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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**
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11 Grand Canyon Skywalk Development, LLC, et
12 al.,

13 Plaintiffs,

14 v.

15 David John Cieslak, Nicholas Scutari, and
16 Scutari & Cieslak Public Relations, Inc.,

17 Defendants.
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Case No.: 2:13-cv-596-JAD-GWF

**Order Denying Defendants John
Cieslak, Nicolas Peter Scutari and
Scutari & Cieslak Public Relations,
Inc.'s Motion for Partial Dismissal
[Doc. 19] and Overruling as Moot
Plaintiffs' Objections to Order Re:
Motion to Stay Discovery [Doc. 60]**

19 This once-complex business tort case previously involving tribal-sovereignty
20 arguments now comes before this Court on a simple motion to dismiss and objections to
21 Magistrate Judge Foley's Order denying the defendant's request for a stay pending resolution
22 of this motion to dismiss. Docs. 19, 60. Defendants, an advertising agency and its two
23 principals charged with promulgating a smear campaign that defamed the Plaintiffs, seek
24 dismissal of Plaintiffs' defamation claims on statute-of-limitations grounds, for failure to
25 state a viable claim, and under Nevada's anti-SLAPP statutes. Finding that the Plaintiffs'
26 allegations survive each of these dismissal arguments, the Court denies the motion to dismiss
27 and overrules as moot Defendants' objections to Judge Foley's order denying the stay during
28 the pendency of this now-resolved motion to dismiss.

Background¹

This case centers on the Grand Canyon Skywalk, a tourist attraction built in the Grand Canyon on land owned by the Hualapai Indian Nation in northern Arizona. Doc. 1. The project was originally conceived by Plaintiff David Jin and his company, Grand Canyon Skywalk Development, LLC ("GCSD"). Beginning in 1996, Jin inked a series of agreements with the Hualapai Tribe to develop the project, market it to tourists, and share the revenue. Doc. 1 at 4. On December 31, 2003, GCSD and a tribal-controlled entity, Sa' Nyu Wa, Inc., ("SNW") entered into a Development and Management Agreement that "provided for, among other things, the construction, management, and operation of the Skywalk and related facilities solely and exclusively by GCSD." *Id.* at 4-5. Plaintiffs claim that under the 2003 agreement, SNW was responsible for providing "the necessary utilities and infrastructure to the Skywalk site not only to allow construction to take place, but also to provide amenities to the public." *Id.* at 8. GCSD alleges that although it began constructing the Skywalk in 2006, the Tribe failed to deliver power, water, or wastewater to the project site, frustrating GCSD's efforts to construct a visitors' center as it was obligated to do under the 2003 Agreement; today, the visitor's center "stands an empty although nearly constructed shell." *Id.* at 8. Plaintiffs claim that the Tribe could have secured up to \$30 million in federal funding to assist in delivering utilities to the site, but the Tribe refused to do so. *Id.* at 9.

Plaintiffs further allege that in 2011, following disputes about allocation of tourist revenue, "some of the defendants began conspiring to invent a justification to take GCSD and Jin's contractual rights, and decided to claim that it was the responsibility of GCSD and Jin to put in all of the infrastructure necessary for . . . the Skywalk." *Id.* at 8-9. Members of the Hualapai Tribal Council retained a Phoenix-based private public relations firm, Defendant Scutari & Cieslak Public Relations, Inc., whose principals were Defendants John Cieslak, Nicolas Peter Scutari, and during the February or March 2011 "time period," Defendants devised a detailed strategy to blame the failure on Jin and GCSD, made false

¹ This factual description is intended only for general background and not intended as any finding of fact.

1 statements directly to the media in a memorandum ultimately leaked to the press, and
 2 ghostwrote a letter disparaging Plaintiffs to the Hualapi Tribe. *See id.* at 10-23. Plaintiffs
 3 contend that these false statements have damaged their business reputation nationally and
 4 globally. *Id.* at 23.

5 Plaintiffs originally sued Scutari & Cieslak and several members of the Hualapai
 6 Tribal Council for defamation, business disparagement, and civil conspiracy, but the tribal
 7 defendants were voluntarily dismissed, leaving only the advertising-agency defendants. *See*
 8 Docs. 63, 64. These remaining defendants move for dismissal of Plaintiffs' claims, arguing
 9 that their statements are not defamatory, some of them were communicated outside the two-
 10 year statute of limitations, and, alternatively, the whole case should be dismissed as an
 11 improper SLAPP suit. Doc. 17.²

12 Defendants also moved to stay discovery pending resolution of the motion to dismiss,
 13 Doc. 48, which Magistrate Judge Foley denied. Doc. 59. Defendants now object to that
 14 ruling and move this Court to reconsider it. Doc. 60. The Court denies both the motion to
 15 dismiss and the motion for reconsideration, permitting this case to now move forward.

16 Discussion

17 A. Motion to Dismiss [Doc. 17]

18 Federal Rule of Civil Procedure 8(a) supplies the standard for pleadings in a federal
 19 cause of action and states, "[a] pleading that states a claim for relief must contain: (1) a short
 20 and plain statement of the grounds for the court's jurisdiction . . . ; (2) a short and plain
 21 statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the
 22 relief sought."³ A district court may dismiss a complaint for failing to state a claim upon
 23 which relief can be granted under Rule 12(b)(6).⁴

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 26 ² Defendants originally challenged venue based on the tribal nature of this case but conceded at the April
 11, 2014, hearing that the dismissal of the tribal defendants mooted that argument.

27 ³ Fed. R. Civ. Proc. 8(a).

28 ⁴ Fed. R. Civ. Proc. 12(b)(6).

1 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
 2 accepted as true, to state a claim for relief that is plausible on its face.”⁵ “[A] plaintiff’s
 3 obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels
 4 and conclusions, and a formulaic recitation of the elements of a cause of action will not do.
 5 Factual allegations must be enough to raise a right to relief above the speculative level.”⁶
 6 The Court is also “not bound to accept as true a legal conclusion couched as a factual
 7 allegation.”⁷ To state a “plausible” claim for relief, the plaintiff must “plead[] factual content
 8 that allows the court to draw a reasonable inference that the defendant is liable for the
 9 misconduct alleged.”⁸ This requires a plaintiff to state “enough facts to raise a reasonable
 10 expectation that discovery will reveal evidence” of the allegations charged.⁹

11 **1. Defendants have not shown that the statute of limitations bars claims**
 12 **based on any statements in the complaint.**

13 Defendants argue that the memorandum, issued in February or March 2011, was
 14 “leaked” prior to April 8, 2011, such that Plaintiffs “discovered” it more than two years
 15 before they filed this suit on April 8, 2013. Doc. 17 at 13. Plaintiffs argue they need to
 16 conduct discovery into when the Memorandum was actually circulated to resolve this issue.
 17 See Doc. 22 at 21.

18 The statute of limitations for defamation in Nevada action is two years.¹⁰ Typically a
 19 cause of action does not accrue until the party discovers it.¹¹ Although the April 8, 2013,

20 ⁵ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

21 ⁶ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

22 ⁷ *Id.* (quoting *Papsan v. Allain*, 478 U.S. 265, 286 (1986)).

23 ⁸ *Iqbal*, 556 U.S. at 678-79.

24 ⁹ *Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011)
 25 (quoting *Twombly*, 550 U.S. at 556).

26 ¹⁰ NRS § 11.190(4); see *Lund v. Eight Judicial District Court of State, ex rel. County of Clark*, 255 P.3d
 280, 285 n.6 (Nev. 2011).

27 ¹¹ *Petersen v. Bruen*, 792 P.2d 18, 20 (1990); *Lahren v. Nevada System of Higher Education*, 238 P.3d
 28 831, 2008 WL 6124733, at *2 (Nev. Sept. 18, 2008) (unpublished disposition) (citing *Petersen* and applying the
 discovery rule to a defamation cause of action).

1 complaint alleges the memorandum was “from” the February or March “timeframe,” it does
 2 not specify when in early 2011 the memorandum was leaked to the public or when the
 3 Plaintiffs discovered that publication, thus triggering the statute of limitations. Doc. 1 at 11
 4 &n.3. Defendants offer no evidence to negate the plausible inferences from the well-pled
 5 facts that either: (1) the memorandum was leaked sometime after April 8, 2011 (two years
 6 before this suit commenced); or (2) even if it was leaked before April 8, 2011, Plaintiffs did
 7 not learn of it until after that date, so their claim is still timely. Defendants’ motion to
 8 dismiss the defamation claim as time barred is thus denied.

9 **2. A reasonable juror could find that the statements were either untrue or**
 10 **did not constitute opinion.**

11 Defendants also contend that many of the statements in question are either true or
 12 ones of opinion, pointing in particular to paragraphs 70-78, 95-101, and 112-16. Doc. 17 at
 13 10. They also claim that even if the statements are not true in every respect, minor
 14 inaccuracies can be overlooked, and in context a reader would not take the statements to be
 15 false. *Id.* In response, Plaintiffs argue that Defendants admitted that they engaged in a media
 16 campaign, and “the evidence attached as exhibits to the complaint undisputedly show the
 17 statements made by the Defendants in Las Vegas and elsewhere.” Doc. 22 at 7. They also
 18 claim that they need to conduct discovery into the truth or falsity of the statements. Doc. 22
 19 at 22-23.

20 “An action for defamation requires the plaintiff to prove four elements: “(1) a false
 21 and defamatory statement . . . ; (2) an unprivileged publication to a third person; (3) fault,
 22 amounting to at least negligence; and (4) actual or presumed damages.”¹² “As a general rule,
 23 only assertions of fact, not opinion, can be defamatory. However, expressions of opinion
 24 may suggest that the speaker knows certain facts to be true or may imply that facts exist
 25 which will be sufficient to render the message defamatory if false.”¹³ “The rule for

26 ¹² *Clark County School District v. Virtual Education Software, Inc.*, 213 P.3d 496, 503 (Nev. 2009)
 27 (quotations omitted).

28 ¹³ *K-Mart Corp. v. Washington*, 866 P.2d 274, 282 (Nev. 1993), *receded from on other grounds*, 114 P.3d 277 (Nev. 2005).

1 distinguishing an opinion from an assertion of fact is whether a reasonable person would be
2 likely to understand the remark as an expression of the source's opinion or as a statement of
3 existing fact."¹⁴ "Words must be reviewed in their entirety and in context to determine
4 whether they are susceptible to defamatory meaning."¹⁵ Where a statement is capable of
5 different constructions, one of which is defamatory, the question is reserved for the jury.¹⁶

6 The Court finds that at least some of the alleged statements may be reasonably
7 construed as defamatory. If Plaintiffs' allegations in the Complaint about the division of
8 labor in the 2003 Agreement between GCSD and SNW are true, then SNW and the Tribe had
9 the "responsibility . . . to provide necessary utilities and infrastructure to the Skywalk site not
10 only to allow construction to take place, but also to provide amenities to the public." Doc. 1
11 at 8. However, Scutari & Cieslak's memorandum, which was allegedly published to the
12 Tribe, states that "Jin agreed to complete certain critical elements of the Skywalk - including
13 water, sewer, and electricity." Doc. 1 at 11. Later, the memorandum states, "Jin has failed to
14 follow through on his contractual obligations." *Id.* Completing "water, sewer, and
15 electricity" work implies, at the very least, access to these items. A reasonable person
16 reading the memorandum's statements in context could come to the conclusion that Jin owed
17 a duty under the contract to provide utilities to the Skywalk Visitors center, failed to do so,
18 and as a result broke his promise to the Tribe and contributed to the deleterious condition of
19 what was to be a large-scale and profitable attraction—all factual assertions that Plaintiffs
20 contend are false. Thus, the complaint sufficiently states a claim that survives dismissal
21 under Rule 12(b)(6).

22 **3. The communications were not privileged or made during the course of**
23 **ongoing litigation.**

24 Defendants also allege that the statements are privileged because they were provided
25 to Defendants' client for review on a "privileged and confidential" basis, which makes them

26 ¹⁴ *Wynn v. Smith*, 16 P.3d 424, 431 (Nev. 2001).

27 ¹⁵ *Chowdhry v. NLVH, Inc.*, 851 P.2d 459, 463 (Nev. 1993).

28 ¹⁶ *Posadas v. City of Reno*, 851 P.2d 438, 442 (1993).

1 privileged work product—a transmission that cannot constitute defamation. Doc. 17 at 12.
2 Defendants cite no authority for the proposition for such an advertiser’s “privilege,” and
3 Nevada law appears to lack any.

4 Nevada law does recognizes some professional privileges, but the one urged by
5 Defendants is not one of them. In *Cucinotta v. Deloitte & Touche, L.L.P.*, Nevada recently
6 adopted a narrow exception to absolute privilege for professionals who divulge information
7 to a client under obligations owed under the law.¹⁷ The *Cucinotta* court expressed its
8 concern that “unfiltered speech to unintended persons could instigate malicious conduct that
9 would go unpunished.”¹⁸ Thus, it extended this absolute privilege only to communications
10 “(1) . . . made pursuant to lawful process, and (2) . . . made to a qualified person.”¹⁹ There is
11 no indication that Defendants’ statements were made pursuant to “lawful process,” i.e.,
12 disclosures required under a federal or state statutory or regulatory scheme,²⁰ so this
13 exception offers no protection from defamation liability.

14 Additionally, the memorandum references the Tribe’s “planned legal action against
15 David Jin,” which is characterized as “a significant public relations opportunity.” Doc. 1 at
16 11. Defendants do not assert privilege on the basis that the statement relates to ongoing
17 litigation, but alluded to this privilege during the course of an oral argument on the motion.
18 They claimed that given Jin and the Tribe’s legal difficulties, “charged” statements were
19 normal.

20 But the litigation privilege also fails to shield Defendants from defamation liability
21 here. Nevada has adopted the “long-standing common law rule that communications [made]
22 in the course of judicial proceedings are absolutely privileged,” even if those statements are
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25 ¹⁷ See *Cucinotta v. Deloitte & Touche, L.L.P.*, 302 P.3d 1099, 1101-02 (Nev. 2013).

26 ¹⁸ *Id.* at 1102.

27 ¹⁹ *Id.* (citing Restatement (Second) of Torts § 592A (1977)).

28 ²⁰ See *id.*

1 false.²¹ This privilege is broad and should be construed in favor of application.²² Although
 2 the Nevada Supreme Court has extended this “ongoing litigation” privilege to a non-attorney
 3 who responded to a communication to another non-attorney regarding a matter which one
 4 party threatened to “turn over” to the company’s legal department,²³ to qualify for this
 5 privilege, “(1) a judicial proceeding must be contemplated in good faith and under serious
 6 consideration, and (2) the communication must be related to the litigation.”²⁴

7 Even if Defendants and the Tribe were reasonably aware that the Tribe sought to
 8 instigate legal proceedings against Jin at the time the statements in the memorandum were
 9 made, Defendants were not involved as parties in the underlying contractual dispute between
 10 the Hualapai Tribe and Jin. According to the Complaint, they were “hired guns” brought in
 11 to help conduct a smear campaign. Thus, Defendants cannot claim the protection of
 12 Nevada’s litigation privilege as a basis to dismiss this claim.

13 **4. Defendants’ anti-SLAPP argument fails because the statements made in**
 14 **the memorandum were not made in a public forum.**

15 In the alternative, Defendants urge dismissal under Nevada’s anti-SLAPP statutes,
 16 arguing that Plaintiffs’ suit was filed to frustrate Defendants’ attempt to “participate in the
 17 democratic process.” Doc. 17 at 14. Plaintiffs respond that their statements—at least at
 18 paragraphs 74-78, 95-99, 101, and 112-16—were designed to bring attention to the state of
 19 the Skywalk project, and “did nothing more than bring attention to the ongoing problems the
 20 Tribe was facing with respect to the development and maintenance” of the project. *Id.* at 15.
 21 They contend that dismissal on the basis of the anti-SLAPP statute would be premature
 22 because there is not enough evidence to conclude that their claims are motivated in this
 23 impermissible way. Doc. 22 at 20.

25 ²¹ *Circus Circus Hotels v. Witherspoon*, 657 P.2d 101, 104 (1983).

26 ²² *Fink v. Oshins*, 49 P.3d 640, 644 (Nev. 2002).

27 ²³ *See Clark County*, 213 P.3d at 503-04.

28 ²⁴ *Id.* at 503.

1 “A SLAPP suit is a meritless lawsuit that a party initiates primarily to chill a
 2 defendant’s exercise of his or her First Amendment free speech rights.”²⁵ A SLAPP Plaintiff
 3 typically seeks “to obtain a financial advantage over one’s adversary by increasing litigation
 4 costs until the adversary’s case is weakened or abandoned.”²⁶ The current version of NRS §
 5 41.660 permits dismissal of “an action is brought against a person based upon a good faith
 6 communication in furtherance of the right to petition or the right to free speech in direct
 7 connection with an issue of public concern.”²⁷ “‘Good faith communication in furtherance of
 8 the right to petition or the right to free speech in direct connection with an issue of public
 9 concern’ means any: Communication made in direct connection with an issue of public
 10 interest in a place open to the public or in a public forum, which is truthful or is made
 11 without knowledge of its falsehood.”²⁸

12 Because Defendants claim that the memorandum statements were designed to be
 13 “privileged and confidential,” they were not clearly made in a “public forum” such that they
 14 were intended as a “good faith communication in furtherance of the right to petition.”
 15 Defendant Cieslak’s April 13, 2011, interview with ABC15.com might meet the “public
 16 forum” exception, but the Court need not determine (1) whether Cieslak’s statement was
 17 “truthful or is made without knowledge of its falsehood,” or (2) whether updates on the
 18 Grand Canyon Skywalk were “issue[s] of public interest,” because at least some of
 19 Defendants’ statements would not qualify for protection under the anti-SLAPP law. The
 20 Court will not engage in piecemeal consideration of every statement Defendants are alleged
 21 to have made to determine whether each qualifies for exclusion under Nevada’s anti-SLAPP

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 23 ²⁵ *Stubbs v. Strickland*, 297 P.3d 326, 329 (Nev. 2013) (citing *John v. Douglas County School District*,
 219 P.3d 1276, 1280 (Nev. 2009)).

24 ²⁶ *John*, 219 P.3d at 1280.

25 ²⁷ NRS § 41.660(1). This version of the statute took effect on September 30, 2013, after this suit had been
 26 filed and all relevant events took place. However, at oral argument on the motion the parties did not argue that
 27 the new amendments impacted disposition of the motion, and the Court applies the same. See *Jensen v. City of*
Boulder City, 2014 WL 495265, at *2-3 (Nev. Jan. 24, 2014) (unpublished decision) (reversing trial court in light
 of intervening changes to anti-SLAPP statute).

28 ²⁸ NRS § 41.637.

1 law. For purposes of this motion, it is sufficient that Plaintiffs have stated a plausible claim
2 based upon some statements to which Nevada's anti-SLAPP dismissal provisions do not
3 apply.

4 **B. Defendants' Objections to Magistrate Judge Foley's Order [Doc. 60]**

5 After they filed their motion to dismiss, Defendants moved to stay discovery pending
6 resolution of the motion to dismiss. Doc. 48. Magistrate Judge Foley denied the stay
7 request, Doc. 59, and Defendants then moved in this Court to reconsider Judge Foley's
8 Order. Doc. 60. As the motion to dismiss is denied by this Order, there is no pending
9 motion necessitating a stay. The motion for reconsideration is therefore denied as moot.


10 **Conclusion**

11 Accordingly, and based on the foregoing reasons,

12 **IT IS HEREBY ORDERED** that Defendants' Motion to Dismiss [Doc. 17] is
13 **DENIED.**

14 **IT IS FURTHER ORDERED** that Plaintiffs' Objections to Magistrate Judge Foley's
15 Order [Doc. 60] are overruled and their request for reconsideration is **DENIED** as moot.

16 DATED: May 21, 2014.

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18 JENNIFER A. DORSEY
19 UNITED STATES DISTRICT JUDGE
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