

CLERK OF THE COURT

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8 **DISTRICT COURT**
 9 **CLARK COUNTY, NEVADA**

10 IQTAXX, LLC, a Nevada Limited Liability
 11 Company
 12 Plaintiff,
 13 vs.
 14 PAMELA BOLING, an individual; and
 15 DOES I through X, inclusive, and ROE
 16 BUSINESS ENTITIES XI through XX, inclusive,
 17 Defendants.

Case No.: A-15-728426-C
 Dept. No.: XV

ORDER

17 **ORDER GRANTING DEFENDANT PAMELA BOLING'S**
 18 **SPECIAL MOTION TO DISMISS UNDER NRS 41.660**

19 This matter, having come before the Court on Defendant Pamela Boling's
 20 Special Motion to Dismiss Under NRS 41.660, and it appearing, upon argument of
 21 counsel and for good cause shown, the motion is granted:

22 NRS 41.635 et seq., Nevada's Anti-SLAPP statute, creates a procedure for
 23 early dismissal of cases targeting speech and conduct protected by the First
 24 Amendment when they lack merit. As provided for in *John v. Douglas Cnty.*
 25 *School Dist.*, 125 Nev. 746 (Nev. 2009), the statute creates a two-step analysis for
 26 courts to follow in deciding whether to dismiss a case under its provisions. First,
 27 under NRS 41.660(3)(a), the moving defendant has the burden of showing, by a

1 preponderance of the evidence, that the plaintiff's suit is "based upon a good
2 faith communication in furtherance of the right to petition or the right to free
3 speech in direct connection with an issue of public concern." If the moving
4 defendant meets this burden, the burden of proof then shifts to the plaintiff to
5 establish "by prima facie evidence a probability of prevailing on the claim."
6 NRS 41.660(3)(b). The plaintiff must introduce evidence establishing his claims to
7 satisfy this burden. Anti-SLAPP motions have traditionally been treated as a
8 motion for summary judgment, and so the plaintiff can survive a special motion
9 to dismiss by establishing a genuine issue of material fact. If the plaintiff fails to
10 do this, his case must be dismissed.

11 **I. FACTUAL BACKGROUND**

12 In April 2015, Defendant retained/hired Plaintiff to prepare certain tax
13 documents on her behalf for filing with the IRS, including an economic hardship
14 filing. The parties dispute the amount of work and actual work that Plaintiff
15 completed. The parties dispute whether Plaintiff filed an economic hardship.
16 After hearing from the Las Vegas Taxpayer Advocate Office in August 2015 that
17 an economic hardship had not been filed on her behalf, Defendant attempted
18 to contact Plaintiff by telephone. On one of these attempts, she was routed to
19 a third-party call center that informed her Plaintiff's phone number was
20 inactive.¹ Aggravated by this exchange and unsatisfied with Plaintiff's work,
21 Defendant posted a review of Plaintiff on the web site Yelp on September 11,
22 2015. This review recounted her experience with the third-party call center and
23 concluded with the statement "This is MALPRACTICE!"

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26 ¹ Plaintiff admits that, during the time Defendant attempted to call Plaintiff, there was a
27 malfunction in Plaintiff's phone system that caused callers to be directed to a third-party call
center.

1 whether a Special Motion to Dismiss should be granted. Under NRS 41.660(3)(a),
2 an Anti-SLAPP movant has the initial burden of establishing, by a
3 preponderance of the evidence, that the plaintiff's claims are "based upon a
4 good faith communication in furtherance of the right to petition or the right to
5 free speech in direct connection with an issue of public concern." This burden
6 may be met by showing that the statement at issue is a "[c]ommunication
7 made in direct connection with an issue of public interest in a place open to the
8 public or in a public forum, which is truthful or is made without knowledge of its
9 falsehood." NRS 41.637(4). The 2013 revisions to the Anti-SLAPP statute,
10 particularly the inclusion of NRS 41.637(4), were meant to broaden the scope of
11 the statute to include statements in furtherance of the right to free speech,
12 instead of focusing solely on the right to petition.

13 Under NRS 41.660(3)(b), once the Court finds that the Anti-SLAPP movant
14 has met its burden on the first prong, the burden then shifts to the plaintiff to
15 show, by *prima facie* evidence as defined by California case law, that it has a
16 probability of prevailing on its claims. S.B. 444, 2015 Leg., 78th Sess., §12.5(2)
17 (Nev. 2015).

18 An Anti-SLAPP motion must be brought within 60 days of a defendant
19 being served with the complaint. See NRS 41.660(2). There is no dispute that
20 Defendant's motion was timely filed. Additionally, an order granting a Special
21 Motion to Dismiss acts as an adjudication on the merits. See NRS 41.660(5).

22 **B. Prong One: Good-Faith Communication in Direct Connection with an Issue**
23 **of Public Concern**

24 The Court finds that Defendant has met her burden of proof under the first
25 prong of Nevada's Anti-SLAPP statute. Plaintiff's claims are primarily based on
26 the statement "This is MALPRACTICE!", which appears only in Defendant's
27 September 11, 2015 Yelp review. Complaints of non-criminal conduct by a

1 business constitute matters of public concern, particularly concerning reviews
2 on web sites such as Yelp. See *Mt. Hood Polaris, Inc. v. Martino (In re Gardner)*,
3 563 F.3d 981, 989 (9th Cir. 2009). The Court agrees with the statement in
4 *Neumont Univ., LLC v. Little Bizzy, LLC*, 2014 U.S. Dist. LEXIS 69168, *33 (D. Nev.
5 May 2014) that "consumers play a vital role" in spreading awareness of
6 companies' products and services, and that "online fora for the exchange of
7 those ideas play an increasingly large role in informing consumers about the
8 choices that make sense for them." California courts have also recognized the
9 importance of such statements, finding that:

10 "The growth of consumerism in the United States is a matter of
11 common knowledge. Members of the public have recognized their
12 roles as consumers and through concerted activities, both private
13 and public, have attempted to improve their . . . positions vis-à-vis
14 the supplies [sic] and manufacturers of consumer goods. They
15 clearly have an interest in matters which affect their roles as
consumers, and peaceful activities, such as plaintiffs', which inform
them about such matters are protected by the First Amendment."

16 *Willbanks v. Wolk*, 121 Cal. App. 4th 883, 899 (2004) (quoting *Paradise Hills*
17 *Associates v. Procel*, 235 Cal. App. 3d 1528, 1544 (1991)).

18 Defendant's statements are statements by a consumer of Plaintiff's
19 services regarding the quality of Plaintiff's services. The statements contained in
20 Defendant's November 3, 2015 updated review are also statements regarding
21 the quality of Plaintiff's services. The authorities cited by Defendant, such as
22 *Wolk*, 121 Cal. App. 4th at 899, establish that Defendant's statements in both her
23 September 11, 2015 and November 3, 2015 review are statements on matters of
24 public interest.

25 There is no dispute that Yelp is a well-known public forum, and Defendant
26 has provided evidence that her allegedly defamatory statements were not
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1 made with knowledge of their falsity. Plaintiff failed to provide evidence
2 tending to show that Defendant knew her statements were false when she
3 made them. Defendant thus made the statements at issue in good faith under
4 NRS 41.637(4). Defendant proved by a preponderance of the evidence that
5 her statements were on a matter of public interest, in a public forum, and were
6 made without knowledge of their falsity. She thus satisfied her burden under
7 prong one of the Anti-SLAPP statute, and the burden shifts to Plaintiff to show a
8 probability of prevailing on the merits of its claims.

9 **C. Prong Two: Probability of Prevailing on the Merits**

10 Plaintiff has failed to meet its burden under NRS 41.660(3)(b). Statements
11 of opinion and rhetorical hyperbole are not actionable, as Supreme Court
12 precedent establishes that "there is no such thing as a false idea. However
13 pernicious an opinion may seem, we depend for its correction not on the
14 conscience of judges and juries but on the competition of other ideas." *Gertz v.*
15 *Robert Welch*, 418 U.S. 323, 339-40 (1974). If a reasonable person would not
16 interpret a statement as an assertion of fact, then the statement is protected
17 under the First Amendment. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1
18 (1990). To determine whether a statement is actionable, the Court must ask
19 whether a reasonable person would be likely to understand the statement as an
20 expression of the source's opinion or a statement of existing fact. See *Pegasus*
21 *v. Reno Newspapers, Inc.*, 118 Nev. 706 (Nev. 2002). A Nevada federal court,
22 applying Nevada law, established a three-factor test in determining whether an
23 allegedly defamatory statement includes a factual assertion: (1) whether the
24 general tenor of the entire work negates the impression that the defendant was
25 asserting an objective fact; (2) whether the defendant used figurative or
26 hyperbolic language that negates that impression; and (3) whether the

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1 statement in question is susceptible to being proved true or false. *Flowers v.*
2 *Carville*, 112 F. Supp. 2d 1202, 1211 (D. Nev. 2000).

3 Additionally, an "evaluative opinion" cannot be defamatory. See *People*
4 *for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 11 Nev. 615, 624-25
5 (Nev. 1995) (finding that claiming depictions of violence towards animals shown
6 in video amounted to "abuse" was protected as opinion) (modified on
7 unrelated grounds in *City of Las Vegas Downtown Redevelopment Agency v.*
8 *Hecht*, 113 Nev. 644, 650 (Nev. 1997)). Such an opinion is one that "involves a
9 value judgment based on true information disclosed to or known by the public.
10 Evaluative opinions convey the publisher's judgment as to the quality of
11 another's behavior, and as such, it is not a statement of fact." *Id.* at 624 (citing
12 *Prosser and Keeton on Torts* 814 (W. Page Keeton, ed.; 5th ed 1984)).

13 Context is vitally important in determining whether a reasonable person is
14 likely to view a statement as one of fact, or one of protected opinion or
15 rhetorical hyperbole. The context of Defendant's statements is Yelp, a well-
16 known online forum for consumer reviews. The Internet is the modern equivalent
17 of the soapbox on the sidewalk, and web sites such as Yelp are the type of
18 public forum that is protected under the First Amendment. The public has
19 become accustomed to seeing fiery rhetoric on online fora, and courts
20 recognize that this context makes it less likely that a reader will interpret
21 statements published in such places as actionable statements of fact. See
22 *Summit Bank v. Rogers*, 206 Cal. App. 4th 669, 696-97 (2012) (finding that readers
23 of statements posed in "Rants and Raves" section of Craigslist "should be
24 predisposed to view them with a certain amount of skepticism, and with an
25 understanding that they will likely present one-sided viewpoints rather than
26 assertions of provable facts"); see also *Global Telemedia Internat., Inc. v. John*
27 *Doe 1*, 132 F. Supp. 2d 1261, 1267 (C.D. Cal. 2001) (finding that Internet postings

1 "are full of hyperbole, invective, short-hand phrases and language not generally
2 found in fact-based documents, such as corporate press releases or SEC
3 filings"); *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1163 (2008) (stating that "online
4 discussions may look more like a vehicle for emotional catharsis than a forum for
5 the rapid exchange of information and ideas").

6 Plaintiff only asserts that the statement "This is MALPRACTICE!" is
7 defamatory, meaning that only Defendant's September 11, 2015 Yelp review is
8 properly considered in determining whether Plaintiff has met its burden. The
9 statement "This is MALPRACTICE!", with the term "malpractice" in all capital
10 letters and with an exclamation mark, in the context of a Yelp review, is a
11 protected statement of rhetorical hyperbole that cannot make out a claim for
12 defamation. Applying the three-factor test enumerated in *Flowers v. Carville*,
13 112 F. Supp. 2d 1202, 1211 (D. Nev. 2000), Defendant's statements are protected
14 statements of emotional hyperbolic opinion. The average Yelp user would not
15 read the statement "This is MALPRACTICE!", with the central term in all capital
16 letters and with an exclamation mark, as a carefully considered legal opinion.
17 The review is much closer to the sort of online "rant" found in cases like *Roger*
18 and *Krinsky*. See *Krinsky*, 159 Cal. App. 4th at 1173, 1178 (finding that in a chat
19 room setting, anonymous post that corporate officers consisted of a
20 "cockroach," "losers," "boobs," and "crooks" were "crude, satirical hyperbole
21 which . . . constitute protected opinion"). The word "malpractice" does not exist
22 in a vacuum, and the Court recognizes that the average reader will not
23 interpret it in a vacuum. See *Fortson v. Colangelo*, 434 F. Supp. 2d 1369, 1384-85
24 (S.D. Fla. 2006) (finding that people do not "read words in a vacuum," and
25 concluding that accusation of basketball player committing "attempted
26 murder" on basketball court was rhetorical hyperbole).

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1 No reasonable person would disagree that the statement at issue is a
2 statement of opinion of Defendant, and a trial to determine whether Plaintiff
3 actually committed malpractice would not change this conclusion. This
4 conclusion is reinforced by the fact that, according to the cease and desist
5 letter sent on October 30, 2015, which is properly considered as evidence
6 before the Court, Plaintiff stated that Defendant's posting was "an exaggerated
7 emotional rant review." Contrary to Plaintiff's argument that malpractice "is a
8 factual determination generally concluded by a tribunal," in this context the
9 statement "malpractice" is a statement of opinion. As explained in *Gertz*, the
10 purpose of forums like Yelp is for some negative reviews and some positive
11 reviews to co-exist; this is how the First Amendment is supposed to work.

12 Defendant additionally provided reasonable factual bases for her
13 assertion that Plaintiff committed malpractice, regardless of whether her
14 conclusion was correct. Defendant instructed Plaintiff to file an economic
15 hardship on her behalf, and then alleges she was told that Plaintiff had not filed
16 it. She alleges that Plaintiff did not return her calls. She alleges that Plaintiff
17 failed to stay in communication with Defendant and failed to keep her informed
18 as to the status of filing the hardship. When she finally spoke with Plaintiff
19 following Plaintiff's transmission of a cease and desist letter, Plaintiff informed her
20 that it had filed the economic hardship. Defendant was later informed by the
21 IRS that this was not true. Regardless of whether Plaintiff actually filed an
22 economic hardship, the facts as Defendant understood them made her
23 statement of opinion reasonable, particularly given that Plaintiff admits there
24 was a glitch in its phone system that routed callers to a third-party call center.

25 Plaintiff has failed to provide *prima facie* evidence, as defined in the
26 statute, of a probability of prevailing on its claims. To the extent that a Special
27 Motion to Dismiss under NRS 41.660 is treated as a motion for summary judgment,

1 there is no genuine dispute as to any material fact that the statement "This is
2 MALPRACTICE!" in the context of Defendant's Yelp review is a statement of
3 protected opinion or rhetorical hyperbole.

4 **D. Proposed Amendment**

5 Plaintiff's opposition to Defendant's Anti-SLAPP motion contains a
6 proposed amended complaint. The proposed amended complaint does not
7 plead additional facts that would establish a claim for relief. Therefore, even in
8 the absence of the Anti-SLAPP statute, the case would be subject to dismissal.
9 Furthermore, a plaintiff cannot avoid a ruling on Defendant's Anti-SLAPP Motion
10 by amending its complaint. See *Sylmar Air Conditioning v. Pueblo Contracting*
11 *Services, Inc.*, 122 Cal. App. 4th 1049, 1055 (2004).

12 **E. Evidentiary Objections**

13 Defendant's counsel objected during the hearing that the Court could
14 not consider the economic hardship allegedly filed by Plaintiff, as Plaintiff had
15 not placed it in the record despite having a reasonable opportunity to do so.
16 Defendant's objection as to the existence or contents of the economic hardship
17 are sustained. Plaintiff could have placed the economic hardship in the record,
18 and the declarations in support of Plaintiff's opposition to Defendant's Anti-
19 SLAPP Motion are insufficient to establish the alleged fact that Plaintiff filed the
20 economic hardship. Even if the economic hardship had been filed and was
21 before the Court, however, it would not change the conclusion that
22 Defendant's allegedly defamatory statement is a statement of opinion not
23 subject to a claim for defamation.

24 **F. Damages, Costs, and Attorneys' Fees**

25 Pursuant to NRS 41.670(1)(a), a defendant that prevails on a Special
26 Motion to Dismiss under NRS 41.660 shall receive a mandatory award of costs
27 and reasonable attorney's fees. NRS 41.670(1)(b) also provides for an award of

1 statutory damages against a plaintiff of up to \$10,000. In this case, the Court
2 finds that \$1,000 is appropriate to deter Plaintiff and other similar plaintiffs from
3 filing SLAPP suits in the future.

4 **III. CONCLUSION**

5 Accordingly, IT IS HEREBY ORDERED that Defendant's Motion is GRANTED.
6 It is ORDERED and adjudged that all Plaintiff's claims against Defendant Pamela
7 Boling are hereby DISMISSED with prejudice.

8 It is FURTHER ORDERED that Defendant shall be awarded an amount of
9 \$1,000 in statutory damages pursuant to NRS 41.670(1)(b).

10 It is FURTHER ORDERED that Defendant is entitled to recover her costs and
11 reasonable attorneys' fees, and may file a separate motion for costs and
12 attorney's fees pursuant to NRS 41.670(1)(a).

13
14 Dated this 4th day of April, 2016.

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16 
17 DISTRICT COURT JUDGE
18 MR

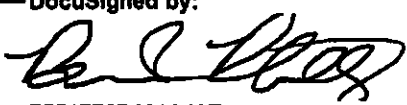
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