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IN THE SUPREME COURT OF THE STATE OF NEVADA

JACKY ROSEN, an individual; and ROSEN FOR NEVADA, a 527 organization, *Appellants,* vs. DANNY TARKANIAN, *Respondent.*	SUPREME COURT NO.: 73274

RESPONDENT DANNY TARKANIAN'S ANSWERING BRIEF

APPEAL FROM THE DISTRICT COURT
FOR CLARK COUNTY, NEVADA, CASE NO.: A-16-746797-C

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Respondent Danny Tarkanian is an individual, and thus there is no parent corporation or publicly held company that owns 10% or more of his stock.

2. The following law firm represents Respondent in this appeal:

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No other law firm is expected to appear on Respondent's behalf in this appeal.

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JURISDICTIONAL STATEMENT

Respondent and Plaintiff, Danny Tarkanian, does not dispute the position taken by Appellants and Defendants Jacky Rosen and Rosen for Nevada that this Court has jurisdiction pursuant to NRS 41.670(4). *See* Vol. II of Appellants' Appendix ("AA") at 433-34. Direct, interlocutory appeals to this Court from a district court's denial of a motion brought under NRS 41.660 (the "Anti-SLAPP Statute") are expressly allowed by that statute.

ROUTING STATEMENT PURSUANT TO NRAP 28(a)(5)

This appeal should be presumptively retained by the Supreme Court pursuant to NRAP 17(a)(11), as it raises "as a principle issue a question of statewide public importance," namely whether a politician may freely and knowingly defame her political opponents and use Nevada's Anti-SLAPP Statute to hide behind her bad-faith conduct.

Contrary to Appellants' assertion, this appeal does "involve[] ballot or election questions." NRAP 17(a)(2).[1] While Appellants' defamatory statements were published as part of her 2016 political campaign, Respondent's claims do not in any way involve Nevada's ballot or election laws.

[1] Appellants erroneously cite to NRAP 17(3), which was the relevant subsection in the 2015 version of NRAP 17.

STATEMENT OF THE ISSUES

The issues on appeal are as follows:

(1) Whether a politician acts in "good faith" under NRS 41.637 when she repeats statements about her political opponent that are substantially similar to statements that have already been adjudicated as false and defamatory, and repeats these false and defamatory statements by deceptively citing to respected publications.

(2) Whether the target of defamatory campaign ads can make a *prima facie* evidentiary showing of a likelihood of success on his defamation and intentional infliction of emotional distress claims where his political opponent repeated statements about him that are substantially similar to statements that have already been adjudicated as false and defamatory, and repeated these false and defamatory statements by deceptively citing to respected publications.

STATEMENT OF THE CASE

On November 17, 2016, Mr. Tarkanian filed his Complaint against Appellants, bringing six claims for defamation and one claim for intentional infliction of emotional distress based on statements in an advertisement called "Integrity" published by Appellants that falsely implied that Mr. Tarkanian established and operated illegal telemarketing schemes that targeted vulnerable seniors. (*See* I AA 1-21.) Appellants filed their Anti-SLAPP Special Motion to Dismiss Under NRS 41.660 (the "Anti-SLAPP Motion") on January 25, 2017. (*See* I AA 22-40.) Mr. Tarkanian filed his opposition on the Anti-SLAPP Motion on April 10, 2017 (*see* I AA 2017-38, II AA 239-300), and Appellants filed their reply on April 20, 2017. (*See* II AA 301-79.) Appellants did not at any point provide a declaration from Ms. Rosen or any other individual identifying the documents Appellants reviewed before publishing their defamatory statements, or even testifying that Appellants made their defamatory statements in good faith.

The district court heard Appellants' Anti-SLAPP Motion on April 25, 2017 (*see* I AA 405-32), and the court's order denying the motion was entered on June 12, 2017. (*See* I AA 440-43.) In its order denying the Anti-SLAPP Motion, the district court found that Mr. Tarkanian was a public figure for purposes of his claims. (*See* I AA 442.) It found that the statements in the Advertisement were "communication[s] in furtherance of the right to petition or the right to free speech

in direct connection with an issue of public concern" under NRS 41.637. (*Id.*) The district court also found, despite a lack of any supporting evidence in the record, that Appellants relied on other articles in creating the Advertisement. (*See id.*)

However, the district court did not find that Appellants satisfied the "good faith" requirement of the Anti-SLAPP statute. Specifically, it found that Appellants "have not shown by a preponderance of evidence that the three statements at issue were truthful or made without knowledge of its falsehood." (*Id.*) It then moved to the second prong of the Anti-SLAPP analysis and found that Mr. Tarkanian "has shown by *prima facie* evidence of [sic] a probability of success on his defamation claim … the Court cannot find, as a matter of law, that Plaintiff cannot make out a case for defamation regarding the statements by Defendants."

STATEMENT OF RELEVANT FACTS

1.0 The Schneider Case

In 2004, Respondent Danny Tarkanian ran for Nevada State Senate against Mike Schneider. During the State Senate campaign, Mr. Schneider made multiple false statements regarding Mr. Tarkanian, which resulted in Mr. Tarkanian losing the election. Mr. Tarkanian subsequently filed a lawsuit in Clark County District Court, Case No. A500379, against Mr. Schneider (the "Schneider Case"). (*See* I AA 239-248.)[2]

The Schneider Case centered on five statements Mr. Schneider made publicly regarding Mr. Tarkanian. The Schneider Case was highly publicized and made headlines on multiple news outlets as recently as 2016. During the Schneider Case, the court determined, as a matter of law, that Mr. Tarkanian was a limited-purpose public figure. (*See* I AA 252, lines 24-25.) Outside of running for public office, Mr. Tarkanian functions as any other local Las Vegan. He is a businessman, married with four children, who focuses most of his time on taking care of his family.

The Schneider Case went to trial in July of 2009 and resulted in a unanimous jury verdict in Mr. Tarkanian's favor. The jury found by clear and convincing evidence that five statements made by Mr. Schneider were false and defamatory.

[2] This Answering Brief will use the same numbering convention as Appellants' Opening Brief to cite Appellants' Appendix.

(*See* I AA 256 at line 23 to I AA 262 at line 11; *see also* I AA 264-272.) After the unanimous verdict in Mr. Tarkanian's favor, the parties were scheduled to hold a second trial regarding punitive damages. (*See* I AA 276, lines 11-17.) Instead of holding another trial for punitive damages, however, the parties agreed to an amount for punitive damages in Mr. Tarkanian's favor without the second trial. The Schneider Case trial and the jury have been continuously in the media since that time, which Appellants acknowledge in their Opening Brief. (*See* Op. Br. At 11-12.)

2.0 The Dispute Between the Parties

In 2016, Mr. Tarkanian ran for United States Congress against Appellant Jacky Rosen. During the campaign, approximately one week before the General Election, Appellants aired an advertisement on multiple media platforms called "Integrity" (the "Advertisement"), including but not limited to, television, YouTube, Facebook, and Appellants' web site alleging Mr. Tarkanian had been engaged in fraudulent telemarketing schemes that targeted senior citizens. After Mr. Tarkanian sent Appellants a cease and desist letter notifying them that the statements in Ms. Rosen's Advertisement were false, Ms. Rosen took no action, and Mr. Tarkanian lost the 2016 election by 1%.

The statements in Appellants' Advertisement are the same or substantially similar to the statements found to be defamatory in the Schneider Case. Defendants' Advertisement begins with the statement "[t]he targets: seniors,"

which sets the general tone of the Advertisement. The Advertisement then displays three defamatory statements, each of which is attributed to a well-regarded Las Vegas publication. (*See* Vol. II AA at 392-393.) The statements at issue are as follows:

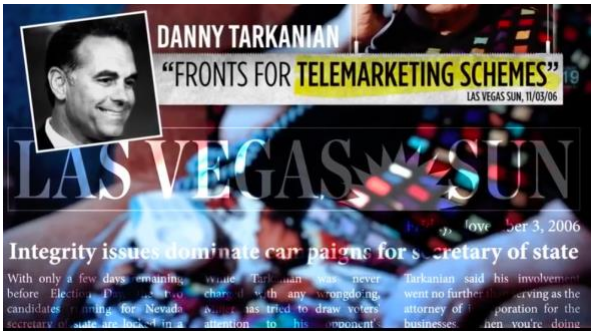
Schneider Statement	Rosen Statement
"Danny set up 19 fraudulent corporations for telemarketers."[3]	"Danny Tarkanian set up 13 fake charities." 

Appellants' Advertisement cites an article in the Las Vegas Review-Journal (the "RJ") published August 9, 2009, which is a "Commentary" by Thomas Mitchell. (*See* I AA 84-87; *see also* I AA 290-292.) The 2009 article, however, says nothing about Mr. Tarkanian setting up fake charities or vulnerable seniors. Indeed, the phrases "fake charities" and "vulnerable seniors" do not even appear in this article.

[3] *See* I AA 241 at ¶ 6(b); *see also* I AA 264-272.)

Schneider Statement	Rosen Statement
"Why did [Mr. Tarkanian] set up an organization to cheat us out over [sic] $2 million of our hard-earned retirement money?"	". . . seniors lost millions from the scams Danny Tarkanian helped set up." 

Like Statement #1, the "Integrity" Advertisement fabricated a statement and attributed it to a newspaper article, when the quoted language never appears in the article. Appellants attributed the quote above to the same 2009 RJ "Commentary" written by Thomas Mitchell. The 2009 article, however, does not contain the language, or any similar language, quoted by Appellants in their Advertisement. (*See* I AA 84-87; *see also* I AA 290-292.)

Schneider Statement	Rosen Statement
"Why did Danny Tarkanian betray the most vulnerable among the elderly"	". . . 'fronts for telemarketing schemes.'" 

For this statement, the Advertisement cites the article "Integrity Issues Dominate Campaign for Secretary of State," by Michael J. Mishak in the Las Vegas

Sun, published November 3, 2006. (*See* I AA 60-65.) The Advertisement literally picks a few words out of a sentence which Appellants use to mislead the audience. The statement contained in the 2006 article actually reads: "In 1994, Tarkanian incorporated at least four business entities later found by state and federal authorities to be fronts for telemarketing schemes. He also served as resident agent, or a point of legal contact, for those companies." (*Id.*)

The Advertisement's claim that its defamatory statements are based on the above articles is demonstrably and knowingly false; the articles did not make these claims, and Appellants deceptively quoted or paraphrased these sources to make them seem otherwise. Appellants make no attempt whatsoever in their Opening Brief to explain these discrepancies.

The five statements at issue in the Schneider Case were:

1. Danny turned state's evidence and testified against his "fellow" telemarketers to keep from being personally charged with a crime.
2. Danny set up 19 fraudulent corporations for telemarketers.
3. Danny was under grand Jury Investigation in two different locations and at two different places of employment.
4. "Why Did Danny Tarkanian betray the most vulnerable among the elderly?"
5. "Why did [Danny] set up an organization to cheat us out over [sic] $2 million of our hard-earned retirement money.

(I AA 241 at ¶6, 245 at ¶42.) The jury in the Schneider Case found that all five statements were defamatory, and the jury's verdict in no way suggested that it found any of the statements to be non-defamatory. (*See* I AA 264-72.)

SUMMARY OF THE ARGUMENT

NRS 41.637 defines conduct that is protected under Nevada's Anti-SLAPP statute. It provides, in relevant part, that a "[c]ommunication made in direct connection with an issue of public interest in a place open to the public or in a public forum, which is **truthful or is made without knowledge of its falsehood**," is protected. NRS 41.637(4) (emphasis added). A party bringing an Anti-SLAPP motion has the initial burden to show that its conduct falls under this definition by a preponderance of the evidence. If it does so, a party opposing the motion must show by *prima facie* evidence that it has a probability of prevailing on the merits of its claims. A district court deciding an Anti-SLAPP motion is required to treat it like a motion for summary judgment, meaning a party must meet its burden with competent, admissible evidence.

Given the evidentiary record before it, the district court properly found that Appellants had not met their initial burden under the Anti-SLAPP statute of proving that their statements were made in good faith. The record was completely silent as to which documents Appellants relied upon in creating their defamatory Advertisement. The Advertisement was deliberately framed to communicate to the average viewer the false and defamatory implication that Mr. Tarkanian was personally involved in creating and operating illegal telemarketing scams, going so far as to deceptively quote and paraphrase articles from well-respected Nevada

newspapers. None of the evidence provided by Appellants even suggested that the defamatory implication of the Advertisement was remotely truthful. And the deliberately misleading context created by the Advertisement made it clear that Appellants knew their claims were false and could not be substantiated by reliable sources, thus showing that they did not make their statements in good faith, and in fact made their statements with actual malice.

ARGUMENT

1.0 Legal Standard

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

NRS 41.660(3) provides that when a defendant files an Anti-SLAPP motion,

> the court shall … [d]etermine whether the moving party has established, by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern.

NRS 41.637 establishes four categories of communications protected by the statute. NRS 41.637(4). Regardless of which category of protected speech a communication falls into, the communication must be "truthful or [] made without knowledge of its falsehood" to be protected. *See Shapiro v. Welt*, 389 P.3d 262, 267 (2017). To satisfy her burden, the defendant "must be unaware that the communication is false **at the time it was made**." *Id*. (emphasis added).

An Anti-SLAPP motion is treated as a motion for summary judgment. *See Stubbs v. Strickland*, 297 P.3d 326, 329 (Nev. 2013). Accordingly, "the district

court can only grant the special motion to dismiss if there is no genuine issue of material fact and 'the moving party is entitled to a judgment as a matter of law."' *John*, 125 Nev. at 753-54 (quoting NRCP 56(c)). Mr. Tarkanian agrees with Appellants that, like a motion for summary judgment, the granting or denial of an Anti-SLAPP motion is reviewed *de novo*. *See John v. Douglas Cnty. School Dist.*, 125 Nev. 746, 753 (Nev. 2009).[4]

In interpreting its Anti-SLAPP statute, Nevada courts look to the wealth of California case law interpreting that state's statute. *See John*, 125 Nev. at 756 (stating that "we consider California caselaw because California's anti-SLAPP statute is similar in purpose and language to Nevada's anti-SLAPP statute"); *see also Shapiro v. Welt*, 389 P.3d at 268 (same); *and see* NRS 41.665 (defining the plaintiff's prima facie evidentiary burden on second prong in terms of California law.)

[4] A recent decision from this Court found that the applicable standard of review is abuse of discretion, but that is not the case here. *Shapiro v. Welt*, 389 P.3d 262 (Nev. 2017) found that, under the 2013 version of the Anti-SLAPP statute, abuse of discretion was the proper standard of review. It expressly did so, however, because *that version* of the statute required a defendant opposing the motion to show by *clear and convincing evidence* a probability of prevailing on its claims. *See id.* at 266. That change of the standard made no sense, but it is of no event now. In 2015, the statute was revised to decrease this evidentiary burden to the summary judgment-like *prima facie* standard. Since this burden is the same as it was before the 2013 revisions, *de novo* is the proper standard of review here.

2.0 Appellants Cannot Meet Their Burden Under Prong One Because They Did Not Make Their Statements in Good Faith

Nevada's Anti-SLAPP statute does not categorically protect statements that fall under the enumerated categories in NRS 41.637(1)-(4). The statute's protections are reserved for statements made in "good faith," i.e., statements "which [are] truthful or [are] made without knowledge of [their] falsehood." NRS 41.637. Accordingly, because Appellants cannot meet their burden of showing the statements in their Advertisement were made in good faith, it does not matter if the statements fall into one of the four categories under NRS 41.637. This is not a case about core political speech designed to inform the electorate; it is about a deliberately deceptive hatchet job targeted at a political opponent right before a national election.

As explained above, Appellants' Advertisement contains three statements attributed to prominent Las Vegas publications. The Advertisement frames these statements in a manner that gives viewers the impression that they are quotes from these articles; the font and background for the text, as well the citation provided and the highlighted wording, is meant to look like text from a printed article annotated by Defendants. The purpose of this framing is to lead viewers to believe that Defendants are not making these assertions themselves, but rather are merely repeating statements from a neutral press outlet, with the intent of giving the statements more credibility to the viewer.

For the first and second statements, however, this is false. The quoted language does not appear anywhere in the 2009 LAS VEGAS REVIEW-JOURNAL article the Defendants claim to quote from. (*See* I AA 84-87.) The article merely paraphrases allegations from a mailer sent out by Mike Schneider in 2009 containing allegations similar to those in the Advertisement; in particular, the article states Schneider "sent out mailings saying [Mr. Tarkanian] did work for telemarketing firms accused of scamming the elderly." (*Id.*) The article does not at any point adopt these allegations or claim that Mr. Tarkanian "set up" any form of "scam" targeting seniors. The closest the article comes to supporting the advertisements' statements is editorializing that "[t]hese were circumstances ripe for innuendo and connecting the dots." (*Id.*) Appellants did not merely paraphrase the contents of the 2009 article; they created factual allegations that did not exist in the article and attributed them to the article. These statements are false because they imply that Mr. Tarkanian was intimately involved in the fraudulent activities of these firms, and they accuse him of engaging in criminal activity. This is not true, and Appellants have never argued that the statements are true.

The third statement, unlike the other two, is an actual quote from a LAS VEGAS SUN article: "fronts for telemarketing schemes." Without providing the surrounding context, which was deliberately left out of Appellants' Advertisement, however, the quote is highly misleading. The article states "[i]n 1994, Tarkanian

incorporated at least four business entities later found by state and federal authorities to be fronts for telemarketing schemes. He also served as resident agent, or a point of legal contact, for those companies." (*See* I AA 61.) It contains explanations from Mr. Tarkanian that he only served as these firms' registered agent and incorporated them. (*See id.*) It also notes that the U.S. Attorneys' office never investigated Mr. Tarkanian in any legal proceedings against the firms. (*See id.*) Appellants' Advertisement does not disclose or even hint at any of this information. Providing this quote without its surrounding context, stuck between two false and defamatory statements, creates the false and defamatory implication that Mr. Tarkanian was intimately involved in these "fronts for telemarketing schemes," and thus that he engaged in criminal conduct. Statements that imply false statements of fact are actionable. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990).

Appellants purport to quote from an article. Therefore, they should be charged with actual knowledge of the content of that article. Anyone who reads that article would know that while the words may appear in the article, they do not appear in the claimed, false, context. It is as if one would claim "Thou shalt … bear false witness against thy neighbor" is properly attributed to the 9th Commandment.

As a matter of politics, the attempt to create a defamatory implication is obvious. The Advertisement would have no impact if Appellants accurately

portrayed the fact that Mr. Tarkanian provided routine legal work for companies that ended up operating telemarketing scams but had no involvement in the operation of the scams. That message would have no bearing on Mr. Tarkanian's qualifications for public office. The Advertisement is only effective if the message it conveys is that Mr. Tarkanian is unqualified because he is the sort of person who would take part in a telemarketing scam that targets seniors. That is exactly what the Advertisement is designed to imply, and is exactly the impression it provides to the average viewer. To claim otherwise is simply not credible.

The statements in the advertisements are thus false, and there is ample record evidence to show that Appellants made these statements knowing they were false. The advertisement is designed to look like a collection of newspaper clippings quoting the LAS VEGAS REVIEW-JOURNAL and the LAS VEGAS SUN, but the first and second statements do not appear in the cited article. There is no conceivable way that Appellants innocently invented "quotes" and misattributed them to a neutral publication. Appellants unquestionably knew that these statements did not appear in the cited article, as the first and second statements do not contain quotation marks (though they keep all other indicia of quoted material), while the third does contain quotation marks. Furthermore, Appellants already knew that substantially similar statements had already been adjudicated as false by a jury in Nevada. Appellants must have been aware of this adjudication, given that the 2009 LAS VEGAS REVIEW-

JOURNAL article they cite in the Advertisement discusses the jury verdict. (*See* I AA 84-87.)[5]

Accordingly, even though Appellants' statements are part of a political advertisement, Appellants did not make these statements in "good faith" under NRS 41.637. In fact, it is impossible for them to have done so. Either they had the referenced articles, and thus had evidence in their hands that their purported paraphrasing was false, or they falsely stated that they were quoting their media source. They are in a factual catch-22. Furthermore, even after Mr. Tarkanian sent Appellants a cease and desist letter explaining why their statements were false and defamatory, Appellants continued to publish the Advertisement. (*See* II AA 278-280.) This is further evidence that Appellants knew their statements were false from the outset, thus establishing a lack of good faith. At the very least, there is a dispute as to an issue of material fact on this question. Appellants thus have not carried their burden under the first prong of the Anti-SLAPP statute, and the Court should affirm the district court's denial of the Anti-SLAPP Motion.

[5] Appellants correctly note that a statement is not defamatory if the "gist or sting" of the statement is true, but this does not help them. (Op. Br. At 33.) The "gist or sting" of the Advertisement is that Mr. Tarkanian established and operated telemarketing scams that preyed on vulnerable seniors. This is objectively false, and to find otherwise would require the Court to consciously ignore the context of the statements at issue.

Appellants try to get around their obvious bad faith by claiming that Mr. Tarkanian has admitted that substantially similar statements about him made by other political opponents in 2009 and 2012 are true. But there are two problems with this argument. First, Mr. Tarkanian never admitted that the statements in these articles are true; in his opposition to the Anti-SLAPP Motion, he stated it was true to assert that "Danny served as a resident agent and did some minor legal work for some companies." (I AA 229.) Appellants insist that the Court should look solely at the words of the Advertisement, and nothing else, and determine that because there is a passing similarity[6] to statements in the Miller and Horsford articles, they cannot be defamatory. But this completely ignores the context created in the Advertisement which suggests that Mr. Tarkanian was personally involved in setting up and operating criminal telemarketing schemes.[7] There is nothing in the

[6] Appellants drastically overstate the similarities between the statements in the Miller and Horsford articles and the statements in the Advertisement. (*See* Op. Br. at 31.) Unlike the Advertisement, statements in the Miller and Horsford articles do not claim, and cannot reasonably be interpreted as claiming, that Mr. Tarkanian set up telemarketing schemes. Rather, they simply note that he worked as the registered agent and attorneys for these entities, has been "involved" with them, and "worked for" them. While these statements also provide an unsavory implication, they do not lead the average reader to believe that Mr. Tarkanian was personally involved with setting up and operating telemarketing schemes. And while Appellants make much ado about the fact that Mr. Tarkanian did not sue over these statements, this is completely irrelevant; there is nothing to suggest that Mr. Tarkanian waived all rights to vindicate his reputation simply by not reflexively suing everyone who makes potentially defamatory statements about him.

[7] Appellants misleadingly cite *Paterno v. Superior Court*, 163 Cal. App. 4th 1342, 1355 (2008) for the proposition that if a statement is "not spun out of whole

record to suggest that the statements of Mr. Tarkanian's other political opponents were framed in the same way as those of Appellants, and so any similarity in wording between the Miller/Horsford articles and the Advertisement is immaterial to the question of whether the statements in the Advertisement are false. Appellants' citation to these articles thus serves only to create additional questions of material fact, and Appellants thus fail to meet their burden under prong one.

Second, these articles have no bearing on whether Appellants knew their statements were false. There is nothing in the record to suggest that Appellants were aware of the Miller and Horsford statements at the time they created and published the Advertisement. There is no declaration from Ms. Rosen or anyone from Rosen for Nevada that Appellants had reviewed these articles beforehand. In fact, there is nothing to suggest that Appellants reviewed any of the documents Appellants submitted as evidence, aside from those cited in the Advertisement. It is equally likely that, after being sued by Mr. Tarkanian, Appellants struggled to find any evidence that could make it look like they acted in good faith and then implied,

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cloth," it cannot be false for Anti-SLAPP purposes. But this is not true at all; as explained below, Nevada and California recognize defamation by implication, which allows for a defamation claim even if the exact statements in question are not literally false. Furthermore, the language cited in *Paterno* actually comes from *Sipple v. Foundation for Nat. Progress*, 71 Cal. App. 4th 226, 246 (1999). Unlike this case, *Sipple* dealt with the "fair report" privilege, which is designed to give media outlets wide latitude in reporting on judicial proceedings. Those principles are not in play here, as Appellants were not engaged in any form of news reporting, and so these cases are inapposite.

without stating under penalty of perjury, that they had these articles in mind when they published the Advertisement. It is Appellants' burden to show that they acted in good faith, and they fail to do so.

3.0 Mr. Tarkanian Can Demonstrate a Probability of Prevailing on His Claims

Because Appellants have not met their burden as to prong one, the Court should stop its analysis there and affirm the district court's order. If, however, and only if, this Court finds that Appellants met their burden, it should find that Mr. Tarkanian has demonstrated a probability of prevailing on his claims.

For a plaintiff to meet his burden under the second prong of the Anti-SLAPP analysis, he must "demonstrate[] with *prima facie* evidence a probability of prevailing on the claim." NRS 41.660(3)(b). The "*prima facie*" evidentiary burden is defined as "the same burden of proof that a plaintiff has been required to meet pursuant to California's anti-Strategic Lawsuits Against Public Participation law as of June 8, 2015." NRS 41.665(2).

This is not a heavy burden. In deciding an Anti-SLAPP motion, "the court does not weigh the credibility or comparative probative strength of competing evidence. It should grant the motion only if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." *Jarrow Formulas, Inc. v. La Marche*, 31 Cal. App. 4th 728, 741 (2003). As in a motion for summary judgment, the court must

accept as true the evidence favorable to the non-moving party and evaluate the moving party's evidence only to determine if it has defeated the evidence submitted by the non-moving party as a matter of law. *See Flatley v. Mauro*, 39 Cal. 4th 299, 326 (2006). "The plaintiff need only establish that his or her claim has '**minimal merit**' to avoid being stricken as a SLAPP." *Soukup v. Law Offices of Herbert Hafif*, 39 Cal. 4th 260, 291 (Cal. 2006) (citing *Navellier v. Sletten*, 29 Cal. 4th 82 (Cal. 2002)) (emphasis added).

There is ample record evidence to show that Appellants both made false and defamatory statements, and that they made these statements with actual malice. At the very least, however, there is a question of material fact as to the falsity of the statements and Appellants' actual malice that requires this Court to affirm the decision of the district court denying the Anti-SLAPP Motion.

3.1 Mr. Tarkanian Has a Probability of Prevailing on His Defamation Claims

Claims 1–6 are defamation *per se* claims regarding the different venues in which Defendants published their defamatory advertisement. For purposes of the Motion, all six claims share the same legal analysis.

In order to establish defamation, a plaintiff must show that: (1) the defendant made a false and defamatory statement concerning the plaintiff; (2) an unprivileged publication of this statement was made to a third person; (3) the defendant was at least negligent in making the statement; and (4) the plaintiff sustained actual or

presumed damages as a result of the statement.[8] *See Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 714 (2002). There is no dispute that Appellants' statements concern Mr. Tarkanian or that they published these statements to third parties.

3.1.1 The Statements in the Advertisement Create a False and Defamatory Implication

A statement is defamatory if it "would tend to lower the subject in the estimation of the community, excite derogatory opinions about the subject, and hold the subject up to contempt." *K-Mart Corp. v. Wash.*, 109 Nev. 1180, 1191 (1993). A statement is not defamatory if it is an expression of opinion or rhetorical hyperbole, or if it is absolutely or substantially true. *See Pegasus*, 118 Nev. at 715.

Ordinarily, whether a statement is one of opinion or fact is a question of law. However, where a statement is capable of multiple interpretations, some of which are defamatory, the question of whether the statement is defamatory becomes an issue of fact. *See Lubin v. Kunin*, 117 Nev. 108, 111 (2001); *see also Miller v. Jones*, 114 Nev. 1291, 1296 (1998). When reviewing a defamatory statement, "[t]he words must be reviewed in their entirety **and in context** to determine whether they are susceptible of a defamatory meaning." *Chowdhry v. NVLH, Inc.*, 109 Nev. 478, 484 (1993) (emphasis added).

[8] Before the district court Mr. Tarkanian briefed the issue of the defamatory *per se* nature of Applicants' statements, which excused him from having to show damages for purposes of establishing liability. Appellants did not contest this at the district court, and does not contest it in their Opening Brief.

While truth is an absolute defense to a defamation claim, a statement can be defamatory even when literally true if it provides a false and defamatory implication to the reader.[9] *See Milkovich*, 497 U.S. at 21; s*ee also Hawran v. Hixson*, 209 Cal. App. 4th 256, 293 (2012) (citing *Kapellas v. Kofman*, 1 Cal. 3d 20, 33 (Cal. 1969)). "'To constitute a libel it is not necessary that there be a direct and specific allegation of improper conduct …. The charge may be either expressly stated or implied ….'" *Thomas*, 189 F. Supp. 2d at 1012-1013 (quoting *MacLeod v. Tribune Publishing Co.*, 52 Cal. 2d 536, 548-49 (Cal. 1959)). When dealing with defamation by implication, the court "'must determine whether the statements that form the basis of a defamation claim: (1) … impliedly assert a fact that is susceptible to being proved false; and (2) whether the language and tenor is such that it cannot 'reasonably be interpreted as stating actual facts.'" *Id*. (quoting *Weller v. ABC*, 232 Cal. App. 3d 991, 1001 (1991). The latter question in this test is meant to protect statements of rhetorical hyperbole that an audience would not consider factual and are thus protected under the First Amendment. *See Weller*, 232 Cal. App. 3d at 1000-01.

It is also important to keep in mind that the defamatory nature of a statement is not evaluated based on the interpretation of the most sophisticated reader, but

[9] A plaintiff's status as a public figure does not bar him from bringing a defamation by implication claim. *See Thomas v. L.A. Times Communs. LLC*, 189 F. Supp. 2d 1005, 1012 (C.D. Cal. 2002).

rather how the average reader will interpret the statement. "California courts in libel cases have emphasized that the publication is to be measured, not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader." *Kaelin v. Globe Communs. Corp.*, 162 F.3d 1036, 1040 (9th Cir. 1998). "So long as the publication is reasonably susceptible of a defamatory meaning, a factual question for the jury exists." *Id.* (citations and alterations omitted); *see also Piping Rock Partners, Inc. v. David Lerner Assocs.*, 946 F. Supp. 2d 957, 979 (N. D. Cal. 2013).

Hawran, for example, dealt with a press release by the defendant company in the midst of a publicized debacle regarding its diagnostic tests. The defendant's press release stated that the plaintiff and other employees had resigned from the company and denied any wrongdoing, but "the special committee's investigation has raised serious concerns, resulting in a loss of confidence by the independent members of the company's board of directors in the personnel involved." *Id.* at 264. The court found that even though it was literally true that a director of the company told the plaintiff that the company's board had lost confidence in the plaintiff, there was a question of fact as to whether the press release was defamatory because it implied the plaintiff had engaged in various forms of negligent and unethical conduct. *See id.* at 293.

In *Weller*, the defendant made numerous statements about the plaintiff's allegedly fraudulent sale of a stolen silver candelabra, claiming, *inter alia*, that the plaintiff was associated with a man recently convicted of insurance fraud involving silver. *See Weller*, 232 Cal. App. 3d at 998. The court found that these statements communicated a defamatory implication because, among other things, it stated true information about the convicted felon arranged in such a manner that it implied a connection with the sale of the candelabra, thus making it appear that the plaintiff also engaged in fraudulent activity. *See id*. at 1002.

This case provides similar issues to those in *Hawran* and *Weller*. Mr. Tarkanian's only "involvement" in the fraudulent telemarketing operations to which Appellants' Advertisement refers was serving as their registered agent and filing incorporation paperwork. (*See* II AA 297-230.) He did not take part in any fraudulent scheme, did not have knowledge of any such activities, and was not investigated for any purported involvement in such activities. But that is not the impression that Appellants' Advertisement creates. In fact, the Advertisement is crafted carefully to avoid the truth.

The Advertisement begins with the text "The target: Seniors," displaying a senior citizen answering a telephone call. It then identifies Mr. Tarkanian by name and by providing a picture of him, directly underneath another senior citizen answering a phone call. This creates the implication that Mr. Tarkanian himself

personally participated in the telemarketing schemes to defraud seniors, which involved calling seniors by telephone in their homes. This implication is objectively false, and Appellants cannot provide any evidence even suggesting it to be true.

The advertisement then states: "Danny Tarkanian set up 13 fake charities that preyed on vulnerable seniors," and displays a third senior citizen speaking on the phone. This language does not appear in the article which the Advertisement cites. The term "set up" is clearly intended to imply that Mr. Tarkanian took part in laying the groundwork for the fraudulent telemarketing schemes. The intended implication is that Mr. Tarkanian was personally involved in defrauding senior citizens. The Advertisement shows seniors answering telephones while it displays the LAS VEGAS SUN quote "fronts for **telemarketing** schemes," insinuating that Mr. Tarkanian was personally involved in the day-to-day operations of these schemes. The statement that Mr. Tarkanian "set up 13 fake charities" is similarly meant to imply that Mr. Tarkanian personally defrauded seniors as part of these schemes. And the statement that seniors lost money "from the scams Tarkanian helped set up" implies not that Mr. Tarkanian incorporated entities that later engaged in scams, but rather that he was an architect of the scams themselves.

The three statements, viewed together and in the context of an advertisement portraying vulnerable senior citizens falling prey to a telemarketing scheme, communicate to the viewer the impression that Mr. Tarkanian himself defrauded

seniors. It does not provide accurate reporting that Mr. Tarkanian merely filed incorporation paperwork for these entities and served as their registered agent. The articles cited in the Advertisement go no further than this, but reporting the truth would not have made for an effective political ad. There is also no question that Appellants attempted to communicate this false implication as an assertion of fact, rather than opinion. It does not contain any statements of opinion or rhetorical hyperbole; rather, it contains factual representations capable of being proven false that are falsely attributed to neutral press outlets. The fact that the Advertisement falsely portrays its statements as quotes from these well-regarded newspapers, rather than the editorialization of a political campaign that it is, conclusively demonstrates that Appellants intended the statements in the Advertisement to be taken as literal statements of fact. Mr. Tarkanian never took part in any fraudulent activities engaged in by entities that he incorporated and served as registered agent for, yet Appellants' Advertisement implies exactly this. Appellants' argument to the contrary, that their statements are substantially similar to the Miller and Horsford statements, both relies on a deliberate misreading of the statements at issue in those articles and is only remotely plausible if the Court completely ignores the context of the Advertisement and how it is framed. The Court cannot do so.

The statements in the Advertisement thus imply false factual assertions and are properly the subject of Mr. Tarkanian's defamation claims. If the Court finds

that there is any ambiguity in the Advertisement's implications, then that is a question of fact for the jury, and not properly disposed of on an Anti-SLAPP motion.

Appellants' argument appears to ignore completely the fact that defamation by implication exists and is recognized in Nevada. Rather, Appellants argue that their statements are "substantially similar" to statements by other political opponents of Mr. Tarkanian that appeared in the Miller and Horsford articles, which Mr. Tarkanian allegedly admitted were true, and thus cannot be defamatory. This is wrong. Mr. Tarkanian only admitted it was true that he incorporated and performed minor legal work for entities that later carried out telemarketing scams. (I AA 229.) There is nothing remotely true about the implication that Mr. Tarkanian took part in these schemes, creates these schemes, or was even aware of these schemes. Appellants do not argue that this implication is true, despite clearly communicating it in the Advertisement. Mr. Tarkanian's claims are not a pedantic "parsing of words" that courts have found inappropriate in defamation cases; they are a recognition that, when the statements at issue are viewed in context, Appellants are encouraging viewers of the Advertisement to draw a conclusion about Mr. Tarkanian that is blatantly and intentionally false.

Appellants also argue essentially that there is a categorical bar on defamation claims in the context of political advertising. This is not true. While audiences in political campaigns may have a greater expectation of "fiery rhetoric or hyperbole,"

and thus may be more inclined to believe a statement of seeming fact to be a statement of opinion, *Reed v. Gallagher*, 248 Cal. App. 4th 841, 859 (2016), the Advertisement was carefully designed to suggest it was quoting reputable, neutral news outlets, and thus expressing statements of fact. As already explained, the Advertisement deceptively paraphrased an article from the RJ but provided several indicia suggesting the language in the Advertisement was a direct quote. It quoted an article from the Las Vegas Sun while deliberately leaving out important context, thus completely changing the quote's meaning. It is not grasping at straws to claim that there might be a defamatory implication created by the Advertisement; it is precisely what Appellants tried to communicate.

Appellants try to reinforce this principle by comparing this case with *Wellman v. Fox*, 108 Nev. 83 (1992). But *Wellman* dealt with a very different factual scenario. The statements at issue there are: "This *gang is led by a member who was thrown off of the local union executive board for obtaining union funds fraudulently*, the only such blemish in our proud history. This gang is *replete with nepotism*, and the real topper is it *even includes a strikebreaker*." *Id*. at 88 (emphasis original). The court noted that several of the statements were objectively true; the plaintiff was thrown off the union executive board for fraudulently submitting duplicative time sheets, and the plaintiff provided support to a former strikebreaker. *See id*. It then observed that, given the inflammatory tenor of the flyer on which the statements appeared,

other statements would be viewed as statements of opinion or rhetorical hyperbole. *See id.*

The facts in *Wellman* are not the facts here. The Advertisement clearly implies that Mr. Tarkanian created, from the ground up, fraudulent telemarketing schemes, operated them, and targeted them at vulnerable seniors. This is not remotely true. The unambiguous message of the Advertisement is that Mr. Tarkanian is not qualified for office due to this implication, and there is nothing in the Advertisement containing inflammatory language that would make a viewer interpret the Advertisement as containing statements of opinion or hyperbole. To the contrary, it tries to give the impression of being a literal recitation of reporting from respected news outlets, despite deceptively misquoting, and even fabricating quotes attributed to, these publications. Yet the flyer in *Wellman* wore its partisan nature on its sleeve, and based its express message on true, disclosed facts that did not create any innuendo. It is entirely different from the Advertisement, and so *Wellman* is inapposite.

3.1.2 Appellants Acted With Actual Malice

Appellants correctly state that, at least for the time during which Mr. Tarkanian was running for office and before the November 8, 2016 election,

Mr. Tarkanian is a public figure for purposes of this action.[10] This means that, to prevail on his defamation claims, Mr. Tarkanian must show "actual malice," *i.e.*, knowledge that the statements are false or were made with reckless disregard for their truth or falsity. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). A defendant displays "reckless disregard" under this standard if she "in fact entertained serious doubts as to the truth of [the] publication." *Nevada Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 414 (1983). This is a subjective test that focuses "on what the defendant believed and intended to convey, not what a reasonable person would have understood the message to be." *Id.* at 415.[11] As this inquiry looks to the subjective motivations of the defendant, actual malice is a question of fact.[12] *See McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 842 (1986).

[10] As the district court noted, it is far from clear that Mr. Tarkanian was a public figure after the 2016 election, when he was no longer running for office, and after which Appellants continued to publish the defamatory Advertisement. The distinction is ultimately immaterial here, however, because Mr. Tarkanian can show that Appellants acted with actual malice.

[11] Appellants correctly note that the plaintiff's ultimate burden of proof at trial on the question of actual malice is by clear and convincing evidence. Mr. Tarkanian's burden to oppose the Anti-SLAPP Motion, however, is only to show *prima facie* evidence of a *probability* of carrying this ultimate evidentiary burden.

[12] Appellate courts will exercise independent review of actual malice determinations and are not strictly bound to the conclusions of the finder of fact on this question. *See id.* But this does not change the fact-intensive nature of this inquiry, which is a determination better left for full factual development after discovery.

The record easily demonstrates the *prima facie* evidentiary showing Mr. Tarkanian must provide as to Appellants' actual malice. As already explained above, Appellants framed their Advertisement to give viewers the impression that Appellants were merely quoting the RJ and the LAS VEGAS SUN, when in reality they made false factual assertions and incorrectly attributed them to these publications to give them greater perceived credibility. They knew that two of these three statements were not quotes from the 2009 article because the language used in the advertisement does not appear anywhere in that article.

The more important question, however, is whether Appellants knew that their implication regarding Mr. Tarkanian's involvement with fraudulent telemarketing schemes was false. There is ample evidence to establish this. Mr. Tarkanian won a defamation jury verdict against Mike Schneider in 2009 for, *inter alia*, the statements:

1. Mr. Tarkanian set up 19 fraudulent corporations for telemarketers. (*See* II AA 241 at ¶6(b).)
2. "Why Did Danny Tarkanian betray the most vulnerable among the elderly?" (II AA 245 at ¶42(a).)
3. "Why did [Mr. Tarkanian] set up an organization to cheat us out over [sic] $2 million of our hard-earned retirement money?" (II AA 245 at ¶42(b).)

Appellants must have known about this jury verdict when they published the Advertisement. The 2006 article discusses the allegations in the Schneider Case while it was ongoing (*see* I AA 60-65), the 2009 article discusses the outcome of

that case, including the jury verdict (*see* I AA 84-87), and, as Appellants note, the case was discussed in the media up through 2012. (*See* I AA 46-50.) Thus, Appellants repeated statements that they *knew communicated a defamatory implication*. They have not provided any evidence establishing the truth of this implication, either, and do not even claim this implication is accurate.[13] The Court does not even need to look into recklessness; the facts establish knowing falsity.

Appellants' purported justification for their conduct is unavailing. They claim that they could not have entertained subjective doubt about the veracity of their statements because the jury verdict in the Schneider Case did not specify which statements were defamatory. But this makes no sense. The defamatory statements in the Schneider Case were divided on the jury verdict form into three categories. (*See* I AA 194-202.) While the verdict form does not specify which statements were defamatory, it does show that all three categories of statements were defamatory. (*See id*.)

The first two categories of statements are relevant here. Category one contains the following defamatory statements, made on the Ralston Show:

[13] Appellants repeatedly refer to statements made by other political opponents of Mr. Tarkanian who made similar allegations in 2009 and 2012 that Mr. Tarkanian did not sue for the proposition that Mr. Tarkanian somehow conceded the truth of Appellants' statements and implications. This is not how defamation law works, nor is it a reasonable conclusion for anyone to reach, much less someone running for public office. Not surprisingly, Appellants provide no authority or explanation for this novel proposition.

1. Mr. Tarkanian turned state's evidence and testified against his "fellow" telemarketers to keep from being personally charged with a crime.
2. Mr. Tarkanian set up 19 fraudulent corporations for telemarketers.
3. Mr. Tarkanian was under Grand Jury Investigation in two different locations and at two different places of employment.

(I AA 78 at ¶6.) The second statement here is legally identical to the statement in Defendants' advertisement that Mr. Tarkanian "set up 13 fake charities that preyed on vulnerable seniors."

The second category contains statements, made in mailed flyers, that essentially repeat this allegation:

1. "Why Did Danny Tarkanian betray the most vulnerable among the elderly?"
2. Why did [Mr. Tarkanian] set up an organization to cheat us out over [sic] $2 million of our hard-earned retirement money?"

(I AA 80 at ¶42.) There is thus no way to read the complaint and jury verdict form and not conclude that the jury found the implication created by the allegation that Mr. Tarkanian "set up" entities that defrauded seniors are defamatory. There is thus a legitimate question as to Appellants' awareness of the falsity of their statements in the Advertisement. The district court correctly decided that this question precludes the court from granting the Anti-SLAPP Motion.

Even if Appellants somehow did not reach this conclusion, their purported thought process was apparently convoluted and extremely risky. First, they must have assumed that the jury in the Schneider Case found that not all the statements at

issue were defamatory. There is nothing in the record to indicate this is so. Second, they would have to have concluded that the jury found one of the statements in category one of the jury verdict form and both the statements in category two were not defamatory. There is no evidence of this, and regarding category two this is in fact impossible. Even if the Court assumes that Appellants were completely unreasonable, Appellants made their statements with the awareness that, *at best*, they had a 50% chance of defaming Mr. Tarkanian. Appellants do not even allege that they engaged in any form of investigation to mitigate this chance. This amounts to reckless disregard for the truth.

Appellants also refer to several news articles covering allegations against Mr. Tarkanian related to the fraudulent telemarketing schemes. As noted in Section 2.0, *supra*, however, this evidence is irrelevant. These articles only bear on the question of Appellants' subjective doubt as to the truth of their statements if they *actually reviewed the statements* when they published the Advertisement. There is nothing in the record to suggest this is the case, as no one testified as to what documents Appellants reviewed, relied on, or were even aware of at the time of publication. Accordingly, the record only shows that Appellants were aware of the 2009 RJ article and the 2006 LAS VEGAS SUN article when they published the Advertisement. The Advertisement deliberately misrepresented the reporting in

these articles to provide a false and defamatory implication to readers. This is textbook actual malice.

Even if there were evidence showing that Appellants reviewed all of the articles attached to the Anti-SLAPP Motion before publishing the Advertisement, this would not help Appellants. The articles Appellants submitted mention that Mr. Tarkanian was not involved in the operation of telemarketing schemes, that he only provided basic legal services to the entities carrying out these schemes, and that he had no knowledge of the schemes. (*See* I AA 47, 53, 58, 61, 68, 85, 94, 188.) If Appellants had read these articles, it would mean that they were aware that all reporting on this issue disclosed the fact that Mr. Tarkanian was not involved in any of the illegal telemarketing scams, and then disregarded this crucial fact to imply that Mr. Tarkanian was in fact involved in them. Appellants' narrative only makes their actual malice even more apparent.

3.2 Mr. Tarkanian Has a Probability of Prevailing on His Intentional Infliction of Emotional Distress Claim

The tort of intentional infliction of emotional distress has four elements: (1) the defendant must act intentionally or recklessly; (2) the defendant's conduct must be extreme and outrageous; and (3) the conduct must be the cause of (4) severe emotional distress. As already explained above, Appellants created an Advertisement that falsely accuses Mr. Tarkanian of defrauding vulnerable seniors. In doing so, they deliberately misled viewers as to the sources for their statements.

Because Appellants acted with actual malice, the first element is satisfied. Lying not just about a political opponent, but about the contents of neutral publications for the purpose of deceiving voters mere days before a national election is extreme and outrageous.

CONCLUSION

Appellants blatantly lied about Mr. Tarkanian in a political advertisement published right before a national election. Appellants deliberately crafted their advertisement to make viewers think Mr. Tarkanian defrauded seniors, when this is patently false, and they knew it to be so. Appellants knew the implication they created was false and published their Advertisement anyway. They acted with the specific, express intention of misleading voters right before an election so that Appellant Jacky Rosen could win. Now they are trying to abuse Nevada's Anti-SLAPP statute to discourage meritorious defamation lawsuits.[14] Mr. Tarkanian's claims are meritorious, and the district court was correct to find that Appellants did not publish their Advertisement in good faith. The Court should affirm the district court's decision and allow Mr. Tarkanian's claims to proceed.

[14] Appellants imply that Mr. Tarkanian would not have prevailed in the Schneider case had the current version of Nevada's Anti-SLAPP statute existed at that time. (*See* Op. Br. at 15-16.) But, they may not understand the statute. The statute is meant only to weed out unmeritorious suits at the outset; it is not intended to keep meritorious claims from proceeding. Mr. Tarkanian obtained a *jury verdict* in his favor in the Schneider case, meaning his claims there were meritorious. Appellants' cynical view of the Anti-SLAPP statute appears to be that, if a lawsuit is aimed at political speech, no matter how clearly defamatory, the plaintiff should lose and have to pay their defamers' attorneys' fees. This is not the law.

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RULE 28.2 CERTIFICATION

1. The undersigned has read the following opening brief of Plaintiff/Appellee Danny Tarkanian;

2. To the best of the undersigned's knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

3. The following brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found; and

4. The brief complies with the formatting requirements of Rule 32(a)(4)-(6) because it was written in 14-Point Times New Roman, and the type-volume limitations stated in Rule 32(a)(7). Specifically, the brief is 8,915 words as counted by Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this foregoing document was electronically filed on this 6th day of August 2018, and served via the Nevada Supreme Court's eFlex electronic filing system to:

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