

FILED

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Storey Co. Clerk

S. GREENBURG Deputy

**IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR STOREY COUNTY**

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LANCE GILMAN, an individual,

CASE NO. 18 TRT 00001 1E

Plaintiff

DEPT. 2

vs.

**SAM TOLL, an individual; DOES I-V,
inclusive; and ROE ENTITIES VI-X,
inclusive,**

**ORDER GRANTING ANTI-SLAPP
SPECIAL MOTION TO DISMISS IN
PART, ALLOWING LIMITED
DISCOVERY, AND STAYING
FURTHER PROCEEDINGS**

Defendant

I. PROCEDURAL BACKGROUND

Lance Gilman filed lawsuit against Sam Toll. He alleged a single claim for relief, defamation per se. Toll filed an Anti-SLAPP special motion to dismiss which Gilman opposed.

II. FINDINGS OF FACT

The following facts were either uncontested or proved by a preponderance of the evidence.

Gilman was elected to the Storey County Commission in 2012, took office in 2013 and has served as a county commissioner continuously since 2013. He

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1 admits he is a public official and a public figure. Opp. to Anti-Slapp Mot.
2 (Opp.), p. 2.

3 Gilman is a financially successful businessman. His company, Lance Gilman
4 Commercial Real Estate Services, is and has been the exclusive broker for the
5 Tahoe Reno Industrial Center (TRI) an 80,000 acre industrial park that
6 encompasses a 30,000 acre industrial complex. TRI has over 16,000,000
7 square feet of industrial space in use by over 130 companies. Each year he and
8 his businesses make over \$100,000 in food donations and labor to needy Storey
9 County seniors and to a school “food in a backpack” program. Gilman Aff. ¶ 20,
10 21, and 28.

11 The Court takes judicial knowledge of the fact that the Mustang Ranch is in
12 Storey County.

13 Toll established a website, the “Teller,” in February 2017. The website is
14 open to the public. Toll posts stories on the website and invites and posts
15 reader’s comments.

16 Toll admits publishing on the Teller website the articles which contain the
17 statements alleged by Gilman to be defamatory. Anti-Slapp Special Mot. to
18 Dismiss (Mot.), p. 5-6.

19 The initial focus of the Teller “was to provide a local news source where
20 people in Storey County could obtain the facts surrounding information
21 contained in pieces criticizing the Storey County Sheriff Gerald Antinoro
22 published by the proponents of the effort to recall the sheriff that was ongoing
23 at the time.” Toll Aff., Mot. Ex. 8, ¶ 7. Toll believes Gilman was behind the recall
24 effort. Toll opposed the recall effort.

25 Additional facts will be included in the sections regarding the allegedly
26 defamatory statements. When the Court uses the phrase “the Court finds” it
27 means the Court finds the stated facts have been proved by a preponderance of
28 the evidence.

1 III. APPLICABLE LAW

2
3 A. Anti-SLAPP statutes and cases

4 To decide this special motion to dismiss the Court must:

- 5 (1) Determine whether Toll established, by a preponderance of the
6 evidence, that the defamation claim is based upon a good faith
7 communication in furtherance of the right to petition or the right to
8 free speech in direct connection with an issue of public concern; and
9 (2) If the court determines that Toll has met the burden under paragraph
10 (1), determine whether Gilman has demonstrated with prima facie
11 evidence a probability of prevailing on the claim. NRS 41.660(3).

12 To demonstrate a probability of prevailing on his claim with prima facie
13 evidence Gilman must meet the same burden of proof that a plaintiff has been
14 required to meet under California’s anti-Strategic Lawsuits Against Public
15 Participation law as of June 8, 2015. NRS 41.665(2). California’s anti-SLAPP
16 statutes are found in its Code of Civil Procedure sections 425.16 through 425.18.
17 The statutes do not establish the plaintiff’s burden of proof regarding the prima
18 facie evidence of a probability of prevailing on the claim so the Court must look
19 to California case law.

20 California courts have held that the plaintiff opposing an anti-SLAPP special
21 motion to dismiss must demonstrate that his complaint is legally sufficient, and
22 supported by a prima facie showing of facts through competent, admissible
23 evidence, to support a favorable judgment. “Whatever the complaint may allege,
24 it is not sufficient to defeat an anti-SLAPP motion. The evidence is what
25 counts.” *Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190, 209, 222 Cal. Rptr. 3d
26 250 (2017). The plaintiff need only establish his claim has minimal merit. The
27 Court must accept as true all evidence favorable to the plaintiff.

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1 A “probability” in an anti-SLAPP context does not mean more probable than
2 not— only a cause of action that lacks even minimal merit constitutes a SLAPP.
3 *Healthsmart Pacific, Inc. v. Kabateck*, 7 Cal. App. 5th 416, 212 Cal. Rptr. 3d
4 589 (2016). Courts do not resolve the merits of the overall dispute on a special
5 motion to dismiss, but rather identify whether the pleaded facts fall within the
6 statutory purpose, which is to prevent and deter lawsuits brought primarily to
7 chill the valid exercise of the constitutional rights of freedom of speech and
8 petition for the redress of grievances. *Wilson v. Cable News Network, Inc.*, 6
9 Cal. App. 5th 822, 211 Cal. Rptr. 3d 724 (2016); see also *Cross v. Facebook, Inc.*,
10 14 Cal. App. 5th 190, 222 Cal. Rptr. 3d 250 (2017).

11 Courts do not pass on the weight of evidence, including the credibility of
12 witnesses in this analysis. Instead, courts accept as true the evidence favorable
13 to the plaintiff and evaluate the defendant’s evidence only to determine if it has
14 defeated the plaintiff’s evidence as a matter of law. *Cruz v. City of Culver City*, 2
15 Cal. App. 5th 239, 205 Cal. Rptr. 3d 736 (2016), citing *Soukup v. Law Offices of*
16 *Herbert Hafif*, 39 Cal.4th 260, 269, fn. 3, 46 Cal. Rptr. 3d 638, 139 P.3d 30
17 (2006).

18 The guiding principles for what distinguishes a public concern from a
19 private one are:

- 20 (1) “Public interest” does not equate with mere curiosity;
- 21 (2) A matter of public interest should be something of concern to a
22 substantial number of people; a matter of concern to a speaker and a
23 relatively small specific audience is not a matter of public interest;
- 24 (3) There should be some degree of closeness between the challenged
25 statements and the asserted public interest; the assertion of a broad
26 and amorphous public interest is not sufficient;

27 /////

28 /////

1 (4) The focus of the speaker's conduct should be the public interest
2 rather than a mere effort to gather ammunition for another round of
3 private controversy; and

4 (5) A person cannot turn otherwise private information into a matter of
5 public interest simply by communicating it to a large number of
6 people.

7 *Shapiro v. Welt*, 133 Nev. A.O. 6, 389 P.3d 262, 268 (2017).

8 Under NRS 41.637 a "good faith communication in furtherance of the right
9 to petition or the right to free speech in direct connection with an issue of public
10 concern" means any:

11 (1) Communication that is aimed at procuring any governmental or
12 electoral action, result or outcome;

13 (2) Communication of information or a complaint to a Legislator, officer
14 or employee of the Federal Government, this state or a political
15 subdivision of this state, regarding a matter reasonably of concern to
16 the respective governmental entity;

17 (3) Written or oral statement made in direct connection with an issue
18 under consideration by a legislative, executive or judicial body, or any
19 other official proceeding authorized by law; or

20 (4) Communication made in direct connection with an issue of public
21 interest in a place open to the public or in a public forum; and

22 which is truthful or is made without knowledge of its falsehood.

23
24 **B. Defamation per se**

25 Defamation per se of a public official or public officer consists of four
26 elements: (1) a false statement; (2) that is defamatory; (3) an unprivileged
27 publication to a third person; and (4) actual malice. *Clark Co. Sch. Dist. v.*
28 *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 718, 57 P.3d 82 (2002).

1 A statement is defamatory when, under any reasonable definition, such
2 statement would tend to lower the subject in the estimation of the community,
3 excite derogatory opinions about the subject, and hold the subject up to
4 contempt. *Las Vegas Sun v. Franklin*, 74 Nev. 282, 287, 329 P.2d 867, 869
5 (1958). ; see *Posadas* at 453.

6 In reviewing an allegedly defamatory statement, the words must be reviewed
7 in their entirety and in context to determine whether they are susceptible of a
8 defamatory meaning. *Lubin v. Kunin*, 117 Nev. 107, 17 P.3d 422 (2001). If a
9 statement is susceptible of different constructions, one of which is defamatory,
10 resolution of the ambiguity is a question of fact for the jury. *Posadas v. City of*
11 *Reno*, 109 Nev. 448, 851 P.2d 438 (1993).

12 False statements that accuse a plaintiff of criminal conduct are defamatory
13 on their face. Statements cannot form the basis of a defamation action if they
14 cannot be reasonably interpreted as stating actual facts about an individual.
15 Thus, rhetorical hyperbole, vigorous epithets, lusty and imaginative expressions
16 of contempt and language used in a loose, figurative sense will not support a
17 defamation action. *Grenier v. Taylor*, 234 Cal. App. 4th 471, 183 Cal. Rptr. 3d
18 867 (2015)(and cases cited therein).

19 To promote free criticism of public officials, and avoid any chilling effect
20 from the threat of a defamation action, a defendant cannot be held liable for
21 damages in a defamation action involving a public official or public figure
22 unless “actual malice” is alleged and proven by clear and convincing evidence.
23 *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 719, 57 P.3d 8 (2002).

24 “Actual malice” means knowledge that the statement was false or with
25 reckless disregard of whether it was false or not. *Id.* “Reckless disregard” means
26 the publisher of the statement acted with a high degree of awareness of the
27 probable falsity of the statement or had serious doubts as to the publication’s
28 truth. *Id.*

1 **IV. ANALYSIS**

2 The Court now turns to the statements Gilman alleged are defamatory in the
3 order Gilman addressed them in his brief.

4
5 **A. Residence and perjury**

6 *1. "Resident" communications*

7 In his Complaint Gilman simply alleged that Toll made statements that
8 Gilman is not a resident of Storey County and that Gilman lied and committed
9 perjury regarding his being a resident of Storey County. In his opposition,
10 Gilman pointed to five statements published by Toll about Gilman being a
11 resident of Storey County; in one of those communications Toll alleged Gilman
12 committed perjury regarding his address. The analysis for these
13 communications is the same and the Court will address them together and refer
14 to them as the "resident communications."
15

16 (a) Washoe County resident

17 Toll published the first resident communication, "Washoe County resident,"
18 on April 7, 2017. A copy of the communication is attached to Gilman's
19 Opposition as Exhibit 4. The specific statement is found in the last paragraph
20 on the second page of the exhibit:
21

22 Team Gilman would have never subjected the citizens to the
23 polarizing effect of the recall effort had it not been for the Washoe
24 County resident who thinks he knows what is best for the
taxpayers who shoulder the tax burden of Don Norman, Lance
Gilman and the rest of the tax escapers at the Center.

25 (b) If you believe he actually lives at 5 Wildhorse Canyon

26 Toll published the second resident communication on April 18, 2017. A copy
27 of the communication is attached to Gilman's Opposition as Exhibit 5. The

28 /////

1 specific statement is found in the paragraph below the text box on the third
2 page of the exhibit:

3 The debacle we emerged from a week ago today is not the kind of
4 thing our County should be making the news with. Sadly, the most
5 equal member of Storey County (if you believe he actually lives at
6 5 Wildhorse Canyon) cares more about himself than the County
7 he represents.

8 (c) Don't actually live here

9 Toll published the third resident communication on May 20, 2017. A copy of
10 the communication is attached to Gilman's Opposition as Exhibit 6. The specific
11 statement is found in the first full paragraph on the third page of the exhibit:

12 "I want the people of Storey County to know that I am a man of
13 integrity and my word is more valuable than gold. This County
14 has been very, very good to me and I want to deliver on promises I
15 made over and over to the good people of Storey County regarding
16 the cash that would be gushing around here. I want to thank them
17 along with the entire Team Storey Team for helping Mr. Norman
18 and me becoming the wealthiest people who do business in Storey
19 County but don't actually live here" said Mr. Gilman.

20 (d) Since they don't actually live at Wildhorse Canyon Drive (or
21 anywhere else in the county for that matter)

22 Toll published the fourth resident communication on October 16, 2017. A
23 copy of the communication is attached to Gilman's Opposition as Exhibit 7. The
24 specific statement is found in the fourth paragraph on the fourth page of the
25 exhibit:

26 The purpose of this complaint is to hold accountable County
27 Commissioner Gilman and Planning Commissioner Thompson for
28 committing perjury when they filed paperwork claiming to live
somewhere it is illegal to live. Since they took office illegally and
since they don't actually live at Wildhorse Canyon Drive (or
anywhere else in the county for that matter) and can't legally
reside where they claimed they did, we conclude and insist they be
prosecuted for perjury and removal from office.

(e) Failing to require Mr. Gilman to reside in the district he
represents within Storey County

Toll published the fifth and final resident communication on December 3,
2017. A copy of the communication is attached to Gilman's Opposition as

1 Exhibit 8. The specific statement is found on the third page of the exhibit under
2 the heading "Special Interests:"

3 The Commissioner Lance Gilman –TRIC Special Interest merry-
4 go-round that gives Mr. Gilman and TRIC access to the Storey
5 County checkbook, tax coffers, real property and special
6 consideration regarding rules and regulations.

7 ...

8 Failing to require Mr. Gilman to reside in the district he
9 represents within Storey County.

10 Gilman argued "[t]he clear inference" from each of these communications is
11 that Gilman is not a Storey County resident. Toll used a different word or
12 phrase in each of his resident communications: "resident," "lives at," "live here,"
13 "live," and "reside." The resident issue is potentially more significant than either
14 party presented. "Residence" has a specific meaning for purposes of eligibility
15 for public office. NRS 281.050. But neither side cited any law or made any
16 argument on the meaning of "residence" under the elections statutes or case
17 law, and therefore the Court will address the issue on the level presented by the
18 parties which is the every day meaning of "resident," "lives at," "live here,"
19 "live," and "reside."

20 The every day meaning of "resident" is dwelling or having an abode for a
21 continued length of time. Webster's Third New International Dictionary 1931
22 (2002). The every day meaning of "live" is to occupy a home. Id. 1323. The every
23 day meaning of "reside" is to settle oneself into a place, to dwell permanently or
24 continuously; have a settled abode for a time; have one's residence or domicile.
25 Id. 1931.

26 2. *Good faith communication*

27 The first issue is whether the resident communications are good faith
28 communications 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)(a).

1 To decide this issue the Court must determine whether the communication
2 falls within any of the four-part definition of “a good faith communication in
3 furtherance of the right to petition or the right to free speech in direct
4 connection with an issue of public concern” set out in NRS 41.637(1)-(4).

5
6 a. NRS 41.637(1): If the communication is aimed at procuring any
7 governmental or electoral action, result or outcome

8 A communication is “a good faith communication in furtherance of the right
9 to petition or the right to free speech in direct connection with an issue of public
10 concern” if the communication is aimed at procuring any governmental or
11 electoral action, result or outcome. NRS 41.637(1)

12 Toll published his first resident” communication on April 7, 2017. That
13 communication included the “Washoe County resident” statement. Toll
14 published that communication four days before the April 11, 2017 sheriff recall
15 vote. The aim of the communication was to blunt Gilman’s political influence in
16 the effort to recall the sheriff by undermining Gilman’s standing and credibility
17 in Storey County by claiming Gilman is a Washoe County resident. The Court
18 concludes the aim of the “Washoe County resident” communication was to
19 procure an electoral action, result or outcome, i.e., to weaken and defeat the
20 sheriff recall effort by undermining public and voter support for Storey County
21 Commissioner Gilman.

22 Toll’s aim in the four resident communications after the April 7, 2017
23 communication was to keep Storey County voters’ attention focused on
24 Gilman’s alleged part in the sheriff recall “debacle” and undermine Gilman’s
25 standing and credibility in Storey County by questioning where Gilman resided
26 or lived. The Court concludes the aim of the four resident communications after
27 the April 7, 2017 communication was to procure an electoral action, result or
28 outcome, i.e., undermining public and voter support for Storey County
Commissioner Gilman.

1 b. NRS 41.637(2): The communication is to a Legislator, officer or
2 employee of the Federal Government, this state or a political
3 subdivision of the state, regarding a matter reasonably of concern
4 to the respective governmental entity.

5 Toll did not produce a preponderance of evidence that any of the “resident”
6 communications were to a Legislator, officer or employee of the Federal
7 Government, this state or a political subdivision of the state, regarding a matter
8 reasonably of concern to the respective governmental entity. Gilman did not
9 allege the communications to the Storey County Sheriff and District Attorney,
10 and the Attorney General were defamatory. The Court concludes NRS 41.637(2)
11 has no application to the resident communications.

12 c. NRS 41.637(3): Written or oral statement made in direct
13 connection with an issue under consideration by a legislative,
14 executive or judicial body, or any other official proceeding
15 authorized by law.

16 The Court finds Toll made a report to the Storey County Sheriff and District
17 Attorney, and the Attorney General regarding Gilman’s residence. Toll
18 published a story about his making the reports in the October 16, 2017
19 communication. The sheriff’s office, district attorney’s office, and attorney
20 general’s office are executive bodies. The Court concludes the October 16, 2017
21 communication was made in direct connection with an issue under
22 consideration by an executive body.

23 The Court finds Toll did not produce evidence that any of the other resident
24 communications were made in direct connection with an issue under
25 consideration by a legislative, executive or judicial body, or any other official
26 proceeding authorized by law. The Court concludes NRS 41.637(3) does not
27 apply to the other resident communications.

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1 d. NRS 41.637(4): Communication made in direct connection with
2 an issue of public interest in a place open to the public or in a
3 public forum.

4 (I) Public interest

5 To determine whether the resident communications were made in direct
6 connection with an issue of public interest the court looks to the guiding
7 principles in *Shapiro*.

8 The first guiding principle is that “public interest” does not equate with
9 mere curiosity. The Court finds that whether Storey County Commissioner
10 Gilman lives or resides in Storey County is not a matter of mere curiosity. The
11 Court concludes this guiding principle weighs in favor of finding the resident
12 communications were made in direct connection with an issue of public
13 interest.

14 The second guiding principle is that a matter of public interest should be
15 something of concern to a substantial number of people; a matter of concern to
16 a speaker and a relatively small specific audience is not a matter of public
17 interest. The Court finds that whether Storey County Commissioner Gilman
18 lives or resides in Storey County is something of concern to the residents of
19 Storey County, a substantial number of people, and not simply a matter of
20 concern to Toll and a relatively small specific audience. The Court concludes
21 this guiding principle weighs in favor of finding the resident communications
22 were made in direct connection with an issue of public interest.

23 The third guiding principle is that there should be some degree of closeness
24 between the challenged statements and the asserted public interest – the
25 assertion of a broad and amorphous public interest is not sufficient. The Court
26 finds the resident communications have some degree of closeness to the
27 asserted public interest of whether Storey County Commissioner Gilman resides
28 in Storey County. The Court concludes this guiding principle weighs in favor of

1 finding the resident communications were made in direct connection with an
2 issue of public interest.

3 The fourth guiding principle is the focus of the speaker's conduct should be
4 the public interest rather than a mere effort to gather ammunition for another
5 round of private controversy. The Court finds the focus of Toll's resident
6 communications was the public interest in whether Storey County
7 Commissioner Gilman lives or resides in Storey County, and was not a mere
8 effort to gather ammunition for another round of private controversy. The
9 Court concludes this guiding principle weighs in favor of finding the
10 communications were made in direct connection with an issue of public
11 interest.

12 The fifth and final guiding principle is that a person cannot turn otherwise
13 private information into a matter of public interest simply by communicating it
14 to a large number of people. The Court finds that where Storey County
15 Commissioner Gilman lives or resides was not private information but a matter
16 of public interest because a county commissioner should reside in the county he
17 represents. The Court concludes this guiding principle weighs in favor of
18 finding the communications were made in direct connection with an issue of
19 public interest.

20 The Court has weighed the *Shapiro* guidelines and concludes the resident
21 communications were made in direct connection with an issue of public
22 interest.

23
24 (ii) Public forum

25 Gilman did not appear to contest that Toll's website is a public forum.
26 Even if Gilman did contest it, most if not all California courts that have
27 considered the issue have concluded a public website is a public forum. *Vogel v.*
28 *Felice*, 127 Cal. App. 4th 1006, 26 Cal. Rptr. 3d 350 (2005); *Wilbanks v. Wolk*

1 121 Cal.App.4th 883, 897, 17 Cal. Rptr. 3d 497 (2004); *ComputerXpress, Inc. v.*
2 *Jackson* 93 Cal.App.4th 993, 1007, 113 Cal. Rptr. 2d 625 (2001). The Nevada
3 Supreme Court has looked to California law for guidance on anti-SLAPP issues
4 because California's and Nevada's anti-SLAPP statutes are similar in purpose
5 and language. *Shapiro*, 268.

6 The Court finds Toll's is a website open to the public, on which he posts
7 political information, and receives and posts reader's comments. The Court
8 concludes Toll's website is a public forum for the purposes of NRS 41.637(4).

9 The Court concludes the resident communications were made in direct
10 connection with an issue of public interest in a place open to the public or in a
11 public forum.

12
13 3. *Truthful communications or made without knowledge of falsehood*

14 The last issue on the question of whether the communications were good
15 faith communications is whether the communications were truthful or made
16 without knowledge of its falsehood. In his first affidavit Toll testified that he
17 conducts research for the pieces he writes. Mot. Ex. 11, ¶ 18. In his second
18 affidavit Toll testified more directly and fully regarding his due diligence. He
19 testified "that for each statement I made that Gilman claims is defamatory, I
20 investigated the facts before making the statement." Reply Ex. 2, ¶ 10(a). The
21 Court finds Attachment 3 to Toll's affidavit is a true and correct copy of his
22 October 16, 2017 website communication. In his first affidavit paragraph 15 Toll
23 testified he believes the contents of his stories, including the October 16, 2017
24 communication, were true. In the October 16, 2017 communication Toll stated
25 he made a public records request to the Storey County Assistant Manager
26 requesting the zoning of the Mustang Ranch compound. Toll alleged the
27 Assistant County Manager failed to provide the requested information for six
28 months. Toll also stated in the communication that he made a request of the

1 Storey County Clerk before his first resident communication requesting proof of
2 Gilman's resident and received a response that Gilman resides at 5B Wildhorse
3 Canyon Drive. Toll asked the Storey County Assessor where 5B Wildhorse
4 Canyon Drive was physically located and was informed that Gilman resides in a
5 double wide mobile home located behind the swimming pool at the Mustang
6 Ranch. The statements of the Storey County Clerk and Assessor are not
7 considered here as proof of the matter asserted but only to show what
8 knowledge Toll had when he made the communication. Based upon the
9 information he had, Toll did not believe that "Lance Gilman, one of the
10 wealthiest men in Northern Nevada, lives in a mobile home behind the
11 swimming pool with his employee and roommate Kris Thompson."

12 Toll did not prove that Gilman is a resident of Washoe County or that
13 Gilman is not a resident of Storey County, but he, Toll, did not have to prove
14 either. Based upon the information Toll had regarding Gilman's residence, the
15 Court concludes Toll proved by a preponderance of evidence that he did not
16 knowingly make a false statement when he published the resident
17 communications.

18 The Court concludes Toll met the burden under NRS 41.660(3)(a). The
19 Court concludes the communications were made in furtherance of the right to
20 free speech in direct connection with an issue of public concern.

21

22 *4. Burden of proof shifts to Gilman*

23 Because Toll met the burden of proof under NRS 41.660(3)(a) the burden
24 shifts to Gilman to demonstrate with prima facie evidence a probability of
25 prevailing on his defamation per se claim. The elements of defamation per se of
26 a public official or public officer are: (1) a false statement; (2) that is
27 defamatory; (3) an unprivileged publication to a third person; and (4) actual
28 malice.

1 Gilman need only establish his claim has minimal merit, but he must
2 establish it with competent, admissible evidence. As the *Cross v. Facebook*
3 court stated, “the evidence is what counts.” *Cross* at 209. The Court cannot
4 resolve the merits of the overall dispute on a special motion to dismiss. The
5 Court cannot and therefore does not weigh the evidence, including the
6 credibility of witnesses in its analysis. Instead, the Court accepts as true the
7 evidence favorable to Gilman and evaluates Toll’s evidence only to determine if
8 it has defeated Gilman’s evidence as a matter of law. The Court must accept as
9 true all competent, admissible evidence favorable to Gilman.

10
11 (a) A false statement

12 The first element of defamation per se requires a false statement. To prove
13 the resident communications were false Gilman must produce some minimal
14 evidence that he resides in Storey County. The Court now turns to the evidence
15 produced on the resident issue. Gilman testified in his affidavit:

16 (1) “I have never been officially notified by any law enforcement or
17 governmental organization about any investigation whatsoever
18 challenging my residency in Storey County.” Opp. Ex. 3, ¶ 39.

19 (2) “Contrary to the Defendant’s assertions, I do live in Storey
20 County, Nevada. My address is 5 Wild Horse Canyon, and I have
21 lived there for 12 years or more.” Opp. Ex. 3, ¶ 42.

22 (3) “I certainly never committed perjury as alleged by the Defendant.
23 The Defendant’s statements are not true.” Opp. Ex. 3, ¶ 43.

24 Gilman provided a copy of his driver’s license which shows his address is 5
25 Wild Horse Canyon, Sparks, Nevada. Opp. Ex. 9.

26 Toll testified the Storey County Assessor informed him that 5 Wild Horse
27 Canyon is on the Mustang Ranch property. Although this statement is hearsay if
28 offered for the truth of the matter asserted, Toll did not in any way limit or

1 attempt to limit the use of his testimony. But the Court need not and does not
2 consider the Assessor's statement to decide this issue.

3 The Court concludes Gilman's testimony under oath that he lives in Storey
4 County is sufficient prima facie evidence that he lives in Storey County.

5
6 (b) A defamatory statement

7 The second element of defamation per se is that the false statement was
8 defamatory. "A statement is defamatory when it would tend to lower the subject
9 in the estimation of the community, excite derogatory opinions about the
10 subject, and hold the subject up to contempt. In reviewing an allegedly
11 defamatory statement, 'the words must be reviewed in their entirety and in
12 context to determine whether they are susceptible of a defamatory meaning.'
13 Whether a statement is defamatory is generally a question of law; however,
14 where a statement is 'susceptible of different constructions, one of which is
15 defamatory, resolution of the ambiguity is a question of fact for the jury.'" *Lubin*
16 *v. Kunin*, 117 Nev. 107, 111, 17 P.3d 422 (2001)(internal citations omitted).

17 The Court finds the resident communications were intended to and
18 would tend to cause Storey County residents to question or doubt whether
19 Storey County Commissioner Gilman lives in Storey County. Voters generally
20 and reasonably want their elected officials to live in the area the elected official
21 represents. The Court finds that Toll's statements suggesting, implying, or
22 outright accusing Storey County Commissioner Gilman of not residing or living
23 in Storey County and lying and perjuring himself about it would tend to lower
24 Gilman in the estimation of the community, excite derogatory opinions about
25 Gilman, and hold Gilman up to contempt. The Court concludes the resident
26 statements were defamatory.

27 /////

28 /////

1 (c) An unprivileged publication to a third person

2 The third element of defamation per se is an unprivileged publication to a
3 third person. Toll argued that insofar as the alleged defamatory statements
4 relate to media reporting on judicial proceedings the fair report privilege
5 applies. Toll failed to produce evidence of judicial proceedings. There cannot be
6 media reporting on judicial proceedings without judicial proceedings. Toll's
7 argument lacks factual or legal support.

8 The Court concludes the resident statements were unprivileged publications
9 to third persons.

10

11 (d) Actual malice

12 The fourth element of defamation per se of a public official or public figure
13 is actual malice. "Actual malice" means knowledge that the statement was false
14 or with reckless disregard of whether it was false or not. "Reckless disregard"
15 means the publisher of the statement acted with a high degree of awareness of
16 the probable falsity of the statement or had serious doubts as to the
17 publication's truth. "This test is a subjective one, relying as it does on 'what the
18 defendant believed and intended to convey, and not what a reasonable person
19 would have understood the message to be.'" *Pegasus* at 722.

20 Gilman's points and authorities in support of his opposition to Toll's anti-
21 SLAPP motion offers little of substance on the actual malice element. Beginning
22 on page 35 of Gilman's points and authorities at line 16 Gilman asserts there is
23 solid proof of actual malice. He then talks about Toll being unhappy about
24 Gilman opposing the sheriff; that Toll has continuously criticized and impugned
25 Gilman in the website communications; that Toll has a deep dislike of Gilman;
26 and that Toll has a private vendetta against Gilman. Gilman argued these
27 "facts" show Toll's negligence, motive and intent. The *Pegasus* court noted that

28 /////

1 reckless or malice may be established through cumulative evidence of
2 negligence, motive, and intent.

3 On page 36 of his opposition, beginning at line 20, Gilman argued Toll did
4 little or no due diligence before making the statements; and made up the
5 assertions out of thin air through an overwrought imagination. Gilman did not
6 support these assertions with competent, admissible evidence.

7 Toll testified he investigated the facts before making the statements Gilman
8 alleged are defamatory, and that he believes the contents of his stories were
9 true, including his October 16, 2017 communication. In his October 16, 2017
10 communication, which was made nearly two months before Gilman filed this
11 action, Toll stated:

- 12 (1) He made a public records request to the Storey County Assistant
13 Manager requesting the zoning of the Mustang Ranch compound and
14 that the Assistant County Manager failed to provide the requested
15 information for six months;
- 16 (2) He made a request of the Storey County Clerk before his first resident
17 communication requesting proof of Gilman's residence and received a
18 response that Gilman resides at 5B Wild Horse Canyon Drive;
- 19 (3) He asked the Storey County Assessor where 5B Wild Horse Canyon
20 was physically located and was informed that Gilman resides in a
21 double wide mobile home located behind the swimming pool at the
22 Mustang Ranch.

23 Again, the statements of the Storey County Clerk and Assessor are not
24 considered here as proof of the truth of the matter asserted but only to show
25 what knowledge Toll had when he made the communications.

26 Toll included as part of his October 16, 2017 a letter he sent to the Storey
27 County District Attorney and Nevada Attorney General. In the letter Toll relates
28 that he received information from the Storey County Community Development

1 Department that none of the property on which the Mustang Ranch sits is
2 zoned residential. Toll continued, "In other words neither 5 nor 56 Wild Horse
3 Canyon Drive are legal residences; nobody can legally reside there or claim
4 either address as their legal residence." Opp. Ex. 9.

5 Toll also knew, as any informed Northern Nevadan would, that Gilman is a
6 financially successful businessman.

7 Based upon the information he had, Toll did not believe Gilman the-
8 successful-businessman lives in a trailer. Toll stated in his October 16, 2017
9 communication: "Lance Gilman, one of the wealthiest men in Northern Nevada,
10 lives in a mobile home behind the swimming pool with his employee and
11 roommate Kris Thompson."

12 The Court finds Toll did conduct some research on Gilman's residence
13 before he published the resident communications and that the information he
14 received as a result of that research caused him to disbelieve that Gilman lives
15 in a trailer behind the Mustang Ranch pool.

16 The Court concludes Gilman has not produced prima facie evidence that Toll
17 knew any of his resident communications were false or acted with a high degree
18 of awareness of the probable falsity of the statement or had serious doubts as to
19 the publication's truth. The Court concludes Gilman failed to produce prima
20 facie evidence that Toll published the resident communications with actual
21 malice.

22
23 *5. Discovery request*

24 Gilman requested an opportunity to conduct discovery under NRS 41.660(4)
25 which requires a court to allow limited discovery upon a showing that
26 information necessary to meet or oppose the burden under NRS 41.660(3)(b) is
27 in the possession of another party or a third party and is not reasonably
28 available without discovery. Gilman failed to make the showing required by

1 NRS 41.660(3)(b) on the issue of actual malice. The Court concludes that here,
2 information as to whether Toll knew the resident statements were false or
3 whether he acted with a high degree of awareness of the probable falsity of the
4 statement or had serious doubts as to the publication's truth, is necessary for
5 Gilman to meet or oppose the burden under NRS 41.660(3)(b), and that
6 information is in the possession of Toll or a third party and is not reasonably
7 available without discovery. Therefore Gilman's request to conduct discovery is
8 granted. Gilman will be allowed to conduct discovery limited solely to
9 information as to whether Toll knew the resident statements were false or
10 whether he acted with a high degree of awareness of the probable falsity of the
11 statement or had serious doubts as to the publication's truth.

12
13 **B. Reverse graft**

14
15 *1. Reverse graft communication*

16 The reverse graft statements come from a communication published on
17 August 6, 2017. A copy of the communication is attached to Gilman's
18 Opposition as Exhibit 10. The specific statement quoted by Gilman is found in
19 the first paragraph on the fifth page of the exhibit:

20 When this deal is approved by Marshall McBride and Jack McGuffey,
21 TRIC will have accomplished another spectacular job of bamboozling
22 Storey County officials. It will mean that Storey County and Nevada
23 taxpayers have dumped \$100 million dollars of what can only be
24 described as "reverse graft" directly into the pockets of the band of merry
25 TRICsters.

26
27 Gilman argued there was no reverse graft and explained that there is no
28 payment of \$100 million going into Gilman's pockets.

29
30 *2. Good faith communication*

31 The first issue is whether the statement is a good faith communication in
32 furtherance of the right to petition or the right to free speech in direct

1 connection with an issue of public concern. NRS 41.660(3)(a). The Court turns
2 to the definition set out in NRS 41.637.

3
4 (a) Communication aimed at procuring any governmental or electoral
5 action, result or outcome

6 NRS 41.637(1) requires the communication be aimed at procuring any
7 governmental or electoral action, result or outcome. The aim of Toll's
8 hyperbolic communication including his use of the term "reverse graft" is that
9 the multimillion dollar pipeline deal is bad for Storey County residents but good
10 for Gilman, and therefore Storey County residents should take political action
11 and oust Gilman. Specifically, Toll stated on page 8 of the communication:

12 This pipeline "deal" is the latest effort to benefit TRIC at the
13 expense of every person in Storey County and should make
14 everyone stand up and voice outrage.

15 If our current County Leadership fail to recognize this for what it
16 is and approve it, it's time to demand a change of those leaders.

17 Marshall McBride is our only hope to shoot this hustle down. If
18 you think Lance should finance his own projects, call or email
19 Marshall and let him know.

20 After these calls to political action Toll included an email address and
21 telephone number for Commissioner McBride.

22 The Court concludes this communication and the use of "reverse graft" was
23 aimed at procuring an electoral action, result or outcome – voicing outrage over
24 the deal that would allegedly hurt Storey County residents and benefit Gilman,
25 demanding a change of leaders if they approved the deal, and encouraging
26 residents to call or email Commissioner McBride to encourage him to shoot
27 down the deal.

28 (b) Directed to a government officer

NRS 41.637(2) requires the communication be directed to a government
officer. The reverse graft communication was directed at all Storey County

1 residents but not to a specific government officer so the communication did not
2 fit within this part of the definition.

3
4 (c) Direct connection with an issue under consideration by a
5 legislative body

6 NRS 41.637(3) requires the statement be made in direct connection with an
7 issue under consideration by a legislative body. The instant statement was made
8 in direct connection with the pipeline deal which was under consideration by
9 the Storey County Commission, a legislative body. The Court concludes the
10 statement was made in direct connection with an issue under consideration by a
11 legislative body.

12 (d) Direct connection with an issue of public interest

13 NRS 41.637(4) requires the communication be made in direct connection
14 with an issue of public interest. To determine whether the communication was
15 made in direct connection with an issue of public interest the court looks to the
16 guiding principles set forth in *Shapiro*.

17
18 (i) Public interest

19 The first guiding principle is that “public interest” does not equate with
20 mere curiosity. The Court concludes that the multimillion dollar pipeline deal
21 had potential effects on all Storey County residents and was not a matter of
22 mere curiosity. This guiding principle weighs in favor of finding the
23 communication and the reverse graft statement were made in direct connection
24 with an issue of public interest.

25 The second guiding principle is that a matter of public interest should be
26 something of concern to a substantial number of people; a matter of concern to
27 a speaker and a relatively small specific audience is not a matter of public
28 interest. The pipeline deal had potential effects on every Storey County resident

1 and was not just a matter of concern to Toll and a relatively small specific
2 audience. This guiding principle weighs in favor of finding the communication
3 and the reverse graft statement were made in direct connection with an issue of
4 public interest.

5 The third guiding principle is that there should be some degree of closeness
6 between the challenged statement and the asserted public interest – the
7 assertion of a broad and amorphous public interest is not sufficient. The instant
8 communication was made before the Storey County Commission voted on the
9 pipeline deal. The communication criticized Gilman’s part in the deal including
10 the use of the “reverse graft” phrase, and expressed outrage at the use of Storey
11 County tax dollars for the project. The Court concludes there is a degree of time
12 and subject matter closeness between the challenged statement and the
13 asserted public interest, and that the communication is not an assertion of a
14 broad and amorphous public interest. This guiding principle weighs in favor of
15 finding the communication and the statement were made in direct connection
16 with an issue of public interest.

17 The fourth guiding principle is the focus of the speaker’s conduct should be
18 the public interest rather than a mere effort to gather ammunition for another
19 round of private controversy. The focus of Toll’s communication was killing the
20 pipeline deal and the reverse graft statement was intended to criticize Gilman
21 for his part in the deal. Toll published the communication before the
22 Commission voted on the deal. The Court concludes Toll’s statement was in the
23 public interest and not a mere effort to gather ammunition for another round of
24 private controversy. This guiding principle weighs in favor of finding the
25 communication and the statement were made in direct connection with an issue
26 of public interest.

27 The fifth and final guiding principle is that a person cannot turn otherwise
28 private information into a matter of public interest simply by communicating it

1 to a large number of people. The Court concludes the information regarding the
2 pipeline deal and Gilman's involvement in the deal was not private information
3 but a matter of public interest. This guiding principle weighs in favor of finding
4 the communication and the statement were made in direct connection with an
5 issue of public interest.

6 The Court concludes the communication and the statement were made in
7 direct connection with an issue of public interest.

8
9 (ii) Public forum

10 The Court concluded above that Toll's website is a public forum.

11
12 (3) *Truthful statement or made without knowledge of its falsehood*

13 The last issue on the question of whether the communication was a good
14 faith communication is whether the communication was truthful or made
15 without knowledge of its falsehood. The Court concludes Toll did not prove the
16 statement was truthful.

17 The Court looks to the facts to see if Toll proved the statement was made
18 without knowledge of its falsehood. Toll referenced in his communication, a
19 communication prepared and published by Nicole Barde on her blog about the
20 August 1, 2017 Commissioner meeting. Toll stated in his communication:

21 Nicole Barde has been the Lone Ranger in her reporting of County
22 Commissioner Meetings since she started in 2015. In her
23 breakdown of the August 1st meeting (**which I encourage you
to read here** ([http://www.bardeblog.com/so-what's-going-on/
24 212-summary-of-the-august-1-2017-storey-county-commission-
meeting](http://www.bardeblog.com/so-what's-going-on/212-summary-of-the-august-1-2017-storey-county-commission-meeting))), she delivers a lengthy in-depth and dead on point
25 dissection of the latest effort of Brothel Owner, TRIC Executive
and self-serving crony County Commissioner Lance Gilman to
26 once again have Storey County Taxpayers forfeit \$35 Million
Dollars of future tax revenue from a "special tax area" so he and
Don Norman can make even more money.

27 (Emphasis in original.) Opp. Ex. 10, p. 2-3.

28 /////

1 Toll stated “Ms. Barde accurately called this Corporate Welfare, I call it
2 reverse graft. In the alternate reality call [sic] that exists in the Courthouse, it’s
3 a ‘public-private partnership-investment thingy.’” Opp. Ex. 10, p. 3.

4 Neither party included Barde’s communication as an exhibit and so the
5 Court has not reviewed it. Gilman did not testify or argue that Barde’s
6 communication was false, incorrect, incomplete, or defamatory.

7 Toll’s communication contains many extravagant exaggerations including:

- 8 – We [Storey County residents] and our pocketbooks serve at the pleasure
9 and plunder of Lance Gilman
- 10 – Storey County Taxpayers gleefully divert tax revenue directly into the
11 band of merry TRICsters pockets.
- 12 – ... you have to admire the ginormity of the brass balls these hucksters
13 clang around in broad daylight.
- 14 – [Referring to charts contained in the communication] I call these
15 projections speculative fantasy mindful that we are one Orange Tweet or
16 North Korean Missile into Seoul away from a major deviation from the
17 ice cream and lollypops [sic] shown in the charts above.
- 18 – The last point I want to make is to remind sober minded residents of
19 Storey County that encumbering us with this debt takes the cream off the
20 top of the annual flood of mythical revenue from the Oceans of Cash in
21 the Sea of TRIC.

22 No reasonable person would believe any of these statements is true.

23 With this context the Court turns to the phrase “reverse graft,” a phrase Toll
24 apparently made up. The phrase has no relevant defined meaning. Looking at
25 the words individually, the adjective “reverse” means opposite or contrary to a
26 specified thing; operating in opposite or contrary fashion to what is usual.
27 Webster’s Third New International Dictionary 1943 (2002). One meaning of
28 “graft” is the acquisition of money or property by dishonest or questionable
means, as by taking advantage of a public office to obtain profit; or illegal or
unfair practice for profit or personal gain. Id. 985. Using the dictionary
definitions “reverse graft” means operating in an opposite or contrary fashion to
what is the usual acquisition of money or property by dishonest or questionable
means, as by taking advantage of a public office to obtain profit; or illegal or

1 unfair practice for profit or personal gain. The Court is unable to make sense of
2 the term “reverse graft.” “Graft” sounds bad, but Toll used the term “reverse
3 graft” and the words have to be taken together. In *Greenbelt Cooperative*
4 *Publishing Assn., Inc. v. Bresler*, 398 U.S. 6, 26 L. Ed. 2d 6, 90 S. Ct. 1537
5 (1970) a real estate developer had engaged in negotiations with a city for a
6 zoning variance on land he owned, while simultaneously negotiating with the
7 city on other land the city wanted to buy from him. A local newspaper published
8 articles that included statements that some people had characterized the
9 developer’s negotiating position as “blackmail.” The developer sued for libel.
10 The court rejected a contention that liability could be premised on the notion
11 that the word “blackmail” implied the developer had committed the actual
12 crime of blackmail and held that “the imposition of liability on such a basis was
13 constitutionally impermissible – that as a matter of constitutional law, the word
14 ‘blackmail’ in those circumstances” was not defamation, but just rhetorical
15 hyperbole, a vigorous epithet used by those who considered the developer’s
16 negotiating position extremely unreasonable. *Id.* 12-13.

17 The facts in the instant case have some similarity to the *Greenbelt* facts.
18 Gilman is the exclusive broker for, a principal in and marketing director for
19 TRI. TRI sought a multi-million dollar deal with the Storey County Commission
20 for a pipeline. Gilman is also a Storey County Commissioner. Toll considered
21 Gilman’s position with TRI and his position with Storey County to be extremely
22 unreasonable. As a result Toll lashed out with a communication that included
23 the meaningless phrase “reverse graft,” which he intended as a vigorous epithet,
24 and what is in fact rhetorical hyperbole. The Court concludes the term, taken in
25 the context of the full communication, is nonsensical and not reasonably
26 susceptible to a defamatory construction.

27 /////

28 /////

1 The Court concludes Toll met the burden under NRS 41.660(3)(a). The
2 Court concludes the communication and statement were made in furtherance of
3 the right to free speech in direct connection with a issue of public concern.
4

5 *4. Burden shifts to Gilman*

6 Because Toll met the burden under NRS 41.660(3)(a) the Court must
7 determine whether Gilman has demonstrated with prima facie evidence a
8 probability of prevailing on the his defamation per se claim. Gilman
9 acknowledges he must prove the allegedly defamatory statement was made with
10 actual malice, that is, with knowledge that it was false or with reckless disregard
11 of whether it was false or not.

12 In his affidavit, Opp. Ex. 3, ¶ 47-64, Gilman denied reverse graft and
13 explained the pipeline and infrastructure deals. Because “reverse graft” is a
14 nonsensical phrase Gilman did not and cannot prove it was false or made with
15 reckless disregard of whether it was false or not.
16

17 *5. Discovery request*

18 Gilman requested an opportunity to conduct discovery under NRS 41.660(4)
19 which requires a court to allow limited discovery upon a showing that
20 information necessary to meet or oppose the burden under NRS 41.660(3)(b) is
21 in the possession of another party or a third party and is not reasonably
22 available without discovery. Gilman failed to make the showing required by
23 NRS 41.660(3)(b). He made no showing that any information regarding reverse
24 graft is in the possession of another party or a third party *and* is not reasonably
25 available without discovery. Therefore the request to conduct discovery is
26 denied.

27 Based upon the foregoing the special motion to dismiss must be granted as
28 to the “reverse graft” statement.

1 **C. Re-licensing Mustang Ranch**

2 The statements regarding re-licensing the Mustang Ranch come from a
3 communication Toll published on February 26, 2017. Toll says the
4 communication was submitted by a Storey County resident who wanted to
5 remain anonymous. A copy of the communication is attached to Gilman's
6 Opposition as Exhibit 11. The specific statement quoted by Gilman is found in
7 the last paragraph on the second page of the exhibit.

8 Funny thing is, the courts didn't agree and the investor won. But,
9 in the meantime, because Lance had shut down the Wildhorse and
10 reopened it as the Mustang, he thought he didn't need to go
11 through the investigation that the Nevada Revised Statutes
12 require for the opening of a new brothel. He didn't want to follow
13 the law. The County Commissioners even agreed with him. Why
14 should Lance, the man who's been a virtual Santa Claus (at least
15 he tries to convince people he is) for Storey County, have to follow
16 the law? Sheriff Antinoro said the law had to be followed and that
17 the Mustang had to be closed for the required number of days, per
18 state statute, for the investigation with which ALL brothels must
19 comply. King Lance was furious. He secretly plotted pay back.

20 Gilman's Complaint (p. 5, ¶ 18(e), the heading for this section of his brief
21 (Opp. p. 12, sec. B(2)©, and his argument regarding the quoted language is that
22 the communication said Gilman didn't follow the law when re-licensing the
23 Mustang Ranch. Opp. p. 12. Toll's communication does not say Gilman did not
24 follow the law. The communication says Gilman "thought he didn't need to go
25 through the investigation that the Nevada Revised Statutes require for the
26 opening of a new brothel," and that "[h]e didn't want to follow the law." Opp.
27 Ex. 11, p. 2-3.

28 Gilman failed to set forth any facts, cite any law, or argue that the actual
statements made in the communication were defamatory or that the statements
were made with actual malice. The Court concludes the actual statements are
not defamatory and will dismiss this portion of Gilman's claim.

//////

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1 **D. Receiving land with zero consideration**

2 The statements regarding special consideration regarding rules and
3 regulations come from a communication Toll published on December 3, 2017. A
4 copy of the communication is Exhibit 8 to Gilman's opposition. The language at
5 issue is:

6 Special Interests

7 The Commissioner Lance Gilman – TRIC Special Interest merry-
8 go-round that gives Mr. Gilman and TRIC access to the Storey
9 County checkbook, tax coffers, real property and special
10 consideration regarding rules and regulations.

11 ...

- 12 • Repeatedly reconvening Storey County property to TRIC with
13 zero consideration or payment that TRIC has turned around and
14 included the free property into lucrative land deals, including the
15 one that gave a portion of the USA Parkway to TRIC (for free)
16 which Mr. Gilman and TRIC turned around and sold to NDOT for
17 \$43 Million Dollars (without giving us a single penny or paying
18 down the \$47 Million Dollars Storey County credit card balance).

19 Gilman admitted under oath that Storey County reconveyed land to TRI as
20 part of the NDOT extension right of way, and TRI did not get all of the USA
21 Parkway back from the County for free. Gilman Aff. p. 8, ¶ 81 and 85. It is clear
22 from Gilman's testimony that Storey County did reconvey land to TRI for which
23 TRI did not pay Storey County. The Court concludes Gilman's own testimony
24 proves that Toll's statement is true and therefore not defamatory, and therefore
25 this portion of Gilman's claim will be dismissed on that ground.

26 **D. Washington, D.C. trip**

27 1. *Washington, D.C. trip communication*

28 The statements regarding Gilman traveling to Washington, D.C. come from
communications Toll published on April 29, 2017 and May 2, 2017. A copy of
the April 29, 2017 communication is Exhibit 12 to Gilman's opposition, and the
May 2, 2017 communication is Exhibit 13. Gilman did not quote specific

1 language related to this portion of his claim, or refer the Court to any particular
2 page of the 41 pages that make up Exhibits 12 and 13.

3 On the first page of the April 29, 2017 communication Toll reported that
4 Storey County sent Gilman and a Storey County lobbyist to Washington, D.C.
5 from January 17 to 22, 2017. Toll stated the purpose of the trip was to lobby for
6 a zip code bill to prevent Storey County from losing out on substantial sales tax
7 revenue. Toll opined that it is a good idea to get the zip code issue resolved.

8 Toll continued his communication by relating he realized Donald Trump
9 was inaugurated on January 21, 2017. After he realized this, Toll, on February
10 16, 2017, made a records request for receipts from the trip. On March 7, 2017
11 the Storey County lobbyist that had accompanied Gilman to Washington, D.C.
12 addressed the Storey County Commission and provided information about
13 lobbying for Storey County. At this point in his communication Toll provided a
14 link that would take a reader to the Commission recording of the lobbyist's
15 report. Toll than stated: "To recap, we paid \$,7611.50 for them to attend Donald
16 Trump's Inauguration." Opp., Ex. 12, p. 3.

17 Toll continued, "I have been to D.C. several times, but never on
18 Inauguration Week. My sources tell me it is pretty much like the week that
19 precedes Super Bowl; business as unusual. If you want to schedule meaningful
20 work, you're in Fantasyland." Toll suggests the lobbying could have been done
21 by Skype. He pointed out that government spending is all about priorities; that
22 \$7,611.50 represents just under one quarter of the annual salary of a new
23 deputy or a new patrol vehicle. He then asks, "What are the priorities in Storey
24 County? "

25 The next pages are Gilman's and the lobbyist's Marriott receipts from the
26 trip. Each receipt includes a hand written statement: "DC trip to Trump
27 inauguration." Documentation of airfare is also posted to the website.

28 The website then has pages of chat posts.

1 Exhibit 13 appears to consist of a series chat posts between Toll and a person
2 he describes as a Gilman spokesman.

3
4 *2. Good faith communication*

5 The first issue is whether the statement is a good faith communication in
6 furtherance of the right to petition or the right to free speech in direct
7 connection with an issue of public concern. NRS 41.660(3)(a). To determine
8 that, the Court must determine whether the statement falls within any of the
9 four definitions set out in NRS 41.637.

10
11 (a) Communication aimed at procuring any governmental or
12 electoral action, result or outcome

13 NRS 41.637(1) requires the communication be aimed at procuring any
14 governmental or electoral action, result or outcome. The primary focus of Toll's
15 communication is accountability for Storey County spending – the legitimacy of
16 Storey County paying Gilman's room and airfare expenses to lobby in
17 Washington D.C. during the week of the U.S. presidential inauguration. The
18 Court concludes these stories and the specific statements were aimed at
19 procuring an electoral action, result, or outcome regarding Storey County's use
20 of tax funds and Gilman's continuing as a Storey County Commissioner.

21
22 (b) Communication directed to a government officer or in
23 direct connection with with an issue under consideration
by a government body or official

24 NRS 41.637(2) requires the communication be directed to a government
25 officer, and subsection (3) requires the statement be made in direct connection
26 with an issue under consideration by a government body or official. The instant
27 statements do not meet either of these requirements.

1 (c) Direct connection with an issue of public interest

2 NRS 41.637(4) requires the communication be made in direct connection
3 with an issue of public interest. To determine whether the communication was
4 made in direct connection with an issue of public interest the court looks to the
5 guiding principles for set forth in *Shapiro*.

6 The first guiding principle is that “public interest” does not equate with
7 mere curiosity. The Court concludes the public has an interest in how tax
8 dollars are spent. The effort to inform the public about Storey County’s
9 spending for the Washington, D.C. trip was not a matter of mere curiosity. This
10 guiding principle weighs in favor of finding the communication and the
11 statement were made in direct connection with an issue of public interest.

12 The second guiding principle is that a matter of public interest should be
13 something of concern to a substantial number of people; a matter of concern to
14 a speaker and a relatively small specific audience is not a matter of public
15 interest. How Storey County tax dollars are spent is an important matter to all
16 Storey County taxpayers and not just a matter of concern to Toll and a relatively
17 small specific audience. This guiding principle weighs in favor of finding the
18 communication and the statement were made in direct connection with an issue
19 of public interest.

20 The third guiding principle is that there should be some degree of closeness
21 between the challenged statements and the asserted public interest – the
22 assertion of a broad and amorphous public interest is not sufficient. The
23 communication criticized Gilman and other county officials about the spending
24 for the trip. The Court concludes there is a degree of closeness between the
25 asserted public interest – responsible spending of taxpayer dollars – and
26 information regarding the Washington, D.C. trip. The Court concludes these
27 communications are not an assertion of a broad and amorphous public interest.
28 This guiding principle weighs in favor of finding the communication and the

1 statement were made in direct connection with an issue of public interest.

2 The fourth guiding principle is the focus of the speaker's conduct should be
3 the public interest rather than a mere effort to gather ammunition for another
4 round of private controversy. The focus of Toll's communication was whether
5 the use of tax dollars for the trip was legitimate, and in the best interests of
6 Storey County taxpayers. The Court concludes Toll's statement was in the
7 public interest and not a mere effort to gather ammunition for another round of
8 private controversy. This guiding principle weighs in favor of finding the
9 communication and the statement were made in direct connection with an issue
10 of public interest.

11 The fifth and final guiding principle is that a person cannot turn otherwise
12 private information into a matter of public interest simply by communicating it
13 to a large number of people. The Court concludes the information regarding the
14 spending of taxpayer dollars on the Washington, D.C. trip was not private
15 information but a matter of public interest in Storey County. This guiding
16 principle weighs in favor of finding the communication and the statement were
17 made in direct connection with an issue of public interest.

18 The Court concludes the communication and the statement were made in
19 direct connection with an issue of public interest.

20
21 *3. Truthful statement or made without knowledge of falsehood*

22 The last issue on the question of whether the communication was a good
23 faith communication is whether the communication was truthful or made
24 without knowledge of its falsehood. In his first affidavit Toll testified that he
25 conducts research for the pieces he writes. In this communication, Toll related
26 that the Storey County lobbyist reported on the lobbying efforts during the
27 Washington, D.C. trip and Toll provided a link for readers to listen to the
28 lobbyist's report. Toll downplayed the lobbying efforts. He included

1 information that the week of the U.S. presidential inauguration is not the best
2 week to do business in Washington, D.C. Gilman does not deny attending the
3 inauguration. Toll included receipts he received from the County which
4 included the handwritten notation “DC trip to Trump inauguration.” Toll
5 suggested an alternative to traveling to Washington to lobby – Skype. This
6 probably should not be taken too seriously. But neither should the statement,
7 “we paid \$7,611.50 for them to attend the inauguration” be taken out of context
8 and understood literally. Read in the context of the full communication, which
9 includes statements about who Gilman and the lobbyist talked to, a link to the
10 lobbyist’s report to the County Commission, the receipts indicating “DC trip to
11 Trump inauguration,” a reasonable person would read the statement “we paid
12 \$7,611.50 for them to attend the inauguration” to mean that the big event
13 during the lobbying trip was the inauguration, not that nothing was done in
14 connection with the zip code issue. The Court concludes the statement in
15 context is not false or susceptible to a defamatory construction.

16 The Court concludes Toll met the burden under NRS 41.660(3)(a). The
17 Court concludes the communication and statement were made in furtherance of
18 the right to free speech in direct connection with a issue of public concern.

19
20 *4. Burden shifts to Gilman*

21 Because Toll met the burden under NRS 41.660(3)(a) the Court must
22 determine whether Gilman demonstrated with prima facie evidence a
23 probability of prevailing on the his defamation per se claim.

24 Gilman’s evidence is his affidavit testimony, Opp. Ex. 3, ¶ 97-98. Gilman
25 testified the trip was on behalf of Storey County and there was significant
26 lobbying. As stated above, a reasonable reader of this communication would not
27 take the statement, “we paid \$7,611.50 for them to attend the inauguration”
28 literally. Read in the context of the full communication, which includes

1 statements about who Gilman and the lobbyist talked to, a link to the lobbyist's
2 report to the County Commission, the receipts indicating "DC trip to Trump
3 inauguration," a reasonable person would read the statement "we paid
4 \$7,611.50 for them to attend the inauguration" to mean that the big event
5 during the lobbying trip was the inauguration, not that nothing was done in
6 connection with the zip code issue. The Court concludes Gilman failed to
7 produce prima facie evidence that the communication was false or defamatory.
8 The Court concludes Gilman also failed to prove actual malice – that Toll made
9 the communication knowing it was false or the statement acted with a high
10 degree of awareness of the probable falsity of the statement or had serious
11 doubts as to the publication's truth.

12 The Court concludes Gilman failed to demonstrate with prima facie evidence
13 a probability of prevailing on the his defamation per se claim.

14
15 *5. Discovery*

16 Gilman requested an opportunity to conduct discovery under NRS
17 41.660(4). Gilman failed to make the showing required by NRS 41.660(3)(b).
18 The information which allegedly supports Toll's accusations came from the
19 Storey County manager's office and is reasonably available without discovery.
20 Therefore the request to conduct discovery is denied.

21 Based upon the foregoing the special motion to dismiss must be and is
22 granted as to the Washington, D.C. trip communication.

23
24 **E. Special consideration regarding rules and regulations**

25 The statement regarding special consideration regarding rules and
26 regulations come from a communication Toll published on December 3, 2017. A
27 copy of the communication is Exhibit 8 to Gilman's opposition. The language at
28 issue is:

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Special Interests

The Commissioner Lance Gilman – TRIC Special Interest merry-go-round that gives Mr. Gilman and TRIC access to the Storey County checkbook, tax coffers, real property and special consideration regarding rules and regulations.

After this opening paragraph Toll lists five examples of the alleged special consideration. Gilman’s challenge to the Storey County reconveying land to TRIC without consideration was addressed above. Gilman does not argue any of the other items on the list are defamatory.

Taken in context, which is that Gilman receives special consideration and here are five examples of special consideration, one that was addressed above and four that Gilman does not challenge, Gilman has failed to show that the statement is defamatory. Rather the communication is rhetorical hyperbole, vigorous epithets, and lusty and imaginative expressions of contempt and language used in a loose, figurative sense. Such language will not support a defamation action. *Grenier*.

The Court concludes the special motion to dismiss must be granted as to this portion of Gilman’s claim.

F. Reimbursing the ethics fine and recall expenses

The statement regarding reimbursing the County for recall expenses comes from a communication Toll published on December 3, 2017. A copy of the communication is Exhibit 6 to Gilman’s opposition. The language at issue is:

Brothel Owner Lance Gilman told thestoryteller.online he will cover the 1000.00 fine incurred by his ethics investigation request filed against Sheriff Gerald Antinoro.

In the spirit of moving peacefully and constructively forward, we have pledged to not only pay the \$1,000 fine imposed on the Sheriff as a result of our petty complaint but also reimburse Storey County for the estimated \$30,000 spend on the Recall Election.

Gilman argues these statements are not true.

1 Statements cannot form the basis of a defamation action if they cannot be
2 reasonably interpreted as stating actual facts about an individual. Thus,
3 rhetorical hyperbole, vigorous epithets, lusty and imaginative expressions of
4 contempt and language used in a loose, figurative sense will not support a
5 defamation action. *Grenier*.

6 The Court concludes this communication and the specific statements are
7 rhetorical hyperbole and cannot be reasonably interpreted as stating actual
8 facts about Gilman. Therefore the Court concludes the special motion to
9 dismiss must be granted as to this portion of Gilman's claim.

10
11 **V. ORDER**

12 **IT IS ORDERED:**

13 Gilman may conduct discovery limited solely to information as to whether
14 Toll knew the resident communications were false or whether he acted with a
15 high degree of awareness of the probable falsity of the statement or had serious
16 doubts as to the publication's truth.

17 Gilman's discovery must be completed by May 11, 2018. Gilman will have
18 until May 25, 2018 to file and serve a supplemental opposition to the anti-
19 SLAPP motion. Toll will have until June 8, 2018 to file a supplemental reply.
20 Toll will file a request to submit the matter for decision on or before June 8,
21 2018.

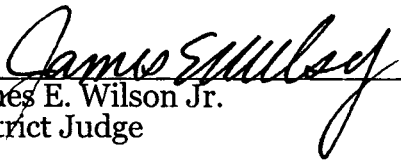
22 The decision on the Anti-SLAPP Special Motion to Dismiss regarding the
23 resident statements and Toll's request for attorney's fees and costs will be
24 delayed until Gilman completes the limited discovery and the parties complete
25 the ordered briefing.

26 Other activity in this case is stayed until the Court rules on the anti-SLAPP
27 motion regarding resident communications.

28 /////

1 The special motion to dismiss is granted as to the statements related to
2 reverse graft, re-licensing Mustang Ranch, receiving land with zero
3 consideration, the Washington, D.C. trip, special consideration regarding rules
4 and regulations, and reimbursing ethics fine and recall expenses.

5 April 9, 2018.

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7 _____
8 James E. Wilson Jr.
9 District Judge
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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of the First Judicial
3 District Court, and I certify that on April 9, 2018, I served the foregoing
4 Order by:

5 Placing a true and correct copy of it in a sealed, envelope, postage
6 prepaid, and depositing the envelope in the U.S. Post Office mail box at
7 1111 South Roop Street, Carson City, Nevada; or

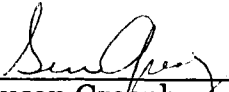
8 Placing a true and correct copy of it in the pick up box located in the
9 Carson City Court Clerk's office.

10 I used the following addresses:

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18 Susan Greenburg
19 Judicial Assistant
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