

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

FREDERIC AND BARBARA ROSENBERG
LIVING TRUST,
Appellant/Cross-Respondent,
vs.
MACDONALD HIGHLANDS REALTY, LLC,
A NEVADA LIMITED LIABILITY
COMPANY; MICH

No. 69399

Electronically Filed
Jan 14 2016 01:29 p.m.

Tracie K. Lindeman
Clerk of Supreme Court
DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Eighth Department I
County Clark Judge Kenneth C. Cory
District Ct. Case No. A-13-689113-C

2. Attorney filing this docketing statement:

Attorney Spencer H. Gunnerson Telephone 702-385-6000
Firm Kemp, Jones & Coulthard, LLP
Address 3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169

Client(s) MacDonald Highlands Realty, LLC, Michael Doiron, and FHP Ventures, A Nevada

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Jacqueline A. Gilbert Telephone 702-485-3300
Firm Kim Gilbert Ebron
Address 7625 Dean Martin Drive
Suite 110
Las Vegas, Nevada 89139
Attorney for Cross-Respondent

Client(s) Frederic and Barbara Rosenberg Living Trust

Attorney _____ Telephone _____

Firm _____

Address _____

Client(s) _____

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|---|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input checked="" type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____ |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

None.

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

Case No. A-13-689113-C

Eighth Judicial District Court, Department I

The original case is ongoing as between parties that were not released from the case by summary judgment.

8. Nature of the action. Briefly describe the nature of the action and the result below:

This was a real estate matter in which the Appellant purchased a home from Bank of America. Respondents were the real estate agents for the seller and the entity responsible for approving construction plans in Appellant's community. Appellant alleged that the seller's agents failed to disclose construction plans at a neighboring property, and sought damages as well as injunctive relief in the form of stopping construction on the neighboring property.

However, the contract documents reviewed and agreed to by Plaintiff specifically provided that issues like those in the complaint were solely the responsibility of the buyer during the due diligence period. The contract documents also contained multiple waivers regarding the liability of Respondents. Based on those documents and applicable law, Respondents moved for and were granted summary judgment on August 13, 2015.

After achieving summary judgment, Respondents moved for fees and costs, including post-judgment interest. Although the district court awarded fees and costs on November 10, 2015, it did not award post-judgment interest.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

1. Whether the district court correctly granted summary judgment, where the contract documents stated that the matters at issue were Appellant's responsibility, and (b) contained extensive waivers of liability regarding Respondents.
2. Whether the district court correctly granted summary judgment where Nevada law did not provide the remedy Plaintiff was requesting.
3. Whether the district court correctly refused to grant post-judgment interest on the attorney fees and costs award.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

None.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

Respondent believes this matter should be assigned to the Court of Appeals pursuant to NRAP 17(b)(2) and 17(b)(7).

14. Trial. If this action proceeded to trial, how many days did the trial last? 0

Was it a bench or jury trial? N/A

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?
N/A

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from November 10, 2015

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served November 10, 2015

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ____, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed Multiple

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

Appellant/Cross-Respondent: December 9, 2015

Respondents/Cross-Appellants: December 11, 2015

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

☒ NRAP 3A(b)(1)

☐ NRS 38.205

☐ NRAP 3A(b)(2)

☐ NRS 233B.150

☐ NRAP 3A(b)(3)

☐ NRS 703.376

☒ Other (specify) The district court granted NRCP 54(b) certification Nov. 10, 2015

(b) Explain how each authority provides a basis for appeal from the judgment or order:

NRAP 3A(b)(1) provides that this Court has jurisdiction over "[a] final judgment entered in an action or proceeding commenced in the court in which the judgment was rendered." On November 10, 2015, the district court certified its August 13, 2015, judgment and October 29, 2015, order as final pursuant to NRCP 54(b).

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Frederic and Barbara Rosenberg Living Trust; Bank of America, N.A.; BAC Home Loans Servicing, LP; MacDonald Highlands Realty, LLC; Michael Doiron; Shahin Shane Malek; Paul Bykowski; The Foothills at MacDonald Ranch Master Association; The Foothills Partners

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

The NRCP 54(b) order entered by the district court on November 10, 2015, only applies to the parties before this Court.

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Appellant's claims against Respondents: (1) unjust enrichment, (2) fraudulent or intentional misrepresentation, (3) negligent misrepresentation, (4) violation of real estate broker statutes, (5) easement, (6) declaratory relief, and (7) mandatory injunction. All were resolved in Respondent's favor via summary judgment on August 13, 2015. Respondents had no independent claims, but obtained fees and costs on October 29, 2015. That fee and cost award did not include post-judgment interest.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☐ Yes

☒ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

At present, Appellant still has active claims against Bank of America, N.A., and BAC Home Loans Servicing, L.P. (the "B of A parties").

At present, Shane Malek has an active claim against Appellant.

(b) Specify the parties remaining below:
Appellant, the B of A parties, and Shane Malek.

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☒ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☒ Yes

☐ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

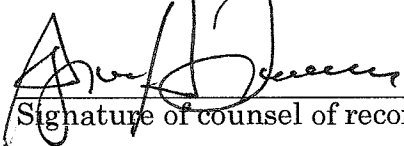
I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

MacDonald Highlands Realty, et al.
Name of appellant

January 13, 2016
Date

Clark County, State of Nevada
State and county where signed

Spencer H. Gunnerson
Name of counsel of record


Signature of counsel of record

CERTIFICATE OF SERVICE

I certify that on the 13th day of January, 2016, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

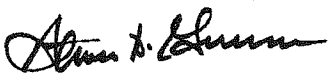
Jacqueline A. Gilbert, Esq.
Kim Gilbert Ebron
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139

Darren Brenner, Esq.
Steven Shevorski, Esq.
William Habdas, Esq.
Akerman LLP
1160 Town Center Drive, Suite 330
Las Vegas, Nevada 89144

Dated this 13th day of January, 2016


Signature

EXHIBIT 1



CLERK OF THE COURT

1 J. RANDALL JONES, ESQ. (#1927
r.jones@kempjones.com
2 SPENCER H. GUNENRSON, ESQ. (#8810)
s.gunnerson@kempjones.com
3 MATTHEW S. CARTER, ESQ. (#9524)
m.carter@kempjones.com
4 KEMP, JONES & COULTHARD, LP
5 3800 Howard Hughes Parkway, 17th Floor
Las Vegas, NV 89169
6 Telephone: (702) 385-6000
7 Facsimile: (702) 385-6001
Attorneys for Defendants
8 *MacDonald Highlands Realty, LLC,*
9 *Michael Doiron, and FHP Ventures,*
A Nevada Limited Partnership

10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

12 THE FREDRIC AND BARBARA
13 ROSENBERG LIVING TRUST,

14 Plaintiffs,

15 v.

16 BANK OF AMERICA, N.A.; BAC HOME
LOANS SERVICING, LP, a foreign limited
17 partnership; MACDONALD HIGHLANDS
REALTY, LLC, A Nevada limited liability
18 company; MICHAEL DOIRON, an
individual; SHAHIN SHANE MALEK, an
19 individual; PAUL BYKOWSKI, an
individual; THE FOOTHILLS AT
20 MACDONALD RANCH MASTER
ASSOCIATION, a Nevada limited liability
21 company; THE FOOTHILLS PARTNERS, a
Nevada limited partnership; DOES 1 through
22 X; and ROE CORPORATIONS I through X,

23 Defendants.
24

Case No.: A-13-689113-C
Dept. No.: I

**ORDER (1) GRANTING MOTION FOR
ATTORNEY FEES AND COSTS AND (2)
GRANTING MOTION TO RE-TAX
COSTS**

25 Defendants MacDonald Highlands Realty, LLC; Michael Doiron; and The Foothills
26 Partners, now known as FHP Ventures, a Nevada Limited Partnership (collectively
27
28

1 “Defendants”), by and through their counsel, Matthew S. Carter, Esq. of the law firm Kemp,
2 Jones & Coulthard, LLP; and Plaintiff The Fredric and Barbara Rosenberg Living Trust, by and
3 through its counsel, Karen Hanks, Esq. and Jacqueline A. Gilbert of the law firm of Howard
4 Kim & Associates, appeared before this Court on October 22, 2015, at 1:30 p.m. for the hearing
5 on Defendants’ Motion for Attorney Fees and Costs and on Plaintiff’s Motion to Re-Tax Costs
6 claimed by Defendants in their Memorandum of Costs filed on August 18, 2015. The Court
7 having reviewed the pleadings and papers on file herein and heard the arguments of counsel
8 made at the hearing, and other good cause appearing therefor,

9 Defendants’ Motion for Attorney Fees and Costs is hereby GRANTED pursuant to the
10 offer of judgment served on Plaintiff on January 29, 2015. Fees in the amount of \$120,315.00
11 are therefore hereby awarded to Defendants.

12 Plaintiff’s Motion to Re-Tax is also hereby GRANTED, and costs in the amount of
13 \$20,728.24 are hereby awarded to Defendants.

14 This Court entered an order granting summary judgment in favor of Defendants on
15 August 13, 2015, and has certified that order pursuant to NRCP 54(b). This Court finds there is
16 no just cause for delay in entering final judgment as to Defendants, as this Order, in conjunction
17 with the order dated August 13, 2015 resolves all claims between Plaintiff and Defendants.

18 Good cause appearing, therefor,

19 IT IS HEREBY ORDERED that the clerk of the court shall enter judgment in favor of
20 Defendants in the amount of \$141,043.24.

21 ///

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26 ///

27 ///

28 ///

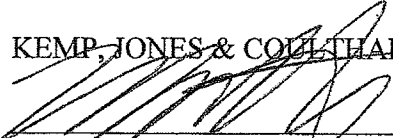
1 IT IS FURTHER ORDERED that this Order awarding attorney's fees and costs shall be
2 certified as final as to Defendants pursuant NRCp 54(b).

3 IT IS SO ORDERED.

4 Dated this 29 day of October, 2015.

5 
6 DISTRICT COURT JUDGE
7 

8 *Respectfully submitted by:*

9 KEMP, JONES & COLLARD, LLP
10 

11 J. Randall Jones Esq. (#1927)
12 Spencer H. Gunnerson Esq. (#8810)
13 Matthew S. Carter Esq. (#9524)
14 3800 Howard Hughes Parkway, 17th Floor
15 Las Vegas, Nevada 89169
16 *Attorneys for Defendants*
MacDonald Highlands Realty, LLC,
Michael Doiron, and FHP Ventures,
A Nevada Limited Partnership

17 *Approved as to form and content:*

18 HOWARD KIM & ASSOCIATES

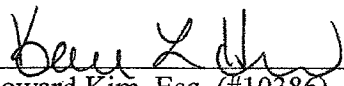
19 
20 Howard Kim, Esq. (#10386)
21 Karen L. Hanks (#9578)
22 1055 Whitney Ranch Drive, Suite 110
23 Henderson, Nevada 89014
24 *Attorneys for Plaintiff*

EXHIBIT 2


CLERK OF THE COURT

1 J. RANDALL JONES, ESQ. (#1927)
r.jones@kempjones.com
2 SPENCER H. GUNNERSON, ESQ. (#8810)
s.gunnerson@kempjones.com
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4 KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Flr.
5 Las Vegas, Nevada 89169
Telephone: (702) 385-6000
6 Facsimile: (702) 385-6001
Attorneys for Defendants
7 *MacDonald Highlands Realty, LLC,*
Michael Doiron and FHP Ventures,
8 *A Nevada Limited Partnership*

9 DISTRICT COURT
10 CLARK COUNTY, NEVADA

11
12 THE FREDRIC AND BARBARA
ROSENBERG LIVING TRUST,

13 Plaintiff,

14 vs.

15 BANK OF AMERICA, N.A.; BAC HOME
16 LOANS SERVICING, LP, a foreign limited
partnership; MACDONALD HIGHLANDS
17 REALTY, LLC, a Nevada limited liability
company; MICHAEL DOIRON, an
18 individual; SHAHIN SHANE MALEK, an
individual; PAUL BYKOWSKI, an
19 individual; THE FOOTHILLS AT
MACDONALD RANCH MASTER
20 ASSOCIATION, a Nevada limited liability
company; THE FOOTHILLS PARTNERS,
21 a Nevada limited partnership; DOES I
through X, inclusive; ROE
22 CORPORATIONS I through X, inclusive,

23 Defendants.
24

Case No.: A-13-689113-C
Dept. No.: I

**NOTICE OF ENTRY OF ORDER (1)
GRANTING MOTION FOR
ATTORNEY FEES AND COSTS AND
(2) GRANTING MOTION TO RE-TAX
COSTS**

25 PLEASE TAKE NOTICE that an Order (1) Granting Motion For Attorney Fees and
26 Costs and (2) Granting Motion to Re-Tax Costs was entered on November 10, 2015, a copy

27 ///

28

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
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Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

1 of which is attached hereto.

2 DATED this 10th day of November, 2015.

4 KEMP, JONES & COULTHARD, LLP

5 /s/ Matthew S. Carter

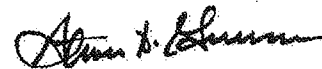
6 J. Randall Jones, Esq. (#1927)
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8 Matthew S. Carter, Esq. (#9524)
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Attorneys for Defendants
MacDonald Highlands Realty, LLC,
Michael Doiron and FHP Ventures,
A Nevada Limited Partnership

14 **CERTIFICATE OF SERVICE**

15 I hereby certify that on the 10th day of November, 2015, pursuant to NRCP 5(b), I e-
16 filed and e-served via the Eighth Judicial District Court electronic service system the
17 **NOTICE OF ENTRY OF ORDER (1) GRANTING MOTION FOR ATTORNEY**
18 **FEES AND COSTS AND (2) GRANTING MOTION TO RE-TAX COSTS** to all parties
19 on the e-service list.

21 /s/ Pamela Montgomery

22 An employee of Kemp, Jones & Coulthard, LLP



CLERK OF THE COURT

1 J. RANDALL JONES, ESQ. (#1927
r.jones@kempjones.com
2 SPENCER H. GUNENRSON, ESQ. (#8810)
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Attorneys for Defendants
8 MacDonald Highlands Realty, LLC,
Michael Doiron, and FHP Ventures,
9 A Nevada Limited Partnership

10 DISTRICT COURT

11 CLARK COUNTY, NEVADA

12 THE FREDRIC AND BARBARA
ROSENBERG LIVING TRUST,

13 Plaintiffs,

14 v.

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16 BANK OF AMERICA, N.A.; BAC HOME
LOANS SERVICING, LP, a foreign limited
17 partnership; MACDONALD HIGHLANDS
REALTY, LLC, A Nevada limited liability
18 company; MICHAEL DOIRON, an
individual; SHAHIN SHANE MALEK, an
19 individual; PAUL BYKOWSKI, an
individual; THE FOOTHILLS AT
20 MACDONALD RANCH MASTER
ASSOCIATION, a Nevada limited liability
21 company; THE FOOTHILLS PARTNERS, a
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23 Defendants.

Case No.: A-13-689113-C
Dept. No.: I

ORDER (1) GRANTING MOTION FOR
ATTORNEY FEES AND COSTS AND (2)
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COSTS

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25 Defendants MacDonald Highlands Realty, LLC; Michael Doiron; and The Foothills
26 Partners, now known as FHP Ventures, a Nevada Limited Partnership (collectively

1 "Defendants"), by and through their counsel, Matthew S. Carter, Esq. of the law firm Kemp,
2 Jones & Coulthard, LLP; and Plaintiff The Fredric and Barbara Rosenberg Living Trust, by and
3 through its counsel, Karen Hanks, Esq. and Jacqueline A. Gilbert of the law firm of Howard
4 Kim & Associates, appeared before this Court on October 22, 2015, at 1:30 p.m. for the hearing
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15 August 13, 2015, and has certified that order pursuant to NRCP 54(b). This Court finds there is
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17 with the order dated August 13, 2015 resolves all claims between Plaintiff and Defendants.

18 Good cause appearing, therefor,

19 IT IS HEREBY ORDERED that the clerk of the court shall enter judgment in favor of
20 Defendants in the amount of \$141,043.24.

21 ///

22 ///

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24 ///

25 ///

26 ///

27 ///

28 ///

1 IT IS FURTHER ORDERED that this Order awarding attorney's fees and costs shall be
2 certified as final as to Defendants pursuant NRCF 54(b).

3 IT IS SO ORDERED.

4 Dated this 29 day of October, 2015.

5 
6 DISTRICT COURT JUDGE
7

8 *Respectfully submitted by:*

9 KEMP, JONES & COLTHARD, LLP
10 

11 J. Randall Jones Esq. (#1927)
12 Spencer H. Gunnerson Esq. (#8810)
13 Matthew S. Carter Esq. (#9524)
14 3800 Howard Hughes Parkway, 17th Floor
15 Las Vegas, Nevada 89169
16 Attorneys for Defendants
MacDonald Highlands Realty, LLC,
Michael Doiron, and FHP Ventures,
A Nevada Limited Partnership

17 *Approved as to form and content:*

18 HOWARD KIM & ASSOCIATES

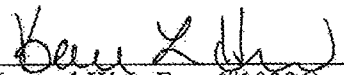
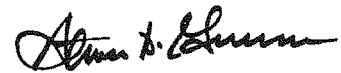
19 
20 Howard Kim, Esq. (#10386)
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22 1055 Whitney Ranch Drive, Suite 110
23 Henderson, Nevada 89014
24 Attorneys for Plaintiff
25
26
27
28

EXHIBIT 3



CLERK OF THE COURT

1 J. RANDALL JONES, ESQ. (#1927
r.jones@kempjones.com
2 SPENCER H. GUNENRSON, ESQ. (#8810)
s.gunnerson@kempjones.com
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m.carter@kempjones.com
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Las Vegas, NV 89169
6 Telephone: (702) 385-6000
7 Facsimile: (702) 385-6001
Attorneys for Defendants
8 *MacDonald Highlands Realty, LLC,*
Michael Doiron, and FHP Ventures,
9 *A Nevada Limited Partnership*

10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

12 THE FREDRIC AND BARBARA
ROSENBERG LIVING TRUST,

Case No.: A-13-689113-C
Dept. No.: I

13 Plaintiffs,

14 v.

**ORDER GRANTING DEFENDANTS'
MOTION FOR CERTIFICATION
PURSUANT TO NRCP 54(b)**

16 BANK OF AMERICA, N.A.; BAC HOME
LOANS SERVICING, LP, a foreign limited
17 partnership; MACDONALD HIGHLANDS
REALTY, LLC, A Nevada limited liability
18 company; MICHAEL DOIRON, an
individual; SHAHIN SHANE MALEK, an
19 individual; PAUL BYKOWSKI, an
individual; THE FOOTHILLS AT
20 MACDONALD RANCH MASTER
ASSOCIATION, a Nevada limited liability
21 company; THE FOOTHILLS PARTNERS, a
Nevada limited partnership; DOES 1 through
22 X; and ROE CORPORATIONS I through X,

23 Defendants.
24

25 This matter having come before this Court on September 21, 2015 regarding Defendants
26 MacDonald Highlands Realty, LLC; Michael Doiron; and The Foothills Partners, now known as

1 FHP Ventures, a Nevada Limited Partnership's (collectively "Defendants") Motion for
2 Certification Pursuant to NRCP 54(b), submitted by and through their counsel, Matthew S.
3 Carter, Esq., of the law firm Kemp, Jones & Coulthard, LLP. The Court having reviewed the
4 pleadings and papers on file herein, and other good cause appearing therefore,

5 This Court finds that there is no just cause for delay in entering final judgment as to
6 Defendants, as the order granting summary judgment dated August 13, 2015, resolves all
7 claims between Plaintiff and Defendants.

8 Good cause appearing, therefor

9 IT IS HEREBY ORDERED that the order granting summary judgment, dated August
10 13, 2015, shall be certified as final as to Defendants pursuant to Rule 54(b) of the Nevada
11 Rules of Civil Procedure.

12 IT IS SO ORDERED.

13 Dated this 29 day of October, 2015.

14
15 
16 DISTRICT COURT JUDGE


17 Respectfully submitted by:

18 KEMP, JONES & COULTHARD, LLP
19 

20 J. Randall Jones Esq. (#1927)
21 Spencer H. Gunnerson Esq. (#8810)
22 Matthew S. Carter Esq. (#9524)
23 3800 Howard Hughes Parkway, 17th Floor
24 Las Vegas, Nevada 89169
25 Attorneys for Defendants
26 MacDonald Highlands Realty, LLC,
27 Michael Doiron, and FHP Ventures,
28 A Nevada Limited Partnership

1 *Approved as to form and content:*

2 HOWARD KIM & ASSOCIATES

3 

4 Howard Kim, Esq. (#10386)

5 Karen L. Hanks (#9578)

6 1055 Whitney Ranch Drive, Suite 110

7 Henderson, Nevada 89014

8 *Attorneys for Plaintiff*

9

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EXHIBIT 4


CLERK OF THE COURT

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Telephone: (702) 385-6000
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Attorneys for Defendants
7 *MacDonald Highlands Realty, LLC,*
Michael Doiron and FHP Ventures,
8 *A Nevada Limited Partnership*

9 DISTRICT COURT
10 CLARK COUNTY, NEVADA

11 THE FREDRIC AND BARBARA
12 ROSENBERG LIVING TRUST,

13 Plaintiff,

14 vs.

15 BANK OF AMERICA, N.A.; BAC HOME
16 LOANS SERVICING, LP, a foreign limited
17 partnership; MACDONALD HIGHLANDS
18 REALTY, LLC, a Nevada limited liability
19 company; MICHAEL DOIRON, an
20 individual; SHAHIN SHANE MALEK, an
21 individual; PAUL BYKOWSKI, an
22 individual; THE FOOTHILLS AT
MACDONALD RANCH MASTER
ASSOCIATION, a Nevada limited liability
company; THE FOOTHILLS PARTNERS,
a Nevada limited partnership; DOES I
through X, inclusive; ROE
CORPORATIONS I through X, inclusive,

23 Defendants.

Case No.: A-13-689113-C
Dept. No.: I

**NOTICE OF ENTRY OF ORDER
GRANTING DEFENDANTS' MOTION
FOR CERTIFICATION PURSUANT TO
NRCP 54(b)**

24
25 PLEASE TAKE NOTICE that an Order Granting Defendants' Motion For
26 Certification Pursuant to NRCP54(b) was entered on November 10, 2015, a copy of which is

27 ///

28

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3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
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1 attached hereto.

2 DATED this 10th day of November, 2015.

4 KEMP, JONES & COULTHARD, LLP

5 /s/ Matthew S. Carter

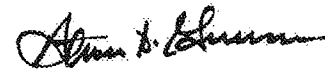
6 J. Randall Jones, Esq. (#1927)
7 Spencer H. Gunnerson, Esq. (#8810)
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9 *Attorneys for Defendants*
10 *MacDonald Highlands Realty, LLC,*
11 *Michael Doiron and FHP Ventures,*
12 *A Nevada Limited Partnership*

13 **CERTIFICATE OF SERVICE**

14 I hereby certify that on the 10th day of November, 2015, pursuant to NRCP 5(b), I e-
15 filed and e-served via the Eighth Judicial District Court electronic service system the
16 **NOTICE OF ENTRY OF ORDER GRANTING DEFENDANTS' MOTION FOR**
17 **CERTIFICATION PURSUANT TO NRCP 54(b)** to all parties on the e-service list.
18

19 /s/ Pamela Montgomery

20 An employee of Kemp, Jones & Coulthard, LLP
21
22
23
24
25
26
27
28



CLERK OF THE COURT

1 J. RANDALL JONES, ESQ. (#1927
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8 MacDonald Highlands Realty, LLC,
Michael Doiron, and FHP Ventures,
9 A Nevada Limited Partnership

10 DISTRICT COURT

11 CLARK COUNTY, NEVADA

12 THE FREDRIC AND BARBARA
ROSENBERG LIVING TRUST,

13 Plaintiffs,

14 v.

15
16 BANK OF AMERICA, N.A.; BAC HOME
LOANS SERVICING, LP, a foreign limited
17 partnership; MACDONALD HIGHLANDS
REALTY, LLC, A Nevada limited liability
18 company; MICHAEL DOIRON, an
individual; SHAHIN SHANE MALEK, an
19 individual; PAUL BYKOWSKI, an
individual; THE FOOTHILLS AT
20 MACDONALD RANCH MASTER
ASSOCIATION, a Nevada limited liability
21 company; THE FOOTHILLS PARTNERS, a
22 Nevada limited partnership; DOES 1 through
23 X; and ROE CORPORATIONS 1 through X,

24 Defendants.

Case No.: A-13-689113-C
Dept. No.: I

ORDER GRANTING DEFENDANTS'
MOTION FOR CERTIFICATION
PURSUANT TO NRCP 54(b)

25 This matter having come before this Court on September 21, 2015 regarding Defendants
26 MacDonald Highlands Realty, LLC; Michael Doiron; and The Foothills Partners, now known as

1 FHP Ventures, a Nevada Limited Partnership's (collectively "Defendants") Motion for
2 Certification Pursuant to NRCP 54(b), submitted by and through their counsel, Matthew S.
3 Carter, Esq., of the law firm Kemp, Jones & Coulthard, LLP. The Court having reviewed the
4 pleadings and papers on file herein, and other good cause appearing therefore,

5 This Court finds that there is no just cause for delay in entering final judgment as to
6 Defendants, as the order granting summary judgment dated August 13, 2015, resolves all
7 claims between Plaintiff and Defendants.

8 Good cause appearing, therefor

9 IT IS HEREBY ORDERED that the order granting summary judgment, dated August
10 13, 2015, shall be certified as final as to Defendants pursuant to Rule 54(b) of the Nevada
11 Rules of Civil Procedure.


12 IT IS SO ORDERED.

13 Dated this 29 day of October, 2015.

14
15 
16 DISTRICT COURT JUDGE
17

17 Respectfully submitted by:

18 KEMP, JONES & COULTHARD, LLP

19 
20 J. Randall Jones Esq. (#1927)
21 Spencer H. Gunnerson Esq. (#8810)
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25 Attorneys for Defendants
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27 Michael Doiron, and FHP Ventures,
28 A Nevada Limited Partnership


1 *Approved as to form and content:*
2 HOWARD KIM & ASSOCIATES
3 
4 _____
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6 Karen L. Hanks (#9578)
7 1055 Whitney Ranch Drive, Suite 110
8 Henderson, Nevada 89014
9 *Attorneys for Plaintiff*

EXHIBIT 5


CLERK OF THE COURT

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Michael Doiron and FHP Ventures,
A Nevada Limited Partnership

DISTRICT COURT

CLARK COUNTY, NEVADA

THE FREDRIC AND BARBARA
ROSENBERG LIVING TRUST,

Plaintiff,

vs.

BANK OF AMERICA, N.A.; BAC HOME
LOANS SERVICING, LP, a foreign
limited partnership; MACDONALD
HIGHLANDS REALTY, LLC, a Nevada
limited liability company; MICHAEL
DOIRON, an individual; SHAHIN SHANE
MALEK, an individual; PAUL BYKOWSKI,
an individual; THE FOOTHILLS AT
MACDONALD RANCH MASTER
ASSOCIATION, a Nevada limited liability
company; THE
FOOTHILLS PARTNERS, a Nevada
limited partnership; DOES I through X,
inclusive; ROE CORPORATIONS I
through X, inclusive,

Defendants.

Case No.: A-13-689113-C

Dept. No.: I

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND JUDGMENT
REGARDING DEFENDANTS
MACDONALD HIGHLANDS REALTY,
LLC, MICHAEL DOIRON, AND FHP
VENTURES' MOTION FOR
SUMMARY JUDGMENT**

On June 10, 2015 at 9:00 a.m., this Court heard argument on the Motion for Summary
Judgment ("MSJ") of MacDonald Highlands Realty, LLC ("MHR"), Michael Doiron

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1 (“Doiron”) and FHP Ventures, wrongfully named as The Foothills Partners (“FHP”)
2 (collectively referred to herein as the “Moving Defendants”). Attending the hearing were Karen
3 Hanks, Esq., Jacqueline Gilbert, Esq., Melissa Barishman, Esq., and Jesse Panoff, Esq. on
4 behalf of the Plaintiff; Jay DeVoy, Esq. and Preston Rezaee, Esq. on behalf of Defendant
5 Shahin Shane Malek; J. Randall Jones, Esq. and Spencer H. Gunnerson, Esq. on behalf of
6 Moving Defendants; and William Habdas, Esq. on behalf of Defendant Bank of America, N.A.
7 and BAC Home Loans Servicing, LP. The Court having heard oral argument and having
8 reviewed all papers and pleadings on file in this matter makes the following findings of fact,
9 conclusions of law and judgment.

10 I.

11 FINDINGS OF FACT

12 1. On February 20, 2013, Barbara Rosenberg sent a letter of intent to Defendant
13 Bank of America’s asset manager in Connecticut, Elena Escobar, regarding the purchase of 590
14 Lairmont Place in Henderson, Nevada (the “subject property”). See Exhibit A to the MSJ, at
15 41:14-43:1 and Letter of Intent and associated documents, attached to the MSJ as Exhibit B.
16 Barbara Rosenberg confirmed in her deposition that Exhibit B is a copy of the letter of intent
17 she sent. Exhibit A to the MSJ at 43:21-44:4.

18 2. The letter of intent, which was signed by Barbara’s son David Rosenberg and his
19 wife, offered the following term:

20 **It is Buyer’s obligation to conduct all necessary studies,**
21 **including but not limited to** environmental, construction, market
22 feasibility, title, **zoning** & CC&R’s. [sic] Buyer shall purchase the
property “As-Is” and “Where-Is” and “With All Faults.”

23 Exhibit B to the MSJ at 2, ¶ 15 (emphasis added).

24 3. Six days later, Ms. Rosenberg was told that she would have to wait to purchase
25 the property while the seller completed its due diligence and marketing preparations. See E-
26 mail from Kelli Barrington dated February 26, 2013, attached to the MSJ as Exhibit C.

1 4. Ms. Rosenberg continued to inquire regarding the subject property into March of
2 2013. See E-mail from Barbara Rosenberg dated March 6, 2013, attached to the MSJ as Exhibit
3 D, and e-mail from Kelli Barrington dated March 7, 2013, attached to the MSJ as Exhibit E.

4 5. Shortly thereafter, on March 13, 2013, Ms. Rosenberg and her husband gave
5 their highest and best offer to purchase the subject property. See E-mail from Siobhan McGill
6 dated March 13, 2013, attached to the MSJ as Exhibit F.

7 6. As part of the Rosenbergs' offer to purchase the property, their real estate agent
8 again underscored the fact that "they [the Rosenbergs] will take property AS-IS." See id.
9 (emphasis original).

10 7. Also on March 13, 2013, Barbara and Frederic Rosenberg both signed a written
11 offer to purchase the subject property under the terms of an attached Residential Purchase
12 Agreement, attached to the MSJ as Exhibit G, at BANA 1-11 (the "Purchase Agreement").
13 That offer was accepted by Bank of America on March 21, 2013, see id. at BANA 11, and
14 subject to four separate addenda. See id. at BANA 12-13. See also Real Estate Purchase
15 Addendum, attached to the MSJ as Exhibit H, at MHR 105-119.

16 8. Both Barbara and Frederic Rosenberg reviewed the Purchase Agreement in detail
17 before they signed it. Exhibit A to the MSJ at 89:1-17.

18 9. Barbara Rosenberg testified that she and her husband could have tried to amend
19 any of the terms of the Purchase Agreement and chose not to. See id. at 90:2-11.

20 10. The Purchase Agreement contained a waiver of the Rosenbergs' right to perform
21 a survey and determine the boundary lines surrounding their property. Exhibit G to the MSJ at
22 BANA 4, ¶ 7(C).

23 11. Paragraph 12(A) of the Purchase Agreement provided Plaintiff with a 12-day due
24 diligence period in which to inspect the subject property. Id. at BANA 6.

25 12. The due diligence required of Plaintiff under the Purchase Agreement was as
26 follows:

27 **During the Due Diligence Period, Buyer shall take such action**
28 **as Buyer deems necessary to determine whether the Property**

1 is satisfactory to Buyer including, but not limited to, whether
2 the Property is insured to Buyer's satisfaction, **whether there are**
3 **unsatisfactory conditions surrounding or otherwise affecting**
4 **the Property** (such as location of flood zones, airport noise,
5 noxious fumes or odors, environmental substances or hazards,
6 **whether the Property is properly zoned**, locality to freeways,
7 railroads, places of worship, schools, etc.) **or any other concerns**
8 **Buyer may have related to the Property. . . . Buyer is advised**
9 **to consult with appropriate professionals regarding**
10 **neighborhood or property conditions, including but not**
11 **limited to:** schools, proximity and adequacy of law enforcement;
12 proximity to commercial, industrial, or agricultural activities;
13 crime statistics; fire protection; other governmental services;
14 existing and proposed transportation; **construction and**
15 **development**; noise or odor from any source; and **other**
16 **nuisances, hazards, or circumstances.**

17 Id. at BANA 6, ¶ 12(b) (emphasis added).

18 13. Paragraph 22 of the Purchase Agreement constituted a waiver of claims against
19 all Brokers and their agents:

20 **Buyer and Seller agree that they are not relying upon any**
21 **representations made by Brokers or Broker's [sic] agent.**
22 **Buyer acknowledges that at COE, the Property will be sold**
23 **AS-IS, WHERE-IS without any representations or**
24 **warranties, unless expressly stated herein. . . .**

25 Buyer acknowledges that any statements of acreage or square
26 footage by brokers are simply estimates, and Buyer agrees to
27 make such measurements, as Buyer deems necessary, to ascertain
28 actual acreage or square footage. **Buyer waives all claims**
29 **against Brokers or their agents for (a) defects in the Property;**
30 **(b) inaccurate estimates of acreage or square footage; (c)**
31 **environmental waste or hazards on the Property; (d) the fact that**
32 **the Property may be in a flood zone; (e) the Property's**
33 **proximity to freeways, airports, or other nuisances; (f) the**
34 **zoning of the Property; (g) tax consequences; or (h) factors**
35 **related to Buyer's failure to conduct walk-throughs,**
36 **inspections and research, as Buyer deems necessary. In any**
37 **event, Broker's liability is limited, under any and all**
38 **circumstances, to the amount of Broker's commission/fee**
39 **received in this transaction.**

40 See id. at BANA 8-9, ¶ 22 (emphasis added).

41 14. Michael Doiron and MacDonald Highlands Realty are listed in the Purchase
42 Agreement as the agent and broker for the seller in this transaction. See id. at BANA 11.

15. The Real Estate Purchase Addendum executed by the Rosenbergs on March 15, 2013, provides both a broad waiver of the Rosenbergs' claims against the seller and its agents, as well as a limitation of the Rosenbergs' remedies in any such claim:

NOTWITHSTANDING ANY PROVISION TO THE CONTRARY IN THE AGREEMENT, SELLER'S LIABILITY AND BUYER'S SOLE AND EXCLUSIVE REMEDY IN ALL CIRCUMSTANCES AND FOR ALL CLAIMS (AS THE TERM IS DEFINED IN SECTION 26 OF THIS ADDENDUM...) ARISING OUT OF OR RELATING IN ANY WAY TO THE AGREEMENT OR THE SALE OF THE PROPERTY TO BUYER INCLUDING, BUT NOT LIMITED TO... THE CONDITION OF THE PROPERTY, ... THE SIZE, SQUARE FOOTAGE, BOUNDARIES, OR LOCATION OF THE PROPERTY... SHALL BE LIMITED TO NO MORE THAN

(A) A RETURN OF THE BUYER'S EARNEST MONEY DEPOSIT IF THE SALE TO BUYER DOES NOT CLOSE;

AND

(B) THE LESSER OF BUYER'S ACTUAL DAMAGES OR \$5,000.00 IF THE SALE TO BUYER CLOSSES.

Exhibit H to the MSJ at MHR 105, ¶ 1 (emphasis original).

16. The Addendum further provided:

THE BUYER FURTHER WAIVES THE FOLLOWING, TO THE FULLEST EXTENT PERMITTED BY THE LAW: ... ANY CLAIMS ARISING OUT OF OR RELATING IN ANY WAY TO ENCROACHMENTS, EASEMENTS, BOUNDARIES, SHORTAGES IN AREAS OR ANY OTHER MATTER THAT WOULD BE DISCLOSED OR REVEALED BY A SURVEY OR INSPECTION OF THE PROPERTY OR SEARCH OF PUBLIC RECORDS.

Id. at MHR 106-07(emphasis original).

17. Barbara Rosenberg understood that if she did not agree to the terms of the Real Estate Purchase Addendum, the Rosenbergs would not have been allowed to purchase the subject property. Exhibit A to the MSJ at 108:3-17.

18. Subsequent to executing the Residential Purchase Agreement and its addenda, the Rosenbergs had inquired through their real estate agent as to whether substantive changes could be made to the terms of the sale. In the words of their real estate agent, "The answer is an

1 emphatic NO!” See E-mail from Siobhan McGill dated March 27, 2013, attached to the MSJ as
2 Exhibit I. The only change allowed was for Barbara and Frederic Rosenberg to place the
3 property in the name of their trust, the Plaintiff in this matter. See Addendum No. 4, attached to
4 the MSJ as Exhibit J.

5 19. During the purchase process, Defendant Michael Doiron, a MacDonald
6 Highlands Realty employee, represented the seller, Bank of America. As part of her disclosures
7 to the Rosenbergs, she gave them a document entitled “ZONING CLASSIFICATIONS AND
8 LAND USE DISCLOSURE,” which the Rosenbergs received on April 13, 2013. See Exhibit K
9 to the MSJ. After describing the zoning classifications and land use surrounding the property,
10 the disclosure specifically stated:

11 This information is current and plotted as of February
12 2010.

13 Master plan designation and zoning classifications, ordinances[,] and regulations adopted pursuant to the master are subject to
14 change. You may obtain more current information regarding the zoning and master plan information from The City of
15 Henderson, Planning Department, 240 Water Street,
Henderson, NV 89015, Te.: [sic] 565-2474.

16 See id. (emphasis original).

17 20. The zoning change on what would become Defendant Malek’s property was
18 recommended for approval on November 15, 2012. See City of Henderson Community
19 Development Staff Report, attached to the MSJ as Exhibit Q. It was thereafter approved by the
20 City and recorded on the City of Henderson’s zoning maps on January 24, 2013. See
21 Deposition of Michael Tassi, attached to the MSJ as Exhibit O, at 27:17-28:11. The maps on
22 the City’s website would have been updated in February of 2013. See id. at 30:6-15.

23 21. Paul Bykowski testified that Plaintiff’s home, like other homes in the
24 neighborhood generally, is constructed to take advantage of the “primary views” because a
25 “maximized” view would be impossible short of building a glass house. See Deposition
26 Transcript of Paul Bykowski, attached to the MSJ as Exhibit S, at 123:11-127:1.

27 22. Independent of any building on Malek’s parcel, the subject property’s privacy
28 was already compromised as a result of its being a golf course and near a walking path. See

1 Exhibit A, at 119:15-120:10 (in which Barbara Rosenberg admits it was possible for golfers on
2 the course to look into the home, and that it was also possible for individuals on a nearby
3 walking path to do so as well). See also Deposition Transcript of Richard MacDonald, attached
4 to the MSJ as Exhibit L, at 59:22-60:4 ("The reality is you don't have any privacy when you
5 live on a golf course, period. You have no privacy whatsoever.")

6 II.

7 CONCLUSIONS OF LAW

8 1. Plaintiff's claims for relief against Moving Defendants fail for multiple reasons.
9 Plaintiff's Third, Fourth, Fifth, Sixth and Eighth Claims for Relief against Moving Defendants
10 for unjust enrichment, fraudulent or intentional misrepresentation, negligent misrepresentation,
11 real estate brokers violations of NRS 645, and declaratory relief (insofar as it pertains to the
12 actions of Moving Defendants), respectively, fail due to Plaintiff's insistence and agreement on
13 taking the subject property as-is; and as a result of Plaintiff's knowing, intentional and
14 voluntary waivers of claims (*See* Sections A and B below). Plaintiff's Seventh, Eighth and
15 Eleventh Claims for Relief against Moving Defendants for easement, declaratory relief, and
16 mandatory injunction, respectively, also fail given that none of the Moving Defendants
17 currently have any ownership interest in the subject property; there is no implied easement for
18 view, privacy or access to light in Nevada; and any alleged implied restrictive covenant not to
19 build on former golf course property does not appear to exist in Nevada and is truly a request
20 for an implied easement for view, privacy, or access to light (*See* Section C below).

21 **A. Plaintiff's insistence and agreement on taking the subject property "as-is"**
22 **forecloses the possibility of a non-disclosure action against the Moving Defendants**
23 **because Plaintiff assumed, as a matter of law, responsibility for all potential**
24 **defects, including zoning and boundary line matters.**

25 2. "Nondisclosure by the seller of adverse information concerning real property
26 generally will not provide the basis for an action by the buyer to rescind or for damages when
27 property is sold 'as is.'" Mackintosh v. Jack Matthews & Co., 855 P.2d 549, 552 (Nev. 1993).
28 Here, findings of fact 2, 6, 12, 13, and 14 all indicate that the sale of the subject property to

1 Plaintiff was “as-is” and that liability for discovering the defects complained of rested solely
2 with the Plaintiff, not with the Moving Defendants.

3 3. In accordance with Facts 7 through 9 above, Plaintiff’s representatives read the
4 purchase documents in detail and understood what they were agreeing to, including the “as-is”
5 provision, when they contracted to purchase the subject property.

6 4. In accordance with Facts 10 through 12 above, Plaintiff either waived its right to
7 inspect the subject property and its boundaries or had an opportunity to conduct due diligence
8 that it did not exercise. In either event, the facts show that Plaintiff either did not conduct
9 diligence with regard to the property boundaries or did and failed to bring its findings to the
10 attention of the seller or its agent.

11 5. In accordance with Facts 19 and 20 above, Plaintiff could have discovered any
12 defect with the zoning or boundaries of the subject property had it performed its due diligence
13 as required by the Purchase Agreement.

14 **B. The purchase documents for the subject properties contained knowing,**
15 **intentional, and voluntary waivers of the claims by Plaintiff against the Moving**
16 **Defendants.**

17 6. In Nevada, a waiver is “the intentional relinquishment of a known right.”
18 Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark, 152 P.3d 737,
19 740 (Nev. 2007); accord, Wood v. Milyard, 132 S. Ct. 1826, 1832 (U.S. 2012) (recognizing that
20 “A waived claim or defense is one that a party has knowingly and intelligently relinquished”).
21 See also State, Univ. & Cmty. Coll. Sys. v. Sutton, 120 Nev. 972, 987, 103 P.3d 8, 18 (2004)
22 (recognizing that a waiver is valid where made with knowledge of all material facts). When a
23 right is waived, the “right is gone forever and cannot be recalled.” Bernhardt v. Harrington, 775
N.W.2d 682, 686 (N.D. 2009).

24 7. Waivers are enforceable to grant summary judgment against a claim where the
25 evidence shows that the plaintiff willingly and voluntarily signed the waiver, and the waiver is
26 clear and unambiguous as to what claims were being waived against which parties. See Cobb v.
27 Aramark Sports & Entm’t Servs., LLC, 933 F. Supp. 2d 1295, 1298-99 (D. Nev. 2013).

28 8. In accordance with Facts 13 and 14 above, there was a clear and knowing waiver

1 of all of Plaintiff's asserted claims against the Moving Defendants in this case.

2 9. In accordance with Facts 16 and 17 above, Plaintiff knowingly, intentionally, and
3 voluntarily entered into a similar waiver in a separate addendum to the purchase contract for the
4 subject property.

5 10. Even if Plaintiff did not waive the claims against the Moving Defendants –
6 which it did, Fact 15 conclusively shows that Plaintiff voluntarily limited its claims in this
7 action to no more than \$5,000.

8 **C. Plaintiff's claims for declaratory and injunctive relief cannot stand as a matter**
9 **of law.**

10 11. To the extent that Moving Defendants also requested relief on the basis that
11 Nevada does not allow an easement for view, privacy and/or access to light, that argument is
12 moot as to Moving Defendants MacDonald Highlands Realty and Doiron due to this Court's
13 decision on the due diligence and waiver arguments. With regard to FHP Ventures, this Court
14 finds that Plaintiff's claim of an easement and/or restrictive covenant not to build on the
15 property at issue is actually a request for an easement for view, privacy or access to light.
16 Under Nevada law, there is no such easement and, accordingly, summary judgment should be
17 granted in favor of FHP Ventures on the claims for declaratory relief and injunctive relief.
18 Furthermore, as a matter of law, in Nevada there is not an implied easement or implied
19 restrictive covenant requiring property formerly owned by a golf course to remain part of the
20 golf course indefinitely, especially where that property was not a part of the playable grass area
21 of the golf course. See Order, Findings of Fact and Conclusions of Law, and Judgment on
22 Defendant/Counterclaimant Shahin Shane Malek's Motion for Summary Judgment, also heard
23 on the same date as the instant Motion and on file herein (the "Malek Decision"); see also Boyd
24 v. McDonald, 408 P.2d 717, 722 (Nev. 1965). The Court addresses these particular issues in
25 detail in the Malek Decision, incorporated herein by reference.

26 12. Additionally, the claims against Moving Defendants for declaratory relief,
27 easement, and injunctive relief cannot stand as a matter of law against any of the Moving
28 Defendants, none of whom currently have any ownership interest in the subject property.

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III.

JUDGMENT

This action having been submitted to the Court for decision on the Motion for Summary Judgment on June 10, 2015, and the Court having made the aforementioned findings of fact and conclusions of law, the Court decides in favor of Moving Defendants MacDonald Highlands Realty, LLC, Michael Doiron and FHP Ventures, with regard to all claims against those Moving Defendants.

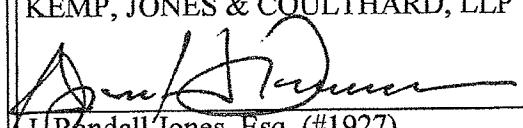
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff take nothing by way of its January 12, 2015 Amended Complaint against Moving Defendants.

DATED this 30th day of Aug 2015.
11th


DISTRICT COURT JUDGE

Respectfully submitted by:
KEMP, JONES & COULTHARD, LLP

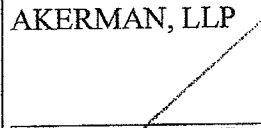
Approved as to form:
HOWARD KIM & ASSOCIATES

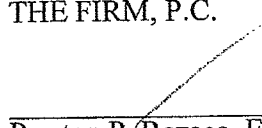

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IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff take nothing by way of its January 12, 2015 Amended Complaint against Moving Defendants.

DATED this ____ day of July, 2015.

~~DISTRICT COURT JUDGE~~

Respectfully submitted by:
KEMP, JONES & COULTHARD, LLP

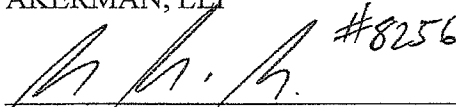
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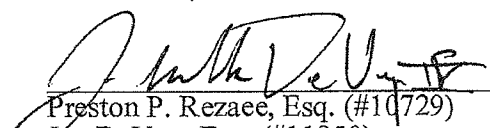
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IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff take nothing by way of its January 12, 2015 Amended Complaint against Moving Defendants.

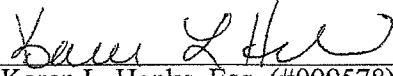
DATED this ____ day of July, 2015.

DISTRICT COURT JUDGE

Respectfully submitted by:
KEMP, JONES & COULTHARD, LLP

Not approved as to form and content:
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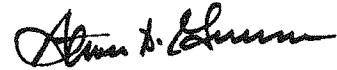
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EXHIBIT 6



CLERK OF THE COURT

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Attorneys for Defendants
7 *MacDonald Highlands Realty, LLC,*
Michael Doiron and FHP Ventures,
8 *A Nevada Limited Partnership*

9 DISTRICT COURT

10 CLARK COUNTY, NEVADA

11
12 THE FREDRIC AND BARBARA
ROSENBERG LIVING TRUST,

13 Plaintiff,

14 vs.

15 BANK OF AMERICA, N.A.; BAC HOME
16 LOANS SERVICING, LP, a foreign limited
partnership; MACDONALD HIGHLANDS
17 REALTY, LLC, a Nevada limited liability
company; MICHAEL DOIRON, an
18 individual; SHAHIN SHANE MALEK, an
individual; PAUL BYKOWSKI, an
19 individual; THE FOOTHILLS AT
MACDONALD RANCH MASTER
20 ASSOCIATION, a Nevada limited liability
company; THE FOOTHILLS PARTNERS,
21 a Nevada limited partnership; DOES I
through X, inclusive; ROE
22 CORPORATIONS I through X, inclusive,

23 Defendants.

Case No.: A-13-689113-C
Dept. No.: I

**NOTICE OF ENTRY OF FINDINGS OF
FACT, CONCLUSIONS OF LAW, AND
JUDGMENT REGARDING
DEFENDANTS MACDONALD
HIGHLANDS REALTY, LLC,
MICHAEL DOIRON, AND FHP
VENTURES' MOTION FOR
SUMMARY JUDGMENT**

24
25 PLEASE TAKE NOTICE that the Findings of Fact, Conclusions of Law, and
26 Judgment Regarding Defendants MacDonald Highlands Realty, LLC, Michael Doiron, and

27 ///

28 ///

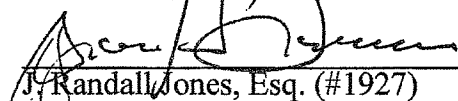
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1 FHP Ventures' Motion for Summary Judgment was entered on August 13, 2015, a copy of
2 which is attached.

3
4 DATED this 13th day of August, 2015.

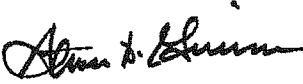
5 Respectfully submitted by:

6 
7 J. Randall Jones, Esq. (#1927)
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12 Las Vegas, Nevada 89169
13 Attorneys for Defendants
14 MacDonald Highlands Realty, LLC,
15 Michael Doiron and FHP Ventures,
16 A Nevada Limited Partnership

17
18 **CERTIFICATE OF SERVICE**

19 I hereby certify that on the 13th day of August, 2015, pursuant to NRCP 5(b), I e-
20 filed and e-served via the Eighth Judicial District Court electronic service system the
21 foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT**
22 **REGARDING DEFENDANTS MACDONALD HIGHLANDS REALTY, LLC,**
23 **MICHAEL DOIRON, AND FHP VENTURES' MOTION FOR SUMMARY**
24 **JUDGMENT** to all parties on the e-service list.

25
26
27
28 
An employee of Kemp, Jones & Coulthard


CLERK OF THE COURT

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8 *Attorneys for Defendants*
9 *MacDonald Highlands Realty, LLC,*
Michael Doiron and FHP Ventures,
A Nevada Limited Partnership

DISTRICT COURT

CLARK COUNTY, NEVADA

12 THE FREDRIC AND BARBARA
13 ROSENBERG LIVING TRUST,

14 Plaintiff,

15 vs.

16 BANK OF AMERICA, N.A.; BAC HOME
17 LOANS SERVICING, LP, a foreign
18 limited partnership; MACDONALD
19 HIGHLANDS REALTY, LLC, a Nevada
20 limited liability company; MICHAEL
21 DOIRON, an individual; SHAHIN SHANE
22 MALEK, an individual; PAUL BYKOWSKI,
23 an individual; THE FOOTHILLS AT
24 MACDONALD RANCH MASTER
ASSOCIATION, a Nevada limited liability
company; THE
FOOTHILLS PARTNERS, a Nevada
limited partnership; DOES I through X,
inclusive; ROE CORPORATIONS I
through X, inclusive,

25 Defendants.

Case No.: A-13-689113-C
Dept. No.: I

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND JUDGMENT
REGARDING DEFENDANTS
MACDONALD HIGHLANDS REALTY,
LLC, MICHAEL DOIRON, AND FHP
VENTURES' MOTION FOR
SUMMARY JUDGMENT**

26
27 On June 10, 2015 at 9:00 a.m., this Court heard argument on the Motion for Summary
28 Judgment ("MSJ") of MacDonald Highlands Realty, LLC ("MHR"), Michael Doiron

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Las Vegas, Nevada 89169
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1 (“Doiron”) and FHP Ventures, wrongfully named as The Foothills Partners (“FHP”)
2 (collectively referred to herein as the “Moving Defendants”). Attending the hearing were Karen
3 Hanks, Esq., Jacqueline Gilbert, Esq., Melissa Barishman, Esq., and Jesse Panoff, Esq. on
4 behalf of the Plaintiff; Jay DeVoy, Esq. and Preston Rezaee, Esq. on behalf of Defendant
5 Shahin Shane Malek; J. Randall Jones, Esq. and Spencer H. Gunnerson, Esq. on behalf of
6 Moving Defendants; and William Habdas, Esq. on behalf of Defendant Bank of America, N.A.
7 and BAC Home Loans Servicing, LP. The Court having heard oral argument and having
8 reviewed all papers and pleadings on file in this matter makes the following findings of fact,
9 conclusions of law and judgment.

10 I.

11 FINDINGS OF FACT

12 1. On February 20, 2013, Barbara Rosenberg sent a letter of intent to Defendant
13 Bank of America’s asset manager in Connecticut, Elena Escobar, regarding the purchase of 590
14 Lairmont Place in Henderson, Nevada (the “subject property”). See Exhibit A to the MSJ, at
15 41:14-43:1 and Letter of Intent and associated documents, attached to the MSJ as Exhibit B.
16 Barbara Rosenberg confirmed in her deposition that Exhibit B is a copy of the letter of intent
17 she sent. Exhibit A to the MSJ at 43:21-44:4.

18 2. The letter of intent, which was signed by Barbara’s son David Rosenberg and his
19 wife, offered the following term:

20 **It is Buyer’s obligation to conduct all necessary studies,**
21 **including but not limited to** environmental, construction, market
22 feasibility, title, **zoning & CC&R’s.** [sic] Buyer shall purchase the
property “As-Is” and “Where-Is” and “With All Faults.”

23 Exhibit B to the MSJ at 2, ¶ 15 (emphasis added).

24 3. Six days later, Ms. Rosenberg was told that she would have to wait to purchase
25 the property while the seller completed its due diligence and marketing preparations. See E-
26 mail from Kelli Barrington dated February 26, 2013, attached to the MSJ as Exhibit C.

1 4. Ms. Rosenberg continued to inquire regarding the subject property into March of
2 2013. See E-mail from Barbara Rosenberg dated March 6, 2013, attached to the MSJ as Exhibit
3 D, and e-mail from Kelli Barrington dated March 7, 2013, attached to the MSJ as Exhibit E.

4 5. Shortly thereafter, on March 13, 2013, Ms. Rosenberg and her husband gave
5 their highest and best offer to purchase the subject property. See E-mail from Siobhan McGill
6 dated March 13, 2013, attached to the MSJ as Exhibit F.

7 6. As part of the Rosenbergs' offer to purchase the property, their real estate agent
8 again underscored the fact that "they [the Rosenbergs] will take property AS-IS." See id.
9 (emphasis original).

10 7. Also on March 13, 2013, Barbara and Frederic Rosenberg both signed a written
11 offer to purchase the subject property under the terms of an attached Residential Purchase
12 Agreement, attached to the MSJ as Exhibit G, at BANA 1-11 (the "Purchase Agreement").
13 That offer was accepted by Bank of America on March 21, 2013, see id. at BANA 11, and
14 subject to four separate addenda. See id. at BANA 12-13. See also Real Estate Purchase
15 Addendum, attached to the MSJ as Exhibit H, at MHR 105-119.

16 8. Both Barbara and Frederic Rosenberg reviewed the Purchase Agreement in detail
17 before they signed it. Exhibit A to the MSJ at 89:1-17.

18 9. Barbara Rosenberg testified that she and her husband could have tried to amend
19 any of the terms of the Purchase Agreement and chose not to. See id. at 90:2-11.

20 10. The Purchase Agreement contained a waiver of the Rosenbergs' right to perform
21 a survey and determine the boundary lines surrounding their property. Exhibit G to the MSJ at
22 BANA 4, ¶ 7(C).

23 11. Paragraph 12(A) of the Purchase Agreement provided Plaintiff with a 12-day due
24 diligence period in which to inspect the subject property. Id. at BANA 6.

25 12. The due diligence required of Plaintiff under the Purchase Agreement was as
26 follows:

27 **During the Due Diligence Period, Buyer shall take such action**
28 **as Buyer deems necessary to determine whether the Property**

1 is satisfactory to Buyer including, but not limited to, whether
2 the Property is insured to Buyer's satisfaction, **whether there are**
3 **unsatisfactory conditions surrounding or otherwise affecting**
4 **the Property** (such as location of flood zones, airport noise,
5 noxious fumes or odors, environmental substances or hazards,
6 **whether the Property is properly zoned**, locality to freeways,
7 railroads, places of worship, schools, etc.) **or any other concerns**
8 **Buyer may have related to the Property. . . . Buyer is advised**
9 **to consult with appropriate professionals regarding**
10 **neighborhood or property conditions, including but not**
11 **limited to:** schools, proximity and adequacy of law enforcement;
12 proximity to commercial, industrial, or agricultural activities;
13 crime statistics, fire protection; other governmental services;
14 existing and proposed transportation; **construction and**
15 **development;** noise or odor from any source; and other
16 **nuisances, hazards, or circumstances.**

17 Id. at BANA 6, ¶ 12(b) (emphasis added).

18 13. Paragraph 22 of the Purchase Agreement constituted a waiver of claims against
19 all Brokers and their agents:

20 **Buyer and Seller agree that they are not relying upon any**
21 **representations made by Brokers or Broker's [sic] agent.**
22 **Buyer acknowledges that at COE, the Property will be sold**
23 **AS-IS, WHERE-IS without any representations or**
24 **warranties, unless expressly stated herein. . . .**

25 Buyer acknowledges that any statements of acreage or square
26 footage by brokers are simply estimates, and Buyer agrees to
27 make such measurements, as Buyer deems necessary, to ascertain
28 actual acreage or square footage. **Buyer waives all claims**
29 **against Brokers or their agents for (a) defects in the Property;**
30 **(b) inaccurate estimates of acreage or square footage; (c)**
31 **environmental waste or hazards on the Property; (d) the fact that**
32 **the Property may be in a flood zone; (e) the Property's**
33 **proximity to freeways, airports, or other nuisances; (f) the**
34 **zoning of the Property; (g) tax consequences; or (h) factors**
35 **related to Buyer's failure to conduct walk-throughs,**
36 **inspections and research, as Buyer deems necessary. In any**
37 **event, Broker's liability is limited, under any and all**
38 **circumstances, to the amount of Broker's commission/fee**
39 **received in this transaction.**

40 See id. at BANA 8-9, ¶ 22 (emphasis added).

41 14. Michael Doiron and MacDonald Highlands Realty are listed in the Purchase
42 Agreement as the agent and broker for the seller in this transaction. See id. at BANA 11.

1 15. The Real Estate Purchase Addendum executed by the Rosenbergs on March 15,
2 2013, provides both a broad waiver of the Rosenbergs' claims against the seller and its agents,
3 as well as a limitation of the Rosenbergs' remedies in any such claim:

4 **NOTWITHSTANDING ANY PROVISION TO THE**
5 **CONTRARY IN THE AGREEMENT, SELLER'S**
6 **LIABILITY AND BUYER'S SOLE AND EXCLUSIVE**
7 **REMEDY IN ALL CIRCUMSTANCES AND FOR ALL**
8 **CLAIMS (AS THE TERM IS DEFINED IN SECTION 26 OF**
9 **THIS ADDENDUM . . .) ARISING OUT OF OR RELATING**
10 **IN ANY WAY TO THE AGREEMENT OR THE SALE OF**
11 **THE PROPERTY TO BUYER INCLUDING, BUT NOT**
12 **LIMITED TO . . . THE CONDITION OF THE PROPERTY,**
13 **. . . THE SIZE, SQUARE FOOTAGE, BOUNDARIES, OR**
14 **LOCATION OF THE PROPERTY . . . SHALL BE LIMITED**
15 **TO NO MORE THAN**

16 **(A) A RETURN OF THE BUYER'S EARNEST MONEY**
17 **DEPOSIT IF THE SALE TO BUYER DOES NOT CLOSE;**

18 **AND**

19 **(B) THE LESSER OF BUYER'S ACTUAL DAMAGES OR**
20 **\$5,000.00 IF THE SALE TO BUYER CLOSSES.**

21 Exhibit H to the MSJ at MHR 105, ¶ 1 (emphasis original).

22 16. The Addendum further provided:

23 **THE BUYER FURTHER WAIVES THE FOLLOWING, TO**
24 **THE FULLEST EXTENT PERMITTED BY THE LAW: . . .**
25 **ANY CLAIMS ARISING OUT OF OR RELATING IN ANY**
26 **WAY TO ENCROACHMENTS, EASEMENTS,**
27 **BOUNDARIES, SHORTAGES IN AREAS OR ANY OTHER**
28 **MATTER THAT WOULD BE DISCLOSED OR**
 REVEALED BY A SURVEY OR INSPECTION OF THE
 PROPERTY OR SEARCH OF PUBLIC RECORDS.

Id. at MHR 106-07(emphasis original).

 17. Barbara Rosenberg understood that if she did not agree to the terms of the Real Estate Purchase Addendum, the Rosenbergs would not have been allowed to purchase the subject property. Exhibit A to the MSJ at 108:3-17.

 18. Subsequent to executing the Residential Purchase Agreement and its addenda, the Rosenbergs had inquired through their real estate agent as to whether substantive changes could be made to the terms of the sale. In the words of their real estate agent, "The answer is an

1 emphatic NO!” See E-mail from Siobhan McGill dated March 27, 2013, attached to the MSJ as
2 Exhibit I. The only change allowed was for Barbara and Frederic Rosenberg to place the
3 property in the name of their trust, the Plaintiff in this matter. See Addendum No. 4, attached to
4 the MSJ as Exhibit J.

5 19. During the purchase process, Defendant Michael Doiron, a MacDonald
6 Highlands Realty employee, represented the seller, Bank of America. As part of her disclosures
7 to the Rosenbergs, she gave them a document entitled “ZONING CLASSIFICATIONS AND
8 LAND USE DISCLOSURE,” which the Rosenbergs received on April 13, 2013. See Exhibit K
9 to the MSJ. After describing the zoning classifications and land use surrounding the property,
10 the disclosure specifically stated:

11 This information is current and plotted as of February
12 2010.

13 Master plan designation and zoning classifications, ordinances[,] and regulations adopted pursuant to the master are subject to
14 change. You may obtain more current information regarding the
15 zoning and master plan information from The City of
Henderson, Planning Department, 240 Water Street,
Henderson, NV 89015, Te.: [sic] 565-2474.

16 See id. (emphasis original).

17 20. The zoning change on what would become Defendant Malek’s property was
18 recommended for approval on November 15, 2012. See City of Henderson Community
19 Development Staff Report, attached to the MSJ as Exhibit Q. It was thereafter approved by the
20 City and recorded on the City of Henderson’s zoning maps on January 24, 2013. See
21 Deposition of Michael Tassi, attached to the MSJ as Exhibit O, at 27:17-28:11. The maps on
22 the City’s website would have been updated in February of 2013. See id. at 30:6-15.

23 21. Paul Bykowski testified that Plaintiff’s home, like other homes in the
24 neighborhood generally, is constructed to take advantage of the “primary views” because a
25 “maximized” view would be impossible short of building a glass house. See Deposition
26 Transcript of Paul Bykowski, attached to the MSJ as Exhibit S, at 123:11-127:1.

27 22. Independent of any building on Malek’s parcel, the subject property’s privacy
28 was already compromised as a result of its being a golf course and near a walking path. See

1 Exhibit A, at 119:15-120:10 (in which Barbara Rosenberg admits it was possible for golfers on
2 the course to look into the home, and that it was also possible for individuals on a nearby
3 walking path to do so as well). See also Deposition Transcript of Richard MacDonald, attached
4 to the MSJ as Exhibit L, at 59:22-60:4 (“The reality is you don’t have any privacy when you
5 live on a golf course, period. You have no privacy whatsoever.”)

6 II.

7 CONCLUSIONS OF LAW

8 1. Plaintiff’s claims for relief against Moving Defendants fail for multiple reasons.
9 Plaintiff’s Third, Fourth, Fifth, Sixth and Eighth Claims for Relief against Moving Defendants
10 for unjust enrichment, fraudulent or intentional misrepresentation, negligent misrepresentation,
11 real estate brokers violations of NRS 645, and declaratory relief (insofar as it pertains to the
12 actions of Moving Defendants), respectively, fail due to Plaintiff’s insistence and agreement on
13 taking the subject property as-is; and as a result of Plaintiff’s knowing, intentional and
14 voluntary waivers of claims (*See* Sections A and B below). Plaintiff’s Seventh, Eighth and
15 Eleventh Claims for Relief against Moving Defendants for easement, declaratory relief, and
16 mandatory injunction, respectively, also fail given that none of the Moving Defendants
17 currently have any ownership interest in the subject property; there is no implied easement for
18 view, privacy or access to light in Nevada; and any alleged implied restrictive covenant not to
19 build on former golf course property does not appear to exist in Nevada and is truly a request
20 for an implied easement for view, privacy, or access to light (*See* Section C below).

21 **A. Plaintiff’s insistence and agreement on taking the subject property “as-is”**
22 **forecloses the possibility of a non-disclosure action against the Moving Defendants**
23 **because Plaintiff assumed, as a matter of law, responsibility for all potential**
24 **defects, including zoning and boundary line matters.**

25 2. “Nondisclosure by the seller of adverse information concerning real property
26 generally will not provide the basis for an action by the buyer to rescind or for damages when
27 property is sold ‘as is.’” Mackintosh v. Jack Matthews & Co., 855 P.2d 549, 552 (Nev. 1993).
28 Here, findings of fact 2, 6, 12, 13, and 14 all indicate that the sale of the subject property to

1 Plaintiff was “as-is” and that liability for discovering the defects complained of rested solely
2 with the Plaintiff, not with the Moving Defendants.

3 3. In accordance with Facts 7 through 9 above, Plaintiff’s representatives read the
4 purchase documents in detail and understood what they were agreeing to, including the “as-is”
5 provision, when they contracted to purchase the subject property.

6 4. In accordance with Facts 10 through 12 above, Plaintiff either waived its right to
7 inspect the subject property and its boundaries or had an opportunity to conduct due diligence
8 that it did not exercise. In either event, the facts show that Plaintiff either did not conduct
9 diligence with regard to the property boundaries or did and failed to bring its findings to the
10 attention of the seller or its agent.

11 5. In accordance with Facts 19 and 20 above, Plaintiff could have discovered any
12 defect with the zoning or boundaries of the subject property had it performed its due diligence
13 as required by the Purchase Agreement.

14 **B. The purchase documents for the subject properties contained knowing,**
15 **intentional, and voluntary waivers of the claims by Plaintiff against the Moving**
16 **Defendants.**

17 6. In Nevada, a waiver is “the intentional relinquishment of a known right.”
18 Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark, 152 P.3d 737,
19 740 (Nev. 2007); accord, Wood v. Milyard, 132 S. Ct. 1826, 1832 (U.S. 2012) (recognizing that
20 “A waived claim or defense is one that a party has knowingly and intelligently relinquished”).
21 See also State, Univ. & Cmty. Coll. Sys. v. Sutton, 120 Nev. 972, 987, 103 P.3d 8, 18 (2004)
22 (recognizing that a waiver is valid where made with knowledge of all material facts). When a
23 right is waived, the “right is gone forever and cannot be recalled.” Bernhardt v. Harrington, 775
N.W.2d 682, 686 (N.D. 2009).

24 7. Waivers are enforceable to grant summary judgment against a claim where the
25 evidence shows that the plaintiff willingly and voluntarily signed the waiver, and the waiver is
26 clear and unambiguous as to what claims were being waived against which parties. See Cobb v.
27 Aramark Sports & Entm’t Servs., LLC, 933 F. Supp. 2d 1295, 1298-99 (D. Nev. 2013).

28 8. In accordance with Facts 13 and 14 above, there was a clear and knowing waiver

1 of all of Plaintiff's asserted claims against the Moving Defendants in this case.

2 9. In accordance with Facts 16 and 17 above, Plaintiff knowingly, intentionally, and
3 voluntarily entered into a similar waiver in a separate addendum to the purchase contract for the
4 subject property.

5 10. Even if Plaintiff did not waive the claims against the Moving Defendants –
6 which it did, Fact 15 conclusively shows that Plaintiff voluntarily limited its claims in this
7 action to no more than \$5,000.

8 **C. Plaintiff's claims for declaratory and injunctive relief cannot stand as a matter**
9 **of law.**

10 11. To the extent that Moving Defendants also requested relief on the basis that
11 Nevada does not allow an easement for view, privacy and/or access to light, that argument is
12 moot as to Moving Defendants MacDonald Highlands Realty and Doiron due to this Court's
13 decision on the due diligence and waiver arguments. With regard to FHP Ventures, this Court
14 finds that Plaintiff's claim of an easement and/or restrictive covenant not to build on the
15 property at issue is actually a request for an easement for view, privacy or access to light.
16 Under Nevada law, there is no such easement and, accordingly, summary judgment should be
17 granted in favor of FHP Ventures on the claims for declaratory relief and injunctive relief.
18 Furthermore, as a matter of law, in Nevada there is not an implied easement or implied
19 restrictive covenant requiring property formerly owned by a golf course to remain part of the
20 golf course indefinitely, especially where that property was not a part of the playable grass area
21 of the golf course. See Order, Findings of Fact and Conclusions of Law, and Judgment on
22 Defendant/Counterclaimant Shahin Shane Malek's Motion for Summary Judgment, also heard
23 on the same date as the instant Motion and on file herein (the "Malek Decision"); see also Boyd
24 v. McDonald, 408 P.2d 717, 722 (Nev. 1965). The Court addresses these particular issues in
25 detail in the Malek Decision, incorporated herein by reference.

26 12. Additionally, the claims against Moving Defendants for declaratory relief,
27 easement, and injunctive relief cannot stand as a matter of law against any of the Moving
28 Defendants, none of whom currently have any ownership interest in the subject property.

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(702) 385-6000 • Fax (702) 385-6001
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III.

JUDGMENT

This action having been submitted to the Court for decision on the Motion for Summary Judgment on June 10, 2015, and the Court having made the aforementioned findings of fact and conclusions of law, the Court decides in favor of Moving Defendants MacDonald Highlands Realty, LLC, Michael Doiron and FHP Ventures, with regard to all claims against those Moving Defendants.

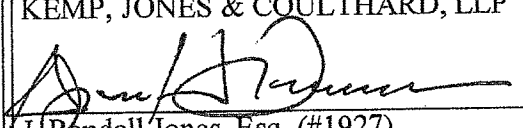
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff take nothing by way of its January 12, 2015 Amended Complaint against Moving Defendants.

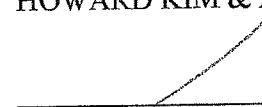
DATED this 30th day of Aug 2015.
11th


DISTRICT COURT JUDGE

Respectfully submitted by:
KEMP, JONES & COULTHARD, LLP

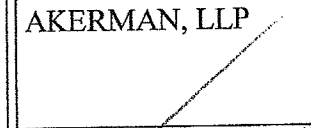
Approved as to form:
HOWARD KIM & ASSOCIATES

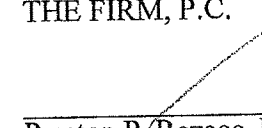

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Matthew S. Carter, Esq. (#9524)
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*Attorneys for Defendants
MacDonald Highlands Realty, LLC,
Michael Doiron and FHP Ventures,
A Nevada Limited Partnership*


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Melissa Barishman, Esq. (#12935)
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Henderson, Nevada 89014
*Attorneys for Plaintiff
The Frederic and Barbara Rosenberg Living
Trust*

Approved as to form and content:
AKERMAN, LLP

Approved as to form and content:
THE FIRM, P.C.


Darren Brenner, Esq. (#8386)
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Attorneys for Bank of America, N.A.


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III.

JUDGMENT

This action having been submitted to the Court for decision on the Motion for Summary Judgment on June 10, 2015, and the Court having made the aforementioned findings of fact and conclusions of law, the Court decides in favor of Moving Defendants MacDonald Highlands Realty, LLC, Michael Doiron and FHP Ventures, with regard to all claims against those Moving Defendants.

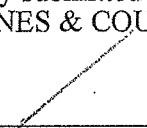
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff take nothing by way of its January 12, 2015 Amended Complaint against Moving Defendants.


DATED this ____ day of July, 2015.


DISTRICT COURT JUDGE

Respectfully submitted by:
KEMP, JONES & COULTHARD, LLP

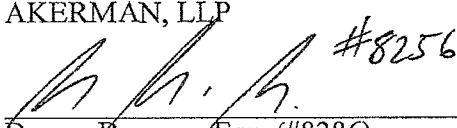
Approved as to form and content:
HOWARD KIM & ASSOCIATES

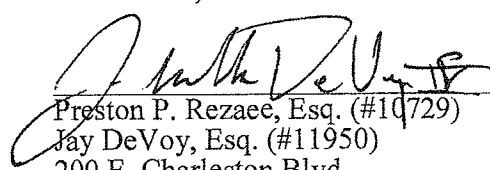

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*Attorneys for Plaintiff
The Frederic and Barbara Rosenberg Living
Trust*

Approved as to form and content:
AKERMAN, LLP

Approved as to form and content:
THE FIRM, P.C.

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III.

JUDGMENT

This action having been submitted to the Court for decision on the Motion for Summary Judgment on June 10, 2015, and the Court having made the aforementioned findings of fact and conclusions of law, the Court decides in favor of Moving Defendants MacDonald Highlands Realty, LLC, Michael Doiron and FHP Ventures, with regard to all claims against those Moving Defendants.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff take nothing by way of its January 12, 2015 Amended Complaint against Moving Defendants.

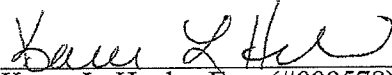
DATED this ____ day of July, 2015.

DISTRICT COURT JUDGE

Respectfully submitted by:
KEMP, JONES & COULTHARD, LLP

Not approved as to form and content:
HOWARD KIM & ASSOCIATES

J. Randall Jones, Esq. (#1927)
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*Attorneys for Defendants
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*Attorneys for Plaintiff
The Frederic and Barbara Rosenberg Living
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Approved as to form and content:
AKERMAN, LLP

Approved as to form and content:
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Las Vegas, Nevada 89104
Attorneys for Shahan Shane Malek

EXHIBIT 7

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Breach of Contract

COURT MINUTES

December 04, 2013

A-13-689113-C Frederic and Barbara Rosenberg Living Trust, Plaintiff(s)
vs.
Bank of America, Defendant(s)

December 04, 2013 1:00 PM Minute Order

HEARD BY: Cory, Kenneth

COURTROOM: RJC Courtroom 16A

COURT CLERK: Michele Tucker

RECORDER:

REPORTER:

PARTIES

PRESENT:

JOURNAL ENTRIES

- Due to the Court's unavailability, COURT ORDERED, the Motion to Dismiss on OST CONTINUED.

CONTINUED TO: 12/09/13 11:00 AM

CLERK'S NOTE: The above minute order has been distributed to: Justin Shiroff, Esq., Lisa Zastrow, Esq. via e-mail. /mlt

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Breach of Contract

COURT MINUTES

December 09, 2013

A-13-689113-C	Frederic and Barbara Rosenberg Living Trust, Plaintiff(s)
	vs.
	Bank of America, Defendant(s)

December 09, 2013 11:00 AM Motion to Dismiss

HEARD BY: Cory, Kenneth

COURTROOM: RJC Courtroom 16A

COURT CLERK: Michele Tucker

RECORDER: Beverly Sigurnik

REPORTER:

PARTIES

PRESENT:	Byrne, Patrick G.	Attorney
	Smyth, James E., II	Attorney
	Winslow, Natalie L	Attorney

JOURNAL ENTRIES

- Statements by the Court as to arguments towards facts in a motion to dismiss. Mr. Byrne stated the position they are taking is based on the pled facts. The Court can take judicial notice as these are public documents. Mr. Byrne gave summary of client purchasing the property to build a custom home, has the plans and approval but cannot be signed off on because of the Lis Pendens. Further Mr. Malek can't lock down a rate because of this. Mr. Byrne argued as to notice stating lot could be used for custom home. There was a zoning change which has been recorded. Mr. Smyth argued as to APN number and it being golf course property. Further argued there is a blanket easement and the zoning change did not change the easement. Statements by the Court. Mr. Smyth stated if the Court is inclined to grant the motion Plaintiffs would request leave to amend. Ms. Winslow suggested the claims against Mr. Malek be separate from the claims against the bank. Further arguments by counsel as to zoning and easements. COURT ORDERED, matter CONTINUED. Court further stated the burden is on the Plaintiff as to why this should not be expunged.

CONTINUED TO: 12/19/13 10:00 AM

Alternatively, Motion for Summary Judgment... DRFH Ventures, LLC f/k/a DragonRidge Properties, LLC; DragonRidge Golf Club, Inc.; MacDonald Properties, LTD; MacDonald Highlands Realty, LLC; and Michael Doiron's Partial Joinder To Bank of America, N.A.'s Motion To Dismiss Plaintiff's Complaint Pursuant To NRCP 12(B)(5), Or Alternatively, Motion For Summary Judgment -

Ms. Winslow stated this is a buyer's remorse case; property was sold as is. There are no additional warranties; this is a bare lot that is barely touching the plaintiff's property. Ms. Winslow provided aerial view of property and gave description. Further argued exhibit B of the purchase contract. It is the burden of the buyers to inspect the property lines of what they are purchasing and the surrounding properties. There is no right to a view in Nevada. Court stated this seems to be a motion for summary judgment and inquired if Mr. Smyth was prepared to argue. Mr. Smyth stated if the Court is inclined to grant, plaintiff would be requesting a continuance and 56(f). Argued his client only has a duty of diligence to look at the recorded documents. Court inquired if more discovery need to be done. Mr. Smyth stated more facts are needed as to the minor adjustment. Colloquy as to doing discovery. Mr. Smyth argued they have money damages as the bank did not disclose. Ms. Winslow argued there is a burden as to 56(f) to state what they are looking for. Statements by the Court. Mr. Brenner argued there is no 56(f) affidavit. Further argument by counsel. COURT ORDERED, Motion and Joinder DENIED WITHOUT PREJUDICE with six months discovery. Ms. Winslow to prepare the Order.

Defendants DRFH Ventures, LLC f/k/a Dragonridge Properties, LLC; Dragonridge Golf Club, Inc.; MacDonald Properties, Ltd.; MacDonald Highlands Realty, LLC; and Michael Doiron's Motion to Dismiss -

Mr. Gunnerson argued the entire case is about an easement. We have concerns as to three of the entities that are still in the lawsuit. There is no implied contract; these entities were not a party to this contract. Plaintiff can't rely on misrepresentation when they admit they never knew of the misrepresentations. Mr. Smyth argued they do not have to have implied easement. Plaintiff's claims are this is a golf course and DRFH is the developer. They are arguing there is little impact and there is a lot of impact. Further arguments by counsel. COURT ORDERED, Defendants DRFH Ventures, LLC f/k/a Dragonridge Properties, LLC; Dragonridge Golf Club, Inc.; MacDonald Properties, Ltd.; MacDonald Highlands Realty, LLC; and Michael Doiron's Motion to Dismiss GRANTED as to DRFH, Dragon, Inc., and MacDonald Ltd.

Defendant's Motion To Dismiss Plaintiff's Complaint And Expunge Lis Pendens On Order Shortening Time -

Mr. Brenner argued there was nothing false in the application; it stated there was going to be a custom home. Plaintiff has the exact view of the 9th hole. Further argued there is no evidence as to what hardship is. If the claim is not dismissed we will be filing a slander claim. Plaintiff had notice of the change, Bank of America had it and gave them notice. Statements by the Court. Mr. Smyth advised supplements have been filed the Plaintiff purchased property based on the plot maps. Mr. Smyth further argued the Court just heard argument from counsel Bank of America had knowledge.

Henderson gave notice of the application to Bank of America. Notice to the world is the recorded documents. This portion of the property is part of the golf course not Mr. Malec's property. Court inquired what gives the Plaintiff the right to lien the property. Mr. Smyth argued they have an interest to keep the title to the property in place. Statements by the Court. Further arguments by counsel. COURT STATED FINDINGS and ORDERED, Defendant's Motion to Dismiss Plaintiff's Complaint DENIED and Expunge Lis Pendens OST GRANTED WITHOUT PREJUDICE.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Breach of Contract

COURT MINUTES

January 05, 2015

A-13-689113-C Frederic and Barbara Rosenberg Living Trust, Plaintiff(s)
vs.
Bank of America, Defendant(s)

January 05, 2015 3:00 AM Motion for Leave

HEARD BY: Cory, Kenneth

COURTROOM: RJC Courtroom 16A

COURT CLERK: Michele Tucker

RECORDER:

REPORTER:

PARTIES

PRESENT:

JOURNAL ENTRIES

- This Motion was GRANTED on 1/9/15.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Breach of Contract

COURT MINUTES

January 09, 2015

A-13-689113-C Frederic and Barbara Rosenberg Living Trust, Plaintiff(s)
vs.
Bank of America, Defendant(s)

January 09, 2015 10:30 AM Minute Order

HEARD BY: Cory, Kenneth

COURTROOM: RJC Courtroom 16A

COURT CLERK: Phyllis Irby

RECORDER:

REPORTER:

PARTIES

PRESENT:

JOURNAL ENTRIES

- Frederic and Barbara Rosenberg Living Trust vs. Bank of America
Plaintiff's Motion for Leave to Amend Complaint and Caption

Plaintiff's unopposed Motion for Leave to Amend Complaint and Caption is GRANTED.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Breach of Contract

COURT MINUTES

January 30, 2015

A-13-689113-C	Frederic and Barbara Rosenberg Living Trust, Plaintiff(s) vs. Bank of America, Defendant(s)
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January 30, 2015	9:00 AM	Motion for Protective Order	Bank of America, N.A.'s Motion For Protective Order re: Deposition of Rule 30(B)(6) Witness, and For Attorneys' Fees on OST
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HEARD BY: Bulla, Bonnie

COURTROOM: RJC Level 5 Hearing Room

COURT CLERK: Jennifer Lott

RECORDER: Francesca Haak

REPORTER:

PARTIES

PRESENT:	DeVoy, James M.	Attorney
	Hanks, Karen	Attorney
	Rulis, Nathanael R., ESQ	Attorney
	Winslow, Natalie L	Attorney

JOURNAL ENTRIES

- The homeowner purchased property in a foreclosure from Bank of America, and there was no communication the neighbor improving the adjacent property. Argument by Ms. Hanks. Colloquy re: notice must include better categories for areas of concern. Colloquy re: the timeframe. Argument by Ms. Winslow.

COMMISSIONER RECOMMENDED, motion is GRANTED WITHOUT PREJUDICE to Pltf to reserve a proper 30(b)(6) notice with appropriate topic areas for the relevant timeframe. Commissioner is available by conference call if necessary. Colloquy re: resetting depositions, and remaining depositions needed.

COMMISSIONER RECOMMENDED, discovery cutoff RE-OPENED to 3/16/15 to complete depositions; FILE dispositive motions by 4/16/15; 5/26/15 Trial date STANDS; no fees or costs. Commissioner is available by conference call if something comes up.

Ms. Winslow to prepare the Report and Recommendations, and counsel to approve as to form and content. A proper report must be timely submitted within 10 days of the hearing. Otherwise, counsel will pay a contribution. Ms. Winslow to appear at status check hearing to report on the Report and Recommendations.

3/6/15 11:00 a.m. Status Check: Compliance

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Breach of Contract

COURT MINUTES

April 08, 2015

A-13-689113-C Frederic and Barbara Rosenberg Living Trust, Plaintiff(s)
vs.
Bank of America, Defendant(s)

April 08, 2015 9:00 AM Motion to Dismiss

HEARD BY: Cory, Kenneth **COURTROOM:** RJC Courtroom 16A

COURT CLERK: Michele Tucker

RECORDER: Lisa Lizotte

REPORTER:

PARTIES

PRESENT: Chavez, Sarah M, ESQ Attorney
Gunnerson, Spencer Attorney
Hanks, Karen Attorney
Shevorski, Steven G. Attorney

JOURNAL ENTRIES

- Mr. Gunnerson advised this case is in regards to a third acre property and it has been clear from the beginning plaintiffs do not want the defendant to build on the property. Mr. Gunnerson argued they have attempted to bring in easements to stop them for building. Plaintiffs are trying to create a strict covenant which would be guidelines; there is nothing in the restrictive guidelines. Plaintiffs are claiming the design guidelines are not applied to the third acre. Mr. Gunnerson argued as to declaratory relief. Ms. Hanks argued plaintiffs are only asking for FHP to enforce the design guidelines. This is essentially a breach of the covenants and CC&R's. Ms. Hanks stated Mr. Malek may be an innocent victim and if he is it falls to FHP for approving the design. Statements by the Court. Ms. Hanks advised discovery has closed and have requested leave to amend for damages. Court stated it was not going to close the door on the defendant for the plaintiffs to come back and claim damages. Ms. Hanks advised they have money damages against other parties, plaintiffs are just looking for FHP to enforce the guidelines. Mr. Gunnerson argued it is possible for the Court to base its decision on the facts pled without additional discovery. Court stated if the motion is granted the defendant has been placed on notice they will be coming back for money damages. Mr. Gunnerson stated they would rather be dismissed out at this point and do not feel there are any money damages.

Plaintiffs are attempting to bring in the CC&R's, and they do not apply to FHP. Ms. Hanks argued under the CC&R's FHP is still a declarant of the MacDonald property and are still in control. Mr. Gunnerson argued they have failed to show any restrictive covenants have not been enforced. Further arguments by counsel. COURT ORDERED, Defendant FHP Venture's Motion to Dismiss Amended Complaint DENIED. Colloquy. COURT FURTHER ORDERED, Trial date VACATED and Matter SET for status check. Ms. Hanks to prepare the Order.

6/10/15 9:00 AM STATUS CHECK: RESET TRIAL

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Breach of Contract

COURT MINUTES

May 18, 2015

A-13-689113-C Frederic and Barbara Rosenberg Living Trust, Plaintiff(s)
vs.
Bank of America, Defendant(s)

May 18, 2015 9:00 AM Minute Order

HEARD BY: Cory, Kenneth

COURTROOM: RJC Courtroom 16A

COURT CLERK: Michele Tucker

RECORDER:

REPORTER:

PARTIES

PRESENT:

JOURNAL ENTRIES

- The COURT ORDERS, Plaintiff's Motion for Summary Judgment Against Shanin Shane Malek, Defendant Shanin Shane Malek Motion for Summary Judgment, and Counter Defendant's Motion for Summary Judgment RESCHEDULED from Tuesday, May 19, 2015 to Wednesday, June 10, 2015 at 9:00 a.m. The Status Check regarding resetting the trial will remain on the 6/10/15 oral calendar.

RESCHEDULED TO: 6/10/15 9:00 AM

CLERK'S NOTE: The above minute order has been distributed to: Jay DeVoy, Esq., Spencer Gunnerson, Esq., Karen Hanks, Esq., and Steven Shevorski, Esq. via e-mail. /mlt

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Breach of Contract

COURT MINUTES

June 10, 2015

A-13-689113-C Frederic and Barbara Rosenberg Living Trust, Plaintiff(s)
vs.
Bank of America, Defendant(s)

June 10, 2015 9:00 AM All Pending Motions

HEARD BY: Cory, Kenneth **COURTROOM:** RJC Courtroom 16A

COURT CLERK: Tena Jolley

RECORDER: Lisa Lizotte

REPORTER:

PARTIES

PRESENT:	Barishman, Melissa	Attorney
	DeVoy, James M.	Attorney
	Gilbert, Jacqueline	Attorney
	Gunnerson, Spencer	Attorney
	Habdas, William S.	Attorney
	Hanks, Karen	Attorney
	Jones, Jon Randall	Attorney
	Panoff, Jesse N	Attorney
	Rezaee, Preston P, ESQ	Attorney

JOURNAL ENTRIES

- STATUS CHECK: RESET TRIAL DATE - Mr. Gunderson advised there is a Motion to Amend to Conform to Evidence set for July 6, 2015, and requested matter be continued. Ms. Hanks stated the Motion is set on the Court's Chambers Calendar. COURT ORDERED, matter CONTINUED to 7/15/15 at 9:00 A.M.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT SHAHIN SHANE MALEK - Ms. Hanks argued that Mr. Malek's counter-claim for slander of title based on the lis pendens recorded by the Rosenberg Trust fails as there is clearly no issue of fact. There is no evidence of malice. Further there is no computation of damages or supporting documentation as required to claim special damages and discovery is closed. Therefore, there are no issues of fact

remaining and summary judgment in favor of the Rosenberg Trust on the slander of title claim is appropriate. Mr. Devoy argued in opposition that the question of malice is whether the statement is knowingly false or is made with reckless disregard for the truth. Ms. Rosenberg knew exactly what she was doing and she filed the lis pendens to prevent Mr. Malek from building his home which was a reckless disregard for the truth that applies. On the issue of damages, attorney fees continue to accrue and questions of fact remain as to what Ms. Rosenberg knew when she filed the lis pendens. COURT ORDERED, Motion DENIED WITHOUT PREJUDICE. Upon Ms. Hanks request that Plaintiff be allowed to depose Mr. Malek if additional documents are produced, Court recommended the issues be brought before the Discovery Commissioner.

DEFENDANT SHAHIN SHANE MALEK'S MOTION FOR SUMMARY JUDGMENT - Mr. Devoy argued that Nevada law prohibits easements being granted to protect view and privacy. The implied restrictive covenant is improper as case law does not recognize this new cause of action and there is no evidence of a restrictive covenant that prevents someone from building their house. Plaintiff's requests for declaratory and injunctive relief requires an underlying finding of liability there can be no relief. Mr. Gunnerson adopted arguments made by Mr. Devoy and made three points: there is no easement for view or privacy recognized in Nevada; the one-third acre of bare land was a bare lot and not a part of the golf course; and the only use Plaintiff's use of that property would be to protect view and privacy. Argument that no genuine issues of material fact exist as the golf course is still the center of the community and no easement existed. Argument by Ms. Hanks in opposition that there are expressed and implied restrictive covenants which limits what a property owner can do with their property thereby maintaining the value of the property that Plaintiff purchased and the expectation that that the surrounding area would remain the same. These are issues of fact for the jury to determine. COURT ORDERED, matter UNDER SUBMISSION, ORDER WILL ISSUE from Chambers, and matter SET for Decision on Court Chamber Calendar.

DEFENDANTS' MACDONALD HIGHLANDS, MICHAEL DOIRON AND FHP VENTURES' MOTION FOR SUMMARY JUDGMENT - Mr. Gunnerson requested that as to the view ad privacy easement portion of their motion, was previously addressed. Argument that the case is ripe for summary adjudication at this time as the Rosenberg's purchased the property "as is," signed a Purchase Agreement, failed to research public records/zoning maps, and waived claims against the broker or their agents. Ms. Hanks argued in opposition that Plaintiff did not waive any defects as to the surrounding area/golf course and did not have knowledge of material facts as to any change in zoning which should have been disclosed and is a question for the jury to determine. Further Doiron and McDonald Realty had a duty to correct any misrepresentations made on the seller's disclosure form. COURT ORDERED, matter UNDER SUBMISSION, ORDER WILL ISSUE from Chambers, and matter SET for Decision on Court Chamber Calendar.

6/29/15 CHAMBERS - DEFENDANT SHAHIN SHANE MALEK'S MOTION FOR SUMMARY JUDGMENT // DEFENDANTS' MACDONALD HIGHLANDS, MICHAEL DOIRON AND FHP VENTURES' MOTION FOR SUMMARY JUDGMENT

A-13-689113-C

7/15/15 9:00 AM STATUS CHECK: RESET TRIAL DATE

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Breach of Contract

COURT MINUTES

June 29, 2015

A-13-689113-C Frederic and Barbara Rosenberg Living Trust, Plaintiff(s)
vs.
Bank of America, Defendant(s)

June 29, 2015 3:00 AM All Pending Motions

HEARD BY: Cory, Kenneth **COURTROOM:** RJC Courtroom 16A

COURT CLERK: Michele Tucker

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- ALL PENDING

Based on the arguments raised in Defendants' briefing, the COURT ORDERS, Defendants' MacDonald Highlands, Michael Doiron and FHP Ventures' Motion for Summary Judgment GRANTED. Counsel for Defendants are to prepare the order, which must include findings of facts and conclusions of law and distribute a copy to all parties.

Based on the arguments raised in Defendant Malek's briefing, the COURT ORDERS, Defendant Shahin Shane Malek's Motion for Summary Judgment GRANTED IN PART and DENIED IN PART. The motion is GRANTED as to claims brought by Plaintiff and DENIED as to Defendant Malek's counterclaim for Slander of Title. Counsel for Defendant Malek is to prepare the order, which must include findings of facts and conclusions of law and distribute a copy to all parties.

CLERK'S NOTE: The above minute order has been distributed to: John Randall Jones, Esq., and Preston Rezaee, Esq. via e-mail. /mlt

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Breach of Contract

COURT MINUTES

July 06, 2015

A-13-689113-C	Frederic and Barbara Rosenberg Living Trust, Plaintiff(s)
	vs.
	Bank of America, Defendant(s)

July 06, 2015	3:00 AM	Motion to Amend Complaint
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HEARD BY: Cory, Kenneth

COURTROOM: RJC Courtroom 16A

COURT CLERK: Michele Tucker

RECORDER: Lisa Lizotte

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- After reviewing all related motions, oppositions, and replies, the Court finds that a motion under NRCP 15(b) is not appropriate. Further, under NRCP 15(a) the Court finds that the proposed claims would be futile as they fall under the preview of NRS 38.310. Accordingly, COURT ORDRED Plaintiff's Motion to Amend Complaint to Conform to Evidence DENIED. The Plaintiffs may refile an appropriate NRCP 15(a) motion after exhausting all required remedies under NRS 38.310. Mr. Brenner to prepare the Order.

CLERK'S NOTE: The above minute order has been distributed to: Karen Hanks, Esq., Spencer Gunnerson, Esq., Preston Rezaee, Esq., and Darren Brenner, Esq. via e-mail. /mlt

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Breach of Contract

COURT MINUTES

July 29, 2015

A-13-689113-C Frederic and Barbara Rosenberg Living Trust, Plaintiff(s)
vs.
Bank of America, Defendant(s)

**July 29, 2015 9:00 AM Status Check: Reset Trial
Date**

HEARD BY: Cory, Kenneth

COURTROOM: RJC Courtroom 16A

COURT CLERK: Michele Tucker

RECORDER: Lisa Lizotte

REPORTER:

PARTIES

PRESENT: Carter, Matthew S. Attorney
 DeVoy, James M. Attorney
 Hanks, Karen Attorney
 Shevorski, Steven G. Attorney

JOURNAL ENTRIES

- Colloquy regarding last hearing. COURT ORDERED, Trial Date SET. COURT FURTHER ORDERED, all Dispositive Motion due February 22, 2016 and Motions in Limine due May 6, 2016.

6/9/16 9:00 AM PRETRIAL CONFERENCE

6/27/16 10:00 AM JURY TRIAL

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Breach of Contract

COURT MINUTES

September 21, 2015

A-13-689113-C Frederic and Barbara Rosenberg Living Trust, Plaintiff(s)
vs.
Bank of America, Defendant(s)

September 21, 2015 3:00 AM All Pending Motions

HEARD BY: Cory, Kenneth

COURTROOM: RJC Courtroom 16A

COURT CLERK: Michele Tucker

RECORDER:

REPORTER:

PARTIES

PRESENT:

JOURNAL ENTRIES

- DEFENDANT MACDONALD HIGHLANDS REALTY LLC'S MOTION FOR CERTIFICATION PURSUANT TO NRCP 54(B)...PLAINTIFF'S MOTION TO RETAX AND SETTLE MEMORANDUM OF COSTS AND DISBURSEMENTS

PLAINTIFF'S MOTION TO RETAX AND SETTLE MEMORANDUM OF COSTS AND DISBURSEMENTS heard and DENIED AS MOOT on 10/22/15 oral calendar.

COURT ORDERED, Defendant Macdonald Highlands Realty LLC's Motion For Certification Pursuant To NRCP 54(B) GRANTED. Mr. Gunnerson to prepare the Order and distribute to all parties.

CLERK'S NOTE: The above minute order has been distributed to: Spencer Gunnerson, Esq. via e-mail. /mlt

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Breach of Contract

COURT MINUTES

October 22, 2015

A-13-689113-C	Frederic and Barbara Rosenberg Living Trust, Plaintiff(s)
	vs.
	Bank of America, Defendant(s)

October 22, 2015 1:30 PM All Pending Motions

HEARD BY: Cory, Kenneth

COURTROOM: RJC Courtroom 16A

COURT CLERK: Michele Tucker

RECORDER: Lisa Lizotte

REPORTER:

PARTIES

PRESENT:	Carter, Matthew S.	Attorney
	DeVoy, James M.	Attorney
	Gilbert, Jacqueline	Attorney
	Hanks, Karen	Attorney

JOURNAL ENTRIES

- ALL PENDING

DEFENDANT SHAHIN MALEK'S MOTION FOR ATTORNEY FEES AND COSTS:

Court noted it had not received an opposition. Ms. Hanks advised a copy had been provided to chambers today. Mr. DeVoy advised he had not seen a copy of the opposition and requested the Motion be granted. COURT ORDERED, Motion CONTINUED.

CONTINUED TO: 12/1/15 9:00 AM

DEFENDANT MACDONALD HIGHLAND REALTY, LLC AND FHP VENTURES MOTION FOR ATTORNEYS' FEES AND COSTS:

Following arguments by counsel, COURT ORDERED, Fees GRANTED in the amount of \$120,315.00; Costs CONTINUED to this Court's Chamber Calendar.

CONTINUED TO: 11/9/15 CHAMBERS

PRINT DATE: 12/15/2015

Page 20 of 24

Minutes Date: December 04, 2013

PLAINTIFF'S MOTION TO RETAX AND SETTLE MEMORANDUM OF COSTS AND
DISBURSEMENTS:
COURT ORDERED, Motion DENIED AS MOOT.

CLERK'S NOTE: Minutes corrected to include the continued hearing dates (which were given in
Court). /mlt

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Breach of Contract

COURT MINUTES

November 09, 2015

A-13-689113-C Frederic and Barbara Rosenberg Living Trust, Plaintiff(s)
vs.
Bank of America, Defendant(s)

**November 09, 2015 3:00 AM Motion for Attorney Fees
and Costs**

HEARD BY: Cory, Kenneth

COURTROOM: RJC Courtroom 16A

COURT CLERK: Michele Tucker

RECORDER:

REPORTER:

PARTIES

PRESENT:

JOURNAL ENTRIES

- The Court previously granted Defendant MacDonald Highland Realty, LLC and FHP Ventures Motion for Attorneys' Fees and continued the matter as to Costs. COURT ORDERED, Motion GRANTED as to costs.

CLERK'S NOTE: The above minute order has been distributed to: Jacqueline Gilbert, Esq., Karen Hanks, Esq., Preston Rezaee, Esq., and Matthew Carter, Esq. via e-mail. /mlt

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Breach of Contract

COURT MINUTES

December 01, 2015

A-13-689113-C Frederic and Barbara Rosenberg Living Trust, Plaintiff(s)
vs.
Bank of America, Defendant(s)

**December 01, 2015 9:00 AM Motion for Attorney Fees
and Costs**

HEARD BY: Cory, Kenneth

COURTROOM: RJC Courtroom 16A

COURT CLERK: Michele Tucker

RECORDER: Lisa Lizotte

REPORTER:

PARTIES

PRESENT: DeVoy, James M. Attorney

JOURNAL ENTRIES

- Mr. DeVoy stated this was his second time here for this motion. The first time the motion was continued to review and reply to the opposition and the date and time were agreed to by both parties; this time there is no appearance by counsel. Mr. DeVoy argued as to the fees and costs incurred by his client do to this litigation. Court inquired as to how much time was spent here this morning. Mr. DeVoy advised 1.8 billable hours. Statements by the Court. COURT ORDERED, Defendant Shahin Malek's Motion for Attorney Fees and Costs GRANTED; fees GRANTED from April 16, 2015 forward and fees for appearing today 12/1/15. All costs GRANTED. Mr. DeVoy to prepare the Order.

CLERK'S NOTE: The above minute order has been distributed to: Karen Hanks, Esq. and Jacqueline Gilbert, Esq. via e-mail. /mlt

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Breach of Contract

COURT MINUTES

December 09, 2015

A-13-689113-C Frederic and Barbara Rosenberg Living Trust, Plaintiff(s)
vs.
Bank of America, Defendant(s)

December 09, 2015 9:00 AM Status Check

HEARD BY: Cory, Kenneth **COURTROOM:** RJC Courtroom 16A

COURT CLERK: Michele Tucker

RECORDER: Lisa Lizotte

REPORTER:

PARTIES

PRESENT: DeVoy, James M. Attorney
 Gilbert, Jacqueline Attorney
 Shevorski, Steven G. Attorney

JOURNAL ENTRIES

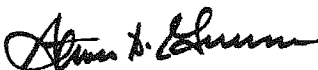
- Statements by the Court regarding there being no signature on the stipulation to stay the matter. Mr. DeVoy and Mr. Shevorski advised they have no objection to the stay. Court STATED the trial date will stand and hopefully the Supreme Court will have made a ruling by then. Mr. DeVoy advised Mr. Malek still has a counterclaim. Mr. Shevorski advised Bank of America is still a party in this matter. COURT ORDERED, Stay to REMAIN IN PLACE and trial date STANDS.

Matter Recalled: Ms. Gilbert present. Court advised of the proceedings.

EXHIBIT 8

1 Preston P. Rezaee, Esq.
2 Nevada Bar No. 10729
3 Jay DeVoy, Esq., of counsel
4 Nevada Bar No. 11950
5 Sarah Chavez, Esq., of counsel
6 Nevada Bar No. 11935
7 THE FIRM, P.C.
8 200 E. Charleston Blvd.
9 Las Vegas, NV 89104
10 Telephone: (702) 222-3476
11 Facsimile: (702) 252-3476
12 *Attorneys for Defendant / Counterclaimant,*
13 *SHAHIN SHANE MALEK*

Electronically Filed
08/13/2015 11:11:51 AM


CLERK OF THE COURT

**DISTRICT COURT
CLARK COUNTY, NEVADA**

10 THE FREDERIC AND BARBARA)
11 ROSENBERG LIVING TRUST,)

CASE NO.: A-13-689113-C
DEPT NO.: I

12 Plaintiff,)

13 vs.)

14 BANK OF AMERICA, N.A.; BAC HOME)
15 LOANS SERVICING, LP, a foreign limited)
16 partnership; MACDONALD HIGHLANDS)
17 REALTY, LLC, a Nevada limited liability)
18 company; MICHAEL DOIRON, an individual;)
19 SHAHIN SHANE MALEK, an individual;)
20 PAUL BYKOWSKI, an individual; THE)
21 FOOTHILLS AT MACDONALD RANCH)
22 MASTER ASSOCIATION, a Nevada limited)
23 liability company; THE FOOTHILLS)
24 PARTNERS, a Nevada limited partnership;)
25 DOES I through X, inclusive; and ROE)
26 BUSINESS ENTITY I through XX, inclusive,)

27 Defendants.)
28)

**[PROPOSED] ORDER, FINDINGS OF
FACT AND CONCLUSIONS OF LAW,
AND JUDGMENT ON DEFENDANT /
COUNTERCLAIMANT SHAHIN SHANE
MALEK'S MOTION FOR SUMMARY
JUDGMENT**

24 Before the Court is Defendant/Counterclaimant Shahin Shane Malek's ("Malek['s]") Motion
25 for Summary Judgment on the claims asserted against him by Plaintiff/Counterclaim Defendant The
26 Frederic and Barbara Rosenberg Living Trust ("Plaintiff" or the "Trust"), and on Malek's
27 Counterclaim for slander of title against the Trust. The Court heard argument on this motion on June
28 10, 2015 at 9:00 a.m. Karen Hanks, Esq., Jacqueline Gilbert, Esq., Melissa Barishman, Esq., and Jesse

1 Panoff, Esq. appeared on behalf of the Plaintiff. Preston Rezaee, Esq. and Jay DeVoy, Esq. appeared
2 on behalf of Malek. Spencer Gunnerson, Esq. and J. Randall Jones, Esq. appeared on behalf of
3 Defendants MacDonald Highlands Realty, LLC, Michael Doiron, and FHP Ventures, erroneously sued
4 as The Foothills Partners. William Habdas, Esq. appeared on behalf of Defendants Bank of America,
5 N.A. and BAC Home Loans Servicing, LP (collectively, and for ease of reference only, "Bank of
6 America"). The Court, having reviewed all papers and pleadings on file in this matter in chambers,
7 entered a minute order granting in part and denying in part Malek's Motion, and articulated its
8 decision on the record during a status check for this matter on July 15, 2015 at 9:00 a.m.¹

9 **I. Introduction**

10 This case arises from the Trust's purchase of a house within the exclusive MacDonald
11 Highlands community, and its desire to restrict the use of Malek's neighboring property. On
12 September 23, 2013, the Trust filed a complaint against Malek, among other defendants, seeking
13 injunctive relief against Malek's development of his property at 594 Lairmont Place, and a portion of
14 additional land Malek had re-zoned and agreed to purchase before the Trust purchased an adjacent
15 parcel at 590 Lairmont Place. The Trust filed an Amended Complaint on January 12, 2015. Malek
16 answered the Amended Complaint, and additionally asserted his Counterclaim for slander of title
17 against the Trust.

18 This order considers Malek's Motion for Summary Judgment on the Trust's claims against
19 him: easement, implied restrictive covenant, injunction, and declaratory relief. Malek has also moved
20 for summary judgment on his counterclaim for slander of title against the Trust. In support of his
21 motion, Malek submitted numerous exhibits, including public records, the Trust's discovery responses,
22 and documents authenticated during depositions, as well as excerpts from numerous depositions taken
23 in this case. The Trust opposed Malek's Motion for Summary Judgment, and referenced its Cross-
24 Motion for Summary Judgment on Malek's slander of title counterclaim² in opposing that branch of
25 Malek's motion. Malek timely replied in support of his motion.

26
27 ¹ At this status check, Karen Hanks, Esq., appeared on behalf of the Plaintiff/Counterclaim Defendant. Jay DeVoy, Esq.
28 appeared on behalf of Defendant/Counterclaimant Malek. Spencer Gunnerson, Esq., appeared on behalf of Defendants
MacDonald Highlands Realty, LLC, Michael Doiron, and FHP Ventures—erroneously sued as The Foothills Partners.
Ariel Stern, Esq. appeared on behalf of Bank of America.

² The Court denied this motion at its June 10, 2015 hearing, and subsequently entered an order to that effect.

1 **II. Legal Standard**

2 This Court evaluates motions for summary judgment under Nevada Rule of Civil Procedure 56.
3 Summary judgment is appropriate “when the pleadings and other evidence on file demonstrate that no
4 ‘genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a
5 matter of law.’” *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). In reviewing
6 the motion, the Court considers the evidence in the light most favorable to the non-moving party.
7 *Collins v. Union Federal Savings and Loan Association*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983).

8 **III. Findings of Fact**

9 Based on its review of the briefing in this case, the Court makes the following findings of fact:

10 **A. Findings Pertaining to the Trust’s Claims Against Malek.**

11 1. This case arises from a private community’s sale of an out-of-bounds portion of a golf
12 course to an adjacent lot owner in order to increase the original lot’s size; this practice is common in
13 prestigious, exclusive communities throughout the Las Vegas valley, including MacDonald Highlands,
14 where the land at issue in this case is situated. Bykowski Dep. Vol. I at 39:16-40:19; Doiron Dep. Vol.
15 I at 110:9-111:25; MacDonald Dep. at 126:22-128:20; Mot. Exhs. 1, 2.

16 2. Malek purchased the property commonly referred to as 594 Lairmont Place (APN 178-
17 27-218-002) (“594 Lairmont”), located within the MacDonald Highlands community, in August of
18 2012. At the same time, Malek planned to purchase a 0.34-acre parcel of undeveloped land adjacent to
19 594 Lairmont (APN 178-28-520-001) (the “Golf Parcel”) and annex it to 594 Lairmont. Malek Dep. at
20 14:17-22:10, 67:9-68:8; Bykowski Dep. Vol. I at 38:12-20; MacDonald Dep. at 60:17-21, 100:12-18;
21 Rosenberg Dep. at 190:2-5, 213:11-23.

22 3. MacDonald Highlands approved of this plan and sold the Golf Parcel to Malek. Malek
23 Dep. at 19:16-22, 21:16-22:10; Bykowski Dep. Vol. I at 38:12-20; Doiron Dep. Vol. I at 120:7-122:5.

24 4. The Golf Parcel consisted of an out-of-bounds area near the ninth hole of the
25 Dragonridge Golf Course, situated within MacDonald Highlands, and occupied a portion of the space
26 bordering the property line of 594 Lairmont, and outside of the golf course’s in-play area. Rosenberg
27 Dep. at 190:2-5; Malek Dep. at 19:16-22, 67:9-68:8; MacDonald Dep. at 60:17-21, 100:12-18;
28 Bykowski Dep. Vol. I at 38:12-20; Rosenberg Dep. at 190:2-5, 213:11-23; *see* Mot. Exh. 7.

1 5. Before merging the Golf Parcel with 594 Lairmont, MacDonald Highlands needed to
2 re-zone it from its Public / Semi-Public designation to residential use. Bykowski Dep. Vol. I at 38:12-
3 20; Malek Dep. at 43:10-21, 47:4-20; Tassi Dep. at 16:6-23:9; see Bykowski Dep. Vol. II at 183:25-
4 185:7.

5 6. MacDonald Highlands had performed this process several times for other property
6 owners with lots adjacent to the golf course, and re-zoned parcels of land from Public / Semi-Public
7 use to the appropriate residential use so that they could be merged with adjacent lots, leased to the
8 owners of adjacent lots, or otherwise incorporated into abutting property.³ Bykowski Dep. Vol. I at
9 39:16-41:23; MacDonald Dep. at 127:3-128:20; *see* Doiron Dep. I at 110:9-111:22.

10 7. Part of this re-zoning process included MacDonald Highlands' submission of an
11 application to vacate easements that may exist on the Golf Parcel. In processing this application, the
12 City of Henderson found that no such easements existed. Bykowski Dep. Vol. II at 183:25-185:7; Mot.
13 Exh. 17.

14 8. To complete the re-zoning process, MacDonald Highlands retained the services of B2
15 Development, which in turn took the steps necessary to re-zone the Golf Parcel. Bykowski Dep. Vol. II
16 at 95:1-20; *see* Mot. Exhs. 4, 5.

17 9. B2 Development took the steps necessary to properly re-zone the Golf Parcel, including
18 organizing a community meeting to discuss the proposed re-zoning. Bykowski Dep. Vol. II at 93:22-
19 100:19; *see* Mot. Exhs. 4, 5. B2 Development mailed notices of the meeting to the owners of record of
20 all parcels near the Golf Parcel, including 590 Lairmont Place (APN 178-27-218-003) ("590
21 Lairmont"), the lot adjacent to 594 Lairmont. Bykowski Dep. Vol. II at 95:1-23; Woodbridge Dep. at
22 56:19-58:2; Mot. Exh. 6.

23 10. At the time B2 Development mailed its notices for the community meeting in October
24 2012, Defendant Bank of America owned 590 Lairmont. Woodbridge Dep. at 15:1-20; Rosenberg
25 Dep. at 43:31-44:25; *see* Mot. Exh. 8. B2 Development mailed its notice to a valid address for Bank
26 of America, which never objected to the Golf Parcel's re-zoning. Woodbridge Dep. at 15:1-20; Mot.
27

28 ³ As noted above, this practice is not limited to MacDonald Highlands, but is common within other Golf Communities within the Las Vegas valley.

1 Exh. 8. In fact, nobody objected to the Golf Parcel's re-zoning at the community meeting, or separately
2 to the City of Henderson. Tassi Dep. at 55:3-23; *see* Bykowski Dep. II at 92:2-18.

3 11. Acting for MacDonald Highlands, B2 further followed the City of Henderson's zoning
4 process in re-zoning the Golf Parcel by obtaining the City Counsel's approval of the Golf Parcel's
5 proposed re-zoning at two consecutive meetings, and the City's adoption of a resolution approving the
6 zoning change. Tassi Dep. at 16:6-23:17; *see* Mot. Exhs. 4, 5.

7 12. MacDonald Highlands' applications for the Golf Parcel's re-zoning were properly heard
8 by the City of Henderson; the City adopted a resolution re-zoning the Golf Parcel to residential use on
9 December 8, 2012, and the City recorded its resolution on January 7, 2013. Bykowski Dep. Vol. II at
10 93:22-97:16, 99:4-105:25; Tassi Dep. at 16:6-23:17; Mot. Exhs. 4, 5.

11 13. Maps and information reflecting the Golf Parcel's changed zoning were readily and
12 almost immediately available to the public. By January 24, 2013, the Golf Parcel's new, residential
13 zoning was reflected in zoning maps that were publicly available at the front desk of Henderson City
14 Hall. Tassi Dep. at 23:10-24:6, 25:2-26:1, 27:17-28:11, 56:16-24.

15 14. Less than a month later in mid-February of 2013, the Golf Parcel's residential zoning
16 could be seen in an online zoning map publicly available from the City of Henderson's website. *Id.* at
17 30:6-20; Mot. Exh. 7.

18 15. According to one of the City of Henderson's planners, a member of the public could
19 access a specific address on this online map in less than five minutes. *Id.* at 26:14-27:7.

20 16. Following the City of Henderson's duly passed resolution approving the Golf Parcel's
21 re-zoning to residential use, the Golf Parcel's sale was recorded and it was merged into 594 Lairmont,
22 creating one parcel of land that was zoned for residential use. Bykowski Dep. I at 38:12-20; Malek
23 Dep. at 43:10-21, 47:4-20; Tassi Dep. at 16:6-23:9.

24 17. Beginning in February of 2013, Barbara Rosenberg, an experienced residential real
25 estate broker and a trustee of the Trust, and David Rosenberg,⁴ an attorney in Las Vegas and a
26 beneficiary of the Trust, began contacting Bank of America in an attempt to purchase 590 Lairmont
27

28 ⁴ David Rosenberg had lived in the Green Valley area of the Las Vegas metropolitan region since 2009, and was familiar with the MacDonald Highlands community.

1 before the property was publicly listed for sale. Rosenberg Dep. at 43:20-46:3, 55:1-57:14; Mot. Exhs.
2 8, 9.

3 18. Barbara Rosenberg not only had more than 25 years of experience as a residential real
4 estate broker, but estimates she has sold more than 500 homes in her career. Rosenberg Dep. at 12:19-
5 13:15, 88:8-25. Individually and through the Trust, Barbara Rosenberg and her husband have made
6 numerous real estate purchases in the past, including an 8,000 square foot primary residence, two other
7 houses in California, and two condos in Manhattan Beach, California—in addition to 590 Lairmont. *Id.*
8 at 13:16-16:13.

9 19. When 590 Lairmont was listed for sale, Barbara Rosenberg offered to purchase it for
10 \$1,750,000—above the listing price of \$1,600,000—in an all-cash transaction. She then increased her
11 offer and submitted the winning bid to purchase the home for \$2,302,000, all cash. Rosenberg Dep. at
12 43:20-46:3, 50:3-51:25, 85:1-86:5; Mot. Exhs. 8, 9, 14.

13 20. Barbara Rosenberg did not do any research about 590 Lairmont's zoning, or the use of
14 surrounding land, prior to purchasing the property. Rosenberg Dep. at 95:9-19, 103:17-104:23, 115:12-
15 116:15, 121:23-123:6, 129:1-130:2; *see* Tassi Dep. at 55:24-56:12. The Rosenbergs were motivated to
16 purchase this property as quickly as possible because they considered it their “dream” home.
17 Rosenberg Dep. at 115:17-24, 210:5-19.

18 21. When Barbara Rosenberg walked through the property, despite generally waiving the
19 Trust's right to an inspection, she did not even look over to 594 Lairmont or the Golf Parcel, the latter
20 of which was marked with stakes that had been in place since December of 2012. Rosenberg Dep. at
21 130:3-23; Malek Dep. at 112:4-113:10.

22 22. In the course of purchasing 590 Lairmont, MacDonald Highlands Realty provided
23 Barbara Rosenberg with numerous disclosures, waivers, and other warnings that she and her husband
24 signed. Rosenberg Dep. at 95:1-16, 129:1-130:2; Mot. Exhs. 10, 11, 12, 13, 14; *see* Doiron Dep. Vol. I
25 at 145:25-149:25.

26 23. Additionally, Barbara Rosenberg knew that there would be subsequent home
27 construction on the vacant lots surrounding 590 Lairmont, including 594 Lairmont, at the time the
28 Trust purchased 590 Lairmont. Rosenberg Dep. at 46:19-47:24; Mot. Exh. 8.

1 24. The Trust was given five days to conduct due diligence before the sale would be
2 completed. Doiron Dep. Vol. I at 145:25-149:25; Mot. Exh. 13, 14. Barbara Rosenberg also signed a
3 zoning disclosure form stating specifically advising the Trust that the zoning information provided was
4 current as of February of 2010—more than three years before the Trust signed its purchase agreement
5 for 590 Lairmont—and the Trust should seek the most current zoning information from the City of
6 Henderson. Rosenberg Dep. at 120:10-23, 121:12-22; Mot. Exh. 12, 14. Among still other warnings
7 and waivers, Barbara Rosenberg signed a disclosure informing her and the Trust of 590 Lairmont's
8 reduced privacy inherent in its location adjacent to the golf course. Rosenberg Dep. at 116:18-118:19;
9 Mot. Exh. 11.

10 25. Additionally, due to the topography of the house and its views onto nearby streets, the
11 Trust already faced certain limitations on its privacy by virtue of the house's existing position and
12 condition. Rosenberg Dep. at 213:11-23, 201:10-203:5, 213:11-23, 201:10-203:5.

13 26. Nonetheless, the Trust purchased 590 Lairmont "as-is, where-is," and accepted the
14 property as it was when it signed the purchase documents in April of 2013. Rosenberg Dep. at 86:11-
15 88:7, 94:15-25, 95:9-19, 95:25-97:4, 99:10-100:7; Mot. Exh. 14 at 8:48-51. The Trust closed on 590
16 Lairmont, and title in the property transferred to the Trust on May 15, 2013.

17 27. Later, in the Summer of 2013, the Trust investigated the use of 594 Lairmont, which
18 now included the Golf Parcel, for the first time. According to Malek's deposition testimony, David
19 Rosenberg confronted him and threatened to sue him if he planned to build on the expanded 594
20 Lairmont. Malek Dep. at 102:13-103:14; *see* Doiron Dep. Vol. I at 80:15-82:17.

21 28. During the course of the litigation, the Trust's discovery responses indicated its only
22 concern was the loss of view, light, and privacy that might accompany Malek's construction on 594
23 Lairmont (including the Golf Parcel). Barbara Rosenberg's deposition testimony and the Trust's
24 responses to interrogatories propounded by Defendants Bank of America, MacDonald Highlands
25 Realty LLC, and Michael Doiron repeatedly identified potential loss of view, light, and privacy⁵ as the
26
27

28 ⁵ As Barbara Rosenberg noted in her deposition, she did not even know what Malek planned to build on 594 Lairmont, and stated that she nonetheless sought this Court's order prohibiting his construction due to the mere possibility of 590 Lairmont losing what Ms. Rosenberg described as its view and privacy.

1 damages arising if the Malek built on 594 Lairmont. Rosenberg Dep. at 184:22-187:20, 195:11-12;
2 Mot. Exhs. 15, 16.

3 29. Specifically, the Trust's interrogatory responses stated that 590 Lairmont would be
4 affected by Malek's construction on the Golf Parcel, with effects upon "the view of the golf course and
5 mountains, privacy, and light entering [the property]." Mot. Exhs. 15, 16.

6 30. The evidence produced to the Court, however, did not show any express easement that
7 would prohibit Malek from building on 594 Lairmont, including the Golf Parcel. All that was required
8 for Malek to construct his house was for him to obtain the MacDonald Highlands' Design Review
9 Committee's approval of his construction plans.⁶ Malek Dep. at 73:9-12; Bykowski Dep. II at 36:10-
10 37:21; *see* Doiron Dep. I at 71:10-72:10.

11 31. Meanwhile, and during the course of this litigation, the Design Review Committee
12 tasked with approving all plans for new buildings within the MacDonald Highlands community before
13 construction may commence, approved Malek's building plans for 594 Lairmont in early 2015.
14 Bykowski Dep. Vol. II at 74:16-21, 76:4-77:23. The Design Review Committee evaluates proposed
15 construction to ensure it maintains the unique character of the MacDonald Highlands community.
16 MacDonald Dep. at 34:16-36:9; 37:3-20; Bykowski Dep. Vol. II at 39:23-42:7. Had Malek's plans not
17 satisfied the Design Review Committee's standards, or negatively affected other residents within the
18 community, the Design Review Committee would not have approved them. *See* Bykowski Dep. Vol. II
19 at 74:16-77:23.

20 **B. Findings of Fact Related to Malek's Counterclaim.**

21 32. At the time the Trust filed this action, it filed a *lis pendens* on Malek's property at 594
22 Lairmont. *See* Sept. 23, 2013 Notice of *Lis Pendens*.

23 33. The Trust subsequently filed an amended *lis pendens* on 594 Lairmont. *See* Oct. 24,
24 2013 Amended Notice of *Lis Pendens*.

25 34. On January 9, 2014, the Court ordered the *lis pendens* on Malek's property expunged.
26 This prior order found that there was no basis for the Trust to have a *lis pendens* on Malek's property
27 under NRS 14.015(3). *See* Jan. 9, 2014 Order on Malek's Motion to Expunge *Lis Pendens*.

28 ⁶ And subsequent approval from the City of Henderson, although the MacDonald Highlands Design Guidelines were stated to be more restrictive than the City of Henderson's requirements.

1 35. Barbara Rosenberg, being a residential real estate agent, was familiar with *lis pendens*
2 filings and their potential consequences for properties upon which they are filed. Rosenberg Dep. at
3 Rosenberg Dep. at 265:3-16.

4 36. However, she did not testify that she specifically knew the *lis pendens* the Trust filed on
5 Malek's property was false. *Id.* Moreover, the declaration of the Trust's former counsel, Peter
6 Bernhard, stated that he acted with a reasonable belief that the *lis pendens* was true when filing it on
7 Malek's property. Decl. of Peter Bernhard.

8 37. Malek submitted evidence of claimed damages in the form of a supplemental
9 disclosure, and testified in his deposition that he had incurred attorneys' fees in this action, which
10 included expunging the Trust's prior *lis pendens*. Malek Dep. at 106:25-107:17; Mot. Exh. 18.

11 IV. Conclusions of Law

12 All of the Trust's claims against Malek fail for numerous reasons. The evidence adduced to the
13 Court shows that the Trust's basis for seeking an easement over Malek's property is based solely on
14 the impermissible grounds of view, light, and privacy. While Nevada law has not previously
15 recognized a claim for implied restrictive covenant, and will not do so now, it also would fail for the
16 same reasons as the Trust's easement claim. Additionally, the Trust's claims for declaratory and
17 injunctive relief are remedies, rather than causes of action that stand on their own, and Malek is
18 entitled to judgment in his favor on both. Questions of fact, however, preclude this Court from
19 entering judgment in Malek's favor on his counterclaim.

20 A. The Trust's Claims of Easement and Implied Restrictive Covenant Are Premised 21 on Grounds Not Recognized Under Nevada Law, and Nevada Law Does Not Even 22 Recognize the Latter Claim.

23 1. Nevada law has squarely and repeatedly repudiated the notion that easements or
24 restrictive covenants may arise by implication to protect views, privacy, or access to light. *Probasco v.*
25 *City of Reno*, 85 Nev. 563, 565, 459 P.2d 772, 774 (1969); *Boyd v. McDonald*, 81 Nev. 642, 650-51,
26 408 P.2d 717, 722 (1965).

27 2. In this case, the Trust has argued alternately that an implied easement and an implied
28 restrictive covenant prevent Malek from building on the Golf Parcel. An easement is a right to use the
land of another, *Boyd*, 81 Nev. at 647, 408 P.2d at 720, while a restrictive covenant is "an easement or

1 a servitude in the nature of an easement.” *Meredith v. Washoe County Sch. Dist.*, 84 Nev. 15, 17, 435
2 P.2d 750, 752 (1968). Based on the evidence on record, and the bases for the Trust’s claim for an
3 easement or implied restrictive covenant in Malek’s property, the classification of the Trust’s claimed
4 restriction as an easement or restrictive covenant “does not matter” for the Court’s analysis in this
5 case. *Venetian Casino Resort L.L.C. v. Local Joint Exec. Bd.*, 257 F.3d 937, 946 (9th Cir. 2001).
6 Because an implied restrictive covenant is a form of easement, they are analyzed in the same manner
7 here.

8 3. The Trust has not produced any evidence showing the existence of an easement
9 requiring the Golf Parcel to remain part of the golf course indefinitely. While the Trust adopted this
10 argument in opposing Malek’s Motion for Summary Judgment, that is, as far as the Court can tell, the
11 first time such a theory arose. Counsel’s arguments do not replace facts in the analysis of a summary
12 judgment motion. *Glover v. Eighth Jud. Dist. Ct.*, 125 Nev. 691, 701, 706, 220 P.3d 684, 691, 695
13 (2009).

14 4. In contrast, the evidence before the Court shows only that the Trust has based its claim
15 for an implied easement on its fear of potentially losing the view, privacy, or access to light
16 Lairmont presently enjoys. The Trust has not shown any evidence of an express easement keeping
17 Malek from building on the Golf Parcel. Nevada law will not imply an easement or restrictive
18 covenant for the only, and undisputed, reasons that the Trust seeks them—protection of
19 Lairmont’s views, privacy, and access to light. *Probasco*, 85 Nev. at 565, 459 P.2d at 774; *Boyd*, 81
20 Nev. at 650-51, 408 P.2d at 722.

21 5. In considering claims for injunctive relief, the Court must consider the totality of the
22 circumstances in which relief is sought. *Edwards v. Emperor’s Garden Rest.*, 122 Nev. 317, 325 130
23 P.3d 1280, 1285 (2006). Here, a seasoned real estate professional appears to have disregarded all
24 warnings and notices before paying more than two million dollars for the Rosenbergs’ “dream” home.
25 There similarly is no evidence the Trust’s attorney beneficiary did any research before the Trust
26 purchased the house in which he now resides. There is, however, undisputed evidence of the Trust and
27 its trustee’s substantial experience buying and selling high-end, residential real estate. To that end, the
28 Trust’s failure to use its acquired skill and knowledge in these areas effectively waived, under the

1 circumstances, any claim it could have for the Court to exercise its jurisdiction to impose a restrictive
2 covenant over Malek's property. *Id.*

3 6. Related to its claim for easement, the Court concludes that the Trust's claim for implied
4 restrictive covenant also fails. Nevada has not previously recognized a cause of action for implied
5 restrictive covenant, and this Court declines to do so. Consistent with the precedent of Nevada's
6 Supreme Court, this Court will not recognize a novel cause of action. *Brown v. Eddie World LLC*, 131
7 Nev. Adv. Rep. 19, 348 P.3d 1002 (2015); *Badillo v. Am. Brands*, 117 Nev. 34, 42, 16 P.3d 435, 440
8 (2001); *Greco v. United States*, 111 Nev. 405, 408-09, 893 P.2d 345, 347-48 (1995); *see Nat'l R.R.*
9 *Passenger Corp v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 457-58 (1974) (promoting the
10 doctrine of *expressio unius est exclusion alterius*, which prohibits theories of liability that are not
11 expressly authorized). This Court's decision to not recognize this cause of action is steeped in the lack
12 of a cohesive national standard, the subjective nature of the claim's object, and the difficulty of
13 proving the claim. *Badillo*, 117 Nev. at 42-44, 16 P.3d at 440-41.

14 7. Among the states that do recognize this claim, the standards for offensively imposing an
15 implied restrictive covenant differ widely. *See Evans v. Pollock*, 796 S.W.2d 465, 466 (Tex. 1990);
16 *Knotts Landing Corp. v. Lathem*, 315 Ga. 321, 323, 348 S.E. 651, 653 (1986); *Arthur v. Lake Tansi*
17 *Village, Inc.*, 590 S.W.2d 923, 927 (Tenn. 1979); *see also Peck v. Lanier Golf Club, Inc.*, 315 Ga. App.
18 176, 178-79, 726 S.E.2d 442, 445 (Ga. Ct. App. 2012). Moreover, Trust seeks to use this claim to
19 enforce its subjective desire to preserve its view, light, and privacy, further militating against the Court
20 recognizing this cause of action. *Greco*, 111 Nev. at 409, 893 P.2d at 348.

21 8. To the extent the Trust's claim for implied restrictive covenant is duplicative of, or
22 otherwise subsidiary within, the Trust's claim for easement, it fails for the reasons stated above.
23 *Probasco*, 85 Nev. at 565, 459 P.2d at 774; *Boyd*, 81 Nev. at 650-51, 408 P.2d at 722. The Trust has
24 not advanced any evidence that its claim for an implied restrictive covenant seeks to preserve or
25 protect anything other than its view, light, or privacy. Any of these three concerns are insufficient
26 bases for the Court to imply an easement or restrictive covenant exists over the Golf Parcel. As the
27 Trust has not produced any evidence showing an alternate, cognizable basis for the Court to impose an
28

1 implied restrictive covenant on the Golf Parcel, the Court will not do so. The Court therefore enters
2 judgment in Malek's favor on this claim.

3 **B. The Trust's Claims for Injunctive and Declaratory Relief Also Fail as a Matter of**
4 **Law.**

5 9. Additionally, the Court enters judgment in Malek's favor on the Trust's remaining
6 claims for declaratory and injunctive relief. This Court concurs with the United States Court of
7 Appeals for the Ninth Circuit and finds that declaratory relief is a remedy, rather than a cause of
8 action. *Swartz v. KPMG LLP*, 476 F.3d 756, 766 (9th Cir. 2007).

9 10. Similarly, this Court adopts the position of the United States District Court for the
10 District of Nevada and several other courts, and concludes that injunctive relief is merely a remedy,
11 rather than an independent claim. *In re Walmart Wage & Hour Empl. Practices Litig.*, 490 F. Supp. 2d
12 1091, 1130 (D. Nev. 2007); *see Brittingham v. Ayala*, 995 S.W.2d 199, 201 (Tex. Ct. App. 1999); *Art*
13 *Movers, Inc. v. Ni West*, 3 Cal. App. 4th 640, 646-47 (Cal. Ct. App. 1992).

14 11. To the extent the Trust has styled these remedies as causes of action, the Court enters
15 judgment in Malek's favor on them. As the Court finds in Malek's favor on the Trust's substantive
16 claims of easement and implied restrictive covenant (to the extent the latter may be recognized as a
17 claim), the Trust has no avenue to assert these remedies against Malek. Therefore, judgment in
18 Malek's favor is appropriate.

19 **C. Questions of Fact Preclude the Court from Granting Malek's Motion for**
20 **Summary Judgment on his Counterclaim.**

21 12. For the same reasons discussed in the Court's Order entered July 23, 2015, denying the
22 Trust's Cross-Motion for Summary Judgment on Malek's counterclaim, and incorporated by reference
23 herein, the Court also denies Malek's Motion for Summary Judgment on the same claim. To prevail,
24 Malek must show that the Trust made a false statement about his title or possession of the Golf Parcel
25 with actual malice—a knowingly false statement, or one made with reckless disregard for the
26 truth—that caused him damage. *Executive Mgmt., Ltd. v. Ticor Title Co.*, 114 Nev. 823, 963 P.2d 465,
27 478 (1998); *Rowland v. Lepire*, 99 Nev. 308, 313, 662 P.2d 1332, 1335 (1983).

28 13. Questions of material fact exist as to whether the Trust and its Trustee, Barbara
Rosenberg, acted with actual malice in filing the *lis pendens* on Malek's property.⁷ Additionally, the

1 Court finds that there is a question of fact as to the calculation of Malek's damages on his slander of
2 title claim, which shall be left to the jury. Malek's Motion for Summary Judgment on his
3 Counterclaim therefore is denied.

4 **V. Conclusion**

5 For the foregoing reasons, it is **ORDERED** that Defendant Shahin Shane Malek's Motion for
6 Summary Judgment is **GRANTED** in part, and the Court enters judgment in Malek's favor on
7 Plaintiff's claims against him, and **DENIED** in part, as the Court denies Malek's Motion for Summary
8 Judgment as it relates to his Counterclaim.

9 **VI. Judgment**

10 This action having been submitted to the Court for decision at trial on June 10, 2015, and the
11 Court having made the foregoing findings of fact and conclusions of law, the Court decides Plaintiff's
12 claims in favor of moving Defendant Shahin Shane Malek, with regard to all of Plaintiff's claims
13 against him.

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26 It is therefore **ORDERED, ADJUDGED, AND DECREED** that Plaintiff take nothing by way
27 of its January 12, 2015 Amended Complaint against Defendant Shahin Shane Malek.

28 ⁷ "In order to prove malice it must be shown that the defendant knew that the statement was false or acted in reckless
disregard of its truth or falsity." *Rowland*, 99 Nev. at 313, 662 P.2d at 1335.

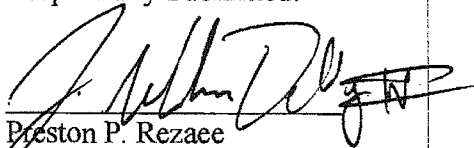
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2 **IT IS SO ORDERED**

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4 Dated: Aug 11, 2015

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DISTRICT JUDGE

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27 **CERTIFICATE OF SERVICE**
28

1 It is therefore **ORDERED, ADJUDGED, AND DECREED** that Plaintiff take nothing by way
2 of its January 12, 2015 Amended Complaint against Defendant Shahin Shane Malek.

3
4 **IT IS SO ORDERED**

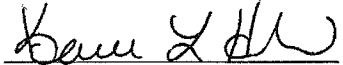
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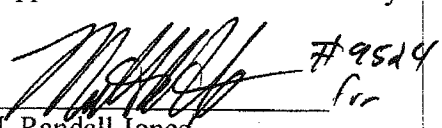
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CERTIFICATE OF SERVICE

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2 **IT IS SO ORDERED**

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4 Dated: _____, 2015

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DISTRICT JUDGE

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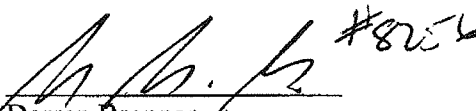
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CERTIFICATE OF SERVICE

1 I hereby certify that one this ____ day of July, 2015, pursuant to NRCP 5(b), I served via the Eighth
2 Judicial District Court electronic service system and to be placed in the United States Mail, with first
3 class postage prepaid thereon, and addressed the foregoing **[PROPOSED] ORDER, FINDINGS OF**
4 **FACT AND CONCLUSIONS OF LAW, AND JUDGMENT ON DEFENDANT /**
5 **COUNTERCLAIMANT SHAHIN SHANE MALEK'S MOTION FOR SUMMARY**
6 **JUDGMENT** to the following parties:

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