CA No. 20-15388

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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STEVE WYNN, Plaintiff-Appellee, vs. LISA BLOOM; and THE BLOOM FIRM, Defendants-Appellants.	D.C. No. 2:18-cv-00609-JCM-NJK (Nevada, Las Vegas)

Appeal from the United States District Court
for the District of Nevada

AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL OF THE DISTRICT COURT'S ORDER DENYING SPECIAL ANTI-SLAPP MOTION TO DISMISS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, C.A. Goldberg PLLC and McLetchie Law state that they have no parent corporation and that no publicly held corporation owns 10% or more of their respective stocks.

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STATEMENT OF AUTHORSHIP

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), C.A. Goldberg PLLC and McLetchie Law state that:

(i) No party or party's counsel authored the brief in whole or in part;

(ii) No party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(iii) No person—other than the amici curiae, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF INTEREST

C. A. Goldberg PLLC is a victim's rights firm located in Brooklyn, New York. McLetchie Law is a civil rights law firm with offices in Las Vegas, Nevada and Santa Ana, California. Our firms have fought for our clients' rights to share their stories with the public, holding organizations and individuals to account for their unconscionable behavior and abuses of power.

We have an interest in the outcome of this case because it involves the type of party we often fight in court: a powerful, highly resourced public figure who launches strategic lawsuits against public participation (SLAPPs) to intimidate his victims into silence and keep his misdeeds out of the public eye. Affirming the District Court's denial of Ms. Bloom's anti-SLAPP motion to dismiss would give the green light to powerful litigants to launch SLAPPs at speakers' attorneys, grievously undermining their ability to zealously represent their clients by manufacturing conflicts of interest and disincentivizing them from representing those who seek to hold the rich and powerful to account. Thus, C.A. Goldberg PLLC and McLetchie Law respectfully request that this Court reverse the District Court's denial of Ms. Bloom's anti-SLAPP motion to dismiss.

SUMMARY OF ARGUMENT

Wealthy and powerful SLAPP plaintiffs stand little to lose by attempting to silence critics and accusers by dragging them through costly legal proceedings.

Recognizing this imbalance, the Nevada legislature aimed to curb abuses of the litigation process by creating "a mechanism that allows a citizen to obtain prompt review of potential SLAPP lawsuits and have them dismissed before she is forced to endure the burdens and expense of the normal litigation process." *Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 802 (9th Cir. 2012). The Ninth Circuit has been a leader in providing anti-SLAPP protections to speakers. *See, e.g.*, *Clifford v. Trump*, No. 18-56351, 2020 WL 4384081, *1 (9th Cir. July 31, 2020) (unpublished) (holding that procedures of state anti-SLAPP law apply in federal court while recognizing that the Fifth Circuit held opposite). This Court should reaffirm its commitment to protecting speakers' First Amendment rights against the tyranny of vexatious SLAPP suits.

In the instant case, Mr. Wynn has found a new target: his accuser's attorney. If the District Court's Order stands, not only will it have serious impact on the Ms. Bloom and her (former) client in defending themselves against Mr. Wynn's litigation strategy, but it will send a devastating message to attorneys who represent victims of the powerful. And that message is, "if you dare engage in pre-litigation advocacy on behalf of your client, you will not only be forced to withdraw the case but you will face liability yourself." One need not be cynical to accept that—as argued more thoroughly in Appellants' Opening Brief—Mr. Wynn's suit is a meritless attempt to punish Ms. Bloom for making good faith communications in direct connection with

the public interest of an internationally renowned casino mogul's misconduct toward her client. Rather, Mr. Wynn's suit is a bald-faced attempt to disadvantage his accuser by conflicting her attorney, Ms. Bloom, out of further representing her against him.

Ms. Bloom, like all attorneys, is required by the rules of professional conduct to believe that her client is telling the truth before she agrees to represent her. If Mr. Wynn truly believes that Ms. Bloom has violated her duty of candor by engaging in pre-litigation advocacy for her client, the legal disciplinary system provides a more appropriate remedy that does not involve clogging up an already overburdened Federal docket.

Finally, the order at issue suggests that Ms. Bloom's attempts to settle this matter are proof of malice. (EOR0010.) For attorneys to represent their clients effectively and for justice to be administered more efficiently among litigants and the courts, pre-litigation settlement negotiations should be encouraged. Construing private and confidential settlement negotiations as indicia of "actual malice" will discourage socially beneficial settlements across the board; under the Order, the mere act of negotiating with a potential litigant exposes an attorney to liability.

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ARGUMENT

I. Nevada's Litigation Privilege[1] Makes Ms. Bloom's Communications Non-Actionable as a Matter of Law.

As the Federal District Court for the District of Nevada has recognized, the scope of Nevada's litigation privilege is quite broad: "To be protected, the defamatory communication need not be relevant to the proposed or pending litigation; it need only be related in some way to the subject of the controversy. The privilege applies to communications outside of court and ***those made before litigation has commenced*** as well as those made during actual judicial proceedings." *In re Davis*, 312 B.R. 681, 690 (Bankr. D. Nev. 2004) (citing *Fink v. Oshins*, 118 Nev. 428, 49 P.3d 640, 644 (2002)) (emphasis added).

"[F]or the privilege to apply (1) a judicial proceeding must be contemplated in good faith and under serious consideration, and (2) the communication must be related to the litigation." *Clark Cty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 383, 213 P.3d 496, 503 (2009) (citing *Fink,* 118 Nev. at 433–34, 49 P.3d at 644.) The policy behind the privilege is to grant attorneys "the utmost freedom in their efforts to obtain justice for their clients." *Greenberg*

[1] Although the parties did not appear to brief this issue in the District Court or on appeal, review of whether the litigation privilege applies in this matter "is necessary to prevent a miscarriage of justice" and "the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." *Bolker v. Comm'r*, 760 F.2d 1039, 1042 (9th Cir. 1985).

Traurig v. Frias Holding Co., 130 Nev. 627, 630, 331 P.3d 901, 903 (2014) (quotation omitted). Indeed, the privilege is "primarily for the client's benefit." *Id.* at 904. *Searcy v. Esurance Ins. Co.*, 243 F. Supp. 3d 1146, 1155 (D. Nev. 2017).

Here, it is not disputed that litigation against Mr. Wynn was being contemplated by Ms. Bloom's client, as their retainer agreement reflected an attempt at procuring a pre-litigation settlement. (*See* EOR0273-274.) In the instant matter, Ms. Bloom's publication of the allegedly defamatory press release is inextricably linked to an action taken for the benefit of her client in a putative lawsuit that was under contemplation. Thus, because the litigation privilege protects Ms. Bloom's speech in this instance, Mr. Wynn cannot make a prima facie case of defamation as a matter of law. *See Wynn v. Smith*, 117 Nev. 6, 10 (Nev. 2001); *see also Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 718 (2002) (elements of defamation require publication to be unprivileged).

II. The Order Discourages Attorneys from Engaging in Important Pre-Litigation Settlement Negotiations.

Settlements to end litigation—or avoid it entirely—have long been favored by this Court. Indeed, the "Ninth Circuit is firmly committed to the rule that the law favors and encourages compromise settlements" as "there is an overriding public interest in settling and quieting litigation." *Ahern v. Cent. Pac. Freight Lines*, 846 F.2d 47, 48 (9th Cir. 1988) (citing *United States v. McInnes*, 556 F.2d 436, 441 (9th

Cir.1977)). "It is well recognized that settlement agreements are judicially favored as a matter of sound public policy. Settlement agreements conserve judicial time and limit expensive litigation." *Ahern*, 846 F.2d at 48 (citing *Speed Shore Corp. v. Denda*, 605 F.2d 469, 473 (9th Cir.1979)). Such settlements are impossible without the ability to make frank negotiations, which involves a full fleshing out of potential allegations against a putative defendant.

Here, Ms. Bloom's prior efforts to settle the case were interpreted by the District Court as satisfying the element of malice in the defamation of a public figure. Basing a finding of "actual malice" on an attorney's desire to "put pressure on" a potential defendant to settle claims before litigation is formally initiated would have the unintended consequence of dissuading parties from pre-litigation settlements. The legal system's dedication to parties' freely exploring pre-litigation settlement is so entrenched that Federal Rules of Evidence has a special rule prohibiting compromise offers and negotiations from being admitted into cases as evidence. See Fed. R. Evid. 408. Attorneys should not be punished for making financial demands on the other side or putting pressure on the opposing party to come to the table by speaking publicly about their client's case. The legitimacy of aggressive pre-litigation settlement tactics is just as appropriate in cases of a personal and intimate nature, as any other type of litigation. Indeed, under the Order, attorneys would

likely forego opportunities to make pre-litigation settlements and forge ahead with presenting their cases to the already-overburdened dockets of the federal courts.

III. This Court Must Reverse the District Court's Order Because It Allows SLAPP Plaintiffs to Silence Speakers by Conflicting Out their Attorneys.

Anti-SLAPP legislation creates an essential procedural mechanism for speakers to exercise their First Amendment rights without being silenced by litigation (and the onerous costs it entails). The prospects of quick disposal of the suit and fee shifting attract qualified attorneys to represent these speakers. Mr. Wynn's attack on his accuser, by way of legal action against her attorney Ms. Bloom, is an end-run around these protections. By allowing Mr. Wynn's SLAPP suit to move forward, the Order permits powerful abusers—intentionally conflicting out the formidable attorneys who are best situated to represent their accusers.

Under the Order, attorneys who dare take on powerful and litigious defendants will be forced to either choose to remain wholly silent regarding their client's case or risk incurring the personal liability of a meritless suit. The ultimate impact is on the victims themselves – who will be disadvantaged by the reluctance of victims' rights attorneys to take on these powerful defendants both in these courts and the court of public opinion and who may lose the privacy-promoting option of pre-litigation settlements because such settlements could be misconstrued later as

showing malicious intent. Victims will ultimately feel limited in what they can say publicly in telling their stories, as the Order turns their advocates into SLAPP targets.

The Order provides a blueprint for stifling speakers by potentially forcing them to switch attorneys every time he or she speaks publicly about the case, as the incentive to advocate for victims that cannot afford to defend themselves evaporates when there is a high risk of having to defend their own suit. This prejudices the victim who has to go through the delay, expense, and strategic disadvantage of finding a new lawyer brave enough to take the case.

IV. This Court Must Reverse the Order Because Attorneys Are Committed to Candor and Belief in the Merits of their Case.

Claims that an attorney lied, and did so with "actual malice," by publicly relating her client's claims implicitly undermine the presumption that attorneys commit to candor and to believing there is merit to the client's case. The Nevada Rules of Professional Conduct, for instance, provide that "in the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person." Nev. R. Prof. Cond. 4.1(a). Furthermore, these rules mandate that "a lawyer shall not present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law." Nev. R. Prof. Cond. 3.1. Thus, there should be a presumption that the lawyer is making truthful

representations and finds merit in the case because the rules of the profession require it, which precludes the possibility of actual malice.

Here, Ms. Bloom provided the facts of her case, corroborated by both her client and witnesses, and followed up with additional information after the Mr. Wynn provided clarification. An "inaccurate statement is considered substantially true if there is no difference in effect on the mind of the reader from that which the pleaded truth would have produced." *Price v. Stossel,* 620 F.3d 992, 1000 (9th Cir., 2010) (citing *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991)); *see also Rosen v. Tarkanian*, 135 Nev. 436, 440, 453 P.3d 1220, 1224 (Nev. 2019) ("in a defamation action, it is not the literal truth of each word or detail used in a statement which determines whether or not it is defamatory; rather, the determinative question is whether the 'gist or sting' of the statement is true or false.") The audience of Ms. Bloom's statements, about Wynn's actions, would have perceived that the "gist" or "sting" of Ms. Bloom's message is that her client intended to seek legal action based on her allegations.

As Ms. Bloom did in this instance, attorneys go through a process of vetting their client's credibility and the facts of their case to follow the Rules of Professional Conduct. When clients do not feel safe providing privileged information to their attorney—for fear the attorney may become a defendant in a

collateral SLAPP suit—it will deter them from speaking and seeking justice. Thus, the Order must be reversed.

CONCLUSION

Allowing the Order to stand will erode the Ninth Circuit's legacy of protecting those who dare share ugly truths about the wealth and powerful—as well as their attorneys. Thus, the Order must be reversed.

DATED this 9th day of September, 2020.

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STATEMENT OF RELATED CASES

Amici Curiae are not aware of any related cases pending in this circuit.

DATED this 10th day of September, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), Ninth Circuit R. 32-1, I hereby verify that the foregoing AMICI CURIAE BRIEF is proportionally spaced 14-point font, contains 2,285 words, and is shorter than fifteen (15) pages in length.

DATED this 10th day of September, 2020.

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The undersigned hereby certifies that she is a person of such age and discretion as to be competent to serve papers.

That on September 10, 2020, she served a copy of the above and foregoing AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL OF THE DISTRICT COURT'S ORDER DENYING SPECIAL ANTI-SLAPP MOTION TO DISMISS via email to all registered case participants on this date because it is a sealed filing or is submitted as an original petition or other original proceeding and therefore cannot be served via the Appellate Electronic Filing system.

/s/ Pharan Burchfield
Employee of McLetchie Law

EXHIBIT B

(Goldberg Declaration)

EXHIBIT B

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DECLARATION OF CARRIE A. GOLDBERG IN SUPPORT OF MOTION FOR LEAVE TO FILE AND FOR PERMISSION TO FILE LATE AMICI CURIAE BRIEF

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