IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. _____

DANIEL OMERZA, DARREN BRESEE, and STEVE CARIA,

Petitioners

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE RICHARD F. SCOTTI, DISTRICT JUDGE, DEPT. II, DISTRICT COURT CASE NUMBER A-18-771224-C,

Respondent,

and

FORE STARS, LTD.; 180 LAND CO., LLC; and SEVENTY ACRES, LLC,

Real Parties in Interest.

PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS

Mitchell J. Langberg, Esq., #10118
mlangberg@bhfs.com
BROWNSTEIN HYATT FARBER SCHRECK LLP
100 N. City Parkway, Suite 1600
Las Vegas, Nevada 89106
702.382.2101

Attorneys for Petitioners Daniel Omerza, Darren Bresee and Steve Caria

RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the foregoing are persons or entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Petitioners Daniel Omerza, Darren Bresee and Steve Caria are individuals so there is no parent corporation or any publicly held company that owns 10% of the party's stock.

DATED this 29th day of June, 2018.

BROWNSTEIN HYATT FARBER
SCHRECK, LLP

By: /s/MITCHELL J. LANGBERG
Mitchell J. Langberg, Esq. Bar No. 10118
100 North City Parkway, Suite 1600
Las Vegas, Nevada 89106

Attorneys for Petitioners Daniel Omerza, Darren Bresee, and Steve Caria

ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding because it raises as a principal issue a question of statewide public importance (NRAP 17(a)(11)). The principal issue presented pertains to the ability of participants in judicial and quasi-judicial proceedings to enjoy the absolute immunity afforded by the litigation privilege when communicating with, and attempting to secure the participation of, witnesses in those proceedings.

Moreover, the issues presented by this Petition relate to and overlap with the issues that are the subject of an appeal of the denial of an anti-SLAPP motion in this same District Court case. Pursuant to NRS 41.670(4), such an appeal lies with the Nevada Supreme Court.

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I. OVERVIEW AND RELIEF SOUGHT

Defendants have been dragged into court because they participated in the collection of written statements under oath to be submitted to the Las Vegas City Council (the "City Council") in advance of a hearing which Plaintiffs acknowledge was a quasi-judicial proceeding. The immunity afforded by the absolute litigation privilege should operate to bar any claims by Plaintiffs against Defendants.

More specifically, Defendants Daniel Omerza, Darren Bresee, and Steve Caria are residents of the Queensridge development, adjacent to a parcel of real estate that has long been used as a golf course. Plaintiffs seek the approval of the City Council for an Amendment of the City's General Plan to allow Plaintiffs to develop the parcel into multi-family residential units. Two of the Defendants oppose the development and have provided declarations to fellow neighbors to indicate if they purchased their homes in reliance on the existing Master Plan, which designated the property as an open space/natural drainage system. The other Defendant signed one of the declarations. Plaintiffs assert various claims against Defendants based upon their communications with fellow residents and their anticipated communications with the City Council.

Defendants moved to dismiss Plaintiffs' claims pursuant to Nevada's Anti-SLAPP statute and NRCP 12(b)(5). The district court's June 18, 2018 Findings of Fact, Conclusions of Law, and Order ("Order") entered on June, 20, 2018, denied

both of Defendants' motions. Defendants have appealed the denial of the anti-SLAPP motion as a matter of right, and hereby petition this Court under NRAP 21 and NRS Chapter 34 for a writ of prohibition or, alternatively, mandamus against the portions of the Order denying Defendants' Motion to Dismiss Pursuant to NRCP 12(b)(5).

While this Court does not typically consider a petition challenging a district court order denying a motion to dismiss, it is appropriate to do so when (i) an important issue of law needs clarification and the petition promotes considerations of sound judicial economy and administration militate in favor, or (ii) no factual dispute exists and the district court is obligated to dismiss an action. Review of the district court's Order is warranted under both these standards.

First, Defendants sought dismissal based upon the immunity afforded by the absolute and qualified litigation privileges, important doctrines which the district court plainly misapplied, requiring clarification by this Court. This Court has recognized that pretrial claims of immunity may merit extraordinary writ relief. Here, the district court disposed of Defendants' assertion of the litigation privilege in a single sentence, stating, "a factual issue exists whether any privilege applies and/or the Defendants acted in good faith." But the privilege applies as a matter of law, because all of the communications at issue were made in anticipation of quasi-judicial proceedings before the City Council. Nor is there any requirement of good

faith in order to invoke absolute privilege. To the contrary, because of the importance of the litigation privilege, this Court has applied absolute privilege even to statements made with ill will and knowledge of their falsity. There is no basis for the district court's disposal of the privilege issue, nor do either of the decisions the court cited support its decision. If the district court's order were accepted as the law of Nevada, it would dramatically limit and reshape litigation privilege in this state, allowing claims to proceed against defendants who have done nothing but prepare for judicial or quasi-judicial proceedings.

Moreover, whereas most petitions for review of an order denying a motion to dismiss serve to disrupt proceedings before the district court and consume judicial resources, here the petition will *promote* sound judicial economy. In this action, the district court's Order simultaneously denied the Rule 12(b)(5) motion to dismiss and Defendants' anti-SLAPP motion, which both raised the identical litigation privilege issue and other closely related issues. Because Defendants have a statutory right to appeal denial of the anti-SLAPP motion, consideration of the instant writ as to the 12(b)(5) motion will not disrupt the case or consume judicial resources, but rather will promote judicial efficiency by allowing the Court to consider the closely related motions at one time. Thus, this Court should step in to correct the mischief the district court's Order would work.

Second, there is no factual dispute here to support the district court's denial of Defendants' motion to dismiss. In the single paragraph of its Order disposing of the litigation privilege issue, the district court identified two factual disputes that the court did *not* need to resolve to apply the absolute privilege. Even as to the qualified privilege, there is no basis for Plaintiffs' contention that Defendants acted in bad faith. Plaintiffs emphasize that Defendants knew the Queensridge covenants do not apply to the Badlands golf course, but that is a red herring—Defendants do not rely on the Queensridge covenants at all. Since that is also the key allegation underlying the fraud theory supporting all of Plaintiffs' claims for relief, there is no material factual dispute and the district court should have dismissed this action for failure to state a claim upon which relief can be granted.

Accordingly, the writ should be granted.

II. ISSUE PRESENTED

Where the City Council will hold a quasi-judicial hearing on an application for amendments to the City's General Plan, does the immunity afforded by the litigation privilege apply to residents' communications with each other to obtain witness declarations in anticipation of those proceedings?

III. FACTS RELEVANT TO UNDERSTANDING THIS PETITION

A. Overview of the Litigation

As alleged in Plaintiffs' Complaint, Defendants are residents of the Queensridge subdivision. Complaint, ¶¶ 4-8, 15-20 (Petitioners Appendix ("PAPP"), Vol. I, 002-003 & 006). Adjacent to Queensridge is an open space that has previously been used as the site of the Badlands Golf Course ("Badlands"). Complaint, ¶¶ 9, 12 (PAPP, Vol. I, 003-004). Badlands is not part of Queensridge and is not subject to Queensridge Covenants, Conditions, Restrictions and Easements. Complaint, ¶ 12 (PAPP, Vol. I, 003-004). However, both Queensridge and the Badlands site are contained within the Peccole Ranch community, and both are subject to the Master Development Plan. Reporter's Transcript of Proceedings dated January 11, 2018, in the matter *Jack Binion v. Las Vegas City of, et al*., pp. 5-10 ("Binion Transcript") (PAPP, Vol. II & III, 121-126).

Plaintiffs have stated their intention to construct residential units on the Badlands site. They sought and received approval from the City of Las Vegas for their plan. However, the City's approval was challenged in a proceeding before Judge Jim Crockett (the "Binion Litigation"). In the Binion Litigation, Judge Crockett held that the City's approval was an abuse of discretion, because it required a major modification of the Master Development Plan. He reasoned in part that residents who bought property in Peccole Ranch relied upon the existing

master planning. The transcript of the hearing during which Judge Crockett announced his decision includes his discussion of his reasoning. Binion Transcript, pp. 5-10 (PAPP, Vol. II & III, 121-126). Plaintiffs have since applied to the City Council to obtain a General Plan Amendment to change the open space designations to residential. (PAPP, Vol. VI, 163-164.)

Defendants oppose a major modification of the Master Plan or an amendment to the General Plan. In order to express their opposition, and that of many of their neighbors, to the City Council, Defendants Caria and Omerza participated in handing out forms of declarations to Queensridge residents. Complaint, ¶ 23 and Exh. 1 (PAPP, Vol. I, 007). If the residents bought their property in reliance upon the open space/natural drainage system specified in the Master Plan, they could execute declarations so indicating. Defendant Bresee signed one of the declarations.

Plaintiffs allege that Defendants knew statements in the declarations to be false. Complaint, ¶ 24 (PAPP Vol. I, 008).

Plaintiffs instituted this instant lawsuit, asserting several claims for relief based upon Defendants activities in gathering declarations to provide to the City Council for consideration during its quasi-judicial proceedings with respect to Plaintiffs' application.

B. The District Court's Ruling

The district court conducted a hearing on Defendants' motions. After taking the matter under consideration, the court issued a minute order on May 29, 2018, stating its intention to deny the motions, and instructing Plaintiffs to submit proposed findings of fact and conclusions of law. Plaintiffs did so on June 8, 2018. On June 18, 2018, the Court issued its Order, adopting most of Plaintiffs' proposed findings. (PAPP, Vol. VIII, 336-349.)

The bulk of the Order pertains to the anti-SLAPP motion, which Defendants are appealing to this Court as permitted by Nevada's anti-SLAPP statute. *See* NRS 41.670(4) (interlocutory appeal of anti-SLAPP motion "lies to the Supreme Court"). As to the portions of the Order relevant to the 12(b)(5) motion, only three paragraphs of Plaintiffs' proposed findings addressed Defendants' assertion of immunity based upon absolute or qualified litigation privilege. The district court struck out two of those paragraphs and revised the third—the only substantive revisions the court made to the proposed findings—leaving only one paragraph concerning the litigation privilege:

> As to Defendants' assertion of absolute, qualified, or conditional privilege, a factual issue exists whether any privilege applies and/or the Defendants acted in good faith, both of which are not properly decided in this special motion. *Fink v. Oshins*, 118 Nev. at 433, 49 P.3d at 645 (factual issue on whether privilege applied); *Bank of America Nevada v. Bordeau*, 115 Nev. at 266-67, 982 P.2d at 476 (factual issue on whether publication was made with malice).

Order, at 9-10, ¶ 26 (PAPP, Vol. III, 344-345).

IV. REASONS WHY THE WRIT SHOULD BE ISSUED

While this Court does not generally entertain writ petitions challenging the denial of a motion to dismiss, it "may do so when: (1) no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule; or (2) an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *State v. Eighth Judicial Dist. Court ex rel. County of Clark*, 118 Nev. 140, 147, 42 P.3d 233, 238 (2002) (footnote omitted). Both of those circumstances are present here; Petitioners will address them in reverse order.

A. The Important Issue of Litigation Privilege Requires Clarification, And Considerations of Sound Judicial Economy Militate in Favor of Granting the Petition.

Nevada applies a "long-standing common law rule that communications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject of controversy." *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101, 104 (1983). The privilege provides an "***unconditional immunity***, even for statements made with personal ill will." *Fink v. Oshins*, 118 Nev. 428, 433, fn. 7, 49 P.3d 640, 643, fn. 7 (2002)(emphasis added, internal quotations omitted). If the district court's Order, disposing of this important immunity in a single confused paragraph is any

indication this important issue requires clarification. Further, in this case, because this matter is already appealable under the anti-SLAPP statute, considerations of sound judicial economy militate in favor of granting the petition.

1. The District Court's Order Misapplied Litigation Privilege, in a Manner Directly Contrary to This Court's Directives.

The district court's order failed to properly apply the important immunity afforded by the litigation privilege. The district court correctly struck Plaintiffs' proposed conclusion of law that the absolute litigation privilege is limited to defamation actions; it is not. However, stripped of this incorrect conclusion, the Court's Order retains no defensible basis for preventing Defendants from invoking the absolute litigation privilege. It is irrelevant that Plaintiffs ***claim*** there is a factual dispute as to whether the privilege applies; under the facts ***Plaintiffs themselves have alleged***, it does. It is also irrelevant whether Plaintiffs dispute whether Defendants acted in good faith; no such standard applies to the absolute privilege. Even as to Defendants' alternative assertion of qualified or conditional privilege, there is no basis for finding any factual dispute as to Defendants' good faith. The district court's erroneous application of litigation privilege warrants this Court's intervention.

Plaintiffs proposed a conclusion of law that "absolute litigation privilege is limited to defamation claims." *See* Order at 9, proposed ¶ 24 (PAPP, Vol. VIII, 344). Plaintiffs cited the *Fink* case for that proposition, but the *Fink* opinion says

nothing of the sort. In fact, the absolute and qualified privileges both apply without regard to how Plaintiffs style their claims. This Court has explained that, when the privilege applies, "[a]n absolute privilege bars ***any*** civil litigation based on the underlying communication." *Hampe v. Foote,* 118 Nev. 405, 409, 47 P.3d 438, 440 (2002) (emphasis added), *overruled in part on other grounds by Buzz Stew, LLC v. City of N. Las Vegas,* 124 Nev. 224, 228 n. 6, 181 P.3d 670, 672 n.6 (2008); *see also Bank of America Nevada v. Bourdeau,* 115 Nev. 263, 267, 982 P.2d 474, 476 (1999) (recognizing that conditional privilege can bar an interference with a prospective business relation claim).[1]

Similarly, contrary to Plaintiffs' arguments below, the privilege is not limited to communications that occur ***during*** a judicial proceeding. As this Court explained in *Fink*, the privilege also applies to communications ***preliminary*** to an anticipated judicial or quasi-judicial proceeding:

> The scope of the absolute privilege is quite broad. The defamatory communication need not be strictly relevant to any issue involved in the proposed or pending litigation, it only need be in some way pertinent to the subject of controversy. Further, ***the privilege applies not only to communications made during actual judicial proceedings, but also to communications preliminary to a proposed judicial proceeding***.

[1] In that same proposed conclusion, Plaintiffs also suggested that the privilege is limited to fair and accurate reporting of judicial proceedings, citing *Adelson v. Harrison,* 402 P.3d 665 (Nev. 2017). But that rule and that case pertain to a different privilege, the "fair report" privilege permitting the news media and others to report newsworthy events, a privilege Defendants have not raised in this action.

Fink v. Oshins, 118 Nev. at 433, 49 P.3d at 643 (emphasis added) (footnotes and internal quotations omitted).

Here, by Plaintiffs' own allegations, Defendants sought to gather or provide input from witnesses for use by the City Council to the extent it considers whether to approve an amendment to the General Plan. Defendants' efforts were thus directly related to anticipated quasi-judicial proceedings before the City Council. The absolute privilege extends to such communications with potential witnesses in quasi-judicial proceedings. *Cf. Knox v. Dick*, 99 Nev. 514, 517, 665 P.2d 267 (1983) (recognizing that statements by *witnesses* can be subject to privilege); *Lebbos v. State Bar*, 165 Cal. App. 3d 656, 668, 211 Cal. Rptr. 847 (Cal. Ct. App. 1985) ("[I]t is well settled that absolute privilege extends in quasi-judicial proceedings to preliminary interviews and conversations with potential witnesses."). Indeed, Plaintiffs did not dispute before the district court the quasi-judicial nature of proceedings before the City Council.

Plaintiffs insist they do not concede that the communications at issue occurred preliminary to a quasi-judicial proceeding, but that is of no consequence. The availability of the absolute litigation privilege is a question of ***law*** for the court to apply. *Fink*, 118 Nev. at 434, 49 P.3d at 644; *Circus Circus Hotels, Inc. v. Witherspoon*, *supra* 99 Nev. at 62, 657 P.2d at 105. Moreover, this Court has instructed that "because the scope of the absolute privilege is broad, a court

determining whether the privilege applies should resolve any doubt in favor of a broad application." *Clark County Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 382, 213 P.3d 496 (2009) (citation omitted). Thus, even if there were some doubt that the privilege applies here—and there should be none—such doubt must be resolved in favor of protecting Defendants' petitioning activities. The district court offered no tenable basis for preventing application of the privilege, or for failing to resolve any doubts in applying the privilege in Defendants' favor.

The district court concluded that there is a factual dispute whether Defendants acted in good faith. Order at 10, ¶ 26 (PAPP, Vol. VIII, 345). But to apply the absolute privilege, no showing of good faith is required. Although Defendants deny they said anything inaccurate or unfair, as a matter of law the absolute litigation privilege does not turn on fairness or accuracy or any other measure of "good faith." To the contrary, the "***absolute privilege precludes liability even where the defamatory statements are published with knowledge of their falsity and personal ill will toward the plaintiff.***" *Circus Circus Hotels, Inc. v. Witherspoon, supra*, 99 Nev. at 60, 657 P.2d at 104 (emphasis added) (citations omitted). Such a "good faith" standard would disrupt the purpose of the privilege. "The policy underlying the privilege is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements." *Circus Circus*, 99

Nev. at 61 (citations omitted). Thus, the district court's ruling that the privilege does not apply because there is a factual dispute as to Defendants' good faith is wrong ***as a matter of law***.

The Court's confusion may be attributable to the fact that a showing of malice can in some circumstances prevent application of the *qualified* privilege, which Defendants asserted in the alternative. Indeed, the district court cited *Bank of America Nevada v. Bourdeau*, for the proposition that "malice" may create a factual issue, Order at 10, ¶ 26 (PAPP, Vol. VIII, 345), but that decision analyzed malice *only* in the context of the qualified or conditional privilege that applies outside the scope of any judicial or quasi-judicial proceedings. *See Bank of America*, 115 Nev. at 266-67, 982 P.2d at 476. The district court plainly erred in applying a good faith requirement to both absolute and qualified privilege.

Even in the context of qualified privilege, there was no basis for the district court to prevent Defendants from asserting privilege. There is no question that the communications and interactions at issue here occurred between persons with interests in the subject matter at issue, the development of the Badlands golf course. *See Circus Circus*, 99 Nev. at 62 (indicating that qualified or conditional privilege exists where the subject matter related to one "in which the person communicating has an interest …, if made to a person with a corresponding interest"). To deny qualified privilege in such circumstances, the court must find

evidence of actual malice, specifically, evidence that a "statement is published with knowledge that it was false or with reckless disregard for its veracity." *Pope v. Motel 6*, 121 Nev. 307, 317, 114 P.3d 277 (2005). Here, the district court did not and could not find that Plaintiffs made any such showing. By offering the declarations for others to consider signing, the Defendants were not making any affirmative statement. And, to the extent that anyone asserted that some residents relied on the existing Master Plan when the purchased their property, they merely stated what Judge Crockett had already found. *See* Binion Transcript, 9:20-22 (PAPP, Vol. III, 125) ("The people who bought into this Peccole Ranch Master Plan 1 and 2 did so in reliance upon what the master planning was.")).

In support of their conclusory allegations of fraud, Plaintiffs emphasized to the district court that Defendants acknowledged in the past that the Queensridge ***Covenants, Conditions and Restrictions*** did not prohibit development of the Badlands Golf Course. But that is flatly irrelevant; Defendants do not claim otherwise today. Rather, they assert that Queensridge residents may have relied upon the designation of the golf course as open space in the ***Master Plan***.[2] In its

[2] Judge Crockett made this very determination in the related Binion Litigation, Case No. A-17-752344-J. Specifically, Judge Crockett concluded that approval of Plaintiffs' plans requires a major modification of the Master Plan, which may run afoul of the reasonable expectations of residents of the area who relied on the existing master planning. Binion Transcript, pp. 5-10 (PAPP, Vol. II & III, 121, 126). Defendants requested that the district court take judicial notice of this ruling. Since Judge Crockett himself obviously raised this concern in good faith, there can

Order, the District Court did not identify a single issue of fact that was pled (or could plausibly be pled) that would support the conclusion that Defendants made this assertion in bad faith. Thus, it should not have denied the motion to dismiss based upon Defendants' assertion of qualified privilege.

Proper application of the litigation privilege and the qualified privilege is an important legal issue meriting clarification by this Court. As this Court recently emphasized in the context of another immunity, "we have recognized that a pretrial claim of judicial or quasi-judicial immunity may merit extraordinary writ relief." *Bertsch v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 396 P.3d 769, 772 (2017) (citing *State v. Second Judicial Dist. Court*, 118 Nev. 609, 614, 55 P.3d 420, 423 (2002)). Immunity based upon litigation privilege is a comparable protection against litigation, which likewise warrants review by this Court.

2. Because the Anti-SLAPP Motion Is Already Subject to Appeal, Review of the District Court's 12(b)(5) Order on an Extraordinary Writ Will Promote Judicial Economy.

The Court generally declines to consider writ petitions as to a district court order denying a motion to dismiss because "such petitions rarely have merit, often disrupt district court case processing, and consume an enormous amount of this Court' resources." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558-59 (2008) (quotations omitted). Not only does the

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be no reasonable inference that Defendants could not believe the same thing in good faith.

instant petition have substantive merit, as demonstrated above, but in this case consideration of the petition will *not* disrupt proceedings in the district court or unduly consume this Court's resources, but rather will *promote* judicial economy.

The district court's Order simultaneously denied Defendants' Rule 12(b)(5) motion to dismiss and their anti-SLAPP motion. But Defendants have a statutory right to interlocutory appeal of the district court's denial of the anti-SLAPP motion. *See* NRS 41.670(4). Therefore, consideration of the instant writ as to the 12(b)(5) motion will allow this Court to consider both motions, and the closely related issues presented in them, at one time. In particular, both motions asserted litigation privilege as a defense. In the context of the anti-SLAPP statute, this privilege prevents Plaintiffs from meeting their burden of demonstrating with *prima facie* evidence a probability of prevailing on their claims. *See* NRS 41.660(3)(b). Since the Court will likely need to address the privilege issue in the context of the anti-SLAPP motion, judicial economy favors simultaneous consideration of both related motions.

B. There Is No Factual Dispute Here; The District Court Was Obligated to Dismiss This Action Pursuant to Clear Authority.

For the reasons demonstrated above, there is no material factual dispute to prevent dismissal of this action based upon litigation privilege. By the same token, since Plaintiffs have alleged no facts to support their conclusory allegation of

fraudulent misconduct, the district court was obligated to dismiss this action for failure to state a claim for relief pursuant to Rule 12(b)(5).

1. The District Court Was Obligated to Dismiss the Action Based Upon Litigation Privilege.

As discussed above, the single paragraph in the district court's Order identified two purported factual disputes preventing dismissal: whether the litigation privilege applies and whether Defendants acted in bad faith. Order at 10, ¶ 26 (PAPP, Vol. VIII, 345). But application of the privilege is a legal issue for the Court, and no showing of good faith is required to apply the absolute litigation privilege. Even as to the qualified privilege, Plaintiffs' emphasis on their allegation that Defendants knew that the Queensridge covenants do not prevent their intended development does nothing to establish malicious misconduct, since Defendants do not rely on those covenants in opposing the development. Thus, there is no pertinent factual dispute here, and under the clear authorities cited above regarding the litigation privilege, the district court was obligated to dismiss the claims against Defendants.

2. The District Court Was Obligated to Dismiss the Action for Failure to State a Claim Upon Which Relief Can Be Granted.

Likewise, all of Plaintiffs' claims for relief arise from the same unsupported conclusory allegation of bad faith and fraud. Plaintiffs did not make factual allegations sufficient to support any of their five claims for relief, for intentional or

negligent interference, conspiracy, or intentional or negligent misrepresentation. Therefore, the district court should not have denied Defendants' Rule 12(b)(5) motion to dismiss for failure to state a claim upon which relief could be granted.

a) Intentional or Negligent Interference

"A plaintiff prevails on a claim for interference with prospective economic advantage by proving: (1) a prospective contractual relationship between the plaintiff and a third party; (2) knowledge by the defendant of the prospective relationship; (3) intent to harm the plaintiff by preventing the relationship; (4) the absence of privilege or justification by the defendant; and (5) actual harm to the plaintiff as a result of the defendant's conduct." *LT Intern. Ltd. v. Shuffle Master, Inc.*, 8 F. Supp. 3d 1238, 1248 (D. Nev. 2014). Absence of privilege has already been addressed. None of the remaining four elements was adequately alleged in Plaintiffs' Complaint.

First, Plaintiffs did not even attempt to identify the prospective contractual or economic relations at issue in this claim for relief. Instead, they simply asserted that some undefined relationships with third parties would come about. *See* Complaint, ¶ 41 (PAPP, Vol. I, 011) ("Defendants … knew, or should have known, that Plaintiffs would be developing the Land with third parties")). It is impossible for the Court to evaluate these nebulous allegations, or for Defendants to respond to them, where Plaintiffs have not even begun to identify what potential

transactions are at issue. *See Valley Health Sys. LLC v. Aetna Health, Inc.*, No. 2:15-CV-1457 JCM (NJK), 2016 U.S. Dist. LEXIS 83710, at *14 (D. Nev. Jun. 28, 2016) (dismissing a claim for intentional interference with prospective economic advantage where plaintiff "has not properly alleged a prospective contractual relationship between [it] and a third party with which [the defendant] could have interfered").

Second, Defendants can hardly be charged with knowledge of potential economic relationships that Plaintiffs were not even able to identify in their own Complaint. *See Bustos v. Dennis*, No. 2:17-CV-00822-KLD-VCF, 2018 U.S. Dist. LEXIS 45764, at *10-11 (D. Nev. Mar. 20, 2018) (dismissing intentional interference with prospective economic advantage claim where plaintiff did not allege a "specific prospective contractual relationship" and did not allege that "Defendants were aware of the prospective relationship").

Third, Plaintiffs alleged no facts to support a finding that Defendants acted with intent to harm Plaintiffs, as opposed to the intent to maintain the value of their own property. *See Wichinsky v. Mosa*, 109 Nev. 84, 44, 847 P.2d 727, 730 (1993) (holding interference claim failed for lack of evidence of intent to harm plaintiff).

Finally, Plaintiffs failed to identify any actual harm resulting from the unspecified interference they imagine. They simply made conclusory allegations that damage occurred, Complaint, ¶¶ 46, 55 (PAPP, Vol. I, 012, 013), which are

meaningless in the absence of any factual allegations to explain how such purported damage took place.

b) Conspiracy

"In Nevada, an actionable civil conspiracy is defined as a combination of two or more persons, who by some concerted action, intend to accomplish some unlawful objective for the purpose of harming another which results in damage." *Flowers v. Carville*, 266 F. Supp. 2d 1245, 1249 (D. Nev. 2003) (citations omitted). The Complaint entirely failed to identify any such "unlawful objective," however. To the contrary, Plaintiffs allege that Defendants' objective was to "influence and/or pressure third-parties, including officials within the City of Las Vegas." Complaint, ¶ 57 (PAPP, Vol. I, 014). But that is the very function of the political process, to influence officials in the exercise of their governmental authority. Similarly, for Defendants "to object to Plaintiffs' development" or "to use their political influence," *id.*, ¶ 60 (PAPP, Vol. I, 014), does not in any way amount to an "unlawful objective." Plaintiffs asserted that Defendants did these things "improperly," but this is a mere conclusion, divorced of any supporting allegations of fact. The *only* factual support Plaintiffs even attempt to advance for their conspiracy claim is the assertion that the declarations Defendants obtained from other residents were false. But this is untenable as a matter of law for the

same reasons discussed above. Plaintiffs have articulated no "unlawful objective" to support a conspiracy claim.

Neither have Plaintiffs alleged any facts to support the element of damages resulting from the purported conspiracy, again making only a conclusory assertion that damages occurred, Complaint, ¶ 61 (PAPP, Vol. I, 015), devoid of any factual allegations that conceivably might support a finding of actual damages.

c) Intentional or Negligent Misrepresentation

Finally, Plaintiffs' Complaint does not allege any of the elements for an intentional or negligent misrepresentation claim. A claim for misrepresentation "is established by three factors: (1) a false representation that is made with either knowledge or belief that it is false or without a sufficient foundation, (2) an intent to induce another's reliance, and (3) damages that result from this reliance." *Nelson v. Heer*, 123 Nev. 217, 225-26, 163 P.3d 420, 426 (2007).

None of those factors is adequately alleged here. First, Plaintiffs asserted that the facts in the declarations at issue are false, but again that is a mere conclusion. As demonstrated, Plaintiffs' reliance on the Queensridge covenants is a red herring that does nothing to support Plaintiffs' conclusory allegations; moreover, the supposedly false declarations are entirely consistent with the district court's ruling in the Binion Litigation. Second, nowhere did Plaintiffs allege that anyone has relied on these declarations. Third, Plaintiffs again asserted in

conclusory fashion that they suffered damages from the declarations, Complaint, ¶¶ 64, 68 (PAPP, Vol. I, 015), but without any factual allegations to support that conclusion. Plaintiffs simply have not alleged no facts to create any triable dispute of fact.

V. CONCLUSION

Accordingly, Defendants respectfully request that the Court issue a writ of prohibition, or alternatively mandamus, to review the district court's denial of Defendants' Rule 12(b)(5) motion to dismiss, including the district court's disposition of the issue of litigation privilege.

DATED this 29th day of June, 2018.

BROWNSTEIN HYATT FARBER
SCHRECK, LLP

By: /s/ MITCHELL J. LANGBERG
Mitchell J. Langberg, Esq. Bar No. 10118
100 North City Parkway, Suite 1600
Las Vegas, Nevada 89106

Attorneys for Daniel Omerza, Darren Bresee, and Steve Caria

VERIFICATION

I, Mitchell J. Langberg, declare as follows:

1. I am an attorney for Petitioners Daniel Omerza, Darren Bresee, and Steve Caria.

2. I verify that I have read the foregoing PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS and that the same is true to my own knowledge, except for those matters stated on information and belief, and as to those matters, I believe them to be true.

3. I declare under the penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

This declaration was executed on the 29th day of June, 2018 in Las Vegas, Nevada.

/s/ MITCHELL J. LANGBERG
Mitchell J. Langberg, Esq., Bar No. 10118

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in double-spaced Times New Roman. I further certify that I have read this brief and that it complies with NRAP 21(d).

Finally, I hereby certify that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 29th day of June, 2018.

BROWNSTEIN HYATT FARBER
SCHRECK, LLP

By: /s/ MITCHELL J. LANGBERG
Mitchell J. Langberg, Esq. Bar No. 10118
100 North City Parkway, Suite 1600
Las Vegas, Nevada 89106
Attorneys for Daniel Omerza, Darren Bresee, and Steve Caria

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and that on this 2nd day of July, 2018, I electronically filed and served a true and correct copies of the above and foregoing **PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS** properly addressed to the to the following:

James J. Jimmerson, Esq.
The Jimmerson Law Firm, P.C.
415 South Sixth Street, Suite 100
Las Vegas, Nevada 89101
Email: ks@jimmersonlawfirm.com

Elizabeth Ham, Esq.
EHB Companies, LLC
9755 West Charleston Boulevard
Las Vegas, Nevada 89117
Email: eham@ehbcompanies.com

Attorneys for Plaintiffs
FORE STARS, LTD., 180 LAND CO., LLC;
and SEVENTY ACRES, LLC

U.S. Mail Copy to:

Honorable Richard Scotti
Eighth Judicial District
Court of Clark County, Nevada
Regional Justice Center
200 Lewis Avenue, Department 2
Las Vegas, Nevada 89155

/s/ DeEtra Crudup
An employee of Brownstein Hyatt Farber Schreck, LLP