IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL KOSOR JR., a Nevada resident, Appellant, vs. OLYMPIA COMPANIES, LLC, a Nevada limited liability company; GARRY V. GOETT, a Nevada resident, Respondents.	**Case No.: 75669** Electronically Filed Apr 25 2019 04:04 p.m. Elizabeth A. Brown Clerk of Supreme Court **Appeal** District Court Case No.: A-17-756257-C The Honorable Michelle Leavitt, District Judge

RESPONDENTS OLYMPIA COMPANIES, LLC'S AND GARRY V. GOETT'S ANSWERING BRIEF

J. Randall Jones, Esq.
Nevada Bar No. 1927
Nathanael R. Rulis, Esq.
Nevada Bar No. 11259
Kemp, Jones & Coulthard, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000
Attorneys for Respondents Olympia Companies, LLC and Garry V. Goett

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL KOSOR JR., a Nevada resident, Appellant, vs. OLYMPIA COMPANIES, LLC, a Nevada limited liability company; GARRY V. GOETT, a Nevada resident, Respondents.	**Case No.: 75669** **Appeal** District Court Case No.: A-17-756257-C The Honorable Michelle Leavitt, District Judge

NRAP 26.1 DISCLOSURE

Pursuant to N.R.A.P. 26.1, 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.

- Olympia Companies, LLC (*Plaintiff/Respondent*)
- Garry V. Goett (*Plaintiff/Respondent*)
- Kemp, Jones & Coulthard, LLP (*Attorneys for Plaintiffs/Respondents*)

DATED this 25th day of April, 2019.

KEMP, JONES & COULTHARD, LLP

/s/ Nathanael Rulis

J. Randall Jones, Esq. (#1927)
Nathanael R. Rulis, Esq. (#11259)
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, NV 89169
Attorneys for Respondents

TABLE OF CONTENTS

NRAP 26.1 DISCLOSURE I

TABLE OF CONTENTS II

TABLE OF AUTHORITIES V

SUMMARY OF THE ARGUMENT 1

STATEMENT OF THE ISSUES 2

STATEMENT OF THE CASE 3

STATEMENT OF THE RELEVANT FACTS 6

A. Kosor claims Respondents spoke with County Commissioners in a "dark room" 6

B. Kosor claims Respondents are "lining its pockets" to the detriment of homeowners 7

C. Kosor claims Respondents obtained a "lucrative agreement" with the County 7

D. Kosor claims Respondents act like a "foreign government" 8

E. Additional Statements on Kosor's Website 8

F. Kosor claims Olympia breached its fiduciary duties 10

G. Kosor claims Respondents' actions have "cost homeowners millions" 11

H. Kosor's pamphlet knowingly misrepresents legal expenses 11

STANDARD OF REVIEW 12

ARGUMENT 13

A. Kosor's Defamatory Statements Were Either Knowingly False or Made with Reckless Disregard for the Truth 14

1. Kosor's knowing misstatement of SHCA's 2016 legal expenses suggests that Respondents are not fit to conduct their business. 17

2. Kosor's "dark room" statement accuses Respondents of criminal activity 19

3. Kosor's "lining its pockets" statement suggests that Respondents are not fit to conduct thir business 20

4. Kosor's "lucrative agreement" and "sweetheart deal" statements accuse Respondents of criminal activity. 21

5. Kosor's statement comparing Respondents to a "foreign government" would tend to lower Respondents in the estimation of the community and excite derogatory opinions about Respondents. 21

6. Kosor's statements accusing Respondents of breaching their fiduciary duties and "cost-shifting" of "millions" constitute defamation per se. 22

7. Kosor's statements accusing Respondents of statutory violations constitute defamation per se and tend to lower Respondents in the estimation of the community and excite derogatory opinions about Respondents.....23

B. Kosor Failed to Meet His Burden to Show His Statements Were Good Faith Communications in Furtherance of the Right to Free Speech in Direct Connection with an Issue of Public Concern 24

1. Kosor's statements were not directly connected to an issue of public concern.....26

2. Kosor's statements were not made in public forums, nor were they made in direct connection with an issue of public interest.....29

a) Kosor's statements were not made in public forums.....29

i. The CCA board meeting was not a public forum because the board does not perform actual government functions......30

*ii. The social media website Nextdoor.com is not a public forum because it has limited access and has strict editorial guidelines for content. *31

iii. Kosor's websites not a public forum, but even if it was the content on his website were not directly connected to issues of public concern......33

*iv. Kosor's campaign pamphlet was not a public forum because it was not publicly disseminated nor did was it directly connected to issues of public concern. *35

b) Kosor's statements were not made in direct connection with an issue of public interest. 36

3. Kosor's statements were not aimed at procuring governmental or electoral action.....38

C. Even Though Mr. Kosor Failed to Meet his Burden to Invoke NRS 41.660, Respondents Still Established a Probability of Prevailing on Their Claims. 40

1. Each of Kosor's statements are unprivileged and were published to third parties. 42

2. Each of Kosor's statements constitute defamation per se, therefore damages are presumed. 43

CONCLUSION 45

CERTIFICATE OF COMPLIANCE 48

CERTIFICATE OF SERVICE 50

TABLE OF AUTHORITIES

Cases

Adelson v. Harris,
133 Nev. Adv. Op. 67, 402 P.3d 665 (2017)..... 38, 39

Ampex Corp. v. Cargle,
128 Cal.App.4th 1569, 27 Cal.Rptr.3d 863 (2005) 34

Arkansas Educ. TV v. Forbes,
523 U.S. 666, 118 S.Ct. 1633 (1998) 34

Baral v. Schnitt,
1 Cal. 5th 376, 376 P.3d 604 (2016) 13

Bongiovi v. Sullivan,
122 Nev. 556, 138 P.3d 433 (2006) 44

Briggs v. Eden Council for Hope & Opportunity,
19 Cal.4th 1106, 969 P.2d 564, 81 Cal.Rptr.2d 471 (1999).....25

Burrill v. Nair,
158 Cal. Rptr. 3d 332 (Cal. Ct. App. 2013) 45

Carey v. Piphus,
435 U.S. 247, 98 S.Ct. 1042 (1978) 43

Church of Scientology v. Wollersheim,
42 Cal. App. 4th 628, 49 Cal. Rptr. 2d 620 (1996) 45

Clark County School Dist. v. Virtual Educ. Software, Inc.,
125 Nev. 374, 213 P.3d 496 (2009) 41

Coker v. Sassone,
432 P.3d 746 (Nev. 2019)..... passim

ComputerXpress, Inc. v. Jackson,
93 Cal.App.4th 993, 113 Cal.Rptr.2d 625 (2001) 32, 33

County of Clark v. City of Las Vegas,
92 Nev. 323, 550 P.2d 779 (1976).....21

D.C. v. R.R.,
182 Cal.App.4th 1190, 106 Cal.Rptr.3d 399 (2010) 27

Damon v. Ocean Hills Journalism Club,
85 Cal. App. 4th 468, 102 Cal. Rptr. 2d 205 (2000) 29, 30, 31, 35

Delucchi v. Songer,
396 P.3d 826 (Nev. 2017)..... 16, 26, 39

Du Charme v. International Brotherhood of Electrical Workers,
110 Cal.App.4th 107, 1 Cal.Rptr.3d 501 (2003) 27, 36

Equilon Enterprises v. Consumer Cause, Inc.,
29 Cal. 4th 53, 52 P.3d 685 (2002) 45

Franklin v. Dynamic Details, Inc.,
116 Cal.App.4th 375 10 Cal.Rptr.3d 429 (2004) 15

Gertz v. Robert Welch, Inc.,
418 U.S. 323, 94 S.Ct. 2997 (1938) 43, 45

Global Telemedia International, Inc. v. Doe,
132 F.Supp.2d 1261 (C.D.Cal. 2001).....33

Hailstone v. Martinez,
169 Cal.App.4th 728, 87 Cal.Rptr.3d 347 (2008) 27

John v. Douglas Cty. Sch. Dist.,
125 Nev. 746, 219 P.3d 1276 (2009) 16, 45

K-Mart Corp. v. Washington,
109 Nev. 1180, 866 P.2d 274 (1993) ..... passim

Metabolife Internat., Inc. v. Wornick,
72 F.Supp.2d 1160 (S.D. Cal. 1999) 31

Milkovich v. Lorain Journal Co.,
497 U.S. 1, 110 S. Ct. 2695 (1990) 20

Nevada Indep. Broad. Corp. v. Allen,
99 Nev. 404, 664 P.2d 337 (1983).....24

Park v. Board of Trustees of California State University,
393 P.3d 905 (Cal. 2017).....13

Pegasus v. Reno Newspapers, Inc.,
118 Nev. 706, 57 P.3d 82 (2002)..... passim

Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.,
946 F. Supp. 2d 957 (N.D. Cal. 2013)
aff'd, 609 F. App'x 497 (9th Cir. 2015) 16, 27, 34

Pope v. Motel 6,
121 Nev. 307, 114 P.3d 277 (2005) 41

Posadas v. City of Reno,
109 Nev. 448, 851 P.2d 438 (1993) 40

Ringler Associates Inc. v. Maryland Casualty Co.,
80 Cal.App.4th 1165, 96 Cal.Rptr.2d 136 (2000) 15

Rivero v. American Federation of State, County and Municipal Employees,
AFL-CIO, 105 Cal.App.4th 913, 130 Cal.Rptr.2d 81 (2003).....36

Ruiz v. Harbor View Community Association,
134 Cal.App.4th 1456, 37 Cal.Rptr.3d 133 (2005) 15

Shapiro v. Welt,
133 Nev. 35, 389 P.3d 262 (2017)..... passim

Silk v. Feldman,
208 Cal.App.4th 547, 145 Cal.Rptr.3d 484 (2012) 23

Simpson v. Mars, Inc.,
113 Nev. 188, 929 P.2d 966 (1997) 42

St. Amant v. Thompson,
390 U.S. 727, 88 S.Ct. 1323 (1968) 16

Talega Maintenance Corp. v. Standard Pacific Corp.,
225 Cal.App.4th 722, 170 Cal.Rptr.3d 453 (2014) 28, 31, 40

Weinberg v. Feisel,
110 Cal.App.4th 1122, 2 Cal.Rptr.3d 385 (2003) 30, 34, 36, 37

Wilbanks v. Welk,
121 Cal.App.4th 883, 17 Cal.Rptr.3d 497 (2004) 20

Young v. Handshoe,
171 So.3d 381 (La.App. 5 Cir. 2016) 34

Statutes

Cal. Civ. Code., §§ 1363.05, 1363, 1350–1376.....31

Cal. Civ. Proc. Code § 425.16 16

NRS 197.020.....19

NRS 204.320.....19

NRS 207.360.....19

NRS 207.390.....19

NRS 41.637..... passim

NRS 41.660..... passim

Rules

NRAP 4(a)(1).....6

SUMMARY OF THE ARGUMENT

Respondents filed this action only after exercising extreme patience with Mr. Kosor and after several attempts to secure his agreement to cease and desist from his reckless behavior defaming Respondents at nearly every opportunity. Unfortunately, despite Respondents' multiple efforts, Kosor's conduct persisted, and Kosor continued to spout statements, that had been demonstrated to him to be false, about Respondents without any regard for the truth or of Respondents' rights. Kosor's tunnel vision may have originated with his earnest attempts to effect political change, but that does not excuse his pattern of reckless behavior towards Respondents and complete refusal to acknowledge the wrongfulness of his actions. Each and every one of Kosor's statements identified in Respondents' Complaint either constitute defamation per se and are of the type which would tend to lower the reputation of Respondents in the community or excite derogatory opinions about Respondents. Kosor's statements are not only defamatory, they are not subject to the protections of Nevada's anti-SLAPP statute, nor does his inclusion of alleged qualifying language transform these statements into mere opinions. When he published each of these statements, Kosor either knew that the statements were false or he published them with a reckless disregard to whether they were true. Respondents demonstrated at the district court level the falsity of

Kosor's statements and also demonstrated their probability of prevailing on each of their claims against Kosor.

Accordingly, 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" and, thus, failed to meet the requirements to invoke NRS 41.660. As such, his anti-SLAPP motion to dismiss was denied. That being the case, the district properly determined there was no reason to reach the second prong of the NRS 41.660 inquiry.

The district court appropriately adhered to the required analysis, finding that the evidence before the court required it to deny Kosor's special motion to dismiss. Judge Leavitt's order denying Kosor's motion should be affirmed.

STATEMENT OF THE ISSUES

1. Under Nevada law, if the evidence demonstrated that Kosor made statements that he knew were false, or made those statements with reckless disregard to the truth, can Kosor invoke the protection of NRS 41.660?

2. Under Nevada law, was the district court's denial of Kosor's special motion to dismiss appropriate in light of the demonstrated fact that Kosor knew the falsity of his statements but made them anyway?

STATEMENT OF THE CASE

After enduring several years of Kosor's attacks, Respondents filed a Complaint for defamation and defamation per se against Kosor on November 29, 2017. *See* Joint Appendix ("JA") 1-5. Respondents' Complaint outlined several of Kosor's critical statements regarding either Respondent Olympia Companies, LLC ("Olympia"), Respondent Garry V. Goett ("Goett"), or both, which Respondents contend constitute defamation or defamation per se. *Id.* Specifically, Respondents complained of the following statements:

- At the December 17, 2015[1], Christopher Communities Association ("CCA") board meeting, Kosor "made comments that Olympia and Mr. Goett spoke with Clark County Commissioners in a "dark room" and coerced them to act or vote in a certain manner." JA 2 at ¶ 6; JA 203 at ¶ 7.
- At the December 17, 2015, Christopher Communities Association ("CCA") board meeting, Kosor "made comments that . . . Olympia is "lining its pockets" to the detriment of the Southern Highlands homeowners." JA 2 at ¶ 6; JA 203 at ¶ 7.

[1] This meeting was held well before Mr. Kosor ever entered any election for the Southern Highlands Community Association ("SHCA") board.

- "On or about September 11, 2017, Kosor posted a statement on the Nextdoor.com website accusing Olympia of obtaining a "lucrative agreement" with Clark County by cost-shifting expenses for the maintenance of public parks to the Southern Highlands owners." JA 3 at ¶ 9; JA 204 at ¶ 13.
- "On or about November 16, 2017, Kosor launched a website under his own name, accusing Olympia and its employees of, among other things, acting like a foreign government that deprives people of essential rights." JA 3 at ¶ 10; JA 204 at ¶ 14.
- In other parts of his website, Kosor continued to reference "massive sweetheart deals", statutory violations, breaches of fiduciary duties, and improper cost shifting of "millions of dollars." JA 3 at ¶ 10; JA 204 at ¶ 14.
- "On or about November 17, 2017, homeowners throughout the Southern Highlands community received a written pamphlet from Kosor" which included a "statement that Olympia/Developer breached its fiduciary duties to the Southern Highlands community." JA 3 at ¶ 11; JA 205 at ¶ 16.
- Kosor's pamphlet also claims that the "Developer's actions have "already cost the homeowners millions." *Id.*

- Both Kosor's pamphlet and his website "grossly overstate[] the Southern Highlands Community Association's 2016 legal expenses." JA 3 at ¶ 11; JA 203-204 at ¶¶8-9.

On January 29, 2018, Kosor filed a special motion to dismiss, seeking to dismiss Respondents' Complaint pursuant to Nevada's anti-SLAPP statute. *See* JA 21-93, Defendant Michael Kosor's Motion to Dismiss Pursuant to NRS 41.660, filed on January 29, 2018 ("Motion to Dismiss"). Respondents filed their opposition on February 16, 2018, *see* JA 139-200, Respondents' Opposition to Defendant Michael Kosor's Motion to Dismiss Pursuant to NRS 41.660 filed on February 16, 2018 ("Opposition"), and Kosor filed his reply on February 26, 2018. *See* JA 206-227, Defendant's Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss Pursuant to NRS 41.660 field on February 26, 2018 ("Reply"). At the hearing on Kosor's Motion to Dismiss, the district court focused its questions on whether Kosor could turn his concerns into issues of public interest by merely posting those online or taking those issues in front of the Real Estate Board. *See* JA 267:2-9 ("but it appears to be an issue specific to this homeowner"), JA 269:10–12. After listening to arguments from counsel, the district court determined that Kosor failed to meet his burden to invoke the protection of NRS 41.660 and, therefore, denied Kosor's motion. The district court then entered an order denying Kosor's Motion to Dismiss, finding that "Defendant has failed to

meet its burden to invoke NRS 41.660." *See* JA 276-279, Notice of Entry of Order Denying Kosor's Motion to Dismiss Pursuant to NRS 41.660 filed on March 21, 2018 ("Order").

Thereafter, Kosor retained new counsel on April 6, 2018. On April 19, 2018, Kosor, through his new counsel of record, timely filed a Notice of Appeal, appealing the district court's Order to the Nevada Supreme Court.[2] *See* JA 283-289, Notice of Appeal filed on April 19, 2018.

STATEMENT OF THE RELEVANT FACTS

Respondents' Complaint outlines several specific examples of Kosor's defamatory statements about Respondents. *See* JA 1-5. At the time of the hearing on Kosor's motion to dismiss, however, the allegations in Respondents' Complaint were additionally supported by the exhibits attached to Kosor's motion, the Respondents' opposition, and the Declaration of Angela Rock, Esq. JA 51-93; JA 168-200; JA 201-205.

A. Kosor claims Respondents spoke with County Commissioners in a "dark room"

Respondents' Complaint alleges that "Kosor made comments that Olympia and Mr. Goett spoke with Clark County Commissioners in a "dark room" and

[2] Per NRAP 4(a)(1), Kosor had thirty (30) days from the date of entry of the Court's Order to file an appeal with the Nevada Supreme Court, or until April 20, 2018.

coerced them to act or vote in a certain manner." JA 2 at ¶ 6. At the December 17, 2015, Christopher Communities Association ("CCA") board meeting, Kosor stated that "They [the County Commissioners] were apologizing to the developer, Goett . . . was upset and angry, and he probably got the Commissioners aside in a dark room someplace, read them the riot act." JA 203 at ¶ 7; JA 79 at 1:20:45–1:21:01. He was later overheard repeating similar statements – that Olympia pays for "back room" deals with politicians – to other Southern Highlands homeowners at an SHCA board meeting in late 2016. JA 203.

B. Kosor claims Respondents are "lining its pockets" to the detriment of homeowners

Respondents' Complaint alleges that "Kosor made comments that . . . Olympia is "lining its pockets" to the detriment of the Southern Highlands homeowners." JA 2 at ¶ 6. At the December 17, 2015, CCA board meeting, Kosor stated that "[the Declarant is] basically lining his own pockets in my opinion at the expense of the owners in Southern Highlands." JA 203 at ¶ 7; JA 79 at 1:19:12–14.

C. Kosor claims Respondents obtained a "lucrative agreement" with the County

Respondents' Complaint alleges that "On or around September 11, 2017, Mr. Kosor posted a statement on the Nextdoor.com website accusing Olympia of obtaining a "lucrative agreement" with Clark County by cost-shifting expenses for the maintenance of public parks to the Southern Highlands owners." JA 3 at ¶ 9. In

fact, Kosor's statement states that "To obtain a lucrative agreement with the County the developer committed to constructing the above Sports Park using private money." *See* JA 169. But beyond that, Kosor admits that this is something that only "a ***small handful*** of concerned residents" have been dealing with – decidedly not a matter of public interest. *Id.*

D. Kosor claims Respondents act like a "foreign government"

Respondents' Complaint alleges that "On or about November 16, 2017, Mr. Kosor launched a website under his own name, accusing Olympia and its employees of, among other things, acting like a foreign government that deprives people of essential rights." JA 3 at ¶ 10. Though Kosor previously denied making this statement (*see* JA 40:5–6), his website undeniably proclaims that he "spent 24 years as an Air Force officer defending the rights of all Americans to choose those that represent us. I lived in **foreign countries where citizens did not have this right** and saw first-hand the negative implications. I do not like the idea **the community** I now look to spend my retirement **has denied me this central and important right**." JA 88.

E. Additional Statements on Kosor's Website

Respondents' Complaint alleges that "In other parts of his website, Mr. Kosor continues to reference sweetheart deals, statutory violations, breaches of fiduciary duties, and improper cost shifting of "millions of dollars." JA 3 at ¶ 10.

Kosor's website specifically states that the "SHCA Board has repeatedly failed to inform owners of", among other things, "**a massive sweetheart deal** for our Developer." JA 86 (emphasis added). Once again, Kosor denied having made this statement, despite the fact that the exhibits to his own motion show otherwise. *See* JA 40:6–7.

Kosor's website also boldly accuses Respondents of numerous statutory violations, including accusations that the "County and Developer coordinated [an] agreement that would permanently and wrongfully obligate the HOA to maintain the "public" parks in our community." JA 85 (emphasis in original). Kosor's website also claimed that Olympia entered into an agreement with the SHCA Board in contravention of Nevada law: "the Agreement was done without satisfying necessary owner acceptance provisions in the statutes. A technical 'loophole' allows it to do so. However, per NRS 116.3112 par 4. '... the contract is not enforceable against the association until approved pursuant to subsections 1, 2 and 3' (a majority vote of the owners)." JA 89.

Further, Kosor repeatedly states that the SHCA Board and Olympia breached their fiduciary duties to Southern Highlands homeowners with statements such as "the general **failure** of our Association Board **to advance the interests of Southern Highlands homeowners**" (JA 84) and "the SHCA Board's **recurring failure to engage on behalf of homeowners**" *Id.* (emphasis added). While more

specifically targeting Olympia as a developer, Kosor avers that "[w]ith the management company, Olympia Management, **also controlled by the Developer**, the potential for conflicts of interest, loss of board autonomy, and **failed fiduciary oversight are clear**." JA 87; JA 90. (emphasis added). Finally, Kosor's website states that "Clark County's '**cost-shifting**' of park maintenance expenses to our HOA" (JA 85) and that he "believe[s] this has cost our community **millions of dollars**." JA 87. (underline in original) (bold added).

Despite claiming in his Motion that his statements on these breaches of fiduciary duties are only presented as "potential," he immediately follows this statement by suggesting that undisclosed facts demonstrate these breaches have **already transpired** and cost the community millions of dollars. JA 87. That does not qualify as a protected opinion.

F. Kosor claims Olympia breached its fiduciary duties

Respondents' Complaint alleges that "On or about November 17, 2017, homeowners throughout the Southern Highlands community received a written pamphlet from Kosor. Within Kosor's written pamphlet was the statement that Olympia/Developer breached its fiduciary duties to the Southern Highlands community." JA 3 at ¶ 11. Kosor's pamphlet and accompanying letter clearly state that "[w]ith Olympia Management **owned by the Developer**, the potential for conflicts of interest, loss of board autonomy, and **failed fiduciary oversight are**

clear." JA 70-71. The letter also accuses the board of "**repeatedly fail[ing] to act in the best interest of homeowners** with government agencies, **defaulting to the Interests of the Developer**." *Id.* (emphasis added).

G. Kosor claims Respondents' actions have "cost homeowners millions"

Plaintiff's Complaint goes on to allege that Kosor's pamphlet claims that the "Developer's actions have "already cost the homeowners millions." Compl. ¶ 11. Kosor's pamphlet does indeed state that "[w]ith Olympia Management owned by the Developer . . . **this has cost our community millions of dollars**." JA 71 (emphasis added).

H. Kosor's pamphlet knowingly misrepresents legal expenses

Additionally, Respondents' Complaint alleges that Kosor's pamphlet (JA 71), as well as his website (JA 85), "grossly overstates the Southern Highlands Community Association's 2016 legal expenses." JA 3 at ¶ 11. Kosor's pamphlet refers to "wasteful legal costs ($1.4M in 2016, far more than typically incurred by HOAs of similar size)." JA 71. This statement exposes that Mr. Kosor's continued accusations of Respondents' lack of fitness for their business or profession are knowingly false. Even his counsel admitted that this statement was false in his Motion to Dismiss. JA 29:24-27. But this admission isn't even entirely revealing. The numbers that Mr. Kosor references in his Motion are **not** the actual legal

expenses incurred by Southern Highlands in 2016.[3] As had been discussed ad nauseum with Mr. Kosor by Olympia employees, the Southern Highlands Community Association's 2016 actual legal expenses were less than $900,000 – or over half-a-million dollars less than Mr. Kosor's published statements. JA 203-204 at ¶ 8-9; *see also* JA 196 (emails with Olympia employee Sara Gilliam).

STANDARD OF REVIEW

Based on recent Nevada Supreme Court law, the standard of review for a district court's denial or grant of an anti-SLAPP motion to dismiss is *de novo*. *Coker v. Sassone*, 432 P.3d 746, 749 (Nev. 2019). As part of the Court's *de novo* review, it will "exercise independent judgment in determining whether, based on [its] review of the record, the challenged claims arise from protected activity."

[3] In the summer of 2016, the SHCA board generated a proposed budget for 2017 based on financial statements received through July 31, 2016. The resulting budget was ratified by the board and was attached as Exhibit F to Mr. Kosor's Motion. JA 75-77. At the time the 2017 budget was generated, the only litigation expenses that had been posted were through May 2016, for a total of $517,488.85. In order to calculate the anticipated litigation expenses for the year, the board annualized that number by dividing the posted number by the number of months ($517,488.85/5 = $103,497.77) and then multiplied that number by twelve in order to estimate what the expenses would be for the entire year ($103,497.77 x 12 = $1,241,973.24). In truth, the actual total spent on legal expenses in 2016 only amounted to $880,967.72, as reflected in the GL Ledger Summary compiling all of Southern Highlands Community Association's Legal Fees for 2016. JA 176. *See also* Declaration of Angela Rock, JA 204 at ¶ 9 ("On more than one occasion, Mr. Kosor has inquired about the 2046 legal expenses and it has been explained to him by Olympia employees and the SHCA Board that Southern Highlands did not incur $1.4 million in legal expenses … that the actual expenses for 2016 were far less than the annualized number, and the reasons for those expenses.").

Coker, 432 P.3d at 749 (quoting *Park v. Board of Trustees of California State University*, 393 P.3d 905, 911 (Cal. 2017)). The Court does not, however, weigh any evidence, instead it accepts "plaintiff's submissions as true" and considers "only whether any contrary evidence from the defendant establishes its entitlement to prevail as a matter of law." *Id.*

ARGUMENT

A court considering a special anti-SLAPP motion to dismiss must undertake a two-prong analysis. First, it must "[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 free speech in direct connection with an issue of public concern." NRS 41.660(3)(a).[4] If the moving party is able to make such a showing, the district court advances to the second prong, whereby "the burden shifts to the plaintiff to show 'with prima facie evidence a probability of prevailing on the claim.' " *Shapiro v. Welt*, 133 Nev. 35, 38, 389 P.3d 262, 267 (2017) (quoting NRS 41.660(3)(b)). Otherwise, the inquiry ends at the first prong, and the case advances to discovery.

[4] While an anti-SLAPP motion may be used to attack parts of a count rather than an entire cause of action, "the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them." *Baral v. Schnitt*, 1 Cal. 5th 376, 396, 376 P.3d 604, 617 (2016). "[A]llegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute." *Id.*, 1 Cal. 5th at 394, 376 P.3d at 615.

However, "no communication falls within the purview of NRS 41.660 unless it is 'truthful or is made without knowledge of its falsehood.' " *Shapiro*, 133 Nev. at 40, 389 P.3d at 268 (quoting NRS 41.637). Additionally, as NRS 41.660 "clearly mandates," it is the defendant's (Kosor's) burden "to prove that his conduct was either truthful or made without knowledge of its falsehood." *Coker*, 432 P.3d at n. 5.

In this case, Kosor failed to meet that burden and the district court rightly found that Kosor did not make a sufficient showing to invoke any protections under NRS 41.660. As will be discussed below, the district court was correct.

A. Kosor's Defamatory Statements Were Either Knowingly False or Made with Reckless Disregard for the Truth

Respondents filed this action because Kosor made defamatory statements about them. Aside from his anti-SLAPP arguments, Kosor claims that most of the statements he made were "opinions" and, thus, cannot be defamatory. *See* Opening Brief, p. 49. 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." *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 715, 57 P.3d 82, 88 (2002) (quoting *K-Mart Corp. v. Washington*, 109 Nev. 1180, 1191, 866 P.2d 274, 281–82 (1993)). While generally statements of opinion are not defamatory, even "expressions of opinion may suggest that the speaker knows certain facts to be true or may imply that facts exist which will be sufficient

to render the message defamatory if false." *Id.*, 118 Nev. at 714, 57 P.3d at 88 (quoting *K-Mart Corp.*, 109 Nev. at 1192, 866 P.2d at 282 (internal citation omitted)). That is, expressions of opinion do not enjoy blanket constitutional protection. *See Franklin v. Dynamic Details, Inc.,* 116 Cal.App.4th 375, 384, 10 Cal.Rptr.3d 429 (2004). An opinion loses its constitutional protection and becomes actionable when it is "based on implied, undisclosed facts" and "the speaker has no factual basis for the opinion." *Ruiz v. Harbor View Community Association,* 134 Cal.App.4th 1456, 1471, 37 Cal.Rptr.3d 133 (2005).[5] "If a statement of opinion implies a knowledge of facts which may lead to a defamatory conclusion, the implied facts must themselves be true." *Ringler Associates Inc. v. Maryland Casualty Co.,* 80 Cal.App.4th 1165, 1181, 96 Cal.Rptr.2d 136 (2000).

The statements made by Kosor go far beyond opinion. Kosor's statements were false, and he knew it. While Respondents are not required to prove that Kosor acted with actual malice in making his statements about Respondents, Respondents can show that Kosor made the statements with knowledge of falsity or reckless disregard for the truth. "Reckless disregard means that the publisher acted with a 'high degree of awareness of . . . [probable] falsity' of the statement or had serious

[5] Kosor discusses *Ruiz* in his brief, claiming support for his position. The California court in *Ruiz* found, however, that plaintiff had met his burden of making a *prima facie* showing that some of defendants statements were libelous and the case should proceed if plaintiff, after discovery on the issue, could show publication. *Id.*, 134 Cal.App.4th at 1472.

doubts as to the publication's truth." *Pegasus*, 118 Nev. at 719, 57 P.3d at 90-91; *see also St. Amant v. Thompson*, 390 U.S. 727, 732, 88 S.Ct. 1323, 1325 (1968) ("recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports"). Kosor's failure to present contrary evidence was a proper basis for the district court's decision.

Even if the district court had not been briefed on the truthfulness of Kosor's statements, the district court would still have been required to deny the motion to dismiss; as it was Kosor's burden to prove the issue in his favor in his initial motion. The party seeking anti-SLAPP protection must "'first make a threshold showing that the lawsuit is based on' a protected communication pursuant to NRS 41.637." *Delucchi v. Songer*, 396 P.3d 826, 831 (Nev. 2017) (quoting *John v. Douglas Cty. Sch. Dist.*, 125 Nev. 746, 753, 219 P.3d 1276, 1281 (2009)). Thus, pursuant to NRS 41.637, the movant must show that the communication "is truthful or is made without knowledge of its falsehood."[6] Kosor utterly failed to do that.

[6] Though Nevada may look to California on anti-SLAPP jurisprudence, comparisons to California statutes about an analysis of truthfulness are inappropriate because, unlike Nevada, California does not include truthfulness in the first prong. *See* Cal. Civ. Proc. Code § 425.16(e); *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F. Supp. 2d 957, 969 (N.D. Cal. 2013), ("California law does not require a statement to be serious or truthful in order to concern an issue of public interest."), *aff'd*, 609 F. App'x 497 (9th Cir. 2015).

Many of Kosor's statements demonstrate on their face that he either knew his statements were not true, or that he was at least doubtful as to the truth of his statements. For example, Kosor used the qualifying term "probably" in relation to his "dark room" statement, showing that he did not know if it was true or not. Kosor claims that his "statements and beliefs are in reliance of Nevada Revised Statutes and recorded documents," *see* JA 25:20–21, yet some of his own exhibits, including the SHCA Board Budget for 2016–2017 and corresponding emails with Olympia employees demonstrate, that he ***knew*** his statements were false or at least had 'obvious reasons to doubt the veracity' of his statements.

1. Kosor's knowing misstatement of SHCA's 2016 legal expenses suggests that Respondents are not fit to conduct their business.

Kosor's pamphlet not only grossly overstates the legal expenses expended by SHCA with Respondents acting as its manager for 2016, it also accuses Respondents of incurring "wasteful legal costs." *See* JA 71. This, despite him having been repeatedly informed by Respondents that his claimed amounts were incorrect. Kosor utterly fails to address this issue in his Opening Brief, most likely because his statements clearly suggest to third parties that he "knows certain facts to be true or [implies] that facts exist" to support his statement, including his reference to a precise sum and a comparison to other homeowners associations of similar size. *See Pegasus*, 118 Nev. at 714, 57 P.3d at 88 (quoting *K-Mart*, 109 Nev. at 1192, 866 P.2d at 282 (internal citation omitted)).

At the district court level, Kosor argued in his own briefing that even though he overstated the 2016 legal expenses, it was not a ***gross*** overstatement as the fees were $1,241,973 and he stated that the fees were $1.4 million. JA 47:3–5. This is a variance of over $158,000; hardly an insignificant number to the average homeowner. But beyond that fact, time and again it was demonstrated to Mr. Kosor that SHCA's legal fees for 2016 were not $1,241,973, either. JA 203-204 at ¶¶ 8-9. Again, this is something that was demonstrated to the district court that Mr. Kosor recognized this. In emails with Olympia employee Sara Gilliam on December 5, 2016, Kosor acknowledges that this number is simply an "annualized" amount, not an actual amount incurred. JA 196; *see also* JA 204 at ¶ 9.

The bottom line is that the $1.4 million figure Kosor used to proclaim that Respondents were not fit to conduct their business is not only demonstrably false, ***but he admits that he knew it was false when he included it in his letter***. When Kosor fabricated this number, he did so to convince homeowners that Olympia is wasting homeowner funds on legal costs, yet failed to mention that (1) the actual legal fees spent in 2016 were significantly less than he represented and (2) the budgeted legal fees for 2017 are significantly less than that spent in 2016. JA 75-77.

Kosor was required to provide evidence to the district court that at the time he made his defamatory statements against Respondents, his statements were "truthful or made without knowledge of its falsehood." *Shapiro*, 133 Nev. at 40, 389 P.3d at 268. Kosor made no such statement and provided the district court with no evidence to show that he had not previously been advised that his statement was false. Absent that evidence, Kosor failed to demonstrate his conduct was truthful or made without knowledge of its falsehood and his anti-SLAPP motion to dismiss was appropriately denied. *Coker*, 432 P.3d at 750.

2. Kosor's "dark room" statement accuses Respondents of criminal activity.

Kosor's statement accusing Respondents of speaking with Clark County Commissioners in a "dark room" in order to influence their actions, clearly constitutes defamation per se. This is a thinly-veiled accusation that Respondents engaged in either bribery or extortion, both of which are felony criminal offenses in the State of Nevada. *See* NRS 204.320, 197.020. Further, engaging in both of these crimes can constitute racketeering. *See* NRS 207.360, 207.390. At the very least, this constitutes slander per se because it suggests that Respondents have engaged in the commission of a crime. *See K-Mart*, 109 Nev. at 1192, 866 P.2d at 282.

Kosor made this statement with absolutely no knowledge of whether it was true or not: his qualifying language of "probably" admits as much. Adding a

qualifier such as "probably" does not transform a defamatory statement into an opinion. Although, even if it was presented as an opinion, that statement loses any constitutional protection and is actionable because it implies undisclosed facts even though Mr. Kosor has no factual basis for the opinion. *See Pegasus*, 118 Nev. at 714, 57 P.3d at 88.

"The ultimate question is whether a reasonable trier of fact could conclude that the published statements imply a provably false assertion." *Wilbanks v. Welk*, 121 Cal.App.4th 883, 902, 17 Cal.Rptr.3d 497, 509 (2004) (rejecting the contention that a rhetorical question was a mere opinion); *see also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21, 110 S. Ct. 2695, 2707 (1990) (the language and "general tenor of the article" did not negate the impression of a factual statement).

3. Kosor's "lining its pockets" statement suggests that Respondents are not fit to conduct thir business.

Kosor's statement accusing Respondents of "lining its pockets" to the detriment of SHCA homeowners, also clearly constitutes defamation per se. This statement suggests that Respondents are misappropriating homeowner funds and getting rich in the process, all the while harming SHCA homeowners. Despite Kosor's qualifying language of "in my opinion," this is clearly not a mere opinion because it "suggest[s] that [Kosor] knows certain facts to be true or [implies] that

facts exist" to support his accusation. *Pegasus*, 118 Nev. at 714, 57 P.3d at 88 (quoting *K-Mart*, 109 Nev. at 1192, 866 P.2d at 282 (internal citation omitted)).

4. Kosor's "lucrative agreement" and "sweetheart deal" statements accuse Respondents of criminal activity.

Kosor's statement accusing Respondents of obtaining a "lucrative agreement" with the County and "cost-shifting expenses" to force SHCA homeowners to pay for the parks, additionally constitutes defamation per se. Kosor implied improper criminal behavior when he stated that Respondents had procured "a massive sweetheart deal" which Respondents then hid from homeowners. Just as Kosor's "dark room" comment implies that Respondents engaged in either bribery or extortion, so does the implication that Respondents had a "lucrative agreement" or obtained "sweetheart deals" with the County. Beyond that, Kosor's statements again imputes Respondents' "lack of fitness for trade, business, or profession," and tends to injure Respondents in their business.

5. Kosor's statement comparing Respondents to a "foreign government" would tend to lower Respondents in the estimation of the community and excite derogatory opinions about Respondents.

Kosor's statement comparing Respondents to a "foreign government" which deprives people of essential rights, when read in-context, suggests that Respondents have deprived him and fellow homeowners of the right to vote. *See* JA 88. "It is, of course, well established that the right to vote is fundamental." *County of Clark v. City of Las Vegas*, 92 Nev. 323, 342, 550 P.2d 779, 792 (1976).

By accusing Respondents of denying him and other homeowners of this "central and important right" Kosor is essentially accusing Respondents of being dictators. *See* JA 88. Such an accusation is the very embodiment of a statement which would "tend to lower [Respondents] in the estimation of the community, [and] excite derogatory opinions about [Respondents]". *K-Mart*, *supra*, 109 Nev. at 1191, 866 P.2d at 281. In truth, Kosor's very motion admits the ***falsity*** of this accusation, as he speaks at length about the recent SHCA board member election, conceding that the election did in fact take place. *See* JA 27:8–13. Therefore, it is clearly not true that Respondents deprive homeowners of their right to vote and this statement is both patently offensive and demonstrably false.

6. Kosor's statements accusing Respondents of breaching their fiduciary duties and "cost-shifting" of "millions" constitute defamation per se.

Kosor further suggests on both his website and in his distributed pamphlet that Respondents breached their fiduciary duties to Southern Highlands homeowners, both by explicitly using of the term "fiduciary duty" and also by repeatedly stating that Respondents engaged in "cost-shifting" which "already cost the homeowners millions." JA 3 at ¶¶ 10–11. As with the accusation that Respondents were "lining its pockets" at the homeowners' expense, this too suggests that Respondents are improperly expending homeowner funds and are, as such, not fit for their trade or business. *See Silk v. Feldman*, 208 Cal.App.4th 547,

555–56, 145 Cal.Rptr.3d 484, 490 (2012) (holding that accusing Respondents "of a serious breach of fiduciary duty . . . is libelous per se."). As these statements both directly accuse Respondents of breaching their fiduciary duties to Southern Highlands owners and also accuses them of actions which would constitute such a breach, these statements constitute slander per se. Although Kosor claims that his use of qualifying language "I believe" makes his statement an opinion, his statements go a step further by suggesting the existence of facts to support his statement, as his statements as a whole suggest that he has seen financial records to support his claim that it has "already cost homeowners millions." *See Pegasus*, *supra*, 118 Nev. at 714, 57 P.3d at 88 (citations omitted).

7. Kosor's statements accusing Respondents of statutory violations constitute defamation per se and tend to lower Respondents in the estimation of the community and excite derogatory opinions about Respondents.

Kosor's website accuses Respondents of numerous statutory violations. *See* JA 3 at ¶ 10; *see also* JA 85-91. Kosor claims that this was based on his good faith review of Nevada law and that he only stated that "SHCA failed to inform homeowners of the date and time of the next executive board meeting." JA 40:7–10. But Kosor's allegations go much further: his website specifically references sections of the Nevada Revised Statutes and claims that Respondents entered into improper deals due to "loopholes" which directly contravene Nevada law. JA 85-91. Many of these allegations further compound the accusations that Respondents

engaged in criminal activity to secure improper deals with government officials, and as such, constitute defamation per se. At the very least, such accusations would "tend to lower [Respondents] in the estimation of the community, [and] excite derogatory opinions about [Respondents]". *K-Mart*, *supra*, 109 Nev. at 1191, 866 P.2d at 281.

Respondents have provided ample evidence that Kosor's statements were false, were made maliciously and with knowledge of their falsity, and were not mere opinions. *See Nevada Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 415, 664 P.2d 337, 344 (1983) ("Evidence of negligence, motive, and intent may be used, cumulatively, to establish the necessary recklessness."). Thus, even if Kosor's statements concerned an issue of public interest (which they did not), Kosor's anti-SLAPP motion was still appropriately denied because false statements or those made with reckless disregard to the truth are not covered or entitled to protection under NRS 41.660. *See Shapiro*, 133 Nev. at 40, 389 P.3d at 268; *see also Coker*, 432 P.3d at 749.

B. Kosor Failed to Meet His Burden to Show His Statements Were Good Faith Communications in Furtherance of the Right to Free Speech in Direct Connection with an Issue of Public Concern

NRS 41.637 defines "good faith communications" as those made "in furtherance of the right to petition or the right to free speech **in direct connection**

with an issue of public concern." *Id.* (emphasis added). This includes the following categories of communications:

> 1. Communication that is aimed at procuring any governmental or electoral action, result or outcome;
>
> 2. Communication of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity;
>
> 3. Written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law; or
>
> 4. Communication 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.

NRS 41.637. Thus, Nevada's anti-SLAPP statute provides protection for four categories of "good faith communications."

The first category involves communications aimed at procuring governmental or electoral action. NRS 41.637(1). The second and third categories concern communications directed to government representatives regarding matters of public concern. NRS 41.637(2)–(3). "[A]ll that matters is that the First Amendment activity take place in an official proceeding or be made in connection with an issue being reviewed by an official proceeding." *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal.4th 1106, 1116, 969 P.2d 564, 570, 81 Cal.Rptr.2d 471, 477 (1999) (discussing a similar provision in California's anti-SLAPP

statute). Finally, the fourth category applies to statements made in a public forum "in direct connection with an issue of public interest." NRS 41.637(4). Even if the statements fit within these narrow categories, the statements are only protected if they are "truthful or . . . made without knowledge of . . . falsehood." NRS 41.637.

"The term 'in furtherance of the right to petition or the right to free speech' does not operate independently within the anti-SLAPP statute. It too is part of the phrase '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**,' which must be given its express definition as provided in NRS 41.637." *Delucchi*, 396 P.3d at 831 (emphasis added).

None of Kosor's statements fall within the protections of Nevada's anti-SLAPP statute because they were either false or made with disregard to whether they were truthful. But in addition to the fact that Kosor's statements were false and with complete disregard to the truth, his statements are not protected by the anti-SLAPP statute as they were not made "in direct connection with an issue of public concern".

1. Kosor's statements were not directly connected to an issue of public concern.

To determine whether an issue is in the public interest, Nevada has adopted the following guiding principles:

(1) "public interest" does not equate with mere curiosity;

> (2) a matter of public interest should be something of concern to a substantial number of people; a matter of concern to a speaker and a relatively small specific audience is not a matter of public interest;
>
> (3) there should be some degree of closeness between the challenged statements and the asserted public interest—the assertion of a broad and amorphous public interest is not sufficient;
>
> (4) the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy; and
>
> (5) a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.

Shapiro, 133 Nev. at 39, 389 P.3d at 268 (quoting *Piping Rock*, 946 F. Supp. 2d at 968). "[W]here the issue is of interest to only a private group, organization, or community, the protected activity must occur in the context of an ongoing controversy, dispute, or discussion, such that its protection would encourage participation in matters of public significance." *D.C. v. R.R.*, 182 Cal.App.4th 1190, 1226, 106 Cal.Rptr.3d 399, 426 (2010) (citations omitted); *see also Du Charme v. International Brotherhood of Electrical Workers*, 110 Cal.App.4th 107, 119, 1 Cal.Rptr.3d 501, 510 (2003).

Kosor's statements all concern issues "of interest to only a limited but definable portion of the public": Southern Highlands homeowners. *Hailstone v. Martinez*, 169 Cal.App.4th 728, 737, 87 Cal.Rptr.3d 347, 353 (2008). Furthermore,

Kosor's statements did not encourage participation in matters of public significance; they merely encouraged scorn and public scrutiny of Respondents, hardly matters which were the subject of an ongoing controversy or dispute.

When determining whether an issue is of public concern, the court's "focus is not on some general abstraction that *may be of concern* to a governmental body, but instead on the specific issue implicated by the challenged statement and whether a governmental entity is reviewing that particular issue." *Talega Maintenance Corp. v. Standard Pacific Corp.*, 225 Cal.App.4th 722, 733, 170 Cal.Rptr.3d 453, 462 (2014) (emphasis in original). In *Talega*, the issue was whether the homeowners association or the developer should be required to pay for neighborhood trails. The court in *Talega* found that "[g]iven the absence of any controversy, dispute, or discussion," the issue was "of interest to only a narrow sliver of society" and thus not an issue of public concern. *Id.*, 225 Cal.App.4th at 734, 170 Cal.Rptr.3d at 463. Some of Kosor's statements involve a very similar issue: whether the homeowners association should be required to pay for community parks. Though Kosor claims that this issue concerned all Southern Highlands homeowners and "the estimate [sic] 40% of [Clark County] citizens that reside in homeowner associations," JA 33:24–26, the truth is that, there is no public controversy, dispute or discussion of this issue beyond Kosor's own protests. As his counsel stated during the hearing on his motion to dismiss, his

posts in the Nextdoor.com forum were between him and "three or four other homeowners." JA 269:24-270:2. Kosor's issues are unlike those implicated in the California cases he cites. Take, for example, *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 102 Cal. Rptr. 2d 205 (2000), which had the residents "split into two camps" and was described as a "highly emotional atmosphere surrounding [the] dispute." *Id.* at 472, Kosor presented no evidence to the district court that the homeowners in Southern Highlands or anywhere else in Clark County are similarly split or even discussing this issue. As such, Kosor's statements were clearly not "in direct connection with an issue of public concern" and are not subject to protection by Nevada's anti-SLAPP statute.

2. Kosor's statements were not made in public forums, nor were they made in direct connection with an issue of public interest.

In order for Kosor's statements to be protected under subsection 4 of Nevada's definition of "good faith communications," they must have been made in public forums *and* in direct connection with an issue of public interest. NRS 41.637(4). None of the statements listed in Plaintiffs' Complaint were made in public forums, and they were not made in direct connection with an issue of public interest.

a) Kosor's statements were not made in public forums.

"A public forum is a place open to the use of the general public 'for purposes of assembly, communicating thoughts between citizens, and discussing

public questions.' " *Weinberg v. Feisel*, 110 Cal.App.4th 1122, 1130, 2 Cal.Rptr.3d 385, 391 (2003). "Means of communication where access is selective . . . are not public forums." *Id.* Kosor's statements were made and published to third parties in four different forums. Most, if not all, of these forums had selective access and thus do not qualify as public forums.

i. The CCA board meeting was not a public forum because the board does not perform actual government functions.

The first forum was the CCA board meeting – a meeting that is specifically not open to the public.[7] Nevertheless, Kosor boldly asserts that homeowners association board meetings are public forums, relying on *Damon v. Ocean Hills Journalism Club*. In *Damon*, the court analogized homeowners associations to "quasi-government entit[ies]" which "served a function *similar* to that of a governmental body." *Id.* at 475 (emphasis added). Further, the board meeting at issue in *Damon* was televised to the public, and was held in accordance with California state law which required that all such boards hold open meetings. *Id.* (citing to Cal. Civ. Code., §§ 1363.05, 1363, 1350–1376). Nevada law has no such parallel provision, nor was the CCA board meeting at issue here available to the

[7] Of course, the CCA board meetings are completely separate from SHCA (the association that Respondents manage), nor do they include Respondents. There is, essentially, no nexus between the CCA board meetings where Kosor made some of his statements and Respondents responsibilities in developing Southern Highlands or providing management services for the SHCA board.

public as "a widely disseminated television broadcast." *Id.* at 476 (citing to *Metabolife Internat., Inc. v. Wornick*, 72 F.Supp.2d 1160, 1165 (S.D. Cal. 1999)). Of course, California has also found that a homeowners association board meeting is ***not*** a public forum, noting that "although courts have recognized the similarities between a homeowners association and a local government . . . a homeowners association is not performing or assisting in the performance of the *actual* government's duties." *Talega*, *supra*, 225 Cal.App.4th at 732, 170 Cal.Rptr.3d at 461 (emphasis in original). The CCA board does not perform or assist with the performance of any *actual* government duties, nor does the subject meeting mirror any of the characteristics of the board meeting in *Damon*. As such, the CCA board meeting at issue in this matter is clearly not a public forum for purposes of Nevada's anti-SLAPP statute.

ii. The social media website Nextdoor.com is not a public forum because it has limited access and has strict editorial guidelines for content.

The second forum was a limited-access website known as Nextdoor.com. *See* JA 169-171. Kosor claims that his statements "were posted on a social media website" which "clearly show[s] the statements were made in a public forum." JA 38:8–9. Nextdoor explains that it is a "**private** social network" for neighborhoods and requires members to be residents of their claimed neighborhoods. *See* JA 178-179 (emphasis added).

To the district court, Kosor claimed that the website at issue is a public forum simply because "websites are 'classical forum communications.'" JA 38:21–22. His arguments to this Court echo that same sentiment. *See* Opening Brief, p. 38. But Nextdoor.com is not simply an open public website where the statements or content from users is accessible to anyone who chooses to visit the site. While Nextdoor.com is accessible to any member of the public, in order to post, or see other people's posts, one must be part of a neighborhood. The 'neighborhood' group in which Kosor posted his defamatory statements about Respondents, is not open to the public. In fact, Nextdoor.com has a policy that only actual residents of a neighborhood may post in a neighborhood's message board. JA 178-179. If someone is not a verified homeowner of a particular neighborhood, they may not view the neighborhood comments or chat rooms. Furthermore, Nextdoor.com routinely exercises editorial control over its content: users are specifically advised to not "use Nextdoor as a soapbox" and the site is moderated, both by "Neighborhood Leads" and by Nextdoor staff. JA 181-182.

In order for a chat-forum website to be considered a public forum, California has previously found that the website – and it's chat rooms – should be open to anyone that has access to the internet ***and*** limited editorial control over the content of the chat rooms. For example, in *ComputerXpress, Inc. v. Jackson*, 93 Cal.App.4th 993, 113 Cal.Rptr.2d 625 (2001) found that the websites "Raging

Bull" and "Ogravity99" constituted public forums because both websites were accessible to any member of the public, and "[l]iterally anyone who has access to the Internet has access to [Raging Bull's] chat-rooms." *Id.*, 93 Cal.App.4th at 1006, 113 Cal.Rptr.2d at 637 (quoting *Global Telemedia International, Inc. v. Doe*, 132 F.Supp.2d 1261, 1264 (C.D.Cal. 2001) (also describing the Raging Bull website)). The court further noted that neither of the websites at issue had editorial control over the content posted on the website. *Id.*

As described above, due to the restricted nature of both membership and content on Nextdoor.com, it is clearly not a "public forum."

iii. Kosor's websites not a public forum, but even if it was the content on his website were not directly connected to issues of public concern.

The third forum was Kosor's personal website. *See* JA 81-93 (for printouts of parts of Kosor's website content). While Kosor's website may have been accessible by any member of the public with internet access, that does not automatically make it a public forum. A 'public forum' is traditionally defined as a place that is open to the public "**where information is freely exchanged**." *ComputerXpress,* 93 Cal.App.4th at 1006 (citations omitted) (emphasis added). This generally means websites and online message boards and forums "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**." *Piping*

Rock, 946 F.Supp.2d at 975 (citing *Ampex Corp. v. Cargle,* 128 Cal.App.4th 1569, 1576, 27 Cal.Rptr.3d 863 (2005)) (emphasis added). However, "[m]eans of communication where access is selective ... are not public forums." *Weinberg v. Feisel*, 110 Cal.App.4th 1122, 1130, 2 Cal.Rptr.3d 385, 391 (2003) (citing *Arkansas Educ. TV v. Forbes,* 523 U.S. 666, 678–680, 118 S.Ct. 1633 (1998)).

While Kosor's website was, indeed, available on the internet, there was no free exchange of information permitted on his website. The only viewpoints that were posted or represented on Kosor's website were his own. There was nowhere for anyone other than Kosor to post their opinions or statements. Undoubtedly, Kosor had complete and unlimited editorial control over his own website and did not permit anything but his own version to be represented.

Furthermore, not all content on his website was geared towards his campaign for a place on the SHCA Board of Directors. While parts of Kosor's website may have labeled one part of his website 'public issues,' "that does not mean that every post on the website is . . . about a 'public issue.'" *Young v. Handshoe*, 171 So.3d 381, 389 (La.App. 5 Cir. 2016). One of the goals of Kosor's website was clearly to impugn Respondents' integrity and their fitness for their trade, business, or profession and to impede their ability to perform their business operations.

These are clearly not public issues; they matter only to a "small handful" the SHCA residents. JA 169. For Kosor's statements to be protected good faith communications, they must not only be made in a public forum, but also be made in direct connection with an issue of public interest. The statements from Kosor's website listed in Respondents' Complaint plainly do not meet either of these criteria.

iv. Kosor's campaign pamphlet was not a public forum because it was not publicly disseminated nor did was it directly connected to issues of public concern.

The fourth forum was a pamphlet which Kosor mailed to residents of Southern Highlands. *See* JA 70-71. While this also was published as part of Kosor's campaign for a place on the SHCA Board of Directors, the limited nature of this publication exempts it from being considered a "public forum" for purposes of Nevada's anti-SLAPP statute. In *Damon*, *supra*, the court found that a newsletter published by a homeowners association constituted a public forum. 85 Cal.App.4th at 476. However, that publication was disseminated not only to the neighborhood residents, but also to "neighboring businesses." *Id.* In contrast, Kosor's pamphlet was only disseminated to residents of Southern Highlands, as they were the only citizens who were eligible to vote in the SHCA election. Thus, while other forms of written communication may constitute public forums, the

limited nature of both the purpose and distribution of Kosor's pamphlet make it a private publication.

b) *Kosor's statements were not made in direct connection with an issue of public interest.*

"[M]ere publication . . . on a Web site . . . should not turn otherwise private information . . . into a matter of public interest." *Du Charme*, 110 Cal.App.4th at 117, 1 Cal.Rptr.3d at 509 (citation omitted). For a matter to be "public", it must bear some attributes which made it a public, as opposed to a merely private, interest. *Weinberg*, 110 Cal.App.4th at 1132, 2 Cal.Rptr.3d at 392. "A person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people." *Id.* 110 Cal.App.4th at 1133, 2 Cal.Rptr.3d at 393; *see also Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO*, 105 Cal.App.4th 913, 130 Cal.Rptr.2d 81 (2003) (rejecting claim that a private matter can transform into one of public interest by publishing it to a large number of people). "First, 'public interest' does not equate with mere curiosity." *Weinberg*, 110 Cal.App.4th at 1132, 2 Cal.Rptr.3d at 392 (internal citation omitted). Second, the matter "should be something of concern to a substantial number of people"; "**a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest**." *Id.* (citations omitted) (emphasis added). Third, there must be a "degree of closeness between the challenged statements and the asserted public interest." *Id.* (citation

omitted). Finally, "the focus of the speaker's conduct should be the public interest" not to "gather ammunition" to further his private controversy. *Id.* 110 Cal.App.4th at 1132–33, 2 Cal.Rptr.3d at 392.

Applying the *Weinberg* factors to Kosor's statements, it is clear that they were not made in direct connection with an issue of public concern. Although some of the content in Kosor's publications may have concerned 'issues' *relevant* to residents voting for the SHCA Board, it does not mean that all SHCA homeowners were more than merely curious about those issues. Further, the primary "issue" implicated by Kosor's statements was the issue of whether Southern Highlands homeowners should bear the costs for the parks. Kosor's concerns have not been echoed by a substantial number of people. If anything, the other homeowners who have expressed similar concerns represent a very small, specific audience – as his own counsel said, "three or four other homeowners." JA 269:25. In Kosor's own words, this is an issue for a "small handful of concerned residents." *See* JA 169.

Moreover, many of Kosor's statements bear absolutely no close relationship to his claimed public issues. For example, accusations that Respondents spoke with County Commissioners in a 'dark room' to pressure them to vote a certain way, and statements comparing Respondents to a foreign government which deprives its citizens of essential rights hardly bear any nexus to purported campaign issues. The

focus of Kosor's statements largely appear to be geared towards impugning Respondents integrity and causing harm to their reputation, not towards any actual public issue.

Each of the four forums Kosor utilized to publish his statements about Respondents bear characteristics which clearly demonstrate they are not public forums. Furthermore, Kosor's statements are not directly related to issues of public concern. As such, each of his statements fall outside of the scope of protection offered by Nevada's anti-SLAPP statute.

3. Kosor's statements were not aimed at procuring governmental or electoral action.

Each of the statements identified in Respondents' Complaint were not made to government or elected officials; they were directed at either Southern Highlands homeowners or the public at large. Kosor claims that the website and pamphlet statements are protected communications because they are "[c]ommunication that [are] aimed at procuring any governmental or electoral action, result or outcome." JA 39:19–20 (emphasis in original). While "communications with either the government or the public that are intended to influence an electoral result [could] *potentially* fall under" Nevada's anti-SLAPP statute, not every election is an issue of public concern. *See Adelson v. Harris*, 133 Nev. Adv. Op. 67, 402 P.3d 665, 670 (2017) (emphasis added).

In *Adelson*, the Supreme Court of Nevada considered whether, as here, communications to non-governmental entities which seek to influence an electoral action or result, were covered by Nevada's anti-SLAPP statute. *Id.* The *Adelson* Court only held that such communications *could potentially* fall under Nevada's statute, however the Court declined to find whether the communications at issue in that case, which sought to weaken financial support for a **U.S. presidential election** candidate, actually *did* fall within this exception.

The provision in Nevada's anti-SLAPP statute which protects good faith communications aimed at procuring an electoral action or result are clearly directed at *governmental* elections. Prior to the 2013 amendments to Nevada's anti-SLAPP statute, NRS 41.637(1) provided protections for "communication that is aimed at procuring any governmental or electoral action, result or outcome." *Delucchi*, *supra*, 396 P.3d at 829–30. After the 2013 amendments, the Nevada Legislature expanded this to clarify that the statute was not intended to only protect communications made directly to a governmental agency. *Id.* at 830. Importantly, the 2013 amendments did not expand scope of the statute's protections, it merely clarified one aspect of the statute's protections. To allow the statute's protections to be available to *any* electoral action or result would go beyond the clear scope the Legislature intended. Kosor's website and pamphlet statements addressed the SHCA Board election, a non-governmental election which was "of interest to only

a narrow sliver of society." *Talega, supra*, 225 Cal.App.4th at 734, 170 Cal.Rptr.3d at 463. This is not the type of electoral action the Legislature intended to be covered by Nevada's anti-SLAPP statute. Even if this Court is inclined to broaden the "electoral result" exception to this extent, which it should not, as explained *supra*, none of Kosor's statements were directly connected to an issue of public concern and are not subject to the protections of Nevada's anti-SLAPP statute.

C. Even Though Mr. Kosor Failed to Meet his Burden to Invoke NRS 41.660, Respondents Still Established a Probability of Prevailing on Their Claims.

When the district court considered Mr. Kosor's Motion to Dismiss, it found that Kosor had not met his burden to invoke the statute. *See* JA 272:10–12. Therefore, the burden did not shift to Respondents to demonstrate a probability of prevailing on their claims. However, Respondents' Opposition to Kosor's Motion to Dismiss set forth more than sufficient *prima facie* evidence that they have a probability of prevailing on their claims.

Respondents' Complaint alleges claims for defamation and defamation *per se*. Defamation is "a publication of a false statement of fact." *Pegasus*, 118 Nev. at 714, 57 P.3d at 87 (quoting *Posadas v. City of Reno*, 109 Nev. 448, 453, 851 P.2d 438, 442 (1993)) "An action for defamation requires the plaintiff to prove four elements: '(1) a false and defamatory statement ...; (2) an unprivileged publication

to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages.'" *Clark County School Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 385, 213 P.3d 496, 503 (2009) (quoting *Pope v. Motel 6*, 121 Nev. 307, 315, 114 P.3d 277, 282 (2005)).

"However, if the defamatory communication imputes a crime, 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." *K-Mart*, *supra*, 109 Nev. at 1192, 866 P.2d at 282.; *see also Clark County School Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. at 385, 213 P.3d at 503.

Respondents demonstrated that they have a probability of prevailing on each of their claims against Kosor because they can demonstrate that each of Kosor's statements are false and defamatory, each of the statements are unprivileged and were published to third parties, Kosor was negligent and/or reckless in making each of these statements, and each of these statements constitute defamation per se, therefore damages are presumed.

/ / /

/ / /

/ / /

1. Each of Kosor's statements are unprivileged[8] and were published to third parties.

Publication is "the communication of the defamatory matter to some third person or persons." *Simpson v. Mars, Inc.*, 113 Nev. 188, 191, 929 P.2d 966, 967 (1997) (citations omitted). Each of Kosor's defamatory statements were published by communicating them to third parties. The "dark room" and "lining his pockets" statements were made at a CCA board meeting at which at least three other individuals were present. JA 79 (audio recording at least three separate voices). The Nextdoor.com post regarding Respondents' "lucrative" agreement with Clark County was posted on a private website where it was seen by three or four fellow homeowners in the Southern Highlands neighborhood group. JA 169-171. Kosor's website was active for several months where an unknown number of individuals saw Kosor's statements comparing Respondents to a foreign government, referencing sweetheart deals, statutory violations, breaches of fiduciary duties, and improper cost shifting. *See* JA 203-205. Finally, Kosor's pamphlet containing statements accusing Respondents of breaching their fiduciary duties to Southern Highlands homeowners, of costing homeowners millions, and grossly overstating SHCA's legal expenses was sent directly to thousands of Southern Highlands homeowners. JA 205 at ¶ 16.

[8] The unprivileged nature of Kosor's statements is addressed in detail in this brief and, for the sake of brevity, will not be repeated here.

Accordingly, there are no available privileges Kosor may assert for his numerous defamatory statements, and Respondents have established that Kosor caused each of these statements to be published by communicating these statements to third parties.

2. Each of Kosor's statements constitute defamation per se, therefore damages are presumed.

Generally, special damages must be proven before a plaintiff may recover for defamation unless defamation per se is proven, in which case damages are presumed. *See K-Mart*, *supra*, 109 Nev. at 1194, 866 P.2d at 284. "[S]tatements that are defamatory per se by their very nature are likely to cause mental and emotional distress, as well as injury to reputation, so there arguably is little reason to require proof of this kind of injury . . .." *Id.*, 109 Nev. at 1195, 866 P.2d at 284 (quoting *Carey v. Piphus*, 435 U.S. 247, 262, 98 S.Ct. 1042, 1051–52 (1978) (footnotes omitted). "Damages for slander per se include harm to the reputation of the person defamed, or, absent proof of such harm, 'for the harm which normally results from such a defamation.'" *Id.* (quoting *Gertz v. Robert Welch*, Inc., 418 U.S. 323, 372, 94 S.Ct. 2997, 3023 (1938) (White, J., dissenting) (quoting Restatement of Torts § 621)).[9]

[9] With slander (or defamation) *per se*, the plaintiff is entitled to presumed, general damages. General damages are those that are awarded for loss of reputation, shame, mortification and hurt feelings. General damages are presumed upon proof of the defamation alone because that proof establishes that there was an injury that

Each and every one of Kosor's statements constitute defamation per se because they all imply that Respondents engaged in criminal activities, and tends to injure Respondents' in their trade, business, and profession. As discussed *supra*, several of Kosor's statements, including the "dark room" and "sweetheart deal" statements suggest that Respondents' engaged in criminal activities such as bribery or extortion. Furthermore, nearly every one of Kosor's statements impute "[Respondents'] lack of fitness for [their] trade, business, or profession," or tends to injure the Respondents in their business. *K-Mart*, 109 Nev. at 1192, 866 P.2d at 282. Kosor's attempt to downplay the severity of his statements by claiming that "the goal of every business owner is to enter into lucrative deals, find sweetheart deals and when possible lower and/or find alternate payors for expenses i.e. cost-shift" does not excuse the fact that each of these terms are derogatory by their very nature, and suggest that Respondents are not fit to conduct business. *See* JA 49:28–50:1.

As each and every one of Kosor's statements constitute defamation per se, damages are presumed and Respondents should not be required to produce proof of

---

damaged plaintiff's reputation and because of the impossibility of affixing an exact monetary amount for present and future injury to the plaintiff's reputation, wounded feelings and humiliation, loss of business, and any consequential physical illness or pain. *See Bongiovi v. Sullivan*, 122 Nev. 556, 577, 138 P.3d 433, 448 (2006) (citations omitted).

damages at this early stage in the litigation. However, after further discovery on the subject, Respondents will be able to demonstrate its actual damages, including damages stemming from "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Gertz*, 418 U.S. at 350, 94 S.Ct. at 3012. *See also Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 646–47, 49 Cal. Rptr. 2d 620 (1996) ("the court may allow specified discovery"), disapproved of on other grounds by *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 52 P.3d 685 (2002).

CONCLUSION

As the moving party, Kosor bore "the initial burden of production and persuasion." *John*, 219 P.3d at 1282. Indeed, it was and is his burden to "prove[] that Nevada's anti-SLAPP statute applies to the case." *Id.* at 1284. Even if he had met that burden and even if the burden of production had shifted to the Respondents to show that they have a meritorious claim, "at all times, the burden of persuasion is on the defendant." *Id.* Indeed, even if the burden of production had shifted to the Respondents, "the anti-SLAPP statute does not require the plaintiff to *prove* the specified claim to the trial court; rather, so as to not deprive the plaintiff of a jury trial, the appropriate inquiry is whether the plaintiff has stated and substantiated a legally sufficient claim." *Burrill v. Nair*, 158 Cal. Rptr. 3d 332, 347–48 (Cal. Ct. App. 2013) (internal quotation marks and citation omitted).

Kosor never denied making the libelous statements at issue in this case. He tried to justify why he made them, but he never denied making them. Even on appeal, Kosor never argues that he did not make the defamatory statements at issue. If he could truthfully assert this, that would most likely have been the leading argument. But the truth is that he made them, and based on the evidence provided to the district court and this Court, Kosor cannot meet his burden to prove that he is entitled to any protection under the anti-SLAPP statutes. Kosor never showed that this is anything other than a personal dispute between him and Respondents.

The district court's Order Denying Defendant Michael Kosor's Motion to Dismiss Pursuant to NRS 41.660 was neither erroneous or manifestly unjust, and Kosor has failed to present this Court with any reason to reverse or overturn the district court's ruling. Kosor's regurgitated arguments fail to demonstrate how his statements, that he knew to be false, give him any grounds to invoke the protection of NRS 41.660.

/ / /

/ / /

/ / /

/ / /

Moreover, because Kosor's statements do not constitute an issue of public interest, the Court should affirm the district court's denial of Kosor's anti-SLAPP motion to dismiss.

Dated this 25th day of April, 2019.

/s/ Nathanael Rulis

J. Randall Jones, Esq.
Nathanael R. Rulis, Esq.
Kemp, Jones & Coulthard, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Attorneys for Respondents
Olympia Companies, LLC and
Garry V. Goett

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14-point, double-spaced Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 29(e) and NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 10,865 words.

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

Dated this 25th day of April, 2019.

/s/ Nathanael Rulis

J. Randall Jones, Esq.
Nathanael R. Rulis, Esq.
Kemp, Jones & Coulthard, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Attorneys for Respondents
Olympia Companies, LLC and
Garry V. Goett

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(b), I hereby certify that I am an employee of Kemp, Jones & Coulthard, LLP; that on the 25th day of April, 2019, I electronically filed the foregoing **RESPONDENTS OLYMPIA COMPANIES, LLC'S AND GARRY V. GOETT'S ANSWERING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (Eflex).

/s/ Ali Augustine
An employee of Kemp, Jones & Coulthard, LLP