IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDERIC AND BARBARA ROSENBERG LIVING TRUST, Appellant/Cross-Respondent, vs. MACDONALD HIGHLANDS REALTY, LLC; MICHAEL DOIRON; and FHP VENTURES, Respondent/Cross-Appellants.	Case No. 69399 District Court Case No. A-13-689113-C
FREDERIC AND BARBARA ROSENBERG LIVING TRUST, Appellant, vs. SHAHIN SHANE MALEK, Respondent.	Case No. 70478 District Court Case No. A-13-689113-C

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable KENNETH C. CORY, District Judge
District Court Case No. A-13-689113-C

APPELLANT'S REPLY BRIEF AND ANSWERING BRIEF ON CROSS-APPEAL

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I. THE FACTUAL STATEMENTS BY RESPONDENTS ARE EITHER FALSE OR MISLEADING

A. MUCH OF MALEK'S STATEMENT OF FACTS IS EITHER FALSE OR MISLEADING

Malek's Statement of Facts[1] is riddled with irrelevant facts, includes argumentative or suggestive language that renders the statement false or misleading, and contains blatant misstatements of fact. Because the Rosenbergs'[2] appeal against Malek rests on the District Court erring in determining that Nevada does not recognize implied restrictive covenants, the Rosenbergs will not address facts that do not relate to this issue, as they are not material, and have no bearing on the issues on appeal.

As for the remaining facts alleged by Malek, the Rosenbergs state as follows:

1. "[A] certain section of raw land abutting the Lot was also available for sale." (Malek RAB_6.)

The Golf Parcel was neither raw land nor was it available for sale. Instead, the Golf Parcel was 1/3 acre that was part of the in-bound play area of the 9th hole of the

[1] All references to Respondent Shahin Malek's Answering Brief shall be cited as Malek RAB.

[2] "Rosenbergs" refers to Frederic and Barbara Rosenberg and, for purposes of this brief, will be used interchangeably with the Frederic and Barbara Rosenberg Living Trust, appellant/cross-respondent in this appeal. (*See* 2JA_0262; AOB_1.)

Golf Course, and it was only sold after Malek inquired as to whether it could be bought to improve the view of his otherwise undesirable lot. (3JA_0550, 161:15-25).

2. "The [Golf] Parcel was a small section of non-manicured undeveloped desert pan [sic] in an out-of-bounds area just outside of the trees…" (Id. at 3.)

MacDonald Highlands has three landscape pallets it uses and the Golf Parcel, which consisted of in-play area for the 9th hole of the Golf Course, was specifically designed with the natural landscape pallet.[3]

3. "The Association had previously sold or leased out-of-bounds sections of the Golf Course to the owners of lots adjacent to the Golf Course." (Id. at 6.)

There were three instances wherein the Golf Course was severed. The first was in planning area 15 and 16, which occurred in 2013 or 2014, and involved an out-of-play area located on a hill.[4] This was Richard MacDonald's property, and he testified, "I had an area of the golf course that I basically moved into, moved into with my yard so to speak. It was technically part of the golf course, but I haven't bothered to subdivide it, move it in…"[5] Mr. Bykowski testified that there are "no changes proposed for the area."[6] The second instance took place in 2004 or 2005, and involved a hill-like area that was blocking the view to the Golf Course for three

[3] 2JA_0357, 30:5-25.
[4] 3JA_0616, 139:1-3; 3JA_0618, 145:13-18.
[5] 2JA_0381, 127:19-24.
[6] 3JA_0617, 142:13-14.

houses.[7] MacDonald Highlands leveled the hill, but this area was never sold to the property owners, and is still owned by the Golf Course.[8] The third, and final instance, involved planning area 20, and occurred in 2013 and 2014.[9] This area has not been sold, but included the addition of a corner of non-playable area between two T boxes to a lot so the owner could adequately fit his house on the lot.[10]

4. ***"Red Rock Country Club and the Southern Highlands Golf Community had taken part in similar transactions." (Id.)***

What the appraiser does not verify is if the extensions were being offered as part of the golf course or were, in fact, vacant land not platted as golf course. Additionally, those extensions appear to be limited to flatscapes without extending the building envelope of the actual house structure, which is not true in this case. Finally, it is unknown if anyone in these communities opted to exercise their rights to prevent the boundary extensions of the lots.

5. ***"The Association took every step necessary to comply with the City of Henderson's rezoning procedure." (Id.)***

Bank of America denied receiving notice of the application for zoning changes,[11] which evidences at least one type of non-compliance. Additionally, the

[7] 3JA_0618, 146:4-147:10.
[8] 3JA_0618, 147:7-22.
[9] 3JA_0618, 148:9; 3A_0619, 149:3-4.
[10] 3JA_0619, 150:12-152:18.
[11] 6JA_1325-1326.

zoning applications and the notices were misleading or provided insufficient information to put any property owners on real notice of what was occurring. Specifically, the Informational Meeting document, makes no reference to Dragon Ridge Golf Course or Hole #9, and characterizes the boundary modification as a "minor boundary adjustment."[12]

Additionally, the findings made by the City of Henderson show that the application misrepresented the facts of the proposed change. First, the City of Henderson found that the "proposal is consistent with the Comprehensive Plan."[13] This is an error as the Comprehensive Plan envisioned Dragon Ridge Golf Course, not portions of it being sold to individuals. Second, the City of Henderson also found that "[t]the planned unit development is necessary to address a unique situation…"[14] There was nothing unique about this situation; Malek wanted to increase his lot size and purchase golf course property to achieve this goal, and DRFH Ventures wanted to make money. There is nothing unique about this. Third, the City of Henderson found that "[t]he proposal mitigates any potential significant adverse impacts to the maximum practical extent."[15] This was equally false. Finally, even if they had complied with the City's rezoning procedures, which they did not, as discussed fully

[12] 6JA_1330.
[13] 6JA_1332.
[14] *Id*.
[15] *Id*.

below, a private restrictive covenant would still exist over the Golf Course as a zoning change cannot remove the covenant under Nevada law. *Western Land Co. v. Truskolaski*, 88 Nev. 200, 206, 495 P.2d 624 (1972).

6. ***"The Staking was clearly visible [and] marked the location where Malek intended to construct his home." (Id. at 8.)***

The Rosenbergs testified they saw no such staking. (2JA_0266, 130:10-12). Instead, what was clearly visible were several large white poles marking where the in-bound portion of the 9th hole ended. Those poles were placed near the center of the Golf Parcel Malek purchased. Moreover, even if Malek placed stakes on the Golf Parcel, and even if the Rosenbergs have seen the stakes, the Rosenbergs could not have possibly imagine that the stakes were intended to notify the world of the location where Malek intended to build his house. After all, Malek did not even close on the purchase of the Golf Parcel until June 26, 2013, four months after the Rosenbergs purchased their property. (3JA_626-627; 4JA_0753, 53:5-21; 7JA_1379-1386).

B. THE MACDONALD PARTIES' STATEMENT OF FACTS IS EITHER FALSE OR MISLEADING.

Much like Malek's Statement of Facts, the MacDonald Parties' statement[16] is

[16] All references to the Respondent/Cross-Appellant's (sic) [MacDonald Parties] Answering Brief and Opening Brief on Cross-Appeal shall be cited herein as MacRAB.

riddled with argumentative or suggestive language that renders the statement false or misleading, and contains blatant misstatements of fact.

1. ***"Lack of research", "lack of interest," and "lack of diligence" on the Trust's part. (MacRAB_12.)***

Specifically, the MacDonald Parties use terms like "lack of research," "lack of interest," and "lack of diligence" to suggest that the Rosenbergs could have discovered the secret purchase by Malek. Of course none of this is true. Since Malek did not close the deal until have the Rosenbergs purchased their home, nothing the Rosenbergs could have researched would have revealed that Malek purchased 1/3 acre of golf course land because they were no recorded documents to show a partition and change in the ownership of the Golf Parcel. As established, the final map was not recorded until June 26, 2013, four months after the Rosenbergs purchased their home. (3JA_0545, 3JA_0620.) As for the assertion that the unrecorded zoning change should have alerted the Rosenberg of the Malek's purchase, this assumes that the Rosenbergs had any reasons to question whether the part of the 9th hole would merge with the vacant residential lot next to their house. The Rosenbergs had no reason to suspect Malek plans to build his house on the part of the 9th hole. Only Malek and the McDonald Parties knew of the secret deal and they intentionally withheld it from the Rosenbergs.

…

…

2. ***The crux of the Trust's argument was that its view . . . matters. (MacRAB_12; see also id. at 15.)***

The MacDonald Parties and Malek and the district court mischaracterizes this case as if the Rosenbergs are fighting to preserve their view. This case is about the golf course, all parts of it, remaining as golf course. This case is about the fact that the Rosenbergs purchased a high-end property with the expectation that the open area and surrounding housing/lots and Golf Course would remain as mapped and not changed in such a way to compromise the value of the Rosenbergs' property. In 2000, when first marketing MacDonald Highlands, MacDonald said it himself,

> The luxury home sites are designed as a low-density community. At build-out, the 1,200-acre community will only include approximately 500 custom homes. The perception of density in the community will be even lower, due in part to the varying levels of elevations at which homes will be built and the natural canyons and washes in the mountain landscape, which help provide a feeling of great expanse and seclusion.
> …
> The home sites will offer a variety of elevated views, including the Las Vegas Valley and the Strip, the DragonRidge Golf Course and the surrounding McCullough Mountains.
>
> Our job is not just to sell lots, but to have *the* luxury development in Las Vegas. [17]

…

[17] http://www.nevadabusiness.com/2000/10/macdonald-ranch-familys-vision-becomes-reality-in-hillside-community/.

Finally, contrary to the MacDonald Parties' statement, the Rosenbergs' damages were not speculative as Malek testified he intended to build a home on the Golf Parcel, and even had plans approved by the MacDonald Highlands Association. (JA_0758, 73:4-25 and 75:6-76:25; JA_0764, 92:17-94:25). In addition to that, the contract he entered into with MacDonald Highlands required all lots to be constructed out within two (2) years. (JA4_0747, 25:6-20). The fact that Malek decided to hold off on building the home pending the litigation does not make the Rosenbergs' damages speculative.

II. THE DISTRICT COURT ERRED ON THE IMPLIED RESTRICTIVE COVENANT ISSUES

A. THE MACDONALD PARTIES AND MALEK CONCEDE NEVADA RECOGNIZES IMPLIED RESTRICTIVE COVENANTS.

Interestingly, in stark contrast to what they argued to the District Court, both the MacDonald Parties and Malek now concede that Nevada does recognize implied restrictive covenants. (Mac RAB_38-39, 41-46; Malek RAB_16.) But this is not what the District Court found. Contrary to Malek's contentions, the District Court did expressly and erroneously find that Nevada does not recognize implied restrictive covenants when it stated: "Furthermore, as a matter of law, in Nevada there is not an implied easement or implied restrictive covenant requiring property formerly owned by a golf course to remain part of the golf course indefinitely…" (12JA_2500, 9:18-24). The Court even stated, "Nevada has not previously

recognized a cause of action for implied restrictive covenant…" (12JA_2518, ln. 4-5). The Court errored in misconstruing the Rosenbergs' prayer for relief. The Rosenbergs were not asking for view easement. The Rosenbergs were asking for the land use restriction. i.e., that the Golf Parcel be used in the manner consistent with a golf course. Unlike the *Probasco* case,[18] relied on by respondents,[19] this is not a case where one neighbor is arguing her un-established rights to views, privacy and light against another neighbor in the context of property purchased in the middle of the desert, and developed outside a planned unit development. The *Probasco* case does not speak to whether rights to views, privacy and light exists in a planned unit development that was advertised and sold as a golf course community and it is not relevant to this case. *See Probasco*, 85 Nev. at 565, 459 P.2d at 774 (*citing Boyd v. McDonald*, 81 Nev. 642, 408 P.2d 717 (1965) (wherein the land and use in question did not involve a planned unit development)). In fact, *Probasco* was an eminent domain case following a prior case, *City of Reno v. District Ct.*, 84 Nev. 322, 440 P.2d 395 (1968), in which Probasco's land was being condemned for the purpose of building an overpass on the roads. *Id.* at 323, 440 P.2d at 396; *see Probasco*, 85 Nev. at 564, 459 P.2d at 773. Nothing in *Boyd*, *Probasco* or *City of Reno* deal with rights arising within a planned unit development.

[18] *Probasco v. City of Reno*, 85 Nev. 563, 459 P.2d 772 (1969).
[19] *See* MacRAB_37; *see also* MalekRAB_16.

To be clear, the Rosenbergs do not seek an easement to view, privacy and light as to construction occurring outside the boundaries of MacDonald Highlands. This, the Rosenbergs concede they would not be entitled to do under the *Probasco* case. In other words, neither the Rosenbergs, nor any other member of MacDonald Highlands can control what happens outside the confines of MacDonald Highlands that may affect their view and privacy. This is what *Probasco* stands for, and what the Rosenbergs mean when they say they do not seek an easement for view, light and air.

Again the *Probasco* case has no bearing on MacDonald Highlands or what the Rosenbergs seek.

This is where the District Court erred. Unlike the appellant in the *Probasco* case, the Rosenbergs purchased their home in MacDonald Highlands, which is a planned unit development that was advertised and sold as a golf course community. Nevada does recognize that when a community is developed, platted, and advertised in such a way that a buyer is induced to purchase property with the understanding the surrounding land will remain as advertised, then an implied restrictive covenant may exist over such land and will be enforced. *Shearer v. City of Reno*, 36 Nev. 443, 136 P. 705, 708 (1913); *Boyd*, 81 Nev. at 647, 408 P.2d at 720.

Unlike the properties in dispute in the *Probasco* case, the properties in this case are located in MacDonald Highland, where not only are views, privacy and

quiet enjoyment governed by covenants, they are bargained for and come at a steep price. In that regard everything about the community is guaranteed, from the style of housing (Tuscan style according to the CC&Rs), the color palate of the housing, the landscaping, the set-backs, common areas, and most importantly, the Golf Course are all covenants running with the land.

In that regard when the MacDonald Parties claim nothing is guaranteed with respect to the MacDonald Highlands Community, they are flat out wrong. Everything is guaranteed. Contrary to their contention, nothing is "borrowed;" it is bargained for and paid for. As one board member of the Queensridge homeowners association, a community seeking to enforce a restrictive covenant with respect to proposed development over the Badlands golf course, stated, "We buy into HOAs for some degree of protection, not a bait-and-switch scenario."[20] That is the crux of this case, and what the Rosenbergs seek to enforce.

B. THE MACDONALD PARTIES AND MALEK CONCEDE MATERIAL ISSUES OF FACT EXIST REGARDING WHETHER AN IMPLIED RESTRICTIVE COVENANT EXISTS.

By attempting to distinguish *Shearer* and *Boyd*, as well as the additional non-Nevada cases that dealt with implied restrictive covenants in the context of a golf

[20] *See* http://www.reviewjournal.com/local/las-vegas/badlands-golf-course-development-las-vegas-leads-bad-blood. *See also*, http://www.reviewjournal.com/brian-hurlburt/silverstone-golf-club-residents-hope-holiday-miracle.

course,[21] the MacDonald Parties and Malek admit material issues of fact exist as to whether a restrictive covenant exists in this case. But the District Court never made any analysis of the factors in *Shearer* and/or *Boyd*, nor did it consider the similar factors set forth by other jurisdictions. In other words, the District Court never applied the facts of this case to determine whether a restrictive covenant existed; rather, it determined Nevada does not recognize this principle of law and ended its inquiry there. That is the reason for this appeal. Because Nevada does recognize implied restrictive covenants, and under *Boyd* the existence of one is an issue of fact, the District Court erred in granting summary judgment on this issue in favor of Malek.

To be clear, by way of this appeal the Rosenbergs do not seek a factual finding from this Court that a restrictive covenant exists over the Golf Course (although the facts overwhelmingly prove that one does), but that the District Court erred when it summarily decided that Nevada does not recognize implied restrictive covenants thereby foreclosing a jury from determining whether factually an implied restrictive covenant exists. There can be no doubt that Nevada does recognize this principle both in common law and via statute. *Glenbrook Homeowners Ass'n v. Glenbrook Co.*, 111 Nev. 909, 920, 901 P.2d 132, 139-140 (1995) (noting reciprocal negative

[21] *See* Mac RAB_38-43; *see also* Malek RAB_16-17, 20-24.

servitudes or easements is a rule of law that restricts what an owner may do with his or her land); NRS 278A.400.

NRS 278A.400(1) provides that

> All provisions of the plan shall run in favor of the residents of the planned unit residential development… and to that extent such provisions, whether recorded by plat, covenant, easement or otherwise, may be enforced at law or equity by the residents acting individually, jointly or through an organization designated in the plan to act on their behalf.

Under either common law or statute, the Rosenbergs have a cognizable claim to enforce the restrictive covenant that exists over the Golf Course, which prohibits Malek from building on the Golf Parcel he purchased.

The MacDonald Parties and Malek wrongfully claim the parcel sold to Malek was raw land abutting the Golf Course or out of bounds play area, when in reality it was part of the Golf Course, and part of the 9th hole. The owner of the Golf Course sold the land to Malek, it had to be rezoned, it was specifically landscaped with a natural desert palate, and before consummating the sale Paul Bykowski had to check with the Golf Course operator to determine if severance of the 1/3 acre sold to Malek would affect the play of the 9th hole. (3JA_614 at 130:8-11.) To represent the land was an afterthought or not part of the Golf Course is wrong. Equally unavailing is the claim that because the Golf Course can still function, no covenant exists. Respondents provide no authority that functionality is the standard. That is because

it is not. The point of a covenant is the land will remain the way it was platted and advertised it would remain. In fact, this is a point missed by the MacDonald Parties when they claim unlike *Shearer*, there was no recorded declaration that the Golf Course would remain golf course land. The recorded declaration is the plat map itself along with all the other promotional materials boasting the community as a premiere golf course community. It is also a point missed by Malek when he claims that because the Golf Course is still operational no covenant exists. Again, function and operation are not the standard.

In attempting to distinguish *Boyd*, the MacDonald Parties fall prey to the various labels used for these types of restrictions, ignoring long established Nevada law. An implied easement is the same thing as an implied restrictive covenant; both restrict what an owner can do with his or her land. *See Meredith v Washoe Cnty. Sch. Dist.*, 84 Nev. 15, 17, 435 P.2d 750, 752 (1968). Regardless of the label, what the Rosenbergs seek is a declaration that Malek is prohibited from building on the Golf Parcel he purchased because this land must remain golf course land. But the key take-away from *Boyd*, in addition to the test it sets forth for determining whether a restrictive covenant exists over a piece of land is that this issue is one of fact, not law. *Boyd*, 81 Nev. at 652, 408 p.2d at 723. As such, the District Court erred when it summarily decided this issue.

Even though all of the MacDonald Parties' and Malek's points of "distinguishment" lack merit, they prove one thing: genuine issues of material fact exist as to whether a restrictive covenant exists over the Golf Course such that the District Court erred in granting summary judgment on this issue.

C. THE IMPLIED RESTRICTIVE COVENANT HAS NEVER BEEN TERMINATED, WAIVED OR ABANDONED.

The *Boyd* Court recognized that "[i]f an easement is created by implication at the time of initial severance, it then vests, and, absent evidence of termination, it cannot be diminished or abridged." *Boyd*, at 650. Here, Malek argues that by virtue of the re-zoning of the Golf Parcel, the Rosenbergs waived their right to a restrictive covenant. This is contrary to Nevada law, which requires termination. There is simply no evidence that the restrictive covenant was terminated. Even the re-zoning does not constitute a termination because this Court has held that "[a] zoning ordinance cannot override privately-placed restrictions, and a trial court cannot be compelled to invalidate restrictive covenants merely because of a zoning change." *Western Land Co. Ltd.*, 88 Nev. at 206, 495 P.2d at 627 (1972) (*citing, Rice v. Heggy*, 322 P.2d 53 (Cal. Ct. App. 1958)). *See also*, *Meredith*, 84 Nev. at 19, 435 P.2d at 753.

Malek also suggests that the Rosenbergs waived the restrictive covenant because they did not conduct due diligence. Malek, however, cites to no law to support this contention. Essentially, Malek suggests that failure to observe stakes on

the Golf Parcel is sufficient to waive a right to a restrictive covenant. First, the Rosenbergs dispute whether the stakes were readily observable, but even if they were, there was also the white stakes from the Golf Course, located toward the edge of Malek's original property lines that marked the out-of-bounds area. As such, even if the Rosenbergs did observe stakes, it was not out of the ordinary. Regardless, there is no basis in law for the proposition that a party can waive a restrictive covenant by merely observing stakes, and if zoning changes cannot invalidate a restrictive covenant, passive observance (even if true) certainly cannot terminate a restrictive covenant.

Malek also suggests that the Rosenbergs had some affirmative duty to research the City of Henderson's website for any zoning changes. Once again, Malek cites to no law to support this contention. What Malek also fails to recognize is the Rosenbergs had no reason to research the zoning laws; neither BANA, nor MacDonald Highlands/Doiron, ever disclosed that a zoning change was effectuated over the Golf Course. Nevertheless, even if the Rosenbergs had researched the zoning changes, the zoning change cannot terminate the restrictive covenant.

While Malek does not address the issue of prior severances of the Golf Course, he does suggest in his Statement of Facts that other portions of the Golf Course were sold and re-zoned, and somehow this constitutes a waiver of the restrictive covenant. This is not true. This Court has dealt squarely with this issue, and held that prior

violations of a restrictive covenant is not grounds to abandon the covenant; "it must be shown that the lot owners acquiesced in substantial and general violations of the covenant within the restricted area." *Tompkins v. Buttrum Const. Co. of Nevada*, 99 Nev. 142, 145, 659 P.2d 865, 867 (1983) *citing Western Land Co. Ltd.* 88 Nev. at 495 P.2d 624(finding that "[e]ven if the alleged occurrences and irregularities could be construed to be violations of the restrictive covenants they were too distant and sporadic to constitute general consent by the property owners in the subdivision and they were not sufficient to constitute an abandonment or waiver."). The *Truskolaski* Court held that "[i]n order for community violations to constitute an abandonment, they must be so general as to frustrate the original purpose of the agreement." *Id. citing Thodos v. Shirk*, 248 Iowa, 172, 79 N.W.2d 733 (1956). *See also, Gladstone v. Gregory*, 95 Nev. 474, 479, 596 P.2d 491, 494 (1979) (finding "in order for community violations to constitute an abandonment of a restrictive covenant they must be so general and substantial as to frustrate the original purpose.").

Here, Malek misstates the nature of the other severances. According to the testimony of Paul Bykowski and Richard MacDonald there were three instances of severances. The first was in planning area 15 and 16, which occurred in 2013 or 2014, and involved an out-of-play area located on a hill.[22] Interestingly, it is Richard MacDonald's property, and he testified, "I had an area of the golf course that I

[22] 7JA_1348, 139:1-3; 7JA_1350, 145:13-18.

basically moved into, moved into with my yard so to speak. It was technically part of the golf course, but I haven't bothered to subdivide it, move it in…"[23] Most importantly, Mr. Bykowski testified that there are "no changes proposed for the area."[24] The second instance took place in 2004 or 2005, and involved a hill-like area that was blocking the view to the Golf Course for three houses.[25] MacDonald Highlands leveled the hill, but this area was never sold to the property owners, and is still owned by the Golf Course.[26] The third, and final instance, involved planning area 20, and occurred in 2013 and 2014.[27] This area has not been sold, but included the addition of a corner of non-playable area between two T boxes to a lot so the owner could adequately fit his house on the lot.[28]

These three instances, two of which occurred at the same time the Rosenbergs were objecting to Malek's attempt to violate the restrictive covenant, do not rise to a "general and substantial" frustration of the restrictive covenant. As such, the restrictive covenant was never abandoned. Based on these facts, the restrictive covenant has not been terminated, waived or abandoned. At the very least, genuine

[23] 6JA_1268, 127:19-24.
[24] 7JA_1349, 142:13-14.
[25] 7JA_1350, 146:4-147:10.
[26] *Id*. at 147:7-22.
[27] *Id*. at 148:9; 149:3-4.
[28] 7JA_1351, 150:12-152:18.

issues of material fact exist as to this issue, and therefore, the District Court erred in granting summary judgment.

D. THE RESTRICTIVE COVENANT OVER THE GOLF COURSE VESTED ONCE THE FIRST LOT WAS SOLD IN MACDONALD HIGHLANDS.

Not surprisingly, Malek misunderstands the concept of restrictive covenants by arguing that BANA had no beneficial interest to pass onto the Rosenbergs. This is not how implied restrictive covenants operate. Instead, once the first lot was sold in MacDonald Highlands, the covenant with respect to the Golf Course vested in all lots in MacDonald Highlands, or at a minimum all lots abutting the Golf Course. *Supervisor of Assessments of Anne Arundel County v. Bay Ridge Properties, Inc.*, 310 A.2d 773 (Md. Ct. App. 1973)(benefit of easements and covenants shown on a plat attaches to all lots on sale of the first lot). In *Swenson v. Erickson*, 998 P.2d 807 (Utah 2000), defendant Erickson constructed a woodworking shop in violation of the restrictive covenants governing the subdivision in which the parties lived. *Id.* at 809. After the Swensons objected, defendant Erickson obtained retroactive approval from the architectural committee. *Id.* The Utah Supreme Court found that the architectural committee's "authority to examine building plans, specifications and plot plans in order to determine 'conformity and harmony of external design,' did not override the restrictive covenant. *Id.* at 815. Having vested long before BANA foreclosed and the

Rosenbergs purchased their property, the implied restrictive covenant existed at the time of the purchase.

III. NOTHING IN THE PAPERS OR CONDUCT IMPACTED THE MACDONALD PARTIES' STATUTORY DUTIES TO DISCLOSE

A. THE ROSENBERGS DID NOT WAIVE THE MACDONALD PARTIES' DUTY TO DISCLOSE THE SALE OF THE GOLF PARCEL.

The MacDonald Parties knew there was a material change to the Golf Course that impacted the Rosenbergs' property, and failed to disclose this material change despite having both a statutory and common law duty to do so. The District Court erred when it found that the Purchase Agreement acted as a waiver on the part of the Rosenbergs because (1) by law, the Rosenbergs could not waive the MacDonald Parties' statutory duty to disclose; and (2) the Purchase Agreement did not include any disclosure of the sale of the Golf Parcel.

There can be no doubt that the MacDonald Parties had a duty to disclose the sale of the Golf Parcel because such sale was material and adversely impacts the Rosenbergs' property. In fact, the MacDonald Parties concede this point by arguing not that the sale was immaterial, and therefore not required to be disclosed,[29] but that the Rosenbergs waived this disclosure via the Purchase Agreement. But again, under

[29] Although not argued by the MacDonald Parties, if there is any question as to whether the sale of the Golf Parcel was material, and therefore required disclosure under NRS 645.252, materiality is a question of fact; a point even the MacDonald Parties admitted when asked by the District Court.

Nevada law, this disclosure is not waivable. *See* NRS 645.255. *See also*, *Davis v. Beling*, 128 Nev. ___, ___ n.6, 278 P.3d 501, 511 n.6 (2012). As such, the District Court erred in finding that the Rosebergs waived this statutory duty. Additionally, contrary to the MacDonald Parties' contentions the Rosenbergs did raise this argument below, when they responded to the MacDonald Parties' argument that the Rosenbergs were suing under the contract. The Rosenbergs had to respond to the MacDonald Parties' arguments, and in doing so stated that they was not suing under the contract but, rather, under the statute. (6JA_1130-1136.) The thrust of the Rosenbergs' argument is the contract could not overcome the duties imposed by the statute. (*Id.*) Thus, the Rosenbergs raised the argument below.

Even if the MacDonald Parties' failure to disclose the sale of the Golf Parcel was waivable (which it is not), the Purchase Agreement certainly did not waive this non-disclosure. For one, the Purchase Agreement makes no mention of sales of portions of the Golf Course. The very provision cited by the MacDonald Parties pertains to the zoning and boundaries of the **property being sold to the Rosenbergs**, not Malek's property and certainly not the Golf Course.[30] As such, it is a factual impossibility that the Rosenbergs waived the non-disclosure of the sale of the Golf Parcel by signing the Purchase Agreement, when the Purchase Agreement makes no mention of such sale. Additionally, the MacDonald Parties conflate this issue by

[30] 2JA_0327; 2JA_0339.

claiming disclosure of outdated zoning information absolves them of their failure to disclose the sale of the Golf Parcel. Both are separate and distinct disclosures that were required by Nevada law, and the MacDonald Parties failed in both respects.

Pursuant to NRS 645.259:

> A licensee may not be held liable for:
> 1. A misrepresentation made by his or her client **unless the licensee**:
> (a) **Knew the client made the misrepresentation**; ***and***
> (b) **Failed to inform the person to whom the client made the misrepresentation that the statement was false**.

(Emphasis added).

Here, the MacDonald Parties had a duty to disclose the sale of the Golf Parcel and the fact that the lot lines of 594 Lairmont (Malek's lot) were altered. The MacDonald Parties should have disclosed the sale of the Golf Parcel because the sale is a material and relevant fact. The sale altered the lot lines of Malek's parcels, thereby creating a significant impairment to the Rosenbergs' property. Additionally, the MacDonald Parties should have disclosed the alteration because they knew about the sale of the Golf Parcel and the subsequent lot line changes to Malek's parcels well in advance of the Rosenbergs' purchase. Astonishingly, the MacDonald Parties claim it is unclear what Doiron knew, but Doiron wrote the contract for the sale of the Golf Parcel to Malek.[31] She also knew about the zoning applications submitted

[31] 3JA_0550, 160:22-161:4.

for the Golf Parcel and their subsequent approval. (JA_0551, 163:8-165:22). There is no doubt Doiron knew everything.

Despite this, she never disclosed the sale of the Golf Parcel to the Rosenbergs.[32] Instead, Doiron showed the Rosenbergs a diagram of all of the lots in MacDonald Highlands, but the diagram did not show the sale of the Golf Parcel to Malek.[33] Furthermore, as of December 8, 2014 the diagram in the MacDonald Realty office still did not reflect the sale of the Golf Parcel and the change to Malek's lot lines.[34] In fact, the Rosenbergs never learned of the sale of the Golf Parcel from the MacDonald Parties – they learned of the sale from a third party approximately one to two months *after* they purchased their property.[35]

But even if the extent of Doiron's knowledge is questionable, the MacDonald Parties admit Doiron's knowledge is an issue of fact. In so doing, they admit that the District Court erred in making a summary decision on Doiron's statutory duty of disclosure.

The MacDonald Parties' violations do not stop there. The MacDonald Parties are also liable for misrepresentations made by BANA, the MacDonald Parties' client, on the Seller's Real Property Disclosure Form ("SRPD) because the

[32] 2JA_0267, 135:7-10.
[33] 2JA_0267, 136:21-137:2.
[34] 2JA_0268, 137:5.
[35] 2JA_0273, 158:16-24.

MacDonald Parties knew that some of the statements were false.[36] In particular, Doiron knew about the sale of the Golf Parcel to Malek because she wrote the contract for the sale and represented the seller in that transaction.[37] Therefore, as the broker for sale of the Golf Parcel and the broker for the sale of the Rosenbergs' property, Doiron knew that the sale of the Golf Parcel was a material change that impacted the Rosenberg's property because Doiron knew that Malek intended to merge the Golf Parcel with 594 Lairmont.[38] However, the SRPD was not answered accurately as evidenced by the responses to the following questions:

- "Are you aware of . . . Whether the property is located next to or near any known future development? No."[39] This response is false because it is undisputed that Malek intends to construct a house on his lots.[40]
- "Are you aware of . . . Any other conditions or aspects of the property which materially affect its value or use in an adverse manner? No."[41] This response is false because the sale of the Golf Parcel to Malek and the change in Malek's lot lines materially affect the Rosenberg's property.[42]

In short, there is ample evidence which raises genuine issues of material fact as to the MacDonald Parties' violation of NRS 645.259, such that the District Court erred when it granted summary judgment in favor of the MacDonald Parties.

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[36] 6JA_1210.
[37] 3JA_0550, 160:22-161:4.
[38] 3JA_0550, 161:25.
[39] 6JA_1212.
[40] 2JA_0280, 187:10-16.
[41] 6JA_1212.
[42] 2JA_0280, 198:24-200:10.

B. THE MACDONALD PARTIES NEVER DISCLOSED THE SALE OF THE GOLF PARCEL, THE CHANGE IN ZONING OR THE CHANGE IN BOUNDARY LINES.

The MacDonald Parties' claim that Doiron made disclosures regarding zoning and property boundaries cannot be sustained: Doiron did not provide accurate, current information regarding the lot lines of the Golf Course. All information provided was misleading. The MacDonald Parties did not update the community map on the website to reflect the merger of the Golf Parcel with Malek's property.[43] The topography table located in the MacDonald Realty office was not changed after the merger – and still was not changed as of March 6, 2015.[44] Additionally, the "final map of the neighborhood" Doiron provided the Rosenbergs was dated March 4, 2004 – nine years before the Rosenbergs' purchase.[45] Additionally, the zoning map was a map of Henderson and did not depict any lot lines of Lairmont Street.[46] [47] Further, even if the Rosenbergs had some inkling that there had been a change to the lot lines for the Golf Course, the Rosenbergs would not have been able to discover that information until May or June of 2013 – months after the purchase of their property.[48]

Simply put, the Rosenbergs were on notice of nothing, and the MacDonald

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[43] 3JA_0552, 166:2-1).
[44] 3JA_0552, 166:12-25.
[45] 3JA_0554, 175:18-21, 176:7-12, 177:12-16.
[46] 3JA_0559, 194:16.
[47] 2JA_0301, 272:22-273:3.
[48] 3JA_0545, 51:10-22.

Parties want to ignore their responsibilities and attempt to shift the burden to the Rosenbergs to research and inspect a material change that was in the MacDonal Parties' purview, and of which the Rosenbergs had no reason to believe had even occurred. At a minimum, whether the Rosenbergs could have learned this information absent disclosure is an issue of fact and therefore the District Court erred in granting summary judgment.

C. THE "AS IS" PROVISION DOES NOT ACT AS A WAIVER OF THE MACDONALD PARTIES' STATUTORY AND COMMON LAW DUTIES OF DISCLOSURE.

The MacDonald Parties attempt to side-step the reality that issues of fact exist as to whether they violated both common law and statutory duties of disclosure by claiming the "AS-IS" provision of the Purchase Agreement negates all of these issues of fact. There is one glaring problem with this argument: every single "AS-IS" provision in the documents pertain to ***only*** the condition of the property that the Rosenbergs purchased, not the Golf Course, not the Golf Parcel, not the zoning changes and not the change in the lot lines of Malek's property. Specifically, the evidence reflects the following:

- The March 13, 2013 Purchase Agreement defines **"Property"** as "the **real property and any personal property included in the sale**."[49] The Purchase Agreement further states that "Buyer acknowledges that at COE, the **Property will be sold AS-IS**."[50]

[49] 2JA_0336 (emphasis added).
[50] 2JA_0335 (emphasis added).

- The Real Estate Purchase Addendum states that "BUYER IS **BUYING THE PROPERTY 'AS IS**.'"[51]

- On February 20, 2013 the Rosenbergs' letter of interest to BANA states in pertinent part: " **CONDITION OF PROPERTY**: . . . Buyer shall **purchase the property 'As-Is**.'"[52]

- The March 13, 2013 email from the Rosenbergs' realtor states "My buyers are very serious and have **no restrictions regarding seeing the interior** as they walked it during the construction phase, (they are aware that there was a leak) and **they will take property AS-IS**.[53]

By operation of law, any provision that, in word or effect, requires the buyer to accept the property "as is" merely means that the buyer accepts the property in the condition which is visible or observable by him. Therefore, when the seller or the seller's agent fails to disclose material facts regarding the condition of the property which are unknown to the buyer, an "as is" provision is ineffective to relieve the seller of any fraud liability arising from the nondisclosure. *See Lingsch v. Savage*, 213 Cal. App. 2d 729, 742, 29 Cal. Rptr. 201 (1963) (stating that allowing as is provisions to negate concealment would be "to permit the seller to contract against his own fraud contrary to existing law").

[51] Respondent/Cross-Appellant's Supplemental Appendix at 29-43.
[52] 2JA_0308 (emphasis added).
[53] 2JA_0325 (emphasis added).

In addition to the documentary evidence, Plaintiff understood "AS-IS" to mean that they were purchasing the subject property "**as is** in terms of the **structural problems that were inside the house**, the **cosmetic problems that were inside the house**."[54] The Rosenbergs further understood "AS-IS" to mean "take the property as they see it."[55] As such, any reference to the Rosenbergs purchasing the subject property "AS-IS" pertains ***only*** to the subject property. Given this, the MacDonald Parties' claim that the sale of the Golf Parcel was accessible to the Rosenbergs via an inspection of the property the Rosenbergs purchased is utter nonsense.

The MacDonald Parties further claim that the Rosenbergs "had access to all pertinent information regarding zoning information prior to the closing on the subject property."[56] However, for this allegation to have merit, the Rosenbergs would have needed a reason to inspect the zoning of the *Golf Course*. But the Rosenbergs were not informed by the MacDonald Parties that a portion of the Golf Course had been sold to Malek nor that the sale of the Golf Parcel altered Malek's lot lines. The Rosenbergs had a "reasonable expectation that when you bought the house that the golf course was going to remain the way it looked at that time and that is what we were represented."[57] Furthermore, when the Rosenbergs conducted

[54] 2JA_0252, 74:8-13 (emphasis added).
[55] *Id*. at 74:16-17.
[56] 1JA_0190, 15:17-18.
[57] 2JA_0286, 212:12-16.

a visual inspection of the subject property, the Rosenbergs did not observe stakes on the Golf Parcel,[58] or anything else that would have led them to believe the Golf Course had been altered. Therefore, because the Rosenbergs had no reason to believe there had been (or would be) a change to the Golf Course, they did not have a duty to inspect the zoning of the *Golf Course*.

Further, the Rosenbergs had no reason to go to the City of Henderson Planning Department to review the zoning of the subject property because the Zoning Classification and Land Use Disclosure states that it "contains the most recent zoning and land use information" for the subject property.[59] Additionally, the Rosenbergs did not have a survey of the subject property conducted because the boundary lines and the subject property had not been altered based on the preliminary title report the Rosenbergs obtained.[60] Therefore, because the Rosenbergs did not have knowledge of the sale of the Golf Parcel, they had no reason to inspect any boundary lines or zoning outside of the subject property, and the AS-IS provisions do not apply to anything outside the subject property.

It is for these reasons that the District Court erred in granting summary judgment in favor of the MacDonald Parties. At a minimum, and as reflected by the case law cited by the MacDonald Parties, what the MacDonald Parties knew,

[58] 2JA_0266, 130:10-12.
[59] 2JA_0347.
[60] 2JA_0272, 156:10-12.

whether the information was material and whether this information was accessible to the Rosenbergs are all issues of fact, such that granting summary judgment on these issues was erroneous.

IV. THE ROSENBERGS DID NOT CONCEDE DAMAGES WITH RESPECT TO THE MACDONALD PARTIES.

Nothing in terms of damages was conceded by the Rosenbergs. In the Opening Brief, the Rosenbergs specifically indicated they would not address each and every erroneous finding of fact, but rather highlight the primary findings that led to the erroneous granting of summary judgment. The damages finding was a superfluous finding that had nothing to do with granting summary judgment. In fact, the only reason it was included is the Court accepted, whole-cloth, an order submitted by the MacDonald Parties even though the Rosenbergs specifically indicated they did not approve as to form and content. This finding like many findings by the Court also makes no sense given the actual provision quoted.

Specifically, the actual provision quoted explains damages against the **seller** i.e. BANA are limited for claims arising from the Purchase Agreement or the sale. There is no mention of agents or brokers i.e. the MacDonald Parties. There can be no doubt, MacDonald, as broker, and Doiron, as agent for BANA are not party to either the Residential Purchase Agreement or the Real Estate Purchase Addendum. The only parties to the Residential Purchase Agreement are BANA and the

Rosenberg Trust.[61] Additionally, the Real Estate Purchase Addendum clearly defines the word "Party" in its preamble section, by stating that: "Buyer and Seller may each referred to herein as a "Party" and collectively as the "Parties."[62] Nowhere in the Addendum is MacDonald, Doiron or FHP listed as parties.

Under Nevada law, "[i]n the absence of clear evidence of a different intention, words [in a contract] must be presumed to have been used in their ordinary sense, and given the meaning usually and ordinarily attributed to them." *Reno Club v. Young Inv. Co.*, 64 Nev. 312, 323, 182 P.2d 1011, 1016 (1947). The court may not create for the parties a new contract which they have not created or intended themselves." *Id.* Additionally, "'[t]he court is not at liberty, either to disregard words used by the parties, descriptive of the subject matter or of any material incident, or to insert words which the parties have not made use of.'" *Id.* at 324, 182 P.2d at 1017 (*quoting* 12 Am.Jur. [Contracts] secs. 228, p. 749.) Moreover, "' [t]he court can properly interpret a contract only as the parties make it, and cannot substitute words for those used by them.'" *Id.* As such, the provision cannot possibly apply to claims brought against the MacDonald Parties.

Not only are the MacDonald Parties not included as a "Party" under either Agreement, they also cannot be qualified as intended third party beneficiaries under

[61] *See* 2JA_0327.
[62] *See* 2JA_0340.

Nevada law. Under Nevada law, "[t]o obtain such a status, there must clearly appear a promissory intent to benefit the third party [], and ultimately it must be shown that the third party's reliance thereon is foreseeable." *Lipshie v. Tracy Inv. Co.*, 93 Nev. 370, 379, 566 P.2d 819, 824-25 (1977). The fact that [third party] might have incidentally benefitted by the performance of the Agreement is insufficient. *Olson v. Iacometti*, 91 Nev. 241, 533 P.2d 1360 (1975) (holding that "[third party] must prove that there was an intent to benefit him.") citing *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 307, 48 S.Ct. 134, 135, 72 L.Ed. 290 (1927)). *See* Corbin on Contracts, § 779c (1951); Restatement of Contracts, § 133(1)(a)(b)(c) (1932).

Here, the fact that broker and agent both benefited under the Agreements by virtue of collecting commission, at most qualifies them as an incidental beneficiary under the *Olson* case. Furthermore, even if the MacDonald Parties were parties to either Agreement, if an "as-is" provision cannot contract around liability for failure to disclose, then certainly a limitations of damages clause cannot contract around the monetary value of such liability. *See Lingsch v.* Savage, 213 Cal. App. at 742.

In addition to the finding being inconsistent with the actual contract language, the District Court contradicted itself when it later found that the MacDonald Parties were not parties to either Agreement when determining the MacDonald Parties' application for fees. Specifically, the MacDonald Parties claimed they were entitled to attorney's fees under the Purchase Agreement and Addendum, but the District

Court rejected this argument finding that the MacDonald Parties were neither parties nor intended beneficiaries of either agreement. (14JA_3015-3025, 3041-3042).

V. THE DISTRICT COURT ONLY CONSIDERED ONE *BEATTIE* FACTOR IN AWARDING ATTORNEYS FEES

The MacDonald Parties never even raised the *Beattie* factors in their motion for attorney's fees. *See Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983). As the party seeking fees, the MacDonald Parties had the burden of proof with respect to the *Beattie* factors. Because the Motion was devoid of any *Beattie* analysis to which the Rosenbergs could respond, the District Court should have denied the Motion. *See Khoury v Seastrand*, 132 Nev. ___, ___, 377 P.3d 81, 88 n.2 (2016) (arguments not raised in an opening brief are deemed waived). It was error to allow the MacDonald Parties to raise new arguments in a Reply to which the Rosenbergs had no meaningful opportunity to respond in writing. The fact that the Rosenbergs took it upon themselves to address the *Beattie* factors does not ameliorate the MacDonald Parties' failure to do this analysis.

Equally wrong is the MacDonald Parties' suggestion that the hearing addressed all the *Beattie* factors. The very portions cited only deal with the third factor, and even the MacDonald Parties concede the hearing focused more on the reasonableness prong. True to form, the MacDonald Parties want to blame the Rosenbergs for the direction that the hearing took and suggest that this is why the Court did not focus on the other prongs. It is not the Rosenbergs' job to do the job

of the party seeking fees or the judge. The Rosenbergs opposed all three prongs that applied to the Offer (the first prong did not apply as the Offer was issued by a defendant), and the District erred when it did not conduct a complete *Beattie* analysis.

Astonishingly, the MacDonald Parties go so far as to blame the Rosenbergs for the content of the order they drafted merely because the Rosenbergs approved as to form and content. But the Order accurately reflected what the District Court ordered; it lacked any *Beattie* analysis because the District Court did not complete a *Beattie* analysis. For these reasons, the District Court's award of fees must be reversed.

VI. THE MACDONALD PARTIES WAIVED THEIR REQUEST FOR POST-JUDGMENT INTEREST.

The MacDonald Parties never asked for post-judgment interest. Their motion for fees never asked for it and their motion for summary judgment never asked for it. Moreover, at no time after the Order granting summary judgment or the Order granting attorney's fees was entered did the MacDonald Parties ask that the Court amend either Order to include such post-judgment interest. Having not asked for post-judgment interest below, the MacDonald Parties waived any right to seek it now. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52-53, 623 p.2d 981, 983-984 (1981)("A point not urded in the trial court . . . is deemed to have been waived and will not be considered on appeal.").

VII. THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING ATTORNEY FEES TO MALEK.

Nothing about this case differs from *Duff v. Foster*, 110 Nev. 1306, 885 P.2d 589 (1994), because the District Court found that the Rosenbergs were unreasonable for maintaining their claims after Malek filed his motion for summary judgment, not when the Rosenbergs initiated their claims. But what Nevada law requires before fees can be awarded under NRS 18.010; is that the claim be frivolous **at initiation**. Additionally, this case does present factual disputes. As detailed in both the Opening Brief and this Reply, whether a restrictive covenant exists over the Golf Course is an issue of fact because Nevada does recognize implied restrictive covenants.

Malek's motion for fees did not contain any billing records such that the Rosenbergs were deprived of the opportunity to challenge the requested fees. As such, no *Brunzell* analysis was even possible by the Court. *See Brunzell v. Golden Gate Nat. Bank,* 85 Nev. 345, 455 P.2d 31 (1969).

The Court abused its discretion in allowing Malek to later submit its billing records because by that time the Rosenbergs had no chance to respond. Even if the Rosenbergs could have responded, the billing records were so heavily redacted it rendered it impossible to apply the *Brunzell* factors. With respect to the prevailing party issue, Malek misses the point. Because the Court arbitrarily chose the filing of the motion for summary judgment as the point in which fees would be awarded, this certainly included work performed in relation to the slander of title claim, on which

Malek did not prevail. In that regard, the District Court abused its discretion.

CONCLUSION

In granting summary judgment in favor of the MacDonald Parties and Malek, the District Court improperly found that Nevada does not recognize implied restrictive covenants, it improperly found that the Rosenbergs waived a non-waivable statutory duty and ignored issues of material fact that exist regarding the MacDonald Parties' common law duty of disclosure. Moreover, the district court abused its discretion when it granted the MacDonald Parties and Malek attorney fees. Accordingly, as to the orders granting the motions for summary judgment, this Court should reverse and remand with specific instructions that Nevada does recognize implied restrictive covenants; that the statutory duty of disclosure is not waivable; and that issues of fact exist regarding the MacDonald Parties' common law duty of disclosure.

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As to the orders granting attorney fees, this Court should reverse and vacate said orders.

DATED this 20th day of March, 2017.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 with 14 point, double-spaced Times New Roman font.
2. I further certify that that this brief complies with the page or type-volume limitations of NRAP 28.1(e)(2)(A) because, excluding the pages of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, is 37 pages long, and contains 8,495 words.
3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found

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4. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 20th day of March, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 20th day of March, 2017. Electronic service of the foregoing **Appellant's Reply Brief and Response Brief on Cross-Appeal** shall be made in accordance with the Master Service List as follows

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