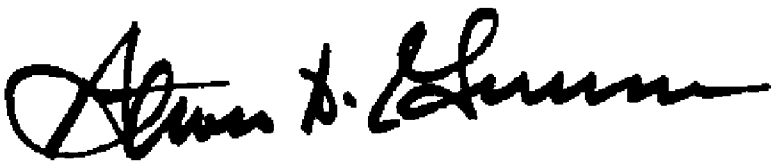


Ex. 1

EXHIBIT 1

Ex. 1


CLERK OF THE COURT

ACOM
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE FREDRIC AND BARBARA
ROSENBERG LIVING TRUST,
Plaintiff,
vs.

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

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; and ROE CORPORATIONS I through X,
inclusive,
Defendants.

AMENDED COMPLAINT

COMES NOW Plaintiff THE FREDRIC AND BARBARA ROSENBERG LIVING TRUST,
by and through its counsel of record, HOWARD KIM & ASSOCIATES, and for causes of action
against the Defendants, and each of them, complains and alleges as follows:

1 I.

2 THE PARTIES

3 1. FREDRIC ROSENBERG and BARBARA ROSENBERG, are, and at all times relevant
4 to this action were, Trustees of THE FREDRIC ROSENBERG AND BARBARA ROSENBERG
5 LIVING TRUST.

6 2. Plaintiff is informed and believes and therefore alleges that Defendant BANK OF
7 AMERICA, N.A. is, and at all times relevant to this action was, conducting business in the State of
8 Nevada.

9 3. Plaintiff is informed and believes and therefore alleges that Defendant BAC HOME
10 LOANS SERVICING, LP, a foreign limited partnership, is, and at all times relevant to this action was,
11 a subsidiary of BANK OF AMERICA, N.A. conducting business in Clark County, Nevada.

12 4. Plaintiff is informed and believes and therefore alleges that Defendant MACDONALD
13 HIGHLANDS REALTY, LLC, is, and at all times relevant to this action was, a Nevada limited
14 liability company conducting a real estate business in Clark County, Nevada.

15 5. Plaintiff is informed and believes and therefore alleges that Defendant MICHAEL
16 DOIRON, an individual, is and at all times relevant to this action was, a resident of Clark County,
17 Nevada and a duly licensed Real Estate Broker/Salesperson conducting business in Clark County,
18 Nevada.

19 6. Plaintiff is informed and believes and therefore alleges that Defendant SHAHIN
20 SHANE MALEK, an individual, is and at all times relevant to this action was, the owner of certain
21 real property in Clark County, Nevada generally described as 594 Lairmont Place, Henderson, Nevada
22 89012, Assessor Parcel Number 178-27-218-002, located in the MacDonald Highlands community.

23 7. Plaintiff is informed and believes and therefore alleges that Defendant PAUL
24 BYKOWSKI, is and at all times relevant to this action was, a resident of Clark County, Nevada and is
25 a member of The Foothills at MacDonald Ranch Master Association, LLC, a member of The Foothills
26 at MacDonald Ranch Master Association, LLC Design Review Committee and an agent of the
27 Declarant The Foothills Partners, LP.

28 ///

8. Plaintiff is informed and believes and therefore alleges that Defendant THE FOOTHILLS at MACDONALD RANCH MASTER ASSOCIATION, LLC is, and at all times relevant to this action was, a Nevada limited liability company, master homeowner's association in Clark County, Nevada.

9. Plaintiff is informed and believes and therefore alleges that Defendant THE FOOTHILLS PARTNERS, LP is, and at all times relevant to this action was, a Nevada limited partnership and the Declarant for THE FOOTHILLS at MACDONALD RANCH MASTER ASSOCIATION, LLC.

10. Plaintiff does not presently know the true names and/or capacities of the individuals, corporations, partnerships and entities sued and identified herein in fictitious names DOES, I through XX, inclusive and ROE BUSINESS ENTITY I through XX, inclusive. Plaintiff alleges said DOES and ROE BUSINESS ENTITIES, and each of them, are liable and legally responsible to Plaintiff under the claims for relief set forth below. Plaintiff requests leave of this Court to amend this Complaint with appropriate allegations when the true names of said Defendants are known to Plaintiff.

II.

GENERAL ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

11. Plaintiff repeats and realleges each and every allegation as contained above and incorporates them by reference as if fully set forth herein.

12. On or about November 2, 2011, BANK OF AMERICA, N.A. was the owner of certain residential real property in Clark County, Nevada, generally described as 590 Lairmont Place, Henderson, Nevada, 89012, and more particularly described as Assessor Parcel Number: 178-27-218-003 (hereinafter "SUBJECT PROPERTY").

13. The SUBJECT PROPERTY is a golf course lot situated at the ninth hole of the private 18-hole championship golf course of the Dragonridge Country Club within the prestigious MacDonald Highlands community.

14. On or about August 8, 2012, Defendant SHAHIN SHANE MALEK (“MALEK”) purchased certain residential real property in Clark County, Nevada, generally described as 594

1 Lairmont Place, Henderson, Nevada, 89012, and more particularly described as Assessor Parcel
2 Number: 178-27-218-002 (hereinafter “MALEK PROPERTY”).

3 15. The MALEK PROPERTY sits adjacent to the SUBJECT PROPERTY.

4 16. On or about October 30, 2012, DRFH Ventures, LLC was the owner of certain real
5 property in Clark County, Nevada, generally described as the Dragonridge golf course located in
6 Henderson, Nevada, 89012 situated in the MacDonald Highlands community and including, but not
7 limited to, a certain .34-acre portion of Assessor Parcel Number 178-28-520-001 generally described
8 as MacDonald Highlands Golf Hole #9 in the NW4 of Section 27, Township 22 South, Range 62 East,
9 M.D.M. in the MacDonald Ranch Planning Area and located northwest of MacDonald Ranch Drive
10 and Stephanie Street (hereinafter the “GOLF PARCEL”).

11 17. Situated on the GOLF PARCEL were certain easements.

12 18. On or about October 30, 2012, Paul Bykowski, on behalf of MacDonald Properties, Ltd.
13 and DRFH Ventures, LLC submitted a Vacation Application to the City of Henderson along with
14 supporting documentation requesting to vacate existing “blanket easements” of the GOLF PARCEL
15 (hereinafter the “VACATION APPLICATION”).

16 19. The VACATION APPLICATION was submitted in conjunction with associated
17 applications for Comprehensive Plan Amendment (CCPA-2012500313), Zone Change (CZCA-201
18 250031 4) and Tentative Map (CTMA-201 2500316) (collectively hereinafter “MACDONALD
19 APPLICATIONS”).

20 20. The MACDONALD APPLICATIONS sought to revise the land use designation
21 regarding the GOLF PARCEL from public/semipublic (PS) to very low density residential (VLDR).

22 21. The MACDONALD APPLICATIONS sought to revise the zoning designation
23 regarding the GOLF PARCEL from Public/Semi Public with Master Plan and Hillside Overlays (PS-
24 MP-H) to Low Density Residential with Master Plan and Hillside Overlays (RS-2-MP-H).

25 22. The MACDONALD APPLICATIONS sought to amend Ordinance No. 2869, the
26 zoning map, to reclassify certain real property within the city limits of the city, described as a portion
27 of section 27, township 22 south, range 62 east, M.D. & M., Clark County, Nevada, located within the
28 MacDonald Highlands Master Plan, off MacDonald Ranch Drive and Stephanie Street from PS-MP-H

(public/semipublic with master plan and hillside overlays) TO RS-2-MP-H (low-density residential with master plan and hillside overlays), and other matters relating thereto.

23. The MACDONALD APPLICATIONS sought a Resolution of the City Council of the City of Henderson, Nevada, to amend the land use policy plan of the City Of Henderson Comprehensive Plan for the purpose of changing the land use designation of that certain property within the city limits of the City of Henderson, Nevada, described as a parcel of land containing 0.34 acres, more or less, and further described as a portion of section 27, township 22 south, range 62 east, M.D.B. & M., Clark County, Nevada, located within the MacDonald Highlands Master Plan, off MacDonald Ranch Drive and Stephanie Street, in the MacDonald Ranch Planning Area, from PS (public/semipublic) to VLDR (very low-density residential).

24. The MACDONALD APPLICATIONS sought to amend the GOLF PARCEL allow an approximately 14,841 square foot common area of the GOLF PARCEL to be subsequently included and integrated into the MALEK PROPERTY (hereinafter "MALEK PROPERTY ADDITION").

25. The MACDONALD APPLICATIONS sought to remove the 0.34-acres (14,841 square feet) from Planning Area 3 (Golf Hole #9) and add it to Lot 2 of Planning Area 10.

26. The MACDONALD APPLICATIONS asserted that the amendment to the GOLF PARCEL area was "minor".

27. The MACDONALD APPLICATIONS asserted that the amendment to the GOLF PARCEL area would have "little or no impact on the adjacent properties".

28. The MACDONALD APPLICATIONS asserted that the amendment to the GOLF PARCEL area would not "conflict with any portion of the goals of the plan".

29. The MACDONALD APPLICATIONS asserted that the impact of the amendment to the GOLF PARCEL would "not adversely impact the general area or portion of the City as to traffic, public facilities, and environmentally sensitive areas or resources."

30. Upon information and belief, on or about November 5, 2012, notice of the public hearing regarding the VACATION APPLICATION was published.

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1 31. Upon information and belief, on or about November 5, 2012, notice of the public
2 hearing regarding the VACATION APPLICATION was mailed to all properties within the
3 MacDonald Highlands community.

4 32. Upon information and belief, on or about November 5, 2012, notice of the public
5 hearing regarding the VACATION APPLICATION was mailed to the owners of property adjacent to
6 the GOLF PARCEL.

7 33. MALEK received notices of the public hearing regarding the VACATION
8 APPLICATION.

9 34. BANK OF AMERICA received notices of the public hearing regarding the
10 VACATION APPLICATION.

11 35. On or about January, 2013, the MACDONALD APPLICATIONS were approved
12 subject to certain conditions.

13 36. The changes and amendments to the MALEK PROPERTY lot lines resulting from the
14 approval of the MACDONALD APPLICATIONS negatively impacted the value of the adjacent
15 SUBJECT PROPERTY or its use in an adverse manner.

16 37. On or about March 8, 2013, BANK OF AMERICA, as Seller, through its real estate
17 agent/broker Defendant MICHAEL DOIRON of Defendant MACDONALD HIGHLANDS REALTY,
18 LLC (hereinafter collectively "SELLER's AGENTS"), listed the SUBJECT PROPERTY for sale in
19 the Multiple Listing Service ("MLS").

20 38. SELLER's AGENTS marketed the SUBJECT PROPERTY as a "Tuscan-inspired
21 estate" sitting on the ninth hole of Dragonridge Country Club, a five bedroom two-story custom home,
22 on a golf course lot of .660 acres with golf and mountain views, more than 10,000 square feet of living
23 area, a six car garage with amenities including a home theatre, a library/office, gym, game room,
24 elevator, backyard patio with fireplace and resort-style pool and spa with infinity edge.

25 39. On or about March 13, 2013, PLAINTIFF, as Buyer, offered to purchase the SUBJECT
26 PROPERTY for the purchase price of \$2,160,000.00.

27 40. On or about, March 14, 2013, PLAINTIFF, as Buyer, executed Addendum No. 1 to the
28 Purchase Agreement whereby PLAINTIFF acknowledged and agreed to enter into a side agreement

1 with the Master Developer for an extension of the construction clock to complete requirements of the
2 exterior of the property

3 41. On or about March 19, 2013, PLAINTIFF, as Buyer, executed Addendum No. 2 to the
4 Purchase Agreement amending the purchase price to \$2,302,000.00, an increase of \$142,000.00 from
5 the original agreed upon price.

6 42. On or about March, 21, 2013, BANK OF AMERCIA, as Seller, executed Addendum
7 No. 1 to the Purchase Agreement.

8 43 On or about March, 21, 2013, BANK OF AMERCIA, as Seller, executed Addendum
9 No. 2 to the Purchase Agreement amending the purchase price to \$2,302,000.00, an increase of
10 \$142,000.00 from the original agreed upon price.

11 44. On or about March, 21, 2013, BANK OF AMERCIA, as Seller, agreed to sell the
12 SUBJECT PROPERTY to PLAINTIFF.

13 45. PLAINTIFF was represented in the purchase of the SUBJECT PROPERTY and the
14 related negotiations by licensed Real Estate Agent Siobahn McGill and licensed Real Estate Broker
15 Kathryn Bovard of Realty One Group.

16 46. BANK OF AMERICA was represented in its sale of the SUBJECT PROPERTY and
17 related negotiations by Defendant MICHAEL DOIRON, licensed Real Estate Agent and Broker with
18 MACDONALD HIGHLANDS REALTY, LLC.

19 47. Defendant MICHAEL DOIRON was BANK OF AMERICA's listing agent for the
20 SUBJECT PROPERTY.

21 48. On or about May 15, 2013, escrow closed and the title to the SUBJECT PROPERTY
22 transferred from BANK OF AMERICA to PLAINTIFF.

23 49. At no time did BANK OF AMERICA, as the SELLER, disclose to PLAINTIFF that the
24 adjacent MALEK PROPERTY lot lines were other than presented and had in fact been amended in
25 such a way as to negatively impact the value of the SUBJECT PROPERTY or its use in an adverse
26 manner.

27 50. At no time did MICHAEL DOIRON, Seller's representative, disclose to PLAINTIFF
28 that the adjacent MALEK PROPERTY lot lines were other than as presented and had been amended in

1 such a way as to negatively impact the value of the SUBJECT PROPERTY or its use in an adverse
2 manner.

3 51. MICHAEL DOIRON, Seller's representative, knew, or should have known, that the
4 adjacent MALEK PROPERTY lot lines were other than as presented to PLAINTIFF and had been
5 amended in such a way as to negatively impact the value of the SUBJECT PROPERTY or its use in an
6 adverse manner.

7 52. BANK OF AMERICA, as Seller, knew, or should have known, that the adjacent
8 MALEK PROPERTY lot lines were other than as presented to PLAINTIFF and had been amended in
9 such a way as to negatively impact the value of the SUBJECT PROPERTY or its use in an adverse
10 manner.

11 53. MICHAEL DOIRON failed to disclose to PLAINTIFF that the adjacent MALEK
12 PROPERTY lot lines had been amended in such a way as to negatively impact the value of the
13 SUBJECT PROPERTY or its use in an adverse manner.

14 54. BANK OF AMERICA failed to disclose to PLAINTIFF that the adjacent MALEK
15 PROPERTY lot lines had been amended in such a way as to negatively impact the value of the
16 SUBJECT PROPERTY or its use in an adverse manner.

17 55. Sometime subsequent to the May 15, 2013 transfer of title to PLAINTIFF, PLAINTIFF
18 became aware that the lot lines presented at the time of PLAINTIFF's negotiations and purchase of the
19 SUBJECT PROPERTY were not accurate and that in fact the lot lines of the MALEK PROPERTY, as
20 amended, negatively impact the value of the SUBJECT PROPERTY or its use in an adverse manner.

21 56. Upon information and belief, MALEK plans to begin construction on the MALEK
22 PROPERTY imminently.

23 57. While the transfer of title in and of itself negatively impacts PLAINTIFF, and likely
24 other residents in the area, should MALEK begin construction according to MALEK's plans, the
25 SUBJECT PROPERTY will be even more grossly impacted given the view at the SUBJECT
26 PROPERTY will be substantially altered.

27 58. All of the properties described in Plaintiff's Complaint are developed and/or
28 undeveloped lots in the MacDonald Highlands community (hereinafter "MacDonald Highlands").

1 59. MacDonald Highlands is set in a hillside area that has prime views of the Las Vegas
2 Valley, surrounding mountains and a golf course.

3 60. MacDonald Highlands, like a substantial number of other properties in Clark County,
4 Nevada, has placed certain written covenants (the Master Declaration of Covenants, Conditions and
5 Restrictions for The Foothills at MacDonald Ranch, hereinafter “Master Declaration”), on each of the
6 residential lots within the MacDonald Highlands development that are for the benefit of all of the
7 property owners in MacDonald Highlands.

8 61. The Master Declaration was intended to be covenants running with the land and burden
9 every residential property within the MacDonald Highlands’ development.

10 62. The Master Declaration was further intended to bind any assignees and/or successors in
11 interest who subsequently obtained any of the residential lots under those covenants.

12 63. Each property in MacDonald Highlands is bound by a restrictive covenant that limits
13 activity on any property next to the golf course or within one hundred feet of the boundary of the golf
14 course in order to protect the use and enjoyment of the golf course (the Deed Restriction Relating to
15 Golf Course Property, hereinafter “Golf Course Deed Restriction”).

16 64. The Master Declaration requires strict compliance with the architectural standards set
17 forth in Article 11 of the Master Declaration.

18 65. Section 11.1 of the Master Declaration requires that all construction activities consider
19 the “unique setting of the Properties in the hillside area.”

20 66. Applications for construction are reviewed and decided by the Design Review
21 Committee (“DRC”).

22 67. The members of the DRC are appointed by the Declarant.

23 68. The development guidelines and application and review procedures for all construction
24 activities within MacDonald Highlands are set forth in the Design Guidelines.

25 69. The Design Guidelines are adopted by the DRC.

26 70. Each property in MacDonald Highlands is also bound by a restrictive covenant that all
27 plans and specifications submitted to the DRC for proposed construction on a property be in
28 compliance with the Design Guidelines in order to preserve the unique views of each property and

1 neighboring properties (Deed Restrictions Applicable to Construction of Residence, hereinafter
2 “Construction Deed Restriction”).

3 71. MALEK purchased the GOLF PARCEL subject to the Golf Course Deed Restriction,
4 the Construction Deed Restriction and the other easements, covenants and conditions that burden all of
5 the properties within the MacDonald Highlands community.

6 72. MALEK’s construction plans for the MALEK PROPERTY do not comply with the
7 Golf Course Deed Restriction and the Construction Deed Restriction.

8 73. All Defendants, and each of them, are, in some manner, legally responsible and liable to
9 Plaintiff for the harm and injury to Plaintiff and the damages incurred by Plaintiff as the result of said
10 harm and injury which damages are in an amount in excess of Ten Thousand and No/100 Dollars
11 (\$10,000.00), to be proven at time of trial.

12 74. Plaintiff has been required to engage the services of an attorney to prosecute this action
13 and Plaintiff is entitled to costs and reasonable attorney’s fees incurred therefore.

14
15 **FIRST CLAIM FOR RELIEF**

16 **(Breach of Contract against BANK OF AMERICA)**

17
18 75. Plaintiff repeats and realleges each and every allegation as contained above and
19 incorporates them by reference as if fully set forth herein.

20 76. Plaintiff entered into the Purchase Agreement with Defendant BANK OF AMERICA.

21 77. BANK OF AMERICA made express representations and warranties in the Purchase
22 Agreement.

23 78. BANK OF AMERICA materially breached the Contract as detailed in paragraphs 1
24 through 73 herein.

25 79. Plaintiff incurred significant damages in an amount which cannot easily be ascertained,
26 but without question in excess of ten thousand dollars, as a direct result from the breach.

27 80. Plaintiff has been required to engage the services of an attorney to prosecute this action
28 and Plaintiff is entitled to costs and reasonable attorney’s fees incurred therefore.

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81. Plaintiff repeats and realleges each and every allegation as contained above and incorporates them by reference as if fully set forth herein.

82. Every agreement imposes, as an implied covenant, an obligation of good faith and fair dealing in its performance or enforcement.

83. Plaintiff and Defendant BANK OF AMERICA were parties to a valid and enforceable contract.

84. Defendant BANK OF AMERICA owed a duty of good faith and fair dealing under the Contract.

85. BANK OF AMERICA breached the implied covenant of good faith and fair dealing.

86. Plaintiff was justified in their expectations under the Contract and, as a result of the breach, those expectations were denied.

87. As a direct and proximate result of the breach, Plaintiff has been damaged in an amount in excess of ten thousand dollars that shall be proven at trial.

88. Plaintiff has been required to engage the services of an attorney to prosecute this action and Plaintiff is entitled to costs and reasonable attorney's fees incurred therefore.

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89. Plaintiff repeats and realleges each and every allegation as contained above and incorporates them by reference as if fully set forth herein.

90. As a result of Defendant BANK OF AMERICA, BAC HOME LOANS SERVICING, LP, MACDONALD HIGHLANDS REALTY, LLC, and MICHAEL DOIRON actions, as fully alleged herein, each has been unjustly enriched.

91. As a result of Defendants, BANK OF AMERICA, BAC HOME LOANS SERVICING, LP, MACDONALD HIGHLANDS REALTY, LLC, and MICHAEL DOIRON and actions, Plaintiff has been required to engage the services of an attorney to prosecute this action and Plaintiff is entitled to costs and reasonable attorney's fees incurred therefore.

FOURTH CLAIM FOR RELIEF

**(Fraudulent or Intentional Misrepresentation – BANK OF AMERICA, BAC HOME LOANS
SERVICING, LP, MACDONALD HIGHLANDS REALTY, LLC, and MICHAEL DOIRON)**

92. Plaintiff repeats and realleges each and every allegation as contained above and incorporates them by reference as if fully set forth herein.

93. A person has committed common law fraud if that person has made a false representation or willful omission with respect to a material fact with knowledge of its falsity and with intent to deceive, and the person acts in reliance on the false representation.

94. Defendants, BANK OF AMERICA, BAC HOME LOANS SERVICING, LP, MACDONALD HIGHLANDS REALTY, LLC, and MICHAEL DOIRON knowingly made false representations and/or willful omissions to Plaintiff over the course of their involvement with Plaintiff, including but not limited to, failing to disclose to PLAINTIFF that the adjacent MALEK PROPERTY lot lines were other than presented and had in fact been amended in such a way as to negatively impact the value of the SUBJECT PROPERTY or its use in an adverse manner.

95. Defendants, BANK OF AMERICA, BAC HOME LOANS SERVICING, LP, MACDONALD HIGHLANDS REALTY, LLC, and MICHAEL DOIRON willful omitted significant information in order to deceive Plaintiff and secure the Purchase and Sale of the Subject Property.

96. Plaintiff relied on said representations and as a direct and proximate result was damaged in excess of Ten Thousand Dollars (\$10,000.00), in an amount to be determined according to proof at the time of trial.

97. As a result of Defendants, BANK OF AMERICA, BAC HOME LOANS SERVICING, LP, MACDONALD HIGHLANDS REALTY, LLC, a and MICHAEL DOIRON's actions, Plaintiff

1 has been required to engage the services of an attorney to prosecute this action and Plaintiff is entitled
2 to costs and reasonable attorney's fees incurred therefore.

3 **FIFTH CLAIM FOR RELIEF**

4 **(Negligent Misrepresentation – BANK OF AMERICA, BAC HOME LOANS SERVICING, LP,**
5 **MACDONALD HIGHLANDS REALTY, LLC, and MICHAEL DOIRON)**

6
7 98. Plaintiff repeats and realleges each and every allegation as contained above and
8 incorporates them by reference as if fully set forth herein.

9 99. Defendants, BANK OF AMERICA, BAC HOME LOANS SERVICING, LP,
10 MACDONALD HIGHLANDS REALTY, LLC, and MICHAEL DOIRON made false representations
11 and/or willful omissions to Plaintiff over the course of their involvement with Plaintiff, including but
12 not limited to, failing to disclose to PLAINTIFF that the adjacent MALEK PROPERTY lot lines were
13 other than presented and had in fact been amended in such a way as to negatively impact the value of
14 the SUBJECT PROPERTY or its use in an adverse manner.

15 100. Plaintiff justifiably relied upon the representations of BANK OF AMERICA, BAC
16 HOME LOANS SERVICING, LP, MACDONALD HIGHLANDS REALTY, LLC, and MICHAEL
17 DOIRON.

18 101. As a result, Defendants, BANK OF AMERICA, BAC HOME LOANS SERVICING,
19 LP, MACDONALD HIGHLANDS REALTY, LLC, and MICHAEL DOIRON actions, Plaintiff has
20 been required to engage the services of an attorney to prosecute this action and Plaintiff is entitled to
21 costs and reasonable attorney's fees incurred therefore.

22
23 **SIXTH CLAIM FOR RELIEF**

24 **(Real Estate Brokers Violations of NRS 645 Against**

25 **MACDONALD HIGHLANDS REALTY, LLC, and MICHAEL DOIRON)**

26
27 102. Plaintiff herein re-alleges each and every allegation as contained above and
28 incorporates them by reference as if fully set forth herein.

103. Defendants MACDONALD HIGHLANDS REALTY, LLC, and MICHAEL DOIRON owed duties and obligations to Plaintiff pursuant to NRS Chapter 645, specifically, but not limited to, NRS 645.252.

104. Defendants MACDONALD HIGHLANDS REALTY, LLC, and MICHAEL DOIRON violated the duties and obligations as defined in NRS 645.252, and additional provisions of NRS 645, by, including, but not limited to failing to disclose to PLAINTIFF that the adjacent MALEK PROPERTY lot lines were other than presented and had in fact been amended in such a way as to negatively impact the value of the SUBJECT PROPERTY or its use in an adverse manner.

105. As a result of Defendants, MACDONALD HIGHLANDS REALTY, LLC, and MICHAEL DOIRON actions, Plaintiff has been required to engage the services of an attorney to prosecute this action and Plaintiff is entitled to costs and reasonable attorney's fees incurred therefore, as well as damages pursuant to NRS 645.257, and any other damages appropriate under NRS Chapter 645.

SEVENTH CLAIM FOR RELIEF

**(Easement - MACDONALD HIGHLANDS REALTY, LLC, MICHAEL DOIRON, and
MALEK)**

106. Plaintiff herein re-alleges each and every allegation as contained above and incorporates them by reference as if fully set forth herein.

107. Defendants' MACDONALD HIGHLANDS REALTY, LLC, and MICHAEL DOIRON acted in contravention of Plaintiffs' easement in the common area surrounding the golf course.

108. Defendants' are estopped to deny Plaintiff's grant of the easement by express and implied agreement.

109. Plaintiff is entitled to an easement in an extent to be determined by the Court; said easement may negatively impact the rights of Defendant MALEK.

110. As a result, Defendants, BANK OF AMERICA, BAC HOME LOANS SERVICING, LP, MACDONALD HIGHLANDS REALTY, LLC, and MICHAEL DOIRON actions, Plaintiff has

1 been required to engage the services of an attorney to prosecute this action and Plaintiff is entitled to
2 costs and reasonable attorney's fees incurred therefore.

3
4 **EIGHTH CLAIM FOR RELIEF**

5 **(Declaratory Relief – ALL DEFENDANTS)**

6
7 111. Plaintiff herein re-alleges each and every allegation as contained above and
8 incorporates them by reference as if fully set forth herein.

9 112. Plaintiff and Defendants, including MALEK, have adverse interests and a judiciable
10 controversy exists between them.

11 113. Plaintiff has a legally protectable interest in this controversy as fully alleged herein.

12 114. The controversy before this Court is ripe for judicial determination as MALEK intends
13 to begin construction on the MALEK PROPERTY, which will permanently impact the value of the
14 SUBJECT PROPERTY as fully alleged herein.

15 115. Pursuant to Nevada's Uniform Declaratory Judgment Act, NRS 30.010 to NRS 30.160,
16 inclusive, Plaintiff seeks a declaration from this Court regarding the respective property rights.

17 116. Plaintiff has been forced to incur attorneys' fees and costs in the prosecution of this
18 action and therefore, is entitled to recover an award of reasonable attorneys' fees and costs of suit
19 incurred herein.

20 **NINTH CLAIM FOR RELIEF**

21 **(Mandatory Injunction - MALEK)**

22
23 117. Plaintiff repeats and realleges each and every allegation as contained above and
24 Incorporates them by reference as if fully set forth herein.

25 118. Violation of the Golf Course Deed Restriction and the Construction Deed
26 Restriction has, and unless restrained by this honorable Court, will continue to cause irreparable
27 injury to Plaintiff, for which there is no adequate remedy at law.

28 119. Plaintiff is entitled to a mandatory injunction, ordering MALEK to comply with the

1 Golf Course Deed Restriction and the Construction Deed Restriction.

2
3 **TENTH CLAIM FOR RELIEF**

4 **(Implied Restrictive Covenant - MALEK)**

5
6 120. Plaintiff repeats and realleges each and every allegation as contained above and
7 Incorporates them by reference as if fully set forth herein.

8 121. Before Plaintiff offered to buy the SUBJECT PROPERTY, the GOLF PARCEL was
9 being used as part of the 18-hole golf course.

10 122. When Plaintiff offered to buy the SUBJECT PROPERTY, the GOLF PARCEL was
11 being used as part of the 18-hole golf course.

12 123. Since Plaintiff's purchase of the SUBJECT PROPERTY, the GOLF PARCEL has
13 continued to be used as part of the 18-hole golf course.

14 124. Thus, when Plaintiff offered to and did in fact buy the SUBJECT PROPERTY, the
15 actual condition of the GOLF PARCEL was that it was being used as part of the 18-hole golf course.

16 125. By offering to and ultimately buying the SUBJECT PROPERTY, Plaintiff accepted the
17 actual condition of the GOLF PARCEL.

18 126. An implied restrictive covenant running with the land requires the GOLF PARCEL to
19 be used as part of the 18-hole golf course and for no other purpose.

20 127. This implied restrictive covenant existed when MALEK purchased the GOLF
21 PARCEL.

22 128. The implied restrictive covenant binds MALEK.

23 129. MALEK is estopped to deny the implied restrictive covenant's existence.

24 130. MALEK's use of the GOLF PARCEL is or will be in violation of the implied restrictive
25 covenant.

26 131. As a result of MALEK's actions, Plaintiff has been required to retain the services of
27 Howard Kim & Associates to prosecute this action, and therefore is entitled to recover an award of
28 reasonable attorney fees and costs of suit incurred herein.

1 **ELEVENTH CLAIM FOR RELIEF**

2 **(Mandatory Injunction - The Foothills at MacDonald Ranch Master Association, The Foothills**
3 **Partners, LP and Paul Bykowski in his capacity as member of the The Foothills at MacDonald**
4 **Ranch Master Association, member of the The Foothills at MacDonald Ranch Master**
5 **Association Design Review Committee and agent for The Foothills Partners, LP)**
6

7 132. Plaintiff repeats and realleges each and every allegation as contained above and
8 Incorporates them by reference as if fully set forth herein.

9 133. MALEK's construction plans for the MALEK PROPERTY were approved by THE
10 FOOTHILLS at MACDONALD RANCH MASTER ASSOCIATION'S DRC on or about March 28,
11 2014.

12 134. The DRC approval of MALEK's construction plans violates the Design Guidelines
13 because the MALEK PROPERTY will block Plaintiff's view.

14 135. The violation of the Design Guidelines will cause irreparable injury to Plaintiff, for
15 which there is no adequate remedy at law.

16 136. Plaintiff is entitled to a mandatory injunction, ordering The Foothills at MacDonald
17 Ranch Master Association, The Foothills Partners, LP and Paul Bykowski in his capacity as member
18 of the The Foothills at MacDonald Ranch Master Association, member of the The Foothills at
19 MacDonald Ranch Master Association Design Review Committee and agent for The Foothills
20 Partners, LP to comply with the Design Guidelines and disapprove MALEK's construction plans.
21

22 **PRAYER FOR RELIEF**

23 WHEREFORE, Plaintiff prays for judgment against Defendants, and each of them, as follows:

- 24 a) For judgment against Defendants, and each of them, an amount in excess of \$10,000.00,
25 which amount shall be proven at trial;
- 26 b) For judgment against Defendants, and each of them, for an award of pre-judgment and
27 post-judgment interest on all amounts due and owing to Plaintiff;
- 28 c) For judgment against Defendants, and each of them, for attorney's fees and costs; and

- 1 d) For Declaratory Judgment;
2 e) For Injunctive Relief; and
3 f) For such other further relief as deemed appropriate by this Court.

4 DATED this 2nd day of January, 2015.

5 Respectfully submitted by:
6 HOWARD KIM & ASSOCIATES

7 /s/ Melissa Barishman
8 Howard C. Kim, Esq.
9 Nevada Bar No. 10386
10 Diana S. Cline, Esq.
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20 *Attorneys for Plaintiff,*
21 *The Fredric and Barbara Rosenberg Living Trust*
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of January, 2015, pursuant to NRCP 5(b), I served via the Eighth Judicial District Court electronic filing system a true and correct copy of the foregoing **AMENDED COMPLAINT**, to the following parties:

Akerman

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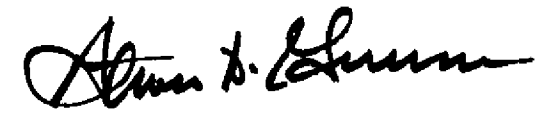
/s/ Andrew M. David

An employee of Howard Kim & Associates

EXHIBIT 2

1 Preston P. Rezaee, Esq.
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2 Jay DeVoy, Esq., of counsel
Nevada Bar No. 11950
3 Sarah Chavez, Esq., of counsel
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6 Telephone: (702) 222-3476
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7 *Attorneys for Defendant / Counterclaimant,*
SHAHIN SHANE MALEK

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CLERK OF THE COURT

8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

10 THE FREDERIC AND BARBARA
11 ROSENBERG LIVING TRUST,

12 Plaintiff,

13 vs.

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

21 Defendants.
22
23

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

**[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 590
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 590
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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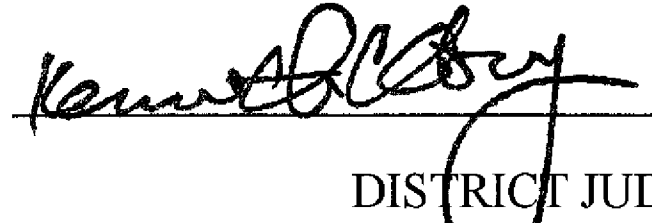
25 ..

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.

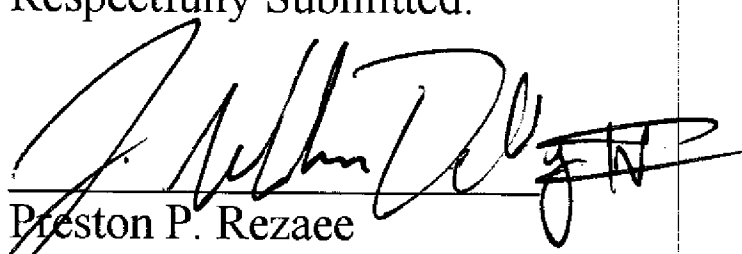
1
2 **IT IS SO ORDERED**

3
4 Dated: Aug 11, 2015

5
6 
7 DISTRICT JUDGE

8 Respectfully Submitted:

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Servicing, LP.

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**


5
6 Dated: _____, 2015

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DISTRICT JUDGE

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1
2 **IT IS SO ORDERED**

3
4 Dated: _____, 2015

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DISTRICT JUDGE

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CERTIFICATE OF SERVICE

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2 **IT IS SO ORDERED**

3
4 Dated: _____, 2015

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DISTRICT JUDGE

Respectfully Submitted:

Approved in content and form by:

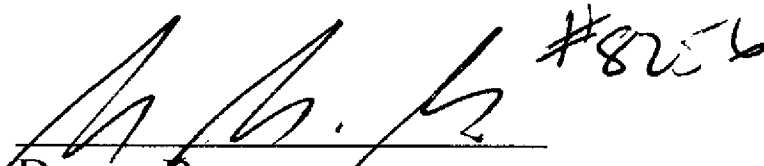
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CERTIFICATE OF SERVICE

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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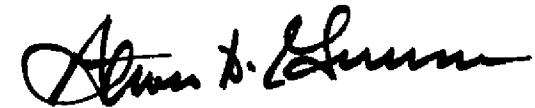
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24
25 /s/ Jacqueline Martinez
Employee of The Firm, P.C.

EXHIBIT 3



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Attorneys for Defendant/Counterclaimant
SHAHIN SHANE MALEK

**EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

THE FREDERIC 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; and ROE
BUSINESS ENTITY I through XX, inclusive,

Defendants.

SHAHIN SHANE MALEK,

Counterclaimant,

vs.

THE FREDERIC AND BARBARA
ROSENBERG LIVING TRUST,

Counterdefendant.

) CASE NO.: A-13-689113-C

) DEPT NO.: I

) **STIPULATION AND ORDER FOR
DISMISSAL OF COUNTERCLAIM
WITHOUT PREJUDICE**

) **PURSUANT TO NEVADA RULE OF
CIVIL PROCEDURE 41(a)(1)**

1 **STIPULATION AND ORDER FOR DISMISSAL OF COUNTERCLAIM WITHOUT**
2 **PREJUDICE PURSUANT TO NEVADA RULE OF CIVIL PROCEDURE 41(a)(1)**

3 Counterclaimant SHAHIN SHANE MALEK ("Malek"), and counterclaim defendant
4 THE FREDRIC AND BARBARA ROSENBERG LIVING TRUST (the "Trust"), through their
5 undersigned counsel of record, stipulate and agree pursuant to Nevada Rule of Civil Procedure
6 41(a)(1) and (c), that Malek's counterclaim against the Trust is voluntarily dismissed **WITHOUT**
7 **PREJUDICE**, with both parties to bear their respective attorneys' fees and costs. The parties
8 hereto further agree that in the event any appeal of the Trust's underlying claims against Malek
9 are remanded by the Nevada Court of Appeals or Nevada Supreme Court for further proceedings
10 before this Court, Malek shall be entitled to re-file and revive the instantly dismissed counterclaim
11 without payment of any costs to the Trust under Rule 41(d), and that the statute of limitations and
12 five-year time limitation for Malek's counterclaim be tolled during the pendency of any appeal of
13 the Trust's claims against Malek in this case before the Nevada Court of Appeals or Nevada
14 Supreme Court under Rule 41(e), so that Malek may reinstitute or revive his counterclaim within
15 180 days of this Court obtaining jurisdiction upon any remand of this case, or otherwise re-file
16 the claim dismissed by this stipulation.

17 Dated May ____, 2016

17 Dated May 10th, 2016

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27 Defendant,
28 *The Fredric and Barbara Living Trust*

26 **ORDER**


27 In light of the foregoing stipulation, it is **ORDERED** that Malek's counterclaim against
28 the Trust is **DISMISSED WITHOUT PREJUDICE**, with each party to bear its own attorney's

1 **STIPULATION AND ORDER FOR DISMISSAL OF COUNTERCLAIM WITHOUT**
2 **PREJUDICE PURSUANT TO NEVADA RULE OF CIVIL PROCEDURE 41(a)(1)**

3 Counterclaimant SHAHIN SHANE MALEK ("Malek"), and counterclaim defendant
4 THE FREDRIC AND BARBARA ROSENBERG LIVING TRUST (the "Trust"), through their
5 undersigned counsel of record, stipulate and agree pursuant to Nevada Rule of Civil Procedure
6 41(a)(1) and (c), that Malek's counterclaim against the Trust is voluntarily dismissed **WITHOUT**
7 **PREJUDICE**, with both parties to bear their respective attorneys' fees and costs. The parties
8 hereto further agree that in the event any appeal of the Trust's underlying claims against Malek
9 are remanded by the Nevada Court of Appeals or Nevada Supreme Court for further proceedings
10 before this Court, Malek shall be entitled to re-file and revive the instantly dismissed counterclaim
11 without payment of any costs to the Trust under Rule 41(d), and that the statute of limitations and
12 five-year time limitation for Malek's counterclaim be tolled during the pendency of any appeal of
13 the Trust's claims against Malek in this case before the Nevada Court of Appeals or Nevada
14 Supreme Court under Rule 41(e), so that Malek may reinstitute or revive his counterclaim within
15 180 days of this Court obtaining jurisdiction upon any remand of this case, or otherwise re-file
16 the claim dismissed by this stipulation.

17 Dated May 6, 2016

17 Dated May , 2016

18 
19 Preston P. Rezaee

20 Nevada Bar No. 10729

21 Jay DeVoy, of counsel

22 Nevada Bar No. 11950

23 THE FIRM, P.C.

24 200 E. Charleston Blvd.

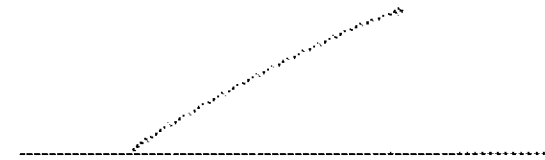
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 Attorneys for Plaintiff/Counterclaim
 Defendant,

The Fredric and Barbara Living Trust

26 **ORDER**

27 In light of the foregoing stipulation, it is **ORDERED** that Malek's counterclaim against
28 the Trust is **DISMISSED WITHOUT PREJUDICE**, with each party to bear its own attorney's

1 fees and costs. This dismissal without prejudice is subject to Malek's right to revive or re-file his
2 counterclaim, including upon any remand of the Trust's underlying claims against Malek, without
3 any payment of costs to the Trust normally allowable under Rule 41(d); and, pursuant to Rule
4 41(e), the tolling of the statute of limitations and five-year rule applicable to Malek's counterclaim
5 during the pendency of any appeal of the Trust's claims against Malek, upon which this Court
6 previously granted summary judgment to Malek. In the event the Nevada Court of Appeals or
7 Nevada Supreme Court remands any of the Trust's claims against Malek in this action to this
8 Court, Malek may revive or re-file his Counterclaim within 180 days of this Court obtaining
9 jurisdiction over the remanded proceedings, with the statute of limitations and five-year rule for
10 such counterclaim tolled during that time.

11 With all claims being resolved, the trial deadlines in this action, including the pretrial
12 conference and trial date for Malek's counterclaim, are hereby **VACATED**.

13 IT IS SO ORDERED.

14
15 Dated: May 13, 2016.

16
17 
18 _____
19 DISTRICT COURT JUDGE

20 Submitted by:

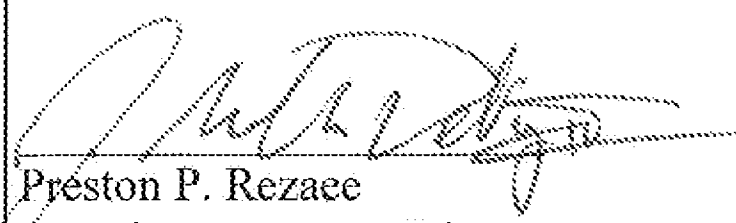
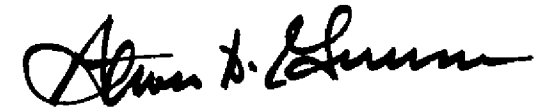
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A Nevada Limited Partnership

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.

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 CLOSES.**

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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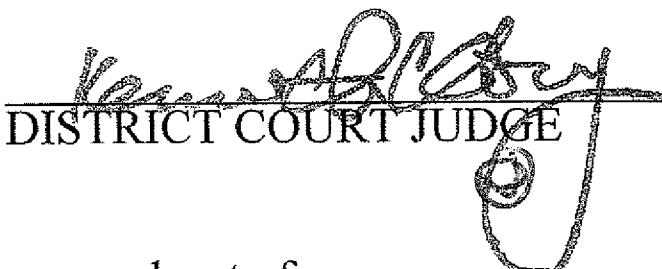
III.

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.

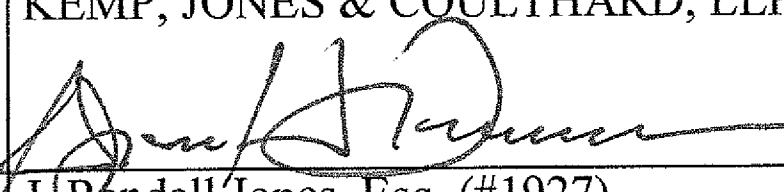
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff take nothing by way of its January 12, 2015 Amended Complaint against Moving Defendants.

DATED this 30th day of July 2015.
11th


DISTRICT COURT JUDGE

Respectfully submitted by:
KEMP, JONES & COULTHARD, LLP


Approved as to form:
HOWARD KIM & ASSOCIATES

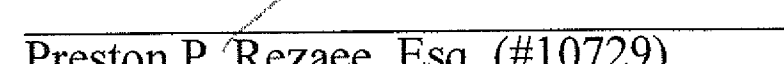

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III.

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

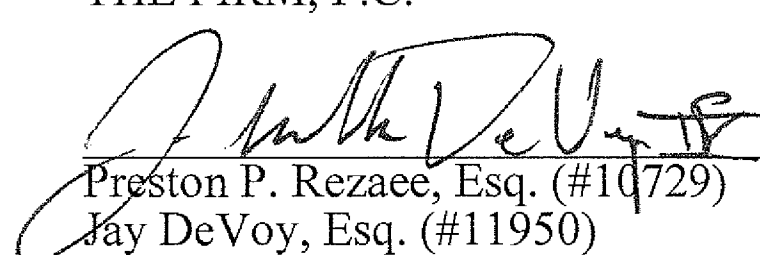
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IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff take nothing by way of its January 12, 2015 Amended Complaint against Moving Defendants.

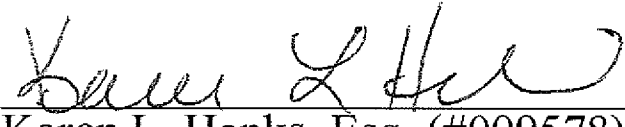
DATED this ____ day of July, 2015.

DISTRICT COURT JUDGE

Respectfully submitted by:
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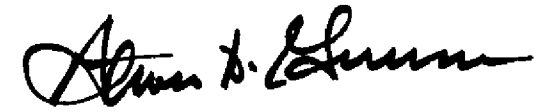
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EXHIBIT 5



CLERK OF THE COURT

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9 *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 ///

22 ///

23 ///

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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 & COULTHARD, 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*
17 *MacDonald Highlands Realty, LLC,*
18 *Michael Doiron, and FHP Ventures,*
19 *A Nevada Limited Partnership*

20 *Approved as to form and content:*

21 HOWARD KIM & ASSOCIATES

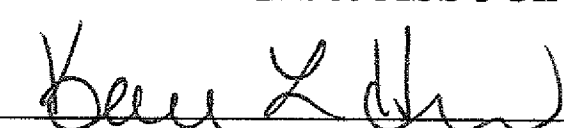
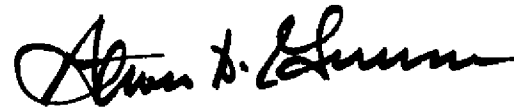
22 
23 Howard Kim, Esq. (#10386)
24 Karen L. Hanks (#9578)
25 1055 Whitney Ranch Drive, Suite 110
26 Henderson, Nevada 89014
27 *Attorneys for Plaintiff*

EXHIBIT 6



CLERK OF THE COURT

1 J. RANDALL JONES, ESQ. (#1927)
r.jones@kempjones.com
2 SPENCER H. GUNNERSON, ESQ. (#8810)
s.gunnerson@kempjones.com
3 MATTHEW S. CARTER, ESQ. (#9524)
m.carter@kempjones.com
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.

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

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

1 attached hereto.

2 DATED this 10th day of November, 2015.

4 KEMP, JONES & COULTHARD, LLP

5 /s/ Matthew S. Carter

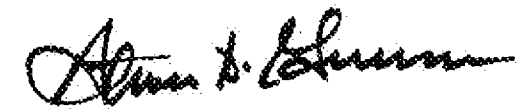
6 J. Randall Jones, Esq. (#1927)
7 Spencer H. Gunnerson, Esq. (#8810)
8 Matthew S. Carter, Esq. (#9524)
9 3800 Howard Hughes Parkway, 17th Floor
10 Las Vegas, Nevada 89169
11 Attorneys for Defendants
12 MacDonalld Highlands Realty, LLC,
13 Michael Doiron and FHP Ventures,
14 A Nevada Limited Partnership

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 GRANTING DEFENDANTS' MOTION FOR**
18 **CERTIFICATION PURSUANT TO NRCP 54(b)** to all parties on the e-service list.

20 /s/ Pamela Montgomery

21 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)
s.gunnerson@kempjones.com
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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,

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

13 Plaintiffs,

14 v.

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

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

24 Defendants.

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

Henderson, Nevada 89014

Attorneys for Plaintiff

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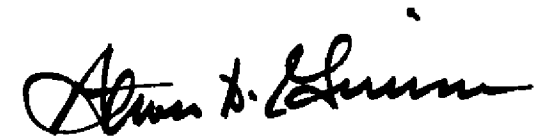
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EXHIBIT 7



CLERK OF THE COURT

1 RTRAN

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DISTRICT COURT

5

CLARK COUNTY, NEVADA

6

7

FREDERIC AND BARBARA)

8

ROSENBERG LIVING TRUST,)

9

Plaintiff,)

CASE NO. A689113

10

vs.)

DEPT. NO. 1

11

BANK OF AMERICA, ET AL.,)

12

Defendants.)

13

14

15

BEFORE THE HONORABLE KENNETH C. CORY, DISTRICT JUDGE

16

TUESDAY, DECEMBER 1, 2015 AT 10:37 A.M.

17

RECORDER'S TRANSCRIPT RE:

18

DEFENDANT SHAHIN MALEK'S MOTION FOR ATTORNEY FEES AND
COSTS

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Recorded by: LISA A. LIZOTTE, COURT RECORDER

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APPEARANCES:

FOR THE PLAINTIFF:	NO ONE PRESENT
FOR THE DEFENDANTS FHP VENTURES, MICHAEL DOIRON AND MacDONALD HIGHLANDS REALTY:	NO ONE PRESENT
FOR THE DEFENDANT BANK OF AMERICA:	NO ONE PRESENT
FOR THE DEFENDANT MALEK:	J. MALCOLM DeVOY, ESQ.

1 (TUESDAY, DECEMBER 1, 2015 AT 10:37 A.M.)

2 THE CLERK: Page 3 and 4, Frederic and Barbara Rosenberg
3 Living Trust versus Bank of America.

4 MR. DeVOY: Good morning. Jay DeVoy for Defendant and Movant
5 Shane Malek.

6 THE COURT: Good morning.

7 MR. DeVOY: I am not sure why I'm the only person here. I spoke
8 with Karen Hanks about this hearing prior to Thanksgiving. I left her a voicemail
9 yesterday afternoon. I have not heard from her by email. I checked with the
10 office. I have not heard anything from Howard Kim's office. This is now the
11 second time that we've come here for a hearing on this motion, and –

12 THE COURT: Is it the second?

13 MR. DeVOY: Yes. The first one was on October 22nd. We dealt
14 with the motion to retax costs because at that time the opposition to our motion
15 for attorney's fees and costs hadn't been filed, it was not filed until the next
16 morning and then that reset the calendar. We had a colloquy. There were two
17 attorneys here from – the Plaintiff's counsel, Ms. Hanks and Ms. Gilbert. We
18 agreed upon the December 1st date. I didn't think there were any issues with it.
19 It was on the Court's calendar. We had communications about it.

20 I'm frankly at a loss as to why Mr. Malek has now had to
21 prepare for this hearing twice, and presumably –

22 THE COURT: I agree with you.

23 MR. DeVOY: I assume you'd like to table it again but I'd like to go
24 forward. I think – I made the argument under EDCR 2.20 last time that they
25 consented by not filing an opposition. They have now opposed it. I've replied.

1 The hearing that was noticed and everyone agreed upon is now here. I ask the
2 Court consider just the Plaintiff to have consented to the motion and if they want
3 to fight it later that's fine. If there's any other questions the Court has, my
4 position –

5 THE COURT: Okay. Well, let me ask you this. Inasmuch as they
6 did file a response –

7 MR. DeVOY: Yes.

8 THE COURT: -- should I not consider that as well?

9 MR. DeVOY: It's untimely. It's within your jurisdiction. I don't think
10 the response changes anything. They said a whole bunch of cases that I think
11 are inept because this case and our motion for fees and costs comes under the
12 premise that it was without reasonable grounds to be brought or maintained, and
13 there's about 20 cases that are cited for the proposition that Nevada recognizes
14 written covenants, they recognize easements, but the reality is that this case is
15 premised on the fact that the Trust brought forward no evidence of anything other
16 than the fact they sought an implied restrictive covenant or negative easement
17 based on view, light and privacy, and in this Court's order that's the only thing
18 that was recognized that the Trust ever articulated its reasons for stopping Shane
19 Malek from building his house, view, light and privacy.

20 That has been disallowed by Nevada law expressly since 1965
21 in *Boyd versus McDonald* and it was reaffirmed in 1969 in *Probasco versus City*
22 *of Reno*, and this case's determination turned almost entirely on those two cases.
23 This isn't something that was new, this isn't something that was in question, and
24 by the close of discovery we knew exactly what the Trust was seeking and its
25 reasons for seeking an easement – or the implied easement, to keep Shane

1 Malek from building his house, and at the last hearing the Court found that the
2 legal position of the Trust was so without legal merit based on the circumstance
3 of the case and the people involved and the fact that the Trustee had extensive
4 real estate experience and had access to very sophisticated counsel and it
5 denied an offer for \$25,000 from the McDonald Highlands' entities, and the Court
6 found that to be objectively unreasonable.

7 So the question is how does that relate to whether it's without
8 reasonable grounds to bring these claims, and I think at this point we've reached
9 that point, and there's other language in NRS 18.010(2)(b) that allows for the
10 imposition of fees in a case like this because the action is maintained to harass
11 the prevailing party. We've now had two hearings on this, and it goes without
12 saying that the entire litigation has been conducted in a way to try to outspend
13 Shane Malek.

14 The Trust opposition makes the argument that they came to
15 court, they made an argument and they lost and they shouldn't have to pay fees
16 because of it and I don't think that holds up because the law is well known, they
17 had knowledge of what was happening, as Ms. Hanks informed the Court in her
18 motion to retax costs the parties went to mediation. There was time for the Trust
19 to discontinue this action anytime it wanted.

20 Part of NRS 18.010(2)(b) considers not only if the action was
21 brought without reasonable grounds but maintained as well, and this action was
22 maintained right until the time that the Court decided as a matter of law that the
23 Trust had no position and no legal claims against Shane Malek. It would be
24 more tenable if the Trust made its argument that it took a run at it and it lost if it
25 went to a jury trial, it was left to six people to decide what the law was, but it was

1 a matter of law that they lost, and the more apt analogy is that they went to a
2 casino and they gambled but they levered up on the attorneys' fees and costs
3 incurred by everybody else and now they don't want to pay it despite taking out
4 that debt to everybody else.

5 So to the extent that NRS 18.010(2)(b) seems to act like a
6 means of tort reform to disincentivize people from bringing actions for the sole
7 purpose of outspending the adversary, and especially in this case outspending a
8 neighbor to try to control their construction plans, I think this is a very accurate
9 use for it. This is a case that went on for more than 2 years. We're now here
10 after the 2 year mark. It was filed in September of 2013. We're at the second
11 hearing of a motion that nobody has made a serious effort to oppose, and I think
12 it should be granted at this point.

13 And, moreover, the case law in Nevada says that we have to
14 look at the specific circumstances of each case to determine if it was without
15 reasonable grounds. To go back to the circumstances that I think the counsel for
16 McDonald Highlands very articulately stated last time, the circumstances were
17 there that they should have known about this. The Trust had massive resources.
18 They hired sophisticated counsel. This wasn't them proceeding pro se or with a
19 new lawyer stumbling throughout the woods when they had no experience with
20 this.

21 They hired the counsel that specifically won the *SFR* case and
22 had experience with real estate litigation. They knew or should have known that
23 this was the likely outcome, and they proceeded anyway and made Shane Malek
24 incur more than \$120,000 in attorney's fees and costs. To the extent they have
25 any arguments about it they should have been made timely, and in the case of

1 the hearing today that we all agreed upon and somehow I managed to
2 remember, you know, they should have shown up to argue that, and now here
3 we are and they won't even dignify the expense that they imposed on him and
4 that he continues to incur as we have successive hearings about this, we have
5 reply briefing and continue to impose these costs that we should have resolved
6 with finality at least a month ago, so that is the sum of my position at this point.

7 THE COURT: All right. How much time did you rack up sitting
8 around last time and this time?

9 MR. DeVOY: This time I got here around 9:00, it is 10:44, so about
10 1.8, and then last time I don't recall off the top of my head. I can look back to my
11 billing records and figure that out, but including preparation time for both last time
12 and this hearing and then the reply brief in between, it depends on how far the
13 Court wants to go, I would say it could be as much as five hours, maybe a little
14 bit more.

15 THE COURT: Well, I'm thinking more of the time you spent sitting
16 around waiting because counsel didn't show up. Didn't we – didn't we wait a
17 while before that came up?

18 MR. DeVOY: For here today?

19 THE COURT: No. For the last time.

20 MR. DeVOY: I don't remember last time. I believe that we were all
21 on time last time. We were close to the top of the calendar. I don't believe it was
22 that excessive. I don't know off the top of my head. I could find out for the Court.

23 THE COURT: All right. Unfortunately I think that in all candor I
24 would probably have to disagree with you about whether or not this was a
25 frivolous action. Maybe it – maybe it was frivolous and the Court was just a little

1 slow in recognizing that your client's position prevailed and the other side did not,
2 but I don't really conclude that that was the case. I think the way that this action
3 arose seemed to me to involve some somewhat novel circumstances, and it is
4 not clear to me that this was an entirely frivolous action to be brought.

5 As to your argument about maintaining it, I find it difficult to say
6 that it was frivolous to maintain it. I think you said right up until the time of
7 mediation was it or the time after mediation?

8 MR. DeVOY: Well, no. I brought up mediation. I bring up the fact
9 they could – well, they could stop it anytime they wanted. This was forced
10 through summary judgment. The motions were filed in April and it wasn't set until
11 July and the orders were entered in August, so it was a long timetable when the
12 facts came out and the Court indicated that it was leaning toward just granting
13 them. So there was a number of indications it was coming.

14 But to go to it, and this is the trap that I think the Trust fell into
15 as well discussing if it was vexatious or frivolous, the standard under NRS
16 18.010(2)(b) is that if the claim is brought without regard to the recovery sought,
17 was brought or maintained without reasonable ground or to harass the prevailing
18 party.

19 It discusses that those kind of – this kind of award of attorney's
20 fees and costs is particularly appropriate to punish or deter frivolous or vexatious
21 claims but that's not the standard, just if it's without reasonable ground, so it's not
22 as high as saying it's frivolous or vexatious, it's just without a reasonable ground
23 to go forward, and I think we got to that last time when we were discussing the
24 fact that it was unreasonable, objectively unreasonable for the Trust to reject an
25

1 offer of judgment of \$25,000 in order to maintain this action in light of the law at
2 the time and the discovery that was conducted in January of 2015.

3 Now, those circumstances aren't quite the same here because
4 there's no pending offer of judgment, but the standard is whether it was with a
5 reasonable ground, not if it was vexatious or frivolous.

6 THE COURT: Well, and so that would – you're saying that you filed
7 your motion for summary judgment in January?

8 MR. DeVOY: No. No. It was filed in April.

9 THE COURT: Of this year?

10 MR. DeVOY: Yes.

11 THE COURT: I mean I could go so far as to say that it was
12 unreasonable for them to maintain the action once – from the time that you filed
13 the motion for summary judgment because by that point they had already seen
14 the Court's response to every argument that they made, and your motion for
15 summary judgment I mean obviously I granted it, so I think that perhaps should
16 have been a tipoff for them.

17 I think the most I could go is to say that it was probably
18 vexatiously -- or unreasonable, let us say, to maintain the position that forced us
19 to go through the argument itself. I would probably only grant fees from the time
20 of – from after you filed your motion for summary judgment.

21 MR. DeVOY: Okay. So from April 16th onward, and then I think also
22 -- to supplement your point about it being frivolous or vexatious and especially
23 the point about it being vexatious, I think the present conduct indicates that going
24 back to the language of Section (2)(b) it's to harass the prevailing party. We've
25

1 won and we've now had to drag the other side to court to hear our motion and
2 had to go through this numerous times, so –

3 THE COURT: Well, what I am going to do is separate and aside
4 from what I've already said about awarding fees after the filing of your motion for
5 summary judgment I would definitely probably sanction opposing counsel or the
6 client for the time that you've spent here today as well as – you think that you
7 were called right away last time?

8 MR. DeVOY: Excuse me?

9 THE COURT: You think that your matter was called right away last
10 time?

11 MR. DeVOY: It wasn't a normal calendar day. It was scheduled on
12 October 22nd. It was originally scheduled for calendar for October 12th, and then
13 there was a – I'm sorry, go ahead.

14 THE CLERK: I can tell you.

15 (Court conferring with the Clerk.)

16 THE COURT: It was at 1:30 so there wasn't a wait, so I certainly
17 would for the time you've had to wait here today there's no reason to – that
18 should have to be. So I'm going to grant as a separate basis your fees for the
19 time that you've had to wait here let's say for two hours it's taken us to get to this
20 point.

21 MR. DeVOY: Would the Court like to make any calculations and
22 enter an order today or are we going to –

23 THE COURT: Just put it in your order.

24 MR. DeVOY: Okay. So we're granting the fees from April 16th
25 onward?

1 THE COURT: Yeah.

2 MR. DeVOY: And then separately two hours for today because –

3 THE COURT: Yeah.

4 MR. DeVOY: Okay. Great.

5 THE COURT: Their failure to show up. Okay.

6 MR. DeVOY: Anything else?

7 THE COURT: The costs. The costs are granted.

8 MR. DeVOY: Yeah. That was separately granted. I have in my

9 notes here from last time it's \$7,568.50, so --

10 THE COURT: I thought I had – I had it down today for 12,000

11 something. Is that not right?

12 MR. DeVOY: That's what we requested. We negotiated down to

13 \$7,568.

14 THE COURT: Oh, yeah. That's right. That's right. So that figure is

15 granted. I guess we already did that last time, right?

16 MR. DeVOY: Correct.

17 THE COURT: Okay. Anything else?

18 MR. DeVOY: That's great. I'll get the calculations done and I'll

19 submit everything to the Court. Thank you very much, Your Honor.

20 THE COURT: Thank you.

21 MR. DeVOY: Thank you.

22 (Whereupon, the proceedings concluded.)

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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/visual proceedings in the above-entitled case to the best of my ability.

 —
LISA A. LIZOTTE
Court Recorder

IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDERIC AND BARBARA
ROSENBERG LIVING TRUST,

Appellant/Cross-Respondent,

vs.

MACDONALD HIGHLANDS
REALTY, LLC, a Nevada Limited
Liability Company; MICHAEL
DOIRON, an Individual; and FHP
VENTURES, a Nevada Limited
Partnership,

Respondent/Cross-Appellants.

Case No. 69399

District Court Case No. A689113
Electronically Filed
Jun 20 2016 08:48 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

FREDERIC AND BARBARA
ROSENBERG LIVING TRUST,

Appellant,

vs.

SHAHIN SHANE MALEK,

Respondent.

Case No. 70478

District Court Case No. A689113

**JOINT MOTION TO CONSOLIDATE APPEALS AND TO APPLY THE
BRIEFING SCHEDULE FOR CASE NO. 70478 TO THE CONSOLIDATED APPEAL**

Appellant/Cross-Respondent The Barbara and Frederick Rosenberg Living Trust (the “Trust”), Respondents/Cross-Appellants MacDonald Highlands Realty, LLC, Michael Doiron and FHP Ventures (“MacDonald Parties”), and Respondent Shahin Shane Malek (“Malek”), jointly move to consolidate or merge the appeal filed by the Trust and the Cross-Appeal filed by the MacDonald Parties bearing Supreme Court No. 69399 (“Realtor Appeal”) with the appeal filed by the Trust bearing Supreme Court No. 70478 (“Easement Appeal”). The Parties also seek to

extend the time to file the opening briefs in Realtor Appeal to October 5, 2016, the same date the opening brief in the Easement Appeal is due. This Motion is based on the following Memorandum of Points and Authorities and the papers and pleadings on file herein.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The parties jointly move this Court to consolidate two appeals arising from the same underlying district court case, concerning the same property and the facts and circumstances giving rise to the two orders. It is anticipated that the outcome of the Easement Appeal may affect the outcome of the Realtor Appeal. Therefore, both appeals should be consolidated. Additionally, the Trust and the MacDonald Parties request that the time to file their opening briefs and appendix in the Realtor appeal be extended from the currently pending requested date of June 27, 2016, to the date the opening brief in the Easement Appeal is due, with all other due dates to be calculated accordingly.

II. RELEVANT FACTUAL BACKGROUND

A. The Trust Purchased the Property within MacDonald Highlands

At issue in both appeals are facts surrounding the sale of a golf-course frontage home in MacDonald Highlands (the “Trust Home”). The Trust sought out and purchased a home on the 9th green of the then Dragonridge Country Club.

(See Amended Complaint, ¶38, 39, attached as **Exhibit 1**.) After closing on the Trust Home, the Trust learned that a 1/3 acre piece of the golf course property in front of the adjoining lot had been rezoned from the golf course to residential (“Golf Course Parcel”) and sold to Malek, thereby allowing Malek to build out past the original property building envelope. (*Id.* at ¶55.)

B. The Trust Sues the MacDonald Parties and Malek

The Trust brought an action for declaratory relief and to enforce an implied restrictive covenant against Malek and others¹ and, against the MacDonald Parties for declaratory relief; Unjust Enrichment; Fraudulent or Intentional Misrepresentation and Negligent Misrepresentation; Real Estate Brokers Violation of NRS 645; and Easement. (*See* Ex. 1.)

C. The Parties’ Motions for Summary Judgment

The Trust brought a motion for summary judgment against Malek, seeking a legal ruling on the existence of an implied restrictive covenant which would prohibit Malek from using the golf course parcel as anything other than golf course and prevent his building beyond the original property building envelop.

Malek brought a motion for summary judgment on the Trust’s claims against him and for his counter-claim of slander of title.

The MacDonald Parties brought a motion for summary judgment on the

¹ Other claims against other parties have been dismissed and are not at issue in these appeals. Additionally, Malek’s counterclaim for slander of title against the Trust was dismissed without prejudice.

Trust's claims against them, arguing that the Property had been brought "as-is" and that the Trust had waived any claims against the MacDonald Parties in the purchase contract.

Following full briefing on the motions, the Court took the matters under advisement.

D. The District Court Grants Malek's Motion for Summary Judgment: The Easement Appeal

The district court granted Malek's motion for summary judgment by order entered on August 13, 2015 ("Easement Order"). The district court found that the Trust was seeking an easement for view, light and privacy rather than a restrictive covenant and, that Nevada does not recognize easements for view, light or privacy, citing *Probasco v. City of Reno*, 85 Nev. 563, 565, 459 P.2d 772, 774 (1969) and *Boyd v. MacDonald*, 81 Nev. 642, 650-51, 408 P.2d 717, 722 (1965). (*See* Easement Order, Section IV(A)(1), attached as **Exhibit 2**.) The district court rejected the Trust's arguments that there was an implied restrictive covenant "requiring the Golf Parcel to remain part of the golf course indefinitely." (*Id.* at IV(A)(3).) The district court also concluded that Nevada "has not previously recognized a cause of action for implied restrictive covenant, and this Court declines to do so." (*Id.* at IV(A)(6).) Accordingly the district court also granted judgment in favor of Malek on the Trust's injunctive relief claims. (*Id.* at (IV)(B)(9).) The court did, however, find that there were questions of fact

remaining as to Malek's counterclaim for slander of title. (*Id.* at (IV)(C)(13).) Thus, that claim remained and the order granting relief was not final and appealable as it did not adjudicate all claims against the parties.

The Trust and Malek eventually agreed that Malek would dismiss his counterclaim so that an appeal of the order on the easement issue could proceed. Thus, following the entry of the stipulation and order dismissing the remaining claim (*See* Stipulation and Order for Dismissal of Counterclaim, attached hereto as **Exhibit 3.**), the Trust filed the Easement Appeal, which was docketed in this Court on June 2, 2016.

E. The Court Grants the MacDonald Parties Motion for Summary Judgment and Subsequent Motion for Attorneys Fees and Costs: The Realtor Appeal.

The MacDonald Parties also moved for summary judgment on the Trust's claims for misrepresentation and violation of statutory duties of disclosure. In granting the MacDonald Parties' motion, by order entered on August 13, 2015 (the "Realtor Order"), the District Court found that the Trust had purchased the Property "as is," had waived rights by reason of the purchase contract, and that the zoning change was available at the City of Henderson. (*See* Realtor Order, attached hereto as **Exhibit 4.**) Thus, the district court concluded that claims against the MacDonald Parties could not stand as a matter of law. (*Id.* at II(A)(2-5).) In addressing the declaratory relief claim, the district court expressly

incorporated the Easement Order by reference. (*Id.* at II(C)(11).)

Finally, the MacDonald Parties moved for attorney fees and costs, which the district court granted by order entered and notice of which was served on November 10, 2015, wherein the district court also certified the order pursuant to NRCP 54(b) (the “Fees Order”). (*See* Fees Order and Notice of Entry of Order, attached hereto as **Exhibit 5**.) The District Court certified the Realtor Order pursuant to NRCP 54(b) by order entered on November 10, 2015, notice of entry of which was served on the same day. (*See* Order and Notice of Entry of Order Granting NRCP 54(b) Certification of Realtor Order, attached hereto as **Exhibit 6**.) The Trust filed its notice of appeal on December 9, 2015. The Realtor Appeal was docketed as case no. 69399 on December 21, 2015.

Because the Realtor Appeal was filed first, it is ahead of the Easement appeal; the Trust’s opening brief and appendix are due on June 27, 2016, on a second extension. The Parties also request that the briefing schedule for the Realtor Appeal be changed to that of the Easement Appeal, with the opening brief being due on October 5, 2016.

III. ARGUMENT

A. Legal Standard

When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the Supreme Court upon its own motion or upon

motion of a party. NRAP 3(b)(2). Consolidation does not mean that the parties must “proceed as a single [appellee].” *United States v. Tippet*, 975 F.2d 713, 718 (10th Cir. 1992). Consolidation is favored when cases raise the same or similar issues, and will result in judicial economy. *Prieur v. D.C.I. Plasma Center of Nevada, Inc.*, 102 Nev. 472, 472, 726 P.2d 1372, 1372 (1986) (“Because these appeals present identical issues and similar facts, we hereby consolidate them for disposition See NRAP 3(b).”); *see United States v. Berberena*, 694 F.3d 514, 517 n. 1. (3d Cir. 2012) (consolidating appeals that raised the same issues).

B. Judicial Economy is Best Served By Consolidation

Here, the appeals arise from the same underlying law suit, the Trust’s complaint for declaratory relief, implied restrictive covenant, and related claims. Because the district court’s Realtor Order incorporated by reference the Easement Order, there are overlapping issues. In particular, the district court considered its decision on the Easement Order in deciding the Fees Order (*See Recorder’s Transcript re: Motion for Attorney Fees and Costs, attached hereto as **Exhibit 7.***) The Parties believe that considering both appeals together provides this Court with judicial economy, allowing the Court to fully consider the issues raised in the Easement Appeal when deciding the Realtor Appeal, to the extent the order appealed from incorporates the Easement Order.

C. Upon Consolidation, The Opening Briefs for the Consolidated Appeals Should Be Extended to Match the MTD Briefing Schedule

Currently, the opening brief in the Realtor Appeal is due on June 27, 2016. The parties request that this Court expand the time to file the opening brief and appendix for the consolidated appeal to the date for filing in the Easement Appeal.

IV. CONCLUSION

Because the appeals arose from the same district court case, involve overlapping issues of law and fact, and will promote judicial economy, the Trust, the MacDonald Parties, and Malek request this Court grant this Motion to

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Consolidate Appeals and Apply the Briefing Schedule for Case No. 70478 to the Consolidated Appeal as requested.

Respectfully submitted:

DATED: June 17, 2016

KIM GILBERT EBRON

/s/Jacqueline A. Gilbert

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 17, 2016, I filed the foregoing **JOINT MOTION TO CONSOLIDATE APPEALS AND TO APPLY THE BRIEFING SCHEDULE FOR CASE NO. 70478 TO THE CONSOLIDATED APPEAL** via the Supreme Court Electronic Filing System, which shall be e-served to the following party:

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