IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 76273

DANIEL OMERZA, DARREN BRESEE, and STEVE CARIA,

Appellants

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.

APPENDIX TO APPELLANTS' OPENING BRIEF VOLUME I of III

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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 22nd day of October, 2018, I electronically filed and served by electronic mail a true and correct copies of the above and foregoing **APPENDIX TO APPELLANTS' OPENING BRIEF, VOLUME I of III** properly addressed to the following:

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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, vs. DANIEL OMERZA, DARREN BRESEE, STEVE CARIA,, AND DOES 1-1000, Defendants.	CASE NO. A-18-771224-C DEPT. NO: Department 31 **COMPLAINT**

Plaintiffs, Fore Stars, Ltd. ("Fore Stars"), 180 Land Co., LLC ("180 Land Co."), and Seventy Acres, LLC ("Seventy Acres"), (collectively referred to as "Plaintiffs") by and through their undersigned counsel, James J. Jimmerson, Esq., of the law firm of Jimmerson Law Firm, P.C., for their complaint against Defendants states as follows:

PARTIES

1 Plaintiff Fore Stars Ltd., is a limited liability company organized to do business in the State of Nevada.

2. Plaintiff 180 Land Co LLC is a limited liability company organized to do business in the State of Nevada.

3. Plaintiff Seventy Acres LLC is a limited liability company organized to do business in the State of Nevada.

4. Defendant David Omerza ("Omerza") is an individual residing in Clark County, Nevada.

5. Defendant, Daniel Bresee ("Bresee"), is an individual residing in Clark County, Nevada.

6. Defendant, Steve Caria ("Caria"), is an individual residing in Clark County, Nevada.

7. The true names of DOES 1 through 1000, their capacities, whether individual, associate, partnership, municipality or otherwise, are known and unknown to the Plaintiffs, but DOES 1 through 1000 actions, and the resulted harm to the Plaintiffs, is not fully known. Some or all of the DOES are, upon information and belief, residents within the Queensridge Common Interest Community created under NRS 116, but who have no claim of title, use or entitlement to the adjoining real property owned by Plaintiffs herein. Therefore, Plaintiffs sue these Defendants by such fictitious names. Plaintiffs are informed and believe, and therefore allege, that each of the Defendants, designated as DOES 1 through 1000, are or may be legally responsible for the events referred to in this action, and caused damages to the Plaintiffs, as herein alleged, and the Plaintiffs will ask leave of this Court to amend the Complaint to insert the true names and capacities of such Defendants, when the same have been ascertained, and to join them in this action, together with the property charges and allegations. (DOES 1 through 1000 collectively referred to herein as the "DOES"). Plaintiffs also reserve their right to expand the number of DOES to a number larger than 1000 as discovery and investigation commences.

Jurisdiction and Venue

8. The State of Nevada possesses both subject matter and personal jurisdiction over the parties hereto. The events involving this lawsuit, and the contacts of the parties within Clark County,

Nevada, grant both subject matter and personal jurisdiction over the parties to this Court. Venue also lies properly in Clark County, Nevada.

Allegations Common To All Claims

9. Plaintiffs Fore Stars, Ltd., 180 Land Co., LLC, and Seventy Acres, LLC (collectively "Land Owners" or "Plaintiffs") own approximately 250 acres of land which was previously leased to a golf course operator who operated the Badlands Golf Course (collectively the "Land").

10. On May 20, 1996, Nevada Legacy 14, LLC recorded a Master Declaration of Covenants, Conditions, Restrictions and Easements for Queensridge, which was later amended and restated, ("Queensridge Master Declaration") with the Clark County Recorder in order to establish the common interest community known as "Queensridge." Queensridge was created and organized under the provisions of NRS 116.

11. The Queensridge Master Declaration describes Queensridge in Section 2.1 as "an exclusive master-planned community", and in Section 1.55 states: "Master Plan" shall mean the Queensridge Master Plan proposed by Declarant for the Property and the Annexable Property which is set forth in Exhibit "1," hereto, as the same may be from time to time supplemented and amended by Declarant, in Declarant's sole discretion, a copy of which, and any amendments thereto, shall be on file at all times in the office of the Association."

12. The Purchase Agreement ("PSA"), that was executed by Defendant Omerza, and by Defendant Bresee, and by Defendant Caria, contains certain very specific disclosures and acknowledgements with respect to the Land , including but not limited to notice via the respective CC&Rs and other documentation that the Land is developable. Depending on the location of the lot/home, Defendants acknowledged receipt of documents, including but not limited to, some or all of the following:

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a. PSA Addendum "1" to PSA, wherein Defendants initialed that they received:

i. A public offering statement which disclosed that the adjacent Land (then a golf course) is not a part of Queensridge.

ii. The Queensridge Master Declaration, which disclosed that the adjacent Land (then a golf course) is not a part of Queensridge (and a comparable Master Declaration for Queensridge Towers); and

iii. A Notice of Zoning Designation of Adjoining Lot (as attachment "C" to the PSA). The Adjoining Lot was the Land and the zoning disclosed was RPD-7.

b. PSA Addendum "1" – Additional Disclosures Section 4 – No Golf Course or Membership Privileges. Purchaser shall not acquire any rights, privileges, interest, or membership in the Badlands Gold Course or any other golf course, public or private, or any country club membership by virtue of its purchase of the Lot.

c. PSA Addendum "1" – Additional Disclosures Section 7 – Views/Location Advantages. The Lot may have a view or location advantage at the present time. The view may at present or in the future include, without limitation, adjacent or nearby single-family homes, multiple-family residential structures, commercial structures, utility facilities, landscaping, and other items. The Applicable Declarations may or may not regulate future construction of improvements and landscaping in the Planned Community that could affect the views of other property owners. Moreover, depending on the location of the Lot, adjacent or nearby residential dwellings or other structures, whether within the Planned Community or outside the Planned Community, could potentially be constructed or modified in a manner that could block or impair all or part of the view from the Lot and/or diminish the location advantages of the Lot, if any. Purchaser acknowledges that Seller has not made any representations, warranties, covenants, or agreement to or with Purchaser concerning

the preservation or permanence of any view or location advantage for the Lot, and Purchaser hereby agrees that Seller shall not be responsible for any impairment of such view or location advantage, or for any perceived or actual loss of value of the Lot resulting from any such impairment. Purchaser is and shall be solely responsible for analyzing and determining the current and future value and permanence of any such view from or location advantage of the Lot. This section was specifically initiated by the Lot Purchasers.

d. As to the Queensridge Towers, the Public Offering Statement also specifically disclosed (1) that the zoning to the south was R-PD7, "Residential up to 7 du;" (2) that "As to those properties contiguous to the Condominium Property, Developer makes no representation that development will follow the above plan, assumes no responsibility for errors or omissions in the information provided and makes no representations as to the development of such properties. As to the property to be submitted to the Condominium pursuant to the Declaration, Developer reserves the right to make changes In the proposed land use,"; and (3) Developer makes no representations as to the desirability or existence of any view from the Unit. The anticipated or currently existing view from the Unit may be changed at any time, either due to action taken by Developer, affiliates of the Developer or any third party." Additionally, the PSA for Queensridge Towers specifically stated: "Seller makes no representations as to the subdivision, use or development of any adjoining or neighboring land (including land that may be withdrawn from the Condominium according to the terms of the Declaration). Without limiting the generality of the foregoing, views from the Unit may be obstructed by future development of adjoining or neighboring land and Seller disclaims any representation that views from the U it will not be altered or obstructed by development of neighboring land;" and "Without limiting the generality of the foregoing or any disclosures in the POS, Purchaser acknowledges that affiliates of Seller control land

neighboring or in the vicinity of the Property. Neither Seller nor its affiliates make any representation whatsoever relating to the future development of neighboring or adjacent land and expressly reserve the right to develop this land in any manner that Seller or Seller's affiliates determine in their sole discretion."

13. The Land, upon which the golf course was operated, was not annexed into Queensridge under Queensridge Master Declaration.

14. The Queensridge Master Declaration established Custom Home Estate Design Guidelines included as Exhibit 1 (page 1-3) an Illustrative Site Plan depicting the portion of the Land adjacent to the Lot purchased by Defendants as a neighborhood of single family homes, and as Exhibit 2 (page 1-4) designating the portion of the Land adjacent to the Lot purchased by Defendants as "Future Development."

15. Upon information and belief, Defendant Omerza closed escrow on a piece of real property within the Queensridge Community under a PSA.

16. Upon information and belief, a deed was recorded evidencing the Defendant Omerza's acquisition of this real property.

17. Upon information and belief, Defendant Bresee closed escrow on a piece of real property within the Queensridge Community under a PSA.

18. Upon information and belief, a deed was recorded evidencing the Defendant Bresee's acquisition of this real property.

19. Upon information and belief, Defendant Caria closed escrow on a piece of real property within One Queensridge Place Community under a PSA.

20. Upon information and belief, a deed was recorded evidencing the Defendant Caria's acquisition of this real property.

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21. The deed obtained by Defendant Omerza and the deed obtained by Defendant Bresee and the deed obtained by Defendant Caria are clear by their respective terms that they have no rights to affect or control the use of Plaintiffs' real property.

22. Conversely, the deeds memorializing the property owned by the respective Plaintiffs, are clear on their face that they are not affected by or conditioned upon the Queensridge Community, a common interest community.

23. In or about March 2018, the Defendants and Does 1-1000, and perhaps others, reached an agreement between themselves and engaged in a scheme to attempt to improperly influence and/or pressure the Plaintiffs to give over to Defendants and/or their co-conspirators a portion of their real estate and/or a portion of their project and to improperly influence and/or pressure public officials including, but not limited to, the City of Las Vegas Planning Commission and the Las Vegas City Council to delay or deny Plaintiff's land rights to develop their property. This scheme and agreement between Defendants and their co-conspirators included, but not limited to, the preparation, promulgation, solicitation and execution of a statement and/or declaration (hereinafter "Declaration") aimed to be sent or delivered to the City of Las Vegas that each of the signatories, "The undersigned purchased a residence/lot in Queensridge which is located within the Peccole Ranch Master Planned Community" and that "The undersigned made such purchase 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 as Park Recreations – Open Space which land use designation does not permit the building of residential units." And finally, that "At the time of purchase, the undersigned paid a significant lot premium to the original developer as consideration for the open space/natural drainage system." Said Declaration is attached hereto as Exhibit 1.

24. That said declaration or statement is false.

25. That said declaration or statement, being false, is being intentionally prepared, circulated, executed, and delivered to the City of Las Vegas for the improper purposes of attempting to delay or deny Plaintiffs' development of their land rights and their property, and is intended to do so, by falsely and intentionally misrepresenting facts, as stated therein that the Defendants, and their co-conspirators, made their purchase of their real property in reliance upon the fact that the open space/natural drainage system would 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 as Park Recreations – Open Space which land use designation does not permit the building of residential units" as those words are used within the Declaration prepared, promulgated, solicited and/or executed by the Defendants and their co-conspirators.

26. That the actions of the Defendants and their co-conspirators to knowingly and intentionally sign the knowingly false Declaration were wrongful. The declaration is false, and it is intended to cause third-parties, including the City of Las Vegas, who detrimentally relied thereon, to take action against Plaintiffs. These actions of Defendants and their co-conspirators, in order to further their improper scheme and agreement, has caused irreparable injury to the Plaintiffs for which there is no adequate remedy of law.

27. The efforts of Defendants and their co-conspirators, are improper, and are an attempt to achieve something that is socially or morally improper or illegal, or out of balance from normal societal expectations of behavior.

28. Defendants, and their co-conspirators, have engaged in multiple concerted actions, including, but not limited to, the preparation, promulgation, and conspiracy to cause homeowners in the Queensridge Community to execute the proposed Declaration despite the fact that the

Declaration is, upon information and belief, false, misleading, and is being solicited and procured based upon false representations of fact that Defendants and their co-conspirators are intentionally causing to occur, with the intent of causing the homeowners who are being asked to sign the document, to detrimentally rely upon their representation approximately, and to cause the City of Las Vegas to rely on the same, directly causing damages to the Plaintiffs.

29. That attached hereto as Exhibits 2 and 3 are true and correct copies of two (2) Court Orders that are public record before the Eighth Judicial District Court. The Court Orders arise from the case of Fore Stars, et al v. Peccole, et al, Case Number A-16-739654-C. The Court Orders are dated November 30, 2016; and, Exhibit 2 dated January 31, 2017. Said Findings of Fact, Conclusions of Law, and Order and Judgments are included by reference within this Complaint as if fully set forth herein. Also attached hereto as Exhibit 4 is a true and correct copy of a Court Order filed May 2, 2017 that is a public record before the Eighth Judicial District Court. The Court Order arises from the case of Binion et al v. Fore Stars, et al Case Number A-17-729053, and specifically found that Plaintiffs therein failed to state a claim upon which relief may be granted in seeking 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," and that "as a matter of law NRS Chapter 278A does not apply to common interest communities. NRS 116.1201 (4)." Said Findings of Fact, Conclusions of Law, and Order are included by reference within this Complaint as if fully set forth herein.

30. The actions of the Defendants, and their co-conspirators, are intended by them, to harm the Plaintiffs and Plaintiffs' land rights, and are being prepared, circulated and solicited to be signed by Defendants, and their co-conspirators solely for the purposes of harassing and maliciously attacking the reputation and character of Plaintiffs, their property rights to develop their property,

to cause economic damage and harm to Plaintiffs, and to slander the title of the property owned by the Plaintiffs referenced herein under the guise of seeking to petition members of the City of Las Vegas and/or its legislative branches, the Planning Commission and/or City Council, amongst others, that despite this guise and the campaign to cause delay and damage by the Defendants and their co-conspirators to the Plaintiffs and to the development of Plaintiffs' land, has caused Plaintiffs irreparable injury.

31. The action of the Defendants, in addition to causing irreparable injury to the Plaintiffs, has also caused the Plaintiffs substantial money damages in a sum in excess of $15,000 all to be proven at the time of trial.

32. Plaintiffs have been forced to retain counsel to prosecute this action and Plaintiffs are entitled to an award of attorneys' fees and costs.

FIRST CLAIM FOR RELIEF
(Equitable and Injunctive Relief)

33. Plaintiffs re-allege the allegations stated in paragraphs 1through 32 above.

34. The actions of Defendants and their co-conspirators, to prepare, promulgate, solicit and seek the signature of homeowners within the Queensridge common interest community and to cause them to misrepresent the facts and circumstances under which they purchased their property within Queensridge are improper, fraudulent, tortious, and intended to irreparably harm the Plaintiffs and to cause them harm and damages.

35. That the actions of the Defendants and their co-conspirators, are repetitive, and continuing, and in accordance with the Nevada Supreme Court decision of *Chisholm v. Redfield*, 347 P.2d 523 (1959) and other related cases, the repeated repugnant and tortious actions of the Defendants and their co-conspirators to essentially suborn the assertion of facts that are false and which are misrepresentations of facts, has irreparably damaged the Plaintiffs.

36. That the actions of the Defendants and their co-conspirators, have caused the

Plaintiffs irreparable harm, for which no adequate remedy of law exists. That the Plaintiffs can establish a likelihood of success on the merits, and that the balance of hardships in this case tips sharply in Plaintiffs' favor. Further, the public interest involved in this case, supports the Plaintiffs being granted equitable relief to preliminarily and permanently enjoin the Defendants and their co-conspirators from continuing their irreparable harm of the Plaintiffs and the Plaintiffs' property rights.

37. As a result of the Defendants' and their co-conspirators' actions, the Plaintiffs have no adequate remedy law and they are entitled to preliminary and permanent injunction against the Defendants and each of them, including against DOES 1 through 1000, in temporarily and permanently enjoining them from preparing, soliciting, and obtaining false signatures from homeowners through use of misrepresentation of facts and other sorted means, all to Plaintiffs' damage and detriment.

38. Plaintiffs are entitled to equitable relief as set forth herein enjoining and otherwise protecting Plaintiffs from the actions of Defendants and each of them.

SECOND CLAIM FOR RELIEF
(Intentional Interference with Prospective Economic Relations)

39. Plaintiffs incorporate paragraphs 1 through 38 above as if fully set forth herein.

40. Plaintiffs Fore Stars, Ltd., 180 Land Company, Seventy Acres LLC have expended hundreds of thousands of dollars, if not more, to properly develop their property, the Land, and to seek from the City of Las Vegas, permission to develop their real property since they came in control of the same in 2015.

41. Defendants, and DOES, knew, or should have known, that Plaintiffs would be developing the Land with third parties, and would be working with the City of Las Vegas to cause the same to occur.

42. Defendants, and DOES, knew, or should have known, that Plaintiffs' relationship with third parties would be disrupted, for several reasons, including, but not limited to, the preparation, promulgation, solicitation and execution of the Declarations and statements referenced herein. Defendants and DOES intended by their actions to disrupt the development of Plaintiffs' land.

43. Defendants, and DOES, engaged in wrongful conduct through the preparation, promulgations, solicitation and execution of the Declarations and statements referenced herein, which contain false representations of fact, and using their intentional misrepresentations to influence and pressure homeowners to sign a statement, relying upon the representations of the solicitors, Defendants herein, to the detriment of the Plaintiffs, as well as to the character and reputation of Plaintiffs in the community, and to the development of their Land.

44. The Defendants, and DOES, intend by their actions to intentionally disrupt the Plaintiffs' prospective economic advantages through the development of their property, which has caused the Plaintiffs damages in excess of $15,000 to be proven at the time of Trial.

45. Defendants' and DOES' wrongful conduct is a substantial factor in causing Plaintiffs, and each of them, substantial harm and money damages.

46. As a result of Defendants' and DOES' improper actions, Plaintiffs have been damaged in a sum in excess of $15,000.

47. The actions of Defendants and DOES were malicious, oppressive and/or fraudulent, for which Plaintiffs are entitled to an award of punitive damages in an amount to be determined at the time of Trial.

THIRD CLAIM FOR RELIEF
(Negligent Interference with Prospective Economic Relations)

48. Plaintiffs incorporate paragraphs 1 through 47 above as if fully set forth herein.

49. Plaintiffs, Defendants and DOES are within a proximate relationship that creates an undertaking by the Defendants not to harm the economic interests and value of Plaintiffs' Land.

50. Defendants and DOES knew, or should have known, of Plaintiffs' prospective economic advantages, and of their intent, desire and expenditure of substantial funds to develop their property.

51. Defendants, and DOES, knew, or should have known, that the statements contained within the prepared, promulgated and solicited Declaration were false, and that their actions in soliciting homeowners to sign the same were based upon negligent and/or fraudulent misrepresentations of fact, negligently and/or intentionally made to cause the homeowners to rely and to influence the homeowners to submit these Declarations to City of Las Vegas officials, despite their falsity, all in a scheme and plan to harm Plaintiffs.

52. Defendants, and DOES, knew, or should have known, that they were obliged to treat the Plaintiffs with reasonable care. Defendants and DOES breached their duty to act with reasonable care owed to the Plaintiffs, which behavior by the Defendants, and each of them, through the preparation, promulgations, solicitation and execution of these Declarations was negligently performed, and which proximately caused the Plaintiffs money damages in excess of $15,000.

53. The actions of Defendants and DOES were not privileged or otherwise protected.

54. The actions of Defendants and DOES were intended to disrupt the Plaintiffs' business and the development of their real estate.

55. As a result of Defendants' and DOES' negligent interference with Plaintiffs' prospective economic relations, the Plaintiffs have been damaged in a sum in excess of $15,000.

FOURTH CLAIM FOR RELIEF
(Conspiracy)

56. Plaintiffs incorporate paragraphs 1 through 55 as if fully set forth herein.

57. In March 2018, Defendants and their co-conspirators, including, but not limited to DOES 1 – 1000, reached an agreement between themselves and formed a concerted action to improperly influence and/or pressure third-parties, including officials within the City of Las Vegas, and others with the intended action of delaying or denying the Plaintiffs' land rights and their intent to develop their property.

58. The Defendants, and DOES 1 – 1000, by their agreement and their concerted action conducted themselves in a way to maximize their opportunities to achieve their improperly goals, including, but not limited to, their attempt to use this delay and denial of Plaintiffs' rights to bargain for a percentage of the project from the Plaintiffs, upon information and belief.

59. The actions of the Defendants were undertaken to achieve improper purposes or motives. The purpose sought to be achieved by these Defendants, and their co-conspirators, was an attempt by them to achieve something that was socially or morally improper, or illegal, or out of the bounds from normal societal expectations of behavior.

60. The Defendants, and their co-conspirators agreement was implemented by their concerted actions to object to Plaintiffs' development, to use their political influence, by utilizing false representations of fact in the form of the declarations of homeowners that the homeowners had allegedly detrimentally relied up the presence of the Peccole Master Plan prior to their purchase of their real property, a representation of fact that, upon information and belief is false and intentionally so. That the actions of the Defendants are without merit, undertaken in bad faith, and without reasonable grounds. They were undertaken specifically as a tactic to delay or prevent the Plaintiffs from developing their own land the goal itself, or in combination with the Defendants and their co-conspirators desire to pressure the Plaintiffs to deliver a portion of their project over to Defendants upon information and belief.

///

61. That the words and actions of the Defendants, and/or their co-conspirators are improper and have caused the Plaintiff substantial money damages in a sum in excess of Fifteen Thousand Dollars ($15,000), all to be proven at the time of trial.

FIFTH CLAIM FOR RELIEF
(Intentional Misrepresentation)

62. Plaintiffs incorporate paragraphs 1 through 61 as if fully set forth herein.

63. The actions of the Defendants and their co-conspirators, were intentional, constitute an intentional misrepresentation, and were undertaken with the intent of causing homeowners and the City of Las Vegas to detrimentally rely upon their misrepresentation of facts being falsely made by Defendants.

64. That said actions by the Defendants were detrimentally and reasonably relied upon by the homeowners, and was thought to have been relied upon by the City of Las Vegas, all to the Plaintiffs' damages as set forth herein in a sum in excess of Fifteen Thousand Dollars ($15,000).

65. That Defendants' intentional misrepresentations were intentionally and maliciously oppressively and fraudulently undertaken and asserted, for which the Plaintiffs are entitled to an award of punitive damages in a sum to be determined at the time of trial.

SIXTH CLAIM FOR RELIEF
(Negligent Misrepresentation)

66. Plaintiffs incorporate paragraphs 1 through 65 as if fully set forth herein.

67. Pled in the alternative pursuant to NRCP 8, Defendants had an obligation to the Plaintiffs not to defame slander or otherwise harm the Plaintiffs, and their property rights.

68. That Defendants owed the Plaintiffs a duty of care, which they breached by virtue of their actions which were at the very least negligent, and the representations that they made, were negligently, if not intentionally asserted, proximately causing the Plaintiffs damages in a sum in excess of Fifteen Thousand Dollars ($15,000).

WHEREFORE, Plaintiffs pray for judgment against Defendants, and each of them, as follows:

1. Compensatory Damages in a sum in excess of Fifteen Thousand Dollars ($15,000);

2. Punitive Damages in a sum in excess of Fifteen Thousand Dollars ($15,000);

3. Equitable relief and preliminary and permanent injunctive relief as prayed for herein;

4. An award of reasonable attorney's fees and costs; and

5. Such other and further relief as the Court deems proper in the premises.

Dated: March 15, 2018.

THE JIMMERSON LAW FIRM, P.C.

/s/ James J. Jimmerson Es .

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415 S. 6th St. #1000
Las Vegas, NV 89101
Telephone: (702) 388-7171
Facsimile: (702) 387-1167
Attorneys for Plaintiffs Fore Stars, Ltd.,
180 Land Co., LLC., Seventy Acres, LLC

Exhibit "1"

TO: City of Las Vegas

☐ The undersigned purchased a residence/lot in Queensridge which is located within the Peccole Ranch Master Planned Community.

The undersigned made such purchase 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 as Parks Recreation – Open Space which land use designation does not permit the building of residential units.

At the time of purchase, the undersigned paid a significant lot premium to the original developer as consideration for the open space/natural drainage system.

_____
Resident Name (Print)

_____
Resident Signature

_____
Address

_____
Date

TO: City of Las Vegas

☐ The undersigned purchased a residence/lot in Queensridge which is located within the Peccole Ranch Master Planned Community.

The Undersigned made such purchase 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 as Parks Recreation – Open Space which land use designation does not permit the building of residential units.

_____
Resident Name (Print)

_____
Resident Signature

_____
Address

_____
Date

Exhibit "2"

Electronically Filed
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CLERK OF THE COURT

FFCL

DISTRICT COURT

CLARK COUNTY, NEVADA

ROBERT N. PECCOLE and NANCY A. PECCOLE, individuals, and Trustees of the ROBERT N. AND NANCY A. PECCOLE FAMILY TRUST,

Plaintiffs,

v.

PECCOLE NEVADA, CORPORATION, a Nevada Corporation; WILLIAM PECCOLE 1982 TRUST; WILLIAM PETER and WANDA PECCOLE FAMILY LIMITED PARTNERSHIP, a Nevada Limited Partnership; WILLIAM PECCOLE and WANDA PECCOLE 1971 TRUST; LISA P. MILLER 1976 TRUST; LAURETTA P. BAYNE 1976 TRUST; LEANN P. GOORJIAN 1976 TRUST; WILLIAM PECCOLE and WANDA PECCOLE 1991 TRUST; 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; EHB COMPANIES, LLC, a Nevada Limited Liability Company; THE CITY OF LAS VEGAS; LARRY MILLER, an individual; LISA MILLER, an individual; BRUCE BAYNE, an individual; LAURETTA P. BAYNE, an individual; YOHAN LOWIE, an individual; VICKIE DEHART, an individual; and FRANK PANKRATZ, an individual,

Defendants.

Case No. A-16-739654-C
Dept. No. VIII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT GRANTING DEFENDANTS FORE STARS, LTD., 180 LAND CO LLC, SEVENTY ACRES LLC, EHB COMPANIES LLC, YOHAN LOWIE, VICKIE DEHART AND FRANK PANKRATZ'S NRCP 12(b)(5) MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Hearing Date: November 1, 2016
Hearing Time: 8:00 a.m.

Courtroom 11B

This matter coming on for Hearing on the 2nd day of November, 2016 on Defendants Fore Stars, Ltd., 180 Land Co LLC, Seventy Acres LLC, EHB Companies LLC, Yohan Lowie, Vickie Dehart and Frank Pankratz's NRCP 12(B)(5) Motion To Dismiss Plaintiffs' Amended Complaint, James J. Jimmerson of the Jimmerson Law Firm, P.C. appeared on behalf of Defendants, Fore Stars, Ltd., 180 Land Co LLC, Seventy Acres LLC, Yohan Lowie, Vickie DeHart and Frank Pankratz; Stephen R. Hackett of Sklar Williams, PLLC and Todd D. Davis of

EHB Companies LLC, appeared on behalf of Defendant EHB Companies LLC; and Robert N. Peccole of Peccole & Peccole, Ltd. appeared on behalf of the Plaintiffs.

The Court, having fully considered the Motion, the Plaintiffs' Oppositions thereto, the Defendants' Replies, and all other papers and pleadings on file herein, including each party's Supplemental filings following oral argument, as permitted by the Court, hearing oral argument, and good cause appearing, issues the following Findings of Fact, Conclusions of Law and Judgment:

FINDINGS OF FACT

Complaint and Amended Complaint

1. Plaintiffs initially filed a Complaint in this matter on July 7, 2016 which raised three Claims for Relief against all Defendants: 1) Declaratory and Injunctive Relief; 2) Breach of Contract and 3) Fraud.

2. On August 4, 2016, before any of the Defendants had filed a responsive pleading to the original Complaint, Plaintiffs filed their Amended Complaint which alleged the following Claims for Relief against all Defendants: 1) Injunctive Relief; 2) Violations of Plaintiffs' Vested Rights and 3) Fraud.

3. Plaintiffs Robert and Nancy Peccole are residents of the Queensridge common interest community ("Queensridge CIC"), as defined in NRS 116, and owners of the property identified as APN 138-31-215-013, commonly known as 9740 Verlaine Court, Las Vegas, Nevada ("Residence"). (Amended Complaint, Par. 2).

4. At the time of filing of the Complaint and Amended Complaint, the Residence was owned by the Robert N. and Nancy A. Peccole Family Trust ("Peccole Trust"). The Peccole Trust acquired title to the Residence on August 28, 2013 from Plaintiff's Robert and Nancy Peccole, as individuals, and transferred ownership of the residence to Plaintiff's Robert N. and Nancy A. Peccole on September 12, 2016.

5. Plaintiff's Robert and Nancy Peccole, as Trustees of the Peccole Trust, have no ownership interest in the Residence and therefor have no standing in this action.

6. Plaintiff's Robert N. and Nancy A. Peccole, as individuals, acquired their present ownership interest in the Residence on September 12, 2016 and therefore had full knowledge of the plans to develop the land upon which the Badlands Golf Course is presently operated at the time they acquired the Residence.

7. Plaintiffs' Amended Complaint alleges that the City of Las Vegas, along with Defendants Fore Stars Ltd., Yohan Lowie, Vickie DeHart and Frank Pankratz, openly sought to circumvent the requirements of state law, the City Code and Plaintiffs' alleged vested rights, which they allegedly gained under their Purchase Agreement, by applying to the City for redevelopment, rezoning and by interfering with and allegedly violating the drainage system in order to deprive Plaintiffs and other Queensridge homeowners from notice and an opportunity to be heard and to protect their vested rights under the Master Declaration of Covenants, Conditions, Restrictions and Easements for Queensridge (hereinafter "Master Declaration" or "Queensridge Master Declaration")(*See* Amended Complaint, Par. 1).

8. Plaintiffs allege that Defendant Fore Stars Ltd. convinced the City of Las Vegas Planning Department to put a Staff sponsored proposed amendment to the City of Las Vegas Master Plan on the September 8, 2015 Planning Commission Agenda. The Amended Complaint alleges that the proposed Amendment would have allowed Fore Stars Ltd. to exceed the density cap of 8 units per acre on the Badlands Golf Course located in the Queensridge Master Planned Community. (Amended Complaint, Par. 44).

9. Plaintiffs allege that Defendant Fore Stars Ltd., recorded a Parcel Map relative to the Badlands Golf Course property without public notification and process required by NRS 278.320 to 278.4725. Plaintiffs further allege that the requirements of NRS 278.4925 and City of Las Vegas Unified Development Code 19.16.070 were not met when the City Planning Director certified the Parcel Map and allowed it to be recorded by Fore Stars, Ltd. and that the City of Las Vegas should have known that it was unlawfully recorded. (Amended Complaint, Par. 51, 61 and 62).

10. Plaintiffs allege in their First Claim for Relief that they are entitled to Injunctive Relief against the Developer Defendants and City of Las Vegas enjoining them from taking any action that violates the provisions of the Master Declaration.

11. Plaintiffs allege in their Second Claim for Relief that Developer Defendants have violated their "vested rights" as allegedly afforded to them in the Master Declaration.

12. Plaintiffs allege the following "Specific Acts of Fraud" committed by some or all of the Defendants in this case:

1. Implied representations by Peccole Nevada Corporation, Larry Miller, Bruc Bayne and Greg Goorjian. (Amended Complaint, ¶ 76).

2. A "scheme" by Defendants Peccole Nevada Corporation, Larry Miller, Bruc Bayne, all of the entities listed in Paragraph 34 as members of Fore Stars, Ltd, an Yohan Lowie, Vickie DeHart, Frank Pankratz and EHB Companies LLC i collusion with each other whereby Fore Stars, Ltd would be sold to Lowie and hi partners and they in turn would clandestinely apply to the City of Las Vegas t eliminate Badlands Golf Course and replace it with residential developmen including high density apartments. (Amended Complaint, ¶ 77).

3. The City of Las Vegas, through its Planning Department and members joined i the scheme contrived by the Defendants and participated in the collusion b approving and allowing Fore Stars to illegally record a Merger and Resubdivisio Parcel Map and accepting an illegal application designed to change drainag system and subdivide and rezone the Badlands Golf Course. (Amende Complaint, ¶ 78).

4. That Yohan Lowie and his agents publicly represented that the Badlands Gol Course was losing money and used this as an excuse to redevelop the entir course. (Amended Complaint, ¶ 79).

5. That Yohan Lowie publically represented that he paid $30,000,000 for Fore Star of his own personal money when he really paid $15,000,000 and borrowe $15,800,000. (Amended Complaint, ¶ 80).

6. Lowie's land use representatives and attorneys have made public claims that th golf course is zoned R-PD7 and if the City doesn't grant this zoning, it will resul in an inverse condemnation. (Amended Complaint, ¶ 81).

Plaintiffs' Motions for Preliminary Injunction against the City of Las Vegas and against the Developer Defendants and Orders Denying Plaintiffs' Motions for Rehearing, for Stay on Appeal and Notice of Appeal.

13. On August 8, 2016, Plaintiffs filed a Motion for Preliminary Injunction seeking to enjoin the City of Las Vegas from entertaining or acting upon agenda items presently before the City Planning Commission that allegedly violated Plaintiffs' vested rights as home owners in the Queensridge common interest community.

14. The Court denied Plaintiffs' Motion for Preliminary Injunction in an Order entered on September 30, 2016 because Plaintiffs failed to demonstrate that permitting the City of Las Vegas Planning Commission (or the Las Vegas City Council) to proceed with its consideration of the Applications constitutes irreparable harm to Plaintiffs that would compel the Court to grant Plaintiffs the requested injunctive relief in contravention of the Nevada Supreme Court's holding in *Eagle Thrifty Drugs & Market v. Hunter Lake Parent Teachers Ass'n*, 85 Nev. 162, 165, 451 P.2d 713, 714 (1969).

15. On September 28, 2016—the day after their Motion for Preliminary Injunction directed at the City of Las Vegas was denied—Plaintiffs filed a virtually identical Motion for Preliminary Injunction, but directed it at Defendants Fore Stars Ltd., Seventy Acres LLC, 180 Land Co LLC, EHB Companies LLC, Yohan Lowie, Vickie DeHart and Frank Pankratz (hereinafter "Developer Defendants").

16. On October 5, 2016, Plaintiffs improperly filed a Motion for Rehearing of Plaintiffs' Motion for Preliminary Injunction.[1]

17. On October 12, 2016, Plaintiffs filed a Motion for Stay Pending Appeal in relation to the Order Denying their Motion for Preliminary Injunction against the City of Las Vegas.

18. On October 17, 2016, the Court, through Minute Order, denied the Plaintiffs' Motion for Rehearing, Motion for Stay Pending Appeal and Motion for Preliminary Injunction

[1] The Motion was procedurally improper because Plaintiffs are required to seek leave of Court prior to filing a Motion for Rehearing pursuant to EDCR 2.24(a) and Plaintiffs failed to do so. On October 10, 2016, the Court issued an Order vacating the erroneously-set hearing on Plaintiffs Motion for Rehearing, converting Plaintiffs Motion to a Motion for Leave of Court to File Motion for Rehearing and setting same for in chambers hearing on October 17, 2016.

against Developer Defendants. Formal Orders were subsequently entered by the Court thereafter on October 19, 2016, October 19, 2016 and October 31, 2016, respectively.

19. The Court denied Plaintiffs' Motion for Rehearing of the Motion for Preliminary Injunction because Plaintiffs could not show irreparable harm, because they possess administrative remedies before the City Planning Commission and City Council pursuant to NRS 278.3195, UDC 19.00.080(N) and NRS 278.0235, and because Plaintiffs failed to show a reasonable likelihood of success on the merits at the September 27, 2016 hearing and failed to allege any change of circumstances since that time that would show a reasonable likelihood of success as of October 17, 2016.

20. The Court denied Plaintiffs' Motion for Stay Pending Appeal on the Order Denying Plaintiffs' Motion for Preliminary Injunction against the City of Las Vegas because Plaintiffs failed to satisfy the requirements of NRAP 8 and NRCP 62(c). Plaintiffs failed to show that the object of their potential writ petition 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.

21. The Court denied Plaintiffs' Motion for Preliminary Injunction against Developer Defendants because Plaintiffs failed to meet their burden of proof that they have suffered irreparable harm for which compensatory damages are an inadequate remedy and failed to show a reasonable likelihood of success on the merits. The Court also based its denial on the fact that Nevada law does not permit a litigant from seeking to enjoin the Applicant as a means of avoiding well-established prohibitions and/or limitations against interfering with or seeking advanced restraint against an administrative body's exercise of legislative power:

> In Nevada, it is established that equity cannot directly interfere with, or in advance restrain, the discretion of an administrative body's exercise of legislative power. [Citation omitted] This means that a court could not enjoin the City of Reno from entertaining Eagle Thrifty's request to review the planning commission recommendation. ***This established principle may not be avoided by the expedient of directing the injunction to the applicant instead of the City Council.***

Eagle Thrifty Drugs & Market v. Hunter Lake Parent Teachers Ass'n, 85 Nev. 162, 165, 451 P.22d 713, 714 (1969) (emphasis added).

22. On October 21, 2016, Plaintiffs filed a Notice of Appeal on the Order Denying their Motion for Preliminary Injunction against the City of Las Vegas. Subsequently, on October 24, 2016, Plaintiffs filed a Motion for Stay in the Supreme Court. On November 10, 2016, the Nevada Supreme Court dismissed Plaintiffs' Appeal, and the Motion for Stay was therefore denied as moot.

Defendants' Motion to Dismiss

23. Defendants Fore Stars, Ltd., 180 Land Co., LLC, Seventy Acres LLC, EHB Companies, LLC, Yohan Lowie, Vickie Dehart and Frank Pankratz filed a Motion to Dismiss Amended Complaint on September 6, 2016.

24. The Amended Complaint makes several allegations against the Developer Defendants:

1) that they improperly obtained and unlawfully recorded a parcel map merging and re-subdividing three lots which comprise the Badlands Golf Course land;
2) that, with the assistance of the City Planning Director, they did not follow procedures for a tentative map in the creation of the parcel map,;
3) that the City accepted unlawful Applications from the Developer Defendants for a general plan amendment, zone change and site development review and scheduled a hearing before the Planning Commission on the Applications;
4) that they have violated Plaintiffs' "vested rights" by filing Applications to rezone, develop and construct residential units on their land in violation of the Master Declaration and by attempting to change the drainage system; and
5) that Developer Defendants have committed acts of fraud against Plaintiffs.

25. The Developer Defendants contended that they properly followed procedures for approval of a parcel map because the map involved the merger and re-subdividing of only three parcels and that Plaintiffs' arguments about tentative maps only apply to transactions involving five or more parcels, whereas parcel maps are used for merger and re-subdividing of four or

fewer parcels of land. *See* NRS 278.461(1)(a)("[a] person who proposed to divide any land for transfer or development into four lots or less… [p]repare a parcel map…").

26. The Developer Defendants further argued that Plaintiffs erroneously represent that a parcel map is subject to same requirements as a tentative map or final map of NRS 278.4925. Tentative maps are used for larger parcels and subdivisions of land and subdivisions of land require "five or more lots." NRS 278.320(1).

27. The Developer Defendants argued that Plaintiffs have not pursued their appeal remedies under UDC 19.16.040(T) and have failed to exhaust their administrative remedies. The City similarly notes that they seek direct judicial challenge without exhausting their administrative remedies and this is fatal to their claims regarding the parcel map in this case. *See Benson v. State Engineer*, 131 Nev. ____, 358 P.3d 221, 224 (2015) and *Allstate Insurance Co. v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993-94 (2007).

28. The Developer Defendants also argued that Plaintiffs have failed to exhaust their administrative remedies prior to seeking judicial review. The Amended Complaint notes that the Defendants' Applications are scheduled for a public hearing before the City Planning Commission and thereafter, before the City of Las Vegas City Council. The Planning Commission Staff had recommended approval of all seven (7) applications. *See* Defendants' Supplemental Exhibit H, filed November 2, 2016. The Applications were heard by the City Planning Commission at its Meeting of October 18, 2016. The Planning Commission's action and decisions on the Applications are subject to review by the Las Vegas City Council at its upcoming November 16, 2016 Meeting under UDC 19.16.030(H), 19.16.090(K) and 19.16.100(G). It is only after a final decision of the City Council that Plaintiffs would be entitled to seek judicial review in the District Court pursuant to NRS 278.3195(4).

29. The Developer Defendants argued that Plaintiffs do not have the "vested rights" that they claim are being violated in their Second Claim for Relief because the Badlands Golf Course land that was not annexed into Queensridge CIC, as required by the Master Declaration

and NRS 116, is unburdened, unencumbered by, and not subject to the CC&Rs and the restrictions of the Master Declaration.

30. The Developer Defendants argued that the Plaintiffs have failed to plead fraud with particularity as required by NRCP 9(b).

31. The Developer Defendants argued that Plaintiffs have not alleged any viable claims against them and their Amended Complaint should be dismissed for failure to state a claim.

Plaintiffs' Voluntary Dismissal of Certain Defendants

32. On October 4, 2016, Plaintiffs dismissed several Peccole Defendants from this case through a Stipulation and Order Dismissing Without Prejudice Defendants Lauretta P. Bayne, individually, Lisa Miller, individually, Lauretta P. Bayne 1976 Trust, Leann P. Goorjian 1976 Trust, Lisa P. Miller 1976 Trust, William Peccole 1982 Trust, William and Wanda Peccole 1991 Trust, and the William Peccole and Wanda Peccole 1971 Trust was entered.

33. On October 11, 2016, Plaintiffs dismissed the remaining Peccole Defendants through a Stipulation and Order Dismissing Without Prejudice Defendants: Peccole Nevada Corporation; William Peter and Wanda Peccole Family Limited Partnership, Larry Miller and Bruce Bayne. As such, no Peccole-related Defendants remain as Defendants in this case.

Dismissal of the City of Las Vegas

34. The City of Las Vegas filed a Motion to Dismiss on August 30, 2016. Said Motion was heard on October 11, 2016 and was granted on October 19, 2016, dismissing all of Plaintiffs' claims against the City of Las Vegas.

Lack of Standing

35. Plaintiff's Robert and Nancy Peccole, as Trustees of the Peccole Trust, have no ownership interest in the Residence and therefor have no standing in this action. As such, all

claims asserted by Plaintiff's Robert and Nancy Peccole, as Trustees of the Peccole Trust are dismissed.

Facts Regarding Developer Defendants' Motion to Dismiss

36. The Court has reviewed and considered the filings by Plaintiffs and Defendants including the Supplements filed by both sides following the November 1, 2016 Hearing, as wel as the oral argument of counsel at the hearing.

37. Plaintiff's Robert N. and Nancy A. Peccole, as individuals, acquired their presen ownership interest in the Residence on September 12, 2016 and therefore had full knowledge o the plans to develop the land upon which the Badlands Golf Course is presently operated at th time they acquired the Residence.

38. Plaintiffs have not set forth facts that would substantiate a basis for the thre claims set forth in their Complaint against the Developer Defendants: Injunctive Relief/Parce Map, Vested Rights, and Fraud.

39. The Developer Defendants are the successors in interest to the rights, interests an title in the Badlands Golf Course land formerly held by Peccole 1982 Trust, Dated February 15, 1982; William Peter and Wanda Ruth Peccole Family Limited Partnership; and Nevada Legac 14 LLC.

40. Plaintiffs' have made some scurrilous allegations without factual basis an without affidavit or any other competent proof. The Court sees no evidence supporting thos claims.

41. The Developer Defendants properly followed procedures for approval of a parce map over Defendants' property pursuant to NRS 278.461(1)(a) because the division involve four or fewer lots. The Developer Defendants parcel map is a legal merger and re-subdividing o land within their own boundaries.

42. The Developer Defendants have complied with all relevant provisions of NRS Chapter 278.

43. NRS 278A.080 provides: "The powers granted under the provisions of thi chapter may be exercised by any city or county which enacts an ordinance conforming to th provisions of this chapter."

44. The Declaration of Luann Holmes, City Clerk for the City of Las Vegas, Exhibi L to Defendants' November 2, 2016 Supplemental Exhibits, states at paragraph 5, "[T]h Unified Development Code and City Ordinances for the City of Las Vegas do not contai provisions adopted pursuant to NRS 278A."

45. The Queensridge Master Declaration (Court Exhibit B and attached t Defendants' November 2, 2016 Supplement as Exhibit B), at p. 1, Recital B, states: "Declaran intends, without obligation, to develop the Property and the Annexable Property in one or mor phases as a mixed-use common interest community pursuant to Chapter 116 of the Nevad Revised Statutes ("NRS"), which shall contain "non-residential" areas and "residential" areas, which may, but is not required to, include "planned communities" and "condominiums," as suc quoted terms are used and defined in NRS Chapter 116."

46. The Queensridge community is a Common Interest Community organized unde NRS 116. This is not a PUD community.

47. NRS 116.1201(4) states that "The provisions of Chapter 117 and 278A of NRS d not apply to common-interest communities." See Defendants' Supplemental Exhibit Q.

48. In contrast to the City of Las Vegas' choice not to adopt the provisions of NRS 278A, municipal or city councils that choose to adopt the provisions of NRS 278A do so, a required by NRS 278A.080, by affirmatively enacting ordinances that specifically adopt Chapte 278A. *See, e.g.,* Defendants' Supplemental Exhibit N and O, Title 20 Consolidate

Development Code 20.704.040 and 20.676, Douglas County, Nevada and Defendants' Supplemental Exhibit P, Ordinance No. 17.040.030, City of North Las Vegas. The provisions of NRS 278A do not apply to the facts of this case.

49. The City Council has not voted on Defendants' pending Applications and the Court will not stop the City Council from conducting its ordinary business and reaching a decision on the Applications. Plaintiffs may not enjoin the City of Las Vegas or Defendants with regard to their instant Applications, or other Applications they may submit in the future. *See Eagle Thrifty Drugs & Market v. Hunter Lake Parent Teachers Ass'n*, 85 Nev. 162, 165, 451 P.2d 713, 714 (1969).

50. Plaintiffs are improperly trying to impede upon the City's land use review and zoning processes. The Defendants are permitted to seek approval of their Applications, or any Applications submitted in the future, before the City of Las Vegas, and the City of Las Vegas, likewise, is entitled to exercise its legislative function without interference by Plaintiffs.

51. Plaintiffs' claim that the Applications were "illegal" or "violations of the Master Declaration" is without merit. The filing of these Applications by Defendants, or any Applications by Defendants, is not prohibited by the terms of the Master Declaration, because the Applications concern Defendants' own land, and such land that is not annexed into the Queensridge CIC is therefore not subject to the terms of its Master Declaration. Defendants cannot violate the terms of an agreement to which they are not a party and which does not apply to them.

52. Plaintiffs' inferences and allegations regarding whether the Badlands Golf Course land is subject to the Queensridge Master Declaration are not fair and reasonable, and have no support in fact or law.

53. The land which is owned by the Defendants, upon which the Badlands Gol Course is presently operated ("GC Land") that was never annexed into the Queensridge CIC never became part of the "Property" as defined in the Queensridge Master Declaration and i therefore not subject to the terms, conditions, requirements or restrictions of the Queensridg Master Declaration.

54. Plaintiffs cannot prove a set of facts under which the GC Land was annexed int the "Property" as defined in the Queensridge Master Declaration.

55. Since Plaintiffs have failed to prove that the GC Land was annexed into th "Property" as defined in the Master Declaration, then the GC Land is not subject to the terms an conditions of the Master Declaration.

56. There can be no violation of the Master Declaration by Defendants if the G Land is not subject to the Master Declaration. Therefore, the Defendants' Applications are no prohibited by, or violative of, the Master Declaration.

57. Plaintiffs' Exhibit 1 to their Supplement filed November 8, 2016 depicts proposed and conceptual master plan amendment. The maps attached thereto do not appear t depict the 9-hole golf course, but instead identifies that area as proposed single famil development units.

58. Plaintiffs' Exhibit 2 to their Supplement filed November 8, 2016, which is als Exhibit J to Defendants' Supplement filed November 2, 2016, approves a request for rezoning t R-PD3, R-PD7 and C-1, which all indicate the intent to develop in the future as residential o commercial. Plaintiffs alleged this was a Resolution of Intent which was "expunged" upo approval of the application. Plaintiffs alleged that Exhibit 3 to their Supplement, the 1991 zoning approval letter, was likewise expunged. However, the Zoning Bill No. Z-20011, Ordinance No. 5353, attached as Exhibit I to Defendants' Motion to Dismiss, demonstrates tha

the R-PD7 Zoning was codified and incorporated into the amended Atlas in 2001. Therefore, Plaintiffs' claim that Attorney Jerbic's presentation at the Planning Commission Meetin (Exhibit D to Defendants' Supplement) is "erroneous" is, in fact, incorrect. Attorney Jerbic' presentation is supported by the documentation of public record.

59. Defendants' Supplemental Exhibit I, a March 26, 1986 letter to the City Planning Commission, specifically sought the R-PD zoning for a planned golf course "as it allows th developer flexibility and the City design control." Thus, keeping the golf course zoned fo potential future development as residential was an intentional part of the plan.

60. Further, Defendants' Supplemental Exhibit K, two letters from the City of La Vegas to Frank Pankratz dated December 20, 2014, confirm the R-PD7 zoning on all parcel held by Fore Stars, Ltd.

61. Plaintiffs' Exhibit 4 to their Supplement filed November 8, 2016, a 1986 ma depicts two proposed golf courses, one proposed in Canyon Gate and the other proposed aroun what is currently Badlands. However, the current Badlands Golf Course is not the same as wha is depicted on that map. Of note, the area on which the 9 hole golf course currently sits i depicted as single family development.

62. Exhibit A to the Queensridge Master Declaration defines the initial lan committed as "Property" and Exhibit B defines the land that is eligible to be annexed, but it onl becomes part of the "Property" if a Declaration of Annexation is filed with the County Recorder.

63. The Court finds that Recital A to the Queensridge Master Declaration define "Property" to "mean and include both of the real property described in Exhibit "A" hereto an that portion of the Annexable Property which may be annexed from time to time in accordanc with Section 2.3, below."

64. The Court finds that Recital A of the Queensridge Master Declaration furth states that "In no event shall the term "Property" include any portion of the Annexable Propert for which a Declaration of Annexation has not been Recorded..."

65. The Court finds that after reviewing the Supplemental Exhibit, Annexation Binde filed on October 20, 2016 at the Court's request, and the map entered as Exhibit A at th November 1, 2016 Hearing and to Defendants' November 2, 2016 Supplement, that the prope owned by Developer Defendants that was never annexed into the Queensridge CIC is therefor not part of the "Property" as defined in the Queensridge Master Declaration.

66. The Court therefore finds that the terms, conditions, and restrictions of th Queensridge Master Declaration do not apply to the GC Land and cannot be enforced against th GC Land.

67. The Court finds that Exhibit C to the Master Declaration is not a depictio exclusively of the "Property" as Plaintiffs allege. It is clear that it depicts both the Property which is a very small piece, and the Annexable Property, pursuant to the Master Declaration page 10, Section 1.55, which states that Master Plan is defined as the "Queensridge Master Pl proposed by Declarant for the Property and the Annexable Property which is set forth in Exhibi "C," hereto..." Plaintiffs' Supplement filed November 8, 2016, Exhibit 5, is page 10 of th Master Declaration, and Plaintiffs emphasize that is a master plan proposed by the Declaratio "for the property." But reading the provision as a whole, it is clear that it is a "proposed" plan fo the Property (as defined by the Master Declaration at Recital A) and "the Annexable Property."

68. Likewise, Exhibit 6 to Plaintiffs' Supplement filed November 8, 2016 define 'Final Map' as a Recorded map of "any portion" of the Property. It does not depict all of th Property. The Master Declaration at Section 1.55 is clear that its Exhibit C depicts the Prope

and the Annexable Propert , and Defendants' Supplemental Exhibit A makes clear that not all o the Annexable Property was actually annexed into the Queensridge CIC.

69. Plaintiffs' Supplemental Exhibit 7, which is Exhibit C to the Master Declaration does not depict "Lot 10" as part of the Property. It depicts Lot 10 as part of the Annexable Property. Plaintiffs' Supplemental Exhibit 8 depicts, as discussed by Defendants at th November 1, 2016 Hearing, that Lot 10 was subdivided into several parcels, one of which became the 9 hole golf course. It was not designated as "not a part of the Property or Annexabl Property" because it was Annexable Property. However, again, the public record Declarations o Annexation, as summarized in Defendants' Supplemental Exhibit A, shows that Parcel 21, the holes, was never annexed into the Queensridge CIC.

70. The Master Declaration at Recital B provides that the Property "may, but is no required to, include…a golf course."

71. The Master Declaration at Recital B further provides that "The existing 18-hol golf course commonly known as the "Badlands Golf Course" is not a part of the Property o Annexable Property." The Court finds that does not mean that the 9-hole golf course was a pa of the Property. It is clear that it was part of the Annexable Property, and was subject t development rights. In addition to the "diamond" on the Exhibit C Map indicating it is "subjec to development rights, p. 1, Recital B of the Master Declaration states: "Declarant intends without obligation, to develo the Property and the Annexable Propert…"

72. In any event, the Amended and Restated Master Declaration of October, 20 included the 9 holes, and provides "The existing 27-hole golf course commonly known as th "Badlands Golf Court" is not a part of the Property or Annexable Property."

73. The Court finds that Mr. Peccole's Deed (Plaintiffs' Supplemental Exhibit 9) an Preliminary Title Report provided by Plaintiffs both indicate that his home was part of th

Queensridge CIC, that it sits on Parcel 19, which was annexed into the Queensridge CIC i March, 2000. Both indicate that his home is subject to the terms and conditions of the Maste Declaration, "includin an amendments and su lements thereto."

74. The Court finds that, conversely, the Fore Stars, Ltd. Deed of 2005 does not hav any such reference to the Queensridge Master Declaration or Queensridge CIC. Likewise none o the other Deeds involving the GC Land, Defendants' Supplemental Exhibits E, F, and G file November 2, 2016, make any reference to such land being subject to, or restricted by, th Queensridge Master Declaration.

75. Plaintiffs' Supplemental Exhibit 10, likewise, ignores the second sentence o Section 13.2.1, which provides "In addition, Declarant shall have the right to unilaterally amen this Master Declaration to make the following amendments..." The four (4) rights including th right to amend the Master Declaration as necessary to correct exhibits or satisfy requirements o governmental agencies, to amend the Master Plan, to amend the Master Declaration as necess or appropriate to the exercise Declarant's rights, and to amend the Master declaration a necessary to comply with the provisions of NRS 116. Declarant, indeed, amended the Maste Declaration as such just a few months after Plaintiffs' purchased their home.

76. Contrary to Plaintiffs' claim, the Amended and Restated Master Declaration was, in fact, recorded on August 16, 2002, as reflected in Defendants' Second Supplement, Exhibit Q.

77. Regardless, whether or not the 9-hole course is "not a party of the Property o Annexable Property" is irrelevant, if it was never annexed.

78. The Court finds that the Master Declaration and Deeds, as well as th Declarations of Annexation, are recorded documents and public record.

79. This Court has heard Plaintiffs' arguments and is not satisfied, and does no believe, that the GC Land is subject to the Master Declaration of Queensridge.

80. This Court is of the opinion that Plaintiffs' counsel Robert N. Peccole, Esq. ma be so personally close to the case that he is missing the key issues central to the causes of action.

81. The Court finds that the Developer Defendants have the right to develop the G Land.

82. The Court finds that the GC Land owned by Developer Defendants has "har zoning" of R-PD7. This allows up to 7.49 development units per acre subject to City of L Vegas requirements.

83. Of Plaintiffs' six averments of Fraud in their Amended Complaint, the only on that could ***possibly*** meet all of the elements required is #1. That is the only averment wher Plaintiffs claim that a false representation was made by any of the Defendants with the intentio of inducing Plaintiffs to act based upon a specific misrepresentation. None of the remaining fiv averments involve representations made directly to Plaintiffs. Plaintiffs' first fraud claim fail for two reasons: first, Plaintiffs alleged that the representations were "implied representations." The elements of Fraud require actual representations, not implied representations and second and more importantly, Plaintiffs have dismissed all of the Defendants listed in averment #1 wh they claim made false representations to them.

84. Plaintiffs allegations of fraud against Developer Defendants fail and ar insufficient pursuant to NRCP 9(b) because they are not plead with particularity and do no include averments as to time, place, identity of parties involved and the nature of the fraud Plaintiffs have not plead any facts which allege any contact or communication with th Developer Defendants at the time of purchase of the custom lot. Furthermore, Plaintiffs hav voluntarily dismissed the Peccole Defendants who allegedly engaged in said alleged fraud.

85. Assuming the facts alleged by Plaintiffs to be true, Plaintiffs cannot meet th elements of any type of fraud recognized in the State of Nevada, including: negligen

misrepresentation, intentional misrepresentation or fraud in the inducement as their claim is ple against Developer Defendants. This alleged "scheme," does not meet the elements of frau because Plaintiffs fail to allege that Developer Defendants made a false representation to them that Developer Defendants knew the representation was false; that Developer Defendant intended to induce Plaintiffs to rely on this knowing, false representation; and that Plaintiff actually relied on such knowing, false representation. Plaintiffs not only fail to allege that the have ever spoken to any of the Developer Defendants, but Mr. Peccole admitted at the Octobe 11, 2016 Hearing that he had never spoken to Mr. Lowie.

86. Plaintiffs are alleging a conspiracy, but that would be a criminal matter. Wha they are trying to do is stop an administrative arm of the City of Las Vegas from doing their job.

87. Plaintiffs' general and unsupported allegations of a "scheme" involvin Developer Defendants and the now-dismissed Peccole Defendants and Defendant City of La Vegas do not meet the legal burden of stating a fraud claim with particularity. There is quit simply no competent evidence to even begin to suggest the truth of such scurrilous allegations.

88. Plaintiffs have failed to state a claim for relief against the following Defendants: Yohan Lowie, Vickie DeHart, Frank Pankratz and EHB Companies LLC and those claim should be dismissed. Plaintiffs' only claims against Lowie, DeHart and Pankratz are the frau claims, but the fraud claim is legally insufficient because it fails to allege that any of thes individuals ever made any fraudulent representations to Plaintiffs. Lowie, DeHart and Pankrat are Mangers of EHB Companies LLC. EHB Companies LLC is the sole Manager of Fore Star Ltd., 180 Land Co LLC, and Seventy Acres LLC. Plaintiffs have failed to properly allege th elements of any causes of action sufficient to impose liability, nor even pierce the corporate veil against the Managers of any of the above-listed entities.

89. In light of Plaintiffs voluntarily dismissal of the Peccole Defendants, whom are alleged to have actually made the fraudulent representations to Plaintiff Robert Peccole Plaintiffs' claims against Yohan Lowie, Vickie DeHart, Frank Pankratz, and EHB Companie LLC, whom are not alleged to have ever held a conversation with Plaintiff Robert Peccole, appear to have been brought solely for the purpose of harassment and nuisance.

90. Although ordinarily leave to amend the Complaint should be freely given whe justice requires, Plaintiffs have already amended their Complaint once and have failed to state claim against the Developer Defendants. For the reasons set forth hereinabove, Plaintiffs shal not be permitted to amend their Complaint a second time in relation to their claims agains Developer Defendants as the attempt to amend the Complaint would be futile.

91. Developer Defendants introduced, and the Court accepted, the following Exhibit at the Hearing, as well as taking notice of multiple other exhibits which were attached to th various filings (including Plaintiffs' Deeds, Title Reports, Plaintiffs' Purchase Agreemen Addendum to Plaintiffs' Purchase Agreement, Fore Stars, Ltd.'s Deed, the Declarations o Annexation, and others):

1) Exhibit A: Property Annexation Summary Map;
2) Exhibit B: Master Declaration;
3) Exhibit C: Amended Master Declaration;
4) Exhibit D: Video/thumb drive from Planning Commission hearing of City Attorney Brad Jerbic.

92. If any of these Findings of Fact is more appropriately deemed a Conclusion o Law, so shall it be deemed.

CONCLUSIONS OF LAW

93. The Nevada Supreme Court has explained that "a timely notice of appeal divest the district court of jurisdiction to act and vests jurisdiction in this court" and that the point a which jurisdiction is transferred from the district court to the Supreme Court must be clearl

defined. Although, when an appeal is perfected, the district court is divested of jurisdiction t revisit issues that are pending before the Supreme Court, the district court retains jurisdiction t enter orders on matters that are collateral to and independent from the appealed order, i.e. matters that in no way affect the appeal's merits. *Mack-Manley v. Manley*, 122 Nev. 849, 855 138 P.3d 525, 529-530 (2006).

94. 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).

95. The Court must draw every fair inference in favor of the non-moving party. *Id.* (emphasis added).

96. Courts are generally to accept the factual allegations of a Complaint as true on Motion to Dismiss, but the allegations must be legally sufficient to constitute the elements of th claim asserted. *Carpenter v. Shalev*, 126 Nev. 698, 367 P.3d 755 (2010).

97. Plaintiffs have failed to state a claim upon which relief can be granted, even wi every fair inference in favor of Plaintiffs. It appears beyond a doubt that Plaintiffs can prove n set of facts which would entitle them to relief.

98. NRS 52.275 provides that "the contents of voluminous writings, recordings o photographs which cannot conveniently be examined in court may be presented in the form of chart, summary or calculation."

99. While a Court generally may not consider material beyond the complaint in rulin on a 12(b)(6) motion, "[a] court may take judicial notice of 'matters of public record' withou converting a motion to dismiss into a motion for summary judgment," as long as the fact noticed are not "subject to reasonable dispute." *Intri-Plex Techs., Inc. v. Crest Grp., Inc.*, 49

F.3d 1048, 1052 (9th Cir. 2007)(citing *Lee v. City of Los Angeles*, 250 F.3d 668, 688–89 (9th Cir. 2001); *see also United States v. Ritchie,* 342 F.3d 903, 908–09 (9th Cir.2003)). Courts may take judicial notice of some public records, including the "records and reports of administrative bodies." *United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003) (citing *Interstate Nat. Gas Co. v. S. Cal. Gas Co.,* 209 F.2d 380, 385 (9th Cir.1953)). The administrative regulations, zoning letters, CC&R and Master Declarations referenced herein are such documents.

100. Plaintiffs have sought judicial challenge and review of the parcel maps without exhausting their administrative remedies first and this is fatal to their claims regarding the parcel maps. *Benson v. State Engineer*, 131 Nev. ___, 358 P.3d 221, 224 (2015) and *Allstate Insurance Co. v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993-94 (2007).

101. The City Planning Commission and City Council's work is of a legislative function and Plaintiffs' claims attempting to enjoin the review of Defendant Developers' Applications are not ripe. UDC 19.16.030(H), 19.16.090(K) and 19.16.100(G).

102. Plaintiffs have an adequate remedy in law in the form of judicial review pursuant to UDC 19.16.040(T) and NRS 233B.

103. Zoning ordinances do not override privately-placed restrictions and courts cannot invalidate restrictive covenants because of a zoning change. *Western Land Co. v. Truskolaski*, 88 Nev. 200, 206, 495 P.2d 624, 627 (1972).

104. NRS 278A.080 provides: "The powers granted under the provisions of this chapter may be exercised by any city or county which enacts an ordinance conforming to the provisions of this chapter."

105. NRS 116.1201(4) specifically and unambiguously provides, "The provisions of chapters 117 and 278A of NRS do not apply to common-interest communities."

106. NRS 278.320(2) states that "A common-interest community consisting of five o more units shall be deemed to be a subdivision of land within the meaning of this section, bu need only comply with NRS 278.326 to 278.460, inclusive and 278.473 to 278.490, inclusive."

107. Private land use agreements are enforced by actions between the parties to th agreement and enforcement of such agreements is to be carried out by the Courts, not zonin boards.

108. Plaintiffs "vested rights" Claim for Relief is not a viable claim because Plaintiff have failed to show that the GC Land is subject to the Master Declaration and therefore tha claim should be dismissed.

109. Plaintiffs have failed to plead fraud with particularity as required by NRCP 9(b). The absence of any plausible claim of fraud against the Defendants was further demonstrated b the fact that throughout the Court's lengthy hearing upon the Defendants' Motion to Dismis Plaintiffs' Amended Complaint, Plaintiffs did not make a single reference or allegatio whatsoever that would suggest in any way that the Plaintiffs had any claim of fraud against an of the Defendants. Plaintiffs did not reference their alleged claim at all, and the Court Finds, a this time, that the Plaintiffs have failed o state any claim upon with relief may be granted agains the Defendants. *See NRCP 9(b).*

110. Under Nevada law, a Plaintiff must prove the elements of fraudulen misrepresentation by clear and convincing evidence: (1) A false representation made by th defendant; (2) defendant's knowledge or belief that its representation was false or that defendan has an insufficient basis of information for making the representation; (3) defendant intended to induce plaintiff to act or refrain from acting upon the misrepresentation; and (4) damage to th plaintiff as a result of relying on the misrepresentation. *Barmettler v. Reno Air, Inc.*, 114 Nev.

441, 447, 956 P.2d 1382, 1386 (1998), citing *Bulbman Inc. v. Nevada Bell*, 108 Nev. 105, 110–11, 825 P.2d 588, 592 (1992); *Lubbe v. Barba*, 91 Nev. 596, 599, 540 P.2d 115, 117 (1975).

111. Nevada law provides: (i) a shield to protect members and managers from liability for the debts and liabilities of the limited liability company. *NRS 86.371*; and (ii) a member of a limited-liability company is not a proper party to proceedings by or against the company. *NRS 86.381*. The Court finds that naming the individual Defendants, Lowie, DeHart and Pankratz, was not made in good faith, nor was there any reasonable factual basis to assert such serious and scurrilous allegations against them.

112. If any of these Conclusions of Law is more appropriately deemed a Findings of Fact, so shall it be deemed.

ORDER AND JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendants Fore Stars, Ltd., 180 Land Co LLC, Seventy Acres LLC, EHB Companies LLC, Yohan Lowie, Vickie Dehart and Frank Pankratz' Motion to Dismiss Amended Complaint is hereby GRANTED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to the Defendants Fore Stars, Ltd., 180 Land Co LLC, Seventy Acres LLC, EHB Companies LLC, Yohan Lowie, Vickie Dehart and Frank Pankratz, Plaintiffs' Amended Complaint is hereby dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that collateral to the instant Findings of Fact, Conclusions of Law, Order and Judgment, the Court will address the Defendants' Motion for Attorneys' Fees and Costs, and Supplement thereto pursuant to NRCP 11, and issue a separate Order and Judgment relating thereto.

DATED this 21 day of November 2016.

DISTRICT COURT JUDGE
A-16-739654-C

Respectfully submitted by:

JIMMERSON LAW FIRM, P.C.

/s/ James J. Jimmerson Es

James J. Jimmerson, Esq.
Nevada Bar No. 000264
415 South 6th Street, Suite 100
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Exhibit "3"

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Attorneys for Defendants Fore Stars, Ltd., 180 Land Co., LLC., Seventy Acres, LLC; Yohan Lowie, Vickie DeHart and Frank Pankratz

DISTRICT COURT
CLARK COUNTY, NEVADA

ROBERT N. PECCOLE and NANCY A. PECCOLE, individuals, and Trustees of the ROBERT N. and NANCY A. PECCOLE FAMILY TRUST,

Plaintiffs,

vs.

PECCOLE NEVADA, CORPORATION, a Nevada Corporation; WILLIAM PECCOLE 1982 TRUST; WILLIAM PETER and WANDA PECCOLE FAMILY LIMITED PARTNERSHIP, a Nevada Limited Partnership; WILLIAM PECCOLE and WANDA PECCOLE 1971 TRUST; LISA P MILLER 1976 TRUST; LAURETTA P. BAYNE 1976 TRUST; LEANN P. GOORJIAN 1976 TRUST; WILLIAM PECCOLE and WANDA PECCOLE 1991 TRUST; 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; EHB COMPANIES, LLC, a Nevada Limited Liability Company; THE CITY OF LAS VEGAS; LARRY MILLER, an individual; LISA MILLER, an individual; BRUCE BAYNE, an individual; LAURETTA P. BAYNE, an individual; YOHAN LOWIE, an individual; VICKIE DEHART, an individual; FRANK PANKRATZ, an individual,

Defendants.

CASE NO. A-16-739654-C

DEPT. NO: VIII

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, FINAL ORDER AND JUDGMENT

Date: January 10, 2017
Courtroom 11B

THE JIMMERSON LAW FIRM, P.C.
415 South Sixth Street, Suite 100, Las Vegas, Nevada 89101
Telephone (702) 388-7171 - Facsimile (702) 387-1167

PLEASE TAKE NOTICE that Findings of Fact, Conclusions of Law, Final Order and Judgment was entered in the above-entitled action on the 31st day of January, 2017, a copy of which is attached hereto.

Dated: January 31st, 2017.

THE JIMMERSON LAW FIRM, P.C.

By: [signature] 8387 for
James J. Jimmerson, Esq.
Nevada State Bar No. 000264
415 South 6th Street, Suite 100
Las Vegas, Nevada 89101
Attorneys for Defendants Fore Stars, Ltd., 180 Land Co., LLC., Seventy Acres, LLC; Yohan Lowie, Vickie DeHart and Frank Pankratz

THE JIMMERSON LAW FIRM, P.C.
415 South Sixth Street, Suite 100, Las Vegas, Nevada 89101
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of The Jimmerson Law Firm, P.C. and that on this 31st day of January, 2017, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, FINAL ORDER AND JUDGMENT** *as* indicated below:

__X__ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;

__X__ by electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk

To the attorney(s) listed below at the address, email address, and/or facsimile number indicated below:

Robert N. Peccole, Esq. PECCOLE & PECCOLE, LTD. 8689 W. Charleston Blvd., #109 Las Vegas, NV 89117 bob@peccole.vcoxmail.com	Todd Davis, Esq. EHB Companies LLC 1215 S. Fort Apache, Suite 120 Las Vegas, NV 89117 tdavis@ehbcompanies.com
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DISTRICT COURT

CLARK COUNTY, NEVADA

ROBERT N. PECCOLE and NANCY A. PECCOLE, individuals, and Trustees of the ROBERT N. AND NANCY A. PECCOLE FAMILY TRUST,

Plaintiffs,

v.

PECCOLE NEVADA, CORPORATION, a Nevada Corporation; WILLIAM PECCOLE 1982 TRUST; WILLIAM PETER and WANDA PECCOLE FAMILY LIMITED PARTNERSHIP, a Nevada Limited Partnership; WILLIAM PECCOLE and WANDA PECCOLE 1971 TRUST; LISA P. MILLER 1976 TRUST; LAURETTA P. BAYNE 1976 TRUST; LEANN P. GOORJIAN 1976 TRUST; WILLIAM PECCOLE and WANDA PECCOLE 1991 TRUST; 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; EHB COMPANIES, LLC, a Nevada Limited Liability Company; THE CITY OF LAS VEGAS; LARRY MILLER, an individual; LISA MILLER, an individual; BRUCE BAYNE, an individual; LAURETTA P. BAYNE, an individual; YOHAN LOWIE, an individual; VICKIE DEHART, an individual; and FRANK PANKRATZ, an individual,

Defendants.

Case No. A-16-739654-C
Dept. No. VIII

FINDINGS OF FACT, CONCLUSIONS OF LAW, FINAL ORDER AND JUDGMENT

Hearing Date: January 10, 2017
Hearing Time: 8:00 a.m.

Courtroom 11B

This matter coming on for Hearing on the 10th day of January, 2017 *on* Plaintiffs' *Renewed Motion For Preliminary Injunction,* Plaintiffs' *Motion For Leave To Amend Amended Complaint,* Plaintiffs' *Motion For Evidentiary Hearing And Stay Of Order For Rule 11 Fees And Costs,* Plaintiffs' *Motion For Court To Reconsider Order Of Dismissal*, and Defendants Fore Stars, Ltd., 180 Land Co LLC, Seventy Acres LLC, EHB Companies LLC, Yohan Lowie,

Vickie Dehart and Frank Pankratz's *Oppositions* thereto and *Countermotions for Attorneys' Fees and Costs,* and upon *Plaintiffs' Opposition to Countermotion for Attorney's Fees and Costs* and Defendants' *Countermotion to Strike Plaintiffs' Rogue and Untimely Opposition filed January 5, 2017 and Attorneys' Fees and Costs*, and upon Defendants Fore Stars, Ltd., 180 Land Co LLC, Seventy Acres LLC, EHB Companies LLC, Yohan Lowie, Vickie Dehart and Frank Pankratz's *Memorandum of Costs and Disbursements*, and no objection or Motion to Retax having been filed by Plaintiffs in response thereto, ROBERT N. PECCOLE, ESQ. of PECCOLE & PECCOLE, LTD. and LEWIS J. GAZDA, ESQ. of GAZDA & TADAYON appearing on behalf of Plaintiffs, and Plaintiff, ROBERT N. PECCOLE being present, and JAMES J. JIMMERSON, ESQ. of THE JIMMERSON LAW FIRM, P.C. appearing on behalf of Defendants Fore Stars, Ltd., 180 Land Co LLC, Seventy Acres LLC, Yohan Lowie, Vickie DeHart and Frank Pankratz, and Defendants Yohan Lowie and Vickie DeHart being present, and STEPHEN R. HACKETT, ESQ. of SKLAR WILLIAMS, PLLC and TODD DAVIS, ESQ. of EHB COMPANIES, LLC appearing on behalf of Defendants EHB Companies, LLC and the Court having reviewed and fully considered the papers and pleadings on file herein, and having heard the lengthy arguments of counsel, and having allowed Plaintiffs, over Defendants' objection, to enter Exhibits 1-13 at the hearing, and having reviewed the record, good cause appearing, issues the following Findings of Fact, Conclusions of Law, Final Orders and Judgment:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Preliminary Findings

1. The Court hearing on November 1, 2016 was extensive and lengthy, and this Court does not need a re-argument of those points. At that time, the Court granted both parties great leeway to argue their case and, thereafter, to file any and all additional documents and/or

exhibits that they wished to file, so long as they did so on or before November 15, 2016. Each party took advantage of said opportunity by submitting additional documents for the Court's review and consideration. The Court has reviewed all submissions by each party. Further, at the Court's extended hearing on January 10, 2017, upon Plaintiffs' and Defendants' post-judgment motions and oppositions, the Court further allowed the parties to make whatever argument necessary to supplement their respective filings and in support of their respective requests;

2. On November 30, 2016, this Court, after a full review of the pleadings, exhibits, affidavits, declarations, and record, entered extensive *Findings of Fact, Conclusions of Law, Order and Judgment Granting Defendants Fore Stars, Ltd., 180 Land Co LLC, Seventy Acres LLC, EHB Companies, LLC, Yohan Lowie, Vickie DeHart and Frank Pankratz's NRCP 12(b)(5) Motion to Dismiss Plaintiffs' Amended Complaint.* On January 20, 2017, the Court also entered its *Findings Of Fact, Conclusions Of Law, and Judgment Granting Defendants Fore Stars, Ltd., 180 Land Co LLC, Seventy Acres LLC, EHB Companies LLC, Yohan Lowie, Vickie Dehart And Frank Pankratz's Motion For Attorneys' Fees And Costs* (the "Fee Order"). Both of these Findings of Fact, Conclusions of Law and Orders are hereby incorporated herein by reference, as if set forth in full, and shall become a part of these Final Orders and Judgment;

3. Following the Notice of Entry of the Court's extensive *Findings of Fact, Conclusions of Law, Order and Judgment Granting Defendants Fore Stars, Ltd., 180 Land Co LLC, Seventy Acres LLC, EHB Companies, LLC, Yohan Lowie, Vickie DeHart and Frank Pankratz's NRCP 12(b)(5) Motion to Dismiss Plaintiffs' Amended Complaint,* Plaintiffs filed four (4) Motions and one (1) Opposition, on an Order Shortening Time set for hearing on this date, Defendants filed their Oppositions and Countermotions for Attorneys' Fees and Costs. Defendants timely filed their *Memorandum of Costs and Disbursements*, and Plaintiffs chose not to file any Motion to Retax. After this briefing, Plaintiffs, at the January 10, 2017 Court hearing

presented in excess of an hour and a half of oral argument. The Court allowed the new exhibit to be admitted over the objection of Defendants;

4. Following the hearing, the Court has reviewed the papers and pleadings filed b both Plaintiffs and Defendants, along with Exhibits, and the oral argument of Plaintiffs an Defendants, and relevant statutes and caselaw, and based upon the totality of the record, make the following Findings:

Plaintiffs' Renewed Motion for Preliminary Injunction

5. As a preliminary matter, based on the record and the evidence presented to dat by both sides, the Court does not believe the golf course land ("GC Land") is subject to the term and restrictions of the Master Declaration of Covenants, Conditions, Restrictions and Easement of Queensridge ("Master Declaration" or "CC&Rs"), because it was not annexed into, or mad part of, the Queensridge Common Interest Community ("Queensridge CIC") which the Maste Declaration governs. The Court has repeatedly made, and stands by, this Finding;

6. The Court does not believe that William and Wanda Peccole, or their entitie (Nevada Legacy 14, LLC, the William Peter and Wanda Ruth Peccole Family Limite Partnership, and/or the William Peccole 1982 Trust) intended the GC Land to be a part of th Queensridge CIC, as evidenced by the fact that if that land had been included within tha community, then every person in Queensridge would be paying money to be a member of th Badlands Golf Course and paying to maintain it. They were not, and have not. In fact, th Master Declaration at Recital B states that the CIC "may, but is not required to include...a gol course" and Plaintiffs' Purchase documents make clear that residents of Queensridge acquire n golf course rights or membership privileges by their purchase of a house within the Queensridg CIC. *Exhibit C to Defendants' Opposition filed September 2, 2016 at page 1, Recital B, an Exhibit L to Defendants' Opposition filed September 2, 2016 at paragraph 4 of Addendum 1,*

7. By Plaintiffs' own exhibit, the enlargement of the Exhibit C Map to the Maste Declaration, it shows that the GC Land is not a part of the CC&Rs. The Exhibit C map showe the initial Property *and* the Annexable Property, as confirmed by Section 1.55 of the Maste Declaration;

8. Therefore, the argument about whether or not the Master Declaration applies the GC Land does not need to be rehashed, despite Plaintiffs' insistence that it do so. The Cou has repeatedly found that it does not. That is the Court's prior ruling, and nothing Plaintiff have brought forward reasonably convinces the Court otherwise. *See* the Court's November 20 2016 Order, Findings 51-76;

9. Regarding the Renewed Motion for Preliminary Injunction, Plaintiffs' Renew Motion and Exhibits are not persuasive, and the Court has made clear that it will not stop governmental agency from doing its job. The Court does not believe that intervention is "clearl necessary" or appropriate for this Court. As the Court understands it, if the owner of the G Land has made an application, the governmental agency would be derelict in their duty if it di not review it, consider it and do all of its necessary work to follow the legal process and make it recommendations and/or decision. The Court will not stop that process;

10. Based upon the papers, there is no basis to grant Plaintiffs' Renewed Motion fo Preliminary Injunction;

11. Plaintiffs' argument that there is a "conspiracy" with the City of Las Veg "behind closed doors" to get certain things done is inappropriate and without merit;

12. It is entirely proper for Defendants to follow the City rules that require the filin of applications if they want to develop their property, or to discuss a development agreemen with the City Attorney, or present a plan to the City of Las Vegas Planning Commission or th Las Vegas City Council. That is what they are supposed to do;

13. Plaintiffs submitted four (4) photos to demonstrate that the proposed ne development under the current application would "ruin his views." However, Plaintiffs' purchase documents make clear that no such "views" or location advantages were guaranteed t Plaintiffs, and that Plaintiffs were on notice through their own exhibit that their existing view could be blocked or impaired by development of adjoining property "whether within the Planne Community or outside of the Planned Community" *Exhibit 1 to Plaintiffs' Reply to Defendants Motion to Dismiss, filed September 9, 2016.*

14. In response to the Court's inquiry regarding what Plaintiffs are trying to enjoin Plaintiffs indicate they desire to enjoin Defendants from resubmitting the four (4) application that have been withdrawn, without prejudice, but which can be refiled. The Court finds tha refiling is exactly what Defendants are supposed to do if they want those application considered;

15. Plaintiffs' argument that Defendants cannot file Applications with the City, because it is a violation of the Master Declaration is without merit. That might be true if the G Land was part of the CC&R's. As repeatedly stated, this Court does not believe, and th evidence does not suggest, that the GC Land is subject to the CC&Rs, period;

16. Defendants' applications were legal and the proper thing to do, and the Court wil not stop such filings. Plaintiffs' position is the filing was not allowed under the Maste Declaration, and Plaintiffs will not listen to the Court's Findings that the GC Land was not adde to the Queensridge CIC by William Peccole or his entities. Plaintiffs' position is vexatious an harassing to the Defendants under the facts of this case;

17. Plaintiffs argue that the new applications that were filed were negotiated an discussed with the City Attorneys' Office without the knowledge of the City Council. But, again, that is not improper. The City Council does not get involved until the applications ar

submitted and reviewed by the Planning Staff and City Planning Commission. The Court finds that there is no "conspiracy" there. People are supposed to follow the rules, and the rules say that if you are going to seek a zone change or a variance, you may submit a pre-application for review, have appropriate discussions and negotiations, and then have a public review by the Planning Commission and ultimately the City Council;

18. The fact that a new application was submitted proposing 61 homes, which is different from the original applications submitted for "The Preserve" which were withdrawn without prejudice, is irrelevant;

19. Plaintiffs' argument that Defendants submitted a new application on December 30, 2016 to allegedly defeat Plaintiffs' Renewed Motion for Preliminary Injunction, to bring the case back into the administrative process, is not reasonable, nor accurate. There were already three (3) applications which were pending and which had been held in abeyance, and thus were still within the administrative process. The new application changes nothing as far as Plaintiffs' requests for a preliminary injunction;

20. Plaintiffs' Exhibit 5 demonstrates that notice was provided to the homeowners which is what Defendants were supposed to do. There was nothing improper in this;

21. Even if *all* the applications had been withdrawn, Plaintiffs could not "directly interfere with, **or in advance restrain**, the discretion of an administrative body's exercise of legislative power." *Eagle Thrifty Drugs & Markets, Inc. v. Hunter Lake Parent Teachers Assn. et al*, 85 Nev. 162, 451 P.2d 713 (1969) at 165, 451 P.2d at 714. Additionally, "This established principle **may not be avoided by the expedient of directing the injunction to the applicant instead of the City Council.**" *Id.* This holding still applies to these facts;

22. Regardless, the possible submission of zoning and land use applications will not violate any rights or restrictions Plaintiffs claim in their Master Declaration, as "A zoning

ordinance cannot override privately-placed restrictions, and a trial court cannot be compelled t invalidate restrictive covenants merely because of a zoning change." *W. Land Co. v. Truskolaski*, 88 Nev. 200, 206, 495 P.2d 624, 627 (1972). Additionally, UDC 19.00.0809(j) provides: "No provision of this Title is intended to interfere with or abrogate or annul an easement, private covenants, deed restriction or other agreement between private parties... Private covenants or deed restrictions which impose restrictions not covered by this Title, are no implemented nor superseded by this Title."

23. Plaintiffs' argument that Defendants needed permission to file the applications fo the 61 homes is, again, without merit, because Plaintiffs incorrectly assume that the CC& apply to the GC Land, when the Court has already found they do not. Plaintiffs unreasonabl refuse to accept this ruling;

24. Plaintiffs have no standing under *Gladstone v. Gregory,* 95 Nev. 474, 596 P.2 491 (1979) to enforce the restrictive covenants of the Master Declaration against Defendants o the GC Land. The Court has already, repeatedly, found that the Master Declaration does no apply to the GC Land, and thus Plaintiffs have no standing to enforce it against the Defendants. Defendants did not, and cannot, violate a rule that does not govern the GC Land. The Plaintiff refuse to hear or accept these findings of the Court;

25. Contrary to Plaintiffs' statement, the Court is not making an "argument" tha Plaintiffs' are required to exhaust their administrative remedies; that is a "decision" on the p of the Court. As the Court stated at the November 1, 2016 hearing, Plaintiffs believe that CC&R of the Queensridge CIC cover the GC Land, and Mr. Peccole is so closely involved in it, h refuses to see the Court's decision coming in as fair or following the law. No matter wha decisions are made, Mr. Peccole is so closely involved with the issues, he would never accep

any Court's decision, because if it does not follow his interpretation, in Plaintiffs' mind, th Court is wrong. *November 1, 2016 Hearing Transcript, P. 3, L. 13-2;*

26. Defendants have the right to close the golf course and not water it. This actio does not impact Plaintiffs' "rights;"

27. A preliminary injunction is available when the moving party can demonstrate tha the nonmoving party's conduct, if allowed to continue, will cause irreparable harm for whic compensatory relief is inadequate and that the moving party has a reasonable likelihood o success on the merits. *Boulder Oaks Cmty. Ass'n v. B & J Andrew Enters., LLC*, 125 Nev. 397 403, 215 P.3d 27, 31 (2009); citing NRS 33.010, *University Sys. v. Nevadans for Sound Gov't,* 120 Nev. 712, 721, 100 P.3d 179, 187 (2004); *Dangberg Holdings v. Douglas Co.,* 115 Nev 129, 142, 978 P.2d 311, 319 (1999). A district court has discretion in deciding whether to grant preliminary injunction. *Id.* The Plaintiffs have failed to make the requisite showing;

28. On September 27, 2016, the parties were before the Court on Plaintiffs' firs Motion for Preliminary Injunction and, after reading all papers and pleadings on file, the Co heard extensive oral argument lasting nearly two (2) hours from all parties. The Court ultimatel concluded that Plaintiffs failed to meet their burden for a Preliminary Injunction, had failed t demonstrate irreparable injury by the City's consideration of the Applications, and failed t demonstrate a likelihood of success on the merits, amongst other failings;

29. On September 28, 2016—the day after their Motion for Preliminary Injunctio directed at the City of Las Vegas was heard—Plaintiffs ignored the Court's words and file another Motion for Preliminary Injunction which, substantively, made arguments identical t those made in the original Motion which had just been heard the day before, except tha Plaintiffs focused more on the "vested rights" claim, namely, that the applications themselve could not have been filed because they are allegedly prohibited by the Master Declaration. O

October 31, 2016, the Court entered an Order denying that Motion, finding that Plaintiffs faile to meet their burden of proof that they have suffered irreparable harm for which compensato damages are an inadequate remedy and failed to show a reasonable likelihood of success on th merits, since the Master Declaration of the Queensridge CIC did not apply to land which was no annexed into, nor a part of, the Property (as defined in the Master Declaration). The Court als based its denial on the fact that Nevada law does not permit a litigant from seeking to enjoin th Applicant as a means of avoiding well-established prohibitions and/or limitations agains interfering with or seeking advanced restraint against an administrative body's exercise o legislative power. See *Eagle Thrifty Drugs & Markets, Inc., v. Hunter Lake Parent Teacher Assoc.*, 85 Nev. 162, 164-165, 451 P.2d 713, 714-715 (1969);

30. On October 5, 2016, Plaintiffs filed a Motion for Rehearing of Plaintiffs' firs Motion for Preliminary Injunction, without seeking leave from the Court. The Court denied th Motion on October 19, 2016, finding Plaintiffs could not show irreparable harm, because the possess administrative remedies before the City Planning Commission and City Council pursuan to NRS 278.3195, UDC 19.00.080(N) and NRS 278.0235, which they had failed to exhaust, an because Plaintiffs failed to show a reasonable likelihood of success on the merits at th September 27, 2016 hearing and failed to allege any change of circumstances since that time tha would show a reasonable likelihood of success as of October 17, 2016;

31. At the October 11, 2016 hearing on Defendants City of Las Vegas' Motion t Dismiss Amended Complaint, which was ultimately was granted by Order filed October 19 2016, the Court advised Mr. Peccole, as an individual Plaintiff and counsel for Plaintiffs, that i believed that he was too close to this" and was missing that the Master Declaration would no apply to land which is not part of the Queensridge CIC. *October 11, 2016 Hearing Transcript 13:11-13;*

32. On October 12, 2016, Plaintiffs filed a Motion for Stay Pending Appeal i relation to the Order Denying their first Motion for Preliminary Injunction against the City o Las Vegas, which sought, again, an injunction. That Motion was denied on October 19, 2016 finding that Plaintiffs failed to satisfy the requirements of NRAP 8 and NRCP 62(c), Plaintiff failed to show that the object of their potential writ petition will be defeated if their stay i denied, Plaintiffs failed to show that they would suffer irreparable harm or serious injury if th stay is not issued, and Plaintiffs failed to show a likelihood of success on the merits;

33. On October 21, 2016, Plaintiffs filed a Notice of Appeal on the Order Denyin their Motion for Preliminary Injunction against the City of Las Vegas, and on October 24, 2016 Plaintiffs filed a Motion for Stay in the Supreme Court. On November 10, 2016, the Nevad Supreme Court dismissed Plaintiffs' Appeal, and the Motion for Stay was therefore denied a moot;

34. Plaintiffs can assert no harm, let alone "irreparable" harm from the thre remaining pending applications, which deal with development of 720 condominiums located mile from Plaintiffs' home on the Northeast corner of the GC Land;

35. Plaintiffs cannot demonstrate a likelihood of success on the merits. Plaintiff have argued the "merits" of their claims *ad nausem* and they have not had established an possibility of success;

36. The Court has repeatedly found that the claim that Defendants' applications wer "illegal" or "violations of the Master Declaration" is without merit, and such claim is bein maintained without reasonable grounds;

37. Plaintiffs' argument within his Renewed Motion is just a rehash of his prio arguments that Lot 10 was "part of" the "Property," (as defined in the Master Declaration) tha

the flood drainage easements along the golf course are not included in the "not a part" language and that he has "vested rights." These arguments have already been addressed repeatedly;

38. In its *Findings of Fact, Conclusions of Law and Order Granting Defendants Motion to Dismiss,* filed November 30, 2016, the Court detailed its analysis of the Maste Declaration, the Declarations of Annexation, Lot 10, and the other documents of public recor and made its Findings that the Plaintiffs were not guaranteed any golf course views or access and that the adjoining GC Land was not governed by the Master Declaration. Those Finding are incorporated herein by reference, as if set forth in full. Specifically Findings No. 51-76 mak clear that the GC Land is not a part of and not subject to the Master Declaration of the NRS 11 Queensridge CIC;

39. There is no "new evidence" that changes this basic finding of fact, and Plaintiff cannot "stop renewal of the 4 applications" or "stop the application" allegedly contemplated fo property merely adjacent to Plaintiffs' Lot and which is not within the Queensridge CIC;

40. Since Plaintiffs were on notice of this undeniable fact on September 2, 2016, y persisted in filing Motion after Motion to try and "enjoin" Defendants, that is exactly why thi Court awarded Defendants $82,718.50 relating to the second Motion for Preliminary Injunction the Motion for Rehearing and the Motion for Stay (Injunction), and why this Court award additional attorneys' fees and costs for being forced to oppose a Renewed Motion fo Preliminary Injunction and these other Motions now;

41. The alleged "new" information cited by Plaintiffs--the withdrawal of fo applications without prejudice at the November 16, 2016 City Council meeting--is irrelevan because this Court cannot and will not, in advance, restrain Defendants from submittin applications. Further, the three (3) remaining applications are pending and still in th administrative process;

42. Zoning is a matter properly within the province of the legislature and that th judiciary should not interfere with zoning decisions, especially before they are even final. *See, e.g., McKenzie v. Shelly*, 77 Nev. 237, 362 P.2d 268 (1961) (judiciary must not interfere wi board's determination to recognize desirability of commercial growth within a zoning district); *Coronet Homes, Inc. v. McKenzie*, 84 Nev. 250, 439 P.2d 219 (1968) (judiciary must no interfere with the zoning power unless clearly necessary); *Forman v. Eagle Thrifty Drugs an Markets*, 89 Nev. 533, 516 P.2d 1234 (1973) (statutes guide the zoning process and the means o implementation until amended, repealed, referred or changed through initiative). Cou intervention is not "clearly necessary" in this instance;

43. Plaintiffs have admitted to the Supreme Court that their duplicative Motion fo Preliminary Injunction filed on September 28, 2016 was without merit and unsupported by th law. In their *Response to Motion to Amend Caption and Joinder and Response to the Motion t Dismiss Appeal of Order Granting the City of Las Vegas Motion to Dismiss Amended Complaint* filed November 10, 2016, Plaintiff's state:"..[T]he case of *Eagle Thrifty Drugs & Market, Inc. v. Hunter Lake Parent Teachers Association,* 85 Nev. 162 (1969) **would not allow directing of Preliminary Injunction against any party but the City Council.** Fore Stars, Ltd., 180 Lan Co LLC, Seventy Acres, LLC, Yohan Lowie, Vickie DeHart, Frank Pankratz and EH Companies, LLC **could not be made arties to the Preliminar In unction because onl th Cit was a ro riate under *Ea le Thri* ."** (Emphasis added.) Yet Plaintiffs have now filed "Renewed" Motion for Preliminary Injunction;

44. Procedurally, Plaintiffs' Renewed Motion is improper because "No motions onc heard and disposed of may be *renewed* in the same cause, nor may the same matters therei embraced be reheard, unless by leave of the court granted upon motion therefor, after notice o

such motion to the adverse parties." *EDCR 2.24 (Emphasis added.)* This is the second time th Plaintiffs have failed to seek leave of Court before filing such a Motion;

45. After hearing all of the arguments of Plaintiffs and Defendants, Plaintiffs hav failed to meet their burden for a preliminary injunction against Defendants, and Plaintiffs hav no standing to do so;

Plaintiffs' Motion for Leave to Amend Amended Com laint

46. Plaintiffs have already been permitted to amend their Complaint, and did so o August 4, 2016;

47. Plaintiffs deleted the Declaratory Relief cause of action, but maintained a cause o action for injunctive relief even after Plaintiffs were advised that the same could not b sustained, Plaintiffs withdrew the Breach of Contract cause of action and replaced it with a caus of action entitled "Violations of Plaintiffs' Vested Rights," and Plaintiffs' Fraud cause of actio remained, for all intents and purposes, unchanged;

48. Plaintiffs were given the opportunity to present a proposed Amended Complain and failed to do so. There is no Amended Complaint which supports the new alter ego theo Plaintiffs suggest;

49. After the November 1, 2016 hearing on the Motion to Dismiss, the Co provided an opportunity for Plaintiffs (or Defendants) to file any additional documents o requests, including a request to Amend the Complaint, with a deadline of November 15, 2016 Plaintiffs' Motion to Amend Amended Complaint was not filed within that deadline;

50. EDCR 2.30 requires a copy of a proposed amended pleading to be attached to an motion to amend the pleading. Plaintiffs never attached a proposed amended pleading, i violation of this Rule. This makes it impossible for the Court to measure what claims Plaintiff

propose, other than those outlined in their briefs, all of which are based on a failed and untru argument;

51. Plaintiffs continue to attempt to enjoin the City from completing its legislativ function, or to in advance restrain Defendants from submitting applications for consideratio This Court has repeatedly Ordered that it will not do that;

52. The Court considered Plaintiffs' oral request from November 1, 2016 to amen the Amended Complaint, and made a Finding in its November 30, 2016 Order of Dismissal, a paragraph 90, "Although ordinarily leave to amend the Complaint should be freely given whe justice requires, Plaintiffs have already amended their Complaint once and have failed to state claim against the Defendants. For the reasons set forth hereinabove, Plaintiffs shall not b permitted to amend their Complaint a second time in relation to their claims against Defendant as the attempt to amend the Complaint would be futile;"

53. Further amending the Complaint, under the theories proposed by Plaintiffs remains futile. The Fraud cause of action does not state a claim upon which relief can b granted, as the alleged "fraud" lay in the premise that there was a representation that the gol course would remain a golf course in perpetuity. Again, Plaintiffs' own purchase documen evidence that no such guarantee was made and that Plaintiffs were advised that futur development to the adjoining property could occur, and could impair their views or lo advantages. The alleged representation is incompetent (*See NRCP 56(e)),* fails woefully for lac of particularity as required by NRCP 9(b), and appears disingenuous under the facts and law o this case;

54. The Fraud claim also fails because Plaintiffs voluntarily dismissed th Defendants—all his relatives or their entities--who allegedly made the fraudulent representatio that the golf course would remain in perpetuity;

55. While it is true that Defendants argued that Plaintiffs did not plead their Frau allegations with particularity as required by NRCP 9(b), Defendants also vociferously argued i their Motion to Dismiss that Plaintiffs failed to state a Fraud claim upon which relief could b granted because their allegations failed to meet the basic and fundamental elements of Fraud: (1 a false representation of fact; (2) made to the plaintiff; (3) with knowledge or belief that th representation was false or without a sufficient basis; (4) intending to induce reliance; (5 creating justifiable reliance by the plaintiff; (6) resulting in damages. *Blanchard v. Blanchard* 108 Nev. 908, 911, 839 P.2d 1320, 1322 (1992). The Court concurred;

56. To this day, Plaintiffs failed to identify any actual false or misleading statemen made by Defendants to them, and that alone is fatal to their claim. Defendants' zoning and lan use applications to the City to proceed with residential development upon the GC Land does no constitute fraudulent conduct by Defendants because third-parties allegedly represented at som (unknown) time roughly 16 years earlier that the golf course would never be replaced wit residential development;

57. Plaintiffs do not and cannot claim that they justifiably relied on any suppose misrepresentation by any of the Defendants or that they suffered damages as a result of th Defendants' conduct because such justifiable reliance requires a causal connection between th inducement and the plaintiff's act or failure to act resulting in the plaintiff's detriment;

58. Plaintiffs have not, and cannot claim that any representations on the part o Defendants lead them to enter into their "Purchase Agreement" in April 2000, over 14 ye prior to any alleged representations or conduct by any of the Defendants. The Court was left t wonder if any of these failings could be corrected in a second amended complaint, as Plaintiff failed to proffer a proposed second amended complaint as is required under EDCR 2.30. A such, Plaintiffs' Motion to Amend Complaint was doomed from the outset;

59. All of Plaintiffs' claims are based on the theory that Plaintiffs have "veste rights" over the Defendants and the GC Land. The request for injunctive relief is based on th assertion of alleged "rights" under the Master Declaration;

60. The Court has already found, both of Plaintiffs' legal theories (1) the zonin aspect and exhaustion of administrative remedies, and (2) the alleged breach of the restrictiv covenants under a Master Declaration "contract," are maintained without reasonable ground Defendants are not parties to the "contract" alleged to have been breached, and Cou intervention is not "clearly necessary" as an exception to the bar to interfere in an administrativ process;

61. The zoning on the GC Land dictates its use and Defendants rights to develop thei land;

62. Plaintiffs' reargument of the "Lot 10" claim, which Plaintiffs have argued before which this Court asked Plaintiffs not to rehash, is without merit. Drainage easements upon th GC Land in favor of the City of Las Vegas do not make the GC Land a part of the Queensridg CIC. The Queensridge CIC would have to be a party to the drainage easements in order to hav rights in the easements. Plaintiffs presented no evidence to establish that the Queensridge CIC i a party to any drainage easements upon the GC Land;

63. Plaintiffs do not represent FEMA or the government, who are the authoritie having jurisdiction to set the regulations regarding "flood drainage." Plaintiffs do not have an agreements with Defendants regarding flood drainage and nor any jurisdiction nor standing t claim or assert "drainage" rights. Any claims under flood zones or drainage easements would b asserted by the governmental authority having jurisdiction;

64. Notwithstanding any alleged "open space" land use designation, the zoning on th GC Land, as supported by the evidence, is R-PD7. Plaintiffs latest argument suggests the land i

"zoned" as "open space" and that they have some right to prevent any modification of tha alleged designation under NRS 278A. But the Master Declaration indicates that Queensridge is NRS Chapter 116 community, and NRS 116.1201(4) specifically and unambiguously provides "The provisions of chapters 117 and 278A of NRS do not apply to common-interes communities." The Plaintiffs do not have standing to even make any claim under NRS 278A;

65. There is no evidence of any recordation of any of the GC Land, by deed, lien, o by any other exception to title, that would remotely suggest that the GC Land is within a planne unit development, or is subject to NRS 278A, or that Queensridge is governed by NRS 278A. Rather, Queensridge is governed by NRS 116;

66. NRS 278.349(3)(e) states "The governing body, or planning commission if it i authorized to take final action on a tentative map, shall consider: Conformity with the zonin ordinances and master plan, except that if any existing zoning ordinance is inconsistent with th master plan, the zoning ordinance takes precedence;"

67. The Plaintiffs do not own the land which allegedly contains the drainage pointe out in Exhibits 11 and 12. It is Defendants' responsibility to deal with it with the government Tivoli Village is an example of where drainage means were changed and drainage challenge were addressed by the developer. Plaintiffs have no standing to enforce the maintenance of drainage easement to which they are not a party;

68. Plaintiffs' Amended Complaint, itself, recognizes that the Master Declaratio does not apply to the land proposed to be developed by the Defendants, as it states on page 2 paragraph 1, that "Larry Miller did not protect the Plaintiffs' or homeowner's vested rights b including a Restrictive Covenant that Badlands must remain a golf course as he and other agent of the developer had represented to homeowners." The Amended Complaint reiterated at pag 10, paragraph 42, "The sale was completed in March 2015 and conveniently left out an

restrictions that the golf course must remain a golf course." *Id.* Thus, Plaintiffs proceeded i prosecuting this case and attempting to enjoin development with full knowledge that there wer no applicable restrictions, conditions and covenants from the Master Declaration which applie to the GC Land, and there were no restrictive covenants in place relating to the sale whic prevented Defendants from doing so;

69. Plaintiffs improperly assert that the Motion to Dismiss relied primarily upon th "ripeness" doctrine and the allegation that the Fraud Cause of Action was not pled wi particularity. But this is not true. The Motion to Dismiss was granted because Plaintiffs do no possess the "vested rights" they assert because the GC Land is not part of Queensridge CIC an not subject to its CC&Rs. The Fraud claim failed because Plaintiffs could not state the element of a Fraud Cause of Action. They never had any conversations with any of the Defendants prio to purchasing their Lot and therefore, no fraud could have been committed by Defendants agains Plaintiffs in relation to their home/lot purchase because Defendants never made any knowingl false representations to Plaintiffs upon which Plaintiffs relied to their detriment, nor as stated b Plaintiff to the Court did Defendants ever make any representations to Plaintiffs at all. Plaintiffs were denied an opportunity to amend their Complaint a second time because doing so would b futile given the fact that they have failed to state claims and cannot state claims for "veste rights" or Fraud;

70. None of Plaintiffs' alleged "changed circumstances"—neither the withdrawal o applications, the abatement of others, or the introduction of new ones, changes the fundamenta fact that Plaintiffs have no standing to enforce the Master Declaration against the GC Land, o any other land which was not annexed into the Queensridge CIC. It really is that simple;

71. Likewise, the claim that because applications were withdrawn by Defendants a the City Council Meeting and the rest were held in abeyance, that the *Eagle Thrifty* case n

longer applies and no longer prevents a preliminary injunction to enjoin Defendants fro submitting future Applications, fails as a matter of law. Plaintiffs' Motion to Amend remain improper under *Eagle Thrifty* because Plaintiffs are effectively seeking to restrain the City of L Vegas by requesting an injunction against the Applicant, and they are improperly seeking t restrain the City from hearing future zoning and development applications from Defendants *Eagle Thrifty* neither allows such advance restraint, nor does it condone such advance restrain by directing a preliminary injunction against the Applicant;

72. Amending the Complaint based on the theories argued by Plaintiffs would futile, and Plaintiffs continue to fail to state a claim upon which relief can be granted;

73. Leave to amend should be freely granted "when justice so requires," but in thi case, justice requires the Motion for Leave to Amend be denied. It would be futile. Additionally Plaintiffs have noticeably failed to submit any proposed second amended Complaint at any time. *See* EDCR 2.30. The Court is compelled to deny Plaintiffs' Motion to Amend;

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Plaintiffs' Motion for Evidentia Hearin and Sta of Order for Rule 11 Fees an Costs

74. Plaintiffs are not entitled to an Evidentiary Hearing on the Motion for Attorneys' Fees and Costs. NRS 18.010(3) states "in awarding attorney's fees, the court may pronounce it decision on the fees at the conclusion of the trial or special proceeding without written motio and with or without presentation of additional evidence."

75. Plaintiffs' seek an Evidentiary Hearing on the "Order for Rule 11 Fees an Costs," but the request for sanctions and additional attorneys' fees pursuant to NRCP 11 wa denied by this Court. Plaintiffs do not seek reconsideration of that denial, and no Evidenti ry Hearing is warranted;

76. The Motion itself if procedurally defective. It contains only bare citations t 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 Plaintiff "opportunity to present evidence as to why they filed a Motion for Preliminary Injunction agai Fore Stars and why that was appropriate." It allows the setting aside of a default judgment due t mistakes, inadvertence, excusable neglect, newly discovered evidence or fraud. With respect t 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 "require something more than allegations which, if proven, might permit inferences sufficient to establis grounds....." "The moving party must present a prima facie case...showing that (1) the fact alleged in the affidavits are relevant to the grounds for modification; and (2) the evidence is no 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 raise supporting a ruling contrary to the ruling already reached should a motion for rehearing b granted." *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (76). "Rehearings ar 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 contentio available before but not raised in the original hearing cannot be maintained or considered o rehearing. See *Achrem v. Expressway Plaza Ltd. P'ship*, 112 Nev. 737, 742, 917 P.2d 447, 45 (1996);

81. There is no basis for an Evidentiary Hearing under NRCP 59(a). There were n irregularities in the proceedings of the court, or any order of the court, or abuse of discretio 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 prudenc could not have guarded against. There was no newly discovered evidence material for the part making the motion which the party could not, with reasonable diligence, have discovered o produced at trial. There were no excessive damages being given under the influence of passio 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 incurre attorneys' fees and costs relating to the preliminary injunction issues, and denied additiona sanctions pursuant to NRCP 11, demonstrates this Court's evenhandedness and fairness to th Plaintiffs;

82. Plaintiffs are not automatically entitled to an Evidentiary Hearing on the issue o attorneys' fees and costs, and the decision to forego an evidentiary hearing does not deprive party of due process rights if the party has notice and an opportunity to be heard. *Lim v. Willic 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 alread presented to the Court the evidence they would seek to present about why they filed a Motion fo a Preliminary Injunction against these Defendants, having argued at the September 27, 201 Hearing, the October 11, 2016 Hearing, the November 1, 2016 Hearing and the January 10, 201 hearing that they had "vested rights to enforce "restrictive covenants" against Defendants unde 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 restrictiv covenant violators after the administrative process ended and Defendants were "no longe protected by Eagle Thrifty" is, again, belied by the fact that the CC&R's do not apply to, an cannot be enforced against, land that was not annexed into the Queensridge CIC. *Gladston* does not apply. Plaintiffs' argument is not convincing;

89. Plaintiffs' arguments regarding how "frivolous" is defined by NRCP 11 i irrelevant because those additional sanctions against Plaintiffs' counsel were denied as moot, i light of the Court awarding Defendants attorneys' fees and costs under NRS 18.010(2)(b) an 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 prelimin injunction against Defendants, which multiplied the proceedings unnecessarily. Afte considering Defendants' Motion and Supplement and Plaintiffs' Response, the Court awarde Defendants $82,718.50. The attorneys' fees and costs awarded related only to those efforts t obtain a preliminary injunction through the end of October, 2016, and did not include or conside the additional attorneys' fees, or the additional costs, which were incurred by Defendants relatin 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 th 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 th claim of the opposing party was brought without reasonable ground or to harass the prevailin party, and/or in bad faith. *NRS 18.010(2)(b)*. A frivolous claim is one that is, "both baseless an made without a reasonable competent inquiry." *Bergmann v. Boyce*, 109 Nev. 670, 856 P.2 560 (1993). Sanctions or attorneys' fees may be awarded where the pleading fails to be wel

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 s blinded by his personal feelings that he is ignoring the key issues central to the causes of actio and failing to recognize that continuing to pursue flawed claims for relief, and rehashing th 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 th quality of the advocate, the character of the work to be done, the work actually performed, an the result. *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969). Defendan submitted, pursuant to the *Brunzell* case, affidavits regarding attorney's fees and costs the requested. The Court, in its separate Order of January 20, 2017, has analyzed and found, an now reaffirms, that counsel meets the *Brunzell* factors, that the costs incurred were reasonabl 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 cost incurred, to which there has been no challenge by Plaintiffs;

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

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

September and October, and Plaintiffs' position was maintained without reasonable ground or t 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 t increase costs unreasonably and vexatiously, and failed to follow the rules of the Court. *EDC 7.60;*

105. Given these facts, there is no basis to hold an Evidentiary Hearing with respect t the Order granting Defendants' attorneys' fees and costs, and the Order should stand;

Plaintiffs' O osition to Countermotion for Fees and Costs

106. This Opposition to "Countermotion," substantively, does not address the pendin Countermotions for attorneys' fees and costs, but rather the Motion for Attorneys' Fees an 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 Novembe 10, 2016. It was not filed until January 7, 2017;

108. Separately, Plaintiffs filed a "response" to the Motion for Attorneys' Fees an Costs, and Supplement thereto, on November 17, 2016. As indicated in the Court's Novembe 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 th reasonableness or the attorneys' fees and costs incurred, the necessity of the attorneys' fees an 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 meritoriou 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 Motion has been granted. The Opposition was improper and should not have been belatedl filed. It compelled Defendants to further respond, causing Defendants to incur furthe 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 allege "misrepresentation" of the Defendants regarding the Amended Master Declaration at th November 1, 2016 Hearing;

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

120. The Amended Master Declaration did not "take out" the 27-hole golf course fro the definition of "Property," as Plaintiffs erroneously now allege. More accurately, it exclude the entire 27-hole golf course from the possible Annexable Property. This means that not onl was it never annexed, and therefore never made part of the Queensridge CIC, but it was n longer even *eligible* to be annexed in the future, and thus could never become part of th Queensridge CIC;

121. It is significant, however, that there are two (2) recorded documents, the Mast Declaration and the Amended Master Declaration, which both make clear in Recital A that th 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 recorde in October, 2000, March, 2001 or August, 2002, does not matter, because, as Defendants pointe out at the hearing, Mr. Peccole's July 2000 Deed indicated it was "subject to the CC&Rs tha were recorded at the time and as may be amended in the future" and that the "CC&Rs which h 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 "entir 27-hole golf course is not a part of the Property or the Annexable Property" instead of just th "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 mad 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 thi Court clearly found, it was not. The 1996 Master Declaration makes clear that the 9-holes w only Annexable Property, and it could only become "Property" by recording a Declaration o 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*, 10 Nev. 842, the Court is permitted to take judicial notice of, and take into consideration, recorde documents in granting or denying a motion to dismiss;

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

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

127. Plaintiffs' argument that the Amended Master Declaration is "invalid" because i "did not contain the certification and signatures of the Association President and Secretary" i irrelevant, since the frivolousness of Plaintiffs' position is based on the original Maste Declaration and not the amendment. But this Court notes that the Declarations of Annexatio which are recorded do not contain such signatures of the Association President and Secretar 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 thu 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 fac or law;

128. A Motion for reconsideration under EDCR 2.24 is only appropriate whe "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 o intervening case law are "superfluous," and it is an "abuse of discretion" for a trial court t 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 conside issues subsequent to the City Council Meeting of November 16, 2016 is also without merit. Th Motion to Dismiss was heard on November 1, 2016 and the Court allowed the parties unti November 15, 2016 to supplement their filings. Although late filed, Plaintiffs did fil "Additional Information to Brief," and their "Renewed Motion for Preliminary Injunction," o

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

130. Plaintiffs' objection to the Findings relating NRS 116, NRS 278, NRS 278A an R-PD7 zoning is also without merit, because those Findings are supported by the Supplement timely filed by Defendants, and those statutes and the zoning issue are all relevant to this cas with respect to Defendants' right to develop their land. This was raised and discussed in th Motion to Dismiss and Opposition to the first Motion for Preliminary Injunction, and properl 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 doe not apply to this controversy, and thus it is clear that the GC Land is not part of or within planned unit development. Plaintiffs do not even possess standing to assert a claim under NR 278A, as they are governed by NRS 116. Further, Defendants' deeds contain no title exception o 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 intere community pursuant to Chapter 116 of the Nevada Revised Statutes." Plaintiffs raised iss concerning NRS 278A. While Plaintiffs may not have specifically cited NRS 278A in th Amended Complaint, in paragraph 67, they did claim that "The City of Las Vegas with respect t the Queensridge Master Planned Development required 'open space' and 'flood drainage' upo the acreage designated as golf course (The Badlands Golf Course)." NRS 278A, entitle "Planned Unit Development," contains a framework of law on Planned Unit Developments,

defined therein, and their 'common open space.' NRS 116.1201(4) states that the provisions o 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 allegatio 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 conten that the Badlands Golf Course was open space and drainage, but the Court rejected tha argument, finding that the subject GC Land was zoned R-PD7;

133. Plaintiffs now allege that alter-ego claims against the individual Defendant (Lowie, DeHart and Pankratz) should not have been dismissed without giving them a chance t 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 Amende Complaint that could possibly support individual liability by piercing the corporate veil is th Fraud Cause of Action. The Court has rejected Plaintiffs' Fraud Cause of Action, not solely o the basis that it was not plead with particularity, but, more importantly, on the basis tha 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 Plaintiff did not even mention its claim for, or a basis for, its fraud claim. The Plaintiffs have offere insufficient basis for the allegations of fraud in the first place, and any attempt to re-plead th same, on this record, is futile;

134. Fraud requires a false representation, or, alternatively an intentional omissio when an affirmative duty to represent exists. See *Lubbe v. Barba*, 91 Nev. 596, 541 P.2d 11 (1975). Plaintiffs alleged Fraud against Lowie, DeHart and Pankratz, while admitting they neve

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

135. Plaintiffs claim that the GC Land that later became the additional nine holes w "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 (whic contains an exclusion that "The existing 18-hole golf course commonly known as the 'Badland Golf Course' is not a part of the Property or the Annexable Property") and the Amended an Restated Master Declaration (which provides that "The existing 27-hole golf course commonl 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 fo which a Declaration of Annexation has not been Recorded..."

136. All three of Plaintiffs' claims for relief in the Amended Complaint are based o 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 o 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.* (emphasi added);

140. Generally, the Court is to accept the factual allegations of a Complaint as true o a Motion to Dismiss, but the allegations must be legally sufficient to constitute the elements o 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 wi every fair inference in favor of Plaintiffs. It appears beyond a doubt that Plaintiffs can prove n 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 an served on December 7, 2016;

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

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

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

Defendants' Countermotions for Attorne s' Fees and Costs

146. The Court has allowed Plaintiffs to enter thirteen (13) exhibits, only three (3) o 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 wer approximately ninety (90) filings. This multiplication of the proceedings vexatiously is i violation of EDCR 7.60. *EDCR 7.60(b)(3)*;

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

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

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

154. Plaintiffs did not file any post-judgment Motions under NRCP 52 or 59, and tw of their Motions, namely the *Motion to Reconsider Order of Dismissal* and the *Motion fo Evidentiary Hearing and Stay of Order for Rule 11 Fees and Costs*, were untimely filed after th 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 Motio for Preliminary Injunction or its Motion to Reconsider Order of Dismissal. *Id.;*

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

Attorneys' Fees and Costs, which was due on or before November 10, 2016. All of these ar 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 an rules and their actions have severely harmed the Defendants;

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

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

160. Plaintiffs' Renewed Motion for Preliminary Injunction (a sixth attempt), Plaintiffs' untimely Motion to Amend Amended Complaint (with no proposed amendmen attached), Plaintiffs' untimely Motion to Reconsider Order of Dismissal, Plaintiffs' Motion fo 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 multiplie 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 a asset "vested rights" which they do not possess against Defendants;

162. Considering the length of time that the Plaintiffs have maintained their action, an the fact that they filed four 4 new Motions after dismissal of this action, and ignored the prio rulings of the Court in doing so, and ignored the rules, and continued to name individua Defendants personally with no basis whatsoever, the Court finds that Plaintiffs are seeking t 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 o their pleadings and Motions warrant the award of reasonable attorney's fees and costs in favor o 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 a Order Shortening Time, including two not filed or served until December 22, 2016, and Opposition and Replies to two Motions filed by Plaintiffs on January 5, 2017, which require response in two (2) business days, the requested sum of $7,500 in attorneys' fees per each of th four (4) motions is most reasonable and necessarily incurred. Given the detail within the filing and the timeframe in which they were prepared, the Court finds these sums , totaling $30,00 ($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). Plaintiff failed to show that the object of their potential appeal will be defeated if their stay is denied, the 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' Renewe* *Motion for Preliminary Injunction* is hereby denied, with prejudice;

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

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

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that *Plaintiffs' Motion Fo* *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 (title* *Opposition to "Countermotion" but substantively an Opposition to the 10/21/16 Motion fo* *Attorney's Fees And Costs, granted November 21, 2016)*, is hereby granted, and such Oppositio is hereby stricken;

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

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Judgment entere in favor of Defendants and against Plaintiffs in the sum of $82,718.50, comprised of $77,312.5

in attorneys' fees and $5,406 in costs relating only to the preliminary injunction issues after th September 2, 2016 filing of Defendants' first Opposition through the end of the October, 201 billing cycle, is hereby confirmed and collectible by any lawful means;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendan Countermotion for Attorneys' Fees relating to their responses to Plaintiffs four (4) motions an 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 thos 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 Orde filed January 20, 2017, $77,312.50 in attorneys' fees pursuant to the November 21, 2016 Minu Order, as incorporated within and confirmed by Fee Order filed January 20, 2017, and $30,00 in additional attorneys' fees relating to the instant Motions, Oppositions and Countermotion addressed in this Order), which is reduced to judgment in favor of Defendants and agains Plaintiffs, collectible by any lawful means, plus legal interest;

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

DATED this 31 day of January, 2017.

DISTRICT COURT JUDGE
A-16-7 654-C

BA

Exhibit “4"

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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 CAROLYN 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 [illegible] LLF

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:

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Attorneys for Plaintiffs

Approved as to Form:

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Attorneys for the City of Las Vegas

Electronically Filed
3/26/2018 5:15 PM
Steven D. Grierson
CLERK OF THE COURT

AOS

DISTRICT COURT , CLARK COUNTY
CLARK COUNTY, NEVADA

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

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

FORE STARS — Plaintiff

vs

DARREN BRESEE — Defendant

CASE NO: A-18-771224-C
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 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

NOTA
MITCHELL J. LANGBERG, ESQ., Bar No. 10118
mlangberg@bhfs.com
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Counsel for Defendants

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 100, Defendants,	CASE NO.: A-18-771224-C DEPT NO.: XXXI **NOTICE OF APPEARANCE**

PLEASE TAKE NOTICE that Mitchell J. Langberg, of Brownstein Hyatt Farber Schreck, LLP, 100 North City Parkway, Suite 1600, Las Vegas, NV 89106, hereby appears in the above-entitled matter as attorney of record on behalf of Defendants Daniel Omerza, Darren Bresee and Steve Caria.

///

///

It is requested that all future correspondence and filings be directed to the undersigned.

DATED this 6th day of April, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

BY: */s/ Mitchell J. Langberg*

MITCHELL J. LANGBERG, ESQ., Bar No. 10118
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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 **NOTICE OF APPEARANCE** be submitted electronically for filing and/or service with the Eighth Judicial District Court via the Court's Electronic Filing System on the 6th day of April, 2018, to the following:

James J. Jimmerson, Esq.
The Jimmerson Law Firm, P.C.
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Las Vegas, Nevada 89101
Email: ks@jimmersonlawfirm.com

Attorneys for Plaintiffs

/s/ Paula Kay
an employee of Brownstein Hyatt Farber Schreck, LLP

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

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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

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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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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
Department 24

DEFENDANTS' SPECIAL MOTION TO DISMISS (ANTI-SLAPP MOTION) PLAINTIFFS' COMPLAINT PURSUANT TO NRS §41.635 ET. SEQ.

Hearing Date: **05/01/2018**

Hearing Time: **9:00 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 NRS §41.635 *et seq*.

This Motion is made and based upon the following Memorandum of Points and Authorities, the declarations attached thereto, 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.

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NOTICE OF MOTION

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that the undersigned will bring the foregoing **DEFENDANTS' SPECIAL MOTION TO DISMISS (ANTI-SLAPP MOTION) PLAINTIFFS' COMPLAINT PURSUANT TO NRS §41.635 ET. SEQ.** for hearing before the above-entitled Court on the 1st day of MAY, 2018, at 9:00 a.m./p.m. of said day in Department ~~31~~ 24 of said Court.

DATED this 13th day of April, 2018.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a textbook example of a "Strategic Lawsuit Against Public Participation" (a "SLAPP suit"). The entirety of Plaintiffs' case seeks to penalize Defendants for exercising their First Amendment rights of free speech and to petition the government because they dared to oppose a developer's efforts to have the Las Vegas City Council allow building in areas now reserved for non-residential use. Because the case has no merit, Nevada's anit-SLAPP statute requires that it be dismissed and that Defendants be awarded their attorneys' fees and other damages.

Defendants Daniel Omerza, Darren Bresee, and Steve Caria are neighbors living next to a parcel of real estate that has long been used as a golf course, but Plaintiffs seek the approval of the Las Vegas City Council (the "City Council") for an amendment to the City of Las Vegas General Plan (the "General Plan") to allow Plaintiffs to develop the parcel into residential units. Two of the defendants oppose the development and have provided declarations for fellow neighbors to indicate if they purchased their homes in reliance on the existing Peccole Ranch Master Development Plan (the "Master Development Plan"), which designated the property at issue as an open space/natural drainage system/golf course. One of the defendants merely signed the declaration. The question of the neighbors' reliance on the Master Development Plan was an issue specifically raised by this Court (Judge Crockett) in separate litigation over Plaintiffs' development plans.

This case could not be more transparent as to Plaintiffs' intentions. It is designed not to redress cognizable injuries from any tenable claim for relief, but to discourage Defendants from continuing to exercise their First Amendment rights to weigh in on an issue of public concern. What Defendants are accused of is nothing more or less than a grass roots community effort to raise significant issues with the City Council. Such efforts are, of course, at the heart of the First Amendment's protection of freedom of speech and the right to petition.

To protect its citizens' First Amendment rights, the Nevada Legislature has created a special process for disposing of such an improper "SLAPP" lawsuit. Under NRS §41.635 *et seq.*,

the Court should undertake a two-prong analysis of Plaintiffs' claims. First, the burden is on Defendants to show that the claims against them arise from their good faith exercise of their First Amendment rights. If Defendants satisfy this first prong, then the second prong shifts the burden to Plaintiffs to demonstrate with *prima facie* evidence a probability of prevailing on the claims.

Here, the first prong heavily favors Defendants. The conduct at issue consists of *nothing but* First Amendment activities—namely, communications aimed at procuring a preferred outcome from the City Council, including by obtaining declarations from residents who relied on the existing master plan when they purchased their homes. Any attempt by Plaintiffs to dispute the statements in these declarations are unavailing, because the declarations constitute factual assertions by the declarants, and because the declarations are consistent with this Court's findings in a separate action concerning Plaintiffs' development plans.

Moreover, Plaintiffs cannot conceivably meet the second prong, because their Complaint fails to state any viable claim for relief, and because Defendants have either an absolute or qualified privilege to gather information for use of the City Council on a matter of public concern.

II. FACTUAL BACKGROUND

The operative facts are presented in the attached Declarations of Defendants Daniel Omerza ("Omerza Decl." attached as Exhibit 1), Darren Bresee ("Bresee Decl," attached as Exhibit 2), and Steve Caria ("Caria Decl.," attached as Exhibit 3) (sometimes, collectively, "Defendants' Declarations"). Further, even a cursory reading of Plaintiffs' complaint (on file herein) demonstrates that all of those claims arise from Defendant's First Amendment speech and petitioning activities. As attested in the Defendants' Declarations, Plaintiffs' emphasis in their complaint on the fact that the golf course they seek to develop into residential housing is not subject to the covenants for Defendants' neighborhood is entirely beside the point. The open space is subject to the area's Master Development Plan, approved by the City in 1990, as well as the General Plan. Defendants have merely exercised their constitutional rights to oppose the developers' efforts:

1. Defendants are residents of the Queensridge subdivision. Defendants' Declarations, ¶ 2.

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2. Adjacent to Queensridge is an open space that has previously been used as the site of the Badlands Golf Course ("Badlands"). Badlands is not part of Queensridge and is not subject to the Covenants, Conditions, Restrictions and Easements for Queenridge. *Id.*, ¶ 3.

3. However, both Queensridge and the land on which Badlands is situated are contained within the Peccole Ranch community, and both are subject to the terms of the Master Development Plan. *Id.*, ¶ 4.

4. Plaintiffs in this action have stated their intention to construct residential units on the Badlands site. *Id.*, ¶ 5.

5. To that end, Plaintiffs have sought and received approval from the City of Las Vegas ("City") for its plans to construct residential units at the Badlands site. *Id.*, ¶ 6.

6. The City's approval of Plaintiffs' plans was challenged in a court proceeding in this Court, Case No. A-17-752344-J, before Judge Jim Crockett ("Binion Litigation"). *Id.*, ¶ 7. A copy of the transcript of the hearing in the Binion Litigation on this issue is included as Exhibit "A" to the concurrently filed Request for Judicial Notice ("Binion Transcipt")**.**

7. Judge Crockett made a ruling in which he determined that the City abused its discretion in approving Plaintiffs' application without first approving a major modification of the Master Development Plan. Defendants' Declarations, ¶ 8.

8. When Judge Crockett's decision was made, the topic was the subject of news reports, which Defendants read, and discussion among people in the community. Defendants' Declarations, ¶ 9.

9. At or near the time of Judge Crockett's decision, Defendants became aware that the decision was partially based on Judge Crockett's determination that people who bought into Peccole Ranch relied upon what the master planning was. *Id.*; Binion Transcript, at 5-10.

10. As reflected in public records relating to the February 21, 2018 City Council meeting,[1] Plaintiffs have since applied to the City Council to obtain a General Plan Amendment

[1] A copy of the City of Las Vegas "Agenda Summary Page – Planning" regarding the City Council Meeting of February 21, 2018 is included as Exhibit "B" to the concurrently filed Request for Judicial Notice.

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to change its parks/recreations/open space designation (that does not allow residential) to residential. *See also* Defendants' Declarations, ¶ 10.

11. Defendants oppose a major modification of the Master Plan or an amendment to the General Plan with respect to Badlands. *Id*., ¶ 11. It is their hope that other people in the community who also oppose such changes would voice their opposition to the City. *Id.* For that purpose, Defendants Caria and Omerza participated in handing out forms of declarations to residents of Queensridge, within the Master Development Plan. Coria Decl., ¶ 11; Omerza Decl., ¶ 11. Defendant Bresee signed on of the declarations. Brezee Decl., ¶ 11.

12. 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 as Parks Recreation – Open Space which land use designation does not permit the building of residential units." Defendants Declarations, ¶ 12. One version of the declarations further states 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.*

13. Defendants have no understanding that any of these statements are false. First, the declarations do not contain any assertions by Caria or Omerza at all. They only offered the declarations to residents for their consideration and to sign if they believed them to be accurate. Caria Decl., ¶ 13; Omerza Decl., ¶ 13. Also, the statements in these declarations correctly summarize Defendants' beliefs as to the Queensridge residents' reliance upon the terms of the Master Development Plan. Defendants Declarations, ¶ 13. Further, based on Defendants' conversations with other Queensridge residents, many other residents have similar recollections. *Id.* Finally, the residents' recollections of relying upon the terms of the Master Development Plan is consistent with the conclusions of Judge Crockett. *Id.*

14. Caria and Omerza participated in gathering these declarations to assist the Las Vegas City Council in its deliberations, to the extent it considers whether to approve an amendment to the General Plan. *Id.*, ¶ 15.

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15. To the extent Defendants are able to gather such information and provide it to the Las Vegas City Council, they do so as citizens exercising their First Amendment rights to free speech and to petition the government guaranteed by the Constitution of the United States. Caria Decl., ¶ 16; Omerza Decl., ¶ 16.

III. ARGUMENT

Both prongs of the anti-SLAPP statute weigh heavily against Plaintiffs. In the circumstances presented here, Plaintiffs' claims against Defendants plainly arise from Defendants' good faith exercise of their First Amendment rights. Plaintiffs cannot demonstrate with *prima facie* evidence a probability of prevailing on their claims.

A. THE ANTI-SLAPP STATUTE APPLIES IN THIS CASE, BECAUSE PLAINTIFFS' CLAIMS ARISE FROM DEFENDANTS' EXERCISE OF THEIR FIRST AMENDMENT RIGHTS.

Nevada's anti-SLAPP statute is found at NRS 41.635, *et. seq.* The statute creates a two-prong analysis for the Court. A person against whom an action is brought may file a "special motion to dismiss." NRS 41.660(1)(a). The first prong places the burden on defendants to show that a claim "is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a). If a defendant meets that burden, the court then considers the second prong—whether the plaintiff has "demonstrated with *prima facie* evidence a probability of prevailing on the claim." NRS 41.660(3)(b).

NRS 41.637 defines the conduct that constitutes a good faith communication protected by Section 41.660:

> Good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern means any:
>
> 1. Communication that is aimed at procuring any governmental or electoral action, result or outcome;
>
> 2. Communication of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity;

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> 3. Written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law; or
>
> 4. Communication made in direct connection with an issue of public interest in a place open to the public or in a public forum, which is truthful or is made without knowledge of its falsehood.

NRS 41.637; *see Shapiro v. Welt*, 133 Nev. Adv. Op. 6, 389 P.3d 262, 267 (2017) (a good faith communication in furtherance of the right to petition or the right to free speech is a phrase that "is explicitly defined by statute in NRS 41.637").

In the recent case of *Delucci v. Songer*, 396 P.3d 826 (2017), the Nevada Supreme Court adopted the reasoning of *City of Montebello v. Vasquez*, 1 Cal.5th 409, 205 Cal. Rptr. 3d 499, 376 P.3d 624 (2016), where the Supreme Court of California[2] explained that this statutory definition (which is identical in Nevada and California) relieves the court of any need to determine whether the speech at issue under the anti-SLAPP statute directly implicates First Amendment rights:

> [C]ourts determining whether conduct is protected under the anti-SLAPP statute look not to First Amendment law, but to the statutory definitions within [the] anti-SLAPP statutes. And courts determining whether a cause of action arises from protected activity are not required to wrestle with difficult questions of constitutional law. Thus, a defendant establishes that he or she has engaged in protected conduct when that defendant's conduct falls within one of the four categories defining [the statutory] phrase, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue."

Delucci, 396 P.3d at 833 (quoting *Vasquez*, 376 P.3d at 633) (quotation marks and alterations in original omitted).

Thus, under Nevada law, "a defendant's conduct constitutes 'good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern' if it falls within one of the four categories enumerated in NRS 41.637 and 'is truthful or is made without knowledge of its falsehood.'" *Delucci*, at 833; *see also Century*

[2] The Nevada Supreme Court has made clear that California cases should be considered when interpreting the anti-SLAPP statute. *John v. Douglas Cnty. Sch. Dist.*, 125 Nev. 746, 756, 219 P.3d 1276, 1283 (2009) ("we consider California case law because California's anti-SLAPP statute is similar in purpose and language to Nevada's anti-SLAPP statute.").

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Surety Co. v. Prince, 265 F. Supp. 3d 1182, 1188-89 (D. Nev. 2017) (a petition is made in good faith under NRS 41.637 if it is "truthful" or "made without knowledge of its falsehood").

Here, under Plaintiffs' own factual allegations, the factual averments of Defendants' Declarations, and judicially noticeable matters, there is no question that the first prong of the anti-SLAPP statute is satisfied—Defendants' conduct falls within the four categories of NRS 41.637 and Defendants' communications are truthful or made without knowledge of their falsehood.

1. Defendants' Conduct Falls Within the Four Categories of NRS 41.637.

The conduct at the heart of Plaintiffs' Complaint is Defendants' efforts to gather declarations from fellow residents, for the purpose of providing information about the residents' reliance on the Master Development Plan to the City Council, in hopes of influencing the Council's decision as to whether to permit an amendment to the General Plan. This constitutes a good faith communication on an issue of public concern as to ***each*** category included in NRS § 41.637.

First, Defendants' activities consisted of communications with fellow residents, directly aimed at procuring a desired governmental or electoral action, result or outcome—namely, a vote against an amendment to the General Plan, thereby preventing Plaintiffs from altering Badlands' designation as Parks Recreation – Open Space.

Second, Defendants' purpose in gathering the disputed declarations from their fellow residents is to provide those declarations to member of the City Council, a political subdivision of this state, for their consideration in deciding whether to condone an amendment to the General Plan, a matter reasonably of concern to that governmental entity.

Third, Plaintiffs have already sought an Amendment to the General Plan, (*see* RJN, Ex. B) (City of Las Vegas Agenda Summary Page from February 21, 2018 Las Vegas City Council meeting regarding request for amendment of General Plan to allow Plaintiffs' development**);** *see also* Defendants' Declarations, ¶ 10. Defendants' communications to obtain the declarations at issue and provide them to the City Council thus constitute written or oral statement in connection with an issue already under consideration by that body.

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Fourth, Defendants' efforts in handing out declarations to other residents, then providing such declarations to members of the City Council, constitute communications on an issue of public interest made in a place open to the public or in a public forum.

It should come as no surprise that the facts here align literally on all fours with the test of NRS 41.637, for the speech in question relates directly to an issue of public interest. *See Shapiro v. Welt*, *supra*, 389 P.3d at 268 (defining an "issue of public interest" as one that (1) is not based on mere curiosity, (2) is of concern to a substantial number of people, (3) the challenged statements closely relate to the asserted public interest, (4) the challenged statements focus on the public interest and (5) is not strictly a matter of private concern) (citing *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F. Supp. 2d 957, 968 (N.D. Cal. 2013), *aff'd*, 609 Fed. Appx. 497 (9th Cir. 2015)). The communications challenged in this action are precisely the type of political speech on a matter of public interest that is at the heart of the First Amendment, which NRS 41.637 is designed to safeguard from intimidation.

2. Defendants' Statements Are Truthful, Or Not Made with Knowledge of Any Falsehoods.

The theme of Plaintiffs' Complaint is that the statements in the declaration forms Defendants have provided to fellow residents are demonstrably false, which Plaintiffs' would presumably argue prevents a finding that they are good faith communications under NRS 41.637. There are several reasons such a contention would be wrong:

First, two of the defendants' conduct at issue is aimed at gathering declarations from *other* residents as to those residents' reliance on the Master Development Plan. Thus they are making no factual assertions; rather, they are simply collecting statements of facts made by their fellow residents. In this respect, the instant case is comparable to *Century Surety*, *supra*, 265 F. Supp. 3d at 188-90, where the Court found that "good faith" encompasses a lawyer drafting a complaint repeating information provided by a potential witness, *see* 265 F. Supp. 3d at 1186 (defendant "argues that the allegations in the state complaint were supported by case law, the nature of the business, and a potential witness"), notwithstanding an opponent's assertion that the allegation was contrary to established facts. By the same token, Defendants have acted in good faith in

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obtaining declarations stating the recollections of other witnesses.

Second, even if the declarations were treated as factual statements by Defendants themselves, Plaintiffs cannot seriously contend that Defendants knew the statements in the declarations about reliance on the Master Development Plan are knowingly 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 (emphasis added).[3] 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 some of the residents purchased their homes in reliance upon the terms of the Master Development Plan—including the designation of Badlands for open space and natural drainage—is untenable.

Third, the Defendants have stated that the language of the declarations they have provided to their neighbors is consistent both with their own belief about the facts and with the recollections of other neighbors with whom they have spoken. Defendants' Declarations, ¶¶ 13, 14. Plaintiffs cannot contradict this direct evidence, which is sufficient to meet Defendants' burden of showing that their communications in furtherance of the right to petition or the right to free speech were undertaken in good faith.

[3] 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.

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B. PLAINTIFFS' CANNOT DEMONSTRATE A PROBABILITY OF PREVAILING ON ANY OF THEIR CLAIMS.

Because Defendants have shown that the claims against them arise from good faith communications in furtherance of their right to petition or their right to free speech on an issue of public concern, the burden shifts to Plaintiffs to demonstrate with *prima facie* evidence a probability of prevailing on their claims. NRS 41.660(3)(b). Despite the fact that Plaintiffs carry that burden, Defendants will briefly address why Plaintiffs cannot meet that burden for two independent reasons. First, on the face of their Complaint, Plaintiffs have failed to state a claim for relief. Second, even if their allegations were otherwise sufficient, Plaintiffs' claims fail because the actions at issue here, gathering information from other residents or communicating directly with the City Council, are privileged as a matter of law.

1. The Allegations of the Complaint Do Not Support a Claim for Relief.

In addition to their request for injunctive relief, Plaintiffs' Complaint asserts five substantive 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.

(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). 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

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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 and security of Defendants' 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.

(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). Yet the Complaint entirely fails to identify any such "unlawful objective." 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. But that is no "unlawful objective"; it 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

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untenable as a matter of law for the same reasons recited above. 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.

(c) 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 again assert that the facts in the declarations at issue are false. But, 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.

2. 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, of for any statements contained in the Declarations, because they are absolutely privileged, or at a

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minimum, subject to an applicable qualified privilege.

(a) 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) (emphasis added) (citation omitted)(noting 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.").

The Nevada Supreme Court has explained when an administrative action constitutes a "quasi-judicial" proceeding. *State ex rel. Bd. of Parole Comm'rs v. Morrow*, 127 Nev. 265, 273, 255 P.3d 224 (2011), The judicial function test "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). The Court explained:

> 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

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> 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 declarations are subject to an absolute privilege because Plaintiffs had already initiated the application process for the amendment to 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 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).[4]

[4] 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

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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 the way in which Plaintiffs can use their property. 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.[5] Based on the foregoing, the proceedings of the City Council relating to Plaintiffs' pending application for amendment of the General Plan are quasi-judicial.

The fact that the statements in the Declaration 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

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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).

[5]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, 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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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.

(b) 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).

Defendants oppose the amendment of the General Plan at issue and hoped that other people in the community who also oppose the amendment would voice their opposition to the City to impact the outcome of Plaintiffs' application. As such, Caria and Omerza provided the declarations to some of the residents of Queensridge, asking them to review and sign if they purchased their property in reliance on the Master Development Plan and "subsequent formal actions designating the open space/natural drainage system in its General Plan as Parks Recreation – Open Space which land use designation does not permit the building of residential units." Complaint, Ex. 1. Bresee merely signed one of the declarations. These declarations were for the purpose of protecting their own interests and communicating their views to the City.

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As demonstrated above and in Defendants' Declarations, there was no malice involved whatsoever. Defendants did not have any belief that they were publishing any false statements, nor did they have reckless disregard for the veracity of any statements. Defendants were only offering the declarations to residents for their consideration and to sign *if* they believed them to be accurate. Moreover, the statements in the Declaration correctly summarized Defendants' beliefs. Finally, the statements were consistent with the conclusions of Judge Crockett, in which he determined that the residents of the community relied on the master plan when they purchased their property.

Therefore, the statements made in the declarations, even if they assert facts by each of the Defendants, are privileged, as a matter of law.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs' claims should be dismissed and Defendants' should be awarded their fees, costs, and damages, according to proof.

DATED this 13th day of April, 2018.

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By: */s/ Mitchell J. Langberg*
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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' SPECIAL MOTION TO DISMISS (ANTI-SLAPP MOTION) PLAINTIFFS' COMPLAINT PURSUANT TO NRS §41.635 ET. SEQ.** 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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FORE STARS, LTD., 180 LAND CO., LLC;
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EXHIBIT 1

Declaration of Daniel Omerza

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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 DECLARATION OF DANIEL OMERZA

DECLARATION OF DANIEL OMERZA

I, Daniel Omerza, hereby declare as follows:

1. I am a Defendant in this action. I make this declaration of my own personal knowledge and, if called upon to do so as a witness, could and would testify competently hereto.

2. I reside within the Queensridge Common Interest Community, a master-planned community in Clark County, Nevada ("Queensridge").

3. Adjacent to Queensridge is an open space that has previously been used as the site of the Badlands Golf Course ("Badlands"). My understanding and belief is that Badlands is not part of Queensridge and is not subject to the Covenants, Conditions, Restrictions and Easements for Queenridge.

4. However, it is also my understanding and belief that both Queensridge and the land on which Badlands is situated are contained within Peccole Ranch, and both are subject to the terms of the Peccole Ranch Master Plan.

5. It is my understanding that the Plaintiffs in this action wish to construct residential units on the Badlands site.

6. I am aware that Plaintiffs sought and received approval from the City of Las Vegas ("City") for its plans to construct residential units at the Badlands site.

7. I am further aware that the City's approval of Plaintiffs' plans was challenged in a court proceeding before Judge Jim Crockett ("Binion Litigation").

8. It is my understanding that Judge Crockett made a ruling in which he determined that the City abused its discretion in approving Plaintiffs' application without first approving a major modification of the Peccole Ranch Master Plan.

9. When Judge Crockett's decision was made, the topic was the subject of news reports, which I read, and discussion among people in the community. At or near the time of Judge Crockett's decision, I became aware that the decision was partially based on his determination that people who bought into Peccole Ranch relied upon what the master planning was.

10. It is my understanding that the developer who owns Badlands has applied for a change to the General Plan in order to allow for its planned development.

11. I oppose any changes with respect to Badlands. It is my hope that other people in the community who also oppose any such changes would voice their opposition to the City. To that end, I participated in handing out forms of declarations to residents of Queensridge, within the Peccole Ranch Master Plan.

12. The declarations (which are attached to Plaintiff's complaint) state that the signatory 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 as Parks Recreation – Open Space which land use designation does not permit the building of residential units." One version of the declarations further states 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."

13. I have no understanding that any of these statements are false. First, I was not making any assertion at all. I was only offering the declarations to residents for their consideration and to sign if they believed them to be accurate. Also, the statements in these declarations correctly summarize my beliefs as to the Queensridge residents' reliance upon the terms of the Peccole Ranch Master Plan. Further, based on my conversations with other Queensridge residents, many other residents have similar beliefs. Finally, this is consistent with the conclusions of Judge Crockett.

14. I have invited Queensridge residents to sign the declarations, to the extent that the declarations correctly summarize their individual recollections.

15. I participated in obtaining these declarations to assist the Las Vegas city council in its deliberations, to the extent it considers whether to approve any changes requested by the developer.

16. Further, to the extent I am able to gather such information and arrange for it to edit provided to the Las Vegas City Council, I seek to do so as a citizen exercising his First

Amendment rights to free speech and to petition the government guaranteed by the Constitution of the United States.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct. Executed on this 13 day of April, 2018, at Las Vegas, Nevada

DANIEL OMERZA

EXHIBIT 2

Declaration of Darren Bresee

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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 DECLARATION OF DARREN BRESEE

DECLARATION OF DARREN BRESEE

I, Darren Bresee, hereby declare as follows:

1. I am a Defendant in this action. I make this declaration of my own personal knowledge and, if called upon to do so as a witness, could and would testify competently hereto.

2. I reside within the Queensridge Common Interest Community, a master-planned community in Clark County, Nevada ("Queensridge").

3. Adjacent to Queensridge is an open space that has previously been used as the site of the Badlands Golf Course ("Badlands"). My understanding and belief is that Badlands is not part of Queensridge and is not subject to the Covenants, Conditions, Restrictions and Easements for Queenridge.

4. However, it is also my understanding and belief that both Queensridge and the land on which Badlands is situated are contained within Peccole Ranch, and both are subject to the terms of the Peccole Ranch Master Plan.

5. It is my understanding that the Plaintiffs in this action wish to construct residential units on the Badlands site.

6. I am aware that Plaintiffs sought and received approval from the City of Las Vegas ("City") for its plans to construct residential units at the Badlands site.

7. I am further aware that the City's approval of Plaintiffs' plans was challenged in a court proceeding before Judge Jim Crockett ("Binion Litigation").

8. It is my understanding that Judge Crockett made a ruling in which he determined that the City abused its discretion in approving Plaintiffs' application without first approving a major modification of the Peccole Ranch Master Plan.

9. When Judge Crockett's decision was made, the topic was the subject of news reports, which I read, and discussion among people in the community. At or near the time of Judge Crockett's decision, I became aware that the decision was partially based on his determination that people who bought into Peccole Ranch relied upon what the master planning was.

10. It is my understanding that the developer who owns Badlands has applied for a change to the General Plan in order to allow for its planned development.

11. I oppose any changes with respect to Badlands. To that end, when I received a form declaration that accurately reflected my recollection and my opinions, I signed it.

12. The declaration (the form of which is attached to Plaintiff's complaint) states that I purchased my 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 as Parks Recreation – Open Space which land use designation does not permit the building of residential units." It also says 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."

13. I have no understanding that any of these statements are false. The statements correctly summarize my beliefs. Further, based on my conversations with other Queensridge residents, many other residents have similar beliefs. Finally, this is consistent with the conclusions of Judge Crockett.

14. I signed the declaration to assist the Las Vegas city council in its deliberations, to the extent it considers whether to approve any changes requested by the developer.

15. Further, I was communicating with the Las Vegas city council in exercise of my First Amendment rights to free speech and to petition the government guaranteed by the Constitution of the United States.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct. Executed on this 13 day of April, 2018, at 10:30, Nevada

/ Darren Bresee

DARREN BRESEE

EXHIBIT 3

Declaration of Steve Caria

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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. DANEIL OMERZA, DARREN BRESEE, STEVE CARIA, and DOES 1 THROUGH 1000, Defendants.	CASE NO. A-18-771224-C DECLARATION OF STEVE CARIA

DECLARATION OF STEVE CARIA

I, Steve Caria, hereby declare as follows:

1. I am a Defendant in this action. I make this declaration of my own personal knowledge and, if called upon to do so as a witness, could and would testify competently hereto.

2. I reside within the Queensridge Common Interest Community, a master-planned community in Clark County, Nevada ("Queensridge").

3. Adjacent to Queensridge is an open space that has previously been used as the site of the Badlands Golf Course ("Badlands"). My understanding and belief is that Badlands is not part of Queensridge and is not subject to the Covenants, Conditions, Restrictions and Easements for Queenridge.

4. However, it is also my understanding and belief that both Queensridge and the land on which Badlands is situated are contained within Peccole Ranch, and both are subject to the terms of the Peccole Ranch Master Plan.

5. It is my understanding that the Plaintiffs in this action wish to construct residential units on the Badlands site.

6. I am aware that Plaintiffs sought and received approval from the City of Las Vegas ("City") for its plans to construct residential units at the Badlands site.

7. I am further aware that the City's approval of Plaintiffs' plans was challenged in a court proceeding before Judge Jim Crockett ("Binion Litigation").

8. It is my understanding that Judge Crockett made a ruling in which he determined that the City abused its discretion in approving Plaintiffs' application without first approving a major modification of the Peccole Ranch Master Plan.

9. When Judge Crockett's decision was made, the topic was the subject of news reports, which I read, and discussion among people in the community. At or near the time of Judge Crockett's decision, I became aware that the decision was partially based on his determination that people who bought into Peccole Ranch relied upon what the master planning was.

10. It is my understanding that the developer who owns Badlands has applied for a change to the General Plan in order to allow for its planned development.

11. I oppose any changes with respect to Badlands. It is my hope that other people in the community who also oppose any such changes would voice their opposition to the City. To that end, I participated in handing out forms of declarations to residents of Queensridge, within the Peccole Ranch Master Plan.

12. The declarations (which are attached to Plaintiff's complaint) state that the signatory 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 as Parks Recreation – Open Space which land use designation does not permit the building of residential units." One version of the declarations further states 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."

13. I have no understanding that any of these statements are false. First, I was not making any assertion at all. I was only offering the declarations to residents for their consideration and to sign if they believed them to be accurate. Also, the statements in these declarations correctly summarize my beliefs as to the Queensridge residents' reliance upon the terms of the Peccole Ranch Master Plan. Further, based on my conversations with other Queensridge residents, many other residents have similar beliefs. Finally, this is consistent with the conclusions of Judge Crockett.

14. I have invited Queensridge residents to sign the declarations, to the extent that the declarations correctly summarize their individual recollections.

15. I participated in obtaining these declarations to assist the Las Vegas city council in its deliberations, to the extent it considers whether to approve any changes requested by the developer.

16. Further, to the extent I am able to gather such information and arrange for it to edit provided to the Las Vegas City Council, I seek to do so as a citizen exercising his First

Amendment rights to free speech and to petition the government guaranteed by the Constitution of the United States.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct. Executed on this 13th day of April, 2018, at LAS VEGAS, Nevada

STEVE CARIA

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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' 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.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

BY: */s/ Mitchell J. Langberg*
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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' 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)** 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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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 refetence 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 2424, 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

general plan amendment rezoning and site development review requests are dependent upon action taken on the major modification, close quotes.

Next, the proposed development requires a major modification on the Peccole Ranch Master Plan.

Next quote, the department of planning has determined that any proposed development not in conformance with the approved 1990 Peccole Ranch Master Plan would be required to pursue a major modification.

Next, the Peccole Ranch Master Plan must be modified to change the land use designations from golf/drainage to multi-family prior to approval of the proposed general plan amendment.

The next quote, in order to redevelop the property as anything other than a golf course or open space, the applicant has proposed a major modification of the 1990 Peccole master plan.

The last quote I'll reference of staff, in order to address all previous entitlements on this property, to clarify intended future development relative to existing development, and because of the acreage of the proposal for development staff has required a modification to the conceptual plan adopted in 1989 and revised in 1990.

This alone, without getting into the question of substantial evidence, is legally fatal to the City's current approval of this application because legally they were required to first deal with and make an approval of a major modification to the master plan, and that was never done.

Instead, over the course of many months there was a gradual retreat from talking about that, and instead all of a sudden that discussion and the need for following staff's recommendation just went out the window.

I realize that the city attorneys office offered his interpretation of the law and said that he didn't think that a major modification was required, but the Court's not bound by that, that is simply counsel advising their client.

The city is not permitted to change the rules and follow something other than what was already in place.

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.

I realize that something has happened with the golf course. I myself have never been on this property. I think I went to somebody's home that was somewhere in Queens Ridge one time several years ago, but that's been my total exposure to it, but I understand there was a transfer of the golf course leased property from one person to another, and ultimately a decision was made to close the golf course.

Though one of the things that was interesting in the latter staff recommendations was the applicant began to I guess wear down the City's and the planning department's resistance to this idea was -- well, I'll deal with that later.

The staff made it clear that a major modification was mandatory.

The city can't decide to just ignore that and not go through that process.

With regard to substantial evidence, I'm not going to weigh evidence or offer my opinions on whether the evidence was greater or less than something to substitute fact finding by the city, but the initial flaw, which is a fatal one, is the legal flaw, which is failure to deal with the major modification that was required in order to approve

this application. That in and of itself standing by itself tells me that the city abused its discretion in approving this plan.

When we look at the question of whether or not substantial evidence supports it, it's ironic that the city and Seventy Acres, they want to point to staff recommendations that were made toward the end of this process, but they want to disregard the repeated recommendations by staff in the earlier stages which made it clear that a major modification was a requirement.

Respondents' claim that the staff reports are substantial evidence supporting the city council's approval, but ignore the fact that the staff reports continuously emphasize that approval of the applications were dependent upon a major modification to the Peccole Ranch Master Plan.

Also, when I look at the testimony that was offered by various people at the hearing.

I note that a Michael Buckley made a very cogent but succinct presentation as to why he opposed this application, and that is in the record at page 17,261 and 17,262.

Frank Shreck made an excellent explanation as to why he was opposed to this, and that is in the

record at pages 17,262 to about 17,266, including his responses to questions that were posed to him.

There was also an individual, I think his name was George Garcia, who saw the big picture here, and that is that the progress to all intents and purposes is incompatible with the master plan that is currently in existence out there, and that's why a major modification would be necessary.

One would basically have to allow the tail to wag the dog, so that the applicant's request to allow it to develop the 17.49 acres as requested would be permitted.

I think that in terms of the duties that the city council has, as well as the planning commission, it is to protect and serve. They need to protect the property rights of those who are already committed and invested in a project, and while they can consider an application such as the one that is under consideration here, the applicant did create his own problems because the applicant -- a representative for the applicant, Mr. Yohan Lowie, testified at the hearing that he bought this property before he got zoning approval to do what he envisioned doing, and of course that paints him into a corner.

The old saying is, you are buying a pig in a poke, which means you're buying something in a burlap sack, you don't know what it is, and you are paying a price for it based upon what you think you are buying.

The problem is, he also indicated that he had secured pre-approval from every member of the city council before he made this purchase.

Well, of course he's welcome to have conversations with the members of the city council about what his plans and intentions are, and by the way it's not disputed by any members of the city council he made that representation, and I guess I could reference it specifically, it's in the record at the November 16th, 2016 city council meeting, and the pages 6454 he says at line 6 -- 7364 to 7365 -- I came to all of you, every single one of you here, before I purchased this golf course, and I told you here's the dilemma.

Well, okay, but before making such a substantial investment typically what one does is, one makes the purchase conditioned upon being able to secure the zoning that is going to make this a smart and wise deal for the purchaser, and apparently that wasn't done. The cart was put in front of the horse.

And I mention this parenthetically because whether he did or didn't is of no consequence to me. I think that's the purely legal determination that LVMC 19.040 was not complied with means necessarily that city council abused its discretion, and their approval of the application was legally improper.

I also think that with regard to whether there's substantial evidence to support it that cannot be said at all.

I think because the early indications from the same staff representatives were that major modification needed to be done, and the evidence suggested that city council chose to just ignore and side-step or otherwise steam-roll past it and do simply what the applicant wanted, without justification for it, other than the applicant's will that it be done.

So that's my intended ruling.

I'm happy to hear from council for Seventy Acres and from the City of Las Vegas, but I need to let you know that if I find you just repeating what is said in your briefs that I read, I'm going to interrupt you and say, you said that in your brief, and I saw that.

I'm asking you to augment anything you wish

to augment.

Mr. Kaempfer.

MS. KAEMPFER: Thank you, Your Honor.

I will deal with just three points.

First of all, with regard to purchasing the property as a pig in the poke, Mr. Lowie received a letter from the City Of Las Vegas that is part of our record indicating that the property is zoned for 17.49 acres RPD-7, so you rely -- you know, I've done a little bit of this over the last 40 years, you rely on representations that you get from the city as to what property is zoned before you make that purchase.

So that is point number 1.

Point number 2 with regard to the modification, it has to be remembered that there are two separate applications that were filed.

The first application that was filed related just to this 17 acres, that application was delayed, so that we could at request of city council do an application on all of the property. They wanted to see everything. They wanted to see the whole project develop.

It was with regard to that project, the whole project developed, a development agreement that they said, and we want you to do a major

modification.

So when we talk about when the major modification is required, it's required when they ask us to do the whole thing.

Now, ironically then we present the whole thing in front of the city counsel, the planning commission, the planning commission denies it. So we withdraw that portion of it, and we move forward only with the 17 acres.

So the major mod that we filed was with this whole project, not with the 17 acres.

Now, that is the first point.

The second point, we then took the 720 units that we originally applied for, and reduced it to 435. When it was reduced to that amount, it then fit within the allowable remaining multi-family units under the Peccole plans.

We have always believed, and we're going to hear from the city that it's not part of the major modification process, and they have demonstrative evidence to show you in that regard, but --

THE COURT: Let me ask you, do you consider this property where the 435 units would be to not be part of the open area drainage?

MR. KAEMPFER: This part was all part of

the golf course.

THE COURT: Right.

MR. KAEMPFER: Not all the golf course has drainage issues on it, and I thank you for asking.

No, it's -- All the golf course is part of drainage, some have drainage issues, some don't.

We can develop some right now, others would require a FEMA approval, so there's a lot --

THE COURT: I saw where a drainage plan was to be submitted. Was it ever actually submitted?

MR. KAEMPFER: Yes, we submitted a plan, it was reviewed, and the county approved conceptually what we were doing, what we would have to do if we wanted to develop the whole 250 because we have to go underground with some underground holes and then take those out just like they did over at Tivoli across the street.

But I can't emphasize enough, Your Honor, that the two different applications, that this one stands on its own, that if we were here on that 250, and they filed for the major mod and had been denied, the city was recommending we do that, actually the city has determined -- and again, you're going to see that they don't think this property is subject to the major modification provisions at all, but even if it

is, by reducing the density from 720 to 435 we fit within those numbers of Peccole Ranch, and the city will confirm that.

So consequently when you fit within those numbers, a major modification isn't required. That is why staff recommendation at the time of the planning commission was for a major modification.

When we got to the city counsel, there was no requirement of a major modification was part of the application we filed. So this application kind of should stand on its own, and on its own the major modification is not required or recommended.

Candidly, the city, as you well know, they throw recommendations out all the time.

We knew in our minds that this was not something that the law required or the code required, but we said we would do it with regard to the whole 250.

Now, I do want to address one thing.

I live in Queens Ridge. I'd like to tell you how sophisticated I am.

When I bought my home, I'm going to look at the CC & R's and do all that, but I just want to address very briefly the idea this was always intended to be a golf course because if it were

intended to be a golf course, it could have been and should have been protected in that right, it could have been zoned RE, could have been zoned U, could have been zoned something that evidenced it's not developable, but what the Peccoles did is, they painted that golf course with the RPD-7 brush, and then when they created the CC & R's, just to show that wasn't a mistake they put in their CC & R's that the golf course is not part of Queens Ridge, that the golf course cannot be annexed into Queens Ridge, and essentially anybody and everybody who bought into Queens Ridge was not buying any interest in that golf course.

And then, Your Honor, what they did was, if they bought a lot on the golf course, they made you sign an agreement, this is Peccoles, the people who tell you, we always wanted it to be golf course and all that, this is a quote, seller has made no representation or warranties concerning zoning or future development of phases of the planned community, or the surrounding area, or nearby property, close quotes.

And another quote, and in this purchase document purchaser shall not acquire any rights, privileges, interest, or membership in the Badlands

Golf Course by virtue of its purchase of the lot.

And then finally, perhaps most importantly, people on the golf course signed a document that said, the view may at present or in the future include, without limitation, include adjacent or nearby single-family homes, multi-family residential structures, commercial structures, utility facilities, and landscaping, and other items.

So everyone who bought into Queens Ridge, be it me by virtue of CC & R's, and those who have custom lots by virtue of the document they signed, knew that that golf course -- or should have known that golf course could be developed.

I agree with Your Honor absolutely that it in fact that major mod is a requirement, that that was not complied with, but it doesn't apply to the 17, and I can't emphasize that enough, it applies -- they wanted it applied when we were doing the whole thing, not the 17, and when we look it down here from 720 units to 435 units, and we fit within that, the city will tell you that clearly no major modification was required.

So we would respectfully ask that Your Honor consider those statements.

THE COURT: All right.

Thank you, Mr. Kaempfer.

Mr. Byrnes.

MR. BYRNES: Thank you, Your Honor.

The Court's essentially made a legal finding that a major modification is required under 19.10.040.

The one thing the Court hasn't done is, look at the code.

No matter what the staff says, city attorney, you have to look at the code first.

And when I was getting ready for this, I thought this was going to be an issue here, so I actually had a few visual aids prepared.

THE COURT: Just so you know, I did look at the code.

MR. BYRNES: Okay.

Then I want to point something out.

THE COURT: All right.

MR. BYRNES: When you look at the entire development --

MR. BICE: What provision are we reading from?

MR. BYRNES: 19.10.040.

MR. BICE: Very good.

I got a copy right here.

MR. BYRNES: This is a zoning code.

If you look at the first line --

THE COURT: I can't read it.

MR. BYRNES: You can't read it?

THE COURT: No.

THE WITNESS: It's the planned development district.

This was a zoning classification. It applies to parcels that are zoned PD.

Now, the only place I could find in the code where you talk about major mods is 19.10.040(G). That is what everyone is talking about here.

If you read the first line, the development of property within the planned development district may proceed only in strict accordance with the approved master development plan.

This is not a planned development district.

Now, if you go look at the City's website where this section is, there's this map, they referred to this planned development district map.

If you click on it -- Would it help if I moved this up a little further?

THE COURT: Yeah.

MR. BYRNES: If you look on the map, here's the entire city, the pink areas show where the

planned development is.

Queens Ridge is down here, and there's two little pink areas, is the planned development district, these are the only planned development district in the Queens Ridge area.

Now, if you blow that up, you have this map --

THE COURT: Okay.

MR. BYRNES: -- the planned development district, this is the house, this is Renaissance across Rampart, this is the subject property never been classified as a planned development district.

THE COURT: Is it part of the Peccole Ranch Master Plan?

MR. BYRNES: Correct.

But the golf course is not a planned development district, it's RPD.

THE COURT: My question was, is the golf course part of the Peccole Ranch Master Plan?

MR. BYRNES: That's not an easy question.

It's part of the area that is the subject --

THE COURT: I read that the Badlands was part of Peccole Ranch II Master Plan, and then another golf course, I guess it was called Canyon

Gate or something, was part of the Peccole Ranch Number I Master Plan.

MR. BYRNES: Canyon Gate is another area down by Sahara --

THE COURT: I understand, but it was Peccole Ranch Number I, right?

MR. BYRNES: I believe that's correct.

THE COURT: And both of them were referenced in the documents as part of the master plan

MR. BYRNES: Correct.

THE COURT: Okay.

THE WITNESS: My point is, the major modification requirement of 19.10.040 only applies the property that is zoned PD.

The subject property and the rest of the golf course is not.

THE COURT: Okay.

MR. KAEMPFER: Your Honor, if I might, Mr. Davis, who is in-house counsel, asked me to read a provision -- Actually, might Mr. Davis just explain this?

He's an attorney for the Seventy Acres.

THE COURT: Okay.

MR. DAVIS: Thank you, Your Honor.

Todd Davis, in-house counsel for Seventy Acres.

I just wanted to point out that if you look at the Peccole Ranch Conceptual Master Plan phase II from 1990; if you go to page 16, at the bottom of page 16 there's a couple sentence paragraph, it starts with, quality of development.

Design architecture and landscape standards will be established for the development.

A design review committee will review and approve all plans for parcel development of Peccole Ranch.

Covenants, conditions and restrictions will be established to guarantee the continued quality of development, and a master homeowners association will be established for the maintenance of common landscaping and open space.

Separate restrictions will be maintained to common area space within those areas.

My point is simply, anything that is in Queens Ridge common interest community where Chris lives is part of the master plan, but if it wasn't in the CC & R's, it never made it in.

THE COURT: Okay.

MR. DAVIS: It's a little bit of an

impossibility for us to put this property into his association.

THE COURT: Okay.

MR. BYRNES: Should I continue now?

THE COURT: Sure.

MR. BYRNES: What I wanted to emphasize is, again the develop of property within the planned development district, this is not within the planned development district, Subsection (D) doesn't apply to this property. This property is RPD, not PD.

You have to look at 19.10.050, the next -- ordinance next in order in that development area. That does contain provision plan amendments approvals conditions.

Amendments to an approved site development plan review shall be reviewed and approved pursuant to LVMC 19.16.1.008, that is site development plans.

The a approving body may attach the amendment to an approved site development plan area and so on.

You go through site development, the PD, and you go through major mods through PD.

And in this case the city council did say it was approved.

The Court's entire finding is based upon

the premise that the major mod under 19.10.040 applies to this property, and it doesn't.

This is based on site development review, which is proper, and it's also --

THE COURT: Was the staff unfamiliar with that?

MR. BYRNES: I don't know what the staff is trying to do, but the code --

THE COURT: Aren't the staff members making recommendations, aren't they long-term professionals who make recommendations for the planning commission and city council to rely upon?

MR. BYRNES: They make representations.

The city council is never bound by staff, and staff makes mistakes, but the code is clear

THE COURT: I'm sure the city council can make mistakes too, we all can.

MR. BYRNES: Lawyers make mistakes too.

THE COURT: So do Judges.

MR. BYRNES: But you have to remember the limited review we have here.

THE COURT: I don't know, this thing went on for well over a year.

MR. BYRNES: The Court's function --

THE COURT: Yes, counsel provided me with

documentation, so I could at least see the black and white results of that review and what the recommendations were.

MR. BYRNES: Correct, Your Honor.

But your role here is to look at the record and say, is there something in here that supports what city council did, you can't re-weigh the evidence, and with all due respect you can't substitute your judgment for what you think the council should have done.

THE COURT: Well, I'm not.

I tried to make that clear at the beginning that my determination is a purely legal one, that I think that LVMC 19.10.040 and the staff's recommendation, and the fact that the applicant applied for a major modification, all indicate that everybody knew a major modification was necessary.

Then somewhere -- Which means city council had to do that.

City council didn't do that, so they abused their discretion.

The fact that they went on down the road and started retreating from the city code and from staff's recommendations, I don't think that that is self-serving evidence to kind of bolster their

decision warrants upholding it.

I'm not re-weighing the evidence though in terms of whether there is substantial evidence to support.

My determination is a purely legal one.

MR. BYRNES: But your determination is based completely on a finding that Subsection (D) of 19.10.040 applies to this property.

THE COURT: Yes.

MR. BYRNES: It's based on the limited expressed language development of property within the plan development district is subject to that provision.

THE COURT: I understand your point, I just disagree.

MR. BYRNES: This is not within a planned development district.

THE COURT: I understand your point, but I disagree.

MR. BYRNES: I mean, if you have questions about the findings here, then I believe your only recourse would be to remand this to city council for further findings about the application of this order.

THE COURT: No, the Court's entitled to interpret the city code and whether or not it's been

complied with, and my interpretation is, the city code required major modifications, and city council didn't make a major modification.

MR. BYRNES: If you like, at the Cimarron Hills case it's clear that the City's interpretation of its own code is entitled to deference, unless it's a manifested abuse of discretion.

THE COURT: Right.

MR. BYRNES: Here if you look at the further cases, you have to defer to the City's interpretation of its own law if it's within the expressed terms of the ordinance.

I have just shown the expressed terms of the ordinance, this doesn't apply.

THE COURT: You have showed me your perspective and your view that the expressed terms of the ordinance doesn't apply, and I understand what you're saying, but I disagree.

MR. BICE: Your Honor, I'd like to just be heard.

THE COURT: Hold on.

I want to make sure Mr. Byrnes is finished.

Everybody will get a chance to address this.

MR. BYRNES: I have said my piece.

I respectfully disagree with the Court, and we'll deal with this down the road, I guess.

THE COURT: Thank you.

Mr. Kaempfer.

Mr. Kaempfer: One more quick COMMENT.

I've been asked to put on the record as well that the Peccole Ranch Master Plan had expired, and that has been before, I just wanted the record to note that's our position that it was expired, and that's why in 2001 the ordinance what was adopted reaffirmed all of the property from you went back to U for PD-7.

So thank you, Your Honor.

THE COURT: You say U. You are referring to the capital letter U?

MR. KAEMPFER: The U, meaning undeveloped.

THE COURT: Right.

THE COURT: Mr. Bice.

MR. BICE: Briefly, Your Honor.

I've known Mr. Byrnes a long time, and I respect Mr. Byrnes, but this argument that is a hyper-technical argument he's now come up with, with all due respect to him, and the city attorneys office they know full well why staff says that provision applies, and said for years it applies, because RPD,

Your Honor, they don't use that anymore.

The RPD criteria that they were using in the past has been eliminated in favor of PD, so to come into court and say he doesn't know why the city staff is applying this criteria to Queens Ridge is with all due respect to Mr. Byrnes that is just not right, he knows full well why staff was applying that provision, because staff has always applies that to -- for PD because RPD doesn't exist anymore, the code had been amended, and it's now called PD. There's no RPD designation going forward in the city.

Let me tell you about Mr. Kaempfer's argument because it's just not -- just not right.

He claims to you that the only reason that they submitted this major modification was, it was in conjunction with the broader development, that's not true.

The original application --

THE COURT: Is that from the 180 code?

MR. BICE: Yes, that was a later application.

The original application was for Seventy Acres LLC, and this is the staff's report from January of 2016, for the record to be clear that is record 17,362 through 17,377 what staff repeatedly

said, repeatedly told them on the Seventy Acres, you must submit a major modification, had nothing to do with the 250, you must submit a major modification because it's a master planned community, and by the way under the City's general plan, this is right out of page 20 of the general plan, the following master development plan areas are located within the southwest sector. Then it goes on to list, and we put this in the brief --

THE COURT: Yes, you told me that.

MR. BICE: All of them, if the city were right on this, Your Honor, all of these master planned communities would be vulnerable to a developer just wiping them out without any modifications to the existing plan. That is not what the code contemplated, and that is why the staff from day one pointed out you must obtain a major modification, because this is covered by the Pernole Ranch Master Plan.

And what the developer did in response to the staff, this is clear back in January of '16, the developer then submitted a major modification, in addition to submitting other applications, and that major modification went by number MOD-63600, that process was going forward.

THE COURT: It's MOD-1600, right?

MR. BICE: MOD-63600.

What was really happening here is, as they were moving forward they realized they were not going to get the votes or that major modification, they can count heads, they just like weren't going to get the approval from the planning commission for it, so that is when they withdrew it.

That major modification was exactly what the city required clear was in 2016, and then they withdrew it, took the position we can can go forward now without a major modification.

But ironically even the staff knew that was wrong after the planning commission meeting because on November 16 of 2016, this is for the record at record 2421 through 2438, staff again repeatedly emphasizes, this is after the planning commission meeting and after the withdrawal, Your Honor, they point out you must have a major modification, and in fact you can't proceed without a major modification for the general planning amendment.

And in fact, Your Honor, I'd point out for the court on the last page of that staff report there's master planned areas on the graph, right beneath it is Peccole Ranch, and if you go to the

right of that, there's a list of whether or not it's in compliance, and the staff puts N for no because the staff's acknowledging it is not in compliance.

That is why, Your Honor, the statute requires a major modification by it's expressed terms, and I'll find the language here.

THE COURT: Well, in the Exhibit 1 the City Of Las Vegas provided they referenced actually excerpts of Exhibit 1, which they referred to as Exhibits 33 and 35, but I went back and looked at the entirety of Exhibit 1, which included Exhibit 33 and 35, that there were some pages from it, and that is the staff report to the February 15th, 2017 council meeting, which is even after the November 16th, 2016 you are talking about --

MR. BICE: Correct.

THE COURT: -- and it says, the proposed development -- This is on record page 11,240, at the bottom it says, the proposed development requires a major modification of the Peccole Ranch Master Plan.

It says on page 11,241, the department of planning has determined that any proposed development not in conformance with the approved 1990 Peccole Ranch Master Plan would be required to pursue a major modification of the plan prior to or concurrently

with any new entitlement.

It goes on to say, in order for this site development plan review request to be approved, the 1990 Peccole Ranch Master Plan land use designation over this site must be amended from golf course drainage to multi-family.

And then on page 11,242 still talking about that same staff report at page 3, it says that section 19.16.030 (1) of the Las Vegas Zoning Code requires that the following conditions be met in order to justify a general plan amendment, and it is that the Peccole Ranch Master Plan must be modified prior to approval of proposed general plan amendment, and the applicant has submitted a second general plan amendment that would be compatible with the proposed high-density residential land use if the major modifications approved.

That is from record 11,243.

There are additional things that they say are conditions and requirements in that report.

They also say on page 11,243, item number 4, the proposed general plan amendment does not conform to the 1990 Peccole Ranch Master Plan, which designates the site for golf course drainage land uses.

So there's no question that the staff recommendation all along has been that it requires a major modification.

MR. BICE: Exactly, Your Honor.

I don't need to take up anymore of your time.

I wanted to respond.

THE COURT: Don't worry about my time.

We're here to deal with this.

MR. BICE: Mr. Kaempfer's final point where he's arguing something, by the way no one in the city has bought this argument, but I guess he's asking you to accept it, is that because they reduced the density on the 17 acres, they somehow now have made it fit within the pre-existing amount of density allowed for the site, and that somehow means it takes it outside of the major modification requirements.

Again, I'll make two points why that is wrong.

Number one, under the terms of the statute about a major modification, and as the staff recited, it required a major modification. It doesn't matter whether or not they reduced the number of units for formally on the master plan the city approved, and this is for the record page 18 of the master plan for

the density, that Mr. Kaempfer is claiming was pre-approved is only for the 461 acres and excludes the golf course because the golf course was specifically carved out with having no density whatsoever.

THE COURT: Under 461, was 250 and 211, correct?

MR. BICE: No, Your Honor, that 211 was the original golf course.

They later added more golf course to it, and it grew to 250.

The 401 and the 60 are where the houses are at today, which is what they had approved the housing.

What the Peccoles ultimately did, even though they got a total of 4247 units approved, they ultimately didn't build them all because what they did was ended up creating larger premium lots because they recognized they could actually make more money that way, and then they sold these larger premium lots, as opposed to building more homes.

So the land for which development was approved by the City Of Las Vegas has already been developed, and that is why the staff correctly said from day one, if you're going to try and change,

because the city designated this PROS under its plan, it's specifically marked on the City's maps when this purchaser bought this land, he knew full well what it was designated because all you go down and do is at look at the City's maps of the master plan, and it's all designated in green with the letters PROS across it, that's why the staff said, if you're going to try and now eliminate that designation and put houses on that property, it would require a major modification to the Peccole Ranch Master Plan.

I thank the Court for its time.

THE COURT: All right.

MR. KAEMPFER: Your Honor, I appreciate your time, and I know you want to get to the truth of this thing.

The City's never taken that position -- Bradley Jerbic's taken that position about the 435 being within the allowable density, so that isn't something I made up.

Secondly, there's actually no density that is currently authorized for the land that is in question here, the 17.49 acres.

I mean, there's a little dash there indicating that at that point in time they were not allocating anything for that.

I would agree with Your Honor's assessment of it.

I will roll over and play dead it you can show me that on the final staff approval relating to the 17 acres in front of city council it says staff recommendation of approval says, file a major mod.

Staff puts conditions of approval on all of their applications.

They talked about it, a major mod, they have always talked about that, but when it came down to it, when we went from the 720 to the 435, and when we went in front of that city council, there was no recommendation of filing a major mod with conditions relating to SDR-62393, said approval of the general plan amendment approval of shall be void two years, development in conformance with the site plan necessary building permits, but no requirement on the final SDR, which is what she's showing me it is, what I represented to the Court on 050.005.990 where it was part of the site development review approval of a major mod. That is on July 12th of 2016.

Then later on that condition is removed, and I can only suggest, Your Honor, it was removed because reduction in the number of units, the change in not doing the whole plan, but doing just the 17

acres.

So staff talks about a major mod, but when it comes down, are they recommending a major mod, insisting it as a zoning approval?

The answer is, no.

THE COURT: Understand the code requires it.

What I was pointing to was the fact that my interpretation of the law saying that it's required, I find corroboration in the fact that staff recommended to, and the applicant applied for, major modification.

MR. KAEMPFER: Your Honor, so we're clear, Your Honor's point is, a major modification is required under the code?

THE COURT: Yes.

MR. KAEMPFER: All right.

I would like also finally to make one other point.

This master plan was never recorded.

The other communities you're talking about have recorded master plans.

The only thing that was recorded against ours are the CC & R's, so I just wanted that for the record.

Thank you.

THE COURT: Mr. Bice, anything further?

MR. BICE: No, Your Honor.

Well --

MR. BYRNES: May I say one thing, Your Honor?

THE COURT: Okay.

Mr. Byrnes.

MR. BYRNES: Mr. Bice mentioned before that the reason this 19.10.040 applies to this property, although it's not a planned development district is because we don't use the RPD zoning class anymore.

I read the ordinance to you, and I want to emphasize, if you go to the next ordinance in the code, 19.10.050, that is the ultimate RPD, we don't allow new development under RPD, but we have rules what we do with existing RPD developments, which this is.

THE COURT: Was this a new development?

MR. BYRNES: No, it's already RPD, been RPD since 1990 or so.

THE COURT: Okay.

MR. BYRNES: It says --

THE COURT: I mean, the application.

MR. BYRNES: They actually rezoned it for

out of RPD when we did this.

But it says when -- if you have existing RPD zoning, you want to change where it's happening, you do it through site development review, which is precisely what happened here.

I think the Court needs to look at 19.10.040 and 19.10.050 as you will see the major modification requirement doesn't apply here, this is done under site development comparing apples and oranges.

THE COURT: All right.

Anything else?

MR. BICE: I would defy that, Your Honor, but I think we've taken up enough of your time.

THE COURT: Okay.

So my ruling is, that the city council abused its discretion, violated the law, the Las Vegas Municipal Code Title 19 by not first dealing with the major modification on this application.

And the question regarding whether or not there's substantial evidence to support it, I don't really reach because in review of the information that was provided to me there is a great deal of opposition evidence that was presented.

I referenced some of it by naming the

people by name whose remarks I read, but there was also a person named Garcia, there were many people whose remarks I read, and it was clear to me they were there, not there speaking in favor of the application, they were speaking most strikingly against this, and so the city when they reference substantial evidence that is consisting of staff recommendations for approval, they are blowing hot and cold at the same time staff recommendations were to the major modification was required, so I don't think the city can suggest or infer that there was substantial evidence to support its decision simply by saying that there were 23,000 pages of information, it just doesn't tell the story.

So, Mr. Bice, I'm going to ask you to prepare the order, circulate it to opposing counsel as to approval as to form and content.

I realize you will want the transcript.

MR. BICE: Yes, I will.

That's true.

THE COURT: So I'd like you to submit to council for the city and Seventy Acres a draft for their review within two weeks after you receive the transcript from the Court Reporter.

MR. BICE: We will do that, Your Honor.

THE COURT: All right.

MR. BICE: I'm going to get out a business card to hand to the Court Reporter right now.

THE COURT: Anything further before we adjourn on this matter?

MR. BICE: No.

Thank you, Your Honor.

MR. KAEMPFER: Obviously we thank you for your time.

MR. BYRNES: Yes, Your Honor, thank you.

MR. HOLMES: Thank you, Your Honor.

THE COURT: All right.

(Proceedings concluded.)

EXHIBIT B

City of Las Vegas Agenda Item No.: **122.**

AGENDA SUMMARY PAGE - PLANNING
CITY COUNCIL MEETING OF: FEBRUARY 21, 2018

DEPARTMENT: PLANNING
DIRECTOR: ROBERT SUMMERFIELD ☐ **Consent** ☒ **Discussion**

SUBJECT:
GPA-72220 - GENERAL PLAN AMENDMENT - PUBLIC HEARING - APPLICANT/OWNER: 180 LAND CO, LLC - For possible action on a request for a General Plan Amendment FROM: PR-OS (PARKS/RECREATION/OPEN SPACE) TO: ML (MEDIUM LOW DENSITY RESIDENTIAL) on 132.92 acres on the east side of Hualapai Way, approximately 830 feet north of Charleston Boulevard (APNs 138-31-601-008; and 138-31-702-003 and 004), Ward 2 (Seroka) [PRJ-72218]. The Planning Commission vote resulted in a tie, which is tantamount to a recommendation of DENIAL. Staff recommends APPROVAL.

PROTESTS RECEIVED BEFORE:		**APPROVALS RECEIVED BEFORE:**	
Planning Commission Mtg.	**67**	**Planning Commission Mtg.**	**44**
City Council Meeting	**152**	**City Council Meeting**	**28**

RECOMMENDATION:
The Planning Commission vote resulted in a tie, which is tantamount to a recommendation of DENIAL. Staff recommends APPROVAL.

BACKUP DOCUMENTATION:
1. Location and Aerial Maps
2. Staff Report
3. Supporting Documentation
4. Photo(s)
5. Justification Letter
6. Submitted after Final Agenda - Protest/Concern Letters and Photo for GPA-72220 [PRJ-72218] and Protest/Support Postcards for WVR-72004, SDR-72005 and TMP-72006 [PRJ-71990], WVR-72007, SDR-72008 and TMP-72009 [PRJ-71991], WVR-72010, SDR-72011 and TMP-72012 [PRJ-71992]
7. Submitted at Meeting - Recusal Request Letters by Mark Hutchison for GPA-72220 [PRJ-72218], WVR-72004, SDR-72005 and TMP-72006 [PRJ-71990], WVR-72007, SDR-72008 and TMP-72009 [PRJ-71991], WVR-72010, SDR-72011 and TMP-72012 [PRJ-71992]
8. Verbatim Transcript of Items 122-131
9. Backup Submitted at the January 9, 2018 Planning Commission Meeting

Motion made by STAVROS S. ANTHONY to Hold in abeyance Items 122-131 to 5/16/2018

Passed For: 5; Against: 0; Abstain: 0; Did Not Vote: 0; Excused: 1
MICHELE FIORE, BOB COFFIN, CAROLYN G. GOODMAN, STAVROS S. ANTHONY, STEVEN G. SEROKA; (Against-None); (Abstain-None); (Did Not Vote-None); (Excused-LOIS TARKANIAN)

CITY COUNCIL MEETING OF: FEBRUARY 21, 2018

Minutes:
A Verbatim Transcript of Items 122-131 is made a part of the Final Minutes.

Appearance List:
CAROLYN G. GOODMAN, Mayor
STEVEN G. SEROKA, Councilman
BRADFORD JERBIC, City Attorney
PETER LOWENSTEIN, Deputy Planning Director
LUANN D. HOLMES, City Clerk
BOB COFFIN, Councilman (via teleconference)
MICHELE FIORE, Councilwoman
STAVROS S. ANTHONY, Councilman
STEPHANIE ALLEN, Legal Counsel for the Applicant
MARK HUTCHISON, Legal Counsel for 180 Land Co, LLC, Seventy Acres LLC and Fore Stars, Ltd.
FRANK SCHRECK, Queensridge Resident
TODD BICE, Legal Counsel for the Queensridge Homeowners
LISA MAYO, Concerned Citizen

ELECTRONICALLY SERVED
4/17/2018 11:30 AM

A-18-771224-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Matters	**COURT MINUTES**	**April 16, 2018**

A-18-771224-C Fore Stars, Ltd., Plaintiff(s)
vs.
Daniel Omerza, Defendant(s)

April 16, 2018 **1:00 PM** **Minute Order**

HEARD BY: Kishner, Joanna S. **COURTROOM:** Chambers

COURT CLERK: Tena Jolley

PARTIES PRESENT: None. Minute Order Only – no hearing held.

JOURNAL ENTRIES

- Although the Court could and would rule fairly and without bias, recusal is appropriate in the present case in accordance with Canon 2.11(A)(3) of the Nevada Code of Judicial Conduct in order to avoid the appearance of impartiality or implied bias as the Court could be viewed to have information relating to the facts and/or circumstances regarding the underlying issues. Thus, the Court recuses itself from the matter and requests that it be randomly reassigned in accordance with appropriate procedures.

Electronically Filed
4/17/2018 9:09 AM
Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
****

Fore Stars, Ltd., Plaintiff(s) vs. Daniel Omerza, Defendant(s)	Case No.: A-18-771224-C Department 24

NOTICE OF DEPARTMENT REASSIGNMENT

NOTICE IS HEREBY GIVEN that the above-entitled action has been randomly reassigned to Judge Jim Crockett.

☐ This reassignment follows the filing of a Peremptory Challenge of Judge .

☒ This reassignment is due to the recusal of Judge JOANNA KISHNER. See minutes in file.

☐ This reassignment is due to:

ANY TRIAL DATE AND ASSOCIATED TRIAL HEARINGS STAND BUT MAY BE RESET BY THE NEW DEPARTMENT.

Any motions or hearings presently scheduled in the FORMER department will be heard by the NEW department as set forth below.

Motion to Dismiss, on 06/05/2018, at 9:00 AM.

PLEASE INCLUDE THE NEW DEPARTMENT NUMBER ON ALL FUTURE FILINGS.

STEVEN D. GRIERSON, CEO/Clerk of the Court

/S/ Ivonne Hernandez

By: _____
Ivonne Hernandez
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that this 17th day of April, 2018

☒ The foregoing Notice of Department Reassignment was electronically served to all registered parties for case number A-18-771224-C.

☒ I placed a copy of the foregoing Notice of Department Reassignment in the appropriate attorney folder located in the Clerk of the Court's Office:

Mitchell J. Langberg

/S/ Ivonne Hernandez

Ivonne Hernandez
Deputy Clerk of the Court

CHLG
James J. Jimmerson, Esq. #000264
Email: ks@jimmersonlawfirm.com
JIMMERSON LAW FIRM P.C.
415 S. 6th St. #100
Las Vegas, NV 89101
Telephone: (702) 388-7171
Facsimile: (702) 387-1167

Attorneys for Plaintiffs Fore Stars, Ltd.,
180 Land Co., LLC., Seventy Acres, LLC

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, vs. DANIEL OMERZA, DARREN BRESEE, STEVE CARIA,, AND DOES 1-1000, Defendants.	CASE NO. A-18-771224-C DEPT NO: 24

PEREMPTORY CHALLENGE OF JUDGE

At Plaintiffs' request, Plaintiffs, Fore Stars, Ltd. ("Fore Stars"), 180 Land Co., LLC ("180 Land Co."), and Seventy Acres, LLC ("Seventy Acres"), (collectively referred to as "Plaintiffs") by and through their counsel, James J. Jimmerson, Esq., of The Jimmerson Law Firm, P.C., hereby respectfully submits this Peremptory Challenge of Judge Jim Crockett, Department 24 of the Eighth Judicial District Court for the State of Nevada, pursuant to Nevada Supreme Court Rule 48.1 in the above-captioned matter. This

challenge is accompanied by a fee of Four Hundred Fifty Dollars ($450) as provided under the aforementioned Rule.

Dated this 19th day of April, 2018.

THE JIMMERSON LAW FIRM, P.C.

/s/ James J. Jimmerson Esq.

James J. Jimmerson, Esq. #000264
Email: ks[redacted]immersonlawfirm.com
JIMMERSON LAW FIRM P.C.
415 S. 6th St. #100
Las Vegas, NV 89101
Telephone: (702) 388-7171
Facsimile: (702) 387-1167
Attorneys for Plaintiffs Fore Stars, Ltd.,
180 Land Co., LLC., Seventy Acres, LLC

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of JIMMERSON LAW FIRM, P.C., and that on this 19th day of April, 2018 I caused a document entitled **PEREMPTORY CHALLENGE OF JUDGE** to be served as follows:

[x] pursuant to EDCR 8.05(a), EDCR 8.05(f), NRCP 5(b)(2)(D) and Administrative Order 14-2 captioned "In the Administrative Matter of Mandatory Electronic Service in the Eighth Judicial District Court," by mandatory electronic service through the Eighth Judicial District Court's electronic filing system;

[x] by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;

To the attorney(s) listed below at the address, email address, and/or facsimile number indicated below:

Mitchell J. Langberg, Esq., Bar No. 10118
BROWNSTEIN HYATT FARBER & SCHRECK LLP
100 North City Parkway, Suite 1600
Las Vegas, Nevada 89106
mlangberg@bhfs.com

An employee of JIMMERSON LAW FIRM, P.C.

Electronically Filed
4/20/2018 9:49 AM
Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
****

Fore Stars, Ltd., Plaintiff(s) vs. Daniel Omerza, Defendant(s)	Case No.: A-18-771224-C Department 2

NOTICE OF DEPARTMENT REASSIGNMENT

NOTICE IS HEREBY GIVEN that the above-entitled action has been randomly reassigned to Judge Richard F. Scotti.

☒ This reassignment follows the filing of a Peremptory Challenge of Judge Jim Crockett.

ANY TRIAL DATE AND ASSOCIATED TRIAL HEARINGS STAND BUT MAY BE RESET BY THE NEW DEPARTMENT.

Any motions or hearings presently scheduled in the FORMER department will be heard by the NEW department as set forth below.

Motion, on 05/02/2018, at 9:00 AM.
Motion, on 06/06/2018, at 9:00 AM

PLEASE INCLUDE THE NEW DEPARTMENT NUMBER ON ALL FUTURE FILINGS.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/Michelle McCarthy
Michelle McCarthy, Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that this 20th day of April, 2018

☒ The foregoing Notice of Department Reassignment was electronically served to all registered parties for case number A-18-771224-C.

/s/ Michelle McCarthy
Michelle McCarthy, Deputy Clerk of the Court

OPPS

THE JIMMERSON LAW FIRM, PC.
James J. Jimmerson, Esq.
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Attorneys for Plaintiffs

DISTRIC 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, vs. DANIEL OMERZA, DARREN BRESEE, STEVE CARIA, and DOES 1-1000, Defendants.	Case No.: A-18-771224-C Dept. No.: II **PLAINTIFFS' OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS (ANTI-SLAPP MOTION) PLAINTIFFS' COMPLAINT PURSUANT TO NRS 41.635 ET SEQ.**

Plaintiffs, Fore Stars, LTD. (hereinafter "Fore Stars"), 180 Land Company LLC (hereinafter "180 Land Company"), and Seventy Acres, LLC (hereinafter "Seventy Acres") (collectively "Land Owners" or "Plaintiffs"), by and through their undersigned counsel, James J. Jimmerson, Esq., of THE JIMMERSON LAW FIRM, P.C., hereby oppose the Special Motion to Dismiss (Anti-SLAPP Motion) Plaintiffs' Complaint Pursuant to Nevada Revised Statute ("NRS") 41.635 *et seq.* filed by Defendants Daniel Omerza (hereinafter "Omerza"), Darren Bresee ("Bresee"), and Steve Caria ("Caria") (collectively "Homeowners" or "Defendants").

This Opposition is made and based on the following Memorandum of Points and Authorities, the attached Declaration of James M. Jimmerson, Esq., the pleadings and papers on file in this matter, as well as any oral argument the Court may consider.[1]

DATED this 4th day of May, 2018.

THE JIMMERSON LAW FIRM, P.C.

By: */s/ James J. Jimmerson Es*
JAMES J. JIMMERSON, ESQ.
Nevada Bar No. 000264
JAMES M. JIMMERSON, ESQ.
Nevada Bar No. 12599
415 S. 6th Street, #100
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

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(702) 388-7171 - fax (702) 387-1167

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

This case involves certain homeowners' unjust efforts to prevent the transition of land adjacent to their common interest community from an inoperable golf course to beautiful homes, walking trails, and open space. The Land Owners were forced to initiate this lawsuit because the Defendants' conduct has gone far beyond mere participation in the political process to being unlawful and causing significant harm to the Land Owners and their livelihood.

Defendants' reliance on Judge Crockett's order in the *Binion* case is wholly misplaced and, in fact, evidences their improper conduct. The *Binion* matter (in which Frank Schreck, Esq., counsel with the firm representing these Defendants, was a Plaintiff) is a completely different type of case involving judicial review, and does not

[1] With respect to Defendants concurrently filed Request for Judicial Notice, the Land Owners respectfully request that this Court take judicial notice of the district court orders attached to their Complaint if it takes judicial notice of the documents request by Defendants. *See Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 846, 858 P.2d 1258, 1260 (1993) (The court may take into account matters of public record, orders, items present in the record of the case, and any exhibits attached to the complaint when ruling on a motion to dismiss for failure to state a claim upon which relief can be granted.); *see also* Comp., Exs. 2, 3, and 4. It is noteworthy that the copy of the January 11, 2018 hearing transcript – Exhibit A to Defendants' Request – is not an official, file-stamped copy

involve the "Queensridge" development. The case that *does* directly involve the Queensridge development was *Peccole, et al v. Peccole, A-16-739654-C,* in which the Court, the Honorable Judge Smith, entered detailed Findings of Fact, Conclusions of Law and Orders specifically citing to the Purchase Documents, Public Offering Statements, and Master Declaration of Queensridge, and demonstrates that the claim that they (or others) purchased their lots "in reliance" of the Peccole Ranch Master Plan is false. That Defendants rely upon a decision that post-dates all of the earlier events and decisions concerning the Queensridge development, a decision which **did not exist** at the time these individuals purchased their homes, is evidence that they were (and still are) cherry-picking the information they were communicating to their neighbors and that the claims are revisionist history. More importantly, such behavior constitutes fraud when material information is concealed, and thus is not "protected" under Anti-SLAPP statutes.

The Court should summarily deny Defendants' special motion because Nevada's anti-SLAPP statute is not implicated here. Indeed, the Defendants' claim of "good faith communication in furtherance of the right to ... free speech" is a ruse. They are not entitled to immunity under NRS 41.635 *et seq.* for several important reasons: (1) Nevada's anti-SLAPP statute does not protect against intentional torts; (2) the alleged claims against the Defendants are based on their wrongful conduct rather than free speech; (3) even if Defendants' conduct could be characterized as "communications," it was not "truthful or made without knowledge of its falsehood" and therefore doesn't constitute good faith communications; and (4) no absolute or qualified privilege applies. Alternatively, the Landowners respectfully request that they be allowed to conduct limited discovery pursuant to NRS 41.660(4) should the Court determine that the Defendants have established by a preponderance of the evidence that the Landowners' claims are based on "a good faith communication in furtherance of ... the right to free speech" under NRS 41.660(3)(a).

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II. RELEVANT FACTS.

The Land Owners are developing approximately 250 acres of land they own and control in Las Vegas, Nevada known as the Badlands Golf Course property (hereinafter the "Land") because golf course operations are no longer feasible. *See* Comp. at ¶ 9. They have the absolute right to develop the Land under its present RDP 7 zoning, which means that up to 7.49 dwelling units per acre may be constructed on it. *See* Comp. at ¶ 29, Ex. 2 at p. 18. The Land is adjacent to the Queensridge Common Interest Community (hereinafter "Queensridge") which was created and organized under the provisions of NRS Chapter 116. *See* Comp. at ¶ 10. The Defendants are certain residents of Queensridge who strongly oppose *any* redevelopment of the Land because some have enjoyed golf course views, which views they don't want to lose even though the golf course is not operational. *See* Comp. at ¶¶ 23-30. Rather than properly participating in the political process, however, the Defendants are using unjust and unlawful tactics to harm the Land Owners in an attempt to impede development by any means possible, lawful or not. They are doing so despite having received and being bound by prior, express written notice that, among other things, the Land is developable and any views or location advantages they have enjoyed may be obstructed by future development. *See* Comp. at ¶¶ 12-22. (CC&Rs)

III. ARGUMENT.

A. Nevada's Anti-SLAPP Statute.

Nevada's anti-slap lawsuit against public participation (SLAPP) statutes, codified in NRS Chapter 41.635 *et seq.*, protect a defendant from liability for engaging in "good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern" as addressed in "any civil action for claims based upon the communication." NRS 41.650. As the Nevada Supreme Court has explained in *John v. Douglas County School District*, "Nevada's anti-SLAPP statute is predicated on protecting 'well-meaning citizens who petition the government and then find themselves hit with retaliatory suits known as SLAPP[] [suits].'" *Id.* (*citing*

comments by State Senator on S.B. 405 Before the Senate, 67th Leg. (Nev., June 17, 1993)). Importantly, however, Nevada's anti-SLAPP statute only protects from civil liability those citizens who engage in ***good-faith communications***. *See* NRS 41.637 (emphasis added). Thus, Nevada's anti-SLAPP statute is not an absolute bar against substantive claims. *See id.* Instead, it only bars claims from persons who seek to abuse other citizens' rights to participate in the political process, and it allows meritorious claims against citizens who do not act in good faith. *See id.; see also John v. Douglas Cnty. Sch. Dist.,* 125 Nev. at 753, 219 P.3d at 1281. In other words, Nevada's anti-SLAPP statute does not apply in cases such as this where the Defendants have mischaracterized their wrongful conduct as "good faith participation in the political process" so that they can continue to harm the Land Owners with impunity.

In particular, the Defendants erroneously argue that they are immune from liability in this case because their "efforts to gather declarations from fellow residents" constitute "good faith communication(s) in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern" under all four categories in NRS 41.637, namely:

> 1. Communication that is aimed at procuring any governmental or electoral action, result or outcome;
> 2. Communication of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity;
> 3. Written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law; or
> 4. Communication made in direct connection with an issue of public interest in a place open to the public or in a public forum, which is truthful or is made without knowledge of its falsehood.

NRS 41.637.

Upon filing a special motion to dismiss, the statute sets out the process for the Court to follow and the burdens on the respective parties. *See* NRS 41.660(3). Specifically, the Court must first "[d]etermine whether the moving party has established, ***by a preponderance of the evidence***, that the claim is based upon a ***good faith***

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communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a) (emphasis added). Only after determining that the moving party has met this burden, the Court may then "determine whether the plaintiff has demonstrated with ***prima facie evidence*** a probability of prevailing on the claim." NRS 41.660(3)(b) (emphasis added). As set forth below, the Defendants have not and cannot meet their threshold burden of establishing, by a ***preponderance of the evidence,*** that the Land Owners' claims against them are based on their "good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.637.

B. Nevada's Anti-SLAPP Statute Does Not Protect Against Intentional Torts.

As an initial matter, it is noteworthy that most anti-SLAPP cases involve defamation claims. *See, e.g., Bongiovi v. Sullivan,* 122 Nev. 556, 138 P.3d 433 (2006). This case is not a defamation action, and the Land Owners are not trying to stifle the Defendants' expression of public concern or free speech. *See* Comp. at ¶¶ 33-68. Nor are they trying to prevent the Defendants from participating in the political process. *See id.* To the contrary, the Land Owners' seek an open examination of the Defendants' wrongful actions, including the intentional, repeated presentation of false information to their neighbors and manipulation of them into signing false declarations as part of an overall scheme to mislead the City of Las Vegas and its council members into denying the Land Owners' applications and delay and/or prevent the redevelopment of the Land. *See* Comp. at ¶¶ 23-28. Indeed, the Land Owners allege in the Complaint that the Defendants have intentionally and/or negligently participated in multiple concerted actions such as "preparation, promulgation, circulation, solicitation and execution" of ***false*** statements and/or declarations for the purpose of conjuring up sham opposition to the redevelopment of the Land from an inoperable golf course to beautiful homes, walking trails, and open space. *See id.* The Complaint further alleges that the Defendants are doing so with the intent to deliver such false statements and/or declarations to the City

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of Las Vegas for the improper purpose of presenting a false narrative to council members, deceiving them into denying the Land Owners' applications and, ultimately, sabotaging the Land Owners' development rights and their livelihoods. *See id.* Quite simply, Nevada's anti-SLAPP statutes do not protect the Defendants' conduct. *See* Mot. at pp. 8-11; *see also* NRS 41.635 *et seq.* Unquestionably, the First Amendment does not overcome intentional torts. *See Bongiovi v. Sullivan,* 122 Nev. at 472, 138 P.3d at 445 (No special protection is warranted when "the speech is wholly false and clearly damaging to the victim's business reputation.") (*quoting Dun & Bradstreet, Inc. v. Greenmoss Builders,* 472 U.S. 749, 762, (1985)); *see also Holloway v. Am. Media, Inc.,* 947 F.Supp.2d 1252, 1266-67 (N.D. Ala. 2013)(First Amendment does not overcome intentional infliction of emotional distress claim); *Gibson v. Brewer,* 952 S.W.2d 239, 248-49 (Mo. 1997)(First Amendment does not protect against adjudication of intentional torts). As such, the Defendants are not entitled to dismissal simply by characterizing their wrongful conduct as "free speech."

C. The Land Owners' Claims Are Based On The Defendants' Wrongful Conduct Rather Than Free Speech.

Although Nevada's anti-SLAPP protections include speech that seeks to influence a governmental action but is not directly addressed to the government agency, that immunity is limited to a "civil action for claims ***based upon the communication.***" NRS 41.650 (emphasis added). As discussed above, it does not overcome intentional torts or claims based on wrongful conduct. *See id.* As California courts have repeatedly held, an anti-SLAPP movant bears the threshold burden of establishing that "the challenged claims arise from acts in furtherance of the defendants' right of free speech or right of petition under one of the categories set forth in [California's anti-SLAPP statute]."[2] *Finton Constr., Inc. v. Bidna & Keys, APLC,* 190 Cal. Rptr. 3d 1, 9 (Cal. Ct. App. 2015)

[2] Because the Nevada Supreme Court has recognized that California's and Nevada's anti-SLAPP "statutes are similar in purpose and language," this Court may look to California law for guidance. *See Shapiro v. Welt,* 133 Nev. at ___, 389 P.3d at 268 (*citing John v. Douglas Cty. Sch. Dist.*, 125 Nev. at 752, 219 P.3d at 1281, *superseded by statute as stated in Shapiro v. Welt,* 133 Nev. at ___, 389 P.3d at 266); *cf.* NRS 41.637(4), *with* Cal. Civ. Proc. Code § 425.16(e).

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(citation omitted). When analyzing whether the movants have met their burden, the Court is to "'examine the *principal thrust* or *gravamen* of a plaintiff's cause of action to determine whether the anti-SLAPP statute applies.'" *Id.* (quoting *Ramona Unified School Dist. v. Tsiknas*, 37 Cal. Rptr. 3d 381, 388 (Cal. Ct. App. 2005) (emphasis in original)). In doing so, the Court must determine whether the "allegedly wrongful and injury-producing conduct ... provides the foundation for the claim." *Hylton v. Frank E. Rogozienski, Inc.*, 99 Cal. Rptr. 3d 805, 810 (Cal. Ct. App. 2009) (quotation and citation omitted).

Here, the Defendants' artful characterization of their actions as free speech is belied by the allegations in the Complaint which clearly demonstrate that the Land Owners' claims are based on wrongful conduct rather than "communications." *See* Comp. at ¶¶ 23-28. In particular, the Land Owners' intentional and negligent interference with prospective economic relations claims (Second and Third Claims for Relief) allege the Defendants engaged in wrongful conduct through the "preparation, promulgation, solicitation and execution" of the declarations which "contain false representations of fact, and using their intentional misrepresentations to influence and pressure homeowners to sign a statement," causing damage to the Land Owners' reputation, livelihood, and ability to develop the Land. Comp. at ¶¶ 42-43, 50-52; *see also LT Intern. Ltd. v. Shuffle Master, Inc.*, 8 F.Supp.3d 1238, 1248 (D. Nev. 2014)(allegations of tortious interference with prospective economic relations need not plead the existence of a valid contract and must only raise plausible claim for relief under NRCP 8 to avoid dismissal). Similarly, the Land Owners' conspiracy claim (Fourth Claim for Relief) is based on the Defendants' clandestine, behind-the-scenes "concerted action to improperly influence and/or pressure third-parties, including officials with the City of Las Vegas, and others with the intended action of delaying or denying the [Land Owners'] land rights and their intent to develop their property." Comp. at ¶ 58. The Complaint further alleges that the "co-conspirators agreement was implemented by their concerted actions to object to [the

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Land Owners'] development and to use their political influence" to delay and sabotage any development projects to the detriment of the Land Owners and their livelihoods. Comp. at ¶¶ 58-60; *see also Flowers v. Carville,* 266 F.Supp.2d 1245, 1249 (D. Nev. 2003) (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).

Additionally, the Land Owners' intentional and negligent misrepresentation claims (Fifth and Sixth Claims for Relief) allege that the Defendants' actions were intentional and/or negligent and were undertaken "with the intent of causing homeowners and the City of Las Vegas to detrimentally rely upon their misrepresentation of fact being falsely made...." Comp. at ¶¶ 62-68. According to the Complaint, the Defendants solicited and procured the statements and/or declarations, *i.e.*, false misrepresentations of fact, as part of a scheme to mislead council members into denying the Land Owners' applications. *See id.* The Defendants did so despite having received prior, express written notice that, among other things, the Land is developable and any views or location advantages they have enjoyed may be obstructed by future development. *See* Comp. at ¶¶ 12-22 & CC&Rs. They did so despite also being aware of court orders determining, among other things, that homeowners in Queensridge don't have any "vested rights" with respect to the Land and that the Land Owners have the absolute right to develop it. *See* Comp., Ex. 2 at ¶¶ 81-82, 108; Ex. 3.

Courts may take judicial notice of facts that are "not subject to reasonable dispute." NRS 47.130(2). Generally, the court will not take judicial notice of facts in a different case, even if connected in some way, unless the party seeking such notice demonstrates a valid reason for doing so. *Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (Nev. 2009) (holding that the court will generally not take judicial notice of records in other matters); *Carson Ready Mix v. First Nat'l Bk.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (Nev. 1981) (providing that the court will not consider evidence not

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appearing in the record on appeal). In this case, a decision on a petition for judicial review, such as the order from Judge Crockett (which, incidentally, is under appeal) does not allow for "findings of fact" and should be disregarded. Findings in the case before Judge Smith, however, were proper and made after receipt of substantial evidence upon which this Court can rely.[3]

Even if the statements and/or declarations were consistent with the "ruling in the Binion Litigation" as the Defendants argue, they were controverted by at least three other court orders which are public records attached to the Complaint and which the Defendants should have disclosed to their neighbors, particularly given their discussions with them about the court order in *Binion et al v. Fore Stars et al,* Dkt. No. A-17-729053. *See* Comp., Exs. 2, 3, and 4. *See also Brelient v. Preferred Equities Corp.,* 109 Nev. at 845, 858 P.2d at 1260 (In ruling on a motion to dismiss, the court may consider matters of public record, orders, items present in the record and any exhibits attached to the complaint.). The Defendants' omission of these material facts from the statements and/or declarations they prepared, executed, promulgated, solicited, and circulated to other homeowners in Queensridge is equivalent to a false representation. *See* Comp., Ex. 1; *see also Nelson v. Heer,* 123 Nev. 217, 225-26, 163 P.3d 420, 426 (2007) ("With respect to false-representation element of intentional-misrepresentation claim, the suppression or omission of a material fact which a party is bound in good faith to disclose is equivalent to a false representation, since it constitutes an indirect representation that such fact does not exist.").

In sum, the Defendants' admitted "efforts to gather declarations from fellow residents" are just the tip of the proverbial iceberg. *See* Mot. at p. 10. As detailed above, the allegations in the Complaint set forth far more in terms of the Defendants' wrongful conduct and the elements of cognizable claims against them. *See* Comp. at ¶¶ 39-68.

[3] The Plaintiffs attempted to appeal Judge Smith's Order of Dismissal of November 30, 2016, but the Appeal was dismissed as untimely. Only the issue of attorneys' fees and costs, and the denial of a Motion to Reconsider are presently on Appeal in that case, having been fully briefed.

Clearly, the Land Owners' claims are based on wrongful conduct rather than "communications" and therefore outside the purview of Nevada's anti-SLAPP statutes. The Defendants' special motion must be denied accordingly.

Moreover, there is no heightened pleading requirement for the Land Owners' interference with prospective economic relations and conspiracy claims. *See e.g., LT Intern. Ltd. v. Shuffle Master, Inc.*, 8 F.Supp.3d at 1248 (tortious interference with prospective economic relations claim must meet NRCP 8 pleading standard); *Flowers v. Carville,* 266 F.Supp.2d at 1249 (no heightened pleading requirement for a civil conspiracy under Nevada law). Instead, NRCP 8 requires only general factual allegations, not itemized descriptions of evidence. *See* NRCP 8 (complainant need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief"); *see also Breliant v. Preferred Equities Corp.,* 109 Nev. at 846, 858 P.2d at 1260 ("The test for determining whether the allegations of a complaint are sufficient to assert a claim for relief is whether [they] give fair notice of the nature and basis of a legally sufficient claim and the relief requested."). Thus, a pleading need only broadly recite the "ultimate facts" necessary to set forth the elements of a cognizable claim that a party believes can be proven at trial.

Furthermore, Nevada is a "notice pleading" state, which means that the ultimate facts alleged within the pleadings need not be recited with particularity. *See Hall v. SSF, Inc.,* 112 Nev. 1384, 1391, 930 P.2d 94, 98 (1996) ("[A] complaint need only set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of the claim and the relief sought.") (internal quotation marks omitted); *Pittman v. Lower Court Counseling,* 110 Nev. 359, 365, 871 P.2d 953, 957 (1994) ("Nevada is a notice pleading jurisdiction and we liberally construe pleadings to place matters into issue which are fairly noticed to the adverse party."), *overruled on other grounds by Nunez v. City of N. Las Vegas,* 116 Nev. 535, 1 P.3d 959 (2000). As such, the Land Owners are entitled under NRCP 8 to set forth only

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general allegations in their Complaint and then rely at trial upon specific evidentiary facts never mentioned anywhere in the pleadings. *See Nutton v. Sunset Station, Inc.,* 131 Nev. ___, 357 P.3d 966, 974 (Nev. Ct. App. 2015).

With respect to their misrepresentation claims, the Land Owners should be granted leave to amend their Complaint and/or conduct discovery pursuant to *Rocker v. KPMG LLP,* 122 Nev. 1185, 148 P.3d 703 (2006), if the Court determines that those claims are not plead with sufficient particularity pursuant to NRCP 9. *See* NRCP 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity...."); *cf. Rocker,* 122 Nev. at 1192-95, 148 P.3d at 707-10 (A relaxed pleading standard applies in fraud actions where the facts necessary for pleading with particularity are peculiarly within the defendant's knowledge or are readily obtainable by him. In such situations, district court should allow the plaintiff time to conduct the necessary discovery.). *See also Squires v. Sierra Nevada Ed. Found. Inc.,* 107 Nev. 902, 906 and n. 1, 823 P.2d 256, 258 and n. 1 (1991)(misrepresentation allegations sufficient to avoid dismissal under NRCP 12(b)(5)).

D. The Defendants' Conduct Does Not Constitute "Good Faith Communications".

Even if the Defendants' conduct is characterized as "communication" under Nevada's anti-SLAPP statute (which it is not), that communication is not protected unless it is in "good faith." NRS 41.637(4) (good faith communication is "truthful or is made without knowledge of its falsehood"); *see also Adelson v. Harris,* 133 Nev. ___, ___ n. 5, 402 P.3d 665, 670-71 n. 5 (2017)(Even if the communication in this case was "aimed at procuring a[ ] governmental or electoral action, result or outcome," that communication is not protected unless it is "truthful or is made without knowledge of its falsehood.")(*citing Delucchi v. Songer,* 133 Nev. ___, 396 P.3d 826, 829–30 (2017)). Here, in order for the Defendants' purported "communications" to be in good faith, they must demonstrate them to be "truthful or made without knowledge of [their] falsehood." NRS 41.637(4). In particular, the phrase "made without knowledge of its falsehood" has a

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well-settled and ordinarily understood meaning. *See Shapiro v. Welt,* 133 Nev. at ___, 389 P.3d at 267. The declarant must be unaware that the communication is false at the time it was made. *See id.* Here, however, the Complaint and exhibits thereto, public records, and the Defendants' own affidavits belie any claim of truthfulness or ignorance of falsity. *See* Comp., Exs. 1, 2 and 3; *cf.* Def. Mot., Exs. 1, 2, and 3.

Specifically, the Defendants executed purchase agreements when they purchased their residences within the Queensridge Common Interest Community which expressly acknowledged their receipt of, among other things, the following: (1) Master Declaration of Covenants, Conditions, Restrictions and Easements for Queensridge (Queensridge Master Declaration), which was recorded in 1996; (2) Notice of Zoning Designation of Adjoining Lot which disclosed that the Land was zoned RPD 7; (3) Additional Disclosures Section 4 – No Golf Course or Membership Privileges which stated that they acquired no rights in the Badlands Golf Course; (4) Additional Disclosure Section 7 – Views/Location Advantages which stated that future construction in the planned community may obstruct or block any view or diminish any location advantage; and (5) Public Offering Statement for Queensridge Towers which included these same disclaimers. *See* Comp. at ¶¶ 10-12, 15-20. Furthermore, the deeds to the Defendants' respective residences "are clear by their respective terms that they have no rights to affect or control the use of Plaintiffs' real property." Comp. at ¶ 21. It is broadly accepted that CC&Rs create contractual obligations binding upon the homeowners. *see Sandy Valley Assocs. V. Sky Ranch Estates Owners Ass'n.* 117 Nev. 948, 954, 35 P 3d 964, 968 (2001), receded from on other grounds by *Horgan v. Felton,* 123 Nev. 577, 170 P. 3d 982 (2007) ("the CC&Rs constituted a written contract to convey land"); *see also Diaz v. Ferne*, 120 Nev. 70, 73, 84 P.3d 664, 665-66 (2004) (using contract interpretation rules to interpret CC&Rs). The Defendants nevertheless prepared, promulgated, solicited, circulated, and executed the following declaration to their Queensridge neighbors in March 2018:

TO: City of Las Vegas

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> The Undersigned purchased a residence/lot in Queensridge which is located within the Peccole Ranch Master Planned Community.
>
> The undersigned made such purchase 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 as Parks Recreation – Open Space which land use designation does not permit the building of residential units.
>
> At the time of purchase, the undersigned paid a significant lot premium to the original developer as consideration for the open space/natural drainage system....

Comp., Ex. 1.

In their special motion, the Defendants don't acknowledge the statements in the declarations as their own or affirmatively assert their truthfulness. *See* Def. Mot. at pp. 11-12. Coincidently, however, they all feign ignorance of falsity in paragraph 13 of their respective affidavits, claiming to "have no understanding that any of these statements are false." Def. Mot., Ex. 1 at ¶ 13, Ex. 2 at ¶ 13, Ex. 3 at ¶ 13. Yet they don't dispute any of the allegations in the Complaint about the Queensridge Master Declaration, the Land Owners having the absolute right to develop the Land based solely on the RPD 7 zoning, or their having received notice that any views and/or locations advantages they enjoyed could be obstructed in the future. *See gen.,* Def. Mot., Exs. 1, 2, and 3. Nor do they dispute knowledge of the other court orders which involved their similarly situated neighbors in Queensridge, which are public records attached to the Complaint, and which expressly found that: (1) the Land Owners have complied with all relevant provisions of NRS Chapter 278 and properly followed procedures for approval of a parcel map over their property; (2) Queensridge Common Interest Community is governed by NRS Chapter 116 and not NRS Chapter 278A because there is no evidence remotely suggesting that the Land is within a planned unit development; (3) the Land is not subject to the Queensridge Master Declaration, and the Land Owners' applications to develop the Land are not prohibited by, or violative of, that declaration; (4) Queensridge residents have no vested rights in the Land; (5) the Land Owners' development applications are legal and proper; (6) the Land Owners have the right to close the golf

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course and not water it without impacting the Queensridge residents' rights; (7) the Land is not open space and drainage because it is zoned RPD 7; and (8) the Land Owners have the absolute right to develop the Land because zoning – not the Peccole Ranch Master Plan – dictates its use and the Land Owners' rights to develop it. *See id.; see also* Comp., Ex. 2 at ¶¶ 41-42, 52, 56, 66, 74, 78-79, and 108; Ex. 3 at ¶¶ 8, 12, 15-23, 26, 61, 64-67, and 133. Instead, the Defendants claim to have "no understanding that any of the statements are false" based solely on "conversations with other Queensridge residents" and the court order in *Binion et al v. Fore Stars et al,* Dkt. No. A-17-729053. *See* Def. Mot., Ex. 1 at ¶¶ 7-9, Ex. 2 at ¶¶ 7-9, Ex. 3 at ¶¶ 7-9. In other words, the Defendants fraudulently procured signatures by picking and choosing the information they shared with their neighbors to manipulate them into signing the declaration. *See id.*[4] At best, they simply ignored or disregarded known, material facts that directly conflicted with the statements in the declaration and undermined their plan to present a false narrative to the City of Las Vegas and mislead council members into delaying and ultimately denying the Land Owners' development applications. *See id.; see also* Comp., Ex. 1. Such conduct hardly constitutes "good faith" for purposes of immunity under Nevada's anti-SLAPP statute. *See* NRS 41.637. For these reasons, the Defendants are not entitled to immunity under NRS 41.635 *et seq.* as a matter of law.

E. The Defendants' Conduct Is Not Privileged.

Finally, the Defendants concede authorship of the statements in the declaration and devote the last five pages of their special motion to the absurd notion that their

[4] Defendants' reliance on Judge Crockett's order in the *Binion* case is wholly misplaced and, in fact, evidences their improper conduct. As the Court knows, the *Binion* matter is completely different and does not involve the Queensridge development. That Defendants rely upon a decision that post-dates all of the earlier events and decisions concerning the Queensridge development is evidence that they were (and still are) cherry-picking the information they were communicating to their neighbors. Such behavior constitutes fraud when material information is concealed. *See Epperson v. Roloff,* 102 Nev. 206, 212, 719 P.2d 799, 803 (1986) ("[W]e also note that a defendant may be found liable for misrepresentation even when the defendant does not make an express misrepresentation, but instead makes a representation which is misleading because it partially suppresses or conceals information.".

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"efforts in gathering information for an anticipated proceeding are privileged." Def. Mot. at p. 15-20. This contention fails for at least three reasons. First, the absolute litigation privilege is limited to defamation claims, and this is not a defamation action. *See Fink v. Oshins,* 118 Nev. 428, 433, 49 P.3d 640, 645 (2002)(absolute privilege limited to defamation cases).

Second, only the fair, accurate, and impartial reporting of judicial proceedings is privileged and nonactionable. *See Adelson v. Harris,* 133 Nev. at ___, 402 P.3d at 667. Nevada "has long recognized a special privilege of absolute immunity from defamation given to the news media and the general public to report newsworthy events in judicial proceedings." *Id. (quoting Sahara Gaming Corp. v. Culinary Workers Union Local 226,* 115 Nev. 212, 214, 984 P.2d 164, 166 (1999); *citing Circus Circus Hotels, Inc. v. Witherspoon,* 99 Nev. 56, 60, 657 P.2d 101, 104 (1983) ("[There] is [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." (citation omitted)). "[T]he 'fair, accurate, and impartial' reporting of judicial proceedings is privileged and nonactionable ... affirming the policy that Nevada citizens have a right to know what transpires in public and official legal proceedings." *Lubin v. Kunin,* 117 Nev. 107, 114, 17 P.3d 422, 427 (2001) (quoting *Sahara Gaming,* 115 Nev. at 215, 984 P.2d at 166). Not only are the Defendants' purported "communications" in this case far from "fair or accurate" as analyzed above, but they were not "uttered or published in the course of judicial proceedings" under any stretch of the allegations in the Complaint. *See Adelson v. Harris,* 133 Nev. at ___, 402 P.3d at 667; *see also* Comp. at ¶¶ 23-30.

Likewise, there were no good faith "communications preliminary to a proposed judicial proceeding or quasi-judicial proceeding." *Bank of America Nevada v. Bordeau,* 115 Nev. 263, 267, 982 P.2d 474, 476 (1999) (statements made to investigator during a statutorily required fact-finding investigation by the FDIC not protected by absolute

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privilege granted to quasi-judicial bodies). Indeed, preparing, promulgating, circulating, soliciting, and executing false declarations within one's neighborhood – even as part of an overall scheme to mislead council members during some undetermined, future hearing – hardly constitutes the quasi-judicial proceedings contemplated by Nevada courts. *See id.; cf. Knox v. Dick.*99 Nev. 514, 518, 665 P.2d 267, 270 (1983) (guidelines for grievance board indicated that hearing was conducted in manner consistent with quasi-judicial administrative proceeding). Thus, an absolute privilege is inapplicable here.

Third, the qualified or conditional privilege alternatively sought by the Defendants only applies 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 a duty, if it is made to a person with a corresponding interest or duty." *Bank of America Nevada v. Bordeau,* 115 Nev. at 266-67, 982 P.2d at 476 (statements made to FDIC investigators during background check of employee are subject to conditional privilege). As a party claiming a qualified or conditional privilege in publishing a defamatory statement, the Defendants must have acted in good faith, without malice, spite or ill will, or some other wrongful motivation, and must believe in the statement's probable truth. *See id.; see also Pope v. Motel 6,* 121 Nev. 307, 317, 114 P.3d 277, 284 (2005) (statements made to police during investigation subject to conditional privilege). Not only are the purported "communications" in this case beyond those contemplated by the Nevada Supreme Court as privileged, but the Defendants did not act in good faith as detailed above. At minimum, 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. *See 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). The Court should reject their claim of privilege accordingly.

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F. If The Court Determines That Nevada's Anti-SLAPP Statute Is Implicated Here The Land Owners Are Entitled To Discovery Pursuant To NRS 41.660 4).

Should the Court determine that the Defendants have met their threshold burden of establishing, by a preponderance of the evidence, that any of the Land Owners' claims are based on acts protected by Nevada's anti-SLAPP statute (which they have not), the Land Owners respectfully move for discovery pursuant to NRS 41.660(4). Indeed, NRS 41.660 provides that the Court "shall allow limited discovery for the limited purpose of ascertaining such information" necessary to "demonstrate with prima facie evidence a probability of prevailing on the claim." NRS 41.660(3)(b); NRS 41.660(4). In this case, such limited discovery will afford the Land Owners the opportunity to obtain information necessary for their opposition, *i.e.*, presentation of prima facie evidence of a probability of prevailing on their claims against the Defendants. *See, e.g., Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 850 (9th Cir. 2001) (reasoning that the district court erred in refusing the plaintiff's discovery request under FRCP 56 and the California anti-SLAPP statute); *see also, e.g., Pacquiao v. Mayweather*, No. 209-CV-2448-LRH-RJJ, 2010 WL 1439100, at *1 (D. Nev. Apr. 9, 2010) (granting plaintiff's request for limited discovery to oppose the defendants' Nevada anti-SLAPP motion in order to challenge, *inter alia*, defendants' statements about their knowledge and reasoning). Specifically, the Land Owners should be allowed discovery in order to obtain facts including, but not limited to, from whom the Defendants received the information stated in the declarations, who prepared them, whether they read their CC&Rs, whether they read Judge Smith's orders, what they understood to be the implications of their CC&Rs as well as the court orders, why they believe the declarations to be accurate, what efforts they took, if any, to ascertain the truth of the information in the declarations, and with whom and the contents of the conversations they had with other Queensridge residents. According to their affidavits, the Defendants are uniquely in possession of this information, and the Land Owners are entitled to an opportunity to conduct discovery in order to elicit this

information. Accordingly, the Land Owners respectfully requests that the Court allow limited discovery for this purpose should it determine that the Defendants have met their burden under NRS 41.660(3)(a). *See* Affidavit of James M. Jimmerson, attached hereto.

IV. CONCLUSION.

Based on the foregoing, the Court should deny the Defendants' special motion in its entirety. If the Court somehow determines that the Home Owners have met their burden under NRS 41.660(3)(a), the Landowners respectfully requests that the Court allow them to conduct limited discovery pursuant to NRS 41.660(4).

DATED this 4th day of May, 2018.

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/s/ James J. Jimmerson Es .
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DECLARATION OF JAMES M. JIMMERSON ESQ. IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS ANTI-SLAPP MOTION PLAINTIFFS' COMPLAINT PURSUANT TO NRS 41.635 *ET SEQ.*

JAMES M. JIMMERSON, ESQ., under penalty of perjury, does hereby declare:

1. I am counsel of record in the above-captioned matter. I have personal knowledge of the subject matter of this Declaration and I am competent to testify thereto, except for those matters stated upon information and belief, and as to those matters, there exists a reasonable basis to believe they are true.

2. For the reasons set forth in the Opposition, the Court should deny the motion to dismiss. However to the extent the Court is willing to consider the motion, Plaintiff should be granted necessary discovery. Indeed, should the Court determine that the Defendants have met their threshold burden of establishing, by a preponderance of the evidence, that any of the Land Owners' claims are based on acts protected by Nevada's anti-SLAPP statute, the Land Owners should be permitted to conduct discovery. NRS 41.660(4) provides that the Court "shall allow limited discovery for the limited purpose of ascertaining such information" necessary to "demonstrate with prima facie evidence a probability of prevailing on the claim." The Land Owners intend to conduct discovery to obtain facts including, but not limited to, from whom the Defendants received the information stated in the declarations, who prepared them, their knowledge of their CC&Rs, their knowledge of Judge Smith's orders, what they understood to be the implications of their CC&Rs as well as the court orders, why they believe the declarations to be accurate, what efforts they took, if any, to ascertain the truth of the information in the declarations, and with whom and the contents of the conversations they had with other Queensridge residents. According to their affidavits, the Defendants are uniquely in possession of this information, and the Land Owners are entitled to an opportunity to conduct discovery in order to elicit information to demonstrate with prima facie evidence a probability of prevailing on their claims.

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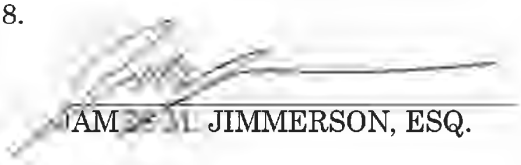
I declare under the penalty of perjury and laws of the State of Nevada that the foregoing is true and correct to the best of my knowledge.

Executed on this 4th day of May, 2018.



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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of May, 2018, I caused a true and correct copy of the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS (ANTI-SLAPP MOTION) PLAINTIFFS' COMPLAINT PURSUANT TO NRS 41.635 ET SEQ.** to be submitted electronically for filing and service with the Eighth Judicial District Court via the Electronic Filing System to the following:

Mitchell Langberg, Esq.
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway
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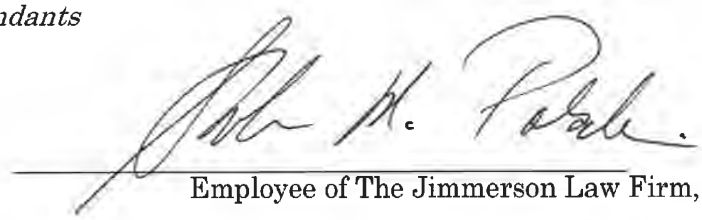
Las Vegas, Nevada 89106
Attorneys for Defendants



Employee of The Jimmerson Law Firm, P.C.