IN THE SUPREME COURT OF

THE STATE OF NEVADA

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MICHAEL KOSOR JR., A NEVADA RESIDENT, Appellant, vs. OLYMPIA COMPANIES, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND GARRY V. GOETT, A NEVADA RESIDENT, Respondents.	**Supreme Court No. 75669** District Court Case No. A-17-765257-C

APPELLANT'S REPLY BRIEF

On Appeal from Order of the Eighth Judicial District Court, Clark County, Nevada

The Honorable Michelle Leavitt

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APPELLANT'S 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. Michael Kosor, Jr.
2. Olympia Companies, LLC
3. Garry V. Goett
4. Barron & Pruitt, LLP

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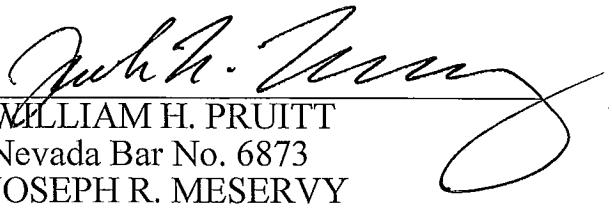
5. Kemp, Jones & Coulthard, LLP

BARRON & PRUITT, LLP



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NRAP 28.2 CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRCP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

> [X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14-point; or
>
> [ ] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7), excluding the parts of the brief exempted by NRAP 32(a)(7)(C), because it is either:

> [X] Proportionately spaced, has a typeface of 14 points or more, and contains 6,998 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[ ] Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this reply 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 and volume number, if any, 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 Appellant's Reply Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 3rd day of September, 2019.

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I. LEGAL ARGUMENTS

Respondents' silencing lawsuit violates both the letter of Nevada's anti-SLAPP laws and the spirit of such laws, as the lawsuit is without merit and, instead was intended to intimidate Mr. Kosor from opposing the policies and practices of Respondents in an election. Contrary to Respondents' claims, overwhelming evidence exists to demonstrate that Mr. Kosor's statements which contain a statement of fact were made in good faith and without knowledge of any falsity. As such, the statements are not actionable.

Furthermore, most of the alleged defamatory statements were published within the context of an election campaign and reflect the opinions of Mr. Kosor. Under Nevada law, such opinions do not require a showing of good faith because they are by definition non-defamatory and incapable of being proven false.

Most importantly, Mr. Kosor's statements are subject to anti-SLAPP protection because they were connected to issues of public concern and aimed at procuring an electoral outcome. Because of concern over the state of the developer-controlled SHCA and the lack of information available to the community, Mr. Kosor campaigned for a seat on the SHCA board to effect change from the inside on the issues of control over the SHCA board, management of the Southern Highlands, and the costs associated with legal fees and public park maintenance.

None of the issues were unique to Mr. Kosor; instead all of the issues affected the entire Southern Highlands community and were issues of public concern. Moreover, the issues raised by Mr. Kosor were directly connected to the election for the SHCA board and contributed to the marketplace of ideas. Furthermore, Mr. Kosor's statements do not defame Respondents. Some of the statements do not even mention Respondents. Mr. Kosor's statements were true when made or were made without knowledge of their falsity.

Because Nevada's anti-SLAPP law precludes Respondents' action against Mr. Kosor, this Court should vacate the order of the lower court and remand this matter with instruction to enter an order granting Mr. Kosor's special motion to dismiss under Nevada's anti-SLAPP law.

A. Nevada's Anti-SLAPP Laws Are Intended to Protect Electoral Speech and Those Addressing Public Issues from the Chilling Effect of Litigation Commenced to Silence Such Speech.

This matter embodies the very type of case for which Nevada's anti-SLAPP law was intended to serve as a shield and protection. The overwhelming majority of the statements at issue were published in the context of an election—a marketplace of ideas and opinions. In addition, the pre-election statements at issue addressed matters of public interest and concern.

Nevada recognizes the value in protecting such speech to maintain a free society and has enacted laws against the use of litigation to chill or coerce such

speech into silence.[1] Indeed, Article I, Section 9 of the Nevada Constitution enshrines the importance of the liberty of speech, providing in part that "every citizen may freely speak, write and publish his sentiments on all subjects . . . and no law shall be passed to restrain . . . the liberty of speech." Additional protection for speech is provided under Nevada's anti-SLAPP laws.

Given the importance of such speech, one may reasonably ask if a case such as this, where the alleged defamatory statements were offered in the context of an election and concerned the manner in which a homeowners' association is governed and managed falls outside of the protections of Nevada's anti-SLAPP laws, then what does the law protect? As this is precisely the type of case for which the anti-SLAPP laws were intended to serve as a shield and deterrent against vexatious litigation designed to silence free speech, the Court should grant the relief requested by Appellant.

B. Respondents Attempt to Change the Facts of this Case to Fit an Unsupported Narrative, that Mr. Kosor's Statements Were False.

Respondents erroneously claim "the district court found that Kosor failed to meet his preponderance-of-the-evidence standard of demonstrating that his conduct was 'truthful or made without knowledge of its falsehood.'"[2] Respondents' account is fictitious and misleading, as the district court never made any finding

[1] *See* NRS 41.660.
[2] Respondents' Answering Brief, p. 2.

addressing whether Mr. Kosor's statements were truthful or made without knowledge of their falsehood. Accordingly, Respondents' statement is a baseless attempt to undermine the merits of Mr. Kosor's appeal and to avoid the full application of Nevada's anti-SLAPP law.

The district court's order denying the motion to dismiss contains zero references to Mr. Kosor's knowledge at the time his statements were made, to the truthfulness of Mr. Kosor's statements, or to whether Mr. Kosor's statements were opinions, as opposed to statements of fact. Furthermore, the district court did not even inquire about Mr. Kosor's knowledge at the time of publishing or the truthfulness of his statements. The transcript is silent on the topic, save introductory argument by counsel and the district court's responsive comment that "I think it's great that [Mr. Kosor]'s involved, that he's concerned, that he's reading these statutes and the CC&Rs and holding people accountable. But I'm not sure that this is[n't] a situation when the statute is supposed to be hard to invoke. . . you want me to take . . . these issues with the developer, the homeowners association and say this is an issue of public interest, you know."[3]

Instead of finding Mr. Kosor made false statements, the district court expressed its concern over whether the statements at issue were made in

[3] JA, Vol. II, 261:9-262:4.

connection with an issue of public concern.[4] And the district court's finding that "Defendant has failed to meet its burden to invoke NRS 41.660" was based on the court's flawed interpretation of anti-SLAPP law, which interpretation was made in the absence of any analysis of the factors for determining whether an issue is of public concern, as adopted in *Shapiro v. Welt*, 133 Nev. Adv. Op. 6, 389 P.3d 262, 268 (2017) by this Court.[5]

C. Mr. Kosor's Statements Are Good Faith Communications Constituting Either True or Substantially True Statements, Statements Made Without Knowledge of Their Falsehood, or Opinion Statements.

In Nevada, a statement is not defamatory if it is true or substantially true.[6] "The doctrine of substantial truth provides that minor inaccuracies do not amount to falsity, unless the inaccuracies would have a different effect on the mind of the reader from that which the pleaded truth would have produced."[7]

Nevada's anti-SLAPP statute does not require "substantial truth" for its application—instead defamatory statements "made without knowledge of [their] falsehood" may still invoke anti-SLAPP protection. According to this Court, "the phrase 'made without knowledge of its falsehood' has a well-settled and understood meaning. The declarant must be unaware that the communication is

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[4] JA, Vol. II, 260:20-22.
[5] *See also* JA, Vol. II, 268:6-10.
[6] *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 715, 57 P.3d 82, 88 (2002) (italics added); *see also* Restatement (Second) of Torts § 581A, comment f (1977).
[7] *Pegasus*, 118 Nev. at 715, n. 17, 57 P.3d at 88, n. 17.

false at the time it was made."[8]

Furthermore, opinion statements are non-defamatory because they are neither capable of being proved true nor being disproved—"there is no such thing as a false idea"—and many of Mr. Kosor's statements are opinion statements.[9] As statements of opinion, they are not actionable. Additionally, any statements deemed or considered to be factual assertions were substantially true or made without knowledge to the contrary.

a. Mr. Kosor's CCA Board Meeting Statement Was Opinion Offered as a Political Comment and Is Not Actionable.

Respondents argue that "Kosor's statements demonstrate on their face that he either knew the statements were not true, or that he was at least doubtful as to the truth of his statements."[10] Although Mr. Kosor's use of qualifying language, *e.g.*, "probably," may reflect some uncertainty, it does not establish that Mr. Kosor possessed knowledge of their falsity—the statutory standard. Respondents offer only one example of such a "doubtful" comment—Mr. Kosor's statement at the CCA board meeting. Yet, in challenging the statement, Respondents fail to offer the statement's full context, as required.[11]

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[8] *Shapiro v. Welt*, 133 Nev. Adv. Op. 6, 389 P.3d 262, 267 (2017) (internal quotations omitted).
[9] *See Pegasus*, 118 Nev. at 714, 57 P.3d at 87.
[10] Respondents' Answering Brief, p. 17.
[11] *Lubin v. Kunin*, 117 Nev. 107, 111, 17 P.3d 422, 425 (2001) (internal quotations omitted) ("words must be viewed in their entirety and in context to determine whether they are susceptible of a defamatory meaning.")

Such full context reveals that Mr. Kosor's statement was non-actionable opinion offered during a board conversation about the declarant's control over the SHCA. The statement is protected by the common interest privilege, as the statement concerned a subject matter in which Mr. Kosor and the other members had a common interest or duty.[12]

Moments before the statement was offered, CCA board members were addressing concerns over the governance of the SHCA and how to protect the community's interest in a much-anticipated sports park. Suggestions were offered, including a lawsuit against the Respondents or the SHCA for failure to transfer control of the SHCA board to the homeowners, and whether a CCA board member should run for a seat on the SHCA board to "effect change from the inside."[13]

During this discussion, Mr. Kosor expressed generalized suspicion about "political shenanigans" resulting in inexplicable allowances by Clark County officials in response to Respondents' failure to post a bond or to hold Respondents accountable for sports park construction obligations that were years overdue.[14] To Mr. Kosor and other board members, this unusual omission was particularly troubling and suggested special treatment by the Clark County Commission.

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[12] Restatement (First) of Torts § 596 (1938); *see also Hardy v. Chromy*, 126 Nev. 718, 367 P.3d 777 (2010); *see also Circus Circus Hotels v. Witherspoon*, 99 Nev. 56, 62-63, 657 P.2d 101, 105 (1983).
[13] JA, Vol. I, 124 at 1:07:00-1:19:05.
[14] *See* JA, Vol. I, 124 at 1:18:10-1:20:14; Vol. II, 420-427.

In "cases involving political comment, there is a strong inclination to determine the remarks to be opinion rather than fact."[15] And, "in determining whether a statement is actionable for the purposes of a defamation suit, the court must ask 'whether a reasonable person would be likely to understand the remark as an expression of the source's opinion or as a statement of existing fact...*in context*."[16] This Court has also cited favorably three factors enunciated by a federal court applying Nevada law for determining whether an alleged defamatory statement includes a factual assertion:

> (1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact; (2) whether the defendant used figurative or hyperbolic language that negates that impression; and (3) whether the statement in question is susceptible to being proved true or false.[17]

Under each of the factors, Mr. Kosor's CCA comments constitute an opinion, which lacks factual assertions. The subject communication occurred as the CCA board considered possible action in response to the developer-controlled SHCA board, and the apparent pass Clark County was giving the developer and the SHCA board.

Within the context of such discussion, Mr. Kosor made the opinion-based comment that "[Goett] . . . *probably* got the Commissioner aside in a dark room or

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[15] *Nevada Indep. Board Corp v. Allen*, 99 Nev. 404, 410, 664 P.2d 337, 341 (1983).
[16] *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 715, 57 P.3d 82, 88 (2002).
[17] *Pegasus*, 118 Nev. at 715, n.19, 57 P.3d 82, 88, n.19 (2002) (citing *Flowers v. Carville*, 112 F.Supp.2d 1202, 1211 (D. Nev. 2000)).

someplace and read them the riot act."[18] Clearly, the tenor and context of Mr. Kosor's statement was that of an opinion couched in humor, as opposed to the assertion of an objective fact.

The opinion nature of the statement is also reflected in Mr. Kosor's use of figurative or hyperbolic language like "political shenanigans" and "in a dark room or someplace" and "read them the riot act." Such terms undermine any suggestion that Mr. Kosor's colloquial comments included a factual assertion. Such terms are not defamatory on their face, nor are they expressed or received in a literal sense. Accordingly, Mr. Kosor never stated that Respondents had criminally influenced the Clark County Commission as Respondents allege.

Furthermore, the opinion statements are not susceptible of being proved true or false. Mr. Kosor has consistently maintained that his statements were political opinion, as opposed to factual statements.

Even if one considered Mr. Kosor's statements as assertions of fact, there is no evidence demonstrating that Mr. Kosor knew such statements were false. Instead, there is compelling evidence supporting Mr. Kosor's belief that such statements were substantially true. Such evidence included Respondents' control over the SHCA board; the ongoing failure of the developer to construct the sports parks, despite receiving millions in tax credits; and the failure of Clark County to

[18] JA, Vol. I, 124 at 1:20-1:21.

enforce its rights against the developer to compel its compliance.

b. Mr. Kosor's Statement that the Developer Committed to Construct a Sports Park "to obtain a lucrative agreement with the County" Was True or Substantially True.

In a misguided attempt to establish a claim for defamation, Respondents ignore the ordinary and plain meaning of the term "lucrative." The definition of "lucrative" is "profitable." [19] Thus, if Olympia sought profit through its agreement with the County, Mr. Kosor's statement concerning the Developer's purpose in agreeing to construct a sports park is true.

According to the *Las Vegas Review-Journal*, "Olympia Companies, the developer...*agreed with Clark County in January 2006 to build a sports park* within two years...The company has a deal with the county to build all the community's parks in exchange for not paying a special construction tax of up to $1,000 a home."[20] Such deal allowed Olympia's projects at Southern Highlands to be even more profitable because Olympia could offset its tax liability by building a sports park for Clark County.

Respondents offer no argument contradicting Mr. Kosor's statement that Respondents (1) entered into an agreement with Clark County to build a sports park, (2) said agreement was aimed at making a profit, and (3) the construction of the park was repeatedly delayed. Indeed, the *Las Vegas Review-Journal* supports

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[19] *E.g.*, LUCRATIVE, Black's Law Dictionary (11th ed. 2019).
[20] JA, Vol. II, 421-422.

each point. Not only did it report the existence of the agreement, it also reported that "County records show that the company . . . has *received about $5.2 million in tax credits*. About $1 million of those tax credits remain."[21] It further reported that: "the proposed park site . . . remains a field of dirt."[22]

Accordingly, Mr. Kosor's statements are not defamatory because they are good faith communications that are true or substantially true. The same applies to Mr. Kosor's statement concerning the Developer receiving a highly favorable or "sweetheart deal." Such statement was non-defamatory on its face and substantially true, given that Olympia delayed construction of the sports park for several years and downsized the park, yet never posted a bond. Meanwhile, tax credit funding was provided to the Developer. Furthermore, there is no evidence that Mr. Kosor understood his statement to be false.

c. Respondents Improperly Attempt to Silence Mr. Kosor's Speech Concerning Non-Party SHCA's Legal Expenses, Despite Lacking Justiciability.

Respondents contend that Mr. Kosor "utterly fails to address [his statement about "wasteful legal costs" incurred by SHCA] in his Opening Brief" and "admits that he knew it was false when he included [his statement about "wasteful legal costs" incurred by SHCA] in his letter." However, Respondents' argument is without merit, as it fails to show Mr. Kosor's statement in its entirety and in

[21] JA, Vol. II, 422 (italics added).
[22] *Id.*

context, and ignores its substantial truthfulness.[23] The subject statement did not defame Respondents, as it was about the SHCA—not Respondents.

More specifically, the statement at issue was part of an election campaign letter that was incorporated into a campaign pamphlet addressed to "Southern Highlands Neighbor," which outlined Mr. Kosor's platform as a candidate for the SHCA board election.[24] The statement reads: "...*we* can significantly lower expenses, get assessments under control, and do so without sacrificing quality... *We* need to . . . refrain from wasteful legal costs ($1.4M in 2016, far more than typically incurred by HOAs of similar size)."[25] [Italics added].

The statement at issue concerned "wasteful legal costs" approved and incurred *by the SHCA—not Respondents*. Mr. Kosor is addressing "we" (the Southern Highlands neighbors) and comparing the amount accrued to amounts "typically incurred by HOAs of similar size." Because the statement is directed at the SHCA and not Respondents, Respondents lack standing to argue that the campaign statement is defamatory.

In addition to Respondents' lack of standing, there is no evidence demonstrating that Mr. Kosor understood the election statement to be false. Furthermore, the statement is not defamatory on its face and reflects the opinion of

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[23] *Lubin v. Kunin*, 117 Nev. 107, 111, 17 P.3d 422, 425 (2001) (context matters).
[24] *Nevada Indep. Board. Corp.*, 99 Nev. at 410, 664 P.2d at 341-42.
[25] JA, Vol. I, 115-116.

Mr. Kosor offered in the context of an election. In suing Mr. Kosor, Respondents sought to silence campaign speech that disapproves of the governance of the SHCA, including unnecessary legal expenses.

Specifically, the SHCA adopted a Southern Highlands 2017 Ratified Budget showing in excess of $1.2M in "litigation expenses" and nearly $90k in "general counsel expenses" for the "2016 Annualized Accrued."[26] Added together, the SHCA published budget reflects *in excess of* $1.3M in "legal costs". Additional costs were also listed that may apply to legal costs, *e.g.*, "fees and permits," "prepaid collection costs," etc.

The SHCA published said Budget to its many residents—including Mr. Kosor. Based on the foregoing, Mr. Kosor's mixed opinion statement that the association should "refrain from wasteful legal costs ($1.4M in 2016…)" was a *substantially* true statement based on the numbers self-published by the SHCA.[27] The statement was not defamatory toward Respondents on its face and, as such, is not actionable.

Although Respondents contend that they informed Mr. Kosor that his claimed amounts were incorrect, Respondents cannot deny that the numbers upon which Mr. Kosor relied for his statement came from the SHCA. Given

[26] JA, Vol. I, 120-122.
[27] JA, Vol. I, 196.

Respondents' lack of transparency, Mr. Kosor reasonably relied on the SHCA Budget.

In any event, the effect on a reader of the campaign pamphlet—alerted to high legal costs—would not be different even if the number stated was an annualized or lesser amount such as $1.3M or $900,000, as now alleged. The statement was substantially true and its purpose in context was to highlight the need for electoral change of the board.

d. Mr. Kosor's Campaign Website and Pamphlet Consisted of Statements that Were Substantially True and Opinion Statements Offered in an Election.

The statements in Mr. Kosor's website and pamphlet were part of his election campaign for the SHCA board. Because of its electoral nature, "there is a strong inclination to determine the remarks to be opinion rather than fact."[28] As opinion, the statements cannot be false and are not defamatory.

Mr. Kosor's statement that "the potential for conflicts of interest, loss of board autonomy, and failed fiduciary oversight are clear" is not defamatory on its face, and does not make a factual assertion about the Respondents' past actions as alleged by Respondents. Instead, that statement is an opinion-based warning of *potential future* concerns that is not susceptible to being proved true or false. As opinion, the statement is not actionable.

[28] *See Nevada Indep. Board Corp*, 99 Nev. at 410, 664 P.2d at 341.

Additionally, Mr. Kosor's opinion-based statement that "I *believe* this has cost our community millions of dollars" is supported by Mr. Kosor's reference to multiple costly SHCA expenses, including: landscaping, maintenance and utilities for public parks; contract obligations with Olympia Management; and legal costs. The figures were based on SHCA's self-published budgets.[29]

Furthermore, the *Las Vegas Review-Journal* reported that the transfer of ownership of public parks from Clark County to the SHCA "has shifted the annual burden of more than $1 million to maintain the parks onto homeowners" and has reported facts consistent with Mr. Kosor's statements.[30] Because there is compelling evidence the statement of Mr. Kosor was substantially true, and because there is no evidence that Mr. Kosor knew his statement to be false, the statement is not actionable by Respondents.

e. Mr. Kosor's Campaign Statement Concerning the Denial of the Right to Vote Was Offered as Opinion and Was Substantially True.

To silence Mr. Kosor over matters of public concern, Respondents improperly isolate Mr. Kosor's words, plucking them from context and twisting their meaning. In so doing, Respondents argue that Mr. Kosor's "motion admits the falsity of this accusation . . . it is clearly not true that Respondents deprive

[29] *See* JA, Vol. I, 120-122.
[30] JA, Vol. II, 423.

homeowners of their right to vote."[31]

As an SHCA board candidate, Mr. Kosor expressed concerns about the developer's control over the SHCA's governance. Mr. Kosor was concerned that three of the five SHCA board seats were appointed by Respondents and not elected, and that the time period over which the developer could appoint a majority of the board should have terminated.

Thus, in every decision by the SHCA, the majority of the votes were reserved for board members appointed by Respondents, and not board members elected by homeowners. By extension, the homeowners' elected representatives were "outvoted" 100% of the time that they disagreed with the Respondents' representatives. With such power, Respondents need never worry about a disagreement with homeowners on virtually any public issue.

Even if 100% of the homeowners united in a position contrary to Respondents, their representation would always be "outvoted" by Respondents' representation. Accordingly, Mr. Kosor was not in error to opine that such a system is hardly reflective of our system of national (or state or local) politics. Instead, it is more reflective of some system for people enjoying far less representation.

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[31] Respondents' Answering Brief, p. 22.

D. Mr. Kosor's Statements Concerned Public Issues and Are Subject to Anti-SLAPP Protection Because They Were Both Aimed at Procuring an Electoral Outcome and Made in an Election.

In attempting to avoid the application of Nevada's anti-SLAPP law, Respondents cite one California court of appeals case, *Talega Maintenance Corp. v. Standard Pacific Corp.*, 225 Cal.App.4th 722 (2014). However, Respondents fail to demonstrate how the *Talega* case (involving an HOA action for fraud against the developers) should apply to Respondents' current action against a homeowner to silence his speech in an election involving matters of public interest. Nor do Respondents attempt to distinguish the *Talega* holding from the multiple case authorities cited by Mr. Kosor in his Opening Brief—cases that support the principle that issues of homeowners association governance and management are inherently public issues.[32]

In *Talega*, the California court of appeals found that in cases where the issue is limited to a "definable portion of the public (a private group, organization, or community), the constitutionally protected activity must, at a minimum, occur in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging participation in matters of public significance." Because the court found that the statement at

[32] *See* Opening Brief, pp. 28-30 (citing *Colyear v. Rolling Hills Cmty. Ass'n of Rancho Palos Verdes*, 214 Cal. Rptr. 3d 767, 776 (Ct. App. 2017) and *Lee v. Silveira*, 211 Cal. Rptr. 3d 705, 715-20 (Ct. App. 2016)).

issue (an alleged fraud/debt) did not meet the minimum standard, the matter "did not concern a public issue."

However, in reaching its narrow decision, the *Talega* court distinguished its holding from three distinct California court of appeal cases. In each of the three cases, the statements at issue were made as part of election campaigns for HOA boards. Because the statements were made in elections for HOA board membership and concerned HOA governance and management, the first prong of the anti-SLAPP analysis was satisfied in the other California cases.

In fact, one of the three cases from which the *Talega* court distinguished its holding was *Damon*—cited also in Mr. Kosor's Opening Brief to support his argument that the subject statements were good-faith communications in furtherance of the right to free speech in direct connection with an issue of public concern. In *Damon*, "the statements were made in connection with the Board elections."

Because Mr. Kosor's statements were made in an HOA board election and involved issues of public concern, his statements are subject to anti-SLAPP protection.

E. HOA Governance and Management Are Matters of Public Interest for Application of Anti-SLAPP Law.

After attempting to chill his speech, Respondents desperately sought to avoid the application of Nevada's anti-SLAPP law by mischaracterizing Mr.

Kosor's statements as not involving the public interest or concern. However, Mr. Kosor's statements clearly involve matters of public interest and concern.

"Although matters of public interest include legislative and governmental activities, they may also include activities that involve private persons and entities, especially when a large, powerful organization may impact the lives of many individuals."[33] Indeed, "[c]onduct involving homeowners associations generally involves a matter of public interest because a homeowners association is akin to a governmental entity."[34]

On multiple occasions, the California Court of Appeals has applied anti-SLAPP protection to uphold the principle that issues of interest to most members of a homeowners association are matters of public interest for purposes of anti-SLAPP protection.[35] Indeed, said court has repeatedly held that issues involving how an HOA is governed and/or its properties are managed constitute issues of public concern subject to anti-SLAPP protection.

For example, when the issue was "the very manner in which [the association's members] would be governed ...," the matter was of public interest

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[33] *Church of Scientology v. Wollersheim*, 42 Cal.App.4th 628, 650 (Ct. App. 1996).
[34] *Donovan v. Dan Murphy Found.*, 204 Cal. App. 4th 1500, 1510 n.4 (Ct. App. 2012).
[35] *See, e.g., Colyear v. Rolling Hills Community Assn. of Rancho Palos Verdes*, 9 Cal.App.5th 119, 131-133 (Ct. App. 2017).

and subject to anti-SLAPP protection.[36] Similarly, when the issues involved the approval of a roofing project affecting multiple buildings in the community and the determination of which management entity was responsible for the day-to-day operations of the HOA, those issues "impacted a broad segment, if not all, of [the association's] members" and constituted matters of public interest subject to anti-SLAPP protection.[37]

Additionally, when the issue involved balcony and shingle siding repair maintenance expenses, such matters were of public interest and subject to anti-SLAPP protection.[38] Again, when the issue involved the HOA's "governance and enforcement of its architectural guidelines," such issues concerned many association members and were matters of public interest subject to anti-SLAPP protection.[39]

Here, Mr. Kosor's statements focused on matters that affected the members of the association, including: (1) control of the SHCA governance; (2) the entity responsible for property management within the HOA; and (3) the SHCA's taking on new community maintenance costs while under the control of the Developer.

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[36] *Damon v. Ocean Hills Journalism Club*, 85 Cal.App.4th 468, 479 (Ct. App. 2000); *see also Chocolate Magic Las Vegas LLC v. Ford*, No. 217CV00690APGNJK, 2018 WL 475418, at *3 (D. Nev. Jan. 17, 2018).
[37] *Lee v. Silveira*, 6 Cal.App.5th 527, 540 (Ct. App. 2016).
[38] *Country Side Villas Homeowners Assn. v. Ivie*, 193 Cal.App.4th 1110, 1118 (Ct. App. 2011).
[39] *Ruiz v. Harbor View Community Assn.*, 134 Cal.App.4th 1456, 1470 (Ct. App. 2005).

These were issues of public interest affecting Southern Highlands homeowners and were brought to the homeowners' attention through Mr. Kosor's campaign for the SHCA board.

Because Mr. Kosor's statements directly related to matters of public interest, Nevada's anti-SLAPP law is applicable.

a. Mr. Kosor's Statements Were Matters of Public Interest and Attention.

Respondents mistakenly contend that the subject statements were not matters of public interest, as they impacted a limited number of people. This argument fails, as it ignores the authorities cited above, which found similar statements to be matters of public interest in communities far smaller in number than Southern Highlands. Furthermore, this argument fails because the issues addressed in Mr. Kosor's statements directly affected the Southern Highlands community. Moreover, evidence demonstrates that the subject statements drew public attention.

Mr. Kosor's posted comments on Nextdoor.com prompted comments from other community members, evidencing that this was a topic of concern for members of the community.[40] Each of these commentators expressed a belief that these were public matters.[41]

Mr. Kosor's campaign statements focused on the control of the SHCA, as

[40] JA, Vol. I, 169-171.
[41] *Id.*; *see also* JA, Vol. II, 420-427 (*Review Journal* article).

well as the management of Southern Highlands. These statements were provided to all Southern Highlands voters. Accordingly, the statements and the issues they addressed were part of the marketplace of ideas and the electoral choice of the community's voting members.

Mr. Kosor's statements concerning the sports park were part of a widespread public concern. Such concern was raised in Clark County Commissioner meetings.[42] Furthermore, Las Vegas' largest local newspaper reported on the negative impact faced by the community as a result of the sports park delay.[43] Thereafter, a News 3 Las Vegas Live segment reported on a June 6, 2018 Clark County Commission meeting on the state of the park.

Accordingly, the issues addressed in Mr. Kosor's statements were matters of public interest and concern, thus warranting protection from Nevada's anti-SLAPP laws.

b. Mr. Kosor's Statements Were Made At Public Forums

Mr. Kosor's statements were offered at public forums. The use of public forums to communicate Mr. Kosor's statements further supports the application of Nevada's anti-SLAPP law.

i. CCA Board Meetings Are Public Forums

Respondents contend that HOA board meetings are not public forums and,

[42] JA, Vol. II, 463:6-13.
[43] JA, Vol. II, 420-427.

therefore, statements offered at such meetings are not entitled to the protection of anti-SLAPP laws. However, Respondents provide no credible legal authority to support their argument.

California appellate courts have held that HOA meetings are public forums for purposes of anti-SLAPP protection, "because they serve a function similar to that of a governmental body."[44] The California Supreme Court has recognized that owners of planned development units "comprise a little democratic subsociety" meaning that a "homeowners association board is in effect a quasi-governmental entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government."[45]

California's appellate courts recognize that boards are mandated to hold open meetings and allow the members to speak publically, with notice, agenda and minutes requirements, and strictly limit closed executive sessions.[46] HOA board meetings in Nevada are likewise public forums. Nevada's legislature has enacted laws substantially similar to the California legislature. For example, NRS 116.31085(1) mandates open meetings and allowing members to speak publically. Board meetings are noticed with agenda and minute requirements.[47] Closed

[44] *See, e.g., Lee v. Silveira*, 211 Cal. Rptr. 3d 705, 714-15 (Ct. App. 2016) (internal citations omitted).
[45] *See id.*
[46] *See id.*
[47] *See* NRS 116.3108(3)-(4); 116.31083(5)-(6).

executive sessions are strictly limited by statute.[48]

While Nevada law does not require that HOA board meetings be televised in contrast to California, the California cases finding HOA governance to be a public issue under anti-SLAPP laws relied on many factors—more than just the televised nature of those proceedings. The notice and agenda requirements, and the ability of members to attend and speak at meetings were all factors which led California courts to find that HOA board meetings are public forums.

Here, CCA board meetings were open to homeowners or their representatives to attend and speak. Accordingly, Respondents' argument that the CCA board meeting "is specifically not open to the public" is misleading. An agenda was prepared in advance and minutes were taken at the CCA board meeting. Clearly, the subject board meeting was a public forum, thus making Mr. Kosor's statements subject to anti-SLAPP law protection.

ii. Nextdoor.com's Message Boards Are Public Forums

Under California's anti-SLAPP law, websites that are "accessible free of charge to any member of the public where members of the public may read the views and information posted, and post their own opinions, meet the definition of a public forum."[49] Nevertheless, Respondents contend that Mr. Kosor's message

[48] *See* NRS 116.31085(2)-(3).
[49] *Ampex Corp. v. Cargle*, 128 Cal.App.4th 1569, 1576 (Ct. App. 2005).

board was not a public forum and, therefore, his statements are not entitled to anti-SLAPP protection. However, Respondent's position is without merit.

Nextdoor.com is a public venue that is free of charge to use. Nextdoor.com welcomes membership to every member of a community—except registered sex offenders and members of their households, a limitation nearly identical to the Facebook or Instagram platforms.[50] Access to its network is arranged by geographic boundaries to help neighbors communicate with neighbors on issues affecting their locality.

Public agencies, including Clark County, partner with Nextdoor.com to share information and engage their geographic constituents on issues of public interest.[51] Although Nextdoor.com brands itself as a private social networking service because it requires users to verify their address and use their real name, its broad account eligibility guidelines and usage render it highly accessible by the public. Users may read the information posted concerning their community and exchange opinions on matters of public interest. Editorial control over content is limited.

By every measure, Nextdoor.com is a public forum and the statements posted thereon by Mr. Kosor are subject to anti-SLAPP protection.

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[50] *See* JA, Vol. II, 305:25 (https://nextdoor.com/member_agreement/).
[51] *See* https://help.nextdoor.com/s/article/How-to-connect-with-your-public-agencies?language=en_US; *see also* https://nextdoor.com/agency-detail/nv/clark-county/clark-county/

iii. Mr. Kosor's Campaign Website Was a Public Forum

Websites accessible to the public at large free of charge "hardly could be more public."[52] Indeed, Respondents admit that "Kosor's website may have been accessible by any member of the public with internet access."[53] Access to Mr. Kosor's campaign website was free to any member of the public and persons viewing the website were invited to contact Mr. Kosor via the "Contact Me" in-site messaging function.[54] This allowed Mr. Kosor and the public to exchange ideas with each other directly.

Despite such facts, Respondents contend that Mr. Kosor's website was not a public forum "where information is freely exchanged," complaining that "the only viewpoints that were posted or represented on Kosor's website were his own." Such position is without merit and ignores the decisions of numerous courts that have broadly construed "public forum" requirements to include publications with a single viewpoint.[55] Under the Respondents' view, all newspapers and leaflets would not be public forums on grounds that members of the public cannot freely publish their opinion in them. However, newspapers, pamphlets, and websites

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[52] *Kronemyer v. Internet Movie Data Base, Inc.*, 59 Cal. Rptr. 3d 48, 55 (Ct. App. 2007); *see also Huntingdon Life Scis., Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 29 Cal. Rptr. 3d 521, 536 (Ct. App. 2005), *cited with approval in Barrett v. Rosenthal*, 40 Cal. 4th 33, 41 n.4, 146 P.3d 510, 514 n.4 (2006).
[53] Respondents' Answering Brief, p. 33.
[54] *See* JA, Vol. II, 436-450.
[55] *See Damon*, 85 Cal.App.4th at 476-78.

contribute to the marketplace of ideas and are part of a larger public forum.

Contrary to Respondents' position, the California Court of Appeals has held that where statements made on a website or newspaper are but one source of information on an issue, and other sources are easily accessible to interested persons, such source is part of a larger public forum."[56] Because Mr. Kosor's website statements permitted open debate, the website was a public forum.[57]

Based on the foregoing, it is difficult to imagine how a campaign website for election would be anything other than a public forum—since the candidate is a voice in the public election arena and promoting open discussion. Accordingly, the Court should find that Mr. Kosor's website was a public forum and that the statements made thereon are subject to anti-SLAPP law protection.

iv. Mr. Kosor's Campaign Pamphlets Are Public Forums

Respondents contend that Mr. Kosor's campaign pamphlet was not a public forum because it was only disseminated to residents of Southern Highlands.[58] Respondents position is again without merit and contrary to California case law, including *Macias v. Hartwell*, 64 Cal. Rptr. 2d 222, 225 (1997) (campaign flyer mailed to union members during union election was a public forum).

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[56] *Id.*

[57] *See Nygard, Inc. v. Uusi-Kerttula*, 72 Cal. Rptr. 3d 210, 217 (2008) (agreeing with *Damon*, 85 Cal.App. 4th 468, 476-477 (Ct. App. 2000) and citing *Wilibanks v. Wolk*, 121 Cal.App.4th 883, 896-897 (Ct. App. 2004)).

[58] Respondents' Answering Brief, p. 35.

Respondents cite no case authority for their position. In contrast, authorities cited by Appellants included *Damon* decision, wherein a newsletter was deemed a public forum, as it was a vehicle for open discussion of public issues and was widely distributed to all interested parties.[59] Likewise, Mr. Kosor's campaign pamphlet promoted discussion of issues involving SHCA governance and management and was distributed to all interested homeowners. Accordingly, Mr. Kosor's campaign pamphlet was a public forum.

c. Respondents Misrepresent Mr. Kosor's Statements as a Private Grievance

Mr. Kosor's statements focus on Respondents' control over and the governance of the SHCA, property management, and issues concerning public parks and expenses in the Southern Highlands. One cannot reasonably maintain that such matters are limited in affect to Mr. Kosor, as opposed to the whole Southern Highlands community.

The concerns addressed in Mr. Kosor's statements are matters of broad applicability and across the board impact. This is not a case about an isolated HOA fine or a single decision that may affect only a limited number of members of the community. Instead, the concerns are large-scale issues, with broad application and impact to the Southern Highlands community.

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[59] *Damon*, 85 Cal.App.4th at 476-78.

d. Nevada's Anti-SLAPP Statute Protects Communications Aimed at Procuring Any Electoral Result or Outcome.

NRS 41.637(1) provides Anti-SLAPP protection for communications "aimed at procuring any . . . electoral action, result or outcome." Under NRS 41.637, the scope of the anti-SLAPP protection is *not limited to a communication made directly to a governmental agency*."[60] Instead, this Court has held that "communications with . . . the public that are intended to influence an electoral result *potentially* fall under NRS 41.637(1)." Such communications fall under NRS 41.637(1) if they were truthful or made without knowledge of their falsehood.

Respondents argue, without authority, that HOA board elections are "not the electoral action the Legislature intended to be covered by Nevada's anti-SLAPP statute." To avoid the application of Nevada's anti-SLAPP laws, Respondents urge the Court to adopt a position contrary to the plain and ordinary meaning of the term "electoral action."

Clearly, the HOA board election at issue and the associated statements made by Mr. Kosor are subject to anti-SLAPP protection.

F. Because Mr. Kosor's Statements Were Privileged, Respondents Cannot Meet Their Burden of Proof

Repeatedly, Respondents refer to the "suggested" or "inferred" meanings of Mr. Kosor's statements—apparently feeling the need to convince the Court that

[60] *Adelson v. Harris*, 133 Nev. Adv. Op. 67, 402 P.3d 665, 670 (2017) (citing prior holding that discussed the legislative history of NRS 41.637(1)).

Mr. Kosor defamed them in demeaning ways not obvious to the reader, including this Court. Such misplaced reliance on inference or innuendo is reflective of Respondents' inability to establish they are likely to prevail on their claims.

As noted above, many statements from which Respondents allege defamation do not even refer to Respondents but refer to other entities such as Clark County or the SHCA. Accordingly, Respondents lack standing to assert any claim.

Additionally, most of Mr. Kosor's statements are non-defamatory opinions. Furthermore, the factual statements made by Mr. Kosor were substantially true—and, therefore, non-defamatory. Nor has any credible evidence been offered demonstrating that Mr. Kosor knew that any his statements were false. In fact, the statements offered by Mr. Kosor are not defamatory on their face and, therefore, are not actionable.

Although Respondents argue in favor of defamation *per se*, they fail to prove such claims. In Nevada, "if the defamatory communication imputes a 'person's lack of fitness for trade, business, or profession,' or tends to injure the plaintiff in his or her business, it is deemed defamation per se and damages are presumed."[61] The words of the alleged defamatory statement "are to be taken in

[61] *E.g.*, *Clark County Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 385, 213 P.3d 496, 503 (2009).

their plain and natural import according to the ideas they convey to those to whom they are addressed; reference being had not only to the words themselves *but also to the circumstances under which they were used.*"[62]

Here, Respondents failed to show that Mr. Kosor made a defamatory communication indicating Respondents were engaged in illegal activity or committed any crime. Although Mr. Kosor used figurative language in opining that Mr. Goett "probably" "read [Clark County officials] the riot act," he never stated that Respondents bribed government officials or performed an illegal act or practice. Thus, Mr. Kosor statements and the context within which they were made do not establish a case for defamation. Consequently, Respondents attempt to infer some hidden meaning or intent to preserve their meritless claims.

Respondents also fail to demonstrate that Mr. Kosor made a defamatory communication imputing Respondents' lack fitness for trade, business, or profession. Instead, Respondents allege defamation over statements concerning "lucrative" and "sweetheart deals." Such statements of opinion are not defamatory on their face. Mr. Kosor did not defame Respondents; rather, he spoke opinion and truth to power.

Clearly, Respondents lawsuit attempts to silence Mr. Kosor, so that he and homeowners do not challenge Respondents' governance and control over the

[62] *Talbot v. Mack*, 41 Nev. 245, 169 P. 25, 29 (1917) (italics added).

SHCA, and their management of Southern Highlands. The commencement of litigation was a tool to intimidate Mr. Kosor and others from exercising their free speech rights in violation of Nevada law, including the anti-SLAPP Act.

II. CONCLUSION

Appellant respectfully requests that the Court vacate the district court's order denying Appellant's special motion to dismiss and further instruct the district court to enter an order granting the Appellant's special motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of September, 2019, I served the foregoing **APPELLANT'S REPLY BRIEF** upon all counsel of record:

☒ By electronically filing and serving the document(s) listed above with the Nevada Supreme Court: or

☐ By personally serving it upon him/her: or

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es).

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