EAGAN AVENATTI, LLP
Michael J. Avenatti, Bar No. 206929
Alexander L. Conti, Bar No. 155945
Scott H. Sims, Bar No. 234178
450 Newport Center Drive, Second Floor
Newport Beach, CA 92660
Tel: (949) 706-7000
Fax: (949) 706-7050

Attorneys for Plaintiff
JOSEPH R. FRANCIS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSEPH R. FRANCIS,

Plaintiff,

vs.

WYNN LAS VEGAS, LLC, STEPHEN A. WYNN, and BARBARA CONWAY,

Defendants.

Case No. CV 11-9054-DSF

Hon. Dale S. Fischer

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO STRIKE AMENDED COMPLAINT PURSUANT TO CALIFORNIA'S ANTI-SLAPP STATUTE

[*Declarations of Joseph R. Francis and David R. Houston, and Plaintiff's Evidentiary Objections filed concurrently herewith*]

Date: **April 9, 2012**
Time: **1:30 p.m.**
Courtroom: **840**

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I. INTRODUCTION

By way of their anti-SLAPP motion, Defendants Wynn Las Vegas, LLC, Stephen A. Wynn, and Barbara Conway (collectively "Defendants" or "the Wynn") seek to escape all liability for submitting a demonstrably false "Bad Check/Marker Complaint Form" to the Clark County, Nevada District Attorney's Office. The demonstrably false Bad Marker Complaint led to Plaintiff Joseph Francis ("Plaintiff" or "Francis") being falsely accused of criminal violations and has caused him substantial economic and emotional injuries. The anti-SLAPP statute does not permit Defendants to escape liability.

First, the anti-SLAPP statute does not cover the activity alleged by Plaintiff. Namely, Plaintiff alleges, and the undisputed evidence establishes, that Defendants submitted a false Bad Marker Complaint to the Clark County District Attorney in order to leverage the power of criminal charges. The anti-SLAPP statute does not cover the submission of false police reports. See Lefebvre v. Lefebvre, 199 Cal. App. 4th 696, 703 (2011). Accordingly, Defendants cannot meet their burden of showing the conduct alleged falls within the ambit of protected activity under the anti-SLAPP statute and their Motion must be denied.

Second, even if Defendants could meet their burden of showing the alleged conduct is a protected activity, Plaintiff can easily establish a probability of success on the merits of his claims. The Eighth Judicial District Court for Clark County, Nevada granted a habeas petition filed by Francis, and in doing so held there was not even "slight" or "marginal" evidence that Francis committed the crimes with which he was charged as a result of Defendants submitting the false police report. The Nevada Court's decision alone establishes a probability of success on Plaintiffs' claims. So do the undisputed facts that show Defendants submitted a false police report.

Accordingly, Defendants' Motion should be denied in its entirety.

II. FACTUAL BACKGROUND

On September 14, 2011, the Eighth Judicial District Court for Clark County, Nevada granted a pre-trial writ of habeas corpus filed by Francis. [Declaration of David R. Houston ("Houston Decl., Exh. 1.] After Defendants filed a false "Bad Check/Marker Complaint Form" with the Clark County, Nevada District Attorneys' Office, Francis had been charged with passing a bad check and with theft under Nevada law. [Houston Decl., Exh. 2.] Both charges related to a casino marker,[1] which under Nevada law is considered the same as a check. See Nguyen v. State, 116 Nev. 1171, 1175, 14 P.3d 515, 518 (2000). In its 11-page opinion, the Court held "the State failed to present slight or marginal evidence that Mr. Francis intended to default on the marker at the time the marker was taken." [Houston Decl., Exh. 1 at 1:17-19.] The facts leading up to the Court's finding that there was not even "slight" or "marginal" evidence of criminal wrongdoing by Francis are as follows:

From February 12-18, 2007, Plaintiff gambled at the Wynn Hotel in Las Vegas, Nevada. During that stay, on February 16, 2007, the Wynn obtained Plaintiff's signature on a $2.5 million marker bearing number 70354728 (hereafter the "Marker"). [Declaration of Joseph Francis ("Francis Decl."), ¶ 2; Declaration of Barbara Conway filed by Defendants ("Conway Decl."), Exh. A.] Two days later, on February 18, 2007, the Wynn obtained Plaintiff's signature on a $300,000 marker bearing number 70356588.[2] [Francis Decl., ¶ 2; Conway Decl., Exh. A.] Prior to executing these markers, Defendants required Plaintiff to provide information regarding his bank accounts. [Francis Decl., ¶ 2.] He listed two accounts -- a Bank One/Morgan Stanley account and a Wells Fargo account. [Id.] Internal Wynn records confirm this fact. [Houston Decl., Exh. 3.] The Bank One/Morgan Stanley account was the primary account to draw from, a fact confirmed by internal Wynn records. [Houston Decl., Exh.

[1] As defined by federal regulations "Marker means a document, signed by the customer, evidencing an extension of credit to him by the gaming operation." 25 C.F.R. 542.2.

[2] The "Marker" as used herein refers to the $2.5 million marker, but the $2.5 million marker and the $300,000 marker are sometimes referred to herein as "the markers."

3.] Plaintiff's Bank One/Morgan Stanley account easily had enough money on deposit to cover the markers – i.e. bank records show the account had approximately $13 million in it at the time and Wynn records show the casino valuing the account at $4-6 million. [Francis Decl., ¶ 2 and Exh. A; Houston Decl., Exh. 3.] The Wells Fargo account was valued at approximately $90,000 at the time, though internal Wynn documents show the account valued at $700,000. [Francis Decl., Exh. B; Houston Decl., Exh. 3.] Both accounts were open at the time Plaintiff executed the Marker. [Francis Decl., ¶ 2.]

After Plaintiff executed the Marker, the Wynn applied $800,000 in "front money" that Plaintiff had on deposit at the casino to the $2.5 million marker, leaving a $1.7 million balance on the Marker. [Houston Decl., Exh. 4 at ¶ 4.] Thereafter, Francis began experiencing unrelated legal issues which resulted in his Wells Fargo account being closed by the bank on May 2, 2007. [Francis Decl., ¶ 3.]

On June 18, 2008, approximately 16 months after the Marker was executed, the Wynn submitted the entire $2.5 million marker to Wells Fargo [Conway Decl., ¶5], even though the balance on the Marker was only $1.7 million. [Houston Decl., Exh. 4 at ¶ 4.] Defendants submitted the Marker to Wells Fargo despite Plaintiff's Bank One/Morgan Stanley account being his primary account. [Houston Decl., Exh. 3.] Further, Defendants post-dated the Marker June 18, 2008, even though it was executed months earlier on February 16, 2007. [Francis Decl., ¶ 2; Conway Decl., Exh. A.] Wells Fargo returned the Marker unpaid. [Houston Decl., Exh. 5.]

Without submitting the Marker to Bank One/Morgan Stanley, Defendants filed a "Bad Check/Marker Complaint Form" (referred to herein as the "Bad Marker Complaint") with the Clark County District Attorneys' Office on July 17, 2008 (i.e. approximately 17 months after the marker was executed). [Houston Decl., Exh. 6.] On the Bad Marker Complaint, Defendants made the following representations, which were verified by Defendant Conway as "true and accurate"—even though they were false:

1. That the Wynn's "normal course of business" was to submit markers for payment in thirty (30) days, and that this normal course of business was followed in connection with the Marker;
2. That the value of the Marker was $2.0 million;
3. That the Bad Marker Complaint did not involve a post-dated check;
4. That Wynn did not receive partial payment on the Marker; and
5. That the Bad Marker Complaint did not involve an extension of credit.

[Houston Decl., Exh. 6]

Moreover, on the Bad Marker Complaint, Defendants listed Plaintiff's Wells Fargo account but concealed and did not list his Bank One/Morgan Stanley account, which according to the Wynn's own records was the primary account associated with the Marker. [Houston Decl., Exhs. 3, 6.]

Following Defendants' submission of the Bad Marker Complaint, Francis was charged criminally with two felonies: (a) theft[3] and (b) drawing and passing a check without sufficient funds.[4] [Houston Decl., Exh. 2.]

Francis' habeas petition followed, and the Court granted it on September 14, 2011. [Houston Decl. Exh. 1.] In its order, the Court stated, with respect to both the theft and bad check charges, that "the State failed to present slight or marginal evidence that Mr. Francis intended to default on the marker at the time the marker was taken." [Id. at 1:16-18, 11:7-8.] The Court also held, with respect to the theft charge, that "the State [] did not present evidence to support the charge of theft in the indictment, because Mr. Francis had sufficient funds in his account to cover the marker at the time it was issued." [Id. at 11:8-10.]

III. LEGAL STANDARD

Both California and Nevada have adopted anti-SLAPP statutes. See NRS 41.660; Cal. Code Civ. Proc. § 425.16. "[B]oth statutes are similar in purpose and

[3] Specifically, Nevada Revised Statutes ("N.R.S.") 205.0832, 205.0835, 205.132, and 205.380.
[4] Specifically, N.R.S. 205.130 , 205.132.

language." John v. Douglas County Sch. Dist., 125 Nev. 746, 752, 219 P.3d 1276, 1281 (2009).[5] "[D]efendants sued in federal court can bring an anti-SLAPP motion to strike state law claims." Verizon Del., Inc. v. Covad Comm. Co., 377 F.3d 1081, 1091 (9th Cir.2004) (citations omitted). In federal court, the Court can permit discovery where the nonmoving party has not had the opportunity to discover information that is essential to its opposition. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n. 5(1986); Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 850 (9th Cir.2001).

The California Code of Civil Procedure and Nevada statute set forth a similar two-prong analysis applicable to anti-SLAPP motions.

First, under California law "the initial burden rests with the defendant to demonstrate that the challenged cause of action arises from protected activity." Brill Media Co., LLC v. TCW Group, Inc., 132 Cal. App. 4th 324, 374 (2005). That is, the defendant must "demonstrate that the challenged cause of action is subject to the special motion to strike procedure." Id. Generally, this requires a showing the conduct "aris[es] from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." Cal. Code Civ. Proc. § 425.16(b)(1). Similarly, under Nevada law, the moving party "bears the initial burden of production and persuasion" and must show that the lawsuit falls within the confines of the anti-SLAPP statute. John, 125 Nev. at 754, 219 P.3d at 1282.

Second, if, and only if, a defendant meets his initial burden, then the burden shifts to the plaintiff to show a probability of prevailing on the merits. Cal. Code Civ. Proc. § 425.16(b). The "probability of prevailing" standard is the same standard governing a motion for summary judgment, nonsuit, or directed verdict—a plaintiff must make a prima facie showing of facts that would support a judgment in plaintiff's favor. See

[5] The events underlying this action took place in Nevada, but this diversity action was filed in California. As California and Nevada's anti-SLAPP statutes are similar in language and purpose, Plaintiffs cite to California and Nevada anti-SLAPP cases herein. Because the underlying events at issue occurred in Nevada, Nevada substantive law applies. In their Motion, Defendants incorrectly cite to California statutes and case law as it relates to the substantive maters at issue.

Taus v. Loftus (2007) 40 Cal. 4th 683, 714 (2007). In determining whether a plaintiff has established a probability of success, the court does not weigh credibility or comparative strength of the evidence, but instead accepts as true all evidence favorable to the plaintiff. See Overstock.com, Inc. v. Gradient Analytics, Inc., 151 Cal. App. 4th 688, 699–700 (2007) ("We do not weigh credibility, nor do we evaluate the weight of the evidence ... [W]e accept as true all evidence favorable to the plaintiff.") The court considers defendant's evidence only to determine if it defeats plaintiff's showing as a matter of law. See Soukup v. Law Offices of Herbert Hafif, 39 Cal .4th 260, 291 (2006) (**"The plaintiff need only establish that his or her claim has 'minimal merit' to avoid being stricken as a SLAPP."**). If a plaintiff meets this burden, the motion again must be denied. The same summary judgment like standard applies under Nevada's anti-SLAPP statute. John, 125 Nev. at 754, 219 P.3d at 1282.

IV. ARGUMENT

A. DEFENDANTS HAVE NOT MET THEIR BURDEN OF SHOWING THAT PLAINTIFF'S CAUSES OF ACTION ARISE FROM PROTECTED ACTIVITY BECAUSE FILING A FALSE POLICE REPORT IS NOT PROTECTED ACTIVITY

Because Plaintiff's claims are based on Defendants filing a false Bad Marker Complaint with the Clark County District Attorney, the claims are not subject to an anti-SLAPP motion. See Lefebvre v. Lefebvre, 199 Cal. App. 4th 696, 703 (2011). In Lefebvre, "[Plaintiff's] complaint allege[d] that [Defendants] conspired to bring a false criminal report against him, that their statements to police precipitated the underlying criminal action, that they repeated their false accusation at trial, and that the trial ended with his acquittal, and the subsequent finding of factual innocence." 199 Cal. App. 4th at 701. Given those allegations, the Lefebvre Court held **"the act of making a false police report [is] not an act in furtherance of [the] constitutional rights of petition or free speech, [and] the anti-SLAPP statute simply never comes into play in this**

case." Id. at 703. That is, "[n]either the federal nor the state constitutional rights of petition or free speech encompass a right to file a false crime report." Id.

This false police report issue comes into play as part of the first-prong of the anti-SLAPP analysis. That is, defendant bears the burden of making a prima facie showing that the underlying activity falls within the ambit of the statute—i.e. that conduct alleged was not criminal. Flatley v. Mauro, 39 Cal. 4th 299, 317-18 (2006). This involves more than "simply rubber stamping such assertions before moving on to the second step." Id.

Here, the evidence establishes Defendants made demonstrably false representations on the police report (i.e. the "Bad Check/Marker Complaint Form"). At least five claims made on the form were demonstrably false or involved material concealments by Defendants.

First, Defendants falsely represented that they followed their "normal course of business" in connection with submitting the Marker. Specifically, the Bad Marker Complaint asks: "What is the casino's normal course of business (disposition) agreed to on redeeming/submitting marker for this person." Defendants answered "30 days." [Houston Decl., Exh. 6 at p. 2.] The next question was "Was this the normal course of business followed in this case?" Defendants answered "yes." [Id.] The facts are undisputed that Defendants did not follow this procedure. The Marker was executed on February 16, 2007. [Francis Decl., ¶ 2; Conway Decl., ¶ 2.] Yet, Defendants did not submit the Marker to Wells Fargo until June 18, 2008, approximately sixteen (16) months later (i.e. approximately some 420 days later). [Conway Decl., ¶ 5.] Thus, Defendants' representation on the Bad Marker Complaint that the Marker was submitted for payment within thirty (30) days was patently false.

Second, Defendants indicated on the Bad Marker Complaint that the matter did not "involve a post-dated check." [Houston Decl., Exh. 6 at p. 1.] That representation was false as a matter of law. In re Jafari, 385 B.R. 262, 265 (W.D. Wis. 2008) ("'Markers' are similar to post-dated, signed checks and are presented for payment from

a gambler's bank account if he is unable to repay the line of credit from his winnings.). Despite the marker being executed on February 16, 2007, it is undisputed that before presenting the marker to Wells Fargo, Defendants post-dated the Marker June 18, 2008. [Conway Decl., Exh. A (check dated "Jun 18, 2008") and Exh. D (stating check is "dated 6/18/2008"); Houston Decl., Exh. 5.; see also Def. RJN, Exh. C at 4:16-17 (noting check was signed in February but dated June 18, 2008).] Defendants presumably did this to avoid N.R.S 104.4404, which provides a bank is not obligated to a customer having an account to pay a check, other than a certified check, presented more than six (6) months after its date of issuance.

In an effort to avoid the post-dated Marker issue, Defendants blatantly misquote Nguyen v. State, 116 Nev. 1171, 1176, fn. 6. They quote Nguyen as saying "Regardless of when they are dated, markers are considered neither the equivalent of a pre-dated check or a post-dated check." [Def. MPA at 14:12-14.] The case says no such thing. The court simply noted "the markers in this case were *not* post-dated" but rather "they bore the date upon which they were executed." Id. at 1177. Here, in contrast, the facts are undisputed that Wynn dated the Marker June 18, 2008 even though it was executed well over a year prior on February 16, 2007.

Third, Defendants lied on the Bad Marker Complaint when they answered "no" to the question of whether partial payment had been received on the account. That Defendants answered "no" to the question is undisputed. It is likewise undisputed that after the Marker was executed, the Wynn applied $800,000 in "front money" that Plaintiff had on deposit at the casino to the Marker. [Houston Decl., Exh. 4 at ¶ 4.] Partial payment was thus absolutely and indisputably made on the account. While Defendants point to their notation on the Bad Marker Complaint that "BAL=$2mil" and "marker value 2,000,000," those statements were also demonstrably false. Because the

$800,000 was applied to the Marker, the balance on the Marker undisputedly was only $1.7 million, not $2 million.[6] [Id.]

Fourth, Defendants lied on the Bad Marker Complaint when they answered "no" to the question of whether the matter involved an extension of credit. [Houston Decl., Exh. 6 at p. 1.] Markers are "extensions of credit," both as a matter of law and as a matter of common sense.

For instance, Federal Indian Gaming Regulations establish that, as a matter of law, a "***Marker*** means a document, signed by the customer, **evidencing an extension of credit to him by the gaming operation**." 25 C.F.R. 542.2 (emphasis added). The Ninth Circuit has recognized markers are extensions of credit. Flamingo Resort, Inc. v. United States, 664 F.2d 1387, 1388 (9th Cir. 1982) ("The customer would sign a "marker" signifying his liability for the sum loaned. Approximately sixty percent of the casino's total play resulted from such credit extensions.") (emphasis added); see also Hakimoglu v. Trump Taj Mahal Associates, 876 F. Supp. 625, 637 (D.N.J. 1994) aff'd, 70 F.3d 291 (3d Cir. 1995) (state dram shop laws "negat[e] a patron's capacity to enter a contract to incur debt to the casino, such as by signing "markers" for extension of credit."). In an effort to avoid this clear authority, Defendants misleadingly cite to N.R.S. 598.741. That statute defines an extension of credit for purposes of deceptive trade practices by a "credit service organization," meaning an organization that helps buyers with their credit in exchange for a fee. N.R.S. 598.741(5). It does not apply to a casino, and casino markers are defined by both Federal Indian Gaming regulations and the Ninth Circuit as an extension of credit.

Likewise, as a matter of common sense, a gambler is absolutely extended credited when he signs a marker—i.e. he is given chips equivalent to cash when he signs the marker even though the marker is not immediately redeemed. The fact that

[6] Any contention by Defendants that the $2 million figure was accurate because Francis allegedly had not paid off the $300,000 marker is irrelevant. Defendants did not submit the $300,000 marker for payment and did not list the $300,000 marker on the Bad Marker Complaint.

the marker is immediately redeemable does not make it any different than a loan payable on demand - both are extensions of credit.

Fifth, Defendants lied when they concealed Plaintiff's Bank One/Morgan Stanley account from the Clark County District Attorney by failing to list it on the Bad Marker Complaint. The facts are undisputed that the Bad Marker Complaint requires a casino to list the "Bank Accounts to be Used by Casino for Redemption/Submittal" and that Defendants only listed Plaintiff's Wells Fargo Account. The facts are likewise undisputed that (a) the Wynn's internal records indicate Plaintiff's Bank One/Morgan Stanley Account as his primary account, and (b) the Wynn's records indicate Plaintiff's Bank/One Morgan Stanley had a balance of $4-6 million when the Marker was executed (in reality the account had a balance of much more - approximately $13 million). [Houston Decl., Exh. 3.] Based on these undisputed facts, Plaintiffs most certainly concealed a material fact when completing the Bad Marker Complaint.

Moreover, with respect to Defendants' lies in answering "no" to the questions about post-dated checks, extensions of credit and partial payment, the Bad Marker Complaint form clearly indicates that if the answer to any of those questions is "yes" (as was the correct answer to all three here), then the "matter should be handled through the appropriate civil courts." [Houston Decl., Exh. 6.] Indeed, Defendants appear to have known this, as they had already filed a civil complaint on June 28, 2008. [Houston Decl., Exh. 7.] Thus, it is a reasonable inference that Defendants' decision to initiate a criminal prosecution was an effort to play "hard ball" with Mr. Francis and use the District Attorney and threat of criminal prosecution to collect a debt, something the Wynn openly admits it has a reputation for doing. [Houston Decl., Exh. 8 at 73:23-25.]

Based on the undisputed facts, Defendants blatantly lied/concealed information from the Clark County District Attorney in at least five ways in connection with the Bad Marker Complaint. Thus, under Leebvre, Defendants have not met their burden of showing the conduct alleged in Plaintiff's FAC falls within the ambit of the anti-SLAPP

statute, and the Motion must be denied on the first prong. Accordingly, the Court need not reach the second prong.

B. EVEN IF PLAINTIFF'S CLAIMS ARE SUBJECT TO THE ANTI-SLAPP STATUTE (WHICH THEY ARE NOT), PLAINTIFF HAS A PROBABILITY OF PREVAILING ON THE MERITS

As set forth above, Defendants cannot meet their burden under the first prong of the anti-SLAPP statute, and thus the Motion should be denied without ever reaching the second prong. However, even if the Court reaches the second prong, Plaintiff is likely to prevail on all of his claims.[7]

1. Plaintiff Is Likely to Prevail on His Malicious Prosecution Claim

In Nevada, the elements of a malicious prosecution claim are: (1) want of probable cause to initiate criminal proceedings; (2) malice; (3) termination of the criminal proceedings; and (4) damage. See LaMantia v. Redisi, 118 Nev. 27, 38 P.3d 877, 879 (Nev.2002).[8] Here, Defendants do not dispute that the prior proceedings were terminated in Plaintiffs' favor or that Plaintiff has been damaged, in the form of at least attorneys' fees incurred, emotional distress, and injury to reputation, nor could Defendants dispute those issues. [Houston Decl., Exh. 1; Francis Decl., ¶ 4.] Rather, Defendants argue that probable cause and malice are lacking.

a) There Was Not Probable Cause To Charge Plaintiff With Theft Or Passing a Bad Check

Want of probable cause is judged by an objective test. See Jordan v. Bailey, 113 Nev. 1038, 944 P.2d 828, 834 (Nev.1997). "Under this test, it is for the court to decide whether a reasonable attorney would have considered the prior action legally tenable-ignoring any subjective factors such as the attorney's expertise and belief." Id. Only

[7] Concurrently herewith, Plaintiff is filing a Notice of Dismissal of his Intentional Misrepresentation Claim. Thus, that claim is not discussed herein.

[8] A malicious prosecution claim also requires that the defendant "initiated, procured the institution of, or actively participated in the continuation of a criminal proceeding against the plaintiff." LaMantia, 38 P.3d at 879-80. Here, by filing the Bad Marker Complaint, Defendants indisputably "procured the institution" of the criminal proceeding against Francis. Defendants do not dispute this.

when a reasonable attorney would find that the action was completely without merit can a court authorize a malicious prosecution action to proceed. See Rashidi v. Albright, 818 F.Supp. 1354, 1359 (D.Nev.1993).

Here, the Nevada Court's opinion granting Francis' petition for writ of habeas corpus definitely establishes a lack of probable cause for both the theft count and the count for passing a bad check. With respect to both charges, the Court held there was not "slight or marginal evidence that Mr. Francis intended to default on the marker at the time the marker was taken." [Houston Decl., Exh. 1 at 1:16-18, 11:7-8.] The Court was right. Francis had sufficient funds in his accounts to cover the Marker when it was executed and there is no evidence of criminal intent. No reasonable attorney would bring a case where there is not even "sight or marginal" evidence as to one of the elements of a cause of action. That alone establishes a lack of probable cause.

In an effort to escape the fact that there was not even "slight or marginal" evidence that Plaintiff intended to commit a crime, Defendants likely will claim probable cause existed because, in some circumstances, intent can be presumed under N.R.S. 205.132(1)(b). That statute provides intent can be presumed if "payment of the instrument is refused by the drawee when it is presented in the *usual course of business*" unless the writer of the check pays the marker in full within five days of being notified the check was returned." (emphasis added) Here, however, Defendants admitted on the Bad Marker Complaint that the "normal course of business" for submitting the marker was 30 days. [Houston Decl., Exh. 6 at p. 2.] Wynn's Executive Vice-President Larry Altschul also admitted before the grand jury that "normal circumstances" dictate that the casino collect payment within 30 days. [Houston Decl. Exh. 8 at 66:14-15.] Because Defendants admit that 30 days is the "normal course of business" for submitting a marker, and it is undisputed the Marker was not submitted for approximately 16 months, no reasonable lawyer would have relied on a statute which requires a marker be submitted in the "usual course of business." Probable cause, therefore, is lacking as to both counts.

However, even if a reasonable attorney would have thought there was a sufficient basis to presume intent, probable cause was still lacking for the theft charge. N.R.S. 205.0832 prohibits a person from drawing or passing a check for property or services "if the person knows that the check will not be paid when presented." But here it is undisputed that Plaintiff's accounts had sufficient funds to cover the Marker when it was issued. [Francis Decl., Exh. A, B; Houston Decl., Exh. 3.] Knowing this, no reasonable lawyer would have charged Plaintiff with theft. A reasonable lawyer would have known that a court would throw out the charge on the grounds that "Mr. Francis had sufficient funds in his account to cover the marker at the time it was issued," which is exactly what the Court did. [Houston Decl., Exh. 1 at 11:8-10.] Hence, probable cause is lacking as to the theft charge on that additional ground.

b) Defendants Acted With Malice

In addition to probable cause lacking, Plaintiff has made a prima facie case of malice. First, "[m]alice may be inferred from proof of want of probable cause." Chapman v. City of Reno, 85 Nev. 365, 369, 455 P.2d 618, 620 (1969). The Court need go no further. Second, Defendants acted with actual malice, as explained immediately below in connection with the "qualified privilege" issue applicable to all but the malicious prosecution causes of action.

2. Defendants' False Statements In The Bad Marker Complaint Are Not Absolutely Privileged Or Otherwise Protected

Defendants contend that Plaintiff's claims, with the exception of the malicious prosecution claim, are barred by California Civil Code Section 47(b), which makes certain statements absolutely privileged.[9] Defendants are wrong. California Civil Code section 47(b) does not even apply in this action, as the statements at issue were made in Nevada and thus Nevada law applies.

[9] Defendants concede the malicious prosecution claim would not be barred by California Civil Code section 47(c). [Def. MPA at 16:2-3.]

Nevada expressly rejects an absolute privilege, and holds that statements made to the police before criminal proceedings are commenced enjoy only a qualified privilege. See Pope v. Motel 6, 121 Nev. 307, 315-318, 114 P.3d 277, 283-284 (2005). "Under a qualified privilege, the plaintiff must prove by a preponderance of the evidence that the defendant abused the privilege by publishing the defamatory communication with actual malice." Id., 121 Nev. at 317, 114 P.3d at 283-84. Actual malice means "a statement is published with knowledge that it was false or with reckless disregard for its veracity." Id.

Here, the undisputed evidence establishes that Defendants published the statements on the Bad Marker Complaint with full knowledge of their falsity: (1) Defendants represented that they followed their "normal course of business" and submitted the marker for payment within 30 days, when in fact the Marker was not submitted for payment for approximately 16 months; (2) Defendants indicated on the Bad Marker Complaint that the matter did not "involve a post-dated check" even though the Marker was executed on February 16, 2007 but post-dated June 18, 2008; (3) Defendants indicated the matter did not involve a partial payment, even though Plaintiffs' $800,000 in "front money" was applied against the Marker, leaving a balance of only $1.7 million; (4) Defendants indicated the matter did not involve an extension of credit, even though Markers are extensions of credit; and (5) Defendants knew Plaintiff's primary account was his Bank One/Morgan Stanley account, but did not list the account on the Bad Marker Complaint. Thus, actual malice exists.

In an attempt to show a lack of "actual malice," Defendants may point to the Declaration of Bernard Zadrowski filed with their moving papers. In his declaration, Zadrowski, the District Attorney who prosecuted the underlying criminal case, opines that the post-dated check question, the extension of credit question, and the partial payment of credit question, "are not relevant to complaints related to unpaid casino markers," that the proper answers to these question is "no" and that he "informed Ms. Conway of this fact." [Zadrowski Decl., ¶ 3.] Plaintiff concurrently lodges with this

opposition objections to the Zadrowski Declaration, which contains hearsay, improper legal conclusions, and improper opinions. But, even if the Zadrowski Declaration was admissible, it ignores that nowhere on the form does it indicate that the questions do not apply to markers, and that by checking the boxes Defendants admitted the relevancy of the questions to Marker. Nobody would check boxes that are not relevant. Moreover, even if the proper answer to those three questions was "no" (which is not the case), Defendants still lied on the Bad Marker Complaint by (1) representing they submitted the Marker for payment within 30 days, (2) representing that the balance of the Marker was $2 million (when it was $1.7 million) and (3) by not listing Plaintiff's Bank One/Morgan Stanley account. Actual malice is thus established and no privilege applies.

3. Plaintiff Is Likely To Prevail On the Abuse of Process Claim

Abuse of process claims can arise from criminal proceedings, and the elements of an abuse of process claim are: (1) an ulterior purpose by the defendants other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding. See LaMantia, 118 Nev. at 80, 38 P.3d at 879. Unlike malicious prosecution claims, "[m]alice, want of probable cause, and termination in favor of the person initiating or instituting proceedings are not necessary elements for a prima facie abuse of process claim." Id.

Here, Plaintiff has made a prima facie case as to both of these elements. First, Defendants were using the criminal justice system to try to accomplish matters that are supposed to be resolved in the civil courts. [Houston Decl., Exh. 6 ("Any 'yes' answer indicates this matter should be handled through the appropriate civil courts"); Houston Decl., Exh. 8 at 74:23-25 (testimony of Wynn employee that Wynn uses the District Attorney to collect debts).] This qualifies as an "ulterior purpose." See Posadas v. City of Reno, 109 Nev. 448, 457, 851 P.2d 438, 445 (1993) ("An ulterior purpose is any improper motive underlying the issuance of legal process.") Second, knowingly lying in a police report is obviously not a proper use of the criminal justice system.

4. Plaintiff Is Likely To Prevail On His Defamation Claim

An action for defamation has four elements: (1) a false and defamatory statement; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages. See Clark County Sch. Dist. v. Virtual Educ. Software, Inc., 125 Nev. 374, 385, 213 P.3d 496, 503 (2009). Here, the first three elements are adequately discussed above—Defendants lied on the Bad Marker Complaint, with full knowledge of the falsity of their statements, and because Defendants acted with "actual malice," they cannot invoke the "qualified privilege" related to submitting police reports. The only issue, then, is damages. Here, damages are presumed because Defendants were accusing Plaintiff of committing a crime. See K-Mart Corp. v. Washington, 109 Nev. 1180, 1192, 866 P.2d 274, 282 (1993) (imputation of a crime is defamatory per se and no actual proof of actual harm to reputation or any other damage is required) (receded from in part on other grounds by Pope v. Motel 6, supra). Moreover, Plaintiff sustained significant actual damages in the form of incurring attorneys' fees to clear his name, emotional distress, and harm to his business reputation. [Francis Decl., ¶ 4.]

5. Plaintiff Is Likely To Prevail On His Emotional Distress Claim

The elements of an intentional infliction of emotional distress claim are: (1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff's having suffered severe or extreme emotional distress and (3) actual or proximate causation. See Star v. Rabello, 97 Nev. 124, 125, 625 P.2d 90, 92 (1981) (citation omitted). Plaintiff here meets all of these elements. First, it cannot be reasonably disputed that submitting a false Bad Marker Complaint is extreme and outrageous. Hamre v. City of Bothell, 81 F. App'x 260, 263 (9th Cir. 2003) ("the district court erred in dismissing Hamre's intentional infliction of emotional distress claim by failing to recognize that being prosecuted on trumped up charges amounts to more than 'mere annoyance, inconvenience, or normal embarrassment.'"). And, given Defendants' knowledge of the falsity of the statements

on the Bad Marker Complaint, Defendants certainly intended to cause Plaintiff emotional injury, or at the least had reckless disregard for causing him emotional injury. Second, Plaintiff has suffered severe and extreme emotional distress as a result of the actions alleged. [Francis Decl., ¶ 4.]

6. Plaintiff Is Likely To Prevail On His Conspiracy Claim

Last, Plaintiff has made a prima case on his conspiracy claim, based on the underlying illegal conduct alleged herein. Consol. Generator-Nevada, Inc. v. Cummins Engine Co., Inc., 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998) ("An actionable civil conspiracy consists of a combination of two or more persons who, by some concerted action, intend to accomplish an unlawful objective for the purpose of harming another, and damage results from the act or acts.")

V. CONCLUSION

Based on the foregoing, Francis respectfully requests that Defendants' anti-SLAPP motion be denied in its entirety. Francis also requests such other and further relief as this Court deems just and proper.

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EAGAN AVENATTI, LLP

By: /s/ Michael J. Avenatti
Michael J. Avenatti
Attorneys for Plaintiff
Joseph R. Francis