IN THE SUPREME COURT OF THE STATE OF NEVADA

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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, Appellants v. DANIEL OMERZA, DARREN BRESEE, STEVE CARIA, Respondents.	Case No.: 82338 (lead case)
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, Appellants v. DANIEL OMERZA, DARREN BRESEE, STEVE CARIA, Respondents.	Case No.: 82880

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION.

Conspicuously absent from Respondents Daniel Omerza ("Omerza"), Darren Bresee ("Bresee"), and Steve Caria's ("Caria") (collectively "Respondents" or "Residents") answering brief is any mention of Frank Schreck or his role in this case. The Residents' silence, however, speaks volumes. As the Court may recall, co-conspirator Schreck is a partner at Brownstein Hyatt Farber & Schreck LLP, the law firm representing the Residents in this litigation. Moreover, Schreck prepared the contents of the Declaration, including the indisputably false statements therein, and lobbied Omerza, Bresee, and Caria to circulate and solicit signatures on copies of that Declaration as part of their plan to sabotage development of the Land.[1] He also participated in other behind-the-scenes unlawful actions which ruined the Landowners' business interests. Upon filing of the Landowners' complaint, Schreck engaged his firm to *defend* the Residents on a *contingency basis* in a case with no counterclaims or other affirmative basis for recovery. Since then, Schreck's firm has purportedly spent nearly 650 hours working on the case at hourly rates upwards of $875. Although the Residents did not incur *any* attorney fees because

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[1] Appellants Fore Stars, Ltd., 180 Land Co., LLC, and Seventy Acres, LLC, (collectively "Appellants" or "Landowners") sought to develop approximately 250 acres of land they own and control in Las Vegas, Nevada formerly known as the Badlands Golf Course property (hereinafter the "Land").

of their contingency fee arrangement with Schreck's firm, they nevertheless sought an exorbitant attorney fees award after the district court improperly granted their special motion to dismiss. Although ultimately less than the amount initially sought by the Residents, the nearly half a million dollars awarded by the district court is still outrageous and must be set aside or substantially reduced.

Rather than address the merits of the Landowners' assignments of error, the Residents simply regurgitate arguments from their district court pleadings. In doing so, they fail to respond to much of the Landowners' opening brief which this Court should deem as confessions of error. As to the Residents' substantive arguments, they all lack merit and should be rejected accordingly. Specifically, the Residents' objection to the Landowners' statement of facts is nothing more than a disingenuous attempt to control the narrative and distract the Court's attention from the relevant inquiry. It does, however, have the presumably unintended consequence of highlighting that the district court improperly limited the scope of discovery under NRS 41.660(4).

The Residents' claim that the Landowners waived any right to challenge the discovery below is also meritless given that a motion to compel would have been futile. Similarly, the district court was obligated to independently evaluate all the Landowners' claims for minimal merit regardless of whether the Residents believe the Landowners demonstrated as much. And, the Landowners' claims all have

minimal merit, including their civil conspiracy claim which is not barred by the absolute litigation privilege. As such, the Landowners met their step-two burden under NRS 41.660, and the district court erred in granting the Residents' special motion to dismiss. Because the district court's attorney fees award is likewise erroneous, both decisions should be reversed in their entirety.

II. LEGAL ARGUMENT.

A. The Residents' Objection To The Landowners' Statement Of Facts Is Meritless But It Shows That The District Court Improperly Limited The Scope Of Discovery Under NRS 41.660(4).

The Residents' request to strike the Landowners' statement of facts is a frivolous litigation tactic which they repeatedly use to control the narrative presented to this and lower courts. They do so presumably because the true facts regarding their actions and wrongful conduct indisputably evidence the Landowners' claims. Importantly, the Residents' own answering brief does not include cites to the record for every statement/proposition asserted, making their request particularly incredulous. *See* NRAP 28(e)(1); *see also* Respondents' Answering Brief (RAB) 1-36. The Court should summarily reject it.

Moreover, anti-SLAPP motions differ from summary judgment motions in that they are brought at an early stage of the litigation, ordinarily within 60 days after the complaint is served. *See* NRS 41.660(2). The defendant has not yet answered the complaint, and discovery is typically stayed, absent that provided for

by the anti-SLAPP statute. *See* NRS 41.660(3)(e), (4). As such, the only evidentiary support for a plaintiff's claims in opposing an anti-SLAPP motion is that revealed because of any limited discovery the district court allows pursuant to NRS 41.660(4). Given this procedural framework, the Residents' objection lacks merit. *See id.* And, it seems disingenuous because NRS 41.660 benefits them by allowing defendants to test the sufficiency of the complaint before the commencement of ordinary pretrial proceedings, including extensive discovery. *See id.* That the Residents have repeatedly opposed *any* discovery throughout the proceedings in this case, including that expressly provided for by statute and the courts, makes their objection beyond disingenuous. *See* NRS 41.660(4); APP 0573-0639, 0671-0681, 0713-0715, 0731-0829; *see also Omerza v. Fore Stars,* 2020 WL 406783, at *6-7 (Jan. 23, 2020) (unpublished disposition).

Finally, even if the Landowners' brief is somehow lacking (which it is not), it is because the district court refused the requested discovery, so they were precluded from discovering evidence of the Residents' actions and wrongful conduct. Despite this error, the Landowners' claims have the minimal merit required as set for in their opening brief and reiterated below. *See* Section II(D), *infra; see also* AOB 38-46. If anything, the Residents' otherwise meritless objection further demonstrates that the district court improperly limited the scope of discovery under NRS 41.660(4).

Under NRS 41.660, the district 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). As such, the Landowners were entitled to *all* discovery that would afford them the opportunity to obtain information necessary for their opposition, *i.e.*, presentation of prima facie evidence of a probability of prevailing on their claims. *See id.* Moreover, discovery into a defendant's state of mind is appropriate for purposes of ascertaining information necessary to demonstrate a claim has minimal merit. *See Toll v. Wilson,* 135 Nev. at ___, 453 P.3d, 1215, 1219 (2019) (district court properly ordered discovery to determine whether defendant made statements with actual malice).

Post-remand, in particular, the Landowners sought limited discovery so that they could ascertain, among other things, facts and evidence of the Residents' knowledge, and motives surrounding their efforts to conjure up false opposition to the Landowners' development plans in order to disrupt their business interests, delay or defeat development of their Land, harm their reputation, and ruin their livelihood. *See* APP 0731-0737, 0800-0815. In other words, the Landowners sought discovery into the Residents' state of mind when they purchased their residences/lots as well as around the time they circulated and solicited signatures on copies of the Declaration. *See id*. Unfortunately, none of this discovery was

permitted by the district court. Because the requested discovery was proper under NRS 41.660(4) and *Toll*, the district court's refusal to allow it constitutes an abuse of discretion. The Residents' objection highlights as much, further demonstrating why reversal is necessary and appropriate.

Significantly, the Residents do not address this contention or even cite *Toll* in their answering brief. *See* NRAP 31(d)(2) ("The failure of respondent to file a brief may be treated by the court as a confession of error and appropriate disposition of the appeal thereafter made."); *see also Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (treating respondent's failure to respond to appellant's argument as a confession of error). The Court should therefore conclude that the Residents have confessed the error here.

Given their failure to address or even cite *Toll*, the Court should likewise conclude that the Residents have confessed error with regards to the district court's law of the case findings and conclusions. *See* APP 1294. Although they argue the law of the case, the Residents don't address the district court's mistaken belief that the doctrine prohibited any inquiry into the Residents' state of mind. As *Toll* indisputably recognizes, discovery into the Residents' knowledge and motives surrounding their efforts to conjure up false opposition to the Landowners' development plans is entirely permissible under NRS 41.660(4) for purposes of the Landowners' step-two burden. *See Toll v. Wilson,* 135 Nev. at ___, 453 P.3d at

1219 (district court properly ordered discovery to determine defendant's state of mind when statements were made). That the Residents established "good faith communications" for purposes of their step-one burden should not have – as the district court erroneously thought – precluded the Landowners from discovering evidence of the Residents' state of mind as well as their other actions and wrongful conduct. The Residents' failure to respond to this argument or even cite *Toll* constitutes a confession of the district court's error in refusing to allow the Landowners' requested discovery.

B. A Motion To Compel Would Have Been Futile.

Contrary to the Residents' contention, a motion to compel discovery would have been futile, and it is well established that the law does not require the doing of a futile act. *See, e.g., Iverson v. Xpert Tune, Inc.,* 553 So.2d 82, 87-88 and n. 1 (Ala. 1989) (noting that Alabama and federal rules are virtually identical (as are Nevada and federal rules) and that filing a motion to compel discovery was unnecessary as it would have been futile). Here, the Residents objected to the Landowners' discovery requests no less than six times, and the district court sustained *all* of those objections. *See* APP 0573-0639, 0671-0681, 0713-0715, 0731-0829. With each objection, the district court further limited the scope of the Landowners' discovery. *See id.* Obviously, the district court was never going to allow the Landowners' discovery requests, and the Residents' waiver argument is simply a red herring.

In particular, the Landowners first sought discovery in 2018 when they opposed the Residents' special motion to dismiss and while the interlocutory appeal from the order denying that motion was pending. *See* APP 0573-0631. The Residents objected to any discovery as well as the discovery commissioner's subsequent report recommending discovery. *See* APP 0671-0681. The district court acquiesced to the Residents and denied any discovery. *See* APP 0713-0715.

Following this Court's remand, the Landowners again sought discovery, some of which was granted by the district court over the Residents' objection. *See* APP 0731-0749, 0800-0815. Rather than simply responding, however, the Residents immediately sought to circumvent the discovery, filing a request to further limit discovery disguised as a "request for clarification." *See* APP 0750-0752. The Landowners were not permitted to respond, and the district court issued a subsequent order on June 5, 2020 which further limited the discovery. *See* APP 0753.

Thereafter, the Landowners served requests for production on the Residents, seeking information as to the beliefs formed by the Residents related to the statements in the Declaration (i.e., their state of mind) and the documents that supported those beliefs. *See* APP 0800-0815. The Residents refused to answer the discovery, claiming it was overbroad. *See* APP 0738-0748, 0754-0799. In a good faith effort to resolve the matter, the Landowners served amended requests for

production and ultimately only posed eight (8) questions to Omerza, four (4) to Caria, and three (3) to Bresee. *See* APP 0800-0815.

Once again, the Residents objected, refused to answer the discovery requests, and instead filed a motion for protective order claiming that the discovery was still overbroad. *See* APP 0754-0799, 0816-0821. The district court granted the Residents' motion for protective order in its entirety, further limiting the Landowners' discovery requests. *See* APP 0823-0829. Given all this, a motion to compel discovery would have been futile. As such, the Landowners were not required to file such a motion, and the Court should reject the Residents' spurious contention otherwise.

C. The District Court Was Obligated To Independently Evaluate All Of The Landowners' Claims.

In their answering brief, the Residents inappropriately blame the Landowners for the district court's failure to properly evaluate all their claims. *See* RAB 24-26. In assessing the merits of a special motion to dismiss pursuant to NRS 41.660, it is well established that the district court must independently review each challenged claim. *See, e.g., Abrams v. Sanson,* 458 P.3d 1062, 1069-70 and n. 4, 136 Nev. ___,

___ and n. 4 (2020).[2] In doing so, the district court must focus on the particular allegations rather than the form of the complaint to determine whether each claim has minimal merit. *See id.*; *see also* NRS 41.665(2) (stating that a plaintiff's burden under prong two is the same as a plaintiff's burden under California's anti-SLAPP law; *Navellier v. Sletten*, 52 P.3d 703, 712-13 (Cal. 2002) (establishing the "minimal merit" burden for a plaintiff). In other words, the district court was obligated to independently review each of the Landowners' claims for minimal merit regardless of whether the Residents believe the Landowners demonstrated as much. *See Abrams v. Sanson,* 458 P.3d at 1070; *see also* RAB 24-26. The district court's failure to do so here constitutes reversible error.

Moreover, a complaint should not be dismissed in its entirety where it contains claims arising from both protected and unprotected communications. *See Abrams v. Sanson,* 458 P.3d at 1069-70, 136 Nev. at ___; *see also Baral,* 376 P.3d at 616. In such cases, the district court may dismiss only those claims based on allegations of protected activity which lack minimal merit. *See Baral,* 376 P.3d at

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[2] *Citing Baral v. Schnitt*, 376 P.3d 604, 616 (Cal. 2016) (providing that the review should focus on the particular allegations, their basis in protected communications, and their probability of prevailing, rather than the form of the complaint); *Okorie v. L.A. Unified Sch. Dist*., 222 Cal. Rptr. 3d 475, 487, 493-96 (Ct. App. 2017) (observing that the motion to dismiss may challenge specific portions or the entirety of a complaint and proceeding to review the merits of each challenged claim).

616. This analysis serves to ensure that the anti-SLAPP statutes protect against frivolous lawsuits designed to impede protected public activities without striking legally sufficient claims. *See Abrams v. Sanson,* 458 P.3d at 1069-70, 136 Nev. at ___ (*citing* Navellier, 52 P.3d at 711).

Critically, the district court dismissed the Landowners' complaint in its entirety without evaluating *each* of their claims independently. *See* APP 1270. Again, this alone constitutes reversible error. *See Abrams v. Sanson,* 458 P.3d at 1069-70, 136 Nev. at ___. In doing so, however, the district court compounded this error by: (1) disregarding all the allegations of unprotected activity in the complaint; and (2) failing to parse out the few allegations of protected activity identified by this Court. *See Omerza v. Fore Stars,* 2020 WL 406783, at *6-7. Indeed, this is not a defamation case, and the Landowners' complaint is replete with allegations of unprotected activity, including slander of title as well as other repeated and repugnant actions and wrongful conduct by the Residents, which was all part of an agreement, scheme and plan to delay, disrupt and ultimately defeat development of the Land as well as harm the Landowners' reputation and ruin their livelihood. *See* APP 0001-0096.

Importantly, the limited discovery permitted by the district court revealed admissible evidence that Omerza, Bresee, and Caria did much more than merely communicate with other Queensridge residence in connection with procuring

signatures on the form declarations and/or in signing the form declaration in anticipation of some future city council proceedings. *See, e.g.,* APP 0853-1216. Indeed, those communications were only a small part of their civil conspiracy with Frank Schreck, council members, and others to delay, disrupt or defeat development of the Land as well as harm and otherwise interfere with the Landowners' business interests. *See id.; see also* AOB 0039-0046. In other words, the Residents' protected activity pales in comparison to their unprotected activity. *See id.* All of this was disregarded by the district court, which is significant because only those claims based on the Residents' protected activity were subject to dismissal *if* they lacked any merit. *See Abrams v. Sanson,* 458 P.3d at 1069-70, 136 Nev. at ___; *see also Baral,* 376 P.3d at 616. In other words, none of the Landowners' claims should have been dismissed to the extent that they were based on unprotected activity. *See id.* By summarily dismissing the Landowners' claims in their entirety, the district court failed to parse out the Residents' protected activity or independently assess each of the Landowners' claims. In doing so, it was impossible for the district court to determine whether those claims lacked any merit let alone whether they were subject to dismissal. All of these errors are significant and compel reversal here.

D. The Landowners' Claims All Have Minimal Merit, Including Their Civil Conspiracy Claim.

The step-two burden under NRS 41.660(3)(b) is hardly akin to the summary judgment standard the Residents improperly espouse and the district court

misapplied. *See* RAB 26; APP 1298-1299. Instead, the standard is low as plaintiffs need only show that some portion of their claims have minimal merit. *See Baral,* 376 P.3d at 613, *cited in Abrams,* 458 P.3d at 1069-70 and n. 4, 136 Nev. at ___ and n. 4; *see also Bikkina v. Mahadevan,* 241 Cal.App.4th 70 (Ct. App. 2015). As detailed in their opening brief, the Landowners' claims all have minimal merit. *See id.; see also* AOB 38-46. The Residents concede as much by only addressing the merits of the Landowners' conspiracy claim in their answering brief. *See* NRAP 31(d)(2); *see also Bates*, 100 Nev. at 682, 691 P.2d at 870 (respondent's failure to respond to appellant's argument treated as a confession of error).

With respect to the conspiracy claim, the evidence gathered by the Landowners – despite the very limited discovery allowed – shows that Omerza, Bresee, and Caria joined Schreck, Steve Seroka, and others in wrongful conduct, including disseminating false information to individual council members and their staff as well as others at fundraisers, parties, and private meetings in order to sabotage any development of the Land and destroy the Landowners' business interests and livelihood. *See* APP 0853-1216. Contrary to the Residents' contention, Schreck's reference to "everything we do going forward" in the email attached to Caria's discovery responses evidences an agreement "between the Defendants to harm the Landowners." *See id.; cf.* RAB 27. The communications between the Residents and city council members regarding development of the Land, as well as

those same council members relationship with Schreck and their adversity to any development of the Land further evidences an agreement to do something unlawful, namely, to improperly influence a city council vote as well as destroy the Landowners' development plans and business interests. *See id.; see also* APP 1007-1011, 1014-1015, 1019-1020, 1060-1061, 1066-1069. Again, that Bresee and Caria sought to delay a city council vote until their friend Seroka took office and could "get rid of [the] development" of the Land also shows the concerted action of these conspirators. *Id*. All of this is prima facie evidence of the agreement element of the Landowners' conspiracy claim and much more than the protected activity identified by this Court. *See Omerza v. Fore Stars,* 2020 WL 406783, at *6-7*; see also Flowers v. Carville,* 266 F.Supp.2d 1245, 1249 (D. Nev. 2003) (An actionable civil conspiracy in Nevada 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."); *Eikelberger v. Tolotti,* 96 Nev. 525, 528 n. 1, 611 P.2d 1086, 1088 n. 1 (1980) ("The gist of a civil conspiracy is not the unlawful agreement but . . . the wrongful action done by the defendants to the injury of the plaintiff."). As such, the Landowners' conspiracy claim indisputably has minimal merit. *See Baral,* 376 P.3d at 613 (to meet step-two burden of anti-SLAPP statute, plaintiffs need only show that some portion of their claims have minimal merit).

Likewise, it is public knowledge that the Landowners have lost economic opportunities to develop the Land and that it remains undeveloped today. *See* AOB 44, 46; *see also Brelient v. Preferred Equities Corp.,* 109 Nev. 842, 845, 858 P.2d 1258, 1260 (1993) (court can take judicial notice of public information). And, they continue to pay all of the carrying costs associated with the Land, including exorbitant real estate taxes, maintenance and upkeep. This too is a matter of public record. *See Brelient,* 109 Nev. at 845, 858 P.2d at 1260 (court may consider matters of public record). Although the Residents ignore it, this public information is evidence of the Landowners' damages resulting from the Residents' actions and wrongful conduct even though certain city council proceedings never took place. *See* AOB 44, 46; *cf.* RAB 27-28. Again, the Residents don't even mention these damages in their answering brief, which failure should be treated as an additional confession of error. *See Bates*, 100 Nev. at 682, 691 P.2d at 870 (respondent's failure to respond to appellant's argument treated as a confession of error).

Finally, nominal damages are available in tort actions, particularly where declaratory and/or injunctive relief is sought as the Landowners do in this case. *See, e.g., Tom Lee, Inc. v. Pacific Telephone & Telegraph Co.,* 59 P.2d 683, 687 (Or. 1936) ("the rule is well established that nominal damages may be recovered for the bare infringement of a right unaccompanied by any actual damage"); *see also* Restatement 2d of Torts § 907 cmt. A, b (1979) (when a cause of action for a tort

exists but no harm has been caused by the tort or the amount of the harm is not significant . . . judgment will be given for nominal damages). Importantly, this is true for civil conspiracy cases. *See, e.g., Weider v. Hoffman,* 238 F.Supp. 437, 447-48 (D.C. Penn 1965) (entering judgment for nominal damages on civil conspiracy claim); *see also Univ. Support Servs. v. Galvin,* 32 Va. Cir. 47, 48-49 (Va. 1993) (awarding injunction and nominal damages on contract and tort causes of action, including civil conspiracy claim). Moreover, nominal damages can support punitive damages which the Landowners seek as well. *See Univ. Support Servs.,* 32 Va. Cir. at 50 (awarding nominal and punitive damages on civil conspiracy claim). Thus, the Landowners' civil conspiracy claim has minimal merit despite the Residents' "lack of damages" argument. As with their other claims, the Landowners therefore met their step-two burden under NRS 41.660, and the district court erred in granting the Residents' anti-SLAPP motion to dismiss.

E. The Landowners' Civil Conspiracy Claim Is Not Barred By The Absolute Litigation Privilege.

The Residents' arguments in support of the district court's erroneous conclusion on the absolute litigation privilege fail for several reasons. *First*, they don't address the important distinction between defamation and other tort cases or the district court's haphazard reliance on – and misinterpretation of – the former cases in reaching its erroneous conclusions of law, including nos. 41-48. *See* APP 1293-1297; RAB 29-32; *cf.* AOB 29-31. Indeed, the Residents recite *every* case the

Landowners already distinguished – either because they are defamation cases and/or they involve statutory privileges not at issue here – once again cherry picking quotes from those cases and misstating the law regarding the absolute litigation privilege. *See* RAB 29-31.[3] Quite simply, those cases are inapposite and indisputably do not support the district court's conclusion that the Landowners' claims are barred by the absolute litigation privilege.[4] *See* APP 1296-1297; AOB 29-31; *see also* n. 2, *supra.* This is because the district court got it wrong as a matter of law. *See, e.g., Fink v. Oshins,* 118 Nev. at 433, 49 P.3d at 645 (absolute privilege applies to defamation cases).

Second, the undetermined, future city council proceedings contemplated in this case are not quasi-judicial despite the Residents' assertion otherwise. *See, e.g.,*

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[3] *See also Clark County Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 382, 213 P.3d 496, 502 (2009) (defamation case); *Fink v. Oshins,* 118 Nev. 428, 433, 49 P.3d 640, 645 (2002) (defamation case); *Hampe v. Foote*, 118 Nev. 405, 409, 47 P.3d 438, 440 (2002) (scope of statutory privilege in defamation case), *overruled in part on other grounds by Buzz Stew, L.L.C. v. City of N. Las Vegas,* 124 Nev. 224, 181 P.3d 670 (2008); *Circus Circus Hotels, Inc. v. Witherspoon,* 99 Nev. 56, 60, 657 P.2d 101, 104 (1983) (scope of statutory privilege in defamation case); *Knox v. Dick,* 99 Nev. 514, 518, 665 P.2d 267, 270 (1983) (defamation case).

[4] It is noteworthy that *Spencer v. Klementi*, 136 Nev. ___, 466 P.3d 1241 (2020), is the only defamation case the Residents don't like, apparently because it contradicts the district court's conclusion that city council proceedings are quasi-judicial as detailed below and in the Landowners' opening brief. *See id.; see also* AOB 33-36.

Knox v. Dick, 99 Nev. at 518, 665 P.2d at 270 (guidelines for grievance board indicated that hearing was conducted in manner consistent with quasi-judicial administrative proceeding). Ironically, the Residents urge this Court to apply the judicial function test to conclude that the city council proceedings at issue here are quasi-judicial; however, the only case they rely on – *State ex rel. Bd. of Parole Comm'rs v. Morrow*, 127 Nev. 265, 273, 255 P.3d 224, 229 (2011) – does not stand for this proposition. As discussed in the Landowners' opening brief, *Morrow* is a criminal case which addressed whether parole board hearings constitute "quasi-judicial proceedings." *Id.* In concluding that they are not quasi-judicial proceedings, the Court recognized that county boards of commissioners, the Public Utilities Commission, the Board of Architecture, and other entities should not be considered quasi-judicial simply because they afford some due process protections. *See id.* at 275, 255 P.3d at 230; *Stockmeier v Nevada Dept. of Corr. Psy. Review Panel,* 122 Nev. 385, 135 P.3d 220 (2008) (proceedings not quasi-judicial because they lacked an opportunity for cross-examination), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas,* 124 Nev. 224, 181 P.3d 670 (2008). *cf. Knox*, 99 Nev. at 518, 665 P.2d at 270 (concluding that a grievance board hearing was a quasi-judicial proceeding because the guidelines governing it required evidence to be taken upon oath or affirmation, allowed witnesses to testify, provided for impeachment of those witnesses, and allowed for rebuttal). Because they lack an

opportunity for cross-examination and other minimal due process standards, the city council proceedings in this case are *not* quasi-judicial under *Morrow*.

Third, not only do the potential city council proceedings fail to meet minimal due process standards, but they also fail to meet the judicial function test the Residents urge the Court to apply here. *See* AOB 32-35; *cf*. RAB 30. In *Morrow,* the court adopted the judicial function test as a means of determining whether an administrative proceeding such as a parole board hearing is quasi-judicial by examining the hearing entity's function. *See id.,* 127 Nev. at 273, 255 P.3d at 229. If a hearing entity's function is judicial in nature, its acts qualify as quasi-judicial. *See id.* In determining whether a hearing entity's function is judicial, courts 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 hear the litigation of the issues on a hearing; and (6) enforce decisions or impose penalties." *Id.* at 274, 255 P.3d at 229 (citations and internal quotations omitted).

It is virtually impossible in this case to speculate whether the city council's function would be judicial in nature because Conclusion no. 45 does not even specify any period of city council proceedings, referring only to "those in connection with issues under consideration by a legislative body," namely, "the city

council's consideration of an "amendment to the Master Plan/General Plan affecting Peccole Ranch." APP 1296. Moreover, Las Vegas City Charter § 2.080 merely bestows subpoena power on the city council to assure the attendance of witnesses and the production of documents. *See id.* It does not require evidence and testimony to be presented under oath or allow opposing parties to cross-examine, impeach, or otherwise confront a witness. *See id.* Thus, although the city council could arguably perform the first and second functions during the proceedings anticipated in this case, it lacks authority to perform the remaining functions, including any authority to "hear the litigation of the issues on a hearing" and/or "enforce decisions or impose penalties." *Morrow,* 127 Nev. at 274, 255 P.3d at 229. Because its function is not judicial in nature, the city council proceedings anticipated here are not quasi-judicial under the judicial function test.[5]

Significantly, the *Morrow* court refused a broad application of the judicial function test, holding that such an approach would be improper and create absurd results with significant implications, including permitting public bodies such as county boards of commissioners (or city councils) to easily circumvent open

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[5] This Court's reference to the city council as a *legislative* body similarly undermines the Residents' contention that the city council's function at some undetermined, future proceeding is judicial in nature for purposes of the judicial function test. *See Omerza v. Fore Stars,* 2020 WL 406783, at *6-7.

meeting and other laws. *See id.* at 275, 255 P.3d at 230. For this additional reason, the city council's function is not judicial in nature. Therefore, the potential city council proceedings are *not* quasi-judicial under *Morrow*, and the district court's conclusion otherwise is erroneous. In sum, the absolute litigation privilege does not apply here, and the district court misinterpreted Nevada law in reaching a contrary conclusion.

F. The District Court's Attorney Fee Award Must be Set Aside or Substantially Reduced.

Again, the district court's order granting the Residents' anti-SLAPP special motion to dismiss should be reversed in its entirety. Consequently, the Residents are not entitled to any attorney fees whatsoever under NRS 41.670. Moreover, the attorney fee award constitutes an abuse of discretion because the district court did not consider the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), or other critical facts concerning the Residents' co-conspirators which indicate that the attorney fees award contradicts the legislative purpose behind anti-SLAPP statutes. At the very least, the attorney fees awarded by the district court must be reduced substantially because they are not reasonable.

Despite the Residents' assertion otherwise, it is not clear that the district court considered the *Brunzell* factors when determining the amount of attorney fees to award. To the contrary, the district court never mentioned the *Brunzell* factors during the hearing on the Residents' motion for attorney fees, and defense counsel

only made a passing reference to the case. *See* APP 1793-1815. The hearing was brief, and no additional evidence was presented. *See id.* The oral explanation referred to by the Residents likewise doesn't mention *Brunzell* either nor does it demonstrate that the district court applied the mandatory factors. *See id; see also* RAB 33. That the Residents were awarded exactly what they requested without more than a single sentence explanation suggests just the opposite, namely, the district court simply rubber stamped the Residents' dollar figure without ever considering the *Brunzell* factors.[6] Similarly, the district court's order granting the Residents' motion for attorney fees makes no mention whatsoever of the *Brunzell* factors. *See* APP 1615-1620. Thus, it too hardly qualifies as the sufficient reasoning and findings required by Nevada law. *See, e.g., Shuette v. Beazer Homes Holdings Corp.,* 121 Nev. 837, 864, 124 P.3d 530, 548-49 (2005) (district court must provide sufficient reasoning and findings to demonstrate consideration of *Brunzell* factors and ultimately support attorney fee award); *see also Argentena*

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[6] The Landowners also pointed out, among other things, numerous billing discrepancies and the lack of evidence of prevailing market rates for attorneys in Las Vegas, all of which further undermines the reasonableness of the district court's attorney fees award and the Residents' claim that it is supported by substantial evidence. *See* AOB 47-53. With respect to the discrepancy in time spent on the case, the Residents claim – *without any evidentiary support* – that work done by the Landowners' in-house counsel accounts for that discrepancy. *See* RAB 35. This Court should reject the unsubstantiated accusation accordingly.

Consol. Mining Co. v. Jolley Urga Wirth Woodbury & Standish, 125 Nev. 527, 540 n.2, 216 P.3d 779, 788 n.2 (2009) (reiterating that the district court's award of attorney fees must include findings as to the reasonableness of the fees under *Brunzell*), *superseded by statute on other grounds as stated in Fredianelli v. Price*, 133 Nev. Adv. Rep. 74, 402 P.3d 1254, 1255-56 (2017). Quite simply, the district court never considered the *Brunzell* factors in this case, which indisputably do not support the exorbitant attorney fee award as detailed in the Landowners' opening brief. *See* AOB 51-53. The failure to do so constitutes an abuse of discretion, and the district court's attorney fee award should be reversed accordingly. *See Shuette,* 121 Nev. at 865, n. 101, 124 P.3d at 549, n. 101 (*citing Beattie v. Thomas*, 99 Nev. 579, 589, 668 P.2d 268, 274 (1983) (noting that it is an abuse of discretion to award the full amount of requested attorney fees without making "findings based on evidence that the attorney's fees sought are reasonable and justified")); *see also Logan v. Abe,* 131 Nev. 260, 266-67, 350 P.3d 1139, 1143 (2015) (at minimum, the district court must state in its order that it "analyzed the [attorney] fees pursuant to [*Beattie*] and *Brunzell,* and that "[t]he individual elements of these cases support the discretionary award of fees and costs.").

The district court's failure to consider the undisputed evidence of Schreck's involvement in the Residents' conspiracy further undermines the attorney fee award. *See* AOB 48-49. "The anti-SLAPP statute is 'intended to compensate a defendant

for the expense of responding to a SLAPP suit . . . [T]he provision is broadly construed so as to effectuate the legislative purpose of reimbursing the prevailing defendant for expenses incurred in extracting [it]self from a baseless lawsuit.'" *Graham-Sult v. Clainos*, 756 F.3d 724, 752 (9th Cir. 2014) (*quoting Wanland v. Law Offices of Mastagni, Holstedt & Chiurazzi*, 45 Cal. Rptr. 3d 633, 637 (Ct. App. 2006)); *see also Shapiro v. Welt*, 389 P.3d 262, 268 (Nev. 2017) (looking to California law for guidance "[b]ecause this court has recognized that California's and Nevada's anti-SLAPP "statutes are similar in purpose and language"). In other words, attorney fees in anti-SLAPP cases are supposed to reimburse attorney fees incurred by defendants improperly sued for exercising their First Amendment rights. *See id.* They are not intended to reward wrongdoers such as Schreck with a windfall of nearly $700,000 in attorney fees for his unlawful actions. *See id.*

Even the district court's ultimate attorney fee award of $363,244.00 is outrageous given that *the Residents have not incurred any attorney fees* because Schreck engaged his firm to *defend* them on a *contingency basis* after he instigated and was a co-conspirator in the Residents' wrongful conduct that halted development of the Land and ruined the Landowners' business interests. Schreck charged nearly $900 per hour, and defense counsel purportedly incurred $20,000 for Schreck's work as a "witness" in the case. *See* APP 1357-1420. None of this was evaluated by the district court under *Brunzell* or anything else for

reasonableness. Given these facts, the attorney fees award screams of extortion. At best, it is unreasonable and a gross aberration of the legislative purpose behind the anti-SLAPP statutes.

As noted above, the Residents never mention Schreck and ignore his wrongful conduct as a co-conspirator in their answering brief, which is particularly telling given that Schreck is defense counsels' law partner so one would expect a vehement denial of such bad acts. Once again, the Residents' silence speaks volumes. Regardless, the Residents concede the point by doing so, which should be treated as another confession of error. *See O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 555-56 and n. 3, 429 P.3d 664, 669 and n. 3 (Nev. App. 2018) (treating respondent's failure to address one of appellant's attorney fee arguments as a confession of error and reversing attorney fee award) (*citing Bates v. Chronister*, 100 Nev. at 682, 691 P.2d at 870). For this additional reason, the Court should conclude that the district court's attorney fees award was not reasonable, prompting reversal or at least a substantial reduction.

III. CONCLUSION.

For the foregoing reasons, the Landowners respectfully submit that the district court erred in granting the Residents' special motion to dismiss (anti-SLAPP

motion). Likewise, the district court erred in awarding the Residents attorney fees. The district court's decisions should therefore be reversed in their entirety.

DATED this 24th day of January 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this **APPELLANTS' REPLY BRIEF**, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I also certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6). The font type is Times New Roman, font size is 14, page length is 27 pages, inclusive of the verification and required certificates, and the word count is 6120. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 24th day of January 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January 2022, I caused service of a true and correct copy of the above and foregoing **APPELLANTS' REPLY BRIEF** to be submitted for filing and service with the Supreme Court of the State of Nevada via the Electronic Filing System to the following:

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