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11 **UNITED STATES DISTRICT COURT**
12 **DISTRICT OF NEVADA**

13 ABBEY DENTAL CENTER, INC.,
14 a Nevada Corporation,

15 Plaintiff,

16 v.

17 CONSUMER OPINION LLC, a Nevada
18 Limited liability company; DOES 1-10;
19 and ROE ENTITIES 1-10, inclusive,

20 Defendants.

Case No.: 2:15-cv-02069-GMN-PAL

**DEFENDANT CONSUMER OPINION LLC'S
SECOND SPECIAL MOTION TO DISMISS
FIRST AMENDED COMPLAINT PURSUANT
TO NRS 41.660 AND MOTION FOR
SUMMARY JUDGMENT**

21 Defendant Consumer Opinion LLC hereby files its Second Special Motion to
22 Dismiss pursuant to NRS 41.660 as to Claims 4-8 in Plaintiff Abbey Dental, Inc.'s First
23 Amended Complaint ("FAC") (ECF No. 28), and incorporates a Motion for
24 Summary Judgment pursuant to Fed. R. Civ. P. 56 as to Claims 1-3 in the FAC.¹

25 _____
26 ¹ The complaint was filed on October 27, 2015. Shortly thereafter, Defendant
27 warned Plaintiff that the case was frivolous and would be subject to an Anti-SLAPP
motion. (See Email from Randazza to Amin dated Jan. 6, 2016, attached hereto
as **Exhibit 1**.) Defendant spent more than a year trying to get Plaintiff to come to
its senses. After eight extensions seeking to avoid this, Defendant finally filed its
first Anti-SLAPP motion. (ECF No. 25.) Plaintiff responded by filing an Amended
Complaint 1 day later. The Amended Complaint simply compounds the problem,
and cures nothing.

MEMORANDUM OF POINTS AND AUTHORITIES

1.0 INTRODUCTION

Abbey Dental Center (“Abbey”) doesn’t want people to read negative reviews about it. It tried to suppress those negative reviews with an unsupportable lawsuit. Abbey may be the greatest dental center in the world – but, many of their former patients feel otherwise. They left negative consumer reviews on the Defendant’s consumer review website. The goal here is to silence the negative reviews by suing the platform for the reviews, Consumer Opinion LLC (“Opinion”).

Abbey knows that it cannot sue Opinion based on the contents of the reviews, as Opinion is immune under 42 U.S.C. § 230. See e.g., *Roca Labs, Inc. v. Consumer Op. Corp.*, 140 F. Supp. 3d 1311 (M.D. Fla. 2015); *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450 (E.D.N.Y. 2011); *Nevada Corporate Headquarters, et al. v. Pissed Consumer*, Case No. 13A003332, Las Vegas Justice Court (Jan. 23, 2014) (ECF No. 27-2 at 6). That is why Abbey brings these creative (but unsupportable) claims. However, in its zeal to avoid 42 U.S.C. § 230, it has instead chosen to walk into the Nevada Anti-SLAPP statute and 15 U.S.C. § 1117(a) (providing for an award of attorneys’ fees in “exceptional cases”).

This is a Strategic Lawsuit Against Public Participation (“SLAPP” suit). The Nevada legislature created a substantive immunity from such lawsuits in the form of the Nevada Anti-SLAPP statute. NRS 41.635-70. The Court should dismiss Abbey’s state law claims, with prejudice, award Opinion its attorneys’ fees, and impose a sanction of \$10,000 on Abbey to deter it and other companies from filing suits such as this. NRS 41.670.

Opinion additionally seeks summary judgment as to Abbey’s claims under 15 U.S.C. §§ 1114, 1125(a), and 1125(d), as no amount of discovery or amendment could present a factual issue requiring trial. Opinion seeks separate relief under Fed. R. Civ. P. 56 because Nevada’s Anti-SLAPP statute is substantive in nature

1 and thus does not apply to federal claims. However, since an Anti-SLAPP motion
 2 is dealt with as a motion for summary judgment, it is appropriate to dispense with
 3 all claims in one motion.

4 **2.0 FACTUAL BACKGROUND AND LR 56-1 STATEMENT OF FACTS**

5 Opinion owns and operates the web site <pissedconsumer.com>, which
 6 provides a consumer review forum. (See ECF No. 27-3.) The site allows potential
 7 customers of a business to inform themselves about a given business and its
 8 competitors, and also to serve as a platform for resolving complaints between a
 9 consumer and a business. (See *id.*)

10 Abbey provides dental services. (See ECF No. 27-4.) It has a lot of
 11 unsatisfied customers. They have 34 reviews on Opinion's web site, most (if not
 12 all) of which are negative. (See **Exhibit 2**, Declaration of Trey A. Rothell ["Rothell
 13 Decl."], at Exhibit A.)² The company has received only slightly more favorable
 14 reviews on <yelp.com>, a similar site. (See ECF No. 27-6.)

15 Opinion's web site is <pissedconsumer.com>. As an organizational
 16 necessity, it includes the name the reviewed business in the web site's sub-
 17 domains, for example <abbey-dental.pissedconsumer.com>.
 18 (ECF No. 27-5.) It is industry practice for consumer review web sites to include the
 19 name of a company in the Uniform Resource Locator ("URL") for a page
 20 containing reviews about that company. For Abbey Dental:

- 21 • <yelp.com> uses <yelp.com/biz/abbey-dental-center-las-vegas>.
 22 (See ECF No. 27-6)

23
 24
 25
 26 ² All of these reviews are authored by third-party users of
 27 <pissedconsumer.com>; Opinion does not create any of the reviews.
 (See ECF No. 27-2 at ¶¶ 4-5.)

- 1 • The consumer review web site <ripoffreport.com> uses the construction
2 ripoffreport.com/reports/specific_search/abbey%20dental>. (See ECF
3 No. 27-7.)
- 4 • The Better Business Bureau uses the construction <bbb.org/southern-
5 nevada/business-reviews/dentists/abbey-dental-center-in-las-vegas-
6 nv-60892>. (See ECF No. 27-8.)
- 7 • Angie's List uses <angieslist.com/companylist/us/nv/las-vegas/abbey-
8 dental-reviews-9130791.htm>. (See ECF No. 27-9.)

9 Additionally, to ensure that Internet users can find the reviews on its web
10 site, Opinion provides search result copy . The copy for its page about Abbey is
11 “[number of reviews] ABBEY DENTAL complaints and reviews @Pissed Consumer.”
12 (See ECF No. 1-1 at 2.)³ This type of construction in Google ad copy is also
13 common with consumer review and information web sites. The Better Business
14 Bureau uses “Abbey Dental Center, Inc. – Better Business Bureau.” (ECF No. 1-1 at
15 2.) Angie's List uses “Abbey Dental Center – Las Vegas, NV 89119 – Angies List.”
16 (*Id.*) Yelp uses “Abbey Dental – 61 Photos & 131 Reviews.” (See ECF No. 27-10.)

17 Though it provides a valuable public service by allowing consumers to share
18 their opinions about a business for free, Opinion is itself a business and allows
19 automated advertising on its web site. Opinion does not choose or create the
20 advertising links on the site, however; they are automatically generated by a third
21 party and are targeted at the search history of a given visitor. (See ECF No. 27-2
22 at ¶¶ 9-10.) Each user will see customized ads. (See ECF Nos. 27-5, 27-11.)

23
24
25
26 ³ This copy changes based on the number of reviews posted to
27 <pissedconsumer.com>. Exhibit A to Abbey's Complaint shows 5 reviews, while
current search results show 34 reviews.

3.0 LEGAL STANDARDS

3.1 The Anti-SLAPP Statute

Under Nevada's Anti-SLAPP statute, NRS. 41.635 *et. seq.*, if a lawsuit is brought against a defendant based upon the exercise of its First Amendment rights, the defendant has substantive immunity from suit unless the plaintiff can meet the burden required under the statute. Evaluating the Anti-SLAPP motion is a two-step process. The Movant bears the burden on the first step, and the Non-Moving party bears the burden on the second. See *John v. Douglas County Sch. Dist.*, 125 Nev. 746, 754 (Nev. 2009).

First, the defendant must show, by a preponderance of the evidence, that the plaintiff's claim is "*based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern.*" NRS 41.660(3)(a). One of the specific statutory categories of protected speech is "[c]ommunication[s] made in direct connection with an issue of public interest in a place open to the public or in a public forum, which is truthful or is made without knowledge of its falsehood." NRS 41.637(4).

Second, once the defendant meets its burden on the first prong, the burden then shifts to the plaintiff, which must make a sufficient evidentiary showing that it has a probability of prevailing on its claim. NRS 41.660(3)(b); see also *John*, 125 Nev. at 754.

Federal courts treat Anti-SLAPP motions as a species of motion for summary judgment. See *Haack v. City of Carson City*, No. 3:11-cv-00353-RAM, 2012 U.S. Dist. LEXIS 120137, at *9 (D. Nev. Aug. 22, 2012); *Las Vegas Sands Corp. v. First Cagayan Leisure & Resort Corp.*, No. 2:14-CV-424 JCM (NJK), 2016 U.S. Dist. LEXIS 101028, at *6 (D. Nev. Aug. 2, 2016) (stating "[a]lthough called a 'motion to dismiss,' anti-SLAPP motions are treated like motions for summary judgment."); *Rogers v. Home Shopping Netwk., Inc.*, 57 F. Supp. 2d 973 (C.D. Cal. 1999) (same).

1 Due to a relative dearth of case law applying Nevada's Anti-SLAPP statute,
 2 Nevada courts look to case law applying California's Anti-SLAPP statute,
 3 Cal. Code Civ. Proc. § 425.16, which shares many similarities with Nevada's law.
 4 See *John*, 125 Nev. at 756 (stating that "we consider California case law because
 5 California's anti-SLAPP statute is similar in purpose and language to Nevada's
 6 anti-SLAPP statute"); see also NRS 41.665(2) (defining the plaintiff's *prima facie*
 7 evidentiary burden in terms of California law.)⁴ To the extent federal procedural
 8 rules take over, Fed. R. Civ. P. 56 dovetails with the goals of the SLAPP statute.

9 **3.2 Summary Judgment**

10 The Court is well aware of summary judgment standards, and Opinion will
 11 not waste the Court's time by repeating them. See *Celotex Corp. v. Catrett*, 477
 12 U.S. 317, 325 (1986); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

13 The goals of Fed. R. Civ. P. 56 are consistent with the goals of Anti-SLAPP
 14 statutes – to provide for the early, speedy disposition of "meritless first amendment
 15 cases aimed at chilling expression through costly, time-consuming litigation."
 16 *Batzel v. Smith*, 333 F.3d at 1023-24; see also *Seelig v. Infinity Broad. Corp.*, 97 Cal.
 17 App. 4th 798, 806 (Cal. Ct. App. 2002) (stating that "[t]he goal is to eliminate
 18 meritless or retaliatory litigation at an early stage of the proceedings").

19 It is important to dispose of meritless cases implicating protected speech
 20 early. "[B]ecause unnecessarily protracted litigation would have a chilling effect

21 ⁴ The Nevada Legislature specifically provides for California Anti-SLAPP
 22 jurisprudence to serve as the basis for interpreting Nevada's Anti-SLAPP law:

23 When a plaintiff must demonstrate a probability of success of
 24 prevailing on a claim pursuant to NRS 41.660, the Legislature intends
 25 that in determining whether the plaintiff "has demonstrated with
 26 prima facie evidence a probability of prevailing on the claim" the
 27 plaintiff must meet the same burden of proof that a plaintiff has been
 required to meet pursuant to California's anti-Strategic Lawsuits
 Against Public Participation law as of the effective date of this act.

1 upon the exercise of First Amendment rights, speedy resolution of cases involving
 2 free speech is desirable." *Good Government Group, Inc. v. Superior Court of Los*
 3 *Angeles County*, 22 Cal.3d 672, 685, 586 P.2d 572, 578 (Cal. 1978) citing
 4 *Dombrowski v. Pfister*, 380 U.S. 479, 486-487 (1965).

5 Thus, summary judgment is deemed to be a "favored" remedy in
 6 defamation⁵ cases. Summary judgment is particularly appropriate in cases
 7 involving free speech rights. "Were not summary judgment granted in proper
 8 cases, the threat of protracted litigation might have a chilling effect upon the full
 9 and free exercise of the First Amendment" *Brudwick v. Minor*, 2006 US. Dist.
 10 LEXIS 51608, *63 (D. Colo. July 13, 2006) (citations omitted).

11 **4.0 ARGUMENT AS TO SUMMARY JUDGMENT**

12 All of Abbey's claims share the same basic allegations: Opinion uses
 13 Google ad copy that incorporates Abbey's trademark, Opinion uses a
 14 sub-domain that incorporates Abbey's trademark, and Opinion's web page for
 15 "Abbey Dental" contains advertisements and user-created content critical of
 16 Abbey. The two additional Lanham Act claims that Abbey added in its FAC are
 17 no more meritorious than the claim in its original Complaint. Accordingly,
 18 although Abbey asserts five causes of action, the same basic arguments establish
 19 why all of Abbey's claims fail and cannot be salvaged.

20 **4.1 Elements of a Lanham Act Trademark Infringement Claim**

21 Abbey's first three claims for relief in its FAC are for trademark infringement⁶
 22 under the Lanham Act and violation of the Anticybersquatting Consumer
 23

24 ⁵ While this is not a defamation case in name, Abbey has clearly attempted to
 25 plead around such a claim in a cynical effort to avoid 47 U.S.C. § 230, but its efforts
 cannot evade the immunity from suit provided by the Anti-SLAPP statute.

26 ⁶ Claim 2 of the FAC is for "false designation of origin," but this is synonymous
 27 with trademark infringement under 15 U.S.C. § 1125(a), and thus the same
 standards for these claims apply. 15 U.S.C. § 1125(d) is the Cybersquatting statute.

1 Protection Act ("ACPA") claim for relief accuses Opinion of trademark
2 infringement under Section 43(a) of the Lanham Act. This section provides that
3 anyone is liable in a civil action who:

4 uses in commerce any . . . name . . . or any false designation of origin,
5 false or misleading description of fact, or false or misleading
6 representation of fact, which - (A) is likely to cause confusion, or to
7 cause mistake, or to deceive as to the affiliation, connection, or
8 association of such person with another person, or as to the origin,
9 sponsorship, or approval of his or her goods, services, or commercial
10 activities by another person.

11 15 U.S.C. § 1114(1)(a) similarly forbids one from using any "reproduction" or
12 "colorable imitation of a registered mark in connection with the sale, offering for
13 sale, distribution, or advertising of any goods or services on or in connection with
14 which such use is likely to cause confusion, or to cause mistake, or to deceive."

15 A defendant violates these sections by misrepresenting his own services as
16 someone else's or, conversely, representing someone else's services as his own.
17 See *Jurin v. Google, Inc.*, 695 F. Supp. 2d 1117, 1121 (C.D. Cal. 2010). In a false
18 designation of origin claim, the word "origin" refers to a false or misleading
19 suggestion as to "the producer of the tangible goods that are offered for sale."
20 *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 28, n.1 (2003). To be
21 liable, the defendant must represent that it provides the services of the plaintiff.
22 See *id.* at 31.

23 A trademark infringement plaintiff must show "the defendants' use of the
24 mark is likely to cause confusion or mistake among the general public." *Perfect
25 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1187 (C.D. Cal. 2002).
26 Courts may determine likelihood of confusion as a matter of law at summary
27 judgment. See *Murray v. Cable Nat'l Broad Co.*, 86 F.3d 858, 859 (9th Cir. 1996).

To show a likelihood of confusion, a plaintiff must provide some evidence
that "the similarity of the marks is likely to confuse customers about the source of

1 the products." *Abercrombie & Fitch Co. v. Moose Creek, Inc.*, 486 F.3d 629, 633
2 (9th Cir. 2007). And there must be a likelihood of confusing "an appreciable
3 number of people as to the source of the product," rather than one or two
4 people. *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1151 (9th Cir. 2002).
5 The plaintiff "must demonstrate likely confusion, not mere diversion." *Network*
6 *Automation, Inc. v. Advanced Systems Concepts, Inc.*, 638 F.3d 1137, 1149 (9th
7 Cir. 2011). "'Likelihood of confusion' signifies more than a mere possibility."
8 *1-800 Contacts, Inc. v. Lens.com, Inc.*, 755 F. sup. 2d 1151, 1173 (D. Utah 2010).
9 The Ninth Circuit uses a non-exhaustive eight-factor test enumerated in *AMF Inc.*
10 *v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979) to determine whether a
11 defendant's use of a mark is confusingly similar. However, a defendant has a right
12 to use the mark to "describe goods or services of [a] party, or their geographic
13 origin." 15 U.S.C. § 1115(b)(4). "Nominative fair use" allows a defendant to use a
14 trademark when discussing a plaintiff's products or services. See *Cairns v. Franklin*
15 *Mint Co.*, 292 F.3d 1139, 1151 (9th Cir. 2002).

16 The Ninth Circuit has a three-part test for determining nominative fair use:
17 "First, the product or service in question must be one not readily identifiable
18 without use of the trademark; second, only so much of the mark or marks may be
19 used as is reasonably necessary to identify the product or service; and third, the
20 user must do nothing that would, in conjunction with the mark, suggest
21 sponsorship or endorsement by the trademark holder." *New Kids on the Block v.*
22 *News. Am. Publ'g, Inc.*, 971 F.2d 302 (9th Cir. 1992); see also *Hakkasan LV, LLC v.*
23 *Wang*, 2015 U.S. Dist. LEXIS 33543, *6-7 (D. Nev. Mar. 17, 2015).

24 Though it is not an element of an infringement claim, Abbey also alleges at
25 that Opinion is diverting Internet users to Abbey's competitors by providing
26 advertising on its web site. Even if this were an element of an infringement claim
27 these allegations would not help Abbey. Opinion does not create these

1 advertising links, and they are tailored to the search patterns of visitors. (See ECF
2 No. 27-2 at ¶¶ 9-10.); see also *In re Google Inc. Cookie Placement Consumer*
3 *Privacy Litig.*, 988 F. Supp. 2d 434, 439-40 (D. Del. 2013) (discussing that web sites
4 often leave “part of their webpage blank for third-party companies to insert
5 advertisements,” and that companies online ads use a customer’s personal
6 information to populate these blank spots with advertisements that synchronize
7 with the customer’s personal information); *In re Google Inc. Gmail Litig.*, 2014 U.S.
8 Dist. LEXIS 36957, *14-16 (N.D. Cal. Mar. 18, 2014) (discussing that online ads are
9 based on queries from users on Google services, that user information was used
10 to personalize advertising content, and that ad targeting was “fully automated”).
11 Abbey most likely saw advertisements for dental services because it offers dental
12 services and, presumably, performs a great number of Internet searches about
13 dentistry. These are not the search habits of the general public.

14 **4.2 Abbey Cannot Prevail On Its Infringement and False Origin Claims**

15 Abbey argues that using the words “Abbey Dental” on a web page with
16 consumer reviews about Abbey creates a likelihood of confusion in the minds of
17 consumers by making them think that the <pissedconsumer.com> web site is
18 affiliated with Abbey. This makes no sense.

19 This use is clearly nominative fair use. See *TCPIP Holding Co., Inc. v. Haar*
20 *Commc'ns, Inc.*, 244 F. 3d 88, 103 (2d Cir. 2001) (Describing fair use in infringement
21 context as “one party’s exclusive right to use a mark will not prevent others from
22 using the word or image constituting the mark in good faith in its descriptive sense,
23 and not as a trademark.” (internal quotation marks and alteration omitted)); see
24 also 15 U.S.C. § 1115(b)(4) (permitting nominative fair use, even when marks are
25 deemed “incontestable”). “Use of another’s trademark is permitted in
26 connection with a description, parody, criticism, commentary and news
27 reporting.” *Web-adviso v. Trump*, 927 F. Supp. 2d 32, 45-46 (E.D.N.Y. 2013).

1 "[N]ominative fair use [is] by definition, not infringement." *Toyota Motor*
2 *Sales v. Tabari*, 610 F.3d 1171, 1175 (9th Cir. 2010). In such cases, "the court applies
3 a different test to evaluate the likelihood of confusion, which 'replaces' the
4 *Sleekcraft* analysis." *Adobe Sys., Inc. v. Christenson*, 891 F. Supp. 2d 1194, 1206
5 (D. Nev. 2012). In applying the three-factor *New Kids* test, "the court's focus is on
6 the 'reasonably prudent consumer in the marketplace.'" *Id.* (quoting *Tabari*, 610
7 F.3d at 1176). Once a defendant asserting nominative fair use establishes that it
8 has used the mark to refer to the trademarked good or service, the burden shifts
9 to the plaintiff to show that the defendant's use is not a nominative fair use.
10 See *Tabari*, 610 F.3d at 1176. This is because "[a] finding of nominative fair use is
11 a finding that the plaintiff has failed to show a likelihood confusion as to
12 sponsorship or endorsement," and the burden of establishing likelihood of
13 confusion is the plaintiff's to bear. *Id.* at 1182-83 (citing *KP Permanent Make-Up,*
14 *Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004)).

15 The first issue is Opinion's use of search result copy on Google. The copy
16 that accompanies a search result for the term "abbey dental" that leads users to
17 Opinion's web site informs users that they will arrive at a site with reviews of this
18 particular business. The Ninth Circuit summed up the weakness of Abbey's
19 argument here when it recognized that internet users:

20 fully expect to find some sites that aren't what they imagine based
21 on a glance at the domain name or search engine summary.
22 Outside the special case of . . . domains that actively claim affiliation
23 with the trademark holder, consumers don't form any firm
expectations about the sponsorship of a website until they've seen
the landing page – if then.

24 *Tabari*, 610 F.3d 1179.

25 Abbey alleges that, because the copy of a Google search result for reviews
26 on <pissedconsumer.com> "depicts Abbey Dental's name in all capital lettering,
27 but leaves the rest of the heading in lower case lettering," it "lead[s] the user to

1 immediately perceive the heading as affiliated with Abbey Dental.” (ECF No. 28
 2 at ¶ 25.) This makes no sense. If anything, using ALL CAPS lettering makes copy
 3 appear less authentic. Abbey appears to agree with this assessment, as its own
 4 copy on Google does not use ALL CAPS lettering. (See ECF No. 27-10.)
 5 Presumably this unsupported assertion is a vain attempt to distinguish Opinion’s
 6 search result copy from that of other consumer review sites which contain very
 7 similar copy. (See ECF No. 1-1 at 2; ECF No. 27-10.)

8 Abbey’s argument on this point is frivolous on its face; Opinion’s use is plainly
 9 a nominative fair use of the “Abbey Dental” mark; there is no way to have a
 10 review page about a business without naming the business. Opinion does nothing
 11 to create any sense of affiliation or sponsorship by the thousands of reviewed
 12 businesses. There is thus no need to apply the *Sleekcraft* factors.⁸ It is simply not
 13 plausible to claim that if consumers come across a search result that says
 14 **“34 ABBEY DENTAL complaints and reviews @ Pissed Consumer”** that they will think
 15 it is sponsored by and affiliated with the subject of the complaints. Opinion is
 16 engaging in precisely the same conduct as every other consumer review web
 17 site. (See ECF Nos. 1-1 at 2, 27-6 to 27-11.) How else could a consumer review site
 18 discuss the business under review without *naming it*?

19 Similarly, there is nothing actionable about Opinion’s use of the Abbey
 20 Dental mark in its <abbey-dental.pissedconsumer.com> sub-domain. *Tabari* is
 21 instructive here, and observed that, when Internet users search for a web site
 22 through a search engine

23 the consumer will click on the link for a likely-relevant site without
 24 paying much attention to the URL. Use of a trademark in the site’s
 25 domain name isn’t materially different from use in its text or metatags

26 _____
 27 ⁸ Although, were the Court to apply them, they would cut similarly (fatally)
 against the Plaintiff.

1 in this context; a search engine can find a trademark in a site
2 regardless of where exactly it appears.

3 *Tabari*, 610 F.3d at 1178-79. It adopted the reasoning in *Playboy Enters. v. Welles*,
4 279 F.3d 796 (9th Cir. 2002) and determined that using a trademark as part of a
5 domain name for information purposes is a nominative fair use of the mark, as
6 “[s]earchers would have a much more difficult time locating relevant websites’
7 if the law outlawed such truthful, non-misleading use of a mark.” *Id.* at 1179.
8 “So long as the site as a whole does not suggest sponsorship or endorsement by
9 the trademark holder,” any temporary uncertainty by a user who mistakenly
10 arrives at a domain name that includes a trademark “does not preclude a finding
11 of nominative fair use.” *Id.* It is hard to think of an Internet user who would not be
12 able to figure out that a URL containing a trademark followed by
13 “pissedconsumer.com” is not affiliated with the owner of the trademark.
14 See, e.g., *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1163-64
15 (C.D. Cal. 1998) (finding that gripe site with domain name
16 <compupix.com/ballysucks> dedicated to Bally’s health club did not create
17 likelihood of confusion because no reasonable visitor would assume it was
18 affiliated with, connected with, or sponsored by Bally’s).

19 Confusion is measured by the standard of the reasonable consumer – not
20 as U.K. Justice Foster so famously put it – “a moron in a hurry.” See *Morning Star*
21 *Cooperative Society v. Express Newspapers Ltd*, [1978] F.S.R. 113 (UK) (FOSTER, J.
22 “only a moron in a hurry would be misled.”)⁹ The only person who could come to
23 a review website called “Pissed Consumer,” see reviews of a business, and then

24 ⁹ Canadian courts have also approved of this short-cut analysis rather than a
25 tortured multi-factor analysis favored by we Americans. See, e.g., *Molson*
26 *Canada v. Oland Breweries Ltd.*, [2001] O.T.C. 129 at 21. (“It is not sufficient that
27 the only confusion would be to a very small, unobservant section of society; or as
Foster J. put it recently, if the only person who would be misled was ‘a moron in a
hurry’.”)

1 think that it was the official Abbey Dental website would, indeed, be Justice
2 Foster's hypothetical moron in a hurry.

3 Despite this clarity, this is not the first time that Opinion has had to dispose
4 of this very issue. In another case, a plaintiff also attempted to misuse trademark
5 law to remove access to negative reviews. The court in *Ascentive, LLC v. Opinion*
6 *Corp.*, 842 F. Supp. 2d 450, 462-63 (E.D.N.Y. 2011) found that:

7 [w]here, as here, the domain name of a website itself –
8 Ascentive.PissedConsumer.com . . . makes clear that it is not affiliated
9 with trademarks the domain name incorporates and indeed is critical
10 of the companies that own the marks, the use of the marks does not
11 present a likelihood of confusion. Like the word ‘sucks,’ the word
12 ‘pissed’ has entered the vernacular as a word instinct with criticism
13 and negativity. Thus, no reasonable visitor to
14 Ascentive.PissedConsumer.com . . . would assume the sites to be
15 affiliated with Ascentive . . . , and PissedConsumer's use of plaintiffs'
16 marks in the various domain names at issue is not likely to cause
17 confusion as to source.

18 The court then reached the same conclusion as to Opinion's use of the marks at
19 issue on the <pissedconsumer.com> web site itself. *Id.* at 464. It additionally
20 determined that there was no possibility of confusion; Opinion could not divert
21 customers from the plaintiffs as “[t]here is no competitive proximity between the
22 parties' goods and services; [plaintiffs] are in completely different fields that
23 PissedConsumer.” *Id.* at 465. And it further recognized that the advertisements
24 on <pissedconsumer.com> are generated by third parties and could not likely
25 form the basis for trademark infringement liability. *See id.* at 470-71.

26 One of Abbey's new arguments in its FAC is that Opinion's alleged
27 purchase of advertising keywords on Google that include the term “Abbey
Dental” constitutes trademark infringement. Numerous courts have dealt with
keyword advertising claims, and “[t]here is a growing consensus in the case
authorities that keyword advertising does not violate the Lanham Act.” *Acad. Of*
Motion Pictures Arts. & Scis. V. GoDaddy.com, Inc., 2015 U.S. Dist. LEXIS 120871,

1 *150-51 (C.D. Cal. Sept. 10, 2015) (collecting cases). The Ninth Circuit has found
2 that in the context of keyword advertising, likelihood of confusion turns on what a
3 consumer sees at a given point and what their reasonable beliefs are, given the
4 context. See *Multi Time Mach., Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 937
5 (9th Cir.). “In other words, the case will turn on the answers to the following two
6 questions: (1) Who is the relevant reasonable consumer?; and (2) What would he
7 reasonably believe based on what he saw on the screen?” *Id.*

8 In dealing with this issue, the Central District of California found that a
9 competitor purchasing keywords that incorporated the plaintiff's trademark did
10 not constitute trademark infringement because the keywords were used to direct
11 Internet users to a site that disparaged the plaintiff's products. See *Goldline, LLC*
12 *v. Regal Assets, LLC*, 2015 U.S. Dist. LEXIS 52417, *6-7 (C.D. Cal. Apr. 21, 2015).

13 The *Goldline* court found that

14 the allegations either state directly, or create a strong inference, that
15 the purpose of Defendants' use of the marks is to disparage Plaintiff
16 and endorse Regal. Taken as true, such conduct would seemingly
17 distinguish Regal's products from Plaintiff's, as opposed to causing
18 customers confusion as to the origins of the two products.

19 *Id.* Though Abbey and Opinion are in no way competitors, Opinion uses keywords
20 to direct Internet users to its site containing consumer reviews of Abbey, many of
21 which are critical of Abbey. No reasonable consumer would be confused by
22 Opinion's use of keywords. But even if confusion were plausible, there is no way
23 Abbey could apportion damages, given that every review site mentioning Abbey
24 does the same thing; that is why their web sites also appear prominently in Google
25 searches for “Abbey Dental.” (See ECF Nos. 1-1 at 2, 27-10.) Any alleged increase
26 in the cost of bidding on these keywords or loss of business reputation and
27 goodwill are thus equally attributable to any of these other web sites.

4.3 Abbey's Cybersquatting Claim is Sanctionably Frivolous

Each website exists at an Internet Protocol address ("IP address"). However, to make it easier for humans to visit them, they are converted into alphanumeric website names. Therefore, in a web address, it works like this:

http://Third.Second.Top

The last segment is the "top level domain," the main part of the domain is the "second level" domain, and if there is one to the far left of the address, this is a "third level domain" or "sub-domain." See, e.g., *Image Online Design, Inc. v. Internet Corp. for Assigned Names & Numbers*, 2013 U.S. Dist. LEXIS 16896, *1-2 (C.D. Cal. Feb. 7, 2013) (articulating the concept).

The ACPA prevents registration, trafficking in, or use of a "domain name" that is "identical or confusingly similar" to a distinctive mark, 15 U.S.C. § 1125(d)(1)(A)(ii)(I), with bad faith intent to profit from the mark, *id.* § 1125(d)(1)(A)(i). Under 15 U.S.C. § 1127, a "domain" is defined as a mark "that is any alphanumeric designation **which is registered with or assigned by any domain name registrar, domain name registry, or other domain name registration authority** as part of an electronic address on the Internet." (emphasis added).

Since sub-domains are not assigned by domain name registrars, they are not covered. "Third-level domain" names cannot be registered by registries or registration authorities, and such names do not qualify under the ACPA.¹⁰ See, e.g., *Beacon Plumbing & Mech., Inc. v. Sposari Inc.*, 2016 U.S. Dist. LEXIS 152061 at *8-9 (W.D. Wash. March 17, 2016) (Dismissing ACPA complaint because "third-level domain names do not fall within the reach of the ACPA" and recognizing that no amendment could cure this legal deficiency); *GoFortt Entm't, LLC v. DigiMedia.com L.P.*, 750 F. Supp. 2d 712, 723 (N.D. Tex. 2010) (granting summary

¹⁰ Abbey presumably knew this when it filed the FAC because it claims to know how subdomains work. (See ECF No. 28 at ¶¶ 30-31.)

1 judgment in favor of defendant facing ACPA claims where the alleged violation
 2 occurred only on third-level domains). “[N]o court has ever held “that a portion
 3 of a web address other than a second or top level domain constitutes a ‘domain
 4 name’ within the meaning of the ACPA.” *Beacon Plumbing (citing GoFort Entm’t,*
 5 *750 F. Supp. 2d at 725).*

6 Perhaps some years ago, this error could be forgiven. But, today there is a
 7 legion of cases explaining “domain name” means “the top level domain and the
 8 second level domain.” *Sallen v. Corinthians Licenciamentos LTDA*, 273 F.3d 14, 19
 9 (1st Cir. 2001); *Rearden LLC, v. Rearden Commerce, Inc.*, 683 F.3d 1190, 1196 n.1
 10 (9th Cir. 2012) (quoting *Office Depot Inc. v. Zuccarini*, 596 F.3d 696, 698-99 (9th Cir.
 11 2010)); *Coca-Cola Co. v. Purdy*, 382 F.3d 774, 783 (8th Cir. 2004); *Interactive Prods.*
 12 *Corp. v. A2z Mobile Office*, 326 F.3d 687, 691 (6th Cir. 2003); *Virtual Works, Inc. v.*
 13 *Volkswagen of Am., Inc.*, 238 F.3d 264, 266 (4th Cir. 2001); *Sporty’s Farm L.L.C. v.*
 14 *Sportsman’s Mkt., Inc.*, 202 F.3d 489, 492-93 (2d Cir. 2000); *Brookfield Commc’ns v.*
 15 *W. Coast Entm’t Corp.*, 174 F.3d 1036, 1044 (9th Cir. 1999).

16 Lest there be any concern that *all* of these courts got it wrong, the
 17 legislative history of the ACPA confirms their wisdom. “Since registrars only register
 18 second level domain,” the definition of domain name “under current registration
 19 practice, applies only to second level domain names.” 145 Cong. Rec. 14986,
 20 15025 (1999). The Senate Judiciary Committee Report on the ACPA also tells us
 21 that “domain name” “essentially covers the second-level domain names
 22 assigned by domain name registration authorities.” S. Rep. No. 106-140, at *10
 23 (1999).

24 **4.4 This is an “exceptional case” warranting a fee award**

25 In “exceptional cases” the court may award costs and fees to a prevailing
 26 party in a Lanham Act case. 15 U.S.C. § 1117(a). “Exceptional case” used to
 27 mean a suit brought in subjective bad faith that was objectively baseless.

1 See *Brooks Furniture Mfg., Inc. v. Dutailier Int'l, Inc.*, 393 F.3d 1378, 1381 (Fed. Cir.
2 2005) (interpreting the term “exceptional” under the Patent Act). In *Octane*
3 *Fitness, LLC v. Icon Health and Fitness, Inc.*, 134 S. Ct. 1749 (2014), the Supreme
4 Court threw out that standard as to identical language in the Patent Act, holding
5 that “exceptional” was much broader. “Something less than ‘bad faith’ suffices
6 to mark a case as ‘exceptional.’” *Id.* at 1757. While there was some debate over
7 whether *Octane* applies in Lanham Act cases, that debate is over. See *Sunearth,*
8 *Inc. v. Sun Earth Solar Power Co.*, 2016 U.S. App. LEXIS 19083 (9th Cir. 24 Oct. 2016)
9 (affirming that the *Octane* standard applies in Lanham Act cases).¹¹

10 The subjective bad faith intent and clearly anemic nature of the claims in
11 this case would have warranted exceptional case status under the pre-
12 *Octane/Sunearth* standard.¹² However, under the *Octane* standard, they are
13 clearly so. When a plaintiff tries to misuse the Lanham Act in this way,
14 “exceptional case” fees are particularly appropriate. See, e.g., *Tobinick v.*
15 *Novella*, 142 F.Supp.3d 1275 (SD Fla. 2015) (Plaintiff attempted to claim that a
16 critical blog post was actionable under the Lanham Act. State law claims
17 dismissed and sanctioned under Calif. Anti-SLAPP Act. Fees granted under
18 15 U.S.C. § 1117(a)).

19 _____
20 ¹¹ See also *Baker v. DeShong*, 821 F.3d 620, 621–25 (5th Cir. 2016); *Georgia-*
21 *Pacific Consumer Prods. LP v. von Drehle Corp.*, 781 F.3d 710, 720 (4th Cir. 2015),
22 as amended (Apr. 15, 2015); *Slep-Tone Entm't Corp. v. Karaoke Kandy Store, Inc.*,
23 782 F.3d 313, 317–18 (6th Cir. 2015); *Fair Wind Sailing, Inc. v. Dempster*, 764 F.3d
24 303, 313–15 (3d Cir. 2014); *Donut Joe's, Inc. v. Interveston Food Servs., LLC*, 116 F.
25 Supp. 3d 1290 (N.D. Ala. 2015); *ADT, LLC v. Alarm Prot. Tech. Fla., LLC*, 2016 U.S.
26 Dist. LEXIS 146226 (S.D. Fla. Oct 20, 2016).

27 ¹² As another indication of subjective bad faith, Abbey asserts in the
Cybersquatting claim that Opinion “registered” the subdomain at issue “to extort
money from Plaintiff . . . in order to release the Subdomain” (ECF No. 28 at ¶ 78)
despite (1) this never happening, and (2) providing no evidence of this, even
though Abbey is perfectly comfortable disclosing settlement-privileged
communications. (See ECF No. 28 at ¶ 42.)

1 **5.0 CLAIMS SUBJECT TO THE ANTI-SLAPP STATUTE**

2 **5.1 NRS 41.660 Applies in Federal Court**

3 Anti-SLAPP statutes apply in federal court. See *Batzel v. Smith*, 333 F.3d 1018,
4 1025-26 (9th Cir. 2003); see also *Thomas v. Fry's Elecs., Inc.*, 400 F.3d 1206, 1207
5 (9th Cir. 2005). NRS 41.650 provides that a person who engages in conduct
6 protected under Nevada's Anti-SLAPP statute "is **immune from any civil action** for
7 claims based upon the communication" (emphasis added). NRS 41.635-670
8 creates a substantive immunity from certain categories of lawsuits and is
9 substantive in nature.

10 **5.2 Prong One: Abbey's Suit is Based Upon Protected Conduct**

11 **5.2.1 Operating a Consumer Review Web Site Is Protected Conduct**

12 In determining whether a defendant makes a successful showing on the
13 first prong of the Anti-SLAPP analysis, courts do not look to the particular cause of
14 action pled by the plaintiff, but rather looks to whether the suit is based on the
15 exercise of speech protected under the statute. See *Church of Scientology v.*
16 *Wollersheim* (1996) 42 Cal. App. 4th 628, 652 (holding that, with an Anti-SLAPP
17 motion, the "nature or form of" the action is "not what is critical but rather that it
18 is against a person who has exercised certain rights"). Courts typically look to "the
19 'gravamen or principal thrust' of the plaintiff's claims to determine whether they
20 arise from the defendant's constitutionally protected petitioning or free speech
21 rights." *In Re Episcopal Church Cases* (2009) 45 Cal. 4th 467, 477. A defendant
22 may take advantage of the Anti-SLAPP statute if the "defendant's conduct
23 underlying the plaintiff's cause of action" was "*itself*" an "act in furtherance of the
24 right of petition or free speech." *City of Cotati v. Cashman*, (2008) 29 Cal. 4th 69,
25 78 (emphasis original).

26 The term "issue of public interest" for Anti-SLAPP purposes is defined broadly
27 as "any issue in which the public is interested." *Nygaard, Inc. v. Uusi-Kerttula*, 159

1 Cal. App. 4th 1027, 1042 (2008). “The issue need not be ‘significant’ to be
2 protected by the anti-SLAPP statute – it is enough that it is one in which the public
3 takes an interest.” *Id.* The right of consumers to have informed access to the
4 quality of Abbey’s services is an issue of public interest. Consumer reviews are
5 matters of public concern. See *Mt. Hood Polaris, Inc. v. Martino (In re Gardner)*,
6 563 F.3d 981, 989 (9th Cir. 2009) (hereinafter “*Gardner*”) (a business owner’s refusal
7 to give a refund to a customer who bought an allegedly defective product was
8 a matter of public concern); see also *Manufactured Home Cmty., Inc. v. Cnty.*
9 *of San Diego*, 544 F.3d 959, 965 (9th Cir. 2008) (claim that a mobile home park
10 operator charged excessive rent as a matter of public concern).
11 This collection of consumer reviews is a “[c]ommunication made in direct
12 connection with an issue of public interest . . . in a public forum.” NRS 41.637(4).

13 Statements containing consumer information, to the extent they involve
14 warnings to aid other consumers, constitute matters of public interest under
15 Anti-SLAPP statutes. See *Willbanks v. Wolk* 121 Cal. App. 4th 883, 898 (2004)
16 (finding statements that were a warning not to use plaintiffs’ services were on a
17 matter of public interest); see also *Carver v. Bonds*, 135 Cal. App. 4th 328, 343-344
18 (2005) (finding that statements serving as a warning against Plaintiff’s method of
19 self-promotion, and that were provided along with other information to assist
20 patients in choosing doctors, were protected under Anti-SLAPP statute).
21 “Consumer reporting plays a vital role in ensuring that a company’s desire to
22 maximize profit, if abused, will not go unnoticed; and online fora for the exchange
23 of those ideas play an increasingly large role in informing consumers about the
24 choices that make sense for them.” *Neumont Univ. LLC v. Little Bizzy, LLC*, 2014
25 U.S. Dist. LEXIS 69168 at *35 (D. Nev. May 20, 2014). Consumers “‘clearly have an
26 interest in matters which affect their roles as consumers, and peaceful activities . . .
27 which inform them about such matters are protected by the First Amendment.’”

1 *Paradise Hills Assocs. v. Procel*, 235 Cal. App. 3d 1528, 1544 (1991) (citing
 2 *Concerned Consumers League v. O'Neill*, 371 F. Supp. 644, 648 (E.D. Wis. 1974)).
 3 This is particularly so in the context of consumer reviews about medical services,
 4 as “[t]here may be no more serious or critical issue extant today than the health
 5 of human beings. Given the frailty of human existence, any controversy on the
 6 subject must be afforded wide open discussion and criticism so that individuals
 7 may make well educated health care choices.” *Spelson v. CBS, Inc.*, 581 F. Supp.
 8 1195, 1206 (N.D. Ill. 1984).

9 A web site is a public forum for purposes of Anti-SLAPP analysis. See *Cole v.*
 10 *Patricia A. Meyer & Associates* (2012) 206 Cal. App. 4th 1095, 1121. The operation
 11 of such a website is protected activity for Anti-SLAPP purposes.
 12 See *Wilbanks v. Wolk* (2004) 121 Cal. App. 4th 883, 897; see also *Vogel v. Felice*
 13 (2005) 127 Cal. App. 4th 1006, 1015; *Little Bizzy*, 2014 U.S. Dist. LEXIS 69168 at *35.

14 **5.2.2 Abbey’s State Law Claims Are Based Upon Protected Conduct**

15 Abbey carefully avoids explicitly making a claim based on the content of
 16 any given review on <pissedconsumer.com>, instead attempting to premise
 17 liability on industry-standard practices that are necessary to allow Internet users
 18 to find reviews about Abbey. Abbey lets its true intentions slip, however, in
 19 paragraph 17 of the original Complaint, where it asserted “[w]hen the user clicks
 20 the link to abbey-dental.pissedconsumer.com, they are again led to webpage
 21 which contains advertisements of Plaintiff’s direct competitors. **The false**
 22 **information turns customers away,**¹³ while presenting advertisements for Plaintiff’s
 23 direct competitors.” (ECF No. 1 at ¶17) (emphasis added.) The “false information”
 24 here is referring to the consumer reviews. The only reasonable interpretation of
 25 this paragraph is that Abbey is claiming its alleged harm is the result of consumers

26 _____
 27 ¹³ Tellingly, Abbey brings no claims for defamation, nor does Abbey explain what
 is false about the information in the reviews.

1 going to <pissedconsumer.com>, seeing reviews, and deciding to take their
2 business elsewhere. This is also the only reasonable interpretation of Abbey's
3 allegation in the FAC that Abbey has suffered "injury to its business reputation and
4 the goodwill associated with the Mark" as a result of Opinion directing Internet
5 users to these reviews. (ECF No. 28 at ¶ 57.)

6 Furthermore, Abbey's claims are centered on the theory that Opinion is
7 liable for directing consumers to <pissedconsumer.com> through its use of
8 industry-standard sub-domains and Google ad copy. To ensure that users
9 actually see reviews about a company, a consumer review web site **must** use a
10 given business's name in a sub-domain and ad copy. To restrict such a site from
11 doing so would be to effectively remove web pages containing reviews of the
12 business from the Internet, as no one would be able to find them while performing
13 an Internet search. Abbey's prayer for relief makes this even clearer, as it seeks
14 both a preliminary and permanent injunction barring Opinion from using Abbey's
15 name on <pissedconsumer.com>.¹⁴ (See ECF No. 28 at 19, ¶ 4.)

16 Abbey claims it is losing business because consumers are reading negative
17 reviews of it on Pissed Consumer.¹⁵ There is no fraud or intellectual property
18 infringement here; rather, Abbey wants to eliminate any ability to find negative
19 reviews of it on <pissedconsumer.com> by eliminating all of Opinion's sign posts
20 to this content. As operating a consumer review web site is activity protected
21 under the statute, and Abbey's claims premise liability on Opinion's ability to
22 direct users to its consumer review web site, Abbey's claims are based upon

23 _____
24 ¹⁴ The requested injunction is sought in terms of misappropriation of the mark and
25 "infringing activity," but these terms do not describe Opinion's conduct here. If
26 Abbey believes that Opinion's conduct amounts to misappropriation and
27 trademark infringement, then it requests a complete ban on any meaningful use
of Abbey's name on <pissedconsumer.com>.

¹⁵ Abbey makes no effort to explain how the Pissed Consumer reviews cause of
this alleged harm, and not its poor reviews on Yelp. (See ECF No. 27-6.)

1 conduct protected under Nevada's Anti-SLAPP statute. See *John*, 125 Nev. at 752
2 (stating that Anti-SLAPP statute is intended to prevent litigants from "abus[ing] the
3 judicial process by chilling, intimidating, and punishing individuals for their
4 involvement in public affairs").

5 Even assuming *arguendo* some of Opinion's conduct is not protected
6 under the Anti-SLAPP statute (which Opinion denies), such conduct is inextricably
7 linked with protected speech, making Abbey's claims "mixed" causes of action
8 for Anti-SLAPP purposes. These "mixed cause[s] of action [are] subject to the
9 Anti-SLAPP statute if at least one of the underlying acts is protected conduct,
10 unless the allegations of protected conduct are merely incidental to the
11 unprotected activity." *Lauter v. Anoufrieva*, 642 F. Supp. 2d 1060, 1109 (C.D. Cal.
12 2008) (emphasis added); see also *Salma v. Capon*, 161 Cal. App. 4th 1275, 1287
13 (2008) (action based on both protected and unprotected activity subject to an
14 Anti-SLAPP motion); *Peregrine Funding, Inc. v. Sheppard Mullin*, 133 Cal. App. 4th
15 658, 675 (2005) (plaintiffs' claims "are based in significant part on [defendant's]
16 protected petitioning activity," the first anti-SLAPP prong was satisfied").

17 All of the claims, and all of Opinion's complained-of acts, are "inextricably
18 tied" to its protected activity of providing a platform for consumer reviews. Abbey
19 brought this claim to remove this protected speech from the eyes of would-be
20 customers. Opinion has met its burden under the first prong of NRS 41.660.
21 The burden now shifts to Abbey to show by a preponderance of the evidence
22 that it has a probability of prevailing on its claims.

23 **5.3 Abbey Cannot Show a Likelihood of Prevailing on Any of Its State Law**
24 **Claims, Thus All Should Be Stricken**

25 NRS 41.660 defines a plaintiff's burden of proof as "the same burden of
26 proof that a plaintiff has been required to meet pursuant to California's
27 anti-Strategic Lawsuit Against Public Participation law as of the effective date of

1 this act." NRS 41.665(2). Abbey cannot simply make vague accusations or
2 provide a mere scintilla of evidence to defeat Opinion's motion. Rather, to satisfy
3 its evidentiary burden under the second prong of the Anti-SLAPP statute, Abbey
4 must present "substantial evidence that would support a judgment of relief made
5 in the plaintiff's favor." *S. Sutter, LLC v. LJ Sutter Partners, L.P.*, 193 Cal. App. 4th
6 634, 670 (2011); see also *Mendoza v. Wichmann*, 194 Cal. App. 4th 1430, 1449
7 (2011) (holding that "substantial evidence" of lack of probable cause was
8 required to withstand Anti-SLAPP motion on malicious prosecution claim.) Abbey
9 cannot make this showing.

10 **5.3.1 Abbey's Claim Under NRS 600.435 Fails**

11 There are no Nevada cases analyzing NRS 600.435. However, as this Court
12 noted in April of this year, the law is so modeled after 15 U.S.C. § 1125(c) that
13 federal dilution cases are instructive. The only real difference is that fame must
14 be state-wide, instead of nationwide. See *Russell Rd. Food & Bev., LLC v. Galam*,
15 2016 U.S. Dist. LEXIS 50354 at *37-38 (April 13, 2016) (reviewing legislative history of
16 600.435 and stating "[t]he Court therefore shall refer to federal law as necessary
17 to interpret the factors under N.R.S. 600.435"). Right there, we are done, as
18 nominative fair use bars dilution claims. See *Stevo Design, Inc. v. SBR Mktg.*, 919 F.
19 Supp. 2d 1112, 1124-25 (D. Nev. 2013). However, even absent that legal certainty,
20 the statute itself does not fit the conduct alleged.

21 NRS 600.435 provides remedies to prohibit or punish the "commercial use of
22 a mark that is famous in this state." Without fame, there is no claim.
23 The defendant must engage in "a lessening in the capacity of a mark that is
24 famous to identify and distinguish goods or services." N.R.S. 600.435(5)(b). As
25 evidence of its "fame," Abbey produces its Facebook page, with 217 "likes."
26 See ECF No. 28-2 at 3. It filed its original complaint in October of 2015, and now
27 comes to this Court with an amended complaint, claiming "fame," and it

1 produces nothing more than 217 Facebook likes. Presuming, generously, that
 2 these were 217 real people, add them to the 34 consumers who hate the place
 3 enough to lodge negative reviews. See Rothell Decl. at Exhibits A-Z. Let us then
 4 charitably add the 133 mostly negative reviews on Yelp. (ECF No. 27-6.) And
 5 finally let us add the 58 followers of Abbey's Twitter account.¹⁶ (See Abbey Dental
 6 Twitter profile, attached as **Exhibit 3**.) We have record evidence that 442 people
 7 on the entire planet have heard of Abbey Dental.

8 Further, the statute contains an exception for the very conduct in this case.
 9 NRS 600.435(1) requires "commercial use" of the diluted mark. However,
 10 NRS 600.435(5)(a) defines "commercial use" under the statute as: "use of a mark
 11 primarily for profit. The term does not include use of a mark for research, **criticism**,
 12 news commentary, news reporting, teaching or any similar use that is not primarily
 13 for profit." *Id.* (emphasis added). Similarly, case law interpreting the federal
 14 dilution statute does not abide Abbey's theories. "Trademark law in general and
 15 dilution in particular are not proper vehicles for combatting speech with which
 16 one does not agree. Trademarks do not give their holders under the rubric of
 17 dilution the rights to stymie criticism." *Radiance Found., Inc. v. NAACP*, 786 F.3d
 18 316, 332 (4th Cir. 2015); see *Web-adviso v. Trump*, 927 F. Supp. 2d at 45-46 (use of
 19 another's mark for criticism is permissible); *Ford Motor Co. v. 2600 Enters.*, 177 F.
 20 Supp. 2d 661, 665 (E.D. Mich. 2001) (criticism is outside dilution liability); *In re Tam*,
 21 808 F.3d 1321, 1373 (Fed. Cir. 2015) (in dicta, stating dilution does not apply to
 22 criticism); *Stevo Design, Inc. v. SBR Mktg.*, 919 F. Supp. 2d at 1124-25.

23
 24
 25 _____
 26 ¹⁶ This charitably assumes that each Twitter follower is an actual person.
 27 The Court should also note that these followers appear to primarily be other
 dentists, not members of the general public or likely consumers of Abbey's
 services. (See Abbey Dental Twitter "Followers" page, attached as **Exhibit 4**.)

1 **5.3.2 Abbey Cannot Show a Likelihood of Prevailing on Its Common**
 2 **Law Misappropriation of Trade-Name or Common Law Trade-**
 3 **Name Infringement Claims.**

4 There do not appear to be any Nevada cases that discuss a claim for
 5 common law misappropriation of a trade name, and there is only one Nevada
 6 case that discusses tradename infringement as a cause of action in any detail.
 7 See *A.L.M.N., Inc. v. Rosoff*, 104 Nev. 274 (1988). The Nevada Supreme Court relied
 8 primarily on federal trademark cases applying the Lanham Act in determining the
 9 particulars of common law tradename infringement claim. See *id.* at 282 (citing
 10 federal cases applying Lanham Act in enumerating multi-factor likelihood of
 11 confusion test). As there is no other guidance as to the elements or specifics of a
 12 “common law tradename infringement” claim, it only makes sense to employ the
 13 same analysis as used for Abbey’s Lanham Act claims. Opinion thus incorporates
 14 the arguments in Section 4.0, *supra*, here.

15 **5.3.3 Abbey Cannot Show a Likelihood of Prevailing on Its Claim**
 16 **Under NRS 41.600 and 598.0915.**

17 NRS 41.600 provides for a civil cause of action for “any person who is a
 18 victim of consumer fraud,” which is defined as including “a deceptive trade
 19 practice as defined in NRS 598.0915” NRS 598.0915 forbids, in relevant part,
 20 “[k]nowingly mak[ing] a false representation as to the source, sponsorship,
 21 approval or certification of goods or services for sale or lease,” as well as
 22 “[k]nowingly mak[ing] a false representation as to affiliation, connection,
 23 association with or certification by another person.” NRS 598.0915(2)-(3).
 24 To prevail on a claim under this statute, a plaintiff must prove that “(1) an act of
 25 consumer fraud by the defendant (2) caused (3) damage to the plaintiff.”
 26 *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 658 (D. Nev. 2009). In cases of
 27 damages allegedly resulting from an affirmative misrepresentation by a

1 defendant, the element of causation also includes reasonable reliance on the
2 alleged misrepresentation. See *id.*

3 There do not appear to be Nevada or federal cases interpreting
4 subsections 2 or 3 in any relevant context, as the only situations in which either
5 one is discussed are allegedly fraudulent mortgages or real estate transactions,
6 and the courts there dismissed the claims at issue for insufficient pleading.
7 See, e.g., *Patterson v. Grimm*, 2010 U.S. Dist. LEXIS 120901, *10-11 (D. Nev. Nov. 1,
8 2010). Nevertheless, there is not much guesswork in concluding that there is
9 nothing fraudulent about Opinion's conduct here. As explained in Section 4.0,
10 *supra*, Opinion is accurately using Abbey's trademark to direct Internet users to a
11 web page that contains consumer reviews. Opinion is not taking anyone's money
12 or spreading lies about random businesses. In fact, it is difficult to guess what the
13 alleged damage to Abbey is as a result of these alleged fraudulent business
14 practices. Opinion does not provide competing services, and only dentists are
15 likely to see advertisements for competitors of Abbey on Opinion's web site.
16 The only way Abbey could possibly be harmed is because people are going to
17 Opinion's web site, reading negative reviews of Abbey, and taking their business
18 elsewhere. That is the opposite of consumer fraud; it is consumer empowerment.

19 None of Opinion's actions as alleged in the Complaint constitute fraudulent
20 or deceptive practices under NRS 41.600 or 598.0915. Accordingly, the Court
21 should dismiss Abbey's Fifth Claim for Relief with prejudice.

22 **5.3.4 The Fraud Claim Fails**

23 Abbey's common law fraud claim fails for the same reasons its statutory
24 consumer fraud claim fails. The Nevada Supreme Court in *Betsinger v. D.R. Horton,*
25 *Inc.*, 232 P.3d 433, 435-46 agreed with the Arizona Court of Appeals that "the
26 purpose of the consumer fraud protection statute was to provide consumers with
27 a cause of action that was easier to establish than common law fraud,"

1 concluding that consumer fraud claims under NRS 598 had a **lower** burden of
2 proof than common law claims. See *id.* (quoting *Dunlap v. Jimmy GMC of Tucson,*
3 *Inc.*, 136 Ariz. 338 (Ariz. Ct. App. 1983)). The Court also said that Nevada's
4 securities fraud statute, while containing the term "fraud," was not limited to
5 common-law fraud. See *Sec'y of State v. Tretiak*, 117 Nev. 299, 309 (2001).

6 Taken together, these cases establish that statutory fraud claims in Nevada
7 are more permissive than common law fraud claims and cover a wider range of
8 conduct. Accordingly, if a plaintiff cannot establish consumer fraud under
9 NRS 41.600 or 598.0915, then it has no hope of establishing a claim under common
10 law fraud. The Court should dismiss this claim with prejudice.

11 **6.0 CONCLUSION**

12 Abbey's suit assumes that informing consumers of one's experiences with a
13 business is consumer fraud, and even **mentioning** a company's name is
14 trademark infringement. The Court should see this SLAPP suit for what it is and
15 (1) dismiss Abbey's state law claims with prejudice; (2) award Opinion the fees it
16 has incurred in defending itself from Abbey's state law claims pursuant to
17 NRS 41.670(1)(a); and (3) impose a sanction of \$10,000 against Abbey under
18 NRS 41.670(3)(a). The Court should further grant summary judgment in Opinion's
19 favor as to Abbey's First, Second, and Third Claims for Relief under the Lanham
20 Act, and deem this an exceptional case under 15 U.S.C. § 1117(a) and
21 *Octane/Sunearth*.

22 ...

23 ...

24 ...

1 Dated this 9th day of December, 2016.

2 Respectfully Submitted,

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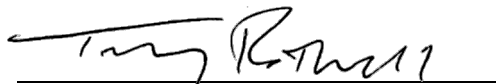
13 *Consumer Opinion LLC*

14 Case No. 2:15-cv-02069-GMN-PAL

15 **CERTIFICATE OF SERVICE**

16 I HEREBY CERTIFY that on December 9, 2016, I electronically filed the
17 foregoing document with the Clerk of the Court using CM/ECF. I further certify
18 that a true and correct copy of the foregoing document being served via
19 transmission of Notices of Electronic Filing generated by CM/ECF.

20 Respectfully Submitted,

21 

22 Employee,

23 Randazza Legal Group, PLLC