IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 76240

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.

APPELLANTS' APPENDIX TO PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS - VOLUME II OF VIII

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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 by electronic mail a true and correct copies of the above and foregoing **APPELLANTS' APPENDIX IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS - VOLUME II of VIII** properly addressed to the following:

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

76. The Motion itself if procedurally defective. It contains only bare citations to statues and rules, and it contains no Affidavit as required by EDCR 2.21 and NRCP 56(e);

77. NRCP 60(b) does not allow for Evidentiary Hearing to give Plaintiffs "opportunity to present evidence as to why they filed a Motion for Preliminary Injunction against Fore Stars and why that was appropriate." It allows the setting aside of a default judgment due to mistakes, inadvertence, excusable neglect, newly discovered evidence or fraud. With respect to the Motion for Attorneys' Fees and Costs and Order granting the same, this is not even alleged;

78. Plaintiffs must establish "adequate cause" for an Evidentiary Hearing. *Rooney v. Rooney*, 109 Nev. 540, 542–43, 853 P.2d 123, 124–25 (1993). Adequate cause "requires something more than allegations which, if proven, might permit inferences sufficient to establish grounds....." "The moving party must present a prima facie case...showing that (1) the facts alleged in the affidavits are relevant to the grounds for modification; and (2) the evidence is not merely cumulative or impeaching." *Id.*

79. Plaintiffs have failed to establish adequate cause for an Evidentiary Hearing. Plaintiffs have not even submitted a supporting Affidavit alleging any facts whatsoever;

80. "Only in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted." *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (76). "Rehearings are not granted as a matter of right, and are not allowed for the purpose of reargument." *Geller v. McCown*, 64 Nev. 102, 108, 178 P.2d 380, 381 (1947) (citation omitted). Points or contentions available before but not raised in the original hearing cannot be maintained or considered on rehearing. See *Achrem v. Expressway Plaza Ltd. P'ship*, 112 Nev. 737, 742, 917 P.2d 447, 450 (1996);

81. There is no basis for an Evidentiary Hearing under NRCP 59(a). There were no irregularities in the proceedings of the court, or any order of the court, or abuse of discretion whereby either party was prevented from having a fair trial. There was no misconduct of the court or of the prevailing party. There was no accident or surprise which ordinary prudence could not have guarded against. There was no newly discovered evidence material for the party making the motion which the party could not, with reasonable diligence, have discovered or produced at trial. There were no excessive damages being given under the influence of passion of prejudice, and there were no errors in law occurring at the trial and objected to by the party making the motion. If anything, the fact that Defendants were awarded 56% of their incurred attorneys' fees and costs relating to the preliminary injunction issues, and denied additional sanctions pursuant to NRCP 11, demonstrates this Court's evenhandedness and fairness to the Plaintiffs;

82. Plaintiffs are not automatically entitled to an Evidentiary Hearing on the issue of attorneys' fees and costs, and the decision to forego an evidentiary hearing does not deprive a party of due process rights if the party has notice and an opportunity to be heard. *Lim v. Willick Law Grp.*, No. 61253, 2014 WL 1006728, at *1 (Nev. Mar. 13, 2014). *See, also, Jones v. Jones, 22016 WL 3856487, Case No. 66632 (2016)*;

83. In this case, Plaintiffs had notice and the opportunity to be heard, and already presented to the Court the evidence they would seek to present about why they filed a Motion for a Preliminary Injunction against these Defendants, having argued at the September 27, 2016 Hearing, the October 11, 2016 Hearing, the November 1, 2016 Hearing and the January 10, 2017 hearing that they had "vested rights to enforce "restrictive covenants" against Defendants under the *Gladstone v. Gregory* case. Those arguments fail;

84. The Court also gave Plaintiffs the opportunity to submit any further evidence they wanted, with a deadline of November 15, 2016. The Court considered all evidence timely submitted;

85. Plaintiffs filed on November 8, 2016 Supplemental Exhibits with their argument regarding the "Amended Master Declaration" and on November 18, 2016 "Additional Information" including description of the City Council Meeting. Plaintiffs also filed on November 17, 2016, their Response to the Motion for Attorneys' Fees and Costs;

86. On its face, the facts claimed in Plaintiffs' Motion, unsupported by Affidavit, regarding why he had to file the first Motion for Preliminary Injunction, second Motion for Preliminary Injunction on September 28, 2016, the Motion for Stay Pending Appeal and the Motion for Rehearing, which Motions were the basis of the award of attorneys' fees and costs, are unbelievable. Plaintiffs claim that the City was dismissed as a Defendant and the "only remedy" was to file directly against the Defendants. But Plaintiffs filed their Motion for Preliminary Injunction against Fore Stars the day after the hearing on their first Motion for Preliminary Injunction—even before the decision on their first Motion was issued detailing the denial of the Motion and the analysis of the *Eagle Thrifty* case. The Court had not even *heard*, let alone granted, City's Motion to Dismiss at that time;

87. Plaintiffs' justification that the administrative process came to an end when four applications were withdrawn without prejudice, three were held in abeyance, and "a contemplated additional violation of the CC&R's appeared on the record" is also without merit. Aside from the fact that Plaintiffs are not permitted to restrain, in advance, the filing of applications or the City's consideration of them, factually, as of September 28, 2016, the Planning Commission Meeting had not even occurred yet (let alone the City Council Meeting). The administrative process was still ongoing;

88. The claim that the *Gladstone case* was applicable directly against restrictive covenant violators after the administrative process ended and Defendants were "no longer protected by Eagle Thrifty" is, again, belied by the fact that the CC&R's do not apply to, and cannot be enforced against, land that was not annexed into the Queensridge CIC. *Gladstone* does not apply. Plaintiffs' argument is not convincing;

89. Plaintiffs' arguments regarding how "frivolous" is defined by NRCP 11 is irrelevant because those additional sanctions against Plaintiffs' counsel were denied as moot, in light of the Court awarding Defendants attorneys' fees and costs under NRS 18.010(2)(b) and EDCR 7.60;

90. Defendants' Motion sought an award of $147,216.85 in attorneys' fees and costs, dollar for dollar, incurred in having to defeat Plaintiffs' repeated efforts to obtain a preliminary injunction against Defendants, which multiplied the proceedings unnecessarily. After considering Defendants' Motion and Supplement and Plaintiffs' Response, the Court awarded Defendants $82,718.50. The attorneys' fees and costs awarded related only to those efforts to obtain a preliminary injunction through the end of October, 2016, and did not include or consider the additional attorneys' fees, or the additional costs, which were incurred by Defendants relating to the Motions to Dismiss, or the new filings after October, 2016;

91. NRS 18.010, EDCR 7.60 and NRCP 11 are distinct rules and statues, and the Court can apply any of the rules and statues which are applicable;

92. NRS § 18.010 makes allowance for attorney's fees when the Court finds that the claim of the opposing party was brought without reasonable ground or to harass the prevailing party, and/or in bad faith. *NRS 18.010(2)(b)*. A frivolous claim is one that is, "both baseless and made without a reasonable competent inquiry." *Bergmann v. Boyce*, 109 Nev. 670, 856 P.2d 560 (1993). Sanctions or attorneys' fees may be awarded where the pleading fails to be well

grounded in fact and warranted by existing law and where the attorney fails to make a reasonable competent inquiry. *Id.* The decision to award attorney fees against a party for pursuing a claim without reasonable ground is within the district court's sound discretion and will not be overturned absent a manifest abuse of discretion. *Edwards v. Emperor's Garden Restaurant*, 130 P.3d 1280 (Nev. 2006).

93. NRS 18.010 (2) provides that: "The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public."

94. EDCR 7.60(b) provides, in pertinent part, for the award of fees when a party without just cause: (1) Presents to the court a motion or an opposition to a motion which is obviously frivolous, unnecessary or unwarranted, (3) So multiplies the proceedings in a case as to increase costs unreasonably and vexatiously, and (4) Fails or refuses to comply with these rules;

95. An award of attorney's fees and costs in this case was appropriate, as Plaintiffs' claims were baseless and Plaintiffs' counsel did not make a reasonable and competent inquiry before proceeding with their first Motion for Preliminary Injunction after receipt of the Opposition, and in filing their second Preliminary Injunction Motion, their Motion for Rehearing or their Motion for Stay Pending Appeal, particularly in light of the hearing the day prior.

Plaintiffs' Motions were the epitome of a pleading that "fails to be well grounded in fact and warranted by existing law and where the attorney fails to make a reasonable competent inquiry;"

96. There was absolutely no competent evidence to support the contentions in Plaintiffs' Motions--neither the purported "facts" they asserted, nor the "irreparable harm" that they alleged would occur if their Motions were denied. There was no Affidavit or Declaration filed supporting those alleged facts, and Plaintiffs even changed the facts of this case to suit their needs by transferring title to their property mid-litigation after the Opposition to Motion for Preliminary Injunction had been filed by Defendants. Plaintiffs were blindly asserting "vested rights" which they had no right to assert against Defendants;

97. Plaintiffs certainly did not, and cannot present any set of circumstances under which they would have had a good faith basis in law or fact to assert their Motion for Preliminary Injunction against the non-Applicant Defendants whose names do not appear on the Applications. The non-Applicant Defendants had nothing to do with the Applications, and Plaintiffs maintenance of the Motion against the non-Applicant Defendants, named personally, served no purpose but to harass and annoy and cause them to incur unnecessary fees and costs;

98. On October 21, 2016, Defendants filed their Motion for Attorneys' Fees and Costs, seeking an award of attorneys' fees and costs pursuant to EDCR 7.60 and NRS 18.070, which was set to be heard in Chambers on November 21, 2016. Plaintiffs filed a response on November 17, 2016, which was considered by the Court;

99. Defendants have been forced to incur significant attorneys' fees and costs to respond to the repetitive filings of Plaintiffs. Plaintiffs' Motions are without merit and unnecessarily duplicative, and made a repetitive advancement of arguments that were without merit, even after the Court expressly warned Plaintiffs that they were "too close" to the dispute;

100. Plaintiff, Robert N. Peccole, Esq., by being so personally close to the case, is so blinded by his personal feelings that he is ignoring the key issues central to the causes of action and failing to recognize that continuing to pursue flawed claims for relief, and rehashing the arguments again and again, following the date of the Defendants' September 2, 2016 Opposition, is improper and unnecessarily harms Defendants;

101. In making an award of attorneys' fees and costs, the Court shall consider the quality of the advocate, the character of the work to be done, the work actually performed, and the result. *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969). Defendants submitted, pursuant to the *Brunzell* case, affidavits regarding attorney's fees and costs they requested. The Court, in its separate Order of January 20, 2017, has analyzed and found, and now reaffirms, that counsel meets the *Brunzell* factors, that the costs incurred were reasonable and actually incurred pursuant to *Cadle Co. v. Woods & Erickson LLP*, 131 Nev. Adv. Op. 15 (Mar. 26, 2015), and outlined the reasonableness and necessity of the attorneys' fees and costs incurred, to which there has been no challenge by Plaintiffs;

102. Plaintiffs were on notice that their position was maintained without reasonable ground after the September 2, 2016 filing of Defendants' Opposition to the first Motion for Preliminary Injunction. The voluminous documentation attached thereto made clear that the Master Declaration does not apply to Defendants' land which was not annexed into the Queensridge CIC. Thus, relating to the preliminary injunction issues, the sums incurred after September 2, 2016 were reasonable and necessary, as Plaintiffs continued to maintain their frivolous position and filed multiple, repetitive documents which required response;

103. Defendants are the prevailing party when it comes to Defendants' Motions for Preliminary Injunction, Motion for Stay Pending Appeal and Motion for Rehearing filed in

September and October, and Plaintiffs' position was maintained without reasonable ground or to harass the prevailing party. *NRS 18.010;*

104. Plaintiffs presented to the court motions which were, or became, frivolous, unnecessary or unwarranted, in bad faith, and which so multiplied the proceedings in a case as to increase costs unreasonably and vexatiously, and failed to follow the rules of the Court. *EDCR 7.60;*

105. Given these facts, there is no basis to hold an Evidentiary Hearing with respect to the Order granting Defendants' attorneys' fees and costs, and the Order should stand;

Plaintiffs' Opposition to Countermotion for Fees and Costs

106. This Opposition to "Countermotion," substantively, does not address the pending Countermotions for attorneys' fees and costs, but rather the Motion for Attorneys' Fees and Costs which was filed October 21, 2016 and granted November 21, 2016;

107. The Opposition to that Motion was required to be filed on or before November 10, 2016. It was not filed until January 7, 2017;

108. Separately, Plaintiffs filed a "response" to the Motion for Attorneys' Fees and Costs, and Supplement thereto, on November 17, 2016. As indicated in the Court's November 21, 2016 Minute Order, as confirmed by and incorporated into the Fee Order filed January 20, 2017, that Response was reviewed and considered;

109. Plaintiffs did not attach any Affidavit as required by EDCR 2.21 to attack the reasonableness or the attorneys' fees and costs incurred, the necessity of the attorneys' fees and costs, or the accuracy of the attorneys' fees and costs incurred;

110. There is sufficient basis to strike this untimely Opposition pursuant to EDCR 2.21 and NRCP 56(e) and the same can be construed as an admission that the Motion was meritorious and should be granted;

111. On the merits, Plaintiffs' "assumptions" that "attorneys' fees and costs are being requested based upon the Motion to Dismiss" and that "sanctions under Rule 11 for filing a Motion for Preliminary Injunction against Fore Stars Defendants" is incorrect. As made clear by the itemized billing statements submitted by Defendants, none of the attorneys' fees and costs requested within that Motion related to the Motion to Dismiss. Further, this is also clear because at the time the Motion for Attorneys' Fees and Costs was filed, the hearings on the City's Motion to Dismiss, or the remaining Defendants' Motion to Dismiss, had not even occurred;

112. Plaintiffs erroneously claim that Defendants cited "no statutes or written contracts that would allow for attorneys' fees and costs." Defendants clearly cited to NRS 18.010 and EDCR 7.60;

113. The argument that if this Court declines to sanction Plaintiffs' counsel pursuant to NRCP 11, they cannot grant attorneys' fees and costs pursuant to NRS 18.010 and EDCR 7.60 is nonsensical. These are district statutes with distinct bases for awarding fees;

114. This Court was gracious to Plaintiffs' counsel in exercising its sound discretion in denying the Rule 11 request, and had solid ground for awarding EDCR 7.60 sanctions and attorneys' fees under NRS 18.010 under the facts;

115. Since Motion for Attorneys' Fees and Costs, and Supplement, was not relating to the Motion to Dismiss, the arguments regarding the frivolousness of the Amended Complaint need not be addressed within this section;

116. The argument that Plaintiffs are entitled to fees because they "are the prevailing party under the Rule 11 Motion" fails. Defendants prevailed on every Motion. That the Court declined to impose additional sanctions against Plaintiffs' counsel does not make Plaintiffs the "prevailing party," as the Motion for Attorneys' Fees and Costs was granted. Moreover, Plaintiffs have not properly sought Rule 11 sanctions against Defendants;

117. There is no statute or rule that allows for the filing of an Opposition after a Motion has been granted. The Opposition was improper and should not have been belatedly filed. It compelled Defendants to further respond, causing Defendants to incur further unnecessary attorneys' fees and costs;

Plaintiffs' Motion for Court to Reconsider Order of Dismissal

118. Plaintiffs seek reconsideration pursuant to NRCP 60(b) based on the alleged "misrepresentation" of the Defendants regarding the Amended Master Declaration at the November 1, 2016 Hearing;

119. No such "misrepresentation" occurred. The record reflects that Mr. Jimmerson was reading correctly from the first page of the Amended Master Declaration, which states it was "effective October, 2000." The Court understood that to be the effective date and not necessarily the date it was signed or recorded. Defendants also provided the Supplemental Exhibit R which evidenced that the Amended Master Declaration was recorded on August 16, 2002, and reiterated it was "effective October, 2000," as Defendants' counsel accurately stated. This exhibit also negated Plaintiffs' earlier contention that the Amended Master Declaration had not been recorded at all. Therefore, not only was there no misrepresentation, there was transparency by the Defendants in open Court;

120. The Amended Master Declaration did not "take out" the 27-hole golf course from the definition of "Property," as Plaintiffs erroneously now allege. More accurately, it excluded the entire 27-hole golf course from the possible Annexable Property. This means that not only was it never annexed, and therefore never made part of the Queensridge CIC, but it was no longer even *eligible* to be annexed in the future, and thus could never become part of the Queensridge CIC;

121. It is significant, however, that there are two (2) recorded documents, the Master Declaration and the Amended Master Declaration, which both make clear in Recital A that the GC Land, since it was not annexed, is not a part of the Queensridge CIC;

122. Whether the Amended Master Declaration, effective October, 2000, was recorded in October, 2000, March, 2001 or August, 2002, does not matter, because, as Defendants pointed out at the hearing, Mr. Peccole's July 2000 Deed indicated it was "subject to the CC&Rs that were recorded at the time and as may be amended in the future" and that the "CC&Rs which he knew were going to be amended and subject to being amended, were amended;"

123. The only effect of the Amended Master Declaration's language that the "entire 27-hole golf course is not a part of the Property or the Annexable Property" instead of just the "18 holes," is that the 9 holes which were never annexed were no longer even annexable. Effectively, William and Wanda Peccole and their entities took that lot off the table and made clear that this lot would not and could not later become part of the Queensridge CIC;

124. None of that means that the 9-holes was a part of the "Property" before—as this Court clearly found, it was not. The 1996 Master Declaration makes clear that the 9-holes was only Annexable Property, and it could only become "Property" by recording a Declaration of Annexation. This never occurred;

125. The real relevance of the fact that the Amended Master Declaration was recorded, in the context of the Motion to Dismiss, is that, pursuant to *Brelint v. Preferred Equities*, 109 Nev. 842, the Court is permitted to take judicial notice of, and take into consideration, recorded documents in granting or denying a motion to dismiss;

126. Plaintiffs ignore the fact that notwithstanding the fact that the Amended Master Declaration, effective October, 2000, was not recorded until August, 2002, Plaintiffs transferred Deed to their lot twice, once in 2013 into their Trust, and again in September, 2016, both times

after the Amended Master Declaration (which they were, under their Deeds, subject to) was recorded and both times with notice of the development rights and zoning rights associated with the adjacent GC Land;

127. Plaintiffs' argument that the Amended Master Declaration is "invalid" because it "did not contain the certification and signatures of the Association President and Secretary" is irrelevant, since the frivolousness of Plaintiffs' position is based on the original Master Declaration and not the amendment. But this Court notes that the Declarations of Annexation which are recorded do not contain such signatures of the Association President and Secretary either. Hypothetically, if that renders such Declarations of Annexation "invalid," then Parcel 19, where Plaintiffs' home sits, was never properly "annexed" into the Queensridge CIC, and thus Plaintiffs would have no standing to assert the terms of the Master Declaration against anyone, even other members of the Queensridge CIC. This last minute argument is without basis in fact or law;

128. A Motion for reconsideration under EDCR 2.24 is only appropriate when "substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). And so motions for reconsideration that present no new evidence or intervening case law are "superfluous," and it is an "abuse of discretion" for a trial court to consider such motions. *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (76).

129. Plaintiffs' request that the Order be reconsidered because it does not consider issues subsequent to the City Council Meeting of November 16, 2016 is also without merit. The Motion to Dismiss was heard on November 1, 2016 and the Court allowed the parties until November 15, 2016 to supplement their filings. Although late filed, Plaintiffs did file "Additional Information to Brief," and their "Renewed Motion for Preliminary Injunction," on

November 18, 2016—before issuance of the *Findings of Fact, Conclusions of Law, Order and Judgment* on November 30th --putting the Court on notice of what occurred at the City Council Meeting. However, as found hereinabove, the withdrawal and abeyance of City Council Applications does not matter in relation to the Motion to Dismiss. Plaintiffs did not possess "vested rights" over Defendants' GC Land before the meeting and they do not possess "vested rights" over it now;

130. Plaintiffs' objection to the Findings relating NRS 116, NRS 278, NRS 278A and R-PD7 zoning is also without merit, because those Findings are supported by the Supplements timely filed by Defendants, and those statutes and the zoning issue are all relevant to this case with respect to Defendants' right to develop their land. This was raised and discussed in the Motion to Dismiss and Opposition to the first Motion for Preliminary Injunction, and properly and timely supplemented. Defendants did specifically and timely submit multiple documents, including the Declaration of City Clerk Luann Holmes to attest to the fact that NRS 278A does not apply to this controversy, and thus it is clear that the GC Land is not part of or within a planned unit development. Plaintiffs do not even possess standing to assert a claim under NRS 278A, as they are governed by NRS 116. Further, Defendants' deeds contain no title exception or reference to NRS 278A, as would be required were NRS 278A to apply, which it does not;

131. Recital B of the Master Declaration states that Queensridge is a "common interest community pursuant to Chapter 116 of the Nevada Revised Statutes." Plaintiffs raised issues concerning NRS 278A. While Plaintiffs may not have specifically cited NRS 278A in their Amended Complaint, in paragraph 67, they did claim that "The City of Las Vegas with respect to the Queensridge Master Planned Development required 'open space' and 'flood drainage' upon the acreage designated as golf course (The Badlands Golf Course)." NRS 278A, entitled "Planned Unit Development," contains a framework of law on Planned Unit Developments, as

defined therein, and their 'common open space.' NRS 116.1201(4) states that the provisions of NRS 278A do not apply to NRS 116 common-interest communities like Queensridge. Thus, while Plaintiffs may not have directly mentioned NRS 278A, they did make an allegation invoking its applicability;

132. Zoning on the subject GC Land is appropriately referenced in the November 30, 2016 *Findings of Fact, Conclusions of Law, Order and Judgment,* because Plaintiffs contended that the Badlands Golf Course was open space and drainage, but the Court rejected that argument, finding that the subject GC Land was zoned R-PD7;

133. Plaintiffs now allege that alter-ego claims against the individual Defendants (Lowie, DeHart and Pankratz) should not have been dismissed without giving them a chance to investigate and flush out their allegations through discovery. But no alter ego claims were made, and alter ego is a remedy, not a cause of action. The only Cause of Action in the Amended Complaint that could possibly support individual liability by piercing the corporate veil is the Fraud Cause of Action. The Court has rejected Plaintiffs' Fraud Cause of Action, not solely on the basis that it was not plead with particularity, but, more importantly, on the basis that Plaintiffs failed to state a claim for Fraud because Plaintiffs have never alleged that Lowie, DeHart or Pankratz made any false representations to them prior to their purchase of their lot. The Court further notes that in Plaintiffs' lengthy oral argument before the Court, the Plaintiffs did not even mention its claim for, or a basis for, its fraud claim. The Plaintiffs have offered insufficient basis for the allegations of fraud in the first place, and any attempt to re-plead the same, on this record, is futile;

134. Fraud requires a false representation, or, alternatively an intentional omission when an affirmative duty to represent exists. See *Lubbe v. Barba*, 91 Nev. 596, 541 P.2d 115 (1975). Plaintiffs alleged Fraud against Lowie, DeHart and Pankratz, while admitting they never

spoke with any of the prior to the purchase of their lot and have never spoken to them prior to this litigation. Plaintiffs' Fraud Cause of Action was dismissed because they cannot state facts that would support the elements of Fraud. No amount of additional time will cure this fundamental defect of their Fraud claim;

135. Plaintiffs claim that the GC Land that later became the additional nine holes was "Property" subject to the CC&Rs of the Master Declaration at the time they purchased their lot, because Plaintiffs purchased their lot between execution of the Master Declaration (which contains an exclusion that "The existing 18-hole golf course commonly known as the 'Badlands Golf Course' is not a part of the Property or the Annexable Property") and the Amended and Restated Master Declaration (which provides that "The existing 27-hole golf course commonly known as the 'Badlands Golf Course' is not a part of the Property or the Annexable Property"), is meritless, since it ignores the clear and unequivocal language of Recital A (of both documents) that "In no event shall the term "Property" include any portion of the Annexable Property for which a Declaration of Annexation has not been Recorded..."

136. All three of Plaintiffs' claims for relief in the Amended Complaint are based on the concept of Plaintiffs' alleged vested rights, which do not exist against Defendants;

137. There was no "misrepresentation," and there is no basis to set aside the Order of Dismissal;

138. In order for a complaint to be dismissed for failure to state a claim, it must appear beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief. *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000) (emphasis added);

139. It must draw every fair inference in favor of the non-moving party. *Id.* (emphasis added);

140. Generally, the Court is to accept the factual allegations of a Complaint as true on a Motion to Dismiss, but the allegations must be legally sufficient to constitute the elements of the claim asserted. *Carpenter v. Shalev*, 126 Nev. 698, 367 P.3d 755 (2010);

141. Plaintiffs have failed to state a claim upon which relief can be granted, even with every fair inference in favor of Plaintiffs. It appears beyond a doubt that Plaintiffs can prove no set of facts which would entitle them to relief. The Court has grave concerns about Plaintiffs' motives in suing these Defendants for fraud in the first instance;

Defendants' Memorandum of Costs and Disbursements

142. Defendants' Memorandum of Costs and Disbursements was timely filed and served on December 7, 2016;

143. Pursuant to NRS 18.110, Plaintiffs were entitled to file, within three (3) days of service of the Memorandum of Costs, a Motion to Retax Costs. Such a Motion should have been filed on or before December 15, 2016

144. Plaintiffs failed to file any Motion to Retax Costs, or any objection to the costs whatsoever. Plaintiffs have therefore waived any objection to the Memorandum of Costs, and the same is now final;

145. Defendants have provided evidence to the Court along with their Verified Memorandum of Costs and Disbursements, demonstrating that the costs incurred were reasonable, necessary and actually incurred. *Cadle Co. v. Woods & Erickson LLP*, 131 Nev. Adv. Op. 15 (Mar. 26, 2015);

Defendants' Countermotions for Attorneys' Fees and Costs

146. The Court has allowed Plaintiffs to enter thirteen (13) exhibits, only three (3) of which had been previously produced to opposing counsel, by attaching them to Plaintiffs' "*Additional Information to Renewed Motion for Preliminary Injunction*," filed November 28,

2016. The Exhibits should have been submitted and filed on or before November 15, 2016, in advance of the hearing, and shown to counsel before being marked. The Court has allowed Plaintiffs to make a record and to enter never before disclosed Exhibits at this post-judgment hearing, including one document dated January 6, 2017, over Defendants' objection that there has been no Affidavit or competent evidence to support the genuineness and authenticity of these documents, as well as because of their untimely disclosure. The Court notes that Plaintiffs should have been prepared for their presentation and these Exhibits should have been prepared, marked and disclosed in advance, but Plaintiffs failed to do so. *EDCR 7.60(b)(2);*

147. The efforts of Plaintiffs throughout these proceedings to repeatedly, vexatiously attempt to obtain a Preliminary Injunction against Defendants has indeed resulted in prejudice and substantial harm to Defendants. That harm is not only due to being forced to incur attorneys' fees, but harm to their reputation and to their ability to obtain financing or refinancing, just by the pendency of this litigation;

148. Plaintiffs are so close to this matter that even with counsel's experience, he fails to follow the rules in this litigation. Plaintiffs' accusation that the Court was "sleeping" during his oral argument, when the Court was listening intently to all of Plaintiffs' arguments, is objectionable and insulting to the Court. It was extremely unprofessional conduct by Plaintiff;

149. Plaintiffs' claim of an alleged representation that the golf course would never be changed, if true, was alleged to have occurred sixteen (16) years prior to Defendants acquiring the membership interests in Fore Stars, Ltd. Of the nineteen (19) Defendants, twelve (12) were relatives of Plaintiffs or entities of relatives, all of whom were voluntarily dismissed by Plaintiffs. The original Complaint faulted the Peccole Defendants for not "insisting on a restrictive covenant" on the golf course limiting its use, which would not have been necessary if

the Master Declaration applied. This was a confession of the frivolousness of Plaintiffs' position. *NRS 18.010(2)(b); EDCR 7.60(b)(1)*;

150. Between September 1, 2016 and the date of this hearing, there were approximately ninety (90) filings. This multiplication of the proceedings vexatiously is in violation of EDCR 7.60. *EDCR 7.60(b)(3)*;

151. Three (3) Defendants, Lowie, DeHart and Pankratz, were sued individually for fraud, without one sentence alleging any fraud with particularity against these individuals. The maintenance of this action against these individuals is a violation itself of NRS 18.010, as bad faith and without reasonable ground, based on personal animus;

152. Additionally, EDCR 2.30 requires that any Motion to amend a complaint be accompanied by a proposed amended Complaint. Plaintiffs' failure to do so is a violation of EDCR 2.30. EDCR 7.60(b)(4);

153. Plaintiffs violated EDCR 2.20 and EDCR 2.21 by failing to submit their Motions upon sworn Affidavits or Declarations under penalty of perjury, which cannot be cured at the hearing absent a stipulation. *Id.;*

154. Plaintiffs did not file any post-judgment Motions under NRCP 52 or 59, and two of their Motions, namely the *Motion to Reconsider Order of Dismissal* and the *Motion for Evidentiary Hearing and Stay of Order for Rule 11 Fees and Costs*, were untimely filed after the 10 day time limit contained within those rules, or within EDCR 2.24.

155. Plaintiffs also failed to seek leave of the Court prior to filing its Renewed Motion for Preliminary Injunction or its Motion to Reconsider Order of Dismissal. *Id.;*

156. Plaintiffs' Opposition to Countermotion for Attorneys' Fees and Costs, filed January 5, 2017, was an extremely untimely Opposition to the October 21, 2016 Motion for

Attorneys' Fees and Costs, which was due on or before November 10, 2016. All of these are failures or refusals to comply with the Rules. *EDCR 7.60(b)(4);*

157. While it does not believe Plaintiffs are intentionally doing anything nefarious, they are too close to this matter and they have refused to heed the Court's Orders, Findings and rules and their actions have severely harmed the Defendants;

158. While Plaintiffs claim to have researched the *Eagle Thrifty* case prior to filing the initial Complaint, admitting they were familiar with the requirement to exhaust the administrative remedies, they filed the first Motion for Preliminary Injunction anyway, in which they failed to even cite to the *Eagle Thrifty* case, let alone attempt to exhaust their administrative remedies;

159. Plaintiffs' motivation in filing these baseless "preliminary injunction" motions was to interfere with, and delay, Defendants' development of their land, particularly the land adjoining Plaintiffs' lot. But while the facts, law and evidence are overwhelming that Plaintiffs ultimately could not deny Defendants' development of their land, Plaintiffs have continued to maintain this action and forced Defendants to incur substantial attorneys' fees to respond to the unsupported positions taken by Plaintiffs, and their frivolous attempt to bypass City Ordinances and circumvent the legislative process. These actions continue with the current four (4) Motions and the Opposition;

160. Plaintiffs' Renewed Motion for Preliminary Injunction (a sixth attempt), Plaintiffs' untimely Motion to Amend Amended Complaint (with no proposed amendment attached), Plaintiffs' untimely Motion to Reconsider Order of Dismissal, Plaintiffs' Motion for Evidentiary Hearing and Stay of Rule 11 Fees and Costs (which had been denied) and Plaintiffs' untimely Opposition were patently frivolous, unnecessary, and unsupported, and so multiplied the proceedings in this case so as to increase costs unreasonably and vexatiously;

161. Plaintiffs proceed in making "scurrilous allegations" which have no merit, and to asset "vested rights" which they do not possess against Defendants;

162. Considering the length of time that the Plaintiffs have maintained their action, and the fact that they filed four (4) new Motions after dismissal of this action, and ignored the prior rulings of the Court in doing so, and ignored the rules, and continued to name individual Defendants personally with no basis whatsoever, the Court finds that Plaintiffs are seeking to harm the Defendants, their project and their land, improperly and without justification. Plaintiffs' emotional approach and lack of clear analysis or care in the drafting and submission of their pleadings and Motions warrant the award of reasonable attorney's fees and costs in favor of the Defendants and against the Plaintiffs. *See EDCR 7.60 and NRS 18.010(b)(2)*;

163. Pursuant to *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), Defendants have submitted affidavits regarding attorney's fees and costs they requested, in the sum of $7,500 per Motion. Considering the number of Motions filed by Plaintiffs on an Order Shortening Time, including two not filed or served until December 22, 2016, and an Opposition and Replies to two Motions filed by Plaintiffs on January 5, 2017, which required response in two (2) business days, the requested sum of $7,500 in attorneys' fees per each of the four (4) motions is most reasonable and necessarily incurred. Given the detail within the filings and the timeframe in which they were prepared, the Court finds these sums , totaling $30,000 ($7,500 x 4) to have been reasonably and necessarily incurred;

Plaintiffs' Oral Motion for Stay Pending Appeal.

164. Plaintiffs failed to satisfy the requirements of NRAP 8 and NRCP 62(c). Plaintiffs failed to show that the object of their potential appeal will be defeated if their stay is denied, they failed to show that they would suffer irreparable harm or serious injury if the stay is not issued, and they failed to show a likelihood of success on the merits.

ORDER AND JUDGMENT

NOW, THEREFORE:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that *Plaintiffs' Renewed Motion for Preliminary Injunction* is hereby denied, with prejudice;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs' *Motion For Leave To Amend Amended Complaint*, is hereby denied, with prejudice;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that *Plaintiffs' Motion For Evidentiary Hearing And Stay Of Order For Rule 11 Fees And Costs*, is hereby denied, with prejudice;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that *Plaintiffs' Motion For Court To Reconsider Order Of Dismissal*, is hereby denied, with prejudice;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants' Countermotion to Strike *Plaintiffs' Rogue and Untimely Opposition Filed 1/5/17 (titled Opposition to "Countermotion" but substantively an Opposition to the 10/21/16 Motion for Attorney's Fees And Costs, granted November 21, 2016)*, is hereby granted, and such Opposition is hereby stricken;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants' request for $20,818.72 in costs, including the $5,406 already awarded on November 21, 2016, and the balance of $15,412.72 in costs through October 20, 2016, pursuant to their timely *Memorandum of Costs and Disbursements*, is hereby granted and confirmed to Defendants, no Motion to Retax having been filed by Plaintiffs. Said costs are hereby reduced to Judgment, collectible by any lawful means;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Judgment entered in favor of Defendants and against Plaintiffs in the sum of $82,718.50, comprised of $77,312.50

in attorneys' fees and $5,406 in costs relating only to the preliminary injunction issues after the September 2, 2016 filing of Defendants' first Opposition through the end of the October, 2016 billing cycle, is hereby confirmed and collectible by any lawful means;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants Countermotion for Attorneys' Fees relating to their responses to Plaintiffs four (4) motions and one (1) opposition, and the time for appearance at this hearing, is hereby GRANTED. Defendants are hereby awarded additional attorneys' fees in the sum of $30,000 relating to those matters pending for this hearing;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, therefore, Defendants are awarded a total sum of $128,131.22 ($20,818.72 in attorneys' fees and costs, including the $5,406 in the November 21, 2016 Minute Order and confirmed by the Fee Order filed January 20, 2017, $77,312.50 in attorneys' fees pursuant to the November 21, 2016 Minute Order, as incorporated within and confirmed by Fee Order filed January 20, 2017, and $30,000 in additional attorneys' fees relating to the instant Motions, Oppositions and Countermotions addressed in this Order), which is reduced to judgment in favor of Defendants and against Plaintiffs, collectible by any lawful means, plus legal interest;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs' oral Motion for Stay pending appeal is hereby denied;

DATED this 31 day of January, 2017.

DISTRICT COURT JUDGE
A-16-719654-C

BA

Exhibit “4"

Electronically Filed
5/2/2017 1:41 PM
Steven D. Grierson
CLERK OF THE COURT

ORDR

DISTRICT COURT
CLARK COUNTY, NEVADA

JACK B. BINION, an individual; DUNCAN R. and IRENE LEE, individuals and Trustees of the LEE FAMILY TRUST; FRANK A. SCHRECK, an individual; TURNER INVESTMENTS, LTD., a Nevada Limited Liability Company; ROGER P. and CAROL YN G. WAGNER, individuals and Trustees of the WAGNER FAMILY TRUST; BETTY ENGLESTAD AS TRUSTEE OF THE BETTY ENGLESTAD TRUST; PYRAMID LAKE HOLDINGS, LLC.; JASON AND SHEREEN AWAD AS TRUSTEES OF THE AWAD ASSET PROTECTION TRUST; THOMAS LOVE AS TRUSTEE OF THE ZENA TRUST; STEVE AND KAREN THOMAS AS TRUSTEES OF THE STEVE AND KAREN THOMAS TRUST; SUSAN SULLIVAN AS TRUSTEE OF THE KENNETH J.SULLIVAN FAMILY TRUST, AND DR. GREGORY BIGLER AND SALLY BIGLER

Plaintiffs,

vs.

FORE STARS, LTD., a Nevada Limited Liability Company; 180 LAND CO., LLC, a Nevada Limited Liability Company; SEVENTY ACRES, LLC, a Nevada Limited Liability Company; and THE CITY OF LAS VEGAS,

Defendants.

CASE NO. A-15-729053-B

DEPT. NO. XXVII

Courtroom #3A

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING IN PART AND DENYING IN PART, DEFENDANT CITY OF LAS VEGAS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT, AND DEFENDANTS' FORE STARS, LTD; 180 LAND CO., LLC, SEVENTY ACRES, LLC'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT, AND DENYING PLAINTIFF'S COUNTERMOTION UNDER NRCP 56(f)

Date of Hearing: February 2, 2017

Time of Hearing: 1:30 pm

THIS MATTER coming on for hearing on the 2nd day of February, 2017 on Defendants CITY OF LAS VEGAS' *Motion to Dismiss Plaintiffs' First Amended Complaint*, and Defendants FORE STARS, LTD; 180 LAND CO., LLC, SEVENTY ACRES, LLC'S *Motion to Dismiss Plaintiffs' First Amended Complaint*, and Plaintiffs' Oppositions thereto, and Countermotions under NRCP 56(f), and the Court having reviewed the papers and pleadings on file and heard the arguments of counsel at the hearing, and good cause appearing hereby

FINDS and ORDERS as follows:

1. Plaintiffs First Amended Complaint alleges two causes of action. Plaintiffs' first cause of action alleges Defendants violated NRS 278.4925 and LVMC § 19.16.070 in the recordation of a parcel map. Plaintiffs' second cause of action alleges a claim for declaratory relief based upon, as Plaintiffs allege, "Plaintiffs' rights to notice and an opportunity to be heard prior to the recordation of any parcel map," and "Plaintiffs' rights under NRS Chapter 278A and the City's attempt to cooperate with the other Defendants in circumventing those rights." (First Amended Complaint, p. 16).

2. Defendants' Motions to Dismiss Plaintiffs' First Amended Complaint are made pursuant to NRCP 12(b)(5). Accordingly, the Court must "regard all factual allegations in the complaint as true and draw all inferences in favor of the nonmoving party." *Stockmeier v. Nevada Dep't of Corr. Psychological Review Panel*, 124 Nev. 313, 316, 183 P.3d 133, 135 (2008). The court may not consider matters outside the allegations of Plaintiffs' complaint. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).

3. The Court finds that Plaintiffs have stated claims upon which relief may be granted as it relates to the parcel map recording alleged in Plaintiffs' First Amended Complaint.

4. Moreover, the Court finds that Plaintiffs have standing and rejects Defendants' argument that Plaintiffs have failed to exhaust their administrative remedies as no notice was provided to Plaintiffs.

5. The Court took under submission Defendant's Motion to Dismiss the Second Cause of Action in Plaintiffs' First Amended Complaint (Declaratory Relief) as to whether Plaintiffs have any rights under NRS 278A over Defendants' property. Plaintiffs seek an order "declaring that NRS Chapter 278A applies to the Queenridge/Badlands development and that no modifications may be made to the Peccole Ranch Master Plan without the consent of property owners" and "enjoining Defendants from taking any action (iii) without complying with the provisions of NRS Chapter 278A." (First Amended Complaint, p. 16).

6. The Court finds that Plaintiffs' second claim for relief for declaratory judgment based upon NRS Chapter 278A fails to state a claim upon which relief may be granted.

. . .

7. The Court finds that pursuant to NRS 116.1201(4) as a matter of law NRS Chapter 278A does not apply to common interest communities. NRS 116.1201(4) provides, "The provisions of chapters 117 and 278A of NRS do not apply to common interest communities." Plaintiffs have alleged ownership interest in the common interest communities as defined in NRS Chapter 116 known as Queensridge or One Queensridge Place. For this reason, NRS Chapter 278A is not applicable to Plaintiffs' claim.

8. The Court further finds that a "planned unit development" as used and defined in NRS 278A only applies to the City of Las Vegas upon enactment of an ordinance in conformance with NRS 278A. Plaintiffs allege that Queensridge or One Queensridge Place is part of the Peccole Ranch Master Plan Phase II that is located within the City of Las Vegas. The City of Las Vegas has not adopted an ordinance in conformance with NRS 278A and for this additional reason NRS Chapter 278A is not applicable and Plaintiffs' request for declaratory judgment based upon NRS Chapter 278A fails to state a claim upon which relief can be granted.

9. Because the Court finds that Plaintiffs' claim for declaratory judgment based upon NRS 278A fails under Rule 12(b)(5) of the Nevada Rules of Civil Procedure, Plaintiffs' countermotion under NRCP 56(f) is denied.

ORDER

NOW, THEREFORE:

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss the First Cause of Action (Breach of NRS 278 and LVMC 19.16.070) and Second Cause of Action based upon the recordation of the parcel map in Plaintiffs' First Amended Complaint is hereby DENIED;

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss the Second Cause of Action (Declaratory Relief) based upon NRS 278A in Plaintiffs' First Amended Complaint is hereby GRANTED, and is hereby dismissed, with prejudice.

. . .

. . .

IT IS FURTHER ORDERED that Plaintiffs' Countermotion under NRCP 56(f) is hereby DENIED.

Dated this 1 day of May, 2017.

HONORABLE NANCY ALLF

Respectfully Submitted:

JIMMERSON LAW FIRM

James J. Jimmerson, Esq.
Nevada Bar No. 00264
415 S. Sixth Street, #100
Las Vegas, Nevada 89101
Attorneys for Fore Stars Ltd., 180 Land Co., LLC, and Seventy Acres, LLC

Approved as to Form:

PISANELLI BICE PLLC

Todd L. Bice, Esq.
Nevada Bar No. 4534
Dustun H. Holmes, Esq.
Nevada Bar No. 12776
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

Approved as to Form:

CITY OF LAS VEGAS

Bradford R. Jerbic, Esq.
Nevada Bar No. 1056
Philip R. Byrnes, Esq.
Nevada Bar No. 0166
495 S. Main Street, 6th Floor
Las Vegas, Nevada 89101
Attorneys for the City of Las Vegas

AOS

DISTRICT COURT , CLARK COUNTY
CLARK COUNTY, NEVADA

FORE STARS, LTD.	Plaintiff	
vs		CASE NO: A-18-771224-C
DANIEL OMERZA	Defendant	HEARING DATE/TIME:
		DEPT NO: 31

AFFIDAVIT OF SERVICE

SHEA BYERS being duly sworn says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, not a party to or interested in the proceedings in which this affidavit is made. That affiant received 1 copy(ies) of the SUMMONS, COMPLAINT, INITIAL APPEARANCE FEE DISCLOSURE, on the 16th day of March, 2018 and served the same on the 18th day of March, 2018, at 14:50 by:

delivering and leaving a copy with the servee DANIEL OMERZA at (address) 800 PETIT CHALET COURT, LAS VEGAS NV 89145

Pursuant to NRS 53.045

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

EXECUTED this 18 day of Mar, 2018.

SHEA BYERS
R-078843

AOS

DISTRICT COURT , CLARK COUNTY
CLARK COUNTY, NEVADA

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3/27/2018 9:50 AM
Steven D. Grierson
CLERK OF THE COURT

FORE STARS	Plaintiff	CASE NO: A-18-771224-C
vs		HEARING DATE/TIME:
DARREN BRESEE	Defendant	DEPT NO: 31

AFFIDAVIT OF SERVICE

SHEA BYERS being duly sworn says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, not a party to or interested in the proceedings in which this affidavit is made. That affiant received 1 copy(ies) of the SUMMONS, COMPLAINT, INITIAL APPEARANCE FEE DISCLOSURE, on the 16th day of March, 2018 and served the same on the 19th day of March, 2018, at 11:55 by:

delivering and leaving a copy with the servee DARREN BRESEE at (address) 1410 E. PAMA LANE, LAS VEGAS NV 89118

WHITE MALE, 50'S, 5'8, 155 LBS LIGHT HAIR

Pursuant to NRS 53.045

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

EXECUTED this 19 day of Mar, 2018.

SHEA BYERS
R-078843

MDSM
Mitchell J. Langberg, Esq., Bar No. 10118
mlangberg@bhfs.com
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100 North City Parkway, Suite 1600
Las Vegas, Nevada 89106
Telephone: 702.382.2101
Facsimile: 702.382.8135

Attorneys For Defendants
DANIEL OMERZA, DARREN BRESEE,
and STEVE CARIA

DISTRICT COURT

CLARK COUNTY, NEVADA

FORE STARS, LTD., a Nevada Limited Liability Company; 180 LAND CO., LLC, a Nevada Limited Liability Company; SEVENTY ACRES, LLC, a Nevada Limited Liability Company,

Plaintiffs,

v.

DANIEL OMERZA, DARREN BRESEE, STEVE CARIA, and DOES 1 THROUGH 1000,

Defendants.

CASE NO. A-18-771224-C

DEFENDANTS' MOTION TO DISMISS PURSUANT TO NRCP 12(b)(5)

Hearing Date: 05/15/18

Hearing Time: 9:30 AM

Defendants Daniel Omerza, Darren Bresee, and Steve Caria, by and through their counsel of record Mitchell J. Langberg of BROWNSTEIN HYATT FARBER SCHRECK LLP, hereby move to dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(5) of the Nevada Rules of Civil Procedure.

This Motion is made and based upon the following Memorandum of Points and Authorities, the concurrently filed Request for Judicial Notice, the pleadings and papers on file in this matter, as well as upon any oral argument the Court may entertain should this matter be set for hearing by the Court.

DATED this 13th day of April, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By *__/s/ Mitchell J. Langberg__*
MITCHELL J. LANGBERG, ESQ. Bar No. 10118
mlangberg@bhfs.com
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Telephone: 702.382.2101
Facsimile: 702.382.8135

Attorneys For Defendants Daniel Omerza, Darren Bresee, and Steve Caria

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100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

NOTICE OF MOTION

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that the undersigned will bring the foregoing **DEFENDANTS' MOTION TO DISMISS PURSUANT TO NRCP 12(b)(5)** for hearing before the above-entitled Court on the 15 day of May, 2018, at 9:30 a.m./~~p.m.~~ of said day in Department 31 of said Court.

DATED this 13th day of April, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By */s/ Mitchell J. Langberg*
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Attorneys For Defendants Daniel Omerza, Darren Bresee, and Steve Caria

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Under separate cover, Defendants Daniel Omerza, Darren Bresee, and Steve Caria have filed a special motion to dismiss this action pursuant to Nevada's anti-SLAPP statute, NRS 41.635 *et seq*. Defendants file this motion to dismiss, in an abundance of caution, so as to prevent any delay in the unlikely event that the Court finds the anti-SLAPP statute inapplicable or the grant of the anti-SLAPP motion is reversed on appeal.

Even setting aside the nature of this action as a SLAPP suit, Plaintiffs' complaint should be dismissed under Rule 12(b)(5) for failure to state a claim upon which relief may be granted. Rule 12(b)(5) applies here for two independent reasons. First, Plaintiffs have utterly failed to allege facts—as opposed to unsupported legal conclusions—that would support the claims for relief they assert. Second, even if Plaintiffs had alleged sufficient facts to support their claims, on the face of the complaint and considering judicially noticeable materials, Defendants' conduct is subject to an absolute privilege, or at a minimum a qualified privilege, to gather information for use of the City Council on a matter of public concern, which relieves Defendants of any potential liability.

II. FACTUAL BACKGROUND

For purposes of this motion only, Defendants assume all of the factual allegations in the complaint to be true. The following factual summary is based upon the factual allegations of the complaint, and upon two items of which the Court may take judicial notice: Judge Crockett's ruling in a related proceeding before this Court and records of the Las Vegas City Council's February 21, 2018 meeting. *See Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993) (on motion to dismiss for failure to state a claim, the court may consider court orders and other matters of public record).

1. Defendants are residents of the Queensridge Common Interest Community in Clark County, Nevada. Complaint, ¶¶ 4-8.

2. Plaintiffs own a parcel of real estate adjacent to Queensridge, which was previously operated as the site of the Badlands Golf Course ("Badlands"). Complaint, ¶ 9.

Defendants acknowledged when they purchased their homes that Badlands is not part of Queensridge. *Id*., ¶ 12.

3. It is apparent from the Complaint as a whole that Plaintiffs in this action intend to construct residential units on the Badlands site.

4. To that end, Plaintiffs sought and received approval from the City of Las Vegas ("City") for its plans to construct residential units at the Badlands site, the approval of which was challenged in a court proceeding in this Court, Case No. A-17-752344-J, before Judge Jim Crockett ("Binion Litigation"). A copy of the transcript of the hearing in the Binion Litigation is Exhibit "A" to the concurrently filed Request for Judicial Notice ("Binion Transcript")**.**

5. Judge Crockett determined that the Badlands property is contained within the Peccole Ranch community, and thus subject to the terms of the Peccole Ranch Master Development Plan ("Master Development Plan"). *Id*. at 5-10.

6. Judge Crockett therefore determined that the City abused its discretion in approving Plaintiffs' application without first approving a major modification of the Master Development Plan. *Id.*

7. This decision was partially based on Judge Crockett's determination that people who bought into Peccole Ranch relied upon what the master planning was. *Id*.

8. Since Judge Crockett's ruling, Plaintiffs have sought to amend the General Plan so as to allow their development plans. *See* Exhibit "B" to the concurrently filed Request for Judicial Notice (Agenda Summary Page from City Council February 21, 2018 meeting).

9. Defendants obviously oppose a major modification of the Master Plan of an amendment to the General Plan with respect to Badlands. In what Plaintiffs characterize as a "scheme … to improperly influence and/or pressure public officials," they have solicited declarations from other residents of Queensridge. Complaint, ¶ 23.

10. These declarations state that the undersigned purchased his or her Queensridge residence or lot "in reliance upon the fact that the open space/natural drainage system could not be developed pursuant to the City's Approval in 1990 of the Peccole Ranch Master Plan and subsequent formal actions designating the open space/natural drainage system in its General Plan

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as Parks Recreation – Open Space which land use designation does not permit the building of residential units." *Id.* The declarations further state that "[a]t the time of purchase, the undersigned paid a significant lot premium to the original developer as consideration for the open space/natural drainage system." *Id.*

11. Plaintiffs asset that these declarations are false. Complaint, ¶ 24.

III. ARGUMENT

Dismissal of an action under NRCP Rule 12(b)(5) is appropriate when it appears beyond a doubt that the plaintiff could prove no set of facts which, if true, would entitle it to relief. *Neville v. Eighth Jud. Dist. Ct.*, 406 P.3d 499, 502 (Nev. 2017). In making that determination, all facts alleged in the complaint are presumed true and all inferences drawn in favor of the plaintiff. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). However, courts are not bound to accept as true legal conclusions couched as factual allegations. *Allen v. United States*, 964 F. Supp. 2d 1239, (D. Nev. 2013).

Here, Plaintiffs have failed to make factual allegations sufficient to support any of their stated claims for relief. Further, the claims are untenable as a matter of law because they are subject to an absolute or qualified privilege.

A. THE ALLEGATIONS OF THE COMPLAINT DO NOT SUPPORT A CLAIM FOR RELIEF

The theme of Plaintiffs' Complaint is that the statements in the declaration forms Defendants have provided to fellow residents are demonstrably false. At the outset, there are several problems with Plaintiffs' contention.

First, Defendants' conduct at issue is aimed at gathering declarations from *other* residents as to those residents' reliance on the Master Development Plan. Defendants themselves are making no factual assertions; rather, they are simply collecting statements of facts made by their fellow residents. Thus, Plaintiffs (as opposed to the declarants on any such declaration) cannot reasonably be characterized as making any false statements.

Second, even if the declarations were treated as factual statements by the Defendants themselves, Plaintiffs cannot seriously contend that Defendants knew the statements in the

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declarations about reliance on the Peccole Ranch Master Plan are false, when Judge Crockett reached the very same conclusion about reliance in the Binion Litigation:

> [T]here was a phase 1 of Peccole Ranch, and Badlands, which was a golf course in phase 2 of Peccole Ranch. Both golf courses were designed to be in a major flood zone and were designated as flood drainage and open space.
>
> At the time that was done 25 years ago or more the city mandated these designations to address the natural flooding problem and the open space necessary for master plan development.
>
> * * *
>
> The people who bought into this Peccole Ranch Master Plan 1 and 2 did so in reliance upon what the master planning was. They bought their homes, some of them made a very substantial investment, but no one making an insubstantial investment, and they moved into the neighborhood.

Binion Transcript, at 6:1-9, 9:20-25.[1] Judge Crockett obviously reached these conclusions in good faith based on his review of the record in the Binion Litigation; thus, Plaintiffs' insistence that Defendants could not assert in good faith that they purchased their homes in reliance upon the terms of the Peccole Ranch Master Plan—including the designation of Badlands for open space and natural drainage—is untenable.

In light of this error, Plaintiffs' Complaint fails to state any claim upon which relief can be granted. In addition to their request for injunctive relief, Plaintiffs' Complaint asserts five claims for relief, which fall into three categories: (i) intentional interference with prospective economic relations and negligent interference with prospective economic relations; (ii) conspiracy; and (iii) intentional misrepresentation and negligent misrepresentation. As a matter of law, the factual allegations of the Complaint are not sufficient to support any of these claims.

1. Intentional or Negligent Interference

"A plaintiff prevails on a claim for interference with prospective economic advantage by

[1] Remarkably, Plaintiffs themselves call the Court's attention to the Binion Litigation, see Complaint, ¶ 29, but omit any mention of Judge Crockett's ruling on this key issue, even though it predated Plaintiffs' Complaint by over two months. The court may take judicial notice of this ruling as a public record on a motion to dismiss. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).

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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). The applicable privilege will be discussed below. None of the remaining four elements is adequately alleged in the Complaint.

First, Plaintiffs do not even attempt to identify the prospective contractual or economic relations at issue in this claim for relief. Instead, they simply assert that some undefined relationships with third parties would come about. *See* Complaint, ¶ 41 ("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.

Second, Defendants can hardly be charged with knowledge of potential economic relationships that Plaintiffs are not even able to identify in their own Complaint.

Third, Plaintiffs have alleged no facts that might 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 cannot identify any actual harm resulting from the unspecified interference they imagine. They make conclusory allegations that damage occurred, Complaint, ¶¶ 46, 55, but these allegations are meaningless in the absence of any factual allegations to explain how such purported damage has taken place.

2. 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 fails to identify any such "unlawful objective," however. To the contrary, Plaintiffs allege that Defendants' objective was

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to "influence and/or pressure third-parties, including officials within the City of Las Vegas." Complaint, ¶ 57. 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, does not in any way amount to an "unlawful objective." Plaintiffs state 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 recited above. In particular, the declarations were from *other* residents and do not constitute statements of fact by the Defendants. Moreover, the declarations are consistent with this Court's ruling in the Binion Litigation, and thus cannot be construed as deliberately false. Plaintiffs have not articulated an "unlawful objective" that might support a claim conspiracy.

Neither have Plaintiffs alleged any facts to support the element of damages resulting from the purported conspiracy. They made a conclusory assertion that damages have occurred, Complaint, ¶ 61, but this is devoid of any factual allegations that conceivably might support a finding of actual damages.

3. Intentional or Negligent Misrepresentation

Finally, Plaintiffs' Complaint does not allege *any* of the elements for a claim for intentional misrepresentation or negligent misrepresentation. A misrepresentation claim in Nevada "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); *see also Wild Game Ng, LLC v. IGT*, 2015 WL 7575352, *1 (Nev. Nov. 24, 2015) ("instead of deceitful intent, negligent misrepresentation arises when one fails to exercise reasonable care in ascertaining the truth").

None of those factors is adequately alleged here. Plaintiffs assert that the facts in the declarations at issue are false, but again those are factual assertions by the declarants not by

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Defendants, and they are entirely consistent with this Court's ruling in the Binion Litigation. Nowhere do Plaintiffs allege that anyone has relied on these declarations. Plaintiffs do assert in conclusory fashion that they suffered damages from the declarations, Complaint, ¶¶ 64, 68, but there are no factual allegations to support that conclusion. Plaintiffs have not alleged facts to support these claims for relief.

B. DEFENDANTS' EFFORTS IN GATHERING INFORMATION FOR AN ANTICIPATED PROCEEDING ARE PRIVILEGED

Even if Plaintiffs had adequately alleged facts to support their specific claims for relief, Defendants could not be liable to Plaintiffs for the solicitation of the Declarations, or for any statements contained in the Declarations because they are absolutely privileged, or at a minimum, subject to an applicable qualified privilege.

1. Absolute Privilege

Nevada recognizes "the 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 matter of the controversy." *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101 (1983). This rule includes "statements made in the course of quasi-judicial proceedings …." *Knox v. Dick*, 99 Nev. 514, 518, 665 P.2d 267 (1983)(citation omitted); *see also Circus Circus*, 99 Nev. at 61 ("the absolute privilege attached to judicial proceedings has been extended to quasi-judicial proceedings before executive officers, boards, and commissions….")(citations omitted).

Under the rule, statements in letters may be absolutely privileged (*Richards v. Conklin*, 94 Nev. 84, 85, 575 P.2d 588, 589 (1978)), and a statement at issue does not even have to be made ***during*** any actual proceedings (*see Fink v. Oshins*, 118 Nev. 428, 433, 49 P.3d 640 (2002)("the privilege applies not only to communications made during actual judicial proceedings, but also to 'communications preliminary to a proposed judicial proceeding.'")(footnote citation omitted)). To the extent that any doubts regarding privilege exist, they should be resolved ***in favor*** of application. *See Clark County Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 382, 213 P.3d 496 (2009)(citation omitted)(noting that "because the scope of the absolute privilege is

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broad, a court determining whether the privilege applies should resolve any doubt in favor of a broad application.")(emphasis added).

In *State ex rel. Bd. of Parole Comm'rs v. Morrow*, 127 Nev. 265, 273, 255 P.3d 224 (2011), the Nevada Supreme Court discussed the judicial function test, which "is a means of determining whether an administrative proceeding is ***quasi-judicial*** by examining the hearing entity's function.[]" *Id.* at 273 (citation omitted)(emphasis added). Then the Court discussed:

> If the hearing entity's function is judicial in nature, its acts qualify as quasi-judicial. [ ] In determining whether a hearing entity's function is judicial, other jurisdictions consider whether the hearing entity has authority to: '"(1) exercise judgment and discretion; (2) hear and determine or to ascertain facts and decide; (3) make binding orders and judgments; (4) affect the personal property rights of private persons; (5) examine witnesses and hearing the litigation of the issues on a hearing; and (6) enforce decisions or impose penalties."' *Craig v. Stafford Constr., Inc.*, 271 Conn. 78, 856 A.2d 372 (Conn. 2004)(quoting *Kelley v. Bonney*, 221 Conn. 549, 606 A.2d 693, 703 (Conn. 1992), and considering, also, whether a sound policy basis exists for protecting the hearing entity from suit). [ ] These factors are not exclusive, and determining whether a proceeding is quasi-judicial is an imprecise exercise because many different types of entities perform judicial functions." [citation] We have previously used the judicial function test in this state to determine whether entities act in a quasi-judicial manner when performing their administrative duties,[ ] and we now expressly adopt the judicial function test for doing so in the future.

Id. at 273-74.

In the instant case, any statements in the Declaration are subject to an absolute privilege because Plaintiffs had already initiated the application process for amendment of the General Plan, and the proceedings before the City Council relating to the application are quasi-judicial in nature. *See* UDC 19.16.030. The factors discussed in *Morrow* are instructive, and the procedure set forth in Unified Development Code 19.16.030 (addressing General Plan Amendment) satisfies the test set forth in *Morrow*, 127 Nev. at 273-74.

First, in deciding land use matters the City Council exercises judgment and discretion, and hears and determines facts before rendering a decision. *See Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 528 (2004)(determining that the process under the Las Vegas Municipal Code for City Council to approve plaintiff's proposed development of the property requires the City Council to "consider a number of factors and to exercise its discretion in

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reaching a decision."). Indeed, Section 19.16.030 expressly provides that a City Council decision is made after a hearing, and the City Council must consider "facts presented at the public hearing" before making a decision on the amendment. *See* UDC 19.16.030(H)(1),(2). In fact, there are a number of specific determinations that the City Council must make before approving a proposed General Plan Amendment. UDC 19.16.030(I)(1)-(4).[2]

The City Council has the authority to "may make and adopt all ***ordinances, resolutions and orders***… which are necessary for the municipal government, the management of the affairs of the City and the execution of all of the powers which are vested in the City." Las Vegas City Charter § 2.090(1)(emphasis added). In accordance, the General Plan Amendment process results in a binding written decision containing "reasons for the decision" that is provided to the "applicant, agent or both" and the notice is formally filed with the City Clerk. UDC 19.16.030(H)(3). There is also no question that the decision by the City Council would affect the "personal property and rights of private persons." Indeed, at a minimum, the dispute at issue implicates Plaintiffs' property rights in the Land. Additionally, as a general matter the City Council has the power to examine and hear witnesses to assist the City Council in making its decisions. In fact, the City Council has authority to "[o]rder the attendance of witnesses and the production of all documents which relate to any business before the City Council" and the "City Council … may apply to the clerk of the district court for a subpoena which commands the attendance of that person before the City Council." Las Vegas City Charter § 2.080(1)(d), (2)(a). Finally, the City, including the City Council, has the ability to enforce decisions or impose penalties.[3] Based on the foregoing, the proceedings of the City Council relating to Plaintiffs'

[2] The City Council must determine that "the density and intensity of the proposed General Plan Amendment is compatible with the existing adjacent land use designations", the "zoning designations allowed by the proposed amendment will be compatible with the existing adjacent land uses or zoning districts", "[t]here are adequate transportation, recreation, utility, and other facilities to accommodate the uses and densities permitted by the proposed General Plan designation" and "[t]he propose amendment conforms to other applicable adopted plans and policies." UDC 19.16.030(I)(1)-(4).

[3]For example, the Unified Development Code provides that "[e]nforcement of the provisions of this Title shall be pursued in order to provide for its effective administration, to ensure compliance with any condition of development approval, to promote the City's planning efforts,

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pending application for amendment of the General Plan are quasi-judicial.

The fact that the statements in the declarations were solicited or gathered prior to the public hearing of the City Council does not undermine any finding that the statements therein are absolutely privileged. *See Fink*, 118 Nev. at 433 ("the privilege applies … to 'communications preliminary to a proposed judicial proceeding.'"). Here, the statements were collected by individuals with a significant interest in the outcome of the application for the purpose of providing input for consideration by the City Council in determining whether to approve Plaintiffs' application for amendment of the General Plan, so there is a direct relevance to Plaintiffs' pending application and the related City Council proceedings. Indeed, the Declaration was specifically addressed to the "City of Las Vegas". *See* Complaint, Ex. 1.

2. Qualified Privilege

Even if absolute privilege did not apply, Defendants cannot be liable to Plaintiffs because any statements in the declarations are also subject to a qualified or conditional privilege. Under Nevada law, "[a] qualified or conditional privilege exists where a defamatory statement is made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if it is made to a person with a corresponding interest or duty." *Circus Circus*, 99 Nev. at 62 (citations omitted). Where any such privilege applies, alleged defamatory statements "are not actionable unless the privilege is abused by publishing the statements with malice." *Bank of America Nevada v. Bordeau*, 115 Nev. 263, 267, 982 P.2d 474 (1999) (citations omitted). "[P]laintiff must prove by a preponderance of the evidence that the defendant abused the privilege by publishing the defamatory communication with actual malice. [ ] Actual malice is a stringent standard that is proven by demonstrating 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).

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and to protect the public health, safety and general welfare" and that the "provisions of this Title, and any conditions of development approval which have been imposed thereunder, may be enforced by the Director; the Las Vegas Metropolitan Police Department; and any other City of Las Vegas officer and employee designated to do so." UDC 19.00.090(A)(1), (2).

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Here, the declarations were exchanged between property owners who had an "interest" in the outcome of Plaintiffs' application for amendment of the General Plan. As alleged, Defendants (in truth, only two of them) participated in the distribution of declarations to be provided to residents of Queensridge. Complaint, Ex. 1. The declarations are consistent with the conclusions of Judge Crockett, in which he determined that residents purchased property in the community in reliance on the Master Development Plan. Thus, to the extent that there were any statements by Defendants in the Declaration, they are subject to a conditional or qualified privilege as well.

IV. CONCLUSION

Because Plaintiffs do not adequately state a claim and because Defendants acts were privileged, as a matter of law, Defendants respectfully request that the Court dismiss Plaintiffs' claims, with prejudice.

DATED this 13th day of April, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and pursuant to NRCP 5(b), EDCR 8.05, Administrative Order 14-2, and NEFCR 9, I caused a true and correct copy of the foregoing **DEFENDANTS' MOTION TO DISMISS PURSUANT TO NRCP 12(b)(5)** be submitted electronically for filing and/or service with the Eighth Judicial District Court via the Court's Electronic Filing System on the 13th day of April, 2018, to the following:

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Attorneys for Plaintiffs
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DISTRICT COURT

CLARK COUNTY, NEVADA

FORE STARS, LTD., a Nevada Limited Liability Company; 180 LAND CO., LLC, a Nevada Limited Liability Company; SEVENTY ACRES, LLC, a Nevada Limited Liability Company,

Plaintiffs,

v.

DANIEL OMERZA, DARREN BRESEE, STEVE CARIA, and DOES 1 THROUGH 1000,

Defendants.

CASE NO. A-18-771224-C

DEFENDANTS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF (1) DEFENDANTS' SPECIAL MOTION TO DISMISS (ANTI-SLAPP MOTION) PLAINTIFFS' COMPLAINT PURSUANT TO NRS §41.635 ET. SEQ. AND (2) DEFENDANTS' MOTION TO DISMISS PURSUANT TO NRCP 12(b)(5)

Pursuant to Nevada Revised Statutes Section 47.130 and 47.150, Defendants Daniel Omerza, Darren Bresee, and Steve Caria, hereby request that this Court take judicial notice of the following documents in support of their Special Motion to Dismiss (Anti-Slapp Motion) Plaintiffs' Complaint Pursuant to NRS § 41.635, *et seq.* and Motion to Dismiss Pursuant to NRCP 12(b)(5).

(1): The Reporter' Transcript of Proceedings dated January 11, 2018, in the matter *Jack Binion v. Las Vegas City of, et al.*, No. A-17-752344-J, Eighth Judicial District Court, Clark County, Nevada, attached hereto as **Exhibit A**; and

(2) City of Las Vegas, "Agenda Summary Page – Planning" regarding City Council Meeting of February 21, 2018 (Agenda Item No. 122), publicly available at http://www5.lasvegasnevada.gov/sirepub/view.aspx?cabinet=published_meetings&fileid=15111413, attached hereto as **Exhibit B**.

Judicial notice of the foregoing is warranted. *See* NRS 47.130(2)(b)(providing that a fact that is "[c]apable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned" is judicially noticeable); *see also Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993)(court may consider matters of public record in ruling on a motion to dismiss)(citations omitted).

DATED this 13th day of April, 2018.

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EXHIBIT A

TRAN

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

JACK BINION, Plaintiff,	)	
vs.	)	Case No.A-17-752344-J
	)	Dept. No. 24
LAS VEGAS CITY OF, ET AL, Defendants.	)	

HEARING

Before the Honorable Jim Crockett

Thursday, January 11, 2018, 9:00 a.m.

Reporter's Transcript of Proceedings

REPORTED BY:

BILL NELSON, RMR, CCR #191
CERTIFIED COURT REPORTER

APPEARANCES:

For the Plaintiff: Todd Bice, Esq.
Dustun Holmes, Esq.

For the Defendants: Christopher Kaempfer, Esq.
James Smyth, Esq.
Stephanie Allen, Esq.
Philip Byrnes, Esq.
Todd Davis, Esq.

Las Vegas, Nevada, Thursday, January 11, 2018

* * * * *

THE COURT: Jack Binion versus Las Vegas City Of. Please tell me that somebody ask this be reported.

THE COURT REPORTER: No, Judge.

MR. BICE: We'll make that request, Your Honor, Plaintiffs will.

Todd Bice and Dustun Holmes on behalf of the Plaintiff.

MR. HOLMES: Dustun Holmes on behalf of Plaintiff.

MR. KAEMPFER: Chris Kaempfer, K-a-e-m-p-f-e-r, my father was a Court Reporter, on behalf of Defendant Seventy Acres, together with James Smyth from our firm and Stephanie Allen.

And we have in-house counsel Todd Davis on behalf of Seventy Acres.

MR. BYRNES: Phil Byrnes for the City Of Las Vegas.

THE COURT: All right.

Have a seat.

MR. KAEMPFER: Your Honor, if I could, also Yohan Lowie and Vickie DeHart are the ownership on

behalf of Seventy Acres are here in court.

THE COURT: Mr. Lowie and who?

MR. KAEMPFER: Vickie DeHart.

THE COURT: Okay.

So I have read and reread these briefs several times now. I've read them a minimum of two times, and in some cases three times.

The matter has been very competently and comprehensively briefed by counsel for the Petitioners, for Seventy Acres, and for the City of Las Vegas, and I appreciate that.

I want to tell you what my inclination is, and I will then reference some of the things from the briefs that I think would help to explain what my inclination is and why, and then I will invite counsel to make any addition oral argument they wish to make that isn't a reiteration of what is in your briefs.

Please be comfortable knowing that I have read your briefs. They are heavily highlighted and annotated, and I have referred to the exhibits you have directed me to. I realize not all 23,000 pages were included, but I appreciate that too, there's no need to include things that don't specifically support and oppose a point.

So I've looked at the -- although I didn't have the original unabridged set of City's exhibits first presented in the black binder, then I got the other set in the white binder, and I've had a chance to review records, and I'll call it testimony, even though it's unsworn, of people who spoke at the various hearings.

I find the Petitioners' arguments persuasive.

I think that the city failed to follow LVMC, Las Vegas Municipal Court, Rule 19.040, and staff recommendations that a major modification needed to be approved in order for the application to be approved. I realize that there were 23,000 pages of information, but the city and Seventy Acres repeat this many times, but the mere volume or number of pages is really not something that necessarily carries the day.

The question is, what do they say?

There is -- For the Court Reporter's benefit I'll say, there is reference to Peccole Ranch Master Plan and Peccole's P-e-c-c-o-l-e, and there's a reference to Peccole Ranch Master Plan number II, Roman numeral two.

Historically this is a project that had --

there was a phase 1 of Peccole Ranch, and Badlands, which was a golf course in phase 2 of Peccole Ranch. Both golf courses were designed to be in a major flood zone and were designated as flood drainage and open space.

At the time that was done 25 years ago or more the city mandated these designations to address the natural flood problem and the open space necessary for master plan development.

Phase 2 of the Peccole Ranch Master Plan was approved on April 4th, 1990. That specifically defined the Badlands 18-hole golf course as flood drainage, in addition to satisfying the the required open space necessitated by the city for master planned development.

Keep in mind that I've lived here since 1952, 1-9-5-2, so I am familiar with how things looked before master planning became the way things are done here in the Vegas Valley.

The phase 2 golf course open space designation was for 211.6 acres.

The William Peccole family knew that residential development would not be feasible in the flood zone, but as a golf course. It could also be used to enhance the value of the surrounding

residential lots.

The staff, when it finally came down to the application for the subject 17.49 acres, the staff repeatedly explained that this had to be a major modification had to be made to the master plan in order to approve the application.

The staff said, the site is part of the 1569 acre Peccole Ranch Master Plan. This is the staff speaking.

Pursuant to title 19.10.040, a request has been submitted for a modification to the 1990 Peccole Ranch Master Plan.

So the applicant new that they needed to apply for that, and staff said it was necessary.

In terms of the record I'm referring to, I'm referring to pages 1 through 27 -- pages 2425, through 2428, pages 6480 to 6490, and pages 17,362 to 17,377.

The next thing staff said is, the site, and this is in quotes, the site is part of the Peccole Ranch Master Plan. The appropriate avenue for considering any amendment to the Peccole Ranch Master Plan is through the major modification process as outlined in title 19.10.040, close quotes.

Quoting again, the staff says, the current