLAPP analysis was correct. Their discussion of the issue of public interest requirement misrepresents the record and fails to address relevant case law. The discussion of the statute's "good faith" requirement is clearly wrong, with no attempt to show how a defendant who did not publish with actual malice could possibly not have

published in "good faith," as the statute defines that term, meaning lacking knowledge of falsity.

This Court should affirm the District Court's order granting summary judgment in Appellees' favor but reverse the denial of Appellees' Anti-SLAPP Motion with instructions to grant the motion.

ARGUMENT

I. Appellants' Evidentiary Objections are Baseless and Unsubstantiated

Appellants claim that large swaths of Appellees' cited evidence is inadmissible or irrelevant. They provide no argument or authority regarding their admissibility objections, instead stating in conclusory fashion that these documents are hearsay and/or unauthenticated. They do no more than refer to their briefing at the District Court where they made such objections, even though the District Court did not sustain any of their objections.

First, these arguments as to admissibility are not properly made. Appellants only refer to their arguments below, and Ninth Circuit Rule 28-1(b) provides that "Parties must not append or incorporate by reference briefs submitted to the district court . . . or refer this Court to such briefs for the arguments on the merits of the appeal." Without any

argument regarding admissibility in Appellants' briefing, they have not adequately presented this issue as part of this cross-appeal.

Nevertheless, for the sake of completeness, Appellees will address these evidentiary objections. Appellants objected below to printouts from various websites, arguing without explanation that they were not authenticated.[1] However, they were, and this lack of candor cannot go unaddressed. Every website printout was authenticated by the declaration of Alex J. Shepard. 4-SER-801-822.[2] For each printout, the declaration states the date and time when it was made; where the declarant was when creating it; the internet browser and program used to create it; the URL of the page from which the printout was created; and a description of the page. *Id*. Appellants simply lied to this court (as well as the District Court), and the lack candor is unbecoming. Every

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[1] Authentication of a printout of a website does not require much. Printouts are properly authenticated where the website, the URL, and the date on which the printout was taken are provided. *See 21st Century Fin. Servs., LLC v. Manchester Fin. Bank*, 255 F. Supp. 3d 1012, 1020 (S.D. Cal. 2017); *Haines v. Home Depot U.S.A., Inc.*, No. 1:10-cv-01763-SKO, 2012 U.S. Dist. LEXIS 47967, *23 (E.D. Cal. Apr. 4, 2012); *Premier Nutrition, Inc. v. Organic Food Bar, Inc.*, No. SACV 06-0827 AG (RNBx), 2008 U.S. Dist. LEXIS 78353, *19 (C.D. Cal. Mar. 27, 2008).

[2] To the extent Appellants have properly raised hearsay objections to printouts of their own websites or social media accounts, *e.g.*, 1-SER-178-183, these are admissible as statements of a party opponent.

exhibit in the Shepard Declaration, including media articles, posts on the <reddit.com> website, and a Facebook post by John Mulvehill, is properly authenticated. Articles in newspapers and periodicals are also self-authenticating under Fed. R. Evid. 902(6). To the extent Appellants make hearsay objections to this evidence, they know full well that the evidence is not being provided to prove the truth of the matters asserted, but rather to show what information about Appellants was publicly available and what Appellees considered when publishing the videos.

Appellants then objected to the authenticity of Exhibits 1 and 32 to the Anti-SLAPP Motion (1-SER-68-174 and Cor-FER-047-093[3]), consisting of Appellants' own Instagram page and promotional material. These are documents that **Appellants themselves produced during discovery**, as shown by their Bates numbers leading with "WEALTHY." Objecting to the authenticity of documents that they provided would mean that they produced falsified documents in discovery. Appellees noted this below (Cor-FER-008) and Appellants never provided any

[3] Citations in this brief to Appellees' Further Excerpts of Record are in the format "Cor-FER-[page number]."

response, but now they continue to make (or rather, allude to) this frivolous objection.

Appellants claimed that Exhibits 10 and 31 to the Anti-SLAPP Motion, 2-SER-485-489 and 4-SER-781-800, are not authenticated. Exhibit 10 is a transcript of a portion of a video posted on John Mulvehill's YouTube channel. Exhibit 31 is a transcript of a video interview Mulvehill conducted with an individual named "Rohit." A declaration properly authenticates these transcripts. As for Exhibit 10, Brittani Holt provides details as to when and where she viewed the video and the URL where the video is located, and she declares that she created the transcript herself. Cor-FER-094-095 at ¶ 4. As for Exhibit 31, Ms. Holt testified that she viewed the "Rohit Derek" video and identified it by Bates number, and that she personally created the transcript. *Id*. at ¶ 5. Cornelia's declaration also details how and when he received and viewed the "Rohit Derek" video, identifies it by Bates number, and testifies that the exhibit is a true and correct transcript of it. (3-SER-545 at ¶ 9). To the extent Appellants make a hearsay objection to this evidence, this evidence is not being used to prove the truth of the matter asserted, but

rather to show what information was publicly available and what information Appellees considered before publishing their videos.

Appellants claim in their Response Brief that they objected to Exhibit 26 to the Anti-SLAPP motion (3-SER-675-679), a printout from <arrestfacts.com> showing an arrest record for Buczkowski. Despite claiming now that this is an "unauthenticated and hearsay exhibit, which was objected to in the district court below" (ECF 39.1 at 19), Appellants never objected to it below; this exhibit is mentioned nowhere in their briefing at the District Court. They have waived any objection as to admissibility or relevance.

Finally, Appellants make relevance objections to the various media articles published about them (some of which they paid for, but they claimed to be unable to remember which, *see* Cor-FER-034-040 at 94:20-100:4) and posts about Buczkowski on <reddit.com>, claiming they post-date Appellees' videos and thus cannot be considered in determining whether Appellants were public figures or there was a public controversy about them. But Appellants get this backwards. 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.

As shown in Appellees' Principal Brief, Plaintiffs 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 Plaintiffs' public figure status, at the very least for articles that were published shortly after the videos.

It is especially odd for Appellants to complain that these exhibits are not relevant when they have claimed to have sought this media attention specifically to counter the alleged damage caused by identical statements Mulvehill published starting in May 2020. 5-SER-899-901 at 172:10-174:3; 1-SER-36-38 at 130:4-22, 131:18-132:12. And in any event, only a small amount of this press coverage came after Appellees' videos were published. The following objected-to exhibits were published before or shortly after the Second Video (February 19, 2021), with a full 24 of them published before *any* of the videos, and are thus relevant:

- **Exhibit 5-A**, *Entrepreneur Magazine* article, published Feb. 20, 2021. 2-SER-192-200.
- **Exhibit 5-B**, *Entrepreneur India* article, published Oct. 28, 2020. 2-SER-202-207.
- **Exhibit 5-C**, *Haute Living* article, published Sept. 20, 2020. 2-SER-208-212.

- **Exhibit 5-D**, *Tech Buzz* article, published Jun. 19, 2020. 2-SER-213-216.
- **Exhibit 5-E**, *Jerusalem Post* article, published Sept. 25, 2020. 2-SER-217-220.
- **Exhibit 5-F**, *Latestly* article, published Jun. 16, 2020. 2-SER-221-224.
- **Exhibits 5-G and 5-H**, *Playboy Australia* and *Maxim* articles, published April 3, 2021. 2-SER-225-235.
- **Exhibit 5-K**, *Baltimore Post Examiner* article, published Jun. 11, 2020. 2-SER-242-245.
- **Exhibit 5-L**, *Business Insider* article, published Feb. 25, 2021. 2-SER-246-252.
- **Exhibit 5-M**, *California Herald* article, published Jun. 16, 2020. 2-SER-253-258.
- **Exhibit 5-N**, *ctpost* article, published Aug. 6, 2020. 2-SER-259-270.
- **Exhibit 5-Q**, *Deadline News* article, published Jan. 19, 2021. 2-SER-283-285.
- **Exhibit 5-R**, *Disrupt Magazine* article, published Jun. 12, 2020. 2-SER-286-292.
- **Exhibit 5-T**, *FHM* article, published March 19, 2021. 2-SER-297-302.
- **Exhibit 5-W**, the *Future Sharks* article, published April 12, 2021. 2-SER-311-314.
- **Exhibit 5-X**, *IB Times* articles, published on Jan. 16, 2021 and Jun. 18, 2020. 2-SER-315-320.
- **Exhibit 5-Y**, *Influencive* article, published April 22, 2021. 2-SER-321-324.

- **Exhibit 5-Z**, *iTech Post* article, published Jul. 10, 2020. 2-SER-325-328.
- **Exhibit 5-AB**, *LA Weekly* article, published Aug. 19, 2019. 2-SER-332-338.
- **Exhibit 5-AC**, *LA Progressive* article, published Jun. 16, 2020. 2-SER-339-341.
- **Exhibit 5-AE**, *Latin Post* article, published Nov. 12, 2020. 2-SER-346-350.
- **Exhibit 5-AF**, *London Daily Post* article, published Jun. 12, 2020. 2-SER-351-357.
- **Exhibit 5-AG**, *Medium* article, published Sept. 25, 2020. 2-SER-358-362.
- **Exhibit 5-AI**, *Net News Ledger* article, published Jun. 11, 2020. 2-SER-378-380.
- **Exhibit 5-AJ**, *Omega Underground* article, published Nov. 17, 2020. 2-SER-381-386.
- **Exhibit 5-AK**, *The Science Times* article, published Nov. 12, 2020. 2-SER-387-391.
- **Exhibit 5-AL**, *SF Weekly* article, published Jan. 2, 2021. 2-SER-392-396.
- **Exhibit 5-AM**, *Tech Bouillon* article, published Jul. 10, 2020. 2-SER-397-403.
- **Exhibit 5-AN**, *American Reporter* article, published Jun. 12, 2020. 2-SER-404-407.
- **Exhibit 5-AO**, *The Good Men Project* article, published Nov. 19, 2020. 2-SER-409-411.
- **Exhibit 5-AQ**, *Time Bulletin* article, published Jun. 12, 2020. 2-SER-418-419.

- **Exhibit 5-AR**, *Time Business News* article, published Jun. 17, 2020. 2-SER-420-423.
- **Exhibit 5-AS**, *Travelers Today* article, published Jan. 15, 2021. 2-SER-425-427.
- **Exhibit 5-AT**, *USA Today* article, published Mar. 25, 2021. 2-SER-428-433.
- **Exhibit 5-AV**, *Yahoo Finance* article, published Nov. 25, 2020. 2-SER-443-446.

Even to the extent the articles do not pre-date all of the statements, they still show Buczkowski's public figure status. Would *USA Today* or *Maxim* publish an article about anyone who had not attained notoriety or fame? Appellants also claim the printout of Buczkowski's Instagram profile showing 4 million followers is irrelevant because it post-dates Appellees' videos, but one does not obtain millions of social media followers overnight.

Appellants similarly claim that **Exhibits 8, 11, and 12** to the Anti-SLAPP Motion (2-SER-480-482, 3-SER-491-493, and 3-SER-494-498), posts on <reddit.com>, are irrelevant because they post-date Appellants' videos. Appellants are wrong; they were published on November 30, December 27, and December 29, 2020, either before any of the videos or before the last of them were published. 1-SER-6-7 at ¶¶ 6-8; 1-SER-12-17.

II. Appellees Satisfied Prong 1 of the Anti-SLAPP Statute

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). The statute does not ask whether Appellants think Appellees published in "good faith," nor whether they think the statements are on a matter of public concern. The statute and case law defines those terms, and not in a way Appellants like, but they do not have the privilege of re-defining these terms here.

Appellees showed 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,"[4] and that they were made in "good faith." Good faith does not mean "Appellants liked it," but rather has a statutorily defined meaning: "truthful or [] made without knowledge of its falsehood." *Shapiro v. Welt*, 389 P.3d 262, 267 (Nev. 2017). In federal

[4] Appellants do not dispute that Appellees have satisfied the requirement that their statements be published in a place open to the public or a public forum.

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).

While the District Court's denial of Appellees' Anti-SLAPP Motion was premised on the erroneous finding Appellees did not satisfy the "good faith" requirement, this Court may decide the appeal on any grounds present in the record. It is thus necessary to address all aspects of the first prong analysis, as well as the second prong.

A. Appellants' Argument as to Timeliness is Frivolous

Appellants argue that the Anti-SLAPP Motion was not timely filed. ECF 39.1 at 65 n.6. First, Appellants waived this argument because they did not raise it until their opposition to Appellees' motion for attorney fees, a month after the District Court had already decided the Anti-SLAPP Motion. Second, they do not substantiate this argument, instead incorporating it by reference in violation of Circuit Rule 28-1(b). Third, their untimely argument at the District Court was that under NRS 41.660(2), an Anti-SLAPP motion must be filed within 60 days of service of the complaint. The 60-day timing requirement is one of the few

procedural aspects of the statute that do not apply in federal court where, as here, an Anti-SLAPP motion is brought as a motion for summary judgment under Rule 56, as opposed to a motion to dismiss under Rule 12(b)(6). *Sarver v. Chartier*, 813 F.3d 891, 900 (9th Cir. 2016) (finding that 60-day timeline to file motion under California Anti-SLAPP law does not apply in federal court because it conflicts with Fed. R. Civ. P. 56); *Clifford v. Trump*, 339 F. Supp. 3d 915, 923 (C.D. Cal. 2018) (noting that 60-day deadline "seeks to limit discovery and allows for anti-SLAPP motions at an early stage of litigation, while rule 56 seeks to promote discovery, requiring motions for summary judgment after litigation has proceeded for some time"). They have known this, but persist, as Appellees noted this was a frivolous argument below. Cor-FER-006.

B. Appellees' Statements Were in Direct Connection to an Issue of Public Interest

"Issue of public interest" is defined very broadly as "any issue in which the public is interested." *Nygard, 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*. These matters can include the actions of non-governmental actors, "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). No subjects are off-limits, as "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). "[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).

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. Appellants fail to directly address any of these factors.

As explained in Section III(A)(ii), *infra*, Appellants are public figures. They aggressively marketed their services and actively sought

and attained international media attention, both as "Derek Moneyberg" and "RSD Derek."[5] 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**; Cor-FER-029-030 at 37:10-38:24. 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; 1-SER-36-38 at 130:4-22 & 131:18-132:12.

Similar to the public figure analysis below, the statements in the Videos are directly connected to this issue of public interest. Whether Appellants are unethically scamming their customers is of significant interest to the millions of people who follow Appellants on Instagram and to whom they advertise their services, as well as their thousands of

[5] While Buczkowski apparently stopped using the name "RSD Derek" at some point, he continues to provide dating coach services. 1-SER-33-35 at 119:25-121:20. Despite this name change, RSD continued to be the largest client of Larson Consulting for some time. 1-SER-30-32 at 110:24-111:7, 113:4-9

customers. They are not part of any private dispute between Appellees and Appellants, as no such dispute existed.

Appellants argue that the videos are not connected to this interest because the statements were made on YouTube instead of in complaints to a consumer protection bureau, citing *Kevin Zhang v. Rozsa*, No. 2:20-cv-6247-SVW, 2021 U.S. Dist. LEXIS 79916, *9 (C.D. Cal. Jan. 27, 2021). But *Rozsa* is inapposite; the court's cited discussion was specifically about a body of California case law regarding statements published for the purpose of providing "consumer protection information." This does not mean a defendant must complain to the state to enjoy Anti-SLAPP protection. And in any event, Appellees published the "Authentic or Charlatan" YouTube series, which the videos at issue were part of, "to discuss very prominent social media influencers and I wanted to do a deep dive into . . . whether they were authentic to being a real guru or possibly not." Cor-FER-012 at 59:14-21. The video series was a consumer watchdog story in the function it provided to the consumer public – warning them of a charlatan.

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. Despite Appellees citing *Kuhns* both below and in their Principal Brief, Appellants make no attempt to address it.

C. Appellees' Statements Were Made 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) and, as explained in Section III(A)(i), *infra*, many of Appellees' statements were expressions of opinion.

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). Even recklessness is not enough to move out from under Prong 1 protection.

Appellants claim there is contravening evidence indicating that Appellees published with actual knowledge of falsity. They cite Cornelia's deposition testimony where he said he was "initially somewhat suspicious of Mulvehill's credibility," while ignoring his later testimony in the same deposition that these initial doubts were dispelled when trusted sources vouched for Mulvehill. 2-SER-449-452, 453, 456-457, 461-462, 468 at 7:16-10:3, 45:6-10; 74:2-75:6, 79:16-80:9, 86:3-20. They then cite Mulvehill's alleged "animosity" toward Buczkowski (understandable, given the number of customers who said Buczkowski had scammed them), but fail to provide any explanation as to how this plausibly translates to an inference of *actual knowledge* of falsity.

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 was false, whether uttered by him or Mulvehill. 3-SER-547 at ¶ 20. Rather, he reviewed significant evidence provided by Mulvehill regarding Appellants 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-454-469 at 7:16-10:3, 45:6-10, 74:2-80:9, 81:1-85:4, 86:3-87:12; 3-SER-547 at ¶¶ 10, 13-20. Cornelia published the videos in good faith.

Appellants attempt to distinguish *Williams* by misrepresenting that case's facts. The defendant's statements there did not consist only of "generalized statements" of unethical and unprofessional behavior. She made very specific factual claims bolstering her opinions. 495 P.3d at 96.

Due to a lack of evidence that Williams *knew* her statements were false, even though the plaintiff claimed the statements were false and she should have known they were false, her statements were found to be made in good faith. *Id.* at 98. Appellants otherwise identify some distinctions without a difference. It does not matter that Appellees did not have personal knowledge of Appellants or their services prior to publishing; if anything, this precludes any possible implication of knowing falsity, because someone with no personal knowledge *cannot* know with certainty one way or another whether a statement is true or false. With a complete lack of evidence of knowledge of falsity, the "good faith" analysis here is indistinguishable from *Williams*. Appellees satisfied their burden under the first prong of the Anti-SLAPP law.

It is noteworthy that Appellants make no attempt to justify the District Court's ruling on the issue of good faith. By failing to address Appellees' argument as to the District Court's misapplication of *Rosen v. Tarkanian*, 453 P.3d 1220 (Nev. 2019), Appellants concede that the District Court's analysis was wrong.

III. Appellees Satisfied Prong 2 of the Anti-SLAPP Statute

A. Defamation

To establish a cause of action for defamation, a plaintiff must show: (1) a false and defamatory statement by the defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages. *Wynn v. Smith*, 117 Nev. 6, 10 (Nev. 2001); *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 718 (2002).

While Buczkowski denies having taken any online courses, this is immaterial and does not change the fact that he attended the part-time program for the Booth School of Business (Cor-FER-027-028 at 12:9-13:13) and that average admissions scores for part-time students is lower than for full-time students. Appellants claim that evidence of these facts and the reputation of part-time MBA programs was "never presented to the district court in any fashion," but yet again, that this evidence was cited in the District Court. Cor-FER-009-010. Appellants lack candor, again.

i. Many of Appellees' Statements are Non-Actionable Opinion

Only false statements of fact can support a defamation claim. Minor inaccuracies that do not affect the "gist" or "sting" of a statement are not actionable. *Pegasus*, 118 Nev. at 715 n.17; *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991). Statements of pure opinion are not actionable, nor are statements of opinion based on disclosed facts, no matter how allegedly unreasonable they are. *Pegasus*, 118 Nev. at 714; *People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 895 P.2d 1269, 1275-76 (Nev. 1995) (mod. on unrelated grounds in *Las Vegas Downtown Redevelopment Agency v. Hecht*, 940 P.2d 134 (Nev. 1997)). When the publication in which a statement is made is filled with "epithets, fiery rhetoric or hyperbole," then even seemingly factual statements are likely to be seen by the average person as expressions of non-actionable opinion. *Lewis v. Time, Inc.*, 710 F.2d 549, 553 (9th Cir. 1983); *Morningstar, Inc. v. Superior Court*, 23 Cal. App. 4th 676, 689 (1994).

A review of the transcripts of the videos shows that they are filled with hyperbolic language and disparaging remarks about Appellants. Indeed, Appellants complain about such language, claiming that this

somehow establishes knowledge of falsity. ECF 39.1 at 66. But it is exactly this kind of language that 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. *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); *Herring Networks, Inc. v. Maddow*, 445 F. Supp. 3d 1042, 1053 (S.D. Cal. 2020). Cornelia also 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." 3-SER-571 at 2:11-18. This primes viewers to anticipate statements of opinion, rather than fact. *ZL Techs., Inc. v. Gartner, Inc.*, 709 F. Supp. 2d 789, 797 (N.D. Cal. 2010).

Appellants argue that Cornelia's statements in the videos implies the existence of unstated facts, which defeats any claim that his statements are expressions of protected opinion. ECF 39.1 at 45-46. Even if this argument was meritorious, which it is not, Appellants sat on it until their Reply Brief, thereby waiving it. At the District Court, Appellants argued only that the statements were factual, not opinion, or that Appellees' assessment of them was erroneous. Cor-FER-019-021;

Cor-FER-097; Cor-FER-015-017 . And in their Opening Brief, Appellants argued only that Appellees' statements were not protected opinion because they constituted "illogical inferences." ECF 13.1 at 57. The entirety of Appellants' legal argument on this position in their Reply Brief is completely new; they have waived it.

Appellants also fail to explain their argument. They refer to statements from Cornelia that he received information from Mulvehill regarding Appellants, consisting of communications from Appellants' customers. What Appellants fail to mention is that these communications concerned the broad swath of comments Mulvehill made about Appellants' services and how they were scamming customers, statements that Appellants have never addressed in their briefing, and for which there is no record evidence of falsity.[6] There are no implied, undisclosed facts regarding the statements actually addressed in Appellants' briefing, nor do they attempt to identify any such facts.

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[6] The same goes for Appellants' argument that Cornelia admitted the statements were factual rather than opinion due to him saying to Mulvehill "So you're hearing the reviews in person, so this isn't an opinion." ECF 39.1 at 47. Again, this is in reference to Appellants' customers who complained about Appellants' services to Mulvehill, not the subjects addressed in Appellants' briefing. Appellants' attempt to conflate the two is highly misleading.

Moving on to the specific statements at issue, Appellants continue to insist that it was obviously defamatory to claim Buczkowski's degree from the Booth School of Business may have some issues. Though Buczkowski denies having taken any online classes at the school, he completed the part-time program which, as explained in Appellees' Principal Brief, consists of students with lower entrance exam scores, meaning it is less selective than the full-time program. Placing an asterisk next to Buczkowski's degree is hardly an unreasonable interpretation of or conclusion to draw from these facts.

Regarding Buczkowski's involvement in the marijuana grow operation at issue in the Longboat asset forfeiture case, Appellants simply repeat their hard-to-believe claim that Buczkowski had nothing to do with this. But such a denial does not change the fact that the average person would interpret the asset forfeiture complaint in that case, which mentions Buczkowski by name, as well as the criminal complaint against Timothy Lantz,[7] to mean that Buczkowski was involved. Cornelia disclosed that this was a matter of public record. ECF

[7] Lantz was Buczkowski's roommate. Cor-FER-031-032 at 72:1-73:21.

No. 1 at ¶ 66. It doesn't matter if Buczkowski vehemently denies involvement in a crime or that Cornelia and Mulvehill drew "illogical inferences" from these facts; these are still protected statements of opinion.

Similarly, as explained in Appellees' Principal Brief, it does not matter whether the claim of Larson Consulting possibly being involved with money laundering is an "illogical inference" to draw from the fact that it has no apparent physical or online presence[8] (not to mention the fact that it is allegedly being run out of the personal residence of a man who has no involvement in the company, and where Buczkowski falsely claimed to live, which Appellees do not address. Cor-FER-041 and Cor-FER-045 at 101:4-10, 147:14-23. These are still disclosed facts upon which Mulvehill based his opinion, and are thus fully protected.[9]

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[8] Even Buczkowski admitted it does not have an active website. Cor-FER-042-044 at 119:3-5, 142:20-143:12.

[9] Appellees do not address the numerous statements Mulvehill made in the videos about Appellants' business practices and fraudulent behavior, nor do they address the statements in Cornelia's "Charlatan of the Year" award video. For example, Appellants admitted that they outsourced the written content for their services to a third-party company. 1-SER-39-40 at 175:11-176:23. They thus concede these statements are not actionable.

ii. 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).

For the same reasons there was an issue of public interest regarding Appellants, their business practices, their credibility, and Buczkowski's educational credentials at the time of Appellees' videos, they were public figures for these purposes. There was widespread media coverage of Appellants and online discussion about them. Most significantly, and something that Appellants do not address, is that

Mulvehill had already published videos making the same statements as those addressed in Appellants' briefing months before Appellees' videos, and Appellants claim to have been so concerned by Mulvehill's earlier statements that they engaged in an advertising blitz. 5-SER-946-948 at 172:10-174:3; 1-SER-36-38, at 130:4-22, 131:18-132:12. There was thus an existing controversy on all these issues by December 2020. Appellants, again misrepresenting the record, falsely claim that Appellees never articulated the controversy in respect with which Appellants are public figures, and that it was not until their Principal Brief that they stated Appellants are public figures "in the context of whether they are fraudsters and scammers." ECF 39.1 at 48. Their refusal to read the record caused them to miss that Appellees' Anti-SLAPP Motion articulated how Appellants are public figures *in exactly these terms*. Cor-FER-024.

Appellants argue that "[t]here can be no 'existing public controversy' derived from other defamatory material," with no explanation. ECF 49.[10] This absolutely can be the case; the "Me Too"

[10] Appellants also, for some reason, describe the Reddit posts concerning Buczkowski as an "outlet of venom." ECF 39.1 at 49. It is

movement, for example, created various controversies for figures within the entertainment industry that these figures vehemently denied, yet they were still public figures for these purposes. All public controversies start somewhere, and so long as the defendant is not the one who created it, the plaintiff may be a limited-purpose public figure in relation to it. Otherwise, any defamation plaintiff could avoid public figure status simply by claiming that statements about them are false, which finds no support in the law. Appellants take issue with the fact that Mulvehill was making the exact same statements at issue here several months before Appellees published their videos, but that is related to Appellants' dispute with Mulvehill, not Appellees. Indeed, the pre-existing dispute Mulvehill had with Appellants only more clearly establishes Appellants as public figures.

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unclear how statements being negative could affect whether they evidence a public controversy. When the allegation from third parties is that the plaintiff is a scammer, it is to be expected that the plaintiff's victims will be vitriolic. The First Amendment does not require politeness from anyone. The fact that some of the comments in response to this post may have been off-topic does not change that the subject of the posts was directly related to the controversy for which Appellants are public figures. And, as explained above, Appellants misrepresent the record by claiming these were all published after Appellees' videos; they were published either before or in-between the videos.

iii. 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. As explained in Section II(C), *supra*, Cornelia did not know or believe that any statement in any of the videos at issue, whether uttered by him or Mulvehill, was false, and there is no contravening evidence. 3-SER-547 at ¶ 20. Appellees thus did not publish any statements with knowing falsity.

This leaves only reckless disregard, which, as explained in Appellees' Principal Brief, requires actual and substantial doubt as to the truth of a publication, and a "high degree of awareness" of probable falsity. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Pegasus*, 118 Nev. at 719. A mere failure to investigate does not establish actual

malice. *Reader's Digest Assn. v. Superior Court*, 690 P.2d 610, 619 (Cal. 1984). Appellants have failed to show evidence of actual malice.

Appellees have already addressed Cornelia's deposition testimony and declaration establishing that he had no subjective doubts as to the statements in Appellees' videos. In response, Appellants ignore most of the evidence on this issue and instead focus on a few immaterial snippets of testimony. For example, Appellants completely ignore that Cornelia found Mulvehill credible because his trusted friends vouched for his credibility and Mulvehill had already posted nearly identical statements months prior and had not received so much as a cease-and-desist letter from Appellants. 2-SER-457-458, 461-462, 468-469 at 75:13-76:4, 79:22-80:9, 86:21-87:12. They also misrepresent the record by claiming that Cornelia did no research of his own, despite the record showing Cornelia had reviewed the Longboat asset forfeiture case that mentioned Buczkowski by name and was aware of Larson Consulting's apparent non-existence. 2-SER-458-460, 465-467 at 76:5-78:4, 83:9-85:4.

Appellants argue that Cornelia's inability to further investigate the circumstances of Mulvehill's arrest in Las Vegas and the death of Stacey Lynn Saunders somehow shows actual malice. They completely fail,

however, to address *Wynn v. A.P.*, 542 P.3d 751, 758-59 (Nev. 2024), cited in Appellees' Principal Brief, which found that the Associated Press did not act with actual malice when reporting on allegedly improbable allegations in a criminal complaint because "it was not possible to meaningfully investigate further as long as that information [the identities of witnesses] was unknown." And in any event, "[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). There is no evidence of actual malice, and so Appellants' defamation claim fails.

B. Intentional Infliction of Emotional Distress

This claim is barely worth addressing. Damages are not presumed for IIED claims. *Olivero v. Lowe*, 116 Nev. 395, 398-99 (2000). Just as they did below, Appellants only point to the allegations in their Complaint of garden-variety emotional distress. Allegations cannot defeat summary judgment, however, and there is no record evidence of

Buczkowski suffering so much as mild discomfort as a result of Appellees' videos. This claim fails.

C. Business Disparagement

The analysis for Appellants' business disparagement claim is largely identical to their defamation claim. Appellants' Reply Brief focuses on whether they provided adequate evidence of damages, which consists solely of their expert witness's report. Appellees' Principal Brief details the many shortcomings of this report, including its hopelessly speculative nature.

Appellants argue that their expert report is not speculative, citing *Bader v. Cerri*, 609 P.2d 314, 318 (Nev. 1980). They are wrong, and in fact the sentence immediately preceding the language they cite shows this: "[t]he rule against recovery of uncertain damages generally is directed as to the existence **or cause** of damage rather than to measure or extent." *Id.* (emphasis added). As explained at the District Court and in Appellees' Principal Brief, Appellants' expert report is speculative because it makes no attempt to show that any of the statements addressed in Appellants' briefing, as opposed to the myriad other negative statements about Appellants' services which they do not argue

are actionable, **caused** the alleged damages. There is uncertainty about the extent of damages as well, to be sure, but the fundamental problem with Appellants' evidence is one of causation, not extent. Appellants make no attempt to address this fatal defect in their evidence, and they failed to provide proof of special damages.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's order granting summary judgment in Appellees' favor and reverse the denial of Appellees' Anti-SLAPP Motion with instructions to grant the motion.

Date: August 14, 2024.

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FOR THE NINTH CIRCUIT

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