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' OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in Nevada Rule of Appellate Procedure ("NRAP") 26.1(a) and must be disclosed. These representations are made in order that the Justices of this Honorable Court may evaluate possible disqualification or recusal.

Appellant Fore Stars, Ltd., is a Nevada limited liability company.

Appellant 180 Land Co., LLC, is a Nevada limited liability company.

Appellant Seventy Acres, LLC, is a Nevada limited liability company.

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1. Whether the district court erred in granting the Residents' special motion to dismiss (anti-SLAPP motion) pursuant to NRS 41.635 *et seq*.?

2. Whether the district court erred in awarding the Residents attorney fees pursuant to NRS 41.670?

II. STATEMENT OF FACTS.

A. The Parties.

Appellants Fore Stars, Ltd., 180 Land Co., LLC, and Seventy Acres, LLC, (collectively "Appellants" or "Landowners") are developing approximately 250 acres of land they own and control in Las Vegas, Nevada formerly known as the Badlands Golf Course property (hereinafter the "Land").[1] *See* Joint Appendix ("APP") 3. They already have the absolute right to develop the Land under its

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[1] Given the number of parties in the underlying litigation, references in this opening brief to them will mostly be to the designations used in the district court, their actual names, or descriptive terms such as "Landowners" for Appellants or "Residents" for Respondents as they have referred to themselves in the underlying litigation. References to "Appellants" and "Respondents" will be kept to a minimum. *See* NRAP 28(d)("In briefs and at oral argument, parties will be expected to keep to a minimum references to parties by such designations as "appellant" and "respondent." It promotes clarity to use the designations used in the lower court or the actual names of parties, or descriptive terms such as "the employee," "the injured person," etc.").

present RDP 7 zoning, which means that up to 7.49 dwelling units per acre may be constructed on it. *See* APP 0003-0004. The Land is adjacent to the Queensridge Common Interest Community ("Queensridge") which was created and organized under the provisions of NRS Chapter 116. *See* APP 0003-0007. Respondents Daniel Omerza ("Omerza"), Darren Bresee ("Bresee"), and Steve Caria ("Caria") (collectively "Respondents" or "Residents") are certain residents of Queensridge who strongly oppose any development of the Land. *See* APP 0002. Rather than properly participate in the political process, however, the Residents used unjust and unlawful tactics to sabotage the Landowners' development rights and their livelihoods. *See* APP 0001-00095. They did 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* APP 0003-0007.

B. <u>The Landowners' Complaint</u>.

In May 2018, the Landowners filed their complaint, alleging intentional and negligent interference with prospective economic advantage, intentional and negligent misrepresentation, and civil conspiracy. *See* APP 0001-0095. These claims are based on the fact that the Residents executed purchase agreements when they purchased their residences which expressly acknowledged their receipt of: (1) Master Declaration of Covenants, Conditions, Restrictions and Easements for

Queensridge ("Queensridge Master Declaration" or "CC&Rs"), recorded in 1996; (2) Notice of Zoning Designation of Adjoining Lot disclosing that the Land was zoned RPD 7; (3) Additional Disclosures Section 4 – No Golf Course or Membership Privileges stating Residents acquired no rights in the Badlands Golf Course; (4) Additional Disclosure Section 7 – Views/Location Advantages stating 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* APP 0003-0007.

Additionally, the deeds to the Residents' respective residences "are clear by their respective terms that they have no rights to affect or control the use of [the Landowners'] real property." *See id*. The Residents nevertheless promulgated, solicited, circulated, and executed the following declaration ("Declaration") to their Queensridge neighbors in March 2018:

> 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….

APP 0018.

The Residents did so at the behest of Frank Schreck, a neighbor and local attorney, who prepared the contents of the Declaration based on a district court order that was later reversed by this Court and then lobbied Omerza, Bresee, and Caria to circulate and solicit signatures on copies of the Declaration as part of a plan to sabotage the Landowners' development of the Land.[2] *See* APP 0002-0016. The Residents joined Schreck and participated in the plan despite having received prior, express written notice that (i) the CC&Rs do not apply to the Land, (ii) the Landowners have the absolute right to develop the Land based solely on the RPD 7 zoning, and (iii) any views and/or locations advantages they enjoyed could be obstructed in the future. *See* APP 0003-0006, 0020-0095. In promulgating, soliciting, circulating, and executing the Declaration, the Residents also disregarded other, publicly available district court orders applying to their similarly-situated neighbors in Queensridge which expressly found that: (i) the Landowners have complied with all relevant provisions of NRS Chapter 278 and properly followed procedures for approval of a parcel map over their property; (ii) Queensridge is governed by NRS Chapter 116 and not NRS Chapter 278A because the Land is not

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[2] *Binion v City of Las Vegas et al.,* Hon. Jim Crockett, Eighth Judicial Dist. Ct. Case No. A-17-752344-J, January 11, 2018. The district court's order ("Crocket decision" or "*Binion* case") was later reversed by this Court. *See Seventy Acres v. Binion,* Case No. 75481 (August 26, 2020).

within a planned unit development; (iii) the Land is not subject to the CC&Rs, and the Landowners' applications to develop the Land are not prohibited by, or violative of, them; (iv) Queensridge residents have no vested rights in the Land; (v) the Landowners' development applications are legal and proper; (vi) the Landowners have the absolute right to close the golf course and not water it; (vii) the Land is not open space and drainage because it is zoned RPD 7; and (viii) the Landowners have the absolute right to develop the Land because zoning – not the Peccole Ranch Conceptual Master Plan – dictates its use and the Landowners' rights to develop it.[3] *See id*. The Residents further ignored another district court order dismissing claims based on findings that similarly contradicted the statements in the Residents' declarations. *See id*.

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[3] Attached to the Complaint are two (2) district court orders in *Peccole v. Fore Stars et al.,* case no. A-16-739654-C ("Peccole Litigation"), Eighth Judicial District Court, Clark County, Nevada. *See* APP 20. The Peccoles appealed those district court decisions to the Nevada Supreme Court (Nos. 72410 and 72455). On December 22, 2017, this Court dismissed the appeal in Docket No. 72455 "as to the order entered November 30, 2016" because it lacked jurisdiction over the appeal of the order granting the motion to dismiss. *See* 12/22/17 Order at p. 3. As to the remaining consolidated appeals, this Court issued an order affirming the district court decisions in the Peccole Litigation on October 17, 2018. *See* 10/17/18 Order at p. 5. Also attached to the Complaint is a district court order in *Binion v. Fore Stars et al.*, case no. A-15-729053-B ("Binion/Fore Stars Litigation"), Eighth Judicial District Court, Clark County, Nevada. *See* APP 92.

Moreover, and perhaps more importantly, these Residents, along with all of the residents within Queensridge, do not and could not live in the Peccole Ranch Master Planned Community as their executed declarations provide. *See* 0001-0095. They do not pay dues to the Peccole Ranch Master Planned Community, they did not execute any documents providing they are within the Peccole Ranch Master Planned Community and there is no mention of the Peccole Ranch Master Plan on their deeds, title, or other any other recorded instrument against their property. *See id*.

In sum, the Complaint alleges that the Residents 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 development of the Land. *See* 0001-0095. In particular, the Residents fraudulently procured signatures of Queensridge residents by picking and choosing the information they shared with their neighbors in order to manipulate them into signing copies of the Declaration. *See id*. They simply ignored or disregarded known, material facts that directly conflicted with the statements in the Declaration. *See id*. They did so with the intent to deliver such false statements and/or declarations to the City of Las Vegas ("City") for the improper purpose of presenting a false narrative to council members, deceiving them into denying the Landowners' applications and,

ultimately, sabotaging the Landowners' development rights and livelihoods. *See id*.

C. Frank Schreck's Engagement As Defense Counsel.

Upon filing of the Complaint, Schreck engaged his firm, Brownstein Hyatt Farber & Schreck LLP, to defend the Residents on a contingency basis. *See* APP 1359. Schreck's firm has purportedly spent nearly 650 hours working on the case since then at hourly rates upwards of $875.[4] *See* APP 1359, 1394-1420. Defense counsel did so even though the Residents have never asserted any counterclaims and have no other affirmative basis for recovery.

D. The Residents' Motions To Dismiss.

Instead of answering the Complaint, the Residents filed motions to dismiss pursuant to NRCP 12(b)(5) and NRS 41.635 *et seq.* (Nevada's anti-SLAPP statute). *See* APP 0148-0162; APP 0163-0197. In their anti-SLAPP special motion to dismiss, the Residents asserted that their conduct was "communications with fellow residents" and "consist[ed] of nothing but First Amendment activities." *See* APP 0172, APP 0167. The Landowners opposed both motions to dismiss arguing, among other things, that Nevada's anti-SLAPP statute was not implicated because their claims against the Residents are based on their wrongful conduct rather than

[4] Frank Schreck himself billing for 22.6 hours totaling $19,775 raising ethical considerations.

free speech. *See* APP 0204-0208; APP 0230-0232. Alternatively, the Landowners requested that they be allowed to conduct limited discovery pursuant to NRS 41.660(4). *See* APP 0215-0216; APP 0232-0233.

In particular, the Landowners requested they be allowed discovery in order to obtain facts, including, but not limited to, from whom they received the information stated in the Declaration, who prepared it, whether they read their CC&Rs and/or the district court orders in the Peccole Litigation, what they understood to be the implications of their CC&Rs as well as the court orders, why they believed the Declaration to be accurate, what efforts they took, if any, to ascertain the truth of the information in the Declaration, and with whom and the contents of the conversations they had with other Queensridge residents. *See* APP 0215-0216; APP 0232-0233. The Landowners pointed out that the information sought was in the possession of the Residents, or third parties with whom they are connected, and included facts and evidence of their actions, 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 0215, 0217; APP 0232. The Landowners' counsel affidavit further detailed the limited discovery sought to "demonstrate with prima facie evidence a probability of prevailing of their claims." APP 0215.

A hearing on the Residents' motions to dismiss was held on May 14, 2018. *See* APP 1651-1712. Thereafter, the district court permitted the parties to submit supplemental brief and/or exhibits. *See* APP 1704-1706. The Landowners submitted legislative history related to the 2015 amendment to NRS 41.635 *et seq.* to point out the "importance of allowing discovery" if necessary for plaintiffs to demonstrate their claims have minimal merit. *See* APP 0372.

The Residents filed an interlocutory appeal, as permitted by statute, and while that appeal was pending, the Landowner again sought the right to conduct discovery. APP 0573-0631. The Residents pushed back hard against this. APP 0632-0639. They objected to any discovery and objected to the Discovery Commissioner's Report and Recommendation. APP 0671-0679; APP 0680-0681; APP 0682-0688. The district court acquiesced to the Residents and denied any discovery. APP 0713-0715.

E. <u>Appeal In Case No. 76273</u>.

The district court denied both motions in their entirety, and the Residents' interlocutory appeal pursuant to NRS 41.670(4) followed.[5] *See Omerza v. Fore Stars,* 2020 WL 406783, at *6-7 (Jan. 23, 2020) (unpublished disposition). On

[5] The Residents also filed a petition for extraordinary writ, challenging the district court's denial of their motion to dismiss pursuant to NRCP 12(b)(5). This Court denied the writ petition on October 17, 2018.

January 23, 2020, this Court vacated the order denying the Residents' anti-SLAPP special motion to dismiss, concluding that the Residents met their burden at step one of the anti-SLAPP analysis. *See id.* With respect to the step-two burden under NRS 41.660(3)(b), the Court determined that the Landowners had not demonstrated with prima facie evidence a probability of prevailing on their claims. *See id.* at *13. However, the Court recognized that NRS 41.660(4) provides for discovery related to the step-two burden and that the Landowners had alternatively requested such discovery pursuant to the statute. *See id.* Because the district court never ruled on the merits of the request, this Court remanded the matter to the district court for resolution of the discovery issue. *See id.* at *14. Thereafter, the Residents' petition for rehearing was denied in its entirety and the remittitur issued. *See* APP 0729-0730.

F. Remand, The Landowners' Discovery Requests, And The District Court's Order Limiting Discovery.

On remand, the Landowners sought to depose Omerza, Bresee, and Caria regarding their actions, 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. The Landowners also requested limited written discovery, including requests for production, requests for admissions, and interrogatories on the Residents prior to taking their depositions.

See id. The Residents opposed any discovery, and the district court initially permitted the Landowners to serve one set of requests for production of documents on each Resident for a total of fifteen (15) requests allocated among them. *See* APP 0738-0749. The district court also permitted the Landowners to depose the Residents but limited each deposition to four (4) hours. *See* APP 0749. The discovery period was limited to approximately six (6) weeks and the Landowners' other discovery requests were denied. *See id*.

Rather than simply responding, the Residents immediately sought to circumvent any 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, 07544444-0799. 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.

Specifically, the Landowners sought: (1) documents between the Residents and other individuals concerning the Land; (2) title and escrow documents related to the Residents' purchase of their residence/lot in Queensridge; (3) documents related to the Residents' statements in the Declaration that they purchased their residence/lot in reliance on the fact that the open space/natural drainage system could not be developed; (4) documents concerning the Residents' statements in their affidavits that they had "no understanding that any of the statements are false;" (5) non-privileged communications related to the good faith component of the special motion to dismiss; (6) non-privileged communications regarding the allegations in the Complaint; (7) documents establishing that the Residents did not receive certain disclosures related to the purchase of their residence/lot; and (8) documents between the Residents related to the declarations gathered and their affidavits. *See id; see also* APP 0830-1216. The Landowners did so to discover where the Residents got their information and what they were relying on when they made the statements in the Declaration and their affidavits because the statements were not, in fact, truthful and are the basis for the Landowners' misrepresentation, interference with economic relations, and conspiracy claims. *See id*.

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. According to the Residents,

permissible discovery under NRS 41.660(4) was limited to documents, if any, they relied upon in making the statements within the declarations. *See id*. The Landowners opposed the motion because the discovery permitted by NRS 61.660(4) includes any information necessary – and in the possession of another party or third party, and not reasonably available without discovery – to meet the step-two burden under NRS 61.660(3)(b). *See* APP 0800-0815. Moreover, the Court's order vacating and remanding noted that the Residents' declarations were sufficient for purposes of their step-one burden, "absent evidence that clearly and directly overcomes" them. *See* APP 0716-0728. Thus, the Landowners asserted that they should be allowed to gather such evidence via their discovery requests. *See* APP 0800-0815.

A hearing on the Residents' motion for protective order was held on July 13, 2020. *See* APP 0825. Shortly thereafter, the district court granted the Residents' motion for protective order and further limited the Landowners' discovery requests to only the "topics of what documents [the Residents] relied on, what information [they] relied on, or whether that information was provided to [them] by third parties, all with respect to the declarations to the City Council." *See* APP 0823-0829.

G. The Landowners' Requests For Production And The Residents' Responses Thereto.

The Landowners served amended requests for production of documents in accordance with the district court's order, seeking the following five categories of

documents from Omerza, Bresee and Caria individually: (1) all documents by and between each of them and any other individual concerning the Land upon which the Badlands golf course was previously operated, including but not limited to, any past or present homeowner within Queensridge, any employee of the management company that manages Queensridge HOA, any Las Vegas City Council member, any Las Vegas Planning Commissioner, and any Las Vegas City employee; (2) title and escrow documents concerning or related to each Residents' purchase of their residence/lot in Queensridge; (3) all documents relied upon in making the statement in their declarations that they had purchased residences/lots in Queensridge in reliance upon the fact that the open space/natural drainage system could not be developed and that they paid a significant lot premium as consideration for that assurance; (4) all non-privileged communications between each of them and any other resident member or former member of the Queensridge HOA regarding the allegations in the Complaint; and (5) all documents between the Residents that they relied on in making the declaration(s) they executed or gathered. *See* APP 1134-1137, 1333-1339, 1353-1356.

In his responses, Caria stated that he had no documents responsive to requests nos. 1, 2, and 5, but relied on the "transcript of the proceedings in the *Binion*" matter and on the "*Crockett* decision" with respect to request no. 3, and relied on a January 11, 2018 email from Frank Schreck with respect to requests nos. 3 and 4 that states:

> The Judge spent at least 30 minutes explaining why the city violated its own ordinance and staff recommendations. He hit every point imaginable including stating Yohan [Lowie] bought the property without any contingency on entitlements so he bought a "pig-in-a-poke." He pointed out Yohan said he didn't buy the property until he had received the approval of each Council person. He said Yohan wore the city down until it just caved. He also spoke of the open space and the reliance [Queensridge] residents placed in the approved Master Plan when they bought expensive lots. The transcript [in *Binion v. City of Las Vegas,* case no. A-17-752344-J] will be priceless and very useful in everything we do going forward.[6]

APP 1134-1137. Copies of the transcript and email were attached to Caria's responses. *See* APP 1116-1117, 1127. Similarly, Omerza stated in his responses that he had no documents responsive to requests nos. 1, 2, 4, and 5, but he relied on a January 19, 2018 "newspaper report of the decision of Judge Crockett in the *Binion* matter and on a sign posted on the [Land's] fencing" with respect to request no. 3. *See* APP 0923-0929. Copies of the article and photograph were attached to Omerza's responses. *See* APP 1341-1344. Likewise, Bresee's responses stated that he had no documents responsive to any of the requests. *See* APP 1353-1356.

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[6] Yohan Lowie is one of the Landowners' principles. He has been described as the best architect in the Las Vegas valley, even having designed and constructed the Nevada Supreme Court building.

H. The Residents' Deposition Testimony.

The Landowners thereafter deposed the Residents who all admitted to receiving the CC&Rs when they purchased their residences/lots in Queensridge, which documents expressly state that they have no rights to or any control over the Land. *See* APP 0862; 0941, 0945; 1004-1005. During his deposition, Omerza claimed to have received the Declaration in a "blast email" and then just "came up with the idea" of circulating declarations to his neighbors in Queensridge for signature and having them mailed to him for return to the City Council. *See* APP 0882-0883. He denied submitting a declaration himself and his counsel instructed him not to answer whether he ever returned the thirty-six (36) he gathered from his neighbors. APP 0880. Despite the Land indisputably being zoned RPD 7, Omerza said he believed the Land couldn't be developed because "it was not zoned for development. It was zoned as open space." *See* APP 0886. He admitted, however, that he initially supported development of the Land, and never discussed any concerns with the Landowners during presentations and/or meetings. *See* APP 0878, 0887. Omerza added that he has never seen or read the Peccole Ranch Master Plan. *See* APP 0891. Importantly, the only thing he reviewed before purchasing his residence/lot in 2003 was a "FEMA study" that he never mentioned and failed to produce in response to the Landowners' discovery requests. APP 0878. Otherwise, Omerza's purported belief that the Peccole Ranch Master Plan precluded

development of the Land was based on gossip with his neighbors. *See* APP 0892. Finally, Omerza admitted meeting with former councilman Steve Seroka and speaking with his staff, but he denied meeting Schreck until after the underlying lawsuit was filed. *See* APP 0917, 0871. Other than the FEMA report, Omerza likewise denied any other correspondence with city councilmembers and/or their staff despite the Landowners having received such communications through public records requests. *See* APP 0919-0920.

During his deposition, however, Bresee admitted being friends with Schreck and having received the Declaration – which he later signed and submitted – from Schreck. *See* APP 0965-0966. Bresee further admitted receiving the Crockett decision, or excerpts of it, as well as emails and text messages regarding development of the Land, including from neighbors and Councilman Bob Beers, but Bresee had no explanation for failing to retain them despite receiving a preservation letter from the Landowners. *See* APP 0985-0987. He also based his belief in the truthfulness of the Declaration on Schreck, excerpts from the Crockett decision, his neighbor "Mike," and "the salesman" from whom he purchased his lot in Queensridge. *See* APP 0948-0950. However, he had no idea when he received the information so he couldn't confirm that it was before he signed and submitted a declaration to city council. *See* APP 0954. Finally, Bresee admitted he never read the CC&Rs nor had he ever even seen the Peccole Ranch Master Plan, despite the

reference to (and purported reliance on) it in the Declaration he signed. *See* APP 0941.

During his deposition, Caria admitted receiving but never reading the CC&Rs, and he has never seen the Peccole Ranch Master Plan. *See* APP 1004-1005. Specifically, Caria had no information at the time he purchased his residence/lot about the Peccole Ranch Master Plan or any limitations on development of the Land. *See* APP 1082-1087, 1091. He indicated that he nevertheless opposed any development of the Land, and that Schreck drafted the Declaration, which Caria admitted circulating to neighbors for signature. *See* APP 1024-1025, 1032. He could not recall, however, whether he ever signed or submitted one to city council. *See* APP 1024. Caria admitted attending several city council meetings, fundraisers, and informal meetings since 2016 to oppose development of the Land. *See* APP 1007-1011, 1014-1015, 1019-1020, 1060-1061, 1066-1069. He added, however, that he never did any "background research" of his own and relied exclusively on Schreck for information, believing "everything that Frank [Schreck] said was true." *See* APP 1020-1021, 1026-1029. Importantly, he received all of this "information," including a newspaper article and certain transcripts as well as the district court order in the *Binion* case, well after he purchased his Queensridge residence in 2013. *See* APP 1012, 1020-1023. Caria also admitted discussing development of the Land with former councilman Seroka and his assistant Mark Newman. *See* APP 1014-

1015, 1033-1037. Although he only produced one email from Schreck, Caria admitted to numerous others, claiming that he gave them to defense counsel who didn't produce them. *See* APP 1092-1093. Otherwise, Caria's recollection about anything related to the Declaration was conveniently poor. *See* APP 1004-1009.

I. The Parties' Supplemental Briefing Related To The Residents' Anti-SLAPP Special Motion To Dismiss.

The parties thereafter submitted supplemental briefing. *See* APP 0830-1257. Specifically, the Landowners submitted the following evidence: (1) transcript of Omerza's deposition; (2) January 19, 2018 newspaper article produced by Omerza in response to the Landowners' discovery requests; (3) minutes from a June 21, 2017 City council proceeding (obtained by the Landowners through a public records request) in which Bresee asked the councilmembers to delay a vote on development of the Land until newly-elected members, including Steve Seroka, were seated; (4) transcript of Bresee's deposition; (5) Declaration circulated by the Residents; (6) preservation letter sent to Bresee; (7) transcript of Caria's deposition; (8) transcript of October 18, 2016 special planning commission meeting (obtained by the Landowners through a public records request) in which Caria spoke out against any development of the Land; (9) redacted August 18, 2020 email from Caria to counsel regarding a "checklist" of documents and information he purportedly relied on for the truthfulness of the Declaration that was not produced in response to the Landowners' discovery requests but revealed during his deposition; (10) transcript

of February 15, 2017 City council proceeding (that Landowners obtained through a public records request) in which Caria disparaged the Landowners – Mr. Lowie in particular – and spoke out against development of the Land; (11) June 20, 2017 email from Caria to City council members (obtained by the Landowners through a public records request) asking them to delay a vote on development of the Land until after Seroka was seated; (12) transcript of September 6, 2017 City council meeting (obtained by the Landowners through a public records request) in which Caria spoke against development of the Land and urged councilmembers to listen to Seroka who he claimed also opposed any development of the Land; (13) February 14, 2018 email from Caria to Seroka (obtained by the Landowners through a public records request) in which Caria encouraged Seroka to vote against any development of the Land; (14) March 20, 2018 preservation letter sent to Caria; (15) Caria's discovery responses, including the January 11, 2018 email from Schreck and hearing transcript from the *Binion* case; (16) transcript excerpt of August 2, 2017 city council meeting (obtained by the Landowners through a public records request) in which Caria made false accusations against Mr. Lowie and stated that Seroka was primarily elected to "get rid of [the] development" of the Land; (17) July 11, 2016 email from Bresee to the City expressing his support for development of the Land obtained by the Landowners through a public records request; and (18) this Court's

August 26, 2020 order of reversal in *Seventy Acres v. Binion,* Case No. 75481 (August 26, 2020). *See* APP 0853-1216.

J. The District Court's Hearing And Decision On The Residents' Anti-SLAPP Special Motion To Dismiss.

On November 9, 2020, the district court held a hearing on the Residents' special motion to dismiss at which time the Landowners argued, among other things, that the documents and testimony gathered via the limited discovery demonstrated that their claims have minimal merit. *See* APP 1782-1792. In particular, the Landowners pointed out the evidence shows that: (1) there is nothing the Residents relied on when they purchased their residences/lots to support the "factual" statements in the Declaration; (2) Schreck (fellow Queensridge resident and mastermind behind the conspiracy) drafted the statements in the Declaration and sent form declarations out to be circulated and signed through the Residents; (3) the statements were concocted from the Crockett decision in the *Binion* case, which was ultimately reversed; and (4) Schreck, the Residents and others did so in order to prevent any development of the Land, which they have succeeded in doing thus far at considerable expense, i.e., monetary damages, to the Landowners. *See* APP 1785-1787.

In written findings of fact and conclusions of law, the district court granted the Residents' special motion to dismiss in its entirety. *See* APP 1260-1272. In doing so, the district court determined that the "litigation privilege is an absolute

bar" to the Landowners' claims even though this is not a defamation action. *See* APP 1268. The district court further concluded that the Landowners failed to meet their step-two burden under NRS 41.660. *See* APP 1270.

The Landowners' filed a Motion for Reconsideration, after objecting to the order itself, which was drafted by the Residents (APP 1260-1272). APP 1273-1286; APP 1302-1356. The Landlord's Motion for Reconsideration was denied in its entirety. *See* APP 1597-1604.

K. The District Court's Attorney Fee Award.

The Residents thereafter sought attorney fees and costs under NRS 41.670. *See* APP 1357-1420. Specifically, the Residents sought an exorbitant $694,044.00 and additional monetary relief in the amount of $10,000.00 each for Omerza, Bresee, and Caria from each Landowner pursuant to NRS 41.670 and NRS 18.010. *See* APP 1357. The Residents claimed that the nearly 650 hours spent as well as their counsels' rates, including Schreck's hourly rate of $875, were reasonable and that the contingent nature of their fee arrangement merited a fee enhancement equal to 100% of the amount that would have been billed hourly. *See* APP 1359. The landowners opposed the motion because the staggering amount requested was not

the result of a reasonable lodestar calculation, did not comport with the *Brunzell* factors, and was nothing more than an extortion attempt.[7] *See* APP 1479.

At the March 31, 2021 hearing on the matter, the Landowners also pointed out that Schreck, a co-conspirator in this case: (1) prepared the contents of the Declaration, including the indisputably false statements therein, (2) solicited Omerza, Bresee, and Caria to circulate and solicit signatures on copies of that Declaration as part of their plan to sabotage the Landowners' development of the Land, (3) thereafter engaged his firm to defend the Residents on a contingency basis, (4) charged an hourly rate of $875 as part of the Residents' defense, and (5) now sought a windfall for his firm of nearly $700,000 in attorney fees for a situation entirely of his doing. *See* APP 1793-1815. The Landowners argued that these facts further demonstrated the unreasonableness of the Residents' attorney fee request. *See id.*

In an order dated April 14, 2021, the district court nevertheless granted the Residents' motion for attorney fees and costs, concluding that they were entitled to $363,244.00 based on a lodestar analysis. *See* APP 1616. The district court did,

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[7] *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969); *see also Herbst v. Humana Health Ins.,* 105 Nev. 586, 781 P.2d 762 (1989) (noting that after a court determines that attorney fees are appropriate it must then multiply the number of hours reasonably spent on a case by a reasonable hourly rate to reach what is termed the lodestar amount).

however, deny the Residents' unprecedented request for the 100% fee enhancement as well as the additional monetary award under NRS 41.670, concluding that both were inappropriate. *See id*. These consolidated appeals followed.

II. SUMMARY OF ARGUMENT.

This case is again before the Court because the Residents' conduct is not the "good faith communication in furtherance of the right to . . . free speech" they claim. Instead, these Queensridge homeowners conspired with Schreck, among others, to prevent development of the Land, and their improper actions went far beyond mere participation in the political process to being unlawful and causing significant harm to the Landowners and their livelihood. Although the Court concluded in case no. 76273 that the Residents met their burden at step one of the anti-SLAPP analysis, the evidence adduced on remand – despite the district court's refusal to allow all the discovery requested by the Landowners – demonstrates that the Residents communications were not truthful or made without knowledge of their falsehood. The evidence also shows that the Landowners' claims have minimal merit. Thus, they met their burden at step two of the anti-SLAPP analysis, and the district court's conclusion otherwise is erroneous. The district court further erred in applying the absolute litigation privilege and awarding the Residents' attorney fees. This Court should reverse the district court's decisions accordingly.

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IV. ARGUMENT.

A. Standard Of Review.

This Court's review of an order granting an anti-SLAPP motion to dismiss is de novo. *See Coker v. Sassone,* 135 Nev. ___, 432 P.3d 746, 748-49 (2019). However, the Court reviews the district court's discovery determination under NRS 41.660 for an abuse of discretion. *See Toll v. Wilson,* 135 Nev. 430, ___, 453 P.3d 1215, 1219 (2019) (*citing Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court,* 128 Nev. 224, 228, 276 P.3d 246, 249 (2012)). Likewise, this Court reviews the district court's decision to award attorney fees and costs requested under NRS 41.670(1)(a) for an abuse of discretion. *See Smith v. Zilverberg*, 137 Nev.___, 481 P.3d 1222, 1230 (2021).

B. The District Court Improperly Limited The Scope Of Discovery Under NRS 41.660(4).

In granting the special motion to dismiss, the district court concluded that "the discovery permitted was appropriate and, in light of [the Landowners'] request, all that was allowed" under NRS 41.660(4). APP 1295. In doing so, the district court misunderstood the scope of the Landowners' discovery requests as well as the permissible scope of discovery pursuant to the statute and this Court's previous decision.

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, plaintiffs are 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 at 1219 (district court properly ordered discovery to determine whether defendant made statements with actual malice).

It is important to note that the Landowner requested discovery throughout these proceedings, both during the initial motion to dismiss, while the matter was pending on appeal and again post-remand. All efforts to do even minimal discovery were met with vigorous opposition from the Residents.

Post-remand, 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.

Significantly, the district court's order devoted several findings and conclusions to this Court's previous decision, stating this Court's order reversing and remanding was the law of the case. *See* APP 1294. In particular, the district court noted that the only "task on remand was to determine whether [the Landowners] were entitled to discovery under NRS 41.660(4)." APP 1294-1295. In doing so, however, the district court mistakenly believed that, because this Court concluded the Residents met their step-one burden to establish good faith communications under NRS 41.660(3)(a), the law of the case prohibited further inquiry into their state of mind. *See id*. 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 to demonstrate otherwise, namely, that the Residents negligently or intentionally omitted, misstated, and/or shaded material facts when they circulated, solicited and procured the statements and/or declarations as part of a scheme to sabotage the Landowners' development plans.

Importantly, this Court recognized as much in the previous order, stating that "absent evidence that clearly and directly overcomes such declarations, the sworn declarations are sufficient for purposes of step one." *See Omerza v. Fore Stars,* 2020 WL 406783, at *6. When discussing the Landowners' burden at step two of the anti-SLAPP analysis, this Court added that "evidence [that the Residents' communications contain 'false representations of fact' or 'intentional misrepresentations'] *is essential to [their] ability to prevail on their claims*." *See Omerza v. Fore Stars,* 2020 WL 406783, at *6-7 (emphasis added). In sum, discovery into the Residents' state of mind was essential to the Landowners' ability to meet their step-two burden under NRS 41.660(3). Again, the Landowners properly requested this limited discovery, and the district court's refusal to allow it constitutes an abuse of discretion.

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C. The District Court Erroneously Granted The Special Motion To Dismiss Because The Absolute Litigation Privilege Does Not Apply Here.

In granting the special motion to dismiss, the district court concluded that the absolute "litigation privilege is an absolute bar to all of [the Landowners'] claims." APP 1297. In doing so, the district court erred as a matter of law for at least three reasons. *See e.g., Clark County Sch. Dist. v. Virtual Educ. Software, Inc.,* 125 Nev. 374, 382, 213 P.3d 496, 502 (2009) (court reviews *de novo* applicability of an absolute privilege).

1. The Absolute Litigation Privilege Is Limited To Defamation Cases.

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). As such, Nevada law does not support the district court's determination that the absolute litigation privilege applies beyond the defamation context. *See* APP 1297-1298. Indeed, all of the cases relied on by the district court for that proposition are indisputably defamation cases.[8] *See id*. That these cases also alleged other claims as well does not mean

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[8] *See Clark County Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. at 382, 213 P.3d at 502; *Pope v. Motel 6,* 121 Nev. 307, 317, 114 P.3d 277, 284 (2005); *Fink v. Oshins,* 118 Nev. 428, 433, 49 P.3d 640, 645 (2002); *Hampe v. Foote*, 118 Nev. 405, 409, 47 P.3d 438, 440 (2002), *overruled in part on other grounds by Buzz*

that the absolute privilege applies where, as here, there is no defamation claim whatsoever. *See id; see also* 0001-0016.

For example, *Clark County Sch. Dist. v. Virtual Educ. Software, Inc.* is a defamation case that addressed whether the absolute litigation privilege extended to non-lawyers. *See id.* at 382, 213 P.3d at 502. In deciding affirmatively, the Court expressly stated that the absolute privilege affords "*freedom from liability for defamation." Id.* (*citing* Restatement (Second) of Torts § 587 cmts. a, d, e (1977)) (emphasis added). And, the court relied on Restatement (Second) of Torts § 587 in doing so, which section covers defenses to defamation actions. *See id.*

With respect to Conclusion no. 48 in particular, *Hampe v. Foote* does not stand for the proposition that "[a]n absolute privilege bars any civil litigation based on the underlying communication" as the district court erroneously determined. *See* APP 1297. Rather, that defamation case concerned the scope of the statutory privilege afforded under NRS 463.3407 to certain communications made to the Nevada Gaming Commission or Nevada Gaming Control Board. *See Hampe v. Foote*, 118 Nev. at 407, 47 P.3d at 439. Similarly, *Circus Circus Hotels, Inc. v. Witherspoon* addressed whether an allegedly defamatory communication was

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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); *Knox v. Dick,* 99 Nev. 514, 518, 665 P.2d 267, 270 (1983).

subject to the privilege under NRS 612.265, which statute created an absolute privilege for all oral or written communications from an employer to the Employment Security Department. *See id*. at 60, 657 P.2d at 104. Thus, these cases involved statutory privileges and likewise do not support the district court's conclusion that the absolute privilege applies here as a matter of law.

2. City Council Proceedings Are Not Quasi-Judicial.

Second, some undetermined, future city council proceedings hardly constitute the quasi-judicial proceedings contemplated by Nevada courts. *See, e.g., 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). In Conclusion nos. 45-49, however, the district court nevertheless concluded that the "city council proceedings were quasi-judicial." APP 1296-1297. In doing so, the district court misguidedly conflated the showing required at step one of the anti-SLAPP analysis under NRS 41.660, i.e., that the plaintiff's claims for relief are based on activist communications to a political subdivision of the state (the city council) in a public forum, with the required showing for application of the absolute litigation privilege, i.e., the defendant's defamatory statements were made during or in anticipation of judicial or quasi-judicial proceedings. *See id*. Indeed, this Court's conclusion that the Residents' communications were made in connection with an issue of public interest does not

necessarily mean that the city council proceedings were quasi-judicial or that the Residents' communications fall within the scope of the absolute litigation privilege.

In fact, this Court's order reversing and remanding expressly recognized that the city council is a *legislative* body, referring only to city council proceedings as a "public forum." *See Omerza v. Fore Stars,* 2020 WL 406783, at *6-7. And once again, the Nevada law cited by the district court does not support its conclusion that city council proceedings are quasi-judicial. *See* APP 1296-1297. Indeed, the district court's reliance on *State ex rel. Bd. of Parole Comm'rs v. Morrow*, 127 Nev. 265, 273, 255 P.3d 224, 229 (2011), is entirely misplaced. *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.

At minimum, a quasi-judicial proceeding must afford each party: (1) the ability to present and be object to evidence; (2) *the ability to cross-examine witnesses*; (3) a written decision from the public body; *and* (4) an opportunity to appeal to a higher authority. *See Morrow,* 127 Nev. at 275, 255 P.3d at 229 (emphasis added). In other words, all of these protections must be present for a

proceeding to be quasi-judicial. *See id.* And, this Court has concluded that similar proceedings were not quasi-judicial solely because they lacked an opportunity for cross-examination. *See, e.g., Stockmeier v Nevada Dept. of Corr. Psy. Review Panel,* 122 Nev. 385, 135 P.3d 220 (2008), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas,* 124 Nev. 224, 181 P.3d 670 (2008). For the same reason, the city council proceedings in this case are *not* quasi-judicial under *Morrow*, and the district court's conclusion otherwise is nonsensical.

More recent Nevada law further contradicts the district court's conclusion that city council proceedings are quasi-judicial. *See* APP 1296-1297. Indeed, the Landowners cited *Spencer v. Klementi*, 136 Nev. ___, 466 P.3d 1241 (2020), for the proposition that city council proceedings are not quasi-judicial for purposes of the absolute privilege because they do not afford due-process protections similar to those provided in a court of law. In *Spencer*, a dispute arose between neighbors which culminated when one allegedly battered the other, resulting in a criminal prosecution and acquittal. *See id.* at ___, 466 P.3d at 1243-44. Thereafter, a civil suit seeking recovery for personal injuries was filed and malicious prosecution and defamation counterclaims were eventually added. *See id.* In granting summary judgment, the district court in *Spencer* concluded that the judicial-proceeding privilege protected defamatory statements made during county planning commission meetings. *See id.* at 1246.

At issue on appeal in *Spencer* was whether such meetings were quasi-judicial proceedings for purposes of the absolute privilege. *See id.* In determining that they were not, this Court held that to qualify as a quasi-judicial proceeding for purposes of the absolute privilege, a proceeding must, at minimum "(1) provide the opportunity to present and rebut evidence and witness testimony, (2) require that such evidence and testimony be presented upon oath or affirmation, and (3) allow opposing parties to cross-examine, impeach, or otherwise confront a witness." *Id.; 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 the county planning commission meetings, and the public comment periods in particular, did not require an oath or affirmation for testimony presented during the meetings, nor was the testimony subject to cross-examination or impeachment, they lacked basic due-process protections and were not quasi-judicial in nature. *See Spencer,* 136 Nev. ___, 466 P.3d at 1248.

Likewise, nothing in the record or Las Vegas City Charter § 2.080 – the authority purportedly relied on by the district court in reaching Conclusion no. 46 – demonstrates that the minimal due-process requirements set forth in *Spencer* are present at the city council proceedings anticipated in this case. In fact, Conclusion

no. 45 does not even specify any particular 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. Furthermore, 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.* Quite simply, the city council proceedings anticipated in this case do not afford the basic due-process protections required by *Spencer* and are therefore not quasi-judicial for purposes of the absolute privilege.

Incredibly, the district court nevertheless rejected *Spencer* because it "involved a defamation suit." APP 1297. In doing so, the district court erroneously concluded that "*[Fink v.] Oshins* controls" even though it too involved a defamation suit, as does every other case cited in the dismissal order. *See id.,* 118 Nev. at 437, 49 P.3d at 646. Moreover, at issue in *Oshins* was an attorney's statements to someone not directly involved with an actual or anticipated judicial proceeding. *See id.* Thus, *Oshins* rather than *Spencer* is distinguishable here, and the district court should have applied the latter case – which was factually analogous – to determine that the city council proceedings anticipated here are not quasi-judicial for purposes

of the absolute privilege. Quite simply, the absolute litigation privilege does not apply here, and the district court misinterpreted Nevada law in reaching a contrary conclusion.

3. The District Court Failed To Conduct The Case-Specific, Fact-Intensive Inquiry Required By *Jacobs v. Adelson*, 130 Nev. 408, 325 P.3d 1282 (2014).

Finally, in order for the absolute privilege to apply to defamatory statements made outside of a judicial proceeding, "(1) a judicial proceeding must be contemplated in good faith and under serious consideration, and (2) the communication must be related to the litigation." *Shapiro v. Welt*, 133 Nev. 35, 40-41, 389 P.3d 262, 268-69. "For a statement to fall within the scope of the absolute litigation privilege it must be made to a recipient who has a significant interest in the outcome of the litigation or who has a role in the litigation." *Id.* "In order to determine whether a person who is not directly involved in the judicial proceeding may still be significantly interested in the proceeding" such that an absolute privilege applies, the district court must review "the recipient's legal relationship to the litigation, not their interest as an observer." *Jacobs v. Adelson*, 130 Nev. at 415, 325 P.3d at 1287 (defamation action recognizing existence of an absolute privilege for defamatory statements made during the course of judicial and quasi-judicial proceedings) The review "is a case-specific, fact-intensive inquiry that must focus on and balance the underlying principles of the privilege." *Id.*; *see also Shapiro v. Welt*, 133 Nev. at 41, 389 P.3d at 268-69 (remanding to district court to conduct

case-specific, fact-intensive inquiry).

Here, it is undisputed that the Residents are not *parties* to any judicial or quasi-judicial proceeding. As a result, the absolute litigation privilege does not apply here as a matter of law. *See Shapiro v. Welt*, 133 Nev. at 40-41, 389 P.3d at 268-69 (recipient of communications must have a role in the litigation or a significant interest in the outcome of the litigation for absolute privilege to apply). At best, as this Court concluded, the Residents are activists or observers whose activities were aimed at influencing a legislative body – the city council – to vote against any measure that would allow for residential development of the Land. *See Omerza v. Fore Stars,* 2020 WL 406783, at *6-7. Assuming city council proceedings are "quasi-judicial" for purposes of the absolute privilege (which they are not), the district court still failed to conduct a case-specific, fact-intensive inquiry that focused on and balanced the underlying principles of the privilege as required by *Jacobs.* Instead, the district court summarily concluded that the city council proceedings were quasi-judicial and ended the inquiry. Thus, the district court erred in its analysis of the Residents' statements. For this additional reason, the district court's application of the absolute privilege in this case was erroneous and should be reversed.

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D. The District Court Erroneously Concluded That The Landowners Failed To Meet Their Step-Two Burden Under NRS 41.660(3)(b).

Despite the district court's refusal to allow the discovery requested, the Landowners' claims still have "minimal merit." In determining that the Landowners failed to meet their step-two burden under NRS 41.660, however, the district court misapplied a summary judgment standard rather than the "minimal merit" standard required for step two of the anti-SLAPP motion to dismiss analysis. *See* APP 1298-1299.

As this Court has recognized, Nevada's anti-SLAPP laws substantially track those of California. *See, e.g., Omerza v. Fore Stars,* 2020 WL 406783, at *10 (*citing Bikkina v. Mahadevan,* 241 Cal.App.4th 70 (Ct. App. 2015)). Under California's anti-SLAPP laws, for purposes of the step-two burden, the court looks to the allegations in the complaint as well as the plaintiffs' evidence to determine whether, accepting that evidence as true and only looking to the defendant's evidence to access whether it defeats the plaintiffs' evidence as a matter of law, the plaintiffs have established that their causes of action have "minimal merit." *Bikkina,* 241 Cal.App.4th at 85 (citations omitted); *see also* NRS 41.665(2) ("[I]n determining whether the plaintiff 'has demonstrated with prima facie evidence a probability of prevailing on the claim[,]' the plaintiff must meet the same burden of proof that a plaintiff has been required to meet pursuant to California's anti-Strategic Lawsuits

Against Public Participation law as of June 8, 2015."). As the court in *Bikkina* noted:

> [This is because a special motion to dismiss] is not a vehicle for testing the strength of a plaintiff's case, or the ability of a plaintiff, so early in the proceedings, to produce evidence supporting each theory of damages asserted in connection with the plaintiff's claims. It is a vehicle for determining whether a plaintiff, through a showing of minimal merit, has stated and substantiated a legally sufficient claim.

Id. at 88 (citation omitted). In other words, Nevada plaintiffs demonstrate "a probability of prevailing" on their claims with "prima facie evidence" under NRS 41.660(3)(b) by showing their causes of action have "minimal merit" based on the allegations in the complaint and any evidence which the district court must accept as true. *See* NRS 41.665(2) (Nevada plaintiff's burden of proof tracks that required of California plaintiff as of June 8, 2015); *see also Baral v Schnitt,* 376 P.3d 604, 608 (Cal. 2016) (court does not "weigh evidence or resolve conflicting claims" but asks "whether plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment"); *Bikkina,* 241 Cal.App.4th at 85 (holding plaintiff's opposition constituted prima facie evidence supporting claims pleaded in complaint).

1. The Landowners' Intentional And Negligent Misrepresentation Claims (Fifth And Sixth Claims For Relief) Have Minimal Merit.

The tort of deceit or misrepresentation can stem from one's communication of misinformation to another with the intention, or having reason to believe, that the

misinformation will be communicated to a third party. *See Epperson v. Roloff,* 102 Nev. 206, 719 P.2d 799 (1986), *overruled on other grounds by GES, Inc. v Corbitt,* 117 Nev. 265, 21 P.3d 11 (2001). Furthermore, the suppression or omission of information is equivalent to a false representation. *See Nelson v. Heer,* 123 Nev. 217, 225-26, 163 P.3d 420, 426 (2007); *see also Epperson,* 102 Nev. at 212, 719 P.2d at 803 (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.)

With respect to their misrepresentation claims, the Landowners allege the Residents' 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…." APP 0001-0016. According to the Complaint, the Residents 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 Landowners' applications. *See id.* During their depositions, the Residents confirmed receipt of their CC&Rs, which was 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, e.g.,* APP 1004-1005, 0862; 0941, 0945. The Residents also

admitted to never reading their CC&Rs or seeing the Peccole Ranch Master Plan. *See id*. Although they denied knowing the statements and/or declarations are false, the Residents further admitted that they did not research or otherwise verify the information, which they gleaned solely from Schreck and gossip with neighbors. *See* APP 1020-1021, 1026-1029. At best, this was a judgmental error. *See Squires v. Sierra Nevada Ed. Found. Inc.,* 107 Nev. 902, 905, 823 P.2d 256, 258 (1991) (*citing Paladino v. Adelphi University,* 454 N.Y.S.2d 868, 873 (N.Y. App. Div. 1982) (negligent misrepresentation is judgmental error)).

Moreover, the deposition transcripts, the documents produced by the Residents, and the public records obtained by the Landowners controvert the Residents' claim of ignorance. Indeed, they show Omerza, Bresee and Caria's involvement with city council, including their relationships and ongoing communications with individual council members regarding development of the Land, and demonstrate that the Residents had significant information and knowledge of facts that belie the contents of the Declaration. *See , e.g.,* JA 1007-1011, 1014-1015, 1019-1020, 1033-1037, 1060-1061, 1066-1069. For example, Omerza admitted during his deposition to meeting with Seroka and speaking with his staff about development of the Land. *See id*. Bresee admitted to being friends with, and having received the Declaration from, Schreck as well as having received numerous emails and text messages regarding development of the Land. *See* APP

0965-0966. Omerza also admitted attending and/or speaking at several city council meetings about development of the Land. *See* APP 0872. Caria likewise admitted attending and/or speaking at several city council meetings, fundraisers, and informal meetings since 2016 to oppose development of the Land. *See* APP 1007-1011, 1014-1015, 1019-1020, 1060-1061, 1066-1069.

With respect to evidence gathered by the Landowners via public records requests, the transcripts and minutes showed Caria and Bresee speaking out against development of the Land, disparaging the Landowners, and seeking to delay a vote on development of the Land until after their friend Seroka was seated. *See* APP 0853-1216. Bresee did so despite initially supporting development of the Land and having conveyed that support to the City in 2016. *See id*. The evidence further showed that Bresee and Caria believed that Seroka was primarily elected to "get rid of [the] development" of the Land. Id. Given this evidence, it defies credulity that the Residents purchased their residences/lots "in reliance upon the fact that the [Land] could not be developed pursuant to the City's Approval in 1990 of the Peccole Ranch Master Plan and subsequent formal actions . . . ." *Id.; see also* APP 0018. At minimum, a reasonable inference may be drawn from the evidence that the Residents knew the Land was developable, or had information indicating as much, and their omission of these material facts from the statements and/or declarations they executed, promulgated, solicited, and circulated to other

homeowners in Queensridge is equivalent to a false representation. *See id.* This constitutes prima facie evidence supporting the Landowners' misrepresentation claims.

2. The Landowners' Intentional And Negligent Interference With Prospective Economic Relations Claims (Second And Third Claims For Relief) Have Minimal Merit.

Under Nevada law, interference with prospective economic advantage requires a showing of the following five factors: (1) a prospective contractual relationship between the plaintiff and a third party; (2) the defendant's knowledge of the prospective relationship; (3) intent to harm the plaintiff by preventing the relationship; (4) the defendant's conduct was not privileged or justified; and (5) the plaintiff suffered actual harm as a result. *See In re Amerco Derivative Litig.,*127 Nev. 196, 252 P.3d 681 (2011); *see also LT Intern. Ltd. v. Shuffle Master, Inc.*, 8 F.Supp.3d 1238, 1248 (D. Nev. 2014) (stating elements of tortious interference with prospective economic relations claim). "Privilege can exist when the defendant acts to protect his own interests." *Leavitt v. Leisure Sports Inc.*, 103 Nev. 81, 734 P.2d 1221 (1987). However, a defendant's activity is not privileged or justified if his actions are unlawful, improper, unfair or unreasonable. *See Crockett v. Sahara Realty Corp.*, 95 Nev. 197, 591 P.2d 1135 (1979).

In the Complaint, the Landowners' interference with prospective economic advantage claims allege the Residents 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 Landowners' reputation, livelihood, and ability to develop the Land. APP 0001-0016. It is public knowledge that the Landowners have lost economic opportunities to develop the Land and that it remains undeveloped today. *See Brelient v. Preferred Equities Corp.,* 109 Nev. 842, 845, 858 P.2d 1258, 1260 (1993) (court can take judicial notice of public information). In addition, the Residents admitted during their depositions, and this Court previously found, that their efforts were intended to influence a city council vote, i.e., prevent development of the Land, including any prospective contractual relationship related thereto. *See* APP 1024-1025, 1032; *see also Omerza v. Fore Stars,* 2020 WL 406783, at *6-7. The documents obtained by the Landowners through public records requests as well as the Schreck email attached to Caria's discovery responses further show the Residents' intent to harm and interfere with the Landowners' business interests. *See* APP 0853-1216. Not only did the Residents drum up opposition to the Landowners' development plans through the misrepresentations detailed above, but Bresee and Caria sought to delay a city council vote until their friend Seroka took office and could "get rid of [the] development." *Id*. Other than their own selfish motives, there is no justification for these improper actions. *See Crockett,* 95 Nev. at 200,

591 P.2d 1137 (illegal or improper actions not privileged or justified). Therefore, prima facie evidence supports the Landowners' interference with prospective economic advantage claims.

3. The Landowners' Civil Conspiracy Claim (Fourth Claim For Relief) Has Minimal Merit.

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). The Landowners' conspiracy claim in this case is based on the Residents' 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 [Landowners'] land rights and their intent to develop their property." APP 0001-0016. The Complaint further alleges that the "co-conspirators agreement was implemented by their concerted actions to object to [the Landowners'] development and to use their political influence" to delay and sabotage any development projects to the detriment of the Landowners and their livelihoods. *Id*.

Despite the very limited discovery allowed, the documents produced as well as the Residents' deposition testimony shows that Omerza, Bresee, and Caria joined Schreck in disseminating false statements to neighbors and others in order to

deceive members of city council into voting against any development of the Land. *See* APP 0853-1216. Schreck's reference to "everything we do going forward" in the email attached to Caria's discovery responses is just one example and a direct admission of the conspiracy. *See id*. The evidence also shows 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. *See id.; see also* APP 1007-1011, 1014-1015, 1019-1020, 1060-1061, 1066-1069. 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 further evidences the concerted action of these conspirators. *Id*. Again, it is public knowledge that the Landowners have lost economic opportunities to develop the Land and that it remains undeveloped today. *See Brelient,* 109 Nev. at 845, 858 P.2d at 1260 (court may consider matters of public record). Even though the Residents deny anything untoward, all of this is sufficient evidence from which a reasonable inference of conspiracy may be drawn. 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.

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E. The District Court's Attorney Fee Award Constitutes An Abuse Of Discretion.

As set forth above, the district court's order granting the Residents' anti-SLAPP special motion to dismiss should be reversed in its entirety. As such, the Residents are not entitled to any attorney fees whatsoever under NRS 41.670. At minimum, the attorney fees awarded by the district court are not reasonable and must be reduced substantially.

Under NRS 41.670(1)(a), if the district court grants a special motion to dismiss filed under NRS 41.660, the court "shall award reasonable costs and attorney's fees to the person against whom the action was brought." Although the district court has discretion to determine the amount of fees to award, that discretion must be tempered by "reason and fairness." *Shuette v. Beazer Homes Holdings Corp.,* 121 Nev. 837, 864, 124 P.3d 530, 548-49 (2005). Generally, the lodestar approach to calculating reasonable attorney fees involves multiplying "the number of hours reasonably spent on the case by a reasonable hourly rate." *Herbst v. Humana Health Ins. of Nevada*, 105 Nev. at 590, 781 P.2d at 764. Thereafter, the district court must also consider the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), to determine whether the requested amount is reasonable. The *Brunzell* factors are: 1) the qualities of the advocate; 2) the character of the work to be done; 3) the work actually performed; and 4) the results achieved. *See id.* at 349, 455 P.2d at 33. For an award of costs to

be upheld, the requested costs "must be reasonable, necessary, and actually incurred." *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 120, 345 P.3d 1049, 1054 (2015).

As an initial matter, there were crucial, undisputed facts regarding the Residents' counsel that should have raised red flags for the district court. Specifically, 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 the Landowners' development of the Land. *See* APP 1024-1025, 1032. Thereafter, he engaged his firm to *defend* the Residents on a *contingency basis* in a case with no counterclaims or other affirmative basis for recovery. Attorneys and clients typically use this fee arrangement in cases where money is being sought and there is a reasonable likelihood of recovery – most often in cases involving personal injury or workers' compensation. The atypical fee arrangement points to something nefarious going on here, i.e., perhaps Schreck is covering his tracks as a conspirator because his behind-the-scenes actions were shady or unethical, and/or he thought his co-conspirators could feign ignorance and get away with their improper actions, and then he could use NRS 41.670 to collect a windfall of nearly $700,000 in

attorney fees for a situation entirely of his doing. At minimum, these facts cast serious doubt on the reasonableness of the Residents' attorney fee request, and the district court should not have ignored them.

Additionally, the record does not support the district court's conclusion that $363,244.00 constitutes a reasonable lodestar amount. *See* APP 1616. The Supreme Court has held that a reasonable hourly rate must "be calculated according to the prevailing market rates in the relevant community," considering the fees charged by "lawyers of reasonably comparable skill, experience, and reputation." *Blum v Stenson*, 465 U.S. 886, 895-96 (1984). Likewise, the hours spent must be adequately documented and cannot be "unreasonably inflated." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (where documentation of hours worked and rates claim is inadequate, the district court may reduce the attorney fee award accordingly).

Here, defense counsel charged hourly rates between $450 and $875, with Mitchell Langberg charging an hourly rate of $690 and Schreck at $875 per hour. *See* APP 1394-1420. There is nothing in the record, however, on the prevailing market rates in Las Vegas or those charged by "lawyers of reasonably comparable skill, experience, and reputation." APP 1478-1591, 1608-1614. Indeed, the Residents did not attach local attorney affidavits to their motion or otherwise demonstrate the reasonableness of such high rates. Instead, the Residents simply

compared their counsels' rates to those of the Landowners' counsel, none of which were as high as Langberg's rate or even came close to that charged by Schreck – the Residents' friend and co-conspirator – for "providing facts" and meeting with Langberg. APP 1357-1420. Such a comparison did not establish that defense counsels' rates were reasonable for purposes of the district court's lodestar analysis.

Similarly, defense counsel purportedly spent nearly 650 hours working on the case. *See id.*. This is substantially more than the 481.5 hours spent by the Landowners' counsel, a discrepancy that should have concerned the district court. In fact, the Landowners only incurred a total of $132,722.21 in attorney fees, which is over $200,000 less than that incurred by defense counsel. *See* APP 1478-1591. A cursory comparison of the parties' counsels' bills, however, explains the huge discrepancy. The Residents' counsels' bills are replete with inflated, duplicative and redundant fees for unnecessary work, including investigating facts, internal meetings, and repeatedly resisting the Landowners' discovery requests. *See* APP 1357-1420. For example, defense counsel purportedly incurred $20,000 for Schreck's work as a witness in the case and nearly $60,000 for preparing, drafting, and filing the Residents' special motion to dismiss. *See id*. By contrast, the Landowners only incurred about $9,000 researching, preparing, and filing their initial opposition. *See* APP 1478-1591. And, these are just a few of the many examples brought to the district court's attention by the Landowners, all of which

were ignored as the district court refused to reduce the amount reflected on defense counsels' bills, i.e., $363,244.00, to a reasonable amount.

Although ultimately less than the even more outrageous $694,044.00 initially sought by the Residents, the amount awarded by the district court here also far exceeds the attorney fee awards in other recent anti-SLAPP cases. *See, e.g., Smith v. Zilverberg,* 137 Nev. at ___, 481 P.3d at 1232 (affirming $66,615 attorney fee award under NRS 41.670(1)(a)); *Brown-Osborne v. Jackson,* 2021 WL 2178578, at *3-4 (Nev. Ct. App. May 27, 2021) (unpublished opinion) (affirming attorney fee award of $11,781.34 under NRS 41.670(1)(a)); *Jablonski Enters. v. Nye Cty.,* 2017 WL 4809997, at *6 (D. Nev. 2017) (reducing anti-SLAPP attorney fees to a reasonable amount of $2,287.50). This too should have indicated to the district court that the attorney fees requested by the Residents were not reasonable, prompting a substantial reduction. The district court's failure to do so constitutes an abuse of discretion.

Finally, the district court's order granting the Residents' motion for attorney fees does not even mention the *Brunzell* factors, which indisputably do not support the exorbitant attorney fee award. *See* APP 1615-1620. Although Langberg is a self-proclaimed "anti-SLAPP expert," the other four attorneys working on this case are not, yet they charged substantial hourly rates for the same work. APP 1357-1420. Again, Schreck – a co-conspirator rather than "anti-SLAPP" expert – charged

an outrageous hourly rate of $875 for merely "providing facts" and attending meetings with Langberg. *Id*. Despite all this, the district court refused to reduce the hourly rate of the Residents' counsel whatsoever. The first *Brunzell* factor – the qualities of the advocate – therefore weighs against the attorney fee award. *See Brunzell,* 85 Nev. at 349, 455 P.2d at 33.

The attorney fee award is likewise unwarranted under the second and third *Brunzell* factors relating to the character of the work done and the work actually performed. *See id.* As noted above, the Residents' counsels' bills are full of inflated, duplicative and redundant fees for investigating facts, meetings, resisting the Landowners' discovery requests, and other unnecessary work, all of which the district court didn't even evaluate because it awarded the entire lodestar amount requested by the Residents. *See* APP 1357-1420; 1615-1620; *see also Hensley v. Echerhart,* 461 U.S. at 434 (fee requests must exclude hours that are "excessive, redundant, or otherwise unnecessary).

Although the district court did grant the special motion to dismiss, that decision has been appealed. As such, the results achieved by the Residents' counsel has yet to be finally determined. Thus, the fourth *Brunzell* factor does not weigh in favor of the attorney fee award. *See Id.* at 349, 455 P.2d at 33; *see also O'Connell v. Wynn,* 134 Nev. 550, 562, 429 P.3d 664, 673 (Ct. App. 2018) (substantial

evidence must show counsels' work accomplished desired result). The attorney fee award should be reduced accordingly.

V. 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 11th day of October, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this **APPELLANTS' OPENING 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 **53** pages, inclusive of the verification and required certificates, and the word count is 12,807. 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 11th day of October, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of October, 2021, I caused service of a true and correct copy of the above and foregoing **APPELLANTS' OPENING 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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