In the
Supreme Court of the State of Nevada

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JACKY ROSEN, AN INDIVIDUAL; AND ROSEN FOR NEVADA, A 527 ORGANIZATION,

Appellants,

vs.

DANNY TARKANIAN,

Respondent.

Case No. 73274

District Court Case No.: A746797

Appellants' Opening Brief

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DISCLOSURE STATEMENT PURSUANT TO N.R.A.P. 26.1

The undersigned counsel of record certifies that there are no persons or entities as described in N.R.A.P. 26.1(a) that must be disclosed.

The following law firms have appeared and/or are expected to appear in this Court on behalf of Appellants.

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Dated: June 4, 2018

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JURISDICTIONAL STATEMENT

This is an interlocutory appeal from the District Court's denial of a special motion to dismiss filed pursuant to NRS 41.660, and is expressly authorized by NRS 41.670(4). The District Court's order denying Appellants' motion was entered on June 12, 2017. *See* Vol. II of Appellants' Appendix ("AA") at 433-34[1]. The notice of appeal in this matter was filed on June 13, 2017. II AA 444. The appeal, therefore, is timely.

ROUTING STATEMENT

This matter is presumptively retained by the Nevada Supreme Court under N.R.A.P. 17(3), cases involving ballot or election matters, and N.R.A.P. 17(14), matters raising as a principal issue a question of statewide public importance. The parties to the appeal are candidates for public office, the controversy arose in the context of a political campaign, and recent amendments to Nevada's Anti-SLAPP statutes argue that guidance from the high court on such matters is of manifest statewide importance.

[1] For the Court's convenience, citations to Appellants' Appendix shall be cited as "[Vol. No.] AA [Page No.]".

INTRODUCTION

This action is about three statements made in a 30-second campaign advertisement (the "Political Advertisement") in the last few weeks of the 2016 race to represent Nevada's 3rd Congressional District between the Respondent, Danny Tarkanian, and Congresswoman Jacky Rosen. Less than ten days after the people of the 3rd Congressional District chose Congresswoman Rosen as their next Representative, Tarkanian filed this lawsuit. (I AA 2). He alleges seven claims for relief, all various forms of the torts of defamation, as well as a claim for "intentional infliction of emotional distress," based on three statements made in the Political Advertisement. (I AA 6-19).

Nevada's Anti-SLAPP statute, N.R.S. 41.635 et seq., was designed specifically to protect defendants like Rosen, who are sued on the basis of "a good faith communication in furtherance of … the right to free speech in direct connection with an issue of public concern," by providing them with a means to obtain a quick and inexpensive dismissal by filing a special motion to dismiss early in the proceedings, *id.* at 41.660(2), (3)(a). Rosen did just that. (I AA 22-39). Nevertheless, on June 8, 2017, the District Court issued an order denying Rosen's

Anti-SLAPP Motion to Dismiss (the "Anti-SLAPP Motion"). (II AA 436-39). For the reasons that follow, that decision was erroneous as a matter of law, and this Court should reverse and remand with directions to the District Court to immediately dismiss this matter, pursuant to the Anti-SLAPP statute.

Nevada law is clear that once an Anti-SLAPP movant shows that the claims against it are based upon First Amendment activity within the reach of the statute, the burden shifts to the plaintiff, who must proffer sufficient evidence to demonstrate that he has a probability of prevailing on his claims. N.R.S. 41.660(3)(a), (3)(b). The District Court correctly found (and Tarkanian does not seriously dispute) that the statements upon which this lawsuit is based are squarely within the reach of the Anti-SLAPP statute, which explicitly protects both communications "aimed at procuring any … electoral action, result or outcome," and those "made in direct connection with an issue of public interest in a place open to the public or in a public forum." *Id*. at 41.637(1), (4). (II AA 438). Nevertheless, the District Court denied the Anti-SLAPP Motion based on its incorrect conclusion that Tarkanian

made a prima facie showing that he was likely to succeed on his claims. (II AA 439).

However, Tarkanian did not prove that the statements in the Political Advertisement meet the legal standards for either defamation or intentional infliction of emotional distress. Most immediately, this is because Tarkanian admitted before the District Court that *substantially identical statements* made by Tarkanian's political opponents in two of his prior attempts to win public office are not defamatory and "do, in fact, state the truth." (I AA 229). This admission is fatal to Tarkanian's claims and provides reason alone to reverse the District Court.

To accept Tarkanian's argument and permit the District Court's decision to stand would fly in the face of decades of precedent, which makes clear that claims for defamation may not turn on subtle parsing of language, particularly where the speech at issue is indisputably political speech, entitled to the "fullest and most urgent" First Amendment protections. *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989). *See also Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 52 (1st Cir. 2012) ("[C]riticizing public officials and

hopefuls for public office, is a core freedom protected by the First Amendment . . . .") (quotation marks and citation omitted); *Vogel v. Felice*, 127 Cal. App. 4th 1006, 1016 (Cal. Ct. App. 2005) ("Public discussion about the qualifications of those who hold or wish to hold positions of public trust presents the strongest possible case for applications of the safeguards afforded by the First Amendment.") (citations and quotation marks omitted). The First Amendment's protections in this area are so significant, that, "[p]rovided that they do not act with actual malice, [candidates] can badmouth their opponents, hammering them with unfair and one-sided attacks … [as] more speech, not damages, is the right strike-back against superheated or false rhetoric." *Schatz*, 669 F.3d at 52 (citing *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 686–87 (1989)).

Consistent with this jurisprudence, courts regularly grant Anti-SLAPP motions to dismiss claims brought by one political candidate against another, even where the speech at issue is, on its face, much more damning than the statements in the Political Advertisement to which Tarkanian now objects. *See, e.g.*, *Reed v. Gallagher*, 248 Cal. App. 4th 841, 859 (Cal. Ct. App. 2016); *Rosenaur v. Scherer*, 88 Cal. App. 4th

260, 264–65 (Cal. Ct. App. 2001), *as modified* (Apr. 5, 2001). This is not only because of the strong protections afforded such speech by the First Amendment, but because of the well-established and well-recognized danger of permitting litigants to wield the judiciary as a weapon to pursue their political battles. Permitting this case to go forward under virtually any circumstances, but *particularly* where Tarkanian has conceded that substantially similar statements were, in fact, true, would not only be unprecedented and unsustainable under the plain terms of the Anti-SLAPP statute and the First Amendment, it would incentivize precisely the type of litigation that the Anti-SLAPP statute is meant to discourage.

The Court should reverse the District Court and enforce the Anti-SLAPP statute's promise that litigants who seek to use Nevada's courts to punish or stifle protected First Amendment speech will be turned away at the gates. It is plain from the record both that Rosen carried her initial burden of demonstrating that the speech at issue comes squarely within the reach of the statute, and that Tarkanian has not made a prima facie showing in support of any of his claims.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in denying the special motion to dismiss the Complaint in its entirety under Nevada's Anti-SLAPP statute, N.R.S. 41.660, et seq., where the speech at issue was clearly a matter of public concern, made during the course of a political campaign, and was substantially similar to statements that Tarkanian admits are true?

2. Did the District Court err in denying the special motion to dismiss under Nevada's Anti-SLAPP statute, N.R.S. 41.660, et seq., specifically with regard to the intentional infliction of emotional distress claim, without making any findings with respect to that claim?

STATEMENT OF THE CASE

Less than ten days after Election Day in November 2016, Tarkanian filed this lawsuit in the Eighth Judicial District Court in and for Clark County, Nevada. (I AA 2). Through his Complaint, Tarkanian contends that three statements made by his political opponent in a Political Advertisement that was aired on television and published on YouTube and Facebook during the 2016 race to represent Nevada's 3rd

Congressional District were defamatory and caused Tarkanian emotional distress. (I AA 2-20).[2]

On January 25, 2017, Rosen filed an Anti-SLAPP Motion under N.R.S. 41.660, seeking dismissal of Tarkanian's Complaint as a meritless lawsuit improperly based on the permissible exercise of her First Amendment rights. (I AA 22-39). Tarkanian filed his Opposition to the Anti-SLAPP Motion on April 10, 2017. (I AA 207). On April 20, 2017, Rosen filed her Reply in Support of the Anti-SLAPP Motion. (II AA 301).

On April 25, 2017, the District Court heard oral argument on the Anti-SLAPP Motion, at the end of which the District Court orally announced that it would issue an order denying the Motion. (*See* II AA 431-32). On June 8, 2017, the District Court issued its written order, setting forth its bases for denial. (II AA 436-39). Notice of entry of the order was filed on June 12, 2017. (II AA 433).

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[2] Tarkanian's Complaint raises three claims of libel per se and slander per se. While each have their own elements, they are each variations of the tort of defamation and require that the basic elements of defamation be met. *See Flowers v. Carville*, 292 F. Supp. 2d 1225, 1232 n. 1 (D. Nev. 2003) (discussing breakdown of defamation into actions for libel and slander and analyzing libel claim by first evaluating elements of defamation), *aff'd*, 161 F. App'x 697 (9th Cir. 2006).

On June 13, 2017, Rosen filed her Notice of Appeal. (II AA 444-45). On June 19, 2017, this appeal was assigned to the Supreme Court's settlement program and briefing in this case was stayed. The parties engaged in good faith mediation, but were unable to reach a settlement. On April 16, 2018, Rosen filed a Stipulation for Extension of Time for Appellants to File Opening Brief. This Court granted that request on that same day. On June 4, 2018, Rosen filed this Opening Brief.

STATEMENT OF FACTS

In October 2016, at the height of the campaign for Nevada's 3rd Congressional District, an ad approved by Congresswoman Rosen entitled "Integrity," aired on television and was posted on YouTube and Facebook pages associated with the Rosen campaign. (I AA 3-4 ¶¶ 11, 15, 16; II AA 333, 393). This lawsuit is based entirely on three statements made in that Political Advertisement: (1) that Tarkanian, Rosen's opponent in the race to represent the 3rd Congressional District, "set up 13 fake charities that preyed on vulnerable seniors," which were (2) "fronts for telemarketing schemes," and that (3) "[s]eniors lost millions from scams Danny Tarkanian set up." (II AA 3-5).

While the Political Advertisement was new to the 2016 campaign, the statements were not. Indeed, as the District Court found, the Political Advertisement "relied upon statements" that Tarkanian's political opponents in earlier races, Ross Miller and Steven Horsford, made in their campaigns in 2006 and 2012 (the "Miller and Horsford Statements"). (II AA 474; *see also* I AA 41-69; I AA 227-29). The Miller and Horsford Statements are ***substantially identical*** to the statements at issue in the Political Advertisement, were widely circulated in the press, never subject to legal challenge and, importantly, in briefing before the District Court, Tarkanian admitted that they, "***do, in fact, state the truth***." (I AA 229) (emphasis added).[3]

But the Miller and Horsford Statements are only the tip of the iceberg. Rosen presented more than sufficient evidence to the District Court demonstrating that Tarkanian would be unable to support his claims in this litigation, both because there is ample support for the

[3] Tarkanian conceded in his briefing that Miller's 2006 statement that Tarkanian "served as the resident agent and attorney for many fraudulent telemarketing organizations who bilked senior citizens out of millions of dollars," (I AA 229; I AA 67-68), and the 2012 statements of Horsford's campaign that "Tarkanian worked for telemarketing scammers," and "has been involved, as a businessman and lawyer, with at least 13 fraudulent charities," were true statements. (I AA 228-29; I AA 47-48).

truth of the statements in the Political Advertisement (making Tarkanian's defamation claim impossible under long-standing precedent), and their subject matter had long been a part of the public conversation about Tarkanian (making his intentional infliction of emotional distress claim similarly impossible).

For example, there were numerous newspaper articles published prior to the Political Advertisement that discussed Tarkanian's involvement with the telemarketing companies that defrauded seniors. (*See* I AA 42, 46-72, 306-09). And many of those articles included statements from Tarkanian *admitting* that he incorporated the companies. (I AA 60-65, 84-87, 92-95, 187-91). Tarkanian did not argue that these articles misquoted or misrepresented him. (*See generally* I AA 207-38). Furthermore, in 2006, an Assistant U.S. Attorney who worked on prosecuting several of the companies that Tarkanian set up published a letter chastising Tarkanian for falsely claiming no involvement and reaffirming that Tarkanian set up at least 13 fraudulent charities. (I AA 109-11). And public documents demonstrate that Tarkanian did in fact incorporate several entities later found to be fraudulent schemes. (I AA 85-87, 110, 193).

Tarkanian has had ample opportunity to respond to these and similar statements over the course of the last 10 to 15 years, including during the 2016 campaign, when he directly responded to the assertions made in the Political Advertisement through multiple avenues. For example, he published a "fact check" addressing the Political Advertisement on his website. (*See* I AA 31-32). He, his campaign, and his family also published numerous ads and campaign responses of their own.[4] *See, e.g.*, (I AA 97) (video of Lois Tarkanian stating Rosen ads are false); (I AA 100) (video of Amy Tarkanian stating "mud-slinging" in election not true); (I AA 108) (depicting mailer and signs disputing Rosen ads and promising Tarkanian will protect seniors).

On November 8, 2016, voters in the 3rd Congressional District chose Rosen as their Representative. Less than ten days later, Tarkanian filed the instant lawsuit alleging that the aforementioned

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[4] Ironically, there is reason to believe at least one of Tarkanian's response ads was dishonest. (*Compare* I AA 108, *with* I AA 103-04). Specifically, Tarkanian superimposed accusations that Rosen was a liar on placards held by seniors in a photograph that was taken from a Rosen ad. (I AA 103-04, 108). In the original ad, the seniors were explicitly expressing their dislike of Tarkanian in support of Rosen. (I AA 103). Tarkanian's use of the images was not only unauthorized, it was so upsetting to one of the seniors that she had to go to the hospital after seeing it. (*Id.*)

statements in the Political Advertisement were "intentionally and maliciously" "false and defamatory." (I AA 2-19 ¶¶ 11, 14-16, 28, 45, 62, 79, 96, 113, 130). Tarkanian's Complaint alleges claims for libel, slander, and intentional infliction of emotional distress and seeks compensatory and punitive damages in excess of eight million dollars. (I AA 6-20 ¶¶ 27-134).

Tellingly, Tarkanian's Complaint rests solely on his false assertion that the statements made in the Political Advertisement were found to be false by a jury in July 2009, after Tarkanian sued Mike Schneider, against whom Tarkanian ran for State Senate in 2004 (the "Schneider Litigation"). (I AA 4 ¶ 12).[5] While Tarkanian purports to lay out the similarities between the Schneider Litigation and the instant suit, his Complaint carefully admits critical information about key differences:

[5] While it is true that a jury verdict was entered in the Schneider Litigation, the case was ultimately terminated not by a judgment, but rather by a settlement agreement, brokered by the defendant's insurance company and the verdict was never appealed. (I AA 84-87). At the time, Senator Schneider was quoted as stating that, "[the] decision will have devastating ramifications on future campaigns and a chilling effect on free speech in general. I am fairly confident we would have reversed the decision at the Supreme Court. However, this matter has been a five-year ordeal and it was time to put it to rest." (I AA 86).

First, the allegations in the Schneider Litigation were *markedly different* than the allegations here. Although it is true that one of the statements at issue in that litigation was somewhat similar, the Schneider Litigation also challenged two *additional* statements that bear no resemblance whatsoever to the statements in the Political Advertisement that Tarkanian now challenges. Specifically, Senator Schneider was also alleged to have stated that Tarkanian had "turned state's evidence and testified against his 'fellow' telemarketers to keep from being personally charged with a crime;" and that Tarkanian "was under Grand Jury Investigation in two different locations and at two different places of employment." (I AA 76 ¶ 6).

Indeed, these *other* two allegations—which are plainly and facially materially different from the statements at issue in this case—are mentioned in the newspaper articles that Tarkanian points to as evidence that Rosen knew or should have known that a jury had previously found similar statements to be defamatory. (I AA 230-231) (discussing 2006 Las Vegas Sun and 2009 Las Vegas Review-Journal articles cited in the Political Advertisement).

Second, all of the relevant papers in the Schneider Litigation—starting with Tarkanian's complaint and ending with the jury verdict form—grouped the allegedly defamatory statements at issue in that case together, making it impossible to determine which statements, as a factual matter, the jury found to be defamatory. (I AA 195-200). When viewed together with the fact that multiple sources have since published statements substantively identical to the statements at issue in the Political Advertisement—including the Miller and Horsford Statements, which, again Tarkanian has *admitted* were *factually true* statements—Tarkanian's entire basis for his case against Rosen necessarily collapses. (I AA 229).

Third, in 2009, Nevada's Anti-SLAPP statute was markedly different from the version in place today and, because of those differences, no Anti-SLAPP defense was available to Senator Schneider.[6] (*See generally*, I AA 89-91). Thus, the remedy available now

[6] Until 2013, Nevada's Anti-SLAPP statute protected only "good faith communication in furtherance of the right to petition." (I AA 90) (quoting N.R.S. 41.637). Accordingly, it was only applicable to suits based on an individual's communications with a government entity when petitioning for an official action or commenting upon an issue. *See John v. Douglas Cty. Sch. Dist.*, 125 Nev. 746, 753, 219 P.3d 1276, 1281

when one candidate sues another for speech made during a political campaign—that is, a quick review of the merits and an early dismissal if the requirements of the Anti-SLAPP statute are met—was not available at the time that Tarkanian sued Senator Schneider.

In 2013, the Legislature strengthened Nevada's Anti-SLAPP law significantly by adding to its protections broad categories of First Amendment speech, including any "communication made in direct connection with an issue of public interest in a place open to the public or in a public forum," (I AA 90-91) (quoting N.R.S. 41.637(4)), and explicitly including statements made during political campaigns. *See* discussion *infra* at 21, 24. As a result, Nevada's Anti-SLAPP protections are now clearly and directly applicable to this suit (and, for the reasons that follow, require dismissal). The impact of that cannot be understated, as litigation of this kind is otherwise lengthy and protracted, and litigants often make practical decisions about strategy

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(2009) (discussing reach of pre-2013 statute). The Schneider allegations would not have come within the statute's then-limited reach.

and, ultimately settlement, that have nothing to do with the merits of the case. *See supra* note 5.[7]

Finally, the Complaint omits any mention of the numerous *other* political advertisements that have aired involving similar statements that went unchallenged by Tarkanian, even after he brought suit against Senator Schneider, including, as the District Court recognized, the Miller and Horsford Statements that Tarkanian admits are true. (II AA 474). Nor does it address the public letter by a former Assistant U.S. Attorney, discussed *supra*, specifically accusing Tarkanian of misrepresenting his involvement with the companies that were later found to be defrauding seniors.

Nevertheless, despite the plain differences in the Schneider Litigation, as well as the substantial similarities between the Miller and Horsford Statements and the statements in the Political Advertisement now at issue in this litigation, the District Court denied

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[7] This is particularly dangerous in a case such as this, where core First Amendment political speech rights are at stake. *Cf. Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971) (recognizing that "[t]he application of the traditional concepts of tort law to the conduct of a political campaign is bound to raise dangers for freedom of speech" and "[a] community that imposed legal liability on all statements in a political campaign deemed 'unreasonable' by a jury would have abandoned First Amendment law as we know it").

Rosen's Anti-SLAPP Motion. In its decision, the District Court correctly found that Tarkanian was a public figure for the purposes of the claims made in the Complaint and that the three statements at issue were made in a 2016 political ad and, as a consequence, constituted political speech. (II AA 474). It also correctly found that Rosen relied on the Miller and Horsford Statements, which Tarkanian admits are true. (*Id.*) Nevertheless, the lower court found it could not determine that the statements at issue were "clearly truthful." (II AA 431). Accordingly, it found that Rosen failed to meet her burden of proof. (II AA 474-75).

The trial court also incorrectly found that Tarkanian had presented prima facie evidence of a probability of success on his defamation claim, based on its conclusion that the mere existence of the jury verdict in the Schneider Litigation was sufficient to pose the basis for actual malice. (II AA 430, 473, 475). The District Court found this despite also finding that Schneider's statements occurred *before* the admittedly true Miller and Horsford Statements were made. (II AA 474).

The District Court made no findings with respect to Rosen's arguments for dismissal of Tarkanian's intentional infliction of emotional distress claims. (*See generally* II AA 472-75, 429-32).

As discussed below, the District Court's decision should be reversed.

STATEMENT OF THE STANDARD OF REVIEW

Nevada's Anti-SLAPP statute, N.R.S. 41.660 *et seq*., permits a defendant who is subject to a lawsuit "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," N.R.S. 41.660(3)(a), to file a special motion to dismiss the complaint early on in the proceedings. *See also Panicaro v. Crowley*, No. 67840, 2017 WL 253581, at *1 (Nev. App. Jan. 5, 2017) (describing Anti-SLAPP statute as providing procedural mechanism of special motion to dismiss as a "quick[] and cheap[]" exit ramp for defendants in civil actions brought in retaliation for their exercise of protected speech).

Anti-SLAPP motions are evaluated under a two-step process: *First*, the movant must show, by a preponderance of the evidence, that the claim is based on First Amendment activity that comes within the

reach of the statute. N.R.S. 41.660(3)(a). *Second*, if the movant makes such a showing, the burden shifts to the plaintiff, who must demonstrate with prima facie evidence a probability of prevailing on his claims. N.R.S. 41.660(3)(b).[8] If the plaintiff cannot meet its burden, the matter must be dismissed.

When a district court denies an Anti-SLAPP motion, the party bringing the motion has a direct right of appeal to this Court, which reviews the matter *de novo*. N.R.S. 41.660; *Goldentree Master Fund, Ltd. v. EB Holdings II, Inc.*, 415 P.3d 14 n. 3 (Nev. 2018).

[8] The Anti-SLAPP statute was most recently amended in 2015. As part of the 2015 amendments, the Legislature was explicit that, in determining whether a plaintiff "has demonstrated with prima facie evidence a probability of prevailing on the claim," courts should look to case law interpreting and applying "California's anti-[SLAPP] law as of [the effective date of this act]." N.R.S. 41.665; *see also* Cal. Code Civ. Proc. § 425.16 (California's Anti-SLAPP law). This is consistent with the approach taken by Nevada courts even prior to the 2015 amendments, which have long recognized that, where there is no Nevada-specific case law on point, consideration of California case law is appropriate "because California's anti-SLAPP statute is similar in purpose and language to Nevada's anti-SLAPP statute." *John v. Douglas Cty. Sch. Dist.*, 125 Nev. at 756.

SUMMARY OF THE ARGUMENT

The District Court erred, as a matter of law, in denying the Anti-SLAPP Motion, because all of Tarkanian's claims against Rosen are "based upon [Rosen's] 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," N.R.S. 41.660(3)(a), and Tarkanian did not make a prima facie showing that he is likely to succeed on either.

First, Rosen amply demonstrated that Tarkanian's claims fall within the Anti-SLAPP statute. The statements at issue were made in a Political Advertisement made at the height of a congressional campaign. As such, they fall squarely within the Anti-SLAPP statute, which explicitly protects both speech "aimed at procuring any … electoral action, result or outcome" and speech "made in direct connection with an issue of public interest in a place open to the public or in a public forum." N.R.S. 41.637 (1), (4). This is consistent with well-established U.S. Supreme Court precedent, recognizing that the First Amendment "has its fullest and most urgent application precisely to" speech related to "campaigns for political office." *Monitor Patriot Co.*, 401 U.S. at 271-72; *see also Eu*, 489 U.S. at 223 (same). Reflecting the

substantial and serious danger of allowing political litigants to weaponize the judiciary by pursing defamation claims based on speech made during the course of campaigns, courts have long recognized that the First Amendment's protections in this area are so significant, that, "[p]rovided that they do not act with actual malice, [candidates] can badmouth their opponents, hammering them with unfair and one-sided attacks … [as] more speech, not damages, is the right strike-back against superheated or false rhetoric." *Schatz*, 669 F.3d at 52 (citing *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. at 686-87).

Second, the statements in the Political Advertisement were plainly made in good faith. Under Nevada law, an Anti-SLAPP communication is made in "good faith" where it is "truthful or made without knowledge of its falsehood." N.R.S. 41.637. Here, Tarkanian has admitted that substantially similar (indeed, nearly identical) statements made by other of his political opponents in prior races for public office are true. Moreover, the record provides additional substantial, unrebutted evidence supporting the truth of these statements (or, at the very least, supporting the fact that the statements were made without any knowledge of falsity).

Third, Tarkanian has not and cannot make a prima facie showing that he has a probability of succeeding on his claims. He cannot make a plausible legal case that the statements in the Political Advertisement are false, given that he has already admitted that substantially similar statements are true. Further, he cannot show a probability of succeeding at proving actual malice because (1) the statements are true, and; (2) his sole basis for actual malice—the Schneider Litigation—is both factually and legally insufficient to sustain his claims.

Lastly, Tarkanian cannot maintain his intentional infliction of emotional distress claim because he cannot plausibly demonstrate that the statements in the Political Advertisement constituted "extreme and outrageous conduct." He also has not and cannot plausibly prove that the statements are responsible for any emotional distress that he claims to have suffered, particularly given that substantially similar statements have been publicly circulated for many years prior to airing of the Political Advertisement.

Accordingly, it is clear that the Anti-SLAPP statute requires dismissal of this action.

ARGUMENT

I. ROSEN HAS DEMONSTRATED BY A PREPONDERANCE OF THE EVIDENCE THAT THE INSTANT LAWSUIT FALLS WITHIN THE ANTI-SLAPP STATUTE

A. The District Court Correctly Found That Tarkanian's Suit is Based on Core Political Speech in Connection With An Issue Of Public Concern

The District Court correctly found that Tarkanian's claims, which are based entirely on statements in a Political Advertisement made at the height of a congressional campaign, fall squarely within the Anti-SLAPP statute, which protects both "the right to petition [and] the right to free speech in direct connection with an issue of public concern." (II AA 473); *see also* N.R.S. 41.660(3). The Political Advertisement was unmistakably speech "aimed at procuring any … electoral action, result or outcome" or "made in direct connection with an issue of public interest in a place open to the public or in a public forum," both of which are categorically covered by the Anti-SLAPP statute and are quintessential political speech. N.R.S. 41.637 (1), (4); (II AA 474, 30, 314); *see also, e.g.*, *Collier v. Harris*, 240 Cal. App. 4th 41 (Cal. Ct. App. 2015), *as modified* (Sept. 1, 2015), *review denied* (Dec. 9, 2015) ("The character and qualifications of a candidate for public office constitutes a

public issue or public interest for purposes of [the Anti-SLAPP statute which therefore] applies to suits involving statements made during political campaigns." (citations and quotation marks omitted)); *Roberts v. L.A. Cty. Bar Ass'n*, 105 Cal. App. 4th 604, 614 (Cal. Ct. App. 2003) (discussing application of California's Anti-SLAPP statute to political campaigns); *Rosenaur*, 88 Cal. App. 4th at 273–74 ("It is well settled that [the Anti-SLAPP statute] applies to actions arising from statements made in political campaigns by politicians [], including statements made in campaign literature.") (citations omitted).

This is consistent with the purpose of the Anti-SLAPP statute, which is meant to "provide[] … immunity from civil actions, not merely from civil liability" for plaintiffs sued on the basis of their exercise of their free speech rights. *Jensen v. City of Boulder*, No. 57116, 57635, 57667, 2014 WL 495265, at *3 (Nev. Jan. 24, 2014) (unpublished op.). The nature of our civil justice system is such that, in the absence of a special procedure for early dismissal, such litigation is often protracted and—even though it is almost always ultimately deemed legally meritless—can quickly become unsustainably expensive, making it an

effective way to punish or chill the speech of those with whom a plaintiff disagrees.

The danger of permitting the District Court's decision to stand, particularly in this case, where the speech at issue was part and parcel of a Political Advertisement by one candidate in the last few weeks of a political campaign, and where the District Court explicitly found that the speech is political speech (II AA 473), cannot be overstated. The U.S. Supreme Court long ago recognized that the First Amendment "has its fullest and most urgent application precisely to" speech related to "campaigns for public office." *Monitor Patriot Co.*, 401 U.S. at 271-72; *see also Eu*, 489 U.S. at 223 (same). This is because the First Amendment was "fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Monitor Patriot Co.*, 401 U.S. at 271-72 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). The First Amendment accordingly protects speech related to "every conceivable aspect of [a political candidate's] public and private life" that could be relevant to his fitness for office. *Id.* at 274; *see also, e.g.*, *Schatz*, 669 F.3d at 52 ("[C]riticizing public officials and hopefuls for public office, is a core

freedom protected by the First Amendment and probably presents 'the strongest case' for applying 'the *New York Times* rule' [*i.e.*, requiring a showing of actual malice].") (quotation marks and citation omitted); *Vogel*, 127 Cal. App. 4th at 1016 ("Public discussion about the qualifications of those who hold or wish to hold positions of public trust presents the strongest possible case for applications of the safeguards afforded by the First Amendment.") (citations and quotation marks omitted); *Conroy v. Spitzer*, 70 Cal. App. 4th 1446, 1451 (Cal. Ct. App. 2015) (same); *Desert Sun Publ'g Co. v. Sup. Ct.*, 97 Cal. App. 3d 49, 50 (Cal. Ct. App. 1979) (finding "the publication of a letter, which, in substance, charges a candidate for public office with engaging in political chicanery is protected by the First Amendment").

Imposing tort liability in the context and under the circumstances at issue in this case would be incompatible not only with the Anti-SLAPP statute, but also "with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns." *Brown v. Hartlage*, 456 U.S. 45, 61 (1982). The Supreme Court long ago expressly recognized that "[t]he application of the traditional concepts of tort law to the conduct of a political campaign is

bound to raise dangers for freedom of speech" and "[a] community that imposed legal liability on all statements in a political campaign deemed 'unreasonable' by a jury would have abandoned the First Amendment as we know it." *Monitor Patriot Co.*, 401 U.S. at 275. "'[V]ehement, caustic, and sometimes unpleasantly sharp attacks' … must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." *Id.* at 277 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). The Anti-SLAPP statute expressly reflects this by creating the categorical definitions of speech discussed *supra*, which plainly encompass the speech at issue here. N.R.S. 41.637 (1), (4).

Consistent with this well-established precedent, courts have repeatedly held that the proper place to test the truth of statements made during a political campaign is the campaign itself, not the courtroom. As the U.S. Supreme Court explained in *Brown*, under the First Amendment, "we depend for … correction not on the conscience of judges and juries but on the competition of other ideas." *Brown*, 456 U.S. at 61 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974)). "In a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's

political opponent." *Id.* In this context, "[t]he preferred First Amendment remedy of 'more speech, not enforced silence,'" thus has special force. *Id.* (quoting *Whitney v. Cal.*, 274 U.S. 357, 377 (1927)) (Brandeis, J., concurring); *Grillo v. Smith*, 144 Cal. App. 3d 868, 872 (Cal. Ct. App. 1983) ("The marketplace of ideas, not the tort system, is the means by which our society evaluates those opinions.") (citation omitted).

And that is precisely what happened here. The Political Advertisement did not go unanswered by Tarkanian, who published a "fact check" on his website. (I AA 27, 31-32). He, his campaign, and his family also published numerous ads and campaign responses of their own. (I AA 42-43, 97, 100, 108). Thus, Tarkanian cannot plausibly contend that he lacked extensive opportunities to respond precisely as the First Amendment contemplates he should.

Having failed to convincingly make his case to the voters, the Anti-SLAPP statute and the First Amendment do not permit Tarkanian to retaliate against Rosen through protracted, frivolous litigation based entirely on her appropriate exercise of her right of free speech as it relates to matters unquestionably of public concern. *See Paterno v.*

Super. Ct., 163 Cal. App. 4th 1342, 1353 (Cal. Ct. App. 2008) (granting Anti-SLAPP motion where plaintiff "ha[d] ample access to channels of effective communication") (quotation marks and citation omitted). Accordingly, the statements at issue in the Political Advertisement, made squarely in the context of the parties' congressional campaigns, are plainly protected by the First Amendment and are directly covered by Nevada's Anti-SLAPP statute.

B. The Statements at Issue Were Made in Good Faith

The preponderance of the evidence also amply demonstrates that the statements from the Political Advertisement that form the basis of Tarkanian's challenge were made in good faith. Under Nevada law, an Anti-SLAPP communication is made in "good faith" where it is "truthful or is made without knowledge of its falsehood." N.R.S. 41.637; *Shapiro v. Welt*, 133 Nev. Adv. Op. 6, 389 P.3d 262, 267-268 (2017). Here, both the unrebutted evidence submitted by Rosen to the District Court, as well as Tarkanian's *admissions that the substantially identical Miller and Horsford Statements were factually true*, demonstrate that the statements that form the basis of Tarkanian's action were truthful or,

at a minimum, made without knowledge of any falsehood, and the District Court erred in finding otherwise.

First, in his Opposition to Rosen's Anti-SLAPP Motion, Tarkanian admitted that substantially identical statements made by his political opponents in two of Tarkanian's earlier attempts to win public office were substantively true. (I AA 229). As the chart below demonstrates, there are no material differences between the Miller and Horsford Statements and the statements in the Political Advertisement that Tarkanian now contends were defamatory and amounted to "intentional infliction of emotional distress."

Miller Statement	**Horsford Statement 1**	**Horsford Statement 2**	**Statements at Issue Here**
"(Tarkanian) served as the resident agent and attorney for many fraudulent telemarketing organizations who bilked senior citizens out of millions of dollars." (I AA 228-29).	"Tarkanian worked for telemarketing scammers." (I AA 228).	"(Tarkanian) has been involved, as a businessman and lawyer, with at least 13 fraudulent charities." (I AA 228).	Tarkanian -- "set up 13 fake charities that preyed on vulnerable seniors," -- "fronts for telemarketing schemes," -- "[s]eniors lost millions from scams Danny Tarkanian set up," (I AA 34 ¶11).

Indeed, if anything, the language used in the Political Advertisement—*i.e.*, that Tarkanian "set up" these fraudulent organizations, from which seniors lost millions—is narrower than Miller's assertion that Tarkanian "served as the resident agent *and attorney*," or the Horsford campaign's assertion that Tarkanian "*worked for*" and "*has been involved, as a businessman and lawyer*" with the same. Each of these constructions could be read to implicate Tarkanian in a much broader range of activities than merely "setting up" the organizations, as asserted by the Political Advertisement.

There is similarly no merit to the assertion that Tarkanian "set up" such companies would connote, to the mind of the Political Advertisement's average viewer, that Tarkanian was guilty of a crime, and certainly not any more so than the language used by Miller or the Horsford campaign (i.e., that Tarkanian "served as a resident agent and attorney," "worked" for, or "has been involved, as a businessman and lawyer" for the same). *Compare Conroy*, 70 Cal. App. 4th at 1453 (finding candidate's argument that opponent's use of the term "guilty" in publication to supporters did not "denote[]" that the plaintiff was in

fact "found guilty of a crime," deeming plaintiff's "definition of 'guilty' as overly narrow," and affirming trial court's grant of Anti-SLAPP motion).

Moreover, it is well-established that the type of parsing of words that is necessary to accept Tarkanian's legal theory—that is, strictly construing one statement as defamatory, while maintaining that other, substantially similar statements are not—is inappropriate as a matter of law.[9] To the contrary, when determining whether a statement is false in a defamation case, courts do not look at the literal truth of "each word or detail used in a statement [to] determine[] whether or not it is defamatory; rather, the determinative question is whether the 'gist or sting' of the statement is true or false." *Oracle USA, Inc. v. Rimini St., Inc.*, 6 F. Supp. 3d 1108, 1131 (D. Nev. 2014) (quoting *Ringler Assocs. v. Maryland Cas. Co.*, 80 Cal. App. 4th 1165, 1180-82 (Cal. Ct. App. 2000)); *see also Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517

[9] Indeed, this type of impermissible parsing of words appears to be precisely what the District Court engaged in to make its decision, given its finding that Rosen relied upon the Miller and Horsford Statements (which Tarkanian admitted were true), and yet the court still found that it could not determine the truthfulness of the statements. (II AA 474-75). Moreover, during its oral ruling, the District Court acknowledged that information in the Political Advertisement could be proven truthful, but then went on to engage in further interpretation of what the statements could be interpreted to mean. (II AA 430-31 at 26:15-27:14).

(1991); *Reed*, 248 Cal. App. 4th at 861; *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 715 n. 17, 57 P.3d 82 (2002); *Reader's Digest Ass'n v. Sup. Ct.*, 37 Cal.3d 244, 262 n. 13 (Cal. App. Ct. 1984). Thus, where challenged statements are substantially true and "not spun out of whole cloth," dismissal under the Anti-SLAPP statute is necessary and appropriate. *Paterno*, 163 Cal. App. 4th at 1355 (quotation marks and citation omitted); *see also Annette F. v. Sharon S.,* 119 Cal. App. 4th 1146, 1169-70 (Cal. Ct. App. 2004).

The fact that Tarkanian admitted that substantially identical statements were true is reason enough to reverse the District Court and direct it to grant the Anti-SLAPP Motion, but even if that were not the case, the evidence presented by Rosen more than adequately demonstrated that the statements were made in good faith. Specifically, presented to the District Court below was unrebutted evidence of:

- At least nine newspaper articles that reported that Tarkanian incorporated and/or was the registered agent for at least 13 entities that were found to be fraudulent telemarketing schemes that solicited millions of dollars from seniors. (I AA 42-68, 85-87, 93-94, 188-189). At least four of these articles included direct admissions from

Tarkanian of these facts (none of which were challenged as inaccurate by Tarkanian below). (I AA 60-65, 84-87, 92-95, 187-91).

- A letter from a former Assistant U.S. Attorney further confirming those facts. Although the letter was made public over ten years ago, it has never been the subject of any legal action by Tarkanian. (I AA 61, 85, 94, 188).

- Two sets of pleadings from court cases demonstrating that individuals in charge of the companies in question were indicted and convicted of fraud. (I AA 110-20).

Thus, it is plain that Rosen has demonstrated by a preponderance of the evidence that the statements at issue were made in good faith and the District Court's decision to the contrary was in error.

II. TARKANIAN CANNOT DEMONSTRATE A PROBABILITY OF SUCCESS ON THE MERITS OF HIS CLAIMS

Because Tarkanian's claims fall squarely within the Anti-SLAPP statute, he bears the burden of making a prima facie showing that the statements in the Political Advertisement satisfy all of the elements of at least one of his claims for either defamation or intentional infliction of emotional distress. *See* N.R.S. 41.660 (3)(b). Because he has not done so, the Anti-SLAPP Motion should have been granted. *First*, as

discussed, Tarkanian *admits* that statements that are substantially similar (indeed, virtually identical) to the statements challenged in this suit are true. (I AA 229); *see also supra* at 9-10, 30-31. It is well-settled under Nevada law, that "[t]here can be no liability for defamation without proof of falsity." *Gordon v. Dalrymple*, No. 3:07-CV-00085-LRH-RAM, 2008 WL 2782914, at *3 (D. Nev. July 8, 2008). Thus, for this reason alone, Tarkanian's defamation claims should be dismissed. *Second*, Tarkanian, a perennial candidate for office and a congressional candidate at the time the Political Advertisement was published, is a public figure. As such, he must make a prima facie showing that it is probable he will prove, with clear and convincing evidence, that the statements that he challenges in the Political Advertisement were made with actual malice. He has not made such a showing. *Third*, with respect to his intentional infliction of emotional distress claim, Tarkanian cannot demonstrate any extreme or outrageous conduct, nor has he presented any evidence of emotional distress.

A. Tarkanian Has Not Made A Prima Facie Case For Defamation

Tarkanian has not made a prima facie case supporting his claims that the Political Advertisement contains defamatory statements. To

succeed on those claims, he must be able to prove at least four elements: "(1) a false and defamatory statement by [the] defendant[s] concerning [him]; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages." *Pegasus*, 118 Nev. at 718 (citation omitted); *see supra* note 2. "A statement may only be defamatory if it contains a factual assertion that can be proven false." *Pacquiao v. Mayweather*, 803 F. Supp. 2d 1208, 1211 (D. Nev. 2011).

Determining whether a statement is capable of being defamatory is a question of law. *Id.* (citing *Branda v. Sanford*, 97 Nev. 643, 645, 637 P.2d 1223, 1225-26 (1981)). "In reviewing an allegedly defamatory statement, the words must be viewed in their entirety and in context to determine whether they are susceptible of a defamatory meaning." *Lubin v. Kunin*, 117 Nev. 107, 111, 17 P.3d 422, 425-26 (2001) (quotation marks omitted). Moreover, when a defamation claim is brought by a public figure like Tarkanian, the plaintiff faces an additional hurdle.[10] This is because, "[t]o promote free criticism of

[10] The Nevada Supreme Court has recognized that "public figure," in this context includes candidates for office. *Nev. Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 414, 664 P.2d 337, 344 (1983) (extending rule

public officials, and avoid any chilling effect from the threat of a defamation action, the [Supreme Court long ago] concluded that a defendant could not be held liable for damages in a defamation action involving a public official plaintiff unless 'actual malice' is alleged and proven." *Pegasus*, 118 Nev. at 718-19.

Because Tarkanian did not make a prima facie case that the statements in the Political Advertisement were false or made with actual malice, his claims must be dismissed.

1. The statements in the Political Advertisement are true

At its most fundamental level, Tarkanian cannot survive the Anti-SLAPP Motion to Dismiss because he cannot possibly prove that the statements that he takes issue with in the Political Advertisement were false. It is black letter law that "[t]here can be no liability for defamation without proof of falsity." *Gordon v. Dalrymple*, No. 3:07-CV-00085-LRH-RAM, 2008 WL 2782914, at *3 (D. Nev. July 8, 2008). When determining whether a statement is defamatory, courts do not look at

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regarding public officials to a gubernatorial candidate); *see also Miller v. Jones*, 114 Nev. 1291, 1298-99, 970 P.2d 571, 576 (1998) (recognizing mayoral candidate as a public figure). The District Court also correctly found that Tarkanian was a public figure for the purposes of this action. (I AA 229).

the literal truth of "each word or detail used in a statement … rather, the determinative question is whether the 'gist or sting' of the statement is true or false." *Oracle USA*, 6 F. Supp. 3d at 1131 (quoting *Ringler Assocs. v. Maryland Cas. Co.,* 80 Cal. App. 4th 1165, 1180–82 (Cal. Ct. App. 2000)), *order clarified*, No. 2:10-CV-00106-LRH-PAL, 2014 WL 5285963 (D. Nev. Oct. 14, 2014). As the plaintiff, Tarkanian bears the burden of proving falsity. *Nev. Indep. Broad. Corp.*, 99 Nev. at 412.

As discussed *supra*, Tarkanian has already admitted that the substantially similar Miller and Horsford Statements, "do, in fact, state the truth." (I AA 229). Accordingly, there is simply no basis upon which Tarkanian can credibly argue that the statements in the Political Advertisement are false. To accept such an argument, a court would have to engage in the type of impermissible parsing of words that has consistently been rejected as inappropriate as a matter of law. *See* discussion *supra* at 31-35; *see, e.g.*, *Pegasus*, 118 Nev. at 715 n. 17 (explaining key is whether "the gist of the story, or the portion of the story that carries the 'sting' of the article, is true") (citations omitted); *Reed*, 248 Cal. App. 4th at 861 (noting it is well-established that a

"slight discrepancy" or "semantic hypertechnicality" cannot be the basis for a successful defamation action); *Desert Sun Publ'g*, 97 Cal. App. 3d at 52 ("A political publication may not be dissected and judged word for word or phrase by phrase."). And, indeed, before the District Court, Tarkanian did not present any argument or offer any proof indicating that the Political Advertisement's statements were false.

Either Tarkanian's admission that substantially similar statements were true, or his failure to make a prima facie showing that the statements in the Political Advertisement were false, provides sufficient reason for this Court to reverse the decision of the District Court. But Rosen also presented substantial evidence that the statements in the Political Advertisement are true (or, at a minimum, that there was ample reason to believe they were true and, therefore, no actual malice), including evidence that Tarkanian has stated under oath that he did "help[] set up 75 to 100 businesses," at least thirteen of which were found by a court of law to be fraudulent; officers of these companies were indicted for their participation in a telemarketing scheme; and seniors lost millions of dollars as a result of the scheme. *See* discussion *supra* at 33-35; (I AA 34).

Further, because the statements were made in the context of a clearly-marked Political Advertisement sponsored by a political opponent in the course of a heated political campaign, any argument that a potentially defamatory meaning could be implied from the context of the statements, *e.g.*, that Tarkanian engaged in criminal or fraudulent activity—an argument that Tarkanian made below and to which the District Court appeared to incorrectly give some credence to—also cannot be sustained.[11] Indeed, as the Nevada Supreme Court explained in *Wellman v. Fox*, 108 Nev. 83, 88, 825 P.2d 208, 211 (1992), "factual assertions are not actionable unless they have *no basis* in truth." *Id.* at 88 (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)) (emphasis added); *see also Pegasus*, 118 Nev. at 715 ("Nor is a statement defamatory if it is absolutely true, or substantially true.").

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[11] In its oral ruling the District Court stated that he "understood that certain information that was in the ads can be proven truthful." (II AA 430:15-16). Yet, the court then parsed through the wording of the statements, essentially indicating that a potentially defamatory meaning could be implied from the statement. *See, e.g.*, (II AA 431:4-7 ("Seniors lost millions from the scams that Danny Tarkanian helped set up. I don't know that [Tarkanian] set up any scams. He set up businesses that ended up taking advantage of people.")). As discussed, this type of parsing is clearly impermissible. Moreover, in a case like this, where the plaintiff and the District Court recognize the truth of the actual statements, reading a potentially defamatory meaning into the statements is plainly incorrect. *See* discussion *supra* at 31-34.

Similarly, the mere existence of some ambiguity in the meaning of statement cannot suffice to carry a defamation plaintiff's burden of demonstrating that the statements at issue were false. *See, e.g.*, *Vogel*, 127 Cal. App. 4th at 1021-22 (rejecting argument that ambiguity in statement was sufficient to establish plaintiff's ability to prove the statement's substantial falsity where plaintiff failed to plainly refute the defamatory imputation by stating the true facts, and granting Anti-SLAPP motion to dismiss); *Annette F.*, 119 Cal. App. 4th at 1167-68 (affirming grant of Anti-SLAPP motion to dismiss even though defendant's statement that plaintiff "was a 'convicted perpetrator of domestic violence' *could be* [wrongly] interpreted to imply that [she] had been convicted of a crime … the dictionary meaning of the word 'convict' *does not necessarily* connote a finding of guilt of a crime ….") (emphasis added); *Conroy*, 70 Cal. App. 4th at 1453 (finding candidate's argument that opponent's use of the term "guilty" in publication to supporters did not "denote[]" that the plaintiff was in fact "found guilty of a crime", deeming plaintiff's "definition of 'guilty' [as] overly narrow," and affirming trial court's grant of Anti-SLAPP motion).

As the cases cited above establish, Tarkanian's argument would fail even if the statements were not published in a political setting, but because they were made about a political opponent in a candidate's clearly-approved Political Advertisement, the authority is clear that his claims cannot be maintained as a matter of law. It is well-settled that, "[w]here potentially defamatory statements are published in a … setting in which the audience may anticipate efforts by the parties to persuade others to their positions by the use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion.'" *Reed*, 248 Cal. App. 4th at 859 (quoting *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 601 (Cal. Ct. App. 1976)) (alteration in original). This is particularly true for statements made during a political campaign, a context in which "hyperbole, distortion, invective, and tirades are as much a part of American politics as kissing babies." *Beilenson v. Sup Ct.*, 44 Cal. App. 4th 944, 954 (Cal. Ct. App. 1996); *see also, e.g.*, *Desert Sun Publ'g*, 97 Cal. App. 3d at 53 (finding no libel action for statements in a letter "of the kind typically generated in a spirited dispute in which the loyalties and subjective motives of rivals

are attacked and defended" (citation and quotation marks omitted)); *Reed*, 248 Cal. App. 4th at 859 (finding explicit statements that candidate was a "crook" made in the context of a political campaign did not imply defamatory meaning given that "a political campaign, [is] a context in which the audience would naturally anticipate the use of rhetorical hyperbole."); *Rosenaur*, 88 Cal. App. 4th at 264–65 ("In the context of a heated confrontation at a shopping center between political opponents, a foe's charge of 'thief' would be reasonably interpreted as loose figurative language and hyperbole, not a claim that the plaintiff actually had a criminal past.").

Nevada law also recognizes this principle. In *Wellman*, this Court evaluated whether statements published in a flyer in the context of a union election were defamatory. The plaintiffs argued that the statements in the flyer that (1) plaintiffs were a "gang," (2) their "leader" had been thrown off the union board for fraudulently obtaining funds, and (3) their "gang" was "replete with nepotism" and "include[d] a strikebreaker," were defamatory because they falsely implied that plaintiffs were thieves, dishonest, crooked, untrustworthy and, in some instances, the statements overstated the truth. 108 Nev. at 85-86. They

further asserted that they had never been convicted of a crime or involved with a criminal gang. *Id.* at 85. Despite this, the Court found that the majority of the statements in question were not actionable as defamation because they were based in truth. *Id.* at 88. It further found—even with regard to the statements that were *not* based in truth—that such statements were the type of "exaggerated statements [that] are permissible in contexts in which the statements would be interpreted by a reasonable person as mere rhetorical hyperbole." *Id.* And, the Court specifically found that "the context of a union election" was precisely such a context. *Id.* (emphasis added).

The parallels between *Wellman* and this case are striking. Just like the majority of the statements at issue in this case, that statements made in the Political Advertisement are true and, as such, are not actionable as defamation. *See* discussion *supra* at 9-10, 29-34. Further, and even if the Court were to find that the statements in the Political Advertisement are somehow meaningfully different from the Miller and Horsford Statements, it cannot be ignored that the statements were made in a Political Advertisement aired by one candidate about another at the height of a campaign for public office. This is precisely the type of

environment that this Court in *Wellman* (and multiple other courts in cases interpreting and applying California's very similar Anti-SLAPP statute) recognized that the average viewer would expect the "use of epithets, fiery rhetoric or hyperbole." *Reed*, 248 Cal. App. 4th at 859; *see also Wellman*, 108 Nev. at 88. And, indeed, despite its ultimate ruling, even the District Court in this case appeared to recognize this principle. (*See* II AA 430) ("And -- and I know the language in the ads is a little bit goofy. That's --- that's what we do in politics.").

For all of these reasons, Tarkanian cannot maintain his claims as a matter of law, and the District Court's conclusion on this point was plainly incorrect.

2. Tarkanian has not made a prima facie case for actual malice

Because Tarkanian has failed to make a prima facie case that the statements at issue were false, the Court need not consider whether he has demonstrated that he would be able to show, by clear and convincing evidence, that the statements were made with actual malice. *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1054 (Cal. Ct. App. 2008); *see also Paterno*, 163 Cal. App. 4th at 1345-46. But even if

the Court were to reach this part of the analysis, Tarkanian has failed to carry his burden here, as well.

"Because [Tarkanian] was … a candidate in the [3rd Congressional] race, he was a public figure at the relevant time and, therefore, must show that [Rosen] published [the alleged defamatory statements] with either knowledge of [their] falsity or reckless disregard as to whether the statement[s were] true or not." *Miller*, 114 Nev. at 1298–99; *see also Rosenaur*, 88 Cal. App. 4th at 274 (quoting *Beilenson*, 44 Cal. App. 4th at 950) (striking defamation claim under Anti-SLAPP statute brought in local initiative campaign). To show "actual malice," Tarkanian must prove that Rosen knew the statements were false or "in fact entertained *serious doubts* as to the truth of [the] publication." *Nev. Indep. Broad. Corp.*, 99 Nev. at 414 (quoting *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968)) (emphasis in original); *see also Christian Research Inst. v. Alnor*, 148 Cal. App. 4th 71, 84 (Cal. Ct. App. 2007) (dismissing claim of defamation under Anti-SLAPP statute for failure to show "actual malice") (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 (1984)). "The test is subjective, with the focus on what the defendant *believed* and *intended*

to convey, not what a reasonable person would have understood the message to be." *Nev. Indep. Broad. Corp.*, 99 Nev. at 415 (citation omitted). Further, a finding of "actual malice" must be based on "clear and convincing evidence." *Id.* at 414 (citation omitted).

Even assuming that the statements in question could be proven as false (and as discussed above, they cannot), Tarkanian has made no plausible showing that Rosen knew they were false or "entertained serious doubts as to the[ir] truth." *Nev. Indep. Broad. Corp.*, 99 Nev. at 414. The facts conveyed in the Political Advertisement and the underlying story surrounding Tarkanian's involvement with multiple companies that were found to be fronts for telemarketing schemes that bilked senior citizens out of millions of dollars were covered ad nauseam in the news and by Tarkanian's political opponents in his repeated attempts to win public office over a more than ten-year period. (I AA 51-69.) That coverage, and discussion of Tarkanian's involvement with these companies continued even *after* the Schneider Litigation and the jury verdict in 2009 that provides Tarkanian's *sole basis* for asserting that Rosen should have known the statements were false. (I AA 51-54). Indeed, both of the Miller and Horsford Statements were made after the

Schneider Statements. (II AA 474; *see also* I AA 41-69, 227-29). And Tarkanian admits those statements are true. (I AA 229). These facts, at a minimum, prevent any finding of actual malice.

Moreover, as discussed *supra* at 13-17, given the material differences in the statements at issue in the Schneider Litigation, as well as the fact that the case was never fully adjudicated, reliance on the Schneider Litigation alone is plainly insufficient to serve as prima facie evidence of actual malice. *See Richardson ex rel. Richardson v. Navistar Int'l Transp. Corp.*, 8 P.3d 263, 265 (Utah 2000) (jury verdict has "no binding or preclusive effect" because the case was settled before the judgment was final). Indeed, to find that the Schneider Litigation could serve as the basis for a finding of actual malice, a court would necessarily have to find—and Tarkanian would have to convincingly show—that Rosen was both aware that the same statements that are similar to those at issue here were adjudged defamatory (which, as noted, is impossible given the grouped pleading and verdict as well as the published articles focusing on the other statements in the litigation), and that Rosen had serious doubts as to the statements' truth (which is equally implausible for the same reasons).

To the contrary, the "evidence" that Tarkanian has presented, at best, leaves "substantial doubt" on this front and is not "sufficiently strong to command the unhesitating assent of every reasonable mind," the required showing for actual malice, for the multiple reasons discussed. *Reed*, 248 Cal. App. 4th at 861-62 (citations and quotation marks omitted). Accordingly, Tarkanian's defamation claim also fails for this reason and should be dismissed.

B. Tarkanian Has Not Made A Prima Facie Case Of Intentional Infliction of Emotional Distress

Tarkanian has also failed to make a prima facie case for his claim for intentional infliction of emotional distress. To succeed on this claim, Tarkanian "must show (1) extreme and outrageous conduct on the part of the defendant; (2) intent to cause emotional distress or reckless disregard for causing emotional distress; (3) that the plaintiff actually suffered extreme or severe emotional distress; and (4) causation." *Miller*, 114 Nev. at 1299–300 (citations omitted). Because Tarkanian is a public figure, he must also show that "the publication contains a false statement of fact which was made with 'actual malice.'" *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

As discussed, the Political Advertisement did not contain provably false assertions of fact. Tarkanian admits that substantially similar statements are true and, further, he has admitted under oath that he set up the companies referred to in the Political Advertisement. (I AA 229, 70-72, 188-89). Further, the facts regarding the telemarketing scheme, *i.e.*, that it occurred, was fraudulent, and took money from millions of seniors, are all independently verifiable through public documents. *See, e.g.*, (I AA 109-89).

Tarkanian also is unable to show actual malice. As discussed, given the longstanding and wide-ranging media coverage and public discussion of Tarkanian's involvement with the fraudulent companies (including long after the 2009 jury verdict), it is inconceivable that Tarkanian can prove that Rosen had or should have had "serious doubts" of the truth of the statements in the Political Advertisement, or was otherwise on any notice that they were potentially false. With regard to the Schneider Litigation specifically, the marked differences in the statements that were the subject of that action make it highly unlikely that any judgment in the suit would alert anyone as to any purported or potential falsity of the statements in the Political

Advertisement, nor would the 2009 jury verdict provide a basis to prove that those statements are false. And this is particularly so given that statements substantially similar to the ones in the Political Advertisement were repeatedly published—without litigious action by Tarkanian—over the course of the over seven years that followed. (I AA 42-68, 85-87, 93-94, 188-189).

Moreover, even if Tarkanian could overcome these barriers, his claim would still fail because he cannot make a prima facie showing of the necessary elements of an intentional infliction of emotional distress claim:

First, Tarkanian is unable to show extreme and outrageous conduct, which the law defines as "conduct is that which is outside all possible bounds of decency and is regarded as utterly intolerable in a civilized community." *Chehade Refai v. Lazaro*, 614 F. Supp. 2d 1103, 1121 (D. Nev. 2009) (quoting *Maduike v. Agency Rent–A–Car,* 114 Nev. 1, 953 P.2d 24 (1998) (per curiam)). The law recognizes that this sets a high bar and not every statement that one finds personally upsetting may provide the basis for liability. *See id.* at 1121-22; Restatement (Second) of Torts § 46 cmt. d. This is even more true in the context of a

political campaign, where courts have repeatedly found that accusations of wrong doing, criminality, and fraud are not only tolerable, but are to be expected and must be permitted to maintain the protections of free speech. *See, e.g.*, *Harte-Hanks*, 491 U.S. at 687 ("When a candidate enters the political arena, he or she must expect that the debate will sometimes be rough and personal."); *Schatz*, 669 F.3d at 52 ("Campaigning for public office sometimes has the feel of a contact sport, with candidates, political organizations, and others trading rhetorical jabs and sound-bite attacks in hopes of landing a knockout blow at the polls. It is not for the thin-skinned or the fainthearted, to use two apropos clichés."); *Desert Sun Publ'g*, 97 Cal. App. 3d at 54 ("Once an individual decides to enter the political wars, he subjects himself to this kind of treatment[, and] deeply ingrained in our political history is a tradition of free-wheeling, irresponsible, bare knuckled, Pier 6, political brawls").

Indeed, court after court has rejected claims by political actors when their opponents or the media did in fact *actually* call them a criminal or a crook. *Vogel*, 127 Cal. App. 4th at 1010; *Reed*, 248 Cal. App. 4th at 859; *Rosenaur*, 88 Cal. App. 4th at 264–265; *Shulman v.*

Hunderfund, 905 N.E.2d 1159, 1160 (N.Y. 2009). Here, even Tarkanian has to acknowledge that, at most, the Political Advertisement might be interpreted by some viewers to imply as much. And if actually *calling* an opponent a crook or guilty of a crime (even when they have not in fact been convicted) is not "extreme and outrageous" in the political context, Tarkanian's legal theory—that statements in the Political Advertisement *might* be understood as innuendo (I AA 223-29)—cannot possibly suffice to meet this standard.

Second, Tarkanian also cannot plausibly show that the statements in the Political Advertisement caused him any "emotional distress," or that Rosen proximately caused his distress. Given that the underlying story has been widely publicized for a decade, any distress that Tarkanian claims to have suffered cannot be demonstrably or credibly linked to the Political Advertisement itself. Moreover, as discussed, the statements are not false and even Tarkanian has admitted as much. Thus, any distress Tarkanian claims to now be suffering as a result of the Political Advertisement can only squarely be placed on himself. Tarkanian bears the burden of making a prima facie showing that he

can prevail on this claim, as well as his defamation claim. He has failed to carry this burden.

CONCLUSION

Tarkanian brought this lawsuit to punish a successful political opponent for airing a Political Advertisement during a congressional campaign that did nothing more than report facts about Tarkanian's much publicized involvement with companies that defrauded seniors of millions of dollars. This was unquestionably core political speech concerning an issue of public interest, falling squarely within the reach of Nevada's Anti-SLAPP statute. Moreover, the danger of permitting the District Court's decision to stand, particularly in a case such as this, where the speech occurred in a Political Advertisement by one of the candidates in the last few weeks of a political campaign, cannot be overstated. Such a decision would not only render the Anti-SLAPP statute toothless to protect core political speech, but it would incentivize the very types of lawsuits that the statute is meant to discourage: those brought to punish defendants for exercising their free speech rights, substantially chilling public discourse, particularly in political campaigns and about matters of obvious public concern. For all of the

reasons set forth above, this Court should promptly order dismissal of Tarkanian's Complaint.

Dated: June 4, 2018

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CERTIFICATION OF ATTORNEY

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of 32(a)(5), and the type style requirements of NRAP 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in a 14-point Century Schoolbook font.

I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14-point or more, and contains 12,176 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June, 2018, a true and correct copy of the foregoing **Opening Brief of Appellants** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system and by depositing a true copy of the same for mailing, postage pre-paid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

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