# IN THE SUPREME COURT OF THE STATE OF NEVADA

***

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

Appellees,

vs.

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

Appellants,

Case No: 82358
(lead case)

Consolidated With:

82880

(same caption)



## JOINT APPENDIX SUBMITTED BY APPELLANTS AND APPELLEES

## VOLUME 2 (Pages 96-305)

Lisa A. Rasmussen, Esq.
Nevada Bar No. 7491
**The Law Offices of Kristina Wildeveld & Associates**
550 E. Charleston Blvd. Suite A
Las Vegas, NV 89104
Tel. (702) 222-0007
Fax. (702 222-0001
lisa@veldlaw.com
*Attorneys for Appellees Fore Stars, 180 Land Co, and Seventy Acres*

MITCHELL J. LANGBERG, ESQ.
Nevada Bar No. 10118
**BROWNSTEIN HYATT FARBER SCHRECK, LLP**
100 North City Parkway, Suite 1600
Las Vegas, NV 89106
Telephone: 702.383.2101
Facsimile: 702.382.8135

## JOINT APPENDIX INDEX

| Vol. | Description | Date | Bates No. |
|---|---|---|---|
| 1 | Complaint with Exhibits | 3/15/18 | **1-95** |
| 2 | Request for Judicial Notice in Support of Special Motion to Dismiss | 4/13/18 | **96-147** |
| 2 | Motion to Dismiss 12(b)(5) | 4/13/18 | **148-162** |
| 2 | Special Motion to Dismiss | 4/13/18 | **163-197** |
| 2 | Opposition to Special MTD | 5/4/18 | **198-219** |
| 2 | Opposition to MTD 12(b)(5) | 5/7/18 | **220-235** |
| 2 | Reply to Special Motion to Dismiss | 5/9/18 | **236-251** |
| 2 | Reply to MTD 12(b)(5) | 5/9/18 | **252-262** |
| 2 | Request for Judicial Notice in support of Reply to Special MTD | 5/9/18 | **263-300** |
| 2 | Plaintiff's First Supplement to their Opposition to Special MTD | 5/11/18 | **301-305** |
| 3 | Plaintiff's Second Supplement to their Opposition to Special MTD | 5/11/18 | **306-327** |
| 3 | Defendants' Supplement in Support of MTD | 5/23/18 | **328-365** |
| 3 | Plaintiff's Supplement in Support of Opposition to Special MTD | 5/23/18 | **366-425** |
| 4 | Plaintiffs' Errata to Complaint | 6/11/18 | **426-523** |
| 4 | Findings of Fact, Conclusion of Law denying Motion to Dismiss | 6/20/18 | **524-537** |
| 4 | Notice of Appeal to FFCOL | 6/27/18 | **538-572** |
| 5 | Plaintiffs' Motion for an Order Permitting Discovery | 9/14/18 | **573-631** |
| 5 | Defendants' Opposition to Mtn for Discovery | 10/1/18 | **632-639** |

| | | | |
|---|---|---|---|
| 5 | Plaintiffs' Reply to Mtn for Discovery | 10/12/18 | **640-664** |
| 5 | Plaintiffs' Supplemental Exhibit in Further Support of Discovery Mtn | 10/17/18 | **665-670** |
| 5 | Defendants' Supplemental Exhibits in Further Support of Opposition to Mtn for Discovery | 10/18/18 | **671-679** |
| 5 | Minutes and Order from Discovery Commissioner | 10/19/18 | **680-681** |
| 5 | Defendants' Objections to the Discovery Commissioner's Report and Recommendation | 1/3/19 | **682-688** |
| 5 | Plaintiffs' Response to Objections to R&R | 1/30/19 | **689-712** |
| 5 | Order Denying Mtn for Discovery | 4/11/19 | **713-715** |
| 5 | Nevada Supreme Court Order on remand | 1/23/20 | **716-728** |
| 6 | Nevada Supreme Court Order on Rehearing | 2/27/20 | **729-730** |
| 6 | Supplemental brief for limited discovery | 5/6/20 | **731-737** |
| 6 | Opposition to request for discovery | 5/11/20 | **738-748** |
| 6 | May 29, 2020, Minute Order | | **749** |
| 6 | Defendants' Request for Clarification | 5/29/20 | **750-752** |
| 6 | Minute Order on Request for Clarification | 6/5/20 | **753** |
| 6 | Defendants' Motion for protective order | 7/2/20 | **754-799** |
| 6 | Plaintiff' response to motion for protective order | 7/7/20 | **800-815** |
| 6 | Reply in support of protective order | 7/9/20 | **816-821** |
| 6 | July 21. 2020 Minute order | 7/21/20 | **822** |

| | | | |
|---|---|---|---|
| 6 | Order granting protective order | 8/3/20 | **823-829** |
| 7 | Plaintiffs' Supplemental Opposition to Motion to Dismiss (PART 1) | 10/14/20 | **830-995** |
| 8 | Plaintiffs' Supplemental Opposition to Motion to Dismiss (PART 2) | 10/14/20 | **996-1216** |
| 9 | Errata to Supplemental Opposition to Motion to Dismiss | 10/14/20 | **1217-1222** |
| 9 | Defendants' Supplemental Reply to Motion to Dismiss | 10/30/20 | **1223-1254** |
| 9 | Declaration of Mitchell Langberg in Support of Supplemental Brief (Reply) to Special MTD | 10/30/20 | **1255-1257** |
| 9 | November 9, 2020, Minute Order | 11/9/20 | **1258-1259** |
| 9 | Findings of Fact and Conclusions of Law granting Motion to Dismiss | 12/3/20 | **1260-1272** |
| 9 | Plaintiffs' Objections to Proposed Findings of Fact, Conclusions of Law as Proposed by Plaintiff | 12/3/20 | **1273-1286** |
| 9 | Notice of Entry of Order on FF, COL and Order granting Special MTD | 12/10/20 | **1287-1302** |
| 9 | Motion to Reconsider Order Granting Special MTD | 12/24/20 | **1302-1356** |
| 9 | Motion for Attorneys Fees and Costs | 12/31/20 | **1357-1420** |
| 10 | Defendants' Opposition to MTN to Reconsider Order Dismissing | 1/7/21 | **1421-1428** |
| 10 | Plaintiffs' Reply to Mtn to Reconsider | 1/14/21 | **1429-1440** |
| 10 | Errata to Reply to Mtn Reconsider | 1/14/21 | **1441-1477** |
| 10 | Opposition to Motion for Attorney's Fees and Costs | 1/22/21 | **1478-1591** |
| 11 | Minute Order Denying Motion to Reconsider | 1/25/21 | **1592** |

| | | | |
|---|---|---|---|
| 11 | Mtn to Reconsider Minute Order dated 1/25/21 | 2/2/21 | **1593-1596** |
| 11 | Order Denying Mtn to Reconsider Order Dismissing | 2/4/21 | **1597-1604** |
| 11 | Declaration of Lisa Rasmussen submitted as Supplement to Mtn for Attorney's Fees | 2/12/21 | **1605-1607** |
| 11 | Reply in support of Motion for Attorney's Fees and Costs | 2/12/21 | **1608-1614** |
| 11 | Order Granting Motion for Attorney's Fees and Costs | 4/16/21 | **1615-1620** |
| 11 | Notice of Appeal Case No. 82338 | 1/8/21 | **1621-1639** |
| 11 | Notice of Appeal Case No. 82880 | 5/5/21 | **1640-1650** |
| 11 | Reporter's Transcript of Proceedings on SLAPP Motion to Dismiss | 5/14/18 | **1651-1712** |
| 11 | Reporter's Transcript of Discovery Commissioner Proceedings | 10/19/18 | **1713-1728** |
| 11 | Reporter's Transcript of Post Remand Hearing | 4/29/20 | **1729-1744** |
| 11 | Reporter's Transcript of Proceedings, Discovery/Protective Order Hearing | 7/13/20 | **1745-1775** |
| 11 | Reporter's Transcript of Proceedings, Discovery/Protective Order Hearing | 7/29/20 | **1776-1781** |
| 11 | Reporter's Transcript of Proceedings, on Special Motio to Dismiss, Post Remand | 11/9/20 | **1782-1792** |
| 11 | Reporter's Transcript of Proceedings on Motion for Attorney's Fees | 3/31/21 | **1793-1815** |

**RFJN**
Mitchell J. Langberg, Esq., Bar No. 10118
mlangberg@bhfs.com
BROWNSTEIN HYATT FARBER & SCHRECK LLP
100 North City Parkway, Suite 1600
Las Vegas, Nevada 89106
Telephone: 702.382.2101
Facsimile: 702.382.8135

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

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| FORE STARS, LTD., a Nevada Limited Liability Company; 180 LAND CO., LLC, a Nevada Limited Liability Company; SEVENTY ACRES, LLC, a Nevada Limited Liability Company,<br><br>Plaintiffs,<br><br>v.<br><br>DANIEL OMERZA, DARREN BRESEE, STEVE CARIA, and DOES 1 THROUGH 1000,<br><br>Defendants. | CASE NO. A-18-771224-C<br><br>**DEFENDANTS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF (1) DEFENDANTS' SPECIAL MOTION TO DISMISS (ANTI-SLAPP MOTION) PLAINTIFFS' COMPLAINT PURSUANT TO NRS §41.635 ET. SEQ. AND (2) DEFENDANTS' MOTION TO DISMISS PURSUANT TO NRCP 12(b)(5)** |

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

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

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

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

DATED this 13th day of April, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

BY: */s/ Mitchell J. Langberg*
MITCHELL J. LANGBERG, ESQ., Bar No. 10118
mlangberg@bhfs.comLAURA B. LANGBERG, ESQ.,
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
Telephone: 702.382.2101
Facsimile: 702.382.8135

*Counsel for Defendants*
DANIEL OMERZA, DARREN BRESEE, and
STEVE CARIA

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and pursuant to NRCP 5(b), EDCR 8.05, Administrative Order 14-2, and NEFCR 9, I caused a true and correct copy of the foregoing **DEFENDANTS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF (1) DEFENDANTS' SPECIAL MOTION TO DISMISS (ANTI-SLAPP MOTION) PLAINTIFFS' COMPLAINT PURSUANT TO NRS §41.635 ET. SEQ. AND (2) DEFENDANTS' MOTION TO DISMISS PURSUANT TO NRCP 12(b)(5)** be submitted electronically for filing and/or service with the Eighth Judicial District Court via the Court's Electronic Filing System on the 13th day of April, 2018, to the following:

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

*Attorneys for Plaintiffs*

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

# EXHIBIT A

TRAN

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

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

HEARING

Before the Honorable Jim Crockett

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

Reporter's Transcript of Proceedings

REPORTED BY:

BILL NELSON, RMR, CCR #191
CERTIFIED COURT REPORTER

APPEARANCES:

| | |
|---|---|
| For the Plaintiff: | Todd Bice, Esq.<br>Dustun Holmes, Esq. |
| For the Defendants: | Christopher Kaempfer, Esq.<br>James Smyth, Esq.<br>Stephanie Allen, Esq.<br>Philip Byrnes, Esq.<br>Todd Davis, Esq. |

Las Vegas, Nevada, Thursday, January 11, 2018

* * * * *

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

THE COURT REPORTER: No, Judge.

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

Todd Bice and Dustun Holmes on behalf of the Plaintiff.

MR. HOLMES: Dustun Holmes on behalf of Plaintiff.

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

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

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

THE COURT: All right.

Have a seat.

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

behalf of Seventy Acres are here in court.

THE COURT: Mr. Lowie and who?

MR. KAEMPFER: Vickie DeHart.

THE COURT: Okay.

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

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

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

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

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

I find the Petitioners' arguments persuasive.

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

The question is, what do they say?

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

Historically this is a project that had --

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

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

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

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

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

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

residential lots.

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

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

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

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

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

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

Quoting again, the staff says, the current

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

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

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

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

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

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

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

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

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

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

The people who bought into this Peccole Ranch Master Plan 1 and 2 did so in reliance upon what the master planning was. They bought their homes, some of them made a very substantial investment, but no one making an insubstantial investment, and they moved into the neighborhood.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So that's my intended ruling.

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

I'm asking you to augment anything you wish

to augment.

Mr. Kaempfer.

MR. KAEMPFER: Thank you, Your Honor.

I will deal with just three points.

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

So that is point number 1.

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

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

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

modification.

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

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

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

Now, that is the first point.

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

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

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

MR. KAEMPFER: This part was all part of

the golf course.

THE COURT: Right.

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

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

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

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

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

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

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

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

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

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

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

Now, I do want to address one thing.

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

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

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

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

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

Golf Course by virtue of its purchase of the lot.

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

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

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

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

THE COURT: All right.

Thank you, Mr. Kaempfer.

Mr. Byrnes.

MR. BYRNES: Thank you, Your Honor.

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

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

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

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

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

MR. BYRNES: Okay.

Then I want to point something out.

THE COURT: All right.

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

MR. BICE: What provision are we reading from?

MR. BYRNES: 19.10.040.

MR. BICE: Very good.

I got a copy right here.

MR. BYRNES: This is a zoning code.

If you look at the first line --

THE COURT: I can't read it.

MR. BYRNES: You can't read it?

THE COURT: No.

THE WITNESS: It's the planned development district.

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

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

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

This is not a planned development district.

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

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

THE COURT: Yeah.

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

planned development is.

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

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

THE COURT: Okay.

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

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

MR. BYRNES: Correct.

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

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

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

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

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

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

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

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

MR. BYRNES: I believe that's correct.

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

MR. BYRNES: Correct.

THE COURT: Okay.

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

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

THE COURT: Okay.

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

He's an attorney for the Seventy Acres.

THE COURT: Okay.

MR. DAVIS: Thank you, Your Honor.

Todd Davis, in-house counsel for Seventy Acres.

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

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

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

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

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

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

THE COURT: Okay.

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

impossibility for us to put this property into his association.

THE COURT: Okay.

MR. BYRNES: Should I continue now?

THE COURT: Sure.

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

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

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

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

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

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

The Court's entire finding is based upon

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

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

THE COURT: Was the staff unfamiliar with that?

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

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

MR. BYRNES: They make representations.

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

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

MR. BYRNES: Lawyers make mistakes too.

THE COURT: So do Judges.

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

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

MR. BYRNES: The Court's function --

THE COURT: Yes, counsel provided me with

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

MR. BYRNES: Correct, Your Honor.

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

THE COURT: Well, I'm not.

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

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

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

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

decision warrants upholding it.

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

My determination is a purely legal one.

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

THE COURT: Yes.

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

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

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

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

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

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

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

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

THE COURT: Right.

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

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

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

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

THE COURT: Hold on.

I want to make sure Mr. Byrnes is finished.

Everybody will get a chance to address this.

MR. BYRNES: I have said my piece.

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

THE COURT: Thank you.

Mr. Kaempfer.

Mr. Kaempfer: One more quick COMMENT.

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

So thank you, Your Honor.

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

MR. KAEMPFER: The U, meaning undeveloped.

THE COURT: Right.

THE COURT: Mr. Bice.

MR. BICE: Briefly, Your Honor.

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

Your Honor, they don't use that anymore.

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

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

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

The original application --

THE COURT: Is that from the 180 code?

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

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

said, repeatedly told them on the Seventy Acres, you must submit a major modification, had nothing to do with the 250, you must submit a major modification because it's a master planned community, and by the way under the City's general plan, this is right out of page 26 of the general plan, the following master development plan areas are located within the southwest sector. Then it goes on to list, and we put this in the brief --

THE COURT: Yes, you told me that.

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

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

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

MR. BICE: MOD-63600.

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

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

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

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

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

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

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

MR. BICE: Correct.

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

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

with any new entitlement.

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

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

That is from record 11,243.

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

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

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

MR. BICE: Exactly, Your Honor.

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

I wanted to respond.

THE COURT: Don't worry about my time.

We're here to deal with this.

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

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

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

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

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

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

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

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

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

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

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

I thank the Court for its time.

THE COURT: All right.

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

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

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

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

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

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

Staff puts conditions of approval on all of their applications.

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

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

acres.

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

The answer is, no.

THE COURT: Understand the code requires it.

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

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

THE COURT: Yes.

MR. KAEMPFER: All right.

I would like also finally to make one other point.

This master plan was never recorded.

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

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

Thank you.

THE COURT: Mr. Bice, anything further?

MR. BICE: No, Your Honor.

Well --

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

THE COURT: Okay.

Mr. Byrnes.

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

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

THE COURT: Was this a new development?

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

THE COURT: Okay.

MR. BYRNES: It says --

THE COURT: I mean, the application.

MR. BYRNES: They actually rezoned it for

out of RPD when we did this.

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

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

THE COURT: All right.

Anything else?

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

THE COURT: Okay.

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

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

I referenced some of it by naming the

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

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

I realize you will want the transcript.

MR. BICE: Yes, I will.

That's true.

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

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

THE COURT: All right.

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

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

MR. BICE: No.

Thank you, Your Honor.

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

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

MR. HOLMES: Thank you, Your Honor.

THE COURT: All right.

(Proceedings concluded.)

# EXHIBIT B

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

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

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

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

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

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

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

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

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

## CITY COUNCIL MEETING OF: FEBRUARY 21, 2018

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

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

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

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

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

v.

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

Defendants.

CASE NO. A-18-771224-C

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

Hearing Date: 05/15/18

Hearing Time: 9:30 AM

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

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

DATED this 13th day of April, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By ___*/s/ Mitchell J. Langberg*_____
MITCHELL J. LANGBERG, ESQ. Bar No. 10118
mlangberg@bhfs.com
100 North City Parkway, Suite 1600
Las Vegas, NV 89106
Telephone: 702.382.2101
Facsimile: 702.382.8135

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

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

**NOTICE OF MOTION**

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD:

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

DATED this 13th day of April, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By */s/ Mitchell J. Langberg*
MITCHELL J. LANGBERG, ESQ. Bar No. 10118
mlangberg@bhfs.com
100 North City Parkway, Suite 1600
Las Vegas, NV 89106
Telephone: 702.382.2101
Facsimile: 702.382.8135

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

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

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

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

## II. FACTUAL BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

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

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

## III. ARGUMENT

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

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

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

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

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

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

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

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

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

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

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

**1. Intentional or Negligent Interference**

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

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



BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

proving: (1) a prospective contractual relationship between the plaintiff and a third party; (2) knowledge by the defendant of the prospective relationship; (3) intent to harm the plaintiff by preventing the relationship; (4) the absence of privilege or justification by the defendant; and (5) actual harm to the plaintiff as a result of the defendant's conduct." *LT Intern. Ltd. v. Shuffle Master, Inc.*, 8 F. Supp. 3d 1238, 1248 (D. Nev. 2014). The applicable privilege will be discussed below. None of the remaining four elements is adequately alleged in the Complaint.

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

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

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

Finally, Plaintiffs cannot identify any actual harm resulting from the unspecified interference they imagine. They make conclusory allegations that damage occurred, Complaint, ¶¶ 46, 55, but these allegations are meaningless in the absence of any factual allegations to explain how such purported damage has taken place.

**2. Conspiracy**

"In Nevada, an actionable civil conspiracy is defined as a combination of two or more persons, who by some concerted action, intend to accomplish some unlawful objective for the purpose of harming another which results in damage." *Flowers v. Carville*, 266 F. Supp. 2d 1245, 1249 (D. Nev. 2003) (citations omitted). The Complaint entirely fails to identify any such "unlawful objective," however. To the contrary, Plaintiffs allege that Defendants' objective was



BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

to "influence and/or pressure third-parties, including officials within the City of Las Vegas." Complaint, ¶ 57. But that is the very function of the political process, to influence officials in the exercise of their governmental authority. Similarly, for Defendants "to object to Plaintiffs' development" or "to use their political influence," *id.*, ¶ 60, does not in any way amount to an "unlawful objective." Plaintiffs state that Defendants did these things "improperly," but this is a mere conclusion, divorced of any supporting allegations of fact. The *only* factual support Plaintiffs even attempt to advance for their conspiracy claim is the assertion that the declarations Defendants obtained from other residents were false. But this is untenable as a matter of law for the same reasons recited above. In particular, the declarations were from *other* residents and do not constitute statements of fact by the Defendants. Moreover, the declarations are consistent with this Court's ruling in the Binion Litigation, and thus cannot be construed as deliberately false. Plaintiffs have not articulated an "unlawful objective" that might support a claim conspiracy.

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

**3. Intentional or Negligent Misrepresentation**

Finally, Plaintiffs' Complaint does not allege *any* of the elements for a claim for intentional misrepresentation or negligent misrepresentation. A misrepresentation claim in Nevada "is established by three factors: (1) a false representation that is made with either knowledge or belief that it is false or without a sufficient foundation, (2) an intent to induce another's reliance, and (3) damages that result from this reliance." *Nelson v. Heer*, 123 Nev. 217, 225-26, 163 P.3d 420, 426 (2007); *see also Wild Game Ng, LLC v. IGT*, 2015 WL 7575352, *1 (Nev. Nov. 24, 2015) ("instead of deceitful intent, negligent misrepresentation arises when one fails to exercise reasonable care in ascertaining the truth").

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





BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

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

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

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

#### 1. Absolute Privilege

Nevada recognizes "the long-standing common law rule that communications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject matter of the controversy." *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101 (1983). This rule includes "statements made in the course of quasi-judicial proceedings …." *Knox v. Dick*, 99 Nev. 514, 518, 665 P.2d 267 (1983)(citation omitted); *see also Circus Circus*, 99 Nev. at 61 ("the absolute privilege attached to judicial proceedings has been extended to quasi-judicial proceedings before executive officers, boards, and commissions….")(citations omitted).

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





BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

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

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

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

*Id.* at 273-74.

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

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





BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

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

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

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

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





BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

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

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

**2. Qualified Privilege**

Even if absolute privilege did not apply, Defendants cannot be liable to Plaintiffs because any statements in the declarations are also subject to a qualified or conditional privilege. Under Nevada law, "[a] qualified or conditional privilege exists where a defamatory statement is made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if it is made to a person with a corresponding interest or duty." *Circus Circus*, 99 Nev. at 62 (citations omitted). Where any such privilege applies, alleged defamatory statements "are not actionable unless the privilege is abused by publishing the statements with malice." *Bank of America Nevada v. Bordeau*, 115 Nev. 263, 267, 982 P.2d 474 (1999) (citations omitted). "[P]laintiff must prove by a preponderance of the evidence that the defendant abused the privilege by publishing the defamatory communication with actual malice. [ ] Actual malice is a stringent standard that is proven by demonstrating that "a statement is published with knowledge that it was false or with reckless disregard for its veracity." *Pope v. Motel 6*, 121 Nev. 307, 317, 114 P.3d 277 (2005).

---

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



BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

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

## IV. CONCLUSION

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

DATED this 13th day of April, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By ___*/s/ Mitchell J. Langberg*_____
MITCHELL J. LANGBERG, ESQ. Bar No. 10118
mlangberg@bhfs.com
100 North City Parkway, Suite 1600
Las Vegas, NV 89106
Telephone: 702.382.2101
Facsimile: 702.382.8135

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

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

## CERTIFICATE OF SERVICE

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

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

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

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

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

**MOT**

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

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

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

v.

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

Defendants.

CASE NO. A-18-771224-C
Department 24

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

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

Hearing Time: **9:00 am**

Defendants Daniel Omerza, Darren Bresee, and Steve Caria, by and through their counsel of record Mitchell J. Langberg of BROWNSTEIN HYATT FARBER SCHRECK LLP, hereby move to dismiss Plaintiffs' Complaint pursuant to NRS §41.635 *et seq.*

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

/ / /

DATED this 13th day of April, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: *__/s/ Mitchell J. Langberg__*

MITCHELL J. LANGBERG, ESQ. Bar No. 10118
mlangberg@bhfs.com
100 North City Parkway, Suite 1600
Las Vegas, NV 89106
Telephone: 702.382.2101
Facsimile: 702.382.8135

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

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

**NOTICE OF MOTION**

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that the undersigned will bring the foregoing **DEFENDANTS' SPECIAL MOTION TO DISMISS (ANTI-SLAPP MOTION) PLAINTIFFS' COMPLAINT PURSUANT TO NRS §41.635 ET. SEQ.** for hearing before the above-entitled Court on the 1st day of MAY, 2018, at 9:00 a.m./p.m. of said day in Department ~~21~~ 24 of said Court.

DATED this 13th day of April, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: */s/ Mitchell J. Langberg*
MITCHELL J. LANGBERG, ESQ. Bar No. 10118
mlangberg@bhfs.com
100 North City Parkway, Suite 1600
Las Vegas, NV 89106
Telephone: 702.382.2101
Facsimile: 702.382.8135

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

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

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

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

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

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

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

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

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

## II. FACTUAL BACKGROUND

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

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

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

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

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

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

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

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

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

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

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

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

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





BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

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

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

12. These declarations state that the undersigned purchased his or her Queensridge residence or lot "in reliance upon the fact that the open space/natural drainage system could not be developed pursuant to the City's Approval in 1990 of the Peccole Ranch Master Plan and subsequent formal actions designating the open space/natural drainage system in its General Plan as Parks Recreation – Open Space which land use designation does not permit the building of residential units." Defendants Declarations, ¶ 12. One version of the declarations further states that "[a]t the time of purchase, the undersigned paid a significant lot premium to the original developer as consideration for the open space/natural drainage system." *Id.*

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

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



BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

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

## III. ARGUMENT

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

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

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

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

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

/ / /





BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

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

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

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

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

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

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

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





BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

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

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

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

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

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

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

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

/ / /





BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

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

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

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

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

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





BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

obtaining declarations stating the recollections of other witnesses.

Second, even if the declarations were treated as factual statements by Defendants themselves, Plaintiffs cannot seriously contend that Defendants knew the statements in the declarations about reliance on the Master Development Plan are knowingly false, when Judge Crockett reached the very same conclusion about reliance in the Binion Litigation:

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

Binion Transcript, at 6:1-9, 9:20-25 (emphasis added).[3] Judge Crockett obviously reached these conclusions in good faith based on his review of the record in the Binion Litigation; thus, Plaintiffs' insistence that Defendants could not assert in good faith that some of the residents purchased their homes in reliance upon the terms of the Master Development Plan—including the designation of Badlands for open space and natural drainage—is untenable.

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

[3] Remarkably, Plaintiffs themselves call the Court's attention to the Binion Litigation, see Complaint, ¶ 29, but omit any mention of Judge Crockett's ruling on this key issue, even though it predated Plaintiffs' Complaint by over two months.





BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

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

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

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

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

#### (a) Intentional or Negligent Interference

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

First, Plaintiffs do not even attempt to identify the prospective contractual or economic relations at issue in this claim for relief. Instead, they simply assert that some undefined



BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

relationships with third parties would come about. *See* Complaint, ¶ 41 ("Defendants … knew, or should have known, that Plaintiffs would be developing the Land with third parties"). It is impossible for the Court to evaluate these nebulous allegations, or for Defendants to respond to them, where Plaintiffs have not even begun to identify what potential transactions are at issue.

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

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

Finally, Plaintiffs cannot identify any actual harm resulting from the unspecified interference they imagine. They make conclusory allegations that damage occurred, Complaint, ¶¶ 46, 55, but these allegations are meaningless in the absence of any factual allegations to explain how such purported damage has taken place.

**(b) Conspiracy**

"In Nevada, an actionable civil conspiracy is defined as a combination of two or more persons, who by some concerted action, intend to accomplish some unlawful objective for the purpose of harming another which results in damage." *Flowers v. Carville*, 266 F. Supp. 2d 1245, 1249 (D. Nev. 2003) (citations omitted). Yet the Complaint entirely fails to identify any such "unlawful objective." To the contrary, Plaintiffs allege that Defendants' objective was to "influence and/or pressure third-parties, including officials within the City of Las Vegas." Complaint, ¶ 57. But that is no "unlawful objective"; it is the very function of the political process, to influence officials in the exercise of their governmental authority. Similarly, for Defendants "to object to Plaintiffs' development" or "to use their political influence," *id.*, ¶ 60, does not in any way amount to an "unlawful objective." Plaintiffs state that Defendants did these things "improperly," but this is a mere conclusion, divorced of any supporting allegations of fact. The *only* factual support Plaintiffs even attempt to advance for their conspiracy claim is the assertion that the declarations Defendants obtained from other residents were false. But this is





BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

untenable as a matter of law for the same reasons recited above. Moreover, the declarations are consistent with this Court's ruling in the Binion Litigation, and thus cannot be construed as deliberately false. Plaintiffs have not articulated an "unlawful objective" that might support a claim conspiracy.

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

**(c) Intentional or Negligent Misrepresentation**

Finally, Plaintiffs' Complaint does not allege *any* of the elements for a claim for intentional misrepresentation or negligent misrepresentation. A misrepresentation claim in Nevada "is established by three factors: (1) a false representation that is made with either knowledge or belief that it is false or without a sufficient foundation, (2) an intent to induce another's reliance, and (3) damages that result from this reliance." *Nelson v. Heer*, 123 Nev. 217, 225-26, 163 P.3d 420, 426 (2007); *see also Wild Game Ng, LLC v. IGT*, 2015 WL 7575352, *1 (Nev. Nov. 24, 2015) ("instead of deceitful intent, negligent misrepresentation arises when one fails to exercise reasonable care in ascertaining the truth").

None of those factors is adequately alleged here. Plaintiffs again assert that the facts in the declarations at issue are false. But, they are entirely consistent with this Court's ruling in the Binion Litigation. Nowhere do Plaintiffs allege that anyone has relied on these declarations. Plaintiffs do assert in conclusory fashion that they suffered damages from the declarations, Complaint, ¶¶ 64, 68, but there are no factual allegations to support that conclusion. Plaintiffs have not alleged facts to support these claims for relief.

**2. Defendants' Efforts in Gathering Information for an Anticipated Proceeding Are Privileged.**

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



BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

minimum, subject to an applicable qualified privilege.

**(a) Absolute Privilege**

Nevada recognizes "the long-standing common law rule that communications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject matter of the controversy." *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101 (1983). This rule includes "statements made in the course of quasi-judicial proceedings …." *Knox v. Dick*, 99 Nev. 514, 518, 665 P.2d 267 (1983)(citation omitted); *see also Circus Circus*, 99 Nev. at 61 ("the absolute privilege attached to judicial proceedings has been extended to quasi-judicial proceedings before executive officers, boards, and commissions….")(citations omitted).

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

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

> If the hearing entity's function is judicial in nature, its acts qualify as quasi-judicial. [ ] In determining whether a hearing entity's function is judicial, other jurisdictions consider whether the hearing entity has authority to: '"(1) exercise judgment and discretion; (2) hear and determine or to ascertain facts and decide; (3) make



BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

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

*Id.* at 273-74.

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

First, in deciding land use matters, the City Council exercises judgment and discretion, and hears and determines facts before rendering a decision. *See Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 528 (2004)(determining that the process under the Las Vegas Municipal Code for City Council to approve plaintiff's proposed development of the property requires the City Council to "consider a number of factors and to exercise its discretion in reaching a decision."). Indeed, Section 19.16.030 expressly provides that a City Council decision is made after a hearing, and the City Council must consider "facts presented at the public hearing" before making a decision on the amendment. *See* UDC 19.16.030(H)(1),(2). In fact, there are a number of specific determinations that the City Council must make before approving a proposed General Plan Amendment. UDC 19.16.030(I)(1)-(4).[4]

[4] The City Council must determine that "the density and intensity of the proposed General Plan Amendment is compatible with the existing adjacent land use designations", the "zoning designations allowed by the proposed amendment will be compatible with the existing adjacent land uses or zoning districts", "[t]here are adequate transportation, recreation, utility, and other





BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

The City Council has the authority to "may make and adopt all ***ordinances, resolutions and orders***… which are necessary for the municipal government, the management of the affairs of the City and the execution of all of the powers which are vested in the City." Las Vegas City Charter § 2.090(1)(emphasis added). In accordance, the General Plan amendment process results in a binding written decision containing "reasons for the decision" that is provided to the "applicant, agent or both" and the notice is formally filed with the City Clerk. UDC 19.16.030(H)(3). There is also no question that the decision by the City Council would affect the "personal property and rights of private persons." Indeed, at a minimum, the dispute at issue implicates the way in which Plaintiffs can use their property. Additionally, as a general matter, the City Council has the power to examine and hear witnesses to assist the City Council in making its decisions. In fact, the City Council has authority to "[o]rder the attendance of witnesses and the production of all documents which relate to any business before the City Council" and the "City Council … may apply to the clerk of the district court for a subpoena which commands the attendance of that person before the City Council." Las Vegas City Charter § 2.080(1)(d), (2)(a). Finally, the City, including the City Council, has the ability to enforce decisions or impose penalties.[5] Based on the foregoing, the proceedings of the City Council relating to Plaintiffs' pending application for amendment of the General Plan are quasi-judicial.

The fact that the statements in the Declaration were solicited or gathered prior to the public hearing of the City Council does not undermine any finding that the statements therein are absolutely privileged. *See Fink*, 118 Nev. at 433 ("the privilege applies … to 'communications preliminary to a proposed judicial proceeding.'"). Here, the statements were collected by

---

facilities to accommodate the uses and densities permitted by the proposed General Plan designation" and "[t]he propose amendment conforms to other applicable adopted plans and policies." UDC 19.16.030(I)(1)-(4).

[5]For example, the Unified Development Code provides that "[e]nforcement of the provisions of this Title shall be pursued in order to provide for its effective administration, to ensure compliance with any condition of development approval, to promote the City's planning efforts, and to protect the public health, safety and general welfare" and that the "provisions of this Title, and any conditions of development approval which have been imposed thereunder, may be enforced by the Director; the Las Vegas Metropolitan Police Department; and any other City of Las Vegas officer and employee designated to do so." UDC 19.00.090(A)(1), (2).



BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

individuals with a significant interest in the outcome of the application for the purpose of providing input for consideration by the City Council in determining whether to approve Plaintiffs' application for amendment of the General Plan, so there is a direct relevance to Plaintiffs' pending application and the related City Council proceedings. Indeed, the Declaration was specifically addressed to the "City of Las Vegas". *See* Complaint, Ex. 1.

**(b) Qualified Privilege**

Even if absolute privilege did not apply, Defendants cannot be liable to Plaintiffs because any statements in the Declarations are also subject to a qualified or conditional privilege. Under Nevada law, "[a] qualified or conditional privilege exists where a defamatory statement is made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if it is made to a person with a corresponding interest or duty." *Circus Circus*, 99 Nev. at 62 (citations omitted). Where any such privilege applies, alleged defamatory statements "are not actionable unless the privilege is abused by publishing the statements with malice." *Bank of America Nevada v. Bordeau*, 115 Nev. 263, 267, 982 P.2d 474 (1999) (citations omitted). "[P]laintiff must prove by a preponderance of the evidence that the defendant abused the privilege by publishing the defamatory communication with actual malice. [ ] Actual malice is a stringent standard that is proven by demonstrating that "a statement is published with knowledge that it was false or with reckless disregard for its veracity." *Pope v. Motel 6*, 121 Nev. 307, 317, 114 P.3d 277 (2005).

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



BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

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

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

## IV. CONCLUSION

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

DATED this 13th day of April, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: */s/ Mitchell J. Langberg*
MITCHELL J. LANGBERG, ESQ. Bar No. 10118
mlangberg@bhfs.com
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106
Telephone: 702.382.2101
Facsimile: 702.382.8135

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

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and pursuant to NRCP 5(b), EDCR 8.05, Administrative Order 14-2, and NEFCR 9, I caused a true and correct copy of the foregoing **DEFENDANTS' SPECIAL MOTION TO DISMISS (ANTI-SLAPP MOTION) PLAINTIFFS' COMPLAINT PURSUANT TO NRS §41.635 ET. SEQ.** be submitted electronically for filing and/or service with the Eighth Judicial District Court via the Court's Electronic Filing System on the 13th day of April, 2018, to the following:

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

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

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

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

# EXHIBIT 1

## Declaration of Daniel Omerza

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

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

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| FORE STARS, LTD., a Nevada Limited Liability Company; 180 LAND CO., LLC, a Nevada Limited Liability Company; SEVENTY ACRES, LLC, a Nevada Limited Liability Company,<br><br>Plaintiffs,<br><br>v.<br><br>DANIEL OMERZA, DARREN BRESEE, STEVE CARIA, and DOES 1 THROUGH 1000,<br><br>Defendants. | CASE NO. A-18-771224-C<br><br>DECLARATION OF DANIEL OMERZA |

**DECLARATION OF DANIEL OMERZA**

I, Daniel Omerza, hereby declare as follows:

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

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

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

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

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

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

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

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

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

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

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

12. The declarations (which are attached to Plaintiff's complaint) state that the signatory purchased his or her Queensridge residence or lot "in reliance upon the fact that the open space/natural drainage system could not be developed pursuant to the City's Approval in 1990 of the Peccole Ranch Master Plan and subsequent formal actions designating the open space/natural drainage system in its General Plan as Parks Recreation – Open Space which land use designation does not permit the building of residential units." One version of the declarations further states that "[a]t the time of purchase, the undersigned paid a significant lot premium to the original developer as consideration for the open space/natural drainage system."

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

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

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

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

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

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

DANIEL OMERZA

# EXHIBIT 2

## Declaration of Darren Bresee

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

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

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| FORE STARS, LTD., a Nevada Limited Liability Company; 180 LAND CO., LLC, a Nevada Limited Liability Company; SEVENTY ACRES, LLC, a Nevada Limited Liability Company,<br><br>Plaintiffs,<br><br>v.<br><br>DANIEL OMERZA, DARREN BRESEE, STEVE CARIA, and DOES 1 THROUGH 1000,<br><br>Defendants. | CASE NO. A-18-771224-C<br><br>DECLARATION OF DARREN BRESEE |

## DECLARATION OF DARREN BRESEE

I, Darren Bresee, hereby declare as follows:

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

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

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

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

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

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

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

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

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

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

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

12. The declaration (the form of which is attached to Plaintiff's complaint) states that I purchased my Queensridge residence or lot "in reliance upon the fact that the open space/natural drainage system could not be developed pursuant to the City's Approval in 1990 of the Peccole Ranch Master Plan and subsequent formal actions designating the open space/natural drainage system in its General Plan as Parks Recreation – Open Space which land use designation does not permit the building of residential units." It also says that "[a]t the time of purchase, the undersigned paid a significant lot premium to the original developer as consideration for the open space/natural drainage system."

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

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

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

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

/ Darren Bresee

DARREN BRESEE

# EXHIBIT 3

## Declaration of Steve Caria

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

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

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| FORE STARS, LTD., a Nevada Limited Liability Company; 180 LAND CO., LLC, a Nevada Limited Liability Company; SEVENTY ACRES, LLC, a Nevada Limited Liability Company,<br><br>Plaintiffs,<br><br>v.<br><br>DANEIL OMERZA, DARREN BRESEE, STEVE CARIA, and DOES 1 THROUGH 1000,<br><br>Defendants. | CASE NO. A-18-771224-C<br><br>DECLARATION OF STEVE CARIA |

**DECLARATION OF STEVE CARIA**

I, Steve Caria, hereby declare as follows:

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

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

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

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

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

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

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

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

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

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

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

12. The declarations (which are attached to Plaintiff's complaint) state that the signatory purchased his or her Queensridge residence or lot "in reliance upon the fact that the open space/natural drainage system could not be developed pursuant to the City's Approval in 1990 of the Peccole Ranch Master Plan and subsequent formal actions designating the open space/natural drainage system in its General Plan as Parks Recreation – Open Space which land use designation does not permit the building of residential units." One version of the declarations further states that "[a]t the time of purchase, the undersigned paid a significant lot premium to the original developer as consideration for the open space/natural drainage system."

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

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

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

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

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

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

STEVE CARIA

OPPS

THE JIMMERSON LAW FIRM, PC.
James J. Jimmerson, Esq.
Nevada Bar No. 000264
James M. Jimmerson, Esq.
Nevada Bar No. 12599
415 S. 6th Street, #100
Las Vegas, Nevada 89101
Telephone: (702) 388-7171
Facsimile: (702) 387-1167
Email: ks@jimmersonlawfirm.com
*Attorneys for Plaintiffs*

**DISTRIC COURT**
**CLARK COUNTY, NEVADA**

| | |
|---|---|
| FORE STARS, LTD., a Nevada Limited Liability Company; 180 LAND CO., LLC, a Nevada Limited Liability Company; SEVENTY ACRES, LLC, a Nevada Limited Liability Company,<br><br>Plaintiffs,<br>vs.<br>DANIEL OMERZA, DARREN BRESEE, STEVE CARIA, and DOES 1-1000,<br><br>Defendants. | Case No.: A-18-771224-C<br><br>Dept. No.: II<br><br>**PLAINTIFFS' OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS (ANTI-SLAPP MOTION) PLAINTIFFS' COMPLAINT PURSUANT TO NRS 41.635 ET SEQ.** |

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

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

DATED this 4th day of May, 2018.

THE JIMMERSON LAW FIRM, P.C.

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

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

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION.

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

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

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

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

The Court should summarily deny Defendants' special motion because Nevada's anti-SLAPP statute is not implicated here. Indeed, the Defendants' claim of "good faith communication in furtherance of the right to ... free speech" is a ruse. They are not entitled to immunity under NRS 41.635 *et seq.* for several important reasons: (1) Nevada's anti-SLAPP statute does not protect against intentional torts; (2) the alleged claims against the Defendants are based on their wrongful conduct rather than free speech; (3) even if Defendants' conduct could be characterized as "communications," it was not "truthful or made without knowledge of its falsehood" and therefore doesn't constitute good faith communications; and (4) no absolute or qualified privilege applies. Alternatively, the Landowners respectfully request that they be allowed to conduct limited discovery pursuant to NRS 41.660(4) should the Court determine that the Defendants have established by a preponderance of the evidence that the Landowners' claims are based on "a good faith communication in furtherance of ... the right to free speech" under NRS 41.660(3)(a).

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

II. RELEVANT FACTS.

The Land Owners are developing approximately 250 acres of land they own and control in Las Vegas, Nevada known as the Badlands Golf Course property (hereinafter the "Land") because golf course operations are no longer feasible. *See* Comp. at ¶ 9. They have the absolute right to develop the Land under its present RDP 7 zoning, which means that up to 7.49 dwelling units per acre may be constructed on it. *See* Comp. at ¶ 29, Ex. 2 at p. 18. The Land is adjacent to the Queensridge Common Interest Community (hereinafter "Queensridge") which was created and organized under the provisions of NRS Chapter 116. *See* Comp. at ¶ 10. The Defendants are certain residents of Queensridge who strongly oppose *any* redevelopment of the Land because some have enjoyed golf course views, which views they don't want to lose even though the golf course is not operational. *See* Comp. at ¶¶ 23-30. Rather than properly participating in the political process, however, the Defendants are using unjust and unlawful tactics to harm the Land Owners in an attempt to impede development by any means possible, lawful or not. They are doing so despite having received and being bound by prior, express written notice that, among other things, the Land is developable and any views or location advantages they have enjoyed may be obstructed by future development. *See* Comp. at ¶¶ 12-22. (CC&Rs)

III. ARGUMENT.

A. Nevada's Anti-SLAPP Statute.

Nevada's anti-slap lawsuit against public participation (SLAPP) statutes, codified in NRS Chapter 41.635 *et seq.*, protect a defendant from liability for engaging in "good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern" as addressed in "any civil action for claims based upon the communication." NRS 41.650. As the Nevada Supreme Court has explained in *John v. Douglas County School District*, "Nevada's anti-SLAPP statute is predicated on protecting 'well-meaning citizens who petition the government and then find themselves hit with retaliatory suits known as SLAPP[] [suits].'" *Id.* (*citing*

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

comments by State Senator on S.B. 405 Before the Senate, 67th Leg. (Nev., June 17, 1993)). Importantly, however, Nevada's anti-SLAPP statute only protects from civil liability those citizens who engage in ***good-faith communications***. *See* NRS 41.637 (emphasis added). Thus, Nevada's anti-SLAPP statute is not an absolute bar against substantive claims. *See id.* Instead, it only bars claims from persons who seek to abuse other citizens' rights to participate in the political process, and it allows meritorious claims against citizens who do not act in good faith. *See id.; see also John v. Douglas Cnty. Sch. Dist.,* 125 Nev. at 753, 219 P.3d at 1281. In other words, Nevada's anti-SLAPP statute does not apply in cases such as this where the Defendants have mischaracterized their wrongful conduct as "good faith participation in the political process" so that they can continue to harm the Land Owners with impunity.

In particular, the Defendants erroneously argue that they are immune from liability in this case because their "efforts to gather declarations from fellow residents" constitute "good faith communication(s) in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern" under all four categories in NRS 41.637, namely:

> 1. Communication that is aimed at procuring any governmental or electoral action, result or outcome;
> 2. Communication of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity;
> 3. Written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law; or
> 4. Communication made in direct connection with an issue of public interest in a place open to the public or in a public forum, which is truthful or is made without knowledge of its falsehood.

NRS 41.637.

Upon filing a special motion to dismiss, the statute sets out the process for the Court to follow and the burdens on the respective parties. *See* NRS 41.660(3). Specifically, the Court must first "[d]etermine whether the moving party has established, ***by a preponderance of the evidence***, that the claim is based upon a ***good faith***





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

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

***communication*** in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a) (emphasis added). Only after determining that the moving party has met this burden, the Court may then "determine whether the plaintiff has demonstrated with ***prima facie evidence*** a probability of prevailing on the claim." NRS 41.660(3)(b) (emphasis added). As set forth below, the Defendants have not and cannot meet their threshold burden of establishing, by a ***preponderance of the evidence,*** that the Land Owners' claims against them are based on their "good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.637.

**B. Nevada's Anti-SLAPP Statute Does Not Protect Against Intentional Torts.**

As an initial matter, it is noteworthy that most anti-SLAPP cases involve defamation claims. *See, e.g., Bongiovi v. Sullivan,* 122 Nev. 556, 138 P.3d 433 (2006). This case is not a defamation action, and the Land Owners are not trying to stifle the Defendants' expression of public concern or free speech. *See* Comp. at ¶¶ 33-68. Nor are they trying to prevent the Defendants from participating in the political process. *See id.* To the contrary, the Land Owners' seek an open examination of the Defendants' wrongful actions, including the intentional, repeated presentation of false information to their neighbors and manipulation of them into signing false declarations as part of an overall scheme to mislead the City of Las Vegas and its council members into denying the Land Owners' applications and delay and/or prevent the redevelopment of the Land. *See* Comp. at ¶¶ 23-28. Indeed, the Land Owners allege in the Complaint that the Defendants have intentionally and/or negligently participated in multiple concerted actions such as "preparation, promulgation, circulation, solicitation and execution" of ***false*** statements and/or declarations for the purpose of conjuring up sham opposition to the redevelopment of the Land from an inoperable golf course to beautiful homes, walking trails, and open space. *See id.* The Complaint further alleges that the Defendants are doing so with the intent to deliver such false statements and/or declarations to the City

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

of Las Vegas for the improper purpose of presenting a false narrative to council members, deceiving them into denying the Land Owners' applications and, ultimately, sabotaging the Land Owners' development rights and their livelihoods. *See id.* Quite simply, Nevada's anti-SLAPP statutes do not protect the Defendants' conduct. *See* Mot. at pp. 8-11; *see also* NRS 41.635 *et seq.* Unquestionably, the First Amendment does not overcome intentional torts. *See Bongiovi v. Sullivan,* 122 Nev. at 472, 138 P.3d at 445 (No special protection is warranted when "the speech is wholly false and clearly damaging to the victim's business reputation.") (*quoting Dun & Bradstreet, Inc. v. Greenmoss Builders,* 472 U.S. 749, 762, (1985)); *see also Holloway v. Am. Media, Inc.,* 947 F.Supp.2d 1252, 1266-67 (N.D. Ala. 2013)(First Amendment does not overcome intentional infliction of emotional distress claim); *Gibson v. Brewer,* 952 S.W.2d 239, 248-49 (Mo. 1997)(First Amendment does not protect against adjudication of intentional torts). As such, the Defendants are not entitled to dismissal simply by characterizing their wrongful conduct as "free speech."

### C. The Land Owners' Claims Are Based On The Defendants' Wrongful Conduct Rather Than Free Speech.

Although Nevada's anti-SLAPP protections include speech that seeks to influence a governmental action but is not directly addressed to the government agency, that immunity is limited to a "civil action for claims ***based upon the communication.***" NRS 41.650 (emphasis added). As discussed above, it does not overcome intentional torts or claims based on wrongful conduct. *See id.* As California courts have repeatedly held, an anti-SLAPP movant bears the threshold burden of establishing that "the challenged claims arise from acts in furtherance of the defendants' right of free speech or right of petition under one of the categories set forth in [California's anti-SLAPP statute]."[2] *Finton Constr., Inc. v. Bidna & Keys, APLC,* 190 Cal. Rptr. 3d 1, 9 (Cal. Ct. App. 2015)

[2] Because the Nevada Supreme Court has recognized that California's and Nevada's anti-SLAPP "statutes are similar in purpose and language," this Court may look to California law for guidance. *See Shapiro v. Welt,* 133 Nev. at ___, 389 P.3d at 268 (*citing John v. Douglas Cty. Sch. Dist.*, 125 Nev. at 752, 219 P.3d at 1281, *superseded by statute as stated in Shapiro v. Welt,* 133 Nev. at ___, 389 P.3d at 266); *cf.* NRS 41.637(4), *with* Cal. Civ. Proc. Code § 425.16(e).

(citation omitted). When analyzing whether the movants have met their burden, the Court is to "'examine the *principal thrust* or *gravamen* of a plaintiff's cause of action to determine whether the anti-SLAPP statute applies.'" *Id.* (quoting *Ramona Unified School Dist. v. Tsiknas*, 37 Cal. Rptr. 3d 381, 388 (Cal. Ct. App. 2005) (emphasis in original)). In doing so, the Court must determine whether the "allegedly wrongful and injury-producing conduct ... provides the foundation for the claim." *Hylton v. Frank E. Rogozienski, Inc.*, 99 Cal. Rptr. 3d 805, 810 (Cal. Ct. App. 2009) (quotation and citation omitted).

Here, the Defendants' artful characterization of their actions as free speech is belied by the allegations in the Complaint which clearly demonstrate that the Land Owners' claims are based on wrongful conduct rather than "communications." *See* Comp. at ¶¶ 23-28. In particular, the Land Owners' intentional and negligent interference with prospective economic relations claims (Second and Third Claims for Relief) allege the Defendants engaged in wrongful conduct through the "preparation, promulgation, solicitation and execution" of the declarations which "contain false representations of fact, and using their intentional misrepresentations to influence and pressure homeowners to sign a statement," causing damage to the Land Owners' reputation, livelihood, and ability to develop the Land. Comp. at ¶¶ 42-43, 50-52; *see also LT Intern. Ltd. v. Shuffle Master, Inc.*, 8 F.Supp.3d 1238, 1248 (D. Nev. 2014)(allegations of tortious interference with prospective economic relations need not plead the existence of a valid contract and must only raise plausible claim for relief under NRCP 8 to avoid dismissal). Similarly, the Land Owners' conspiracy claim (Fourth Claim for Relief) is based on the Defendants' clandestine, behind-the-scenes "concerted action to improperly influence and/or pressure third-parties, including officials with the City of Las Vegas, and others with the intended action of delaying or denying the [Land Owners'] land rights and their intent to develop their property." Comp. at ¶ 58. The Complaint further alleges that the "co-conspirators agreement was implemented by their concerted actions to object to [the

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

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

Land Owners'] development and to use their political influence" to delay and sabotage any development projects to the detriment of the Land Owners and their livelihoods. Comp. at ¶¶ 58-60; *see also Flowers v. Carville,* 266 F.Supp.2d 1245, 1249 (D. Nev. 2003) (actionable civil conspiracy is defined as a combination of two or more persons, who by some concerted action, intend to accomplish some unlawful objective for the purpose of harming another which results in damage).

Additionally, the Land Owners' intentional and negligent misrepresentation claims (Fifth and Sixth Claims for Relief) allege that the Defendants' actions were intentional and/or negligent and were undertaken "with the intent of causing homeowners and the City of Las Vegas to detrimentally rely upon their misrepresentation of fact being falsely made...." Comp. at ¶¶ 62-68. According to the Complaint, the Defendants solicited and procured the statements and/or declarations, *i.e.*, false misrepresentations of fact, as part of a scheme to mislead council members into denying the Land Owners' applications. *See id.* The Defendants did so despite having received prior, express written notice that, among other things, the Land is developable and any views or location advantages they have enjoyed may be obstructed by future development. *See* Comp. at ¶¶ 12-22 & CC&Rs. They did so despite also being aware of court orders determining, among other things, that homeowners in Queensridge don't have any "vested rights" with respect to the Land and that the Land Owners have the absolute right to develop it. *See* Comp., Ex. 2 at ¶¶ 81-82, 108; Ex. 3.

Courts may take judicial notice of facts that are "not subject to reasonable dispute." NRS 47.130(2). Generally, the court will not take judicial notice of facts in a different case, even if connected in some way, unless the party seeking such notice demonstrates a valid reason for doing so. *Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (Nev. 2009) (holding that the court will generally not take judicial notice of records in other matters); *Carson Ready Mix v. First Nat'l Bk.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (Nev. 1981) (providing that the court will not consider evidence not

appearing in the record on appeal). In this case, a decision on a petition for judicial review, such as the order from Judge Crockett (which, incidentally, is under appeal) does not allow for "findings of fact" and should be disregarded. Findings in the case before Judge Smith, however, were proper and made after receipt of substantial evidence upon which this Court can rely.[3]

Even if the statements and/or declarations were consistent with the "ruling in the Binion Litigation" as the Defendants argue, they were controverted by at least three other court orders which are public records attached to the Complaint and which the Defendants should have disclosed to their neighbors, particularly given their discussions with them about the court order in *Binion et al v. Fore Stars et al,* Dkt. No. A-17-729053. *See* Comp., Exs. 2, 3, and 4. *See also Brelient v. Preferred Equities Corp.,* 109 Nev. at 845, 858 P.2d at 1260 (In ruling on a motion to dismiss, the court may consider matters of public record, orders, items present in the record and any exhibits attached to the complaint.). The Defendants' omission of these material facts from the statements and/or declarations they prepared, executed, promulgated, solicited, and circulated to other homeowners in Queensridge is equivalent to a false representation. *See* Comp., Ex. 1; *see also Nelson v. Heer,* 123 Nev. 217, 225-26, 163 P.3d 420, 426 (2007) ("With respect to false-representation element of intentional-misrepresentation claim, the suppression or omission of a material fact which a party is bound in good faith to disclose is equivalent to a false representation, since it constitutes an indirect representation that such fact does not exist.").

In sum, the Defendants' admitted "efforts to gather declarations from fellow residents" are just the tip of the proverbial iceberg. *See* Mot. at p. 10. As detailed above, the allegations in the Complaint set forth far more in terms of the Defendants' wrongful conduct and the elements of cognizable claims against them. *See* Comp. at ¶¶ 39-68.

[3] The Plaintiffs attempted to appeal Judge Smith's Order of Dismissal of November 30, 2016, but the Appeal was dismissed as untimely. Only the issue of attorneys' fees and costs, and the denial of a Motion to Reconsider are presently on Appeal in that case, having been fully briefed.



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

Clearly, the Land Owners' claims are based on wrongful conduct rather than "communications" and therefore outside the purview of Nevada's anti-SLAPP statutes. The Defendants' special motion must be denied accordingly.

Moreover, there is no heightened pleading requirement for the Land Owners' interference with prospective economic relations and conspiracy claims. *See e.g., LT Intern. Ltd. v. Shuffle Master, Inc.*, 8 F.Supp.3d at 1248 (tortious interference with prospective economic relations claim must meet NRCP 8 pleading standard); *Flowers v. Carville,* 266 F.Supp.2d at 1249 (no heightened pleading requirement for a civil conspiracy under Nevada law). Instead, NRCP 8 requires only general factual allegations, not itemized descriptions of evidence. *See* NRCP 8 (complainant need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief"); *see also Breliant v. Preferred Equities Corp.,* 109 Nev. at 846, 858 P.2d at 1260 ("The test for determining whether the allegations of a complaint are sufficient to assert a claim for relief is whether [they] give fair notice of the nature and basis of a legally sufficient claim and the relief requested."). Thus, a pleading need only broadly recite the "ultimate facts" necessary to set forth the elements of a cognizable claim that a party believes can be proven at trial.

Furthermore, Nevada is a "notice pleading" state, which means that the ultimate facts alleged within the pleadings need not be recited with particularity. *See Hall v. SSF, Inc.,* 112 Nev. 1384, 1391, 930 P.2d 94, 98 (1996) ("[A] complaint need only set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of the claim and the relief sought.") (internal quotation marks omitted); *Pittman v. Lower Court Counseling,* 110 Nev. 359, 365, 871 P.2d 953, 957 (1994) ("Nevada is a notice pleading jurisdiction and we liberally construe pleadings to place matters into issue which are fairly noticed to the adverse party."), *overruled on other grounds by Nunez v. City of N. Las Vegas,* 116 Nev. 535, 1 P.3d 959 (2000). As such, the Land Owners are entitled under NRCP 8 to set forth only

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

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

general allegations in their Complaint and then rely at trial upon specific evidentiary facts never mentioned anywhere in the pleadings. *See Nutton v. Sunset Station, Inc.,* 131 Nev. ___, 357 P.3d 966, 974 (Nev. Ct. App. 2015).

With respect to their misrepresentation claims, the Land Owners should be granted leave to amend their Complaint and/or conduct discovery pursuant to *Rocker v. KPMG LLP,* 122 Nev. 1185, 148 P.3d 703 (2006), if the Court determines that those claims are not plead with sufficient particularity pursuant to NRCP 9. *See* NRCP 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity...."); *cf. Rocker,* 122 Nev. at 1192-95, 148 P.3d at 707-10 (A relaxed pleading standard applies in fraud actions where the facts necessary for pleading with particularity are peculiarly within the defendant's knowledge or are readily obtainable by him. In such situations, district court should allow the plaintiff time to conduct the necessary discovery.). *See also Squires v. Sierra Nevada Ed. Found. Inc.,* 107 Nev. 902, 906 and n. 1, 823 P.2d 256, 258 and n. 1 (1991)(misrepresentation allegations sufficient to avoid dismissal under NRCP 12(b)(5)).

D. The Defendants' Conduct Does Not Constitute "Good Faith Communications".

Even if the Defendants' conduct is characterized as "communication" under Nevada's anti-SLAPP statute (which it is not), that communication is not protected unless it is in "good faith." NRS 41.637(4) (good faith communication is "truthful or is made without knowledge of its falsehood"); *see also Adelson v. Harris,* 133 Nev. ___, ___ n. 5, 402 P.3d 665, 670-71 n. 5 (2017)(Even if the communication in this case was "aimed at procuring a[ ] governmental or electoral action, result or outcome," that communication is not protected unless it is "truthful or is made without knowledge of its falsehood.")(*citing Delucchi v. Songer,* 133 Nev. ___, 396 P.3d 826, 829–30 (2017)). Here, in order for the Defendants' purported "communications" to be in good faith, they must demonstrate them to be "truthful or made without knowledge of [their] falsehood." NRS 41.637(4). In particular, the phrase "made without knowledge of its falsehood" has a

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

well-settled and ordinarily understood meaning. *See Shapiro v. Welt,* 133 Nev. at ___, 389 P.3d at 267. The declarant must be unaware that the communication is false at the time it was made. *See id.* Here, however, the Complaint and exhibits thereto, public records, and the Defendants' own affidavits belie any claim of truthfulness or ignorance of falsity. *See* Comp., Exs. 1, 2 and 3; *cf.* Def. Mot., Exs. 1, 2, and 3.

Specifically, the Defendants executed purchase agreements when they purchased their residences within the Queensridge Common Interest Community which expressly acknowledged their receipt of, among other things, the following: (1) Master Declaration of Covenants, Conditions, Restrictions and Easements for Queensridge (Queensridge Master Declaration), which was recorded in 1996; (2) Notice of Zoning Designation of Adjoining Lot which disclosed that the Land was zoned RPD 7; (3) Additional Disclosures Section 4 – No Golf Course or Membership Privileges which stated that they acquired no rights in the Badlands Golf Course; (4) Additional Disclosure Section 7 – Views/Location Advantages which stated that future construction in the planned community may obstruct or block any view or diminish any location advantage; and (5) Public Offering Statement for Queensridge Towers which included these same disclaimers. *See* Comp. at ¶¶ 10-12, 15-20. Furthermore, the deeds to the Defendants' respective residences "are clear by their respective terms that they have no rights to affect or control the use of Plaintiffs' real property." Comp. at ¶ 21. It is broadly accepted that CC&Rs create contractual obligations binding upon the homeowners. *see Sandy Valley Assocs. V. Sky Ranch Estates Owners Ass'n.* 117 Nev. 948, 954, 35 P 3d 964, 968 (2001), receded from on other grounds by *Horgan v. Felton,* 123 Nev. 577, 170 P. 3d 982 (2007) ("the CC&Rs constituted a written contract to convey land"); *see also Diaz v. Ferne,* 120 Nev. 70, 73, 84 P.3d 664, 665-66 (2004) (using contract interpretation rules to interpret CC&Rs). The Defendants nevertheless prepared, promulgated, solicited, circulated, and executed the following declaration to their Queensridge neighbors in March 2018:

TO: City of Las Vegas

> The Undersigned purchased a residence/lot in Queensridge which is located within the Peccole Ranch Master Planned Community.
>
> The undersigned made such purchase in reliance upon the fact that the open space/natural drainage system could not be developed pursuant to the City's Approval in 1990 of the Peccole Ranch Master Plan and subsequent formal actions designating the open space/natural drainage system in its General Plan as Parks Recreation – Open Space which land use designation does not permit the building of residential units.
>
> At the time of purchase, the undersigned paid a significant lot premium to the original developer as consideration for the open space/natural drainage system....

Comp., Ex. 1.

In their special motion, the Defendants don't acknowledge the statements in the declarations as their own or affirmatively assert their truthfulness. *See* Def. Mot. at pp. 11-12. Coincidently, however, they all feign ignorance of falsity in paragraph 13 of their respective affidavits, claiming to "have no understanding that any of these statements are false." Def. Mot., Ex. 1 at ¶ 13, Ex. 2 at ¶ 13, Ex. 3 at ¶ 13. Yet they don't dispute any of the allegations in the Complaint about the Queensridge Master Declaration, the Land Owners having the absolute right to develop the Land based solely on the RPD 7 zoning, or their having received notice that any views and/or locations advantages they enjoyed could be obstructed in the future. *See gen.,* Def. Mot., Exs. 1, 2, and 3. Nor do they dispute knowledge of the other court orders which involved their similarly situated neighbors in Queensridge, which are public records attached to the Complaint, and which expressly found that: (1) the Land Owners have complied with all relevant provisions of NRS Chapter 278 and properly followed procedures for approval of a parcel map over their property; (2) Queensridge Common Interest Community is governed by NRS Chapter 116 and not NRS Chapter 278A because there is no evidence remotely suggesting that the Land is within a planned unit development; (3) the Land is not subject to the Queensridge Master Declaration, and the Land Owners' applications to develop the Land are not prohibited by, or violative of, that declaration; (4) Queensridge residents have no vested rights in the Land; (5) the Land Owners' development applications are legal and proper; (6) the Land Owners have the right to close the golf

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

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

course and not water it without impacting the Queensridge residents' rights; (7) the Land is not open space and drainage because it is zoned RPD 7; and (8) the Land Owners have the absolute right to develop the Land because zoning – not the Peccole Ranch Master Plan – dictates its use and the Land Owners' rights to develop it. *See id.; see also* Comp., Ex. 2 at ¶¶ 41-42, 52, 56, 66, 74, 78-79, and 108; Ex. 3 at ¶¶ 8, 12, 15-23, 26, 61, 64-67, and 133. Instead, the Defendants claim to have "no understanding that any of the statements are false" based solely on "conversations with other Queensridge residents" and the court order in *Binion et al v. Fore Stars et al,* Dkt. No. A-17-729053. *See* Def. Mot., Ex. 1 at ¶¶ 7-9, Ex. 2 at ¶¶ 7-9, Ex. 3 at ¶¶ 7-9. In other words, the Defendants fraudulently procured signatures by picking and choosing the information they shared with their neighbors to manipulate them into signing the declaration. *See id.*[4] At best, they simply ignored or disregarded known, material facts that directly conflicted with the statements in the declaration and undermined their plan to present a false narrative to the City of Las Vegas and mislead council members into delaying and ultimately denying the Land Owners' development applications. *See id.; see also* Comp., Ex. 1. Such conduct hardly constitutes "good faith" for purposes of immunity under Nevada's anti-SLAPP statute. *See* NRS 41.637. For these reasons, the Defendants are not entitled to immunity under NRS 41.635 *et seq.* as a matter of law.

E. **The Defendants' Conduct Is Not Privileged.**

Finally, the Defendants concede authorship of the statements in the declaration and devote the last five pages of their special motion to the absurd notion that their

[4] Defendants' reliance on Judge Crockett's order in the *Binion* case is wholly misplaced and, in fact, evidences their improper conduct. As the Court knows, the *Binion* matter is completely different and does not involve the Queensridge development. That Defendants rely upon a decision that post-dates all of the earlier events and decisions concerning the Queensridge development is evidence that they were (and still are) cherry-picking the information they were communicating to their neighbors. Such behavior constitutes fraud when material information is concealed. *See Epperson v. Roloff,* 102 Nev. 206, 212, 719 P.2d 799, 803 (1986) ("[W]e also note that a defendant may be found liable for misrepresentation even when the defendant does not make an express misrepresentation, but instead makes a representation which is misleading because it partially suppresses or conceals information.".

"efforts in gathering information for an anticipated proceeding are privileged." Def. Mot. at p. 15-20. This contention fails for at least three reasons. First, the absolute litigation privilege is limited to defamation claims, and this is not a defamation action. *See Fink v. Oshins,* 118 Nev. 428, 433, 49 P.3d 640, 645 (2002)(absolute privilege limited to defamation cases).

Second, only the fair, accurate, and impartial reporting of judicial proceedings is privileged and nonactionable. *See Adelson v. Harris,* 133 Nev. at ___, 402 P.3d at 667. Nevada "has long recognized a special privilege of absolute immunity from defamation given to the news media and the general public to report newsworthy events in judicial proceedings." *Id. (quoting Sahara Gaming Corp. v. Culinary Workers Union Local 226,* 115 Nev. 212, 214, 984 P.2d 164, 166 (1999); *citing Circus Circus Hotels, Inc. v. Witherspoon,* 99 Nev. 56, 60, 657 P.2d 101, 104 (1983) ("[There] is [a] long-standing common law rule that communications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject of controversy." (citation omitted)). "[T]he 'fair, accurate, and impartial' reporting of judicial proceedings is privileged and nonactionable ... affirming the policy that Nevada citizens have a right to know what transpires in public and official legal proceedings." *Lubin v. Kunin,* 117 Nev. 107, 114, 17 P.3d 422, 427 (2001) (quoting *Sahara Gaming,* 115 Nev. at 215, 984 P.2d at 166). Not only are the Defendants' purported "communications" in this case far from "fair or accurate" as analyzed above, but they were not "uttered or published in the course of judicial proceedings" under any stretch of the allegations in the Complaint. *See Adelson v. Harris,* 133 Nev. at ___, 402 P.3d at 667; *see also* Comp. at ¶¶ 23-30.

Likewise, there were no good faith "communications preliminary to a proposed judicial proceeding or quasi-judicial proceeding." *Bank of America Nevada v. Bordeau,* 115 Nev. 263, 267, 982 P.2d 474, 476 (1999) (statements made to investigator during a statutorily required fact-finding investigation by the FDIC not protected by absolute

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

privilege granted to quasi-judicial bodies). Indeed, preparing, promulgating, circulating, soliciting, and executing false declarations within one's neighborhood – even as part of an overall scheme to mislead council members during some undetermined, future hearing – hardly constitutes the quasi-judicial proceedings contemplated by Nevada courts. *See id.; cf. Knox v. Dick*.99 Nev. 514, 518, 665 P.2d 267, 270 (1983) (guidelines for grievance board indicated that hearing was conducted in manner consistent with quasi-judicial administrative proceeding). Thus, an absolute privilege is inapplicable here.

Third, the qualified or conditional privilege alternatively sought by the Defendants only applies where "a defamatory statement is made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or a duty, if it is made to a person with a corresponding interest or duty." *Bank of America Nevada v. Bordeau,* 115 Nev. at 266-67, 982 P.2d at 476 (statements made to FDIC investigators during background check of employee are subject to conditional privilege). As a party claiming a qualified or conditional privilege in publishing a defamatory statement, the Defendants must have acted in good faith, without malice, spite or ill will, or some other wrongful motivation, and must believe in the statement's probable truth. *See id.; see also Pope v. Motel 6,* 121 Nev. 307, 317, 114 P.3d 277, 284 (2005) (statements made to police during investigation subject to conditional privilege). Not only are the purported "communications" in this case beyond those contemplated by the Nevada Supreme Court as privileged, but the Defendants did not act in good faith as detailed above. At minimum, a factual issue exists whether any privilege applies and/or the Defendants acted in good faith, both of which are not properly decided in this special motion. *See Fink v. Oshins,* 118 Nev. at 433, 49 P.3d at 645 (factual issue on whether privilege applied); *Bank of America Nevada v. Bordeau,* 115 Nev. at 266-67, 982 P.2d at 476 (factual issue on whether publication was made with malice). The Court should reject their claim of privilege accordingly.

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

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

F. If The Court Determines That Nevada's Anti-SLAPP Statute Is Implicated Here, The Land Owners Are Entitled To Discovery Pursuant To NRS 41.660(4).

Should the Court determine that the Defendants have met their threshold burden of establishing, by a preponderance of the evidence, that any of the Land Owners' claims are based on acts protected by Nevada's anti-SLAPP statute (which they have not), the Land Owners respectfully move for discovery pursuant to NRS 41.660(4). Indeed, NRS 41.660 provides that the Court "shall allow limited discovery for the limited purpose of ascertaining such information" necessary to "demonstrate with prima facie evidence a probability of prevailing on the claim." NRS 41.660(3)(b); NRS 41.660(4). In this case, such limited discovery will afford the Land Owners the opportunity to obtain information necessary for their opposition, *i.e.*, presentation of prima facie evidence of a probability of prevailing on their claims against the Defendants. *See, e.g., Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 850 (9th Cir. 2001) (reasoning that the district court erred in refusing the plaintiff's discovery request under FRCP 56 and the California anti-SLAPP statute); *see also, e.g., Pacquiao v. Mayweather*, No. 209-CV-2448-LRH-RJJ, 2010 WL 1439100, at *1 (D. Nev. Apr. 9, 2010) (granting plaintiff's request for limited discovery to oppose the defendants' Nevada anti-SLAPP motion in order to challenge, *inter alia*, defendants' statements about their knowledge and reasoning). Specifically, the Land Owners should be allowed discovery in order to obtain facts including, but not limited to, from whom the Defendants received the information stated in the declarations, who prepared them, whether they read their CC&Rs, whether they read Judge Smith's orders, what they understood to be the implications of their CC&Rs as well as the court orders, why they believe the declarations to be accurate, what efforts they took, if any, to ascertain the truth of the information in the declarations, and with whom and the contents of the conversations they had with other Queensridge residents. According to their affidavits, the Defendants are uniquely in possession of this information, and the Land Owners are entitled to an opportunity to conduct discovery in order to elicit this

information. Accordingly, the Land Owners respectfully requests that the Court allow limited discovery for this purpose should it determine that the Defendants have met their burden under NRS 41.660(3)(a). *See* Affidavit of James M. Jimmerson, attached hereto.

## IV. CONCLUSION.

Based on the foregoing, the Court should deny the Defendants' special motion in its entirety. If the Court somehow determines that the Home Owners have met their burden under NRS 41.660(3)(a), the Landowners respectfully requests that the Court allow them to conduct limited discovery pursuant to NRS 41.660(4).

DATED this 4th day of May, 2018.

**THE JIMMERSON LAW FIRM, P.C.**

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

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

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

**DECLARATION OF JAMES M. JIMMERSON ESQ. IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS (ANTI-SLAPP MOTION) PLAINTIFFS' COMPLAINT PURSUANT TO NRS 41.635 *ET SEQ.***

JAMES M. JIMMERSON, ESQ., under penalty of perjury, does hereby declare:

1. I am counsel of record in the above-captioned matter. I have personal knowledge of the subject matter of this Declaration and I am competent to testify thereto, except for those matters stated upon information and belief, and as to those matters, there exists a reasonable basis to believe they are true.

2. For the reasons set forth in the Opposition, the Court should deny the motion to dismiss. However to the extent the Court is willing to consider the motion, Plaintiff should be granted necessary discovery. Indeed, should the Court determine that the Defendants have met their threshold burden of establishing, by a preponderance of the evidence, that any of the Land Owners' claims are based on acts protected by Nevada's anti-SLAPP statute, the Land Owners should be permitted to conduct discovery. NRS 41.660(4) provides that the Court "shall allow limited discovery for the limited purpose of ascertaining such information" necessary to "demonstrate with prima facie evidence a probability of prevailing on the claim." The Land Owners intend to conduct discovery to obtain facts including, but not limited to, from whom the Defendants received the information stated in the declarations, who prepared them, their knowledge of their CC&Rs, their knowledge of Judge Smith's orders, what they understood to be the implications of their CC&Rs as well as the court orders, why they believe the declarations to be accurate, what efforts they took, if any, to ascertain the truth of the information in the declarations, and with whom and the contents of the conversations they had with other Queensridge residents. According to their affidavits, the Defendants are uniquely in possession of this information, and the Land Owners are entitled to an opportunity to conduct discovery in order to elicit information to demonstrate with prima facie evidence a probability of prevailing on their claims.

///

///

I declare under the penalty of perjury and laws of the State of Nevada that the foregoing is true and correct to the best of my knowledge.

Executed on this 4th day of May, 2018.

JAMES M. JIMMERSON, ESQ.

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

## CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of May, 2018, I caused a true and correct copy of the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS (ANTI-SLAPP MOTION) PLAINTIFFS' COMPLAINT PURSUANT TO NRS 41.635 ET SEQ.** to be submitted electronically for filing and service with the Eighth Judicial District Court via the Electronic Filing System to the following:

Mitchell Langberg, Esq.
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway
Suite 1600
Las Vegas, Nevada 89106
*Attorneys for Defendants*

Employee of The Jimmerson Law Firm, P.C.

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

**OPPS**

THE JIMMERSON LAW FIRM, PC.
James J. Jimmerson, Esq.
Nevada Bar No. 000264
James M. Jimmerson, Esq.
Nevada Bar No. 12599
415 S. 6th Street, #100
Las Vegas, Nevada 89101
Telephone: (702) 388-7171
Facsimile: (702) 387-1167
Email: ks@jimmersonlawfirm.com
*Attorneys for Plaintiffs*

**DISTRICT COURT**
**CLARK COUNTY, NEVADA**

| | |
|---|---|
| FORE STARS, LTD., a Nevada Limited Liability Company; 180 LAND CO., LLC, a Nevada Limited Liability Company; SEVENTY ACRES, LLC, a Nevada Limited Liability Company,<br><br>Plaintiffs,<br>vs.<br>DANIEL OMERZA, DARREN BRESEE, STEVE CARIA, and DOES 1-1000,<br><br>Defendants. | Case No.: A-18-771224-C<br><br>Dept. No.: II<br><br>**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PURSUANT TO NRCP 12 (b)(5)** |

Plaintiffs, Fore Stars, LTD. (hereinafter "Fore Stars"), 180 Land Company LLC (hereinafter "180 Land Company"), and Seventy Acres, LLC (hereinafter "Seventy Acres") (collectively "Land Owners" or "Plaintiffs"), by and through their undersigned counsel, James J. Jimmerson, Esq. and James M. Jimmerson, Esq., of THE JIMMERSON LAW FIRM, P.C., hereby oppose the Motion to Dismiss Pursuant to Nevada Rule of Civil Procedure ("NRCP") 12(b)(5) (the "Opposition") filed by Defendants Daniel Omerza (hereinafter "Omerza"), Darren Bresee ("Bresee"), and Steve Caria ("Caria") (collectively "Homeowners" or "Defendants").

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

DATED this 7th day of May, 2018.

**THE JIMMERSON LAW FIRM, P.C.**

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

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

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

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

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

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

Defendants' reliance on Judge Crockett's order in the *Binion* case is wholly misplaced and, in fact, evidences their improper conduct. The *Binion* matter (in which Frank Schreck, Esq., counsel with the firm representing these Defendants, was a Plaintiff) is a completely different type of case involving judicial review, and does not involve the "Queensridge" development. The case that *does* directly involve the Queensridge development was *Peccole, et al v. Peccole, A-16-739654-C,* in which the Court, the Honorable Judge Smith, entered detailed Findings of Fact, Conclusions of Law and Orders specifically citing to the Purchase Documents, Public Offering Statements, and Master Declaration of Queensridge, and demonstrates that the claim that they (or others) purchased their lots "in reliance" of the Peccole Ranch Master Plan is false. All of this is alleged in Plaintiffs' Complaint. That Defendants rely upon a decision that post-dates all of the earlier events and decisions concerning the Queensridge development, a decision which **did not exist** at the time these individuals purchased their homes, is evidence that they were (and still are) cherry-picking the information they were communicating to their neighbors and that the claims are revisionist history. More importantly, such behavior constitutes fraud when material information is intentionally concealed.

The Court should summarily deny the Defendants' motion to dismiss because: (1) the Land Owners have stated cognizable claims for relief under Nevada's liberal pleading standard; and (2) the Defendants conduct is not protected by any absolute or qualified privilege.

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

## II. RELEVANT FACTS

The Land Owners 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") because golf course operations are no longer feasible. *See* Comp. at ¶ 9. They have the absolute right to develop the Land under its present RDP 7 zoning, which means that up to 7.49 dwelling units per acre may be constructed on it. *See* Comp. at ¶ 29, Ex. 2 at p. 18. The Land is adjacent to the Queensridge Common Interest Community (hereinafter "Queensridge") which was created and organized under the provisions of NRS Chapter 116. *See* Comp. at ¶ 10. The Defendants are certain residents of Queensridge who strongly oppose any redevelopment of the Land because some have enjoyed golf course views, which views they don't want to lose even though the golf course is no longer operational. *See* Comp. at ¶¶ 23-30. Rather than properly participate in the political process, however, the Defendants are using unjust and unlawful tactics to intimidate and harass the Land Owners and ultimately prevent any redevelopment of the Land. *See id.* They are doing so despite having received prior, express written notice that, among other things, the Land is developable and any views or location advantages they have enjoyed may be obstructed by future development. *See* Comp. at ¶¶ 12-22.

According to the Complaint, the Defendants executed purchase agreements when they purchased their residences within the Queensridge Common Interest Community which expressly acknowledged their receipt of, among other things, the following: (1) Master Declaration of Covenants, Conditions, Restrictions and Easements for Queensridge (Queensridge Master Declaration), which was recorded in 1996; (2) Notice of Zoning Designation of Adjoining Lot which disclosed that the Land was zoned RPD 7; (3) Additional Disclosures Section 4 – No Golf Course or Membership Privileges which stated that they acquired no rights in the Badlands Golf Course; (4) Additional Disclosure Section 7 – Views/Location Advantages which stated that future construction in the planned community may obstruct or block any view or diminish any location advantage;

and (5) Public Offering Statement for Queensridge Towers which included these same disclaimers. *See* Comp. at ¶¶ 10-12, 15-20. The Complaint further alleges that the deeds to the Defendants' respective residences "are clear by their respective terms that they have no rights to affect or control the use of Plaintiffs' real property." Comp. at ¶ 21. The Defendants nevertheless prepared, promulgated, solicited, circulated, and executed the following 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....

Comp., Ex. 1.

The Defendants did so despite having received prior, express written notice that the Queensridge Master Declaration does not apply to the Land, the Land Owners have the absolute right to develop it based solely on the RPD 7 zoning, and any views and/or locations advantages they enjoyed could be obstructed in the future. *See gen.,* Comp., Exs. 2, 3, and 4. In preparing, promulgating, soliciting, circulating, and executing the declaration, the Defendants also disregarded district court orders which involved their similarly situated neighbors in Queensridge, which are public records attached to the Complaint, and which expressly found that: (1) the Land Owners have complied with all relevant provisions of NRS Chapter 278 and properly followed procedures for approval of a parcel map over their property; (2) Queensridge Common Interest Community is governed by NRS Chapter 116 and not NRS Chapter 278A because there is no evidence remotely suggesting that the Land is within a planned unit development; (3) the Land is not subject to the Queensridge Master Declaration, and the Land Owners' applications to

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

develop the Land are not prohibited by, or violative of, that declaration; (4) Queensridge residents have no vested rights in the Land; (5) the Land Owners' development applications are legal and proper; (6) the Land Owners have the right to close the golf course and not water it without impacting the Queensridge residents' rights; (7) the Land is not open space and drainage because it is zoned RPD 7; and (8) the Land Owners have the absolute right to develop the Land because zoning – not the Peccole Ranch Master Plan – dictates its use and the Land Owners' rights to develop it. *See id.; see also* Comp., Ex. 2 at ¶¶ 41-42, 52, 56, 66, 74, 78-79, and 108; Ex. 3 at ¶¶ 8, 12, 15-23, 26, 61, 64-67, and 133. The Defendants further ignored another district court order dismissing claims based on findings that similarly contradicted the statements in the Defendants' declaration. *See* Comp., Exs. 1, 4.

In sum, the Complaint alleges that the Defendants fraudulently procured signatures by picking and choosing the information they shared with their neighbors in order to manipulate them into signing the declaration. *See id.; see also* Comp., Exs. 2 and 3. They simply ignored or disregarded known, material facts that directly conflicted with the statements in the declaration and undermined their plan to present a false narrative to the City of Las Vegas and mislead council members into delaying and ultimately denying the Land Owners' development applications. *See id.; see also* Comp., Ex. 1.

The Defendants have filed a motion to dismiss pursuant to NRCP 12(b)(5), claiming to "have no understanding that any of [the statements in the declaration] are false." *See* Def. Spec. Mot., Exs. 1, 2, and 3 at ¶¶ 13, respectively. Because the allegations in the Complaint – which must be accepted as true – indicate otherwise, the Motion to Dismiss should be denied.

## III. ARGUMENT

### A. Standard for Dismissal Under NRCP 12(b)(5)

The standard for dismissal under NRCP 12(b)(5) is rigorous as the district court "must construe the pleading liberally" and draw every fair inference in favor of the non-moving party. *Breliant v. Preferred Equities Corp.*, 109 Nev. at 846, 858 P.2d at 1260



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

(1993) (*quoting Squires v. Sierra Nev. Educational Found.*, 107 Nev. 902, 905, 823 P.2d 256, 257 (1991)). All factual allegations of the complaint must be accepted as true. *See Breliant,* 109 Nev. at 846, 858 P.2d at 1260 *(citing Capital Mort. Holding v. Hahn,* 101 Nev. 314, 315, 705 P.2d 126, 126 (1985)). A complaint will not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him [or her] to relief." *See Breliant,* 109 Nev. at 846, 858 P.2d at 1260 (*quoting Edgar v. Wagner,* 101 Nev. 226, 228, 699 P.2d 110, 112 (1985) (citation omitted)).

In Nevada, pleadings are governed by NRCP 8, which requires only general factual allegations, not itemized descriptions of evidence. *See* NRCP 8 (complainant need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief"); *see also Breliant v. Preferred Equities Corp.,* 109 Nev. at 846, 858 P.2d at 1260 ("The test for determining whether the allegations of a complaint are sufficient to assert a claim for relief is whether [they] give fair notice of the nature and basis of a legally sufficient claim and the relief requested."). Thus, a pleading need only broadly recite the "ultimate facts" necessary to set forth the elements of a cognizable claim that a party believes can be proven at trial. A pleading is not required to identify the particular "evidentiary facts" that will be employed to prove those allegations. *See* Jack Friedenthal, Mary Kane & Arthur Miller, *Civil Procedure* § 5.5 (4th ed.2005) (discussing distinction between "ultimate facts" upon which a party bears the burden of proof, such as whether a breach of duty occurred, and the "evidentiary facts" such as particular testimony or exhibits that may be used to meet that burden of proof).

Furthermore, Nevada is a "notice pleading" state, which means that the ultimate facts alleged within the pleadings need not be recited with particularity. *See Hall v. SSF, Inc.,* 112 Nev. 1384, 1391, 930 P.2d 94, 98 (1996) ("[A] complaint need only set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of the claim and the relief sought.")

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

(internal quotation marks omitted); *Pittman v. Lower Court Counseling,* 110 Nev. 359, 365, 871 P.2d 953, 957 (1994) ("Nevada is a notice pleading jurisdiction and we liberally construe pleadings to place matters into issue which are fairly noticed to the adverse party."), *overruled on other grounds by Nunez v. City of N. Las Vegas,* 116 Nev. 535, 1 P.3d 959 (2000). Thus, a plaintiff is entitled under NRCP 8 to set forth only general allegations in its complaint and then rely at trial upon specific evidentiary facts never mentioned anywhere in its pleadings. *See Nutton v. Sunset Station, Inc.,* 131 Nev. ____, 357 P.3d 966, 974 (Nev. Ct. App. 2015).

**B. The Complaint States Cognizable Claims For Relief**

There is no heightened pleading requirement for the Land Owners' interference with prospective economic relations and conspiracy claims. *See e.g., LT Intern. Ltd. v. Shuffle Master, Inc.,* 8 F.Supp.3d 1238, 1248 (D. Nev. 2014) (tortious interference with prospective economic relations claim must meet NRCP 8 pleading standard); *Flowers v. Carville,* 266 F.Supp.2d 1245, 1249 (D. Nev. 2003) (no heightened pleading requirement for a civil conspiracy under Nevada law). In the Complaint, the Land Owners' intentional and negligent interference with prospective economic relations claims (Second and Third Claims for Relief) allege the Defendants engaged in wrongful conduct through the "preparation, promulgation, solicitation and execution" of the declarations which "contain false representations of fact, and using their intentional misrepresentations to influence and pressure homeowners to sign a statement," causing damage to the Land Owners' reputation, livelihood, and ability to develop the Land. Comp. at ¶¶ 42-43, 50-52; *see also LT Intern. Ltd. v. Shuffle Master, Inc.,* 8 F.Supp.3d at 1248 (allegations of tortious interference with prospective economic relations need not plead the existence of a valid contract and must only raise plausible claim for relief under NRCP 8 to avoid dismissal). Similarly, the Land Owners' conspiracy claim (Fourth Claim for Relief) is based on the Defendants' clandestine, behind-the-scenes "concerted action to improperly influence and/or pressure third-parties, including officials with the City of Las Vegas, and

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

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

others with the intended action of delaying or denying the [Land Owners'] land rights and their intent to develop their property." Comp. at ¶ 58. The Complaint further alleges that the "co-conspirators agreement was implemented by their concerted actions to object to [the Land Owners'] development and to use their political influence" to delay and sabotage any development projects to the detriment of the Land Owners and their livelihoods. Comp. at ¶¶ 58-60; *see also Flowers v. Carville,* 266 F.Supp.2d at 1249 (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). Based on these allegations, the Land Owners have set forth sufficient facts to demonstrate the necessary elements of their interference with prospective economic relations and conspiracy claims such that the Defendants have adequate notice of the nature of these claims and the relief sought. *See* NRCP 8. Accordingly, they should not be dismissed.

With respect to their intentional and negligent misrepresentation claims (Fifth and Sixth Claims for Relief), the Land Owners allege the Defendants' actions were intentional and/or negligent and were undertaken "with the intent of causing homeowners and the City of Las Vegas to detrimentally rely upon their misrepresentation of fact being falsely made...." Comp. at ¶¶ 62-68. According to the Complaint, the Defendants solicited and procured the statements and/or declarations, *i.e.*, false misrepresentations of fact, as part of a scheme to mislead council members into denying the Land Owners' applications. *See id.* The Defendants did so despite having received prior, express written notice that, among other things, the Land is developable and any views or location advantages they have enjoyed may be obstructed by future development. *See* Comp. at ¶¶ 12-22. They did so despite also being aware of court orders determining, among other things, that homeowners in Queensridge don't have any "vested rights" with respect to the Land and that the Land Owners have the absolute right to develop it. *See* Comp., Ex. 2 at ¶¶ 81-82, 108; Ex. 3. Even if the statements and/or declarations were consistent with the "ruling in

the Binion Litigation" as the Defendants argue, they were controverted by at least three other court orders which are public records attached to the Complaint and which the Defendants should have disclosed to their neighbors, particularly given their discussions with them about the court order in *Binion et al v. Fore Stars et al,* Dkt. No. A-17-729053. *See* Comp., Exs. 2, 3, and 4; *see also Brelient v. Preferred Equities Corp.,* 109 Nev. at 845, 858 P.2d at 1260 (In ruling on a motion to dismiss, the court may consider matters of public record, orders, items present in the record and any exhibits attached to the complaint.). The Defendants omission of these material facts from the statements and/or declarations they prepared, executed, promulgated, solicited, and circulated to other homeowners in Queensridge is equivalent to a false representation. *See* Comp., Ex. 1; *see also Nelson v. Heer,* 123 Nev. 217, 225-26, 163 P.3d 420, 426 (2007) ("With respect to false-representation element of intentional-misrepresentation claim, the suppression or omission of a material fact which a party is bound in good faith to disclose is equivalent to a false representation, since it constitutes an indirect representation that such fact does not exist.").

In sum, these allegations set forth sufficient facts to demonstrate the necessary elements of intentional and/or negligent misrepresentation claims. *See Squires v. Sierra Nevada Ed. Found. Inc.,* 107 Nev. at 906 and n. 1, 823 P.2d at 258 and n. 1 (misrepresentation allegations sufficient to avoid dismissal under NRCP 12(b)(5)). Should the Court determine, however, that the misrepresentation claims are not plead with sufficient particularity pursuant to NRCP 9, the Land Owners respectfully request leave to amend their Complaint and/or conduct discovery pursuant to *Rocker v. KPMG LLP,* 122 Nev. 1185, 148 P.3d 703 (2006). *See* NRCP 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity...."); *cf. Rocker,* 122 Nev. at 1192-95, 148 P.3d at 707-10 (A relaxed pleading standard applies in fraud actions where the facts necessary for pleading with particularity are peculiarly within the defendant's knowledge or are readily obtainable by him. In such

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

situations, district court should allow the plaintiff time to conduct the necessary discovery.).

### C. The Defendants' Conduct Is Not Privileged

The Defendants devote the last five pages of their motion to the absurd notion that they "could not be liable to Plaintiffs for the solicitation of the declarations, or for any statements contained in" them because they are privileged. Def. Mot. at p. 10-15. This contention fails for at least three reasons. First, the absolute litigation privilege is limited to defamation claims, and this is not a defamation action. *See Fink v. Oshins,* 118 Nev. 428, 433, 49 P.3d 640, 645 (2002)(absolute privilege limited to defamation cases). Second, only the fair, accurate, and impartial reporting of judicial proceedings is privileged and nonactionable. *See Adelson v. Harris,* 133 Nev. ___, ___, 402 P.3d 665, 667 (2017). Nevada "has long recognized a special privilege of absolute immunity from defamation given to the news media and the general public to report newsworthy events in judicial proceedings." *Id. (quoting Sahara Gaming Corp. v. Culinary Workers Union Local 226,* 115 Nev. 212, 214, 984 P.2d 164, 166 (1999); *citing Circus Circus Hotels, Inc. v. Witherspoon,* 99 Nev. 56, 60, 657 P.2d 101, 104 (1983) ("[There] is [a] long-standing common law rule that communications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject of controversy." (citation omitted)). "[T]he 'fair, accurate, and impartial' reporting of judicial proceedings is privileged and nonactionable ... affirming the policy that Nevada citizens have a right to know what transpires in public and official legal proceedings." *Lubin v. Kunin,* 117 Nev. 107, 114, 17 P.3d 422, 427 (2001) (quoting *Sahara Gaming,* 115 Nev. at 215, 984 P.2d at 166). Not only are the Defendants' purported "communications" in this case far from "fair or accurate" as analyzed above, but they were not "uttered or published in the course of judicial proceedings" under any stretch of the allegations in the Complaint. *See Adelson v. Harris,* 133 Nev. at ___, 402 P.3d at 667; *see also* Comp. at ¶¶ 23-30. Thus, an absolute privilege is inapplicable here.

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

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

Third, the qualified or conditional privilege alternatively sought by the Defendants only applies where "a defamatory statement is made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or a duty, if it is made to a person with a corresponding interest or duty." *Bank of America Nevada v. Bordeau,* 115 Nev. at 266-67, 982 P.2d at 476 (statements made to FDIC investigators during background check of employee are subject to conditional privilege). As a party claiming a qualified or conditional privilege in publishing a defamatory statement, the Defendants must have acted in good faith, without malice, spite or ill will, or some other wrongful motivation, and must believe in the statement's probable truth. *See id.; see also Pope v. Motel 6,* 121 Nev. 307, 317, 114 P.3d 277, 284 (2005) (statements made to police during investigation subject to conditional privilege). Not only are the purported "communications" in this case beyond those contemplated by the Nevada Supreme Court as privileged, but the Defendants didn't act in good faith.

Specifically, the Complaint alleges the Defendant prepared, promulgated, circulated, solicited, and executed false declarations "solely for the purposes of harassing and maliciously attacking" the Land Owners as part of an overall scheme to "cause economic damage and harm" to them and their livelihoods, to slander title to the Land, delay their developments applications, and to suborn and mislead the City of Las Vegas and its council members with the false declarations into rejecting those applications so the Land Owners are ultimately prevented from ever redeveloping the Land. *See* Comp. at ¶¶ 23-30. The Complaint further alleges that Defendants were aware of and had notice of public records and other information that directly controverted the statements in the declarations which they ignored and disregarded. *See id.* Despite this, the Defendants still sought signatures from their neighbors on the declarations with the intent to use those false declarations to sabotage the Land Owners' redevelopment of the Land. *See id.*

Given these allegations – which must be accepted as true for purposes of this motion – it defies credulity that the Defendants acted "without malice or ill will" or could

have "believed in the statement's probable truth." *See id.; see also Bank of America Nevada v. Bordeau,* 115 Nev. at 266-67, 982 P.2d at 476 (party cannot claim privilege unless they acted in good faith, without malice, spite or ill will, or some other wrongful motivation, and they must have believed in the statement's probable truth). At minimum, a factual issue exists whether any privilege applies and/or the Defendants acted in good faith, both of which are not properly decided in a NRCP 12(b)(5) motion. *See Fink v. Oshins,* 118 Nev. at 433, 49 P.3d at 645 (factual issue on whether privilege applied); *Bank of America Nevada v. Bordeau,* 115 Nev. at 266-67, 982 P.2d at 476 (factual issue on whether publication was made with malice). The Court should reject their claim of privilege accordingly.

### D. Discovery Should Be Permitted Under *Rocker*

Additionally, Land Owners should be permitted to discovery pursuant to *Rocker v. KPMG LLP,* 122 Nev. 1185, 148 P.3d 703 (2006). Specifically, the Land Owners should be allowed discovery in order to obtain facts including, but not limited to, from whom the Defendants received the information stated in the declarations, who prepared them, whether they read their CC&Rs, whether they read Judge Smith's orders, what they understood to be the implications of their CC&Rs as well as the court orders, why they believe the declarations to be accurate, what efforts they took, if any, to ascertain the truth of the information in the declarations, and with whom and the contents of the conversations they had with other Queensridge residents. According to their affidavits, the Defendants are uniquely in possession of this information, and the Land Owners are entitled to an opportunity to conduct discovery in order to elicit this information.

///

///

///

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

## IV. CONCLUSION

Based on the foregoing, the Land Owners respectfully request that the Court deny the Defendants' motion in its entirety. Alternatively, the Court should grant them leave to amend their Complaint and/or conduct discovery pursuant to *Rocker v. KPMG LLP*, 122 Nev. 1185, 148 P.3d 703 (2006).

DATED this 7th day of May, 2018.

**THE JIMMERSON LAW FIRM, P.C.**

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

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

**DECLARATION OF JAMES M. JIMMERSON ESQ. IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PURSUANT TO NRCP 12(b)(5)**

JAMES M. JIMMERSON, ESQ., under penalty of perjury, does hereby declare:

1. I am counsel of record in the above-captioned matter. I am above eighteen years of age, an attorney duly-licensed to practice law in the State of Nevada, and a partner at THE JIMMERSON LAW FIRM, P.C. I make this Declaration in support of Plaintiffs' Opposition to Defendants' Motion to Dismiss.

2. I have personal knowledge of the subject matter of this Declaration and I am competent to testify thereto.

3. In a Motion to Dismiss, all facts in Plaintiffs' Complaint must be regarded as true and in a light most favorable to the non-moving party. Based on these allegations, the Land Owners have set forth sufficient facts to demonstrate the necessary elements of their claims and the relief sought. The Motion to Dismiss should be denied.

4. Additionally, Land Owners should be permitted to discovery pursuant to *Rocker v. KPMG LLP*, 122 Nev. 1185, 148 P.3d 703 (2006). Specifically, the Land Owners should be allowed discovery in order to obtain facts including, but not limited to, from whom the Defendants received the information stated in the declarations, who prepared them, whether they read their CC&Rs, whether they read Judge Smith's orders, what they understood to be the implications of their CC&Rs as well as the court orders, why they believe the declarations to be accurate, what efforts they took, if any, to ascertain the truth of the information in the declarations, and with whom and the contents of the conversations they had with other Queensridge residents.

I declare under the penalty of perjury and laws of the State of Nevada that the foregoing is true and correct to the best of my knowledge.

JAMES M. JIMMERSON, ESQ.

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

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

**CERTIFICATE OF SERVICE**

I hereby certify that on the 7th day of May, 2018, I caused a true and correct copy of the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PURSUANT TO NRCP 12(b)(5)** to be submitted electronically for filing and service with the Eighth Judicial District Court via the Electronic Filing System to the following:

Mitchell Langberg, Esq.
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway
Suite 1600
Las Vegas, Nevada 89106
*Attorneys for Defendants*

Employee of The Jimmerson Law Firm, P.C.

**RIS**
Mitchell J. Langberg, Esq., Bar No. 10118
mlangberg@bhfs.com
BROWNSTEIN HYATT FARBER & SCHRECK LLP
100 North City Parkway, Suite 1600
Las Vegas, Nevada 89106
Telephone: 702.382.2101
Facsimile: 702.382.8135

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

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

v.

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

Defendants.

CASE NO.: A-18-771224-C
DEPT. NO.: II

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

Hearing Date: May 14, 2018

Hearing Time: 9:00 am.



## I. INTRODUCTION

In order to safeguard against legal actions that could impose a chilling effect on free speech and petitioning activities, Nevada's anti-SLAPP statute, NRS §41.635 *et seq*., creates an expedited procedure for testing the merits of claims arising from activities typically protected by the First Amendment. The Act specifies a two-prong analysis: Defendants must show that the claims against them are "based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern," as that phrase is defined in the statute. NRS 41.660(3)(a). If they do, then the burden switches to Plaintiffs to produce evidence to "demonstrate[] with *prima facie* evidence a probability of

prevailing on the claim." NRS 41.660(3)(b).

In their motion, Defendants met their initial burden, showing that the claims against them arise from their free speech and petitioning activity ultimately directed to the Las Vegas City Council on a matter of public interest: Plaintiffs' efforts to obtain changes to land use restrictions so they can convert open space previously used as a golf course to new residential units. That some nearby residents relied on the open space designation of the golf course when they purchased their homes directly bears on this issue, as this Court (Judge Crockett) has already found, in separate litigation over Plaintiffs' development plans.

Thus, the burden is now on Plaintiffs to produce facts sufficient to support a *prima facie* claim against Defendants. Yet in their Opposition, Plaintiffs have not even attempted to meet that burden. Instead, Plaintiffs argue that the first prong of the anti-SLAPP analysis could not have been met because, assuming Plaintiffs' own factual allegations to be true, Defendants could conceivably be liable for the conduct alleged.

This argument proceeds from a profound misunderstanding of the anti-SLAPP statute. An anti-SLAPP motion is not a Rule 12(b)(5) motion to dismiss, and for purposes of Defendants' motion, the facts alleged in Plaintiffs' Complaint are ***not*** assumed to be true. It is not enough for Plaintiffs to argue as a legal matter that the type of facts they have alleged, ***if proven***, might give rise to a claim for relief. Rather, the anti-SLAPP statute challenges Plaintiffs to come forward with admissible supporting evidence at the outset of the case, to justify moving forward with an action that the Legislature has found disruptive of First Amendment activities. Here, Plaintiffs have failed to answer the bell, offering no evidence to support their strained claims against Defendants. Plaintiffs only attempt at factual support—as opposed to unsubstantiated conclusory allegations—rests on an earlier judicial proceedings (to which these Defendants were not parties) involving whether Queensridge covenants, conditions and restrictions ("CC&R's") prohibit development of the Badlands Golf Course. But, this is an issue not even raised in the present dispute.

Disregarding Plaintiffs' efforts to confuse the matter, dismissal under the anti-SLAPP statute is plainly appropriate here. There is no question that the communications at issue are in

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

furtherance of Defendants' rights to petition and free speech in connection with an issue of public concern. Plaintiffs dispute whether Defendants' communications have been in good faith, but the only support Plaintiffs offer for their position (beyond the bald allegations of their own Complaint) are judicial rulings on the inapplicable issue of whether Plaintiffs are bound by Queensridge CC&R's. Thus, Defendants have met their initial burden under the statute by showing that this case implicates First Amendment issues.

Plaintiffs, meanwhile, have not even attempted to meet their burden of presenting *prima facie* evidence to support their claims for relief. They offer no evidentiary support for their claims. They present no response to Defendants' argument that their claims are invalid, other than to request discovery. But, they have also failed to demonstrate any need for discovery under NRS 41.660(4). Finally, Plaintiffs dispute whether Defendants' conduct was privileged — an independent basis for dismiss the claims asserted here — but once again Plaintiffs' position is based on fundamental misunderstandings as to the controlling law.

## II. ARGUMENT

Plaintiffs' Opposition to Defendants' Special Motion to Dismiss (Anti-SLAPP Motion) Plaintiffs' Complaint Pursuant to NRS 41.635 Et Seq. ("Opposition") entirely misses the point of the anti-SLAPP statute, which challenges them to produce evidence to support their claims at the outset of their case. This burden cannot be satisfied merely by reliance on allegations in the Complaint. Defendants have met the first prongs of the anti-SLAPP statute because Plaintiffs' claims arise from Defendants' "good faith communications in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern," as that phrase is defined in the statute. Thus, the burden was on Plaintiffs to produce *prima facie* evidence demonstrating a probability of prevailing on their claims, which they have entirely failed to do.

### A. PLAINTIFFS' OPPOSITION MISPERCEIVES THE OPERATION AND IMPORT OF THE ANTI-SLAPP STATUTE.

Defendants' Motion is brought under the anti-SLAPP statute, not Rule 12(b)(5). Under the anti-SLAPP statute, Plaintiffs' factual allegations are not assumed true; rather, the statute calls on Plaintiffs to come forward with evidence to support a *prima facie* case against Defendants.

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

Failure to do so results in an adjudication on the merits against Plaintiffs' claims. NRS 41.660(5).

Plaintiffs repeatedly emphasize that the anti-SLAPP statute "is not an absolute bar against substantive claims" and does not render Defendants "immune" from potential claims. *E.g.*, Opposition at 5. This simply misses the point. Defendants do not contend that the anti-SLAPP statute is an absolute bar against all potential claims. Rather, the purpose of the statute is to create a procedure for testing whether there is in fact any evidentiary basis for Plaintiffs' substantive claims at the outset of the litigation. This "filters unmeritorious claims in an effort to protect citizens from costly retaliatory lawsuit arising from their right to free speech under both the Nevada and Federal Constitutions." *John v. Douglas City Sch. Dist.*, 125 Nev. 746, 755, 219 P.3d 1276, 1282 (2009), *superseded by statute on other grounds, as stated in Shapiro v. Welt*, 133 Nev. Adv. Op. 6, 389 P.3d 262, 266 (2017)) (cited by Plaintiffs).[1] Plaintiffs cannot satisfy that test simply by asserting that the allegations of the Complaint might, in theory, state a claim for relief, if they are later able to prove their factual allegations at trial. Because of their Complaint's obvious impact on the exercise of Defendants' First Amendment rights, Plaintiffs must come forward with supporting evidence ***now***.

Specifically, Plaintiffs assert that the anti-SLAPP statute does not apply because they allege in their Complaint that Defendants' communications were not truthful and were made with knowledge of their falsehood. But Defendants have met their initial burden to show their communications were made in good faith, by providing the Court with Defendants' Declarations, *see* Motion, Exs. 1-3, stating that they are not aware of any falsehood in the disputed communications. Thus, the burden shifts to Plaintiffs to produce *evidence* that Defendants made false statements that they knew to be false. In functionally identical circumstances, the Nevada Supreme Court held in *Delucchi v. Songer*, 133 Nev. ___, 396 P.3d 826 (2017) (discussed in Defendants' Motion but ignored in Plaintiffs' Opposition), that a defendant's declaration that he

[1] Among other changes, the Nevada Legislature amended the anti-SLAPP statute in 2013 to clarify that the statute is not limited to communications "addressed to a governmental agency," but rather covers any good faith "communication that is aimed at procuring any governmental or electoral action, result, or outcome." *Adelson v. Harris*, 402 P.3d 665, 670 (Nev. 2017) (quoting *Delucchi v. Songer*, 133 Nev. ____, 396 P.3d 826, 830-31 (2017)).





BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

believed his disputed communications to be truthful was sufficient to shift the burden to the plaintiffs to show a *prima facie* basis for their claims:

> Songer also made an initial showing that the Songer Report was true or made without knowledge of its falsehood. In a declaration before the district court, Songer stated, "[t]he information contained in [his] reports was truthful to the best of [his] knowledge, and [he] made no statements [he] knew to be false." **Because Songer made the required initial showing, the question becomes whether in opposing the special motion to dismiss, Delucchi and Hollis set forth specific facts by affidavit or otherwise to show that there was a genuine issue for trial regarding whether the Songer Report fit within the definition of protected communication.**

*Delucchi*, 396 P.3d at 833 (emphasis added). As *Delucchi* squarely holds, it is not sufficient for Plaintiffs to dispute whether Defendants' communications were truthful—they must present affidavits or other evidence to make a *prima facie* showing in support of their allegations.

Plaintiffs make no attempt to do that, instead repeatedly insisting without support that the allegations of their Complaint are sufficient to prevent dismissal under the anti-SLAPP statute. They even go so far as to suggest that the anti-SLAPP statute does not apply at all to intentional torts, Opposition at 6-7, but again they offer no authority so holding, while *Delucchi* expressly applied the statute to a claim for intentional infliction of emotional distress. Further, Plaintiffs concede that California authority is persuasive as to the scope of the anti-SLAPP statute, and California courts have squarely rejected Plaintiffs' position. *See, e.g., Navellier v. Sletten*, 29 Cal. 4th 82, 92, 124 Cal. Rptr. 2d 530, 52 P.3d 703 (2002) ("Nothing in the statute itself categorically excludes any particular type of action from its operation, and no court has the 'power to rewrite the statute so as to make it conform to a presumed intention which is not expressed.' ") (quoting *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.*, 14 Cal. 4th 627, 633, 59 Cal. Rptr. 2d 671, 927 P.2d 1175 (1997)); *Graham-Sult v. Clainos*, 756 F.3d 724, 739 (9th Cir. 2014) (applying anti-SLAPP statute to claims for intentional and negligent misrepresentation); *Healthsmart Pacific, Inc. v. Kabateck*, 7 Cal. App. 5th 416, 426, 438, 212 Cal. Rptr. 3d 589 (2016) (affirming anti-SLAPP dismissal of claim for interference with prospective economic advantage); *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures*, 184 Cal. App. 4th 1539, 1548-49, 110 Cal. Rptr. 3d 129 (2010) (holding anti-SLAPP statute applies to claim for

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

conspiracy to obtain false testimony).

This same line of cases also dispels Plaintiffs' peculiar theory that the anti-SLAPP statute cannot apply when Plaintiffs allege wrongful conduct by Defendants (as if any plaintiff would fail to make such an allegation). Opposition, at 7-9. The predictable allegation of some wrongdoing by Defendants does not dispel the fact that the claims arise in significant part from their participation in the political arena. "Where, as here, a cause of action is based on both protected activity and unprotected activity, it is subject to [the anti-SLAPP statute] 'unless the protected conduct is merely incidental to the unprotected conduct.'" *Haight Ashbury Free Clinics*, *supra*, at 1551 (quoting *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*, 133 Cal. App. 4th 658, 672, 35 Cal. Rptr. 3d 31 (2005)); *see also Baral v. Schnitt*, 1 Cal. 5th 376, 396, 205 Cal. Rptr. 3d 475, 376 P.3d 604, 617 (2016) ("When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this [first prong] stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached."). This is consistent with the rule in Nevada that courts need only determine whether a claim involves conduct meeting the definition of NRS 41.637, without need to undertake an analysis of First Amendment law. *Delucchi*, 396 P.3d at 833 (quoted in Motion, at 8). Plaintiffs' insistence that the statute does not apply to intentional torts or alleged wrongful conduct is nonsense, underscoring their misunderstanding of the nature and purpose of the anti-SLAPP statute.

### B. DEFENDANTS MET THEIR INITIAL BURDEN OF SHOWING THAT PLAINTIFFS' CLAIMS ARISE FROM DEFENDANTS' EXERCISE OF THEIR FIRST AMENDMENT RIGHTS.

The first prong of the anti-SLAPP statute places the burden on Defendants to show that a claim "is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a). The meaning of that phrase is explicitly defined at NRS 41.637. Plaintiffs cannot dispute the nature of the communications at issue here, which fall squarely within the type of conduct contemplated by the statute. Plaintiffs attempt to avoid the scope of the anti-SLAPP statute by asserting that Defendants' communications were not in good faith, but again they have offered no





BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

evidentiary support for their view, other than the outcome of a judicial proceeding to which they were not parties that addressed an issue not presented here.

As demonstrated in Defendants' Motion, the Legislature has defined four ways in which communications may be deemed to be in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern, all four of which apply here. There is no dispute that the communications and conduct at issue here consist of Defendants conversing with fellow residents to obtain declarations in order to provide information about the residents' reliance on the Peccole Ranch Master Development Plan to the City Council, in hopes of influencing the Council's decision as to whether to permit an amendment to the General Plan. Plaintiffs cannot seriously contest that this constitutes (i) communications aimed at procuring a desired governmental or electoral action; (ii) an effort to communicate information to government personnel; (iii) written and oral statements on an issue under consideration by a legislative, executive or judicial body; and (iv) communications in a public forum in direct connection with an issue of public interest. *See* NRS 41.637. This is grass roots activism on a matter of immediate public interest. It is difficult to imagine an effort that would fall more squarely within the statutory definition.

Plaintiffs only response in their Opposition is to insist that the communications at issue are not *good faith* communications, because Defendants know that nobody relied on the designation in the Master Development Plan of the Badlands golf course as Parks Recreation – Open Space. Their only support for this assertion is the Court's decision in *Peccole v. Peccole*, Case A-16-739654-C, which Plaintiffs claim held just that. But this Court will search the Findings of Fact in that action in vain for any such holding. To the contrary, that case analyzed another resident's contention that the Queensridge CC&R's apply to Plaintiffs and somehow *forbid* them from developing the Badlands property. Defendants here have not taken the position that Plaintiffs are bound by the Queensridge CC&R's, nor do the declarations they secured make any such assertion. Rather, the declarations state that the signing residents purchased their residence or lot "in reliance upon the fact that the open space/natural drainage system could not be developed pursuant to the City's Approval in 1990 of the Peccole Ranch Master Plan and

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

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." Mot., Exs. 1-3, ¶ 12. These declarations do *not* rely on the terms of the Queensridge CC&R's, and thus are not in any way inconsistent with the court's holding in *Peccole v. Peccole*. They are, however, entirely consistent with Judge Crockett's determination in the Binion Litigation, Case No. A-17-752344-J, that approval of Plaintiffs' plans requires a major modification of the Peccole Ranch Master Plan, which may run afoul of the reasonable expectations of residents of the area who relied on the existing master planning. *See* Request for Judicial Notice, Ex. A, at 5-10. Since Judge Crockett himself obviously raised this concern in good faith, there can be no reasonable inference that Defendants could not believe the same thing in good faith.[2]

There can be no serious dispute that Defendants' communications in an attempt to be heard on issues pending before the Las Vegas City Council implicate the rights of free speech and petition the anti-SLAPP statute was designed to protect.

### C. PLAINTIFFS HAVE FAILED TO DEMONSTRATE A PROBABILITY OF PREVAILING ON ANY OF THEIR CLAIMS.

The burden thus shifts to Plaintiffs to demonstrate with *prima facie* evidence a probability of prevailing on their claims. NRS 41.660(3)(b). In their Motion, Defendants demonstrated that Plaintiffs would not be able to meet that burden for two independent reasons: first, the claims they have asserted are untenable as a matter of law; second, Defendants' activities at issue are privileged. Remarkably, Plaintiffs have made no attempt to respond to the first argument. Instead, they ask the court to undertake discovery, but they have failed to show any basis for seeking such discovery under the anti-SLAPP statute. Plaintiffs do attempt to answer the second argument, but their position is at odds with the controlling authority on the privilege issue.

[2] Judge Crockett's concerns do not in any way exclude Queensridge, but apply to any Peccole Ranch residents and Badlands neighbors, which would include the Queensridge residents in question. Defendants are simply at a loss to understand why Plaintiffs believe that it is significant that Judge Crockett's ruling post-dates the *Peccole v. Peccole* decision, Opposition at 15 n.4, when the two cases address different issues.

### 1. Plaintiffs Have Not Presented Any *Prima Facie* Evidence To Show a Probability of Prevailing on Their Claims for Relief.

As shown above, once Defendants have made an initial showing that the anti-SLAPP statute applies, the burden shifts to Plaintiffs to present *prima facie* evidence showing a probability that they will prevail on their claims. Here, Plaintiffs have presented **no such evidence at all**. Defendants' expectation that Plaintiffs would not be able to carry their burden thus wins by default. Instead of a presentation of evidence and an argument on the merits, Plaintiffs ask the Court to permit them to commence discovery in hopes of proving up their claims. Opposition, at 18. The Court should deny this request for two reasons.

First, the anti-SLAPP statute specifies precisely the circumstances in which discovery is permitted, and Plaintiffs have utterly failed to meet that standard. Plaintiffs quote NRS 41.660(4) as stating that the Court "'shall allow limited discovery for the limited purpose of ascertaining such information' necessary to 'determine with prima facie evidence a probability of prevailing on their claims.'" Opposition at 18 (quoting NRS 41.660(4)). This selective quotation is remarkable for what it omits — that such discovery is ***only*** available to the extent the information necessary for Plaintiffs to meet their burden is exclusively within the possession of another party:

> **Upon a showing by a party that information necessary to meet or oppose the burden pursuant to paragraph (b) of subsection 3 is in the possession of another party or a third party and is not reasonably available without discovery**, the court shall allow limited discovery for the purpose of ascertaining such information.

NRS 41.660(4) (emphasis added). Plaintiffs have made no such showing here. They suggest to the Court topics of discovery they might like to pursue, but offer no basis for concluding that such information is necessary in order for them to meet their burden of showing a probability of success on their claims. *See Schroeder v. Irvine City Council*, 97 Cal. App. 4th 174, 193, 83 Cal. Rptr. 2d 677 (1999) (affirming denial of plaintiff's request for discovery, where the plaintiff failed to show how depositions and written discovery requests "would have produced evidence relevant to his *prima facie* showing"). Plaintiffs compound the error by relying on *Pacquiao v. Mayweather*, No. 209-CV-2448-LRH-RJJ, 2010 WL 1439100 (D. Nev. Apr. 9, 2010), which permitted discovery on anti-SLAPP issues that Judge Hicks expressly observed would *not* have

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

been available in state court. *Id.* at *1 (when an anti-SLAPP motion is filed in Nevada state court, courts must "stay discovery pending a ruling on the motion," but "in federal court, a plaintiff is entitled to seek limited discovery to oppose an anti-SLAPP motion").

Second, Plaintiffs request is untimely. An anti-SLAPP motion is designed to be an expedited procedure, with the statute calling for a decision within 20 days of filing. NRS 41.660(3)(f). Any serious need for discovery is one that should naturally be raised immediately with the Court, not belatedly requested as an alternative, in the event Plaintiffs should lose on their other arguments. By waiting to make a request for discovery for the first time in the alternative in their responsive pleading, Plaintiffs have failed to reasonably attempt to meet their burden of showing a probability of prevailing on their claims. Instead, they have invited the Court to give them an additional opportunity for delay and for imposing costs and burdens on Defendants, exactly what the anti-SLAPP statute is supposed to prevent. The Court should not indulge Plaintiffs in such gamesmanship.

**2. Plaintiffs' Claims Also Fail Because Defendants Are Protected by Absolute and Qualified Privileges.**

Plaintiffs could not have met their burden even if they had attempted to do so, because Defendants' activites at issue is protected by absolute and qualified privileges. Plaintiffs dispute this (curiously, since they have not argued the merits of their claims anyway), but each of their arguments is based on mischaracterizations of the law and/or unsupported conclusory statements.

First, without any legal authority and ignoring Nevada Supreme Court authority directly on point, Plaintiffs argue that the absolute privilege cannot apply because "this is not a defamation action." Opp. at 16. The truth is that both absolute and qual\ified privileges apply regardless of how the claim for relief is styled. As explained by the Nevada Supreme Court, when applicable, "[a]n absolute privilege bars ***any*** civil litigation based on the underlying communication." *Hampe v. Foote,* 118 Nev. 405, 409, 47 P.3d 438, 440 (2002) (emphasis added), *overruled in part on other grounds by Buzz Stew, LLC v. City of N. Las Vegas,* 124 Nev. 224, 228 n. 6, 181 P.3d 670, 672 n. 6 (2008); *see also Bank of America Nevada v. Bourdeau,* 115 Nev. 263, 267, 982 P.2d 474, 476 (1999)(recognizing that conditional privilege can bar an



BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

interference with a prospective business relation claim).

Plaintiffs also misrepresent the criteria for asserting the absolute litigation privilege. Whether by intent or neglect, Plaintiffs argue that reliance on the absolute litigation privilege requires that the statements at issue be "fair and accurate." However, that requirement relates to an entirely distinct privilege—the "fair report" privilege—which has not even been asserted by Defendants. Plaintiffs correctly note that "Nevada 'has long recognized a special privilege of absolute immunity from defamation given to the news media and the general public to report newsworthy events in judicial proceedings'" and that "only the fair, accurate, and impartial reporting of judicial proceedings is privileged and nonactionable." Opposition at 16 (citations omitted). Misapplying this privilege, Plaintiffs advance the red-herring argument that the "communications" at issue were not "fair or accurate" and were not "uttered or published in the course of judicial proceedings …." Opp. at 16 (citations omitted). The fair report privilege (which is designed to protect those who report ***about*** what is said in official proceedings) is not at issue in this motion. Thus, cases discussing the requirements of the fair report privilege are inapposite.

Defendants' efforts to gather statements for use in a public proceeding does not involve news media or members of the general public attempting to report on judicial proceedings, so any limitations specific to the fair report privilege do not apply here.[3] The absolute privilege that is applicable here is completely different. Mr. Caria and Mr. Omerza's efforts relate to their opposition to development of the subject Badlands property, and their hope that others would also voice their opposition to the City. They were merely gathering statements to be submitted in the City Council proceedings from potential witnesses in the form of declarations by residents of Queensridge who could review and sign them *if the resident agreed with the statements contained*

[3] In *Adelson v. Harris*, 402 P.3d 665 (2017), the Court explained that "the fair report privilege is most commonly asserted by media defendants" and "extends to any person who makes a republication of a judicial proceeding from material that is available to the general public." *Adelson*, 402 P.3d at 667 (citation omitted). The fair report privilege relates to "Nevada's policy that citizens have a right to a fair account of what occurs during official proceedings." *Id.* at 668 (citation omitted).





BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

*therein.* Motion, Exs. 1, 3. Mr. Bresee signed the form declaration because he believed it correctly summarized his *own* belief relating to the subject Master Development Plan. Motion, Ex. 2.

Plaintiffs have not—and cannot—rebut the well-settled rule that the privilege's protections go beyond communications that occur *during* the course of any judicial proceedings. It is well-established that communications *preliminary* to a proposed judicial or quasi-judicial proceeding are also absolutely privileged. *See, e.g., Fink v. Oshins,* 118 Nev. 428, 433, 49 P.3d 640 (2002) ("the privilege applies not only to communications made during actual judicial proceedings, but also to 'communications preliminary to a proposed judicial proceeding'") (footnote omitted). Here, Defendants sought to gather or provide input from witnesses for use by the City to the extent it considers whether to approve an amendment to the General Plan.[4] Defendants' efforts were thus directly related to anticipated quasi-judicial proceedings before the City Council.

Although Defendants deny they said anything that was inaccurate or unfair, ***as a matter of law***, there simply is no requirement that the communications be "fair or accurate," as Plaintiffs contend. In fact, it is well-established that "***absolute privilege precludes liability even where the defamatory statements are published with knowledge of their falsity and personal ill will toward the plaintiff***." *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101, 104 (1983) (citations omitted).[5] "The policy underlying the privilege is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements." *Circus Circus,* 99 Nev. at 61 (citations omitted).

Plaintiffs also argue that "there were no good faith 'communications preliminary to a

[4] As stated in the Motion, Plaintiffs had already filed an application with the City to amend the General Plan to allow their development. Mot. at 6-7.

[5] This is even true under the "fair report privilege" discussed by Plaintiffs. *See Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212, 219, 984 P.2d 164 (1999) (noting that because a Union's statements "were a fair and accurate report of a judicial proceeding, they are absolutely privileged … even if the statements were made maliciously and with knowledge of their falsity").





BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

proposed judicial proceeding or quasi-judicial proceeding'" explaining that the Defendants actions in gathering and/or executing witness declarations, even if relating to some "undetermined, future hearing – hardly constitutes the quasi-judicial proceedings contemplated by Nevada courts." Opp. at 16, 17. As noted above, Plaintiffs' unsupported and extremely narrow interpretation of the law is simply wrong because Nevada does not require that any relevant communications occur during any actual proceedings (*see, e.g., Fink,* 118 Nev. at 433), and an absolute privilege may be extended to statements by witnesses, like the Defendants here.[6] Notably, Plaintiffs do not even attempt to rebut the factors in Defendants' analysis (Motion at 16-18) which demonstrated that the anticipated City Council proceedings at issue are quasi-judicial in nature. In fact, Plaintiffs own counsel has *already* admitted during a meeting before the City that the relevant City Council land use proceedings are quasi-judicial in nature.[7]

The Nevada Supreme Court has instructed that "because the scope of the absolute privilege is broad, a court determining whether the privilege applies should resolve any doubt in favor of a broad application." *Clark County Sch. Dist. v. Virtual Educ. Software, Inc.,* 125 Nev. 374, 382, 213 P.3d 496, 502 (2009)(citation omitted). Thus, even if there were some doubt that the privilege applies here – and there should be none – such doubt must be resolved in favor of protecting Defendants' petitioning activities.

Even if an absolute privilege did not apply, Defendants' are still protected under a qualified or conditional privilege. Plaintiffs arguments on this issue are also wholly inadequate. As an initial matter, Plaintiffs fail to dispute that the subject matter at issue here may be subject to conditional or qualified privilege. Indeed, they do not dispute that any communications or

---

[6] *Cf. Knox v. Dick,* 99 Nev. 514, 517, 665 P.2d 267 (1983)(recognizing that statements by *witnesses* can be subject to privilege); *Lebbos v. State Bar*, 165 Cal. App. 3d 656, 668, 211 Cal. Rptr. 847 (Cal. Ct. App. 1985) ("[I]t is well settled that absolute privilege extends in quasi-judicial proceedings to preliminary interviews and conversations with potential witnesses.").

[7] *See* Request for Judicial Notice (concurrently filed herewith), Ex. 1 (Transcript of City Council Meeting of February 21, 2018, at 16:411-419 (Plaintiffs' counsel argues that "when a body like a city council is sitting on a land use application or business license application…. [¶] … you are now in a quasi-judicial proceeding ….[y]ou have to act in conformity with a quasi-judicial capacity….").





BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

interactions at issue here were made between persons with interests in the subject matter at issue (the development of the Badlands golf course). *See Circus Circus,* 99 Nev. at 62 (indicating that qualified or conditional privilege exists where the subject matter related to one "in which the person communicating has an interest …, if made to a person with a corresponding interest …").

Plaintiffs contend that "Defendants did not act in good faith" (Opposition at 17) but as discussed in relation to the applicability of the anti-SLAPP statute and in Defendants' supporting declarations, Defendants did act in good faith. Moreover, the Plaintiffs do not dispute that they must have evidence of actual malice in order to prevail on this motion. That burden can only be met by providing evidence that a "statement is published with knowledge that it was false or with reckless disregard for its veracity." *Pope v. Motel 6*, 121 Nev. 307, 317, 114 P.3d 277 (2005). Here, it is impossible for Plaintiffs to meet that burden because Defendants did not have any belief that they were publishing any false statements, nor did they have reckless disregard for the veracity of any statements. *See* Mot. at 20; Mot. Exs. 1-3. Indeed, Plaintiffs have completely failed to meet their burden of proving actual malice. Instead, they completely dodge the issue by contending that this privilege issue cannot be decided on *this* Motion, but (as discussed above) they are incorrect, and any evidence they have to oppose this Motion must be presented now.[8]

In sum, Defendants cannot be liable for the claims asserted by Plaintiffs relating to their actions in gathering, soliciting and/or executing the form declarations, because they are subject to absolute and qualified privilege protection.

/ / /

/ / /

/ / /

/ / /

/ / /

[8] *See also Circus Circus*, 99 Nev. at 62-63 (recognizing that whether a conditional privilege exists is a question of law for the court and plaintiff's burden to show malice is a question that "goes to the jury only if there is sufficient evidence for the jury to reasonably to infer that the publication was made with malice in fact")(citations omitted).





BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

## III. CONCLUSION

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

DATED this 9th day of May, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: */s/ Mitchell J. Langberg*

MITCHELL J. LANGBERG, ESQ. Bar No. 10118
mlangberg@bhfs.com
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106
Telephone: 702.382.2101
Facsimile: 702.382.8135

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

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and pursuant to NRCP 5(b), EDCR 8.05, Administrative Order 14-2, and NEFCR 9, I caused a true and correct copy of the foregoing **DEFENDANTS' REPLY IN SUPPORT OF SPECIAL MOTION TO DISMISS (ANTI-SLAPP MOTION) PLAINTIFFS' COMPLAINT PURSUANT TO NRS §41.635 ET. SEQ.** be submitted electronically for filing and/or service with the Eighth Judicial District Court via the Court's Electronic Filing System on the 9th day of May, 2018, to the following:

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

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

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

16802328

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

**RIS**

MITCHELL J. LANGBERG, ESQ., Bar No. 10118
mlangberg@bhfs.com
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
Telephone: 702.382.2101
Facsimile: 702.382.8135

*Counsel for Defendants,*
DANIEL OMERZA, DARREN BRESEE, and
STEVE CARIA

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| FORE STARS, LTD., a Nevada limited liability company; 180 LAND CO., LLC; a Nevada limited liability company; SEVENTY ACRES, LLC, a Nevada limited liability company,<br><br>Plaintiffs,<br><br>v.<br><br>DANIEL OMERZA, DARREN BRESEE, STEVE CARIA, and DOES 1 THROUGH 100,<br><br>Defendants, | CASE NO.: A-18-771224-C<br>DEPT. NO.: II<br><br>**DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS PURSUANT TO NRCP 12(B)(5)**<br><br>Hearing Date: May 14, 2018<br><br>Hearing Time: 9:00 a.m. |

## I. INTRODUCTION

Plaintiffs' Complaint fails to state a claim upon which relief may be granted for two independent reasons: first, they have not alleged facts sufficient to support a cognizable claim; second, even if Plaintiffs had adequately pled any of their claims, they still would not have a tenable claim because Defendants' conduct at issue is protected by absolute and qualified privileges.

In Plaintiffs' Opposition to Defendants' Motion to Dismiss Pursuant to NRCP 12(b)(5) ("Opposition"), Plaintiffs repeatedly argue that Defendants knew of prior litigation the outcome of which cannot be reconciled with Defendants' position regarding Plaintiffs' development plans. In fact, they are easy to reconcile. The prior litigation dealt with whether Queensridge covenants,

conditions and restrictions ("CC&R's") prohibit development of the Badlands Golf Course, but this is an issue not even raised in the present dispute. The current issue is whether Plaintiffs' efforts to make a major modification of the Peccole Ranch Master Development Plan is contrary to the expectations of neighboring residents, some of whom purchased their homes or lots in reliance upon the open space designation of the Badlands property in the Development Plan.

Stripped of this single crumbling foundation, Plaintiffs have not alleged facts sufficient to support any of their claims for relief. Even if they did, the claims should be dismissed based upon Defendants' applicable privileges. Plaintiffs' attempt to evade those privileges proceeds from fundamental misunderstandings as to the controlling law.

Finally, the Court should not condone Plaintiffs' request to issue broad discovery in the hopes that some other claim for relief may yet materialize.

## II. DEFENDANTS' MOTION TO DISMISS SHOULD BE GRANTED IN ITS ENTIRETY.

### A. Plaintiffs Fail to Adequately Allege a Claim For Relief.

Plaintiffs' primary argument in their Opposition is to insist that a judicial ruling in prior litigation regarding the Badlands site is enough to establish a host of misconduct by Defendants. This argument does not withstand serious scrutiny—the litigation Plaintiffs rely upon decided a question not presented here at all; meanwhile, this Court (Judge Crockett) has ruled *against* Plaintiffs on the issue that actually is pertinent. Stripped of this single substantive allegation, Plaintiffs specific claims for relief fall like a house of cards.

#### 1. Plaintiffs' Reliance on Prior Litigation Involving the Badlands Golf Course Does Nothing to Establish Any Misconduct by Defendants.

The central underpinning of Plaintiffs' entire case is their assertion that Defendants know that nobody relied on the designation in the Master Development Plan of the Badlands golf course as Parks Recreation – Open Space. Their only support for this assertion is the Court's decision in *Peccole v. Peccole*, Case A-16-739654-C, which Plaintiffs claim held just that. But this Court will search the Findings of Fact in that action in vain for any such holding. To the contrary, that case analyzed a different resident's contention that the Queensridge CC&R's apply to Plaintiffs



BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

and somehow *forbid* them from developing the Badlands property. Defendants here have not taken the position that Plaintiffs are bound by the Queensridge CC&R's, nor do the declarations they secured make any such assertion. Rather, the declarations state that the signing residents purchased their residence or lot "in reliance upon the fact that the open space/natural drainage system could not be developed pursuant to the City's Approval in 1990 of the Peccole Ranch Master Plan and subsequent formal actions designating the open space/natural drainage system in its General Plan as Parks Recreation – Open Space which land use designation does not permit the building of residential units." These declaration do *not* rely on the terms of the Queensridge CC&R's, and thus are not in any way inconsistent with the court's holding in *Peccole v. Peccole*.

Crucially, however, the declarations are entirely consistent with Judge Crockett's determination in the Binion Litigation, Case No. A-17-752344-J, that approval of Plaintiffs' plans requires a major modification of the Peccole Ranch Master Plan, which may run afoul of the reasonable expectations of residents of the area who relied on the existing master planning. *See* Request for Judicial Notice, Ex. A, at 5-10. Since Judge Crockett himself obviously raised this concern in good faith, there can be no reasonable inference that Defendants could not believe the same thing in good faith.[1]

**2. Plaintiffs' Factual Allegations Do Not Support Any of Their Asserted Claims for Relief.**

Deprived of the dubious underpinning of Plaintiffs' reliance on *Peccole v. Peccole*, Plaintiffs are left only with conclusory allegations that cannot conceivably support any of their claims for relief.

**a) Intentional or Negligent Interference**

The first flaw in Plaintiffs' claims for intentional or negligent interference is that there are no allegations to identify the prospective contractual relationships at issue. While stating a claim

[1] Judge Crockett's concerns do not in any way exclude Queensridge, but apply to any Peccole Ranch residents and Badlands neighbors, which would include the Queensridge residents in question. Defendants are simply at a loss to understand why Plaintiffs believe that it is significant that Judge Crockett's ruling post-dates the *Peccole v. Peccole* decision (and Defendants' purchase of their properties), Opposition at 1, when the two cases address different issues.



BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

for interference with "prospective" relationships does not require an allegation of a specific, existing contract, *see LT Inten. Ltd. v. Shuffle Master, Inc.*, 8 F. Supp. 3d 1238, 1248 (D. Nev. 2014) (relied upon by Plaintiffs, *see* Opposition, at 6), it *does* require allegations sufficient to identify the *prospective* relationships at issue. *See Valley Health Sys. LLC v. Aetna Health, Inc.*, No. 2:15-CV-1457 JCM (NJK), 2016 U.S. Dist. LEXIS 83710, at *14 (D. Nev. Jun. 28, 2016) (dismissing a claim for intentional interference with prospective economic advantage where plaintiff "has not properly alleged a prospective contractual relationship between [it] and a third party with which [the defendant] could have interfered"); *Bustos v. Dennis*, No. 2:17-CV-00822-KLD-VCF, 2018 U.S. Dist. LEXIS 45764, at *10-11 (D. Nev. Mar. 20, 2018) (dismissing intentional interference with prospective economic advantage claim where plaintiff did not meet "his burden in alleging interference with a specific prospective contractual relationship" and did not allege that "Defendants were aware of the prospective relationship") (emphasis added). By the same token, Plaintiffs cannot claim they have adequately alleged that Defendants knew of the prospective relationships at issue, when Plaintiffs themselves cannot identify what they were.

Further, Plaintiffs have failed to allege—beyond bald conclusory allegations—any specific harm from Defendants' purported conduct, or that Defendants acted with intent to harm Plaintiffs. *See Rimini St., Inc. v. Oracle Int'l Corp.*, No. 2:14-cv-1699-LRH-CWH, 2017 U.S. Dist. LEXIS 184597, at *47-49 (D. Nev. Nov. 7, 2017) (finding plaintiff failed to sufficiently plead a claim for intentional interference with prospective economic advantage, including because plaintiff failed to identify "either a prospective client or prospective contract" and that "to allege actual harm, a plaintiff must allege that he would have been awarded the contract but for the defendant's interference") (citations omitted).

Finally, Plaintiffs cannot even establish that a claim for negligent interference with prospective economic advantage even exists in Nevada law. *See Valley Health Sys.*, 2016 U.S. Dist. LEXIS 83710, at *6 (dismissing the negligent interference with prospective economic advantage claim where "parties agree that [the] claim should be dismissed because it is not a recognized cause of action under Nevada law").

/ / /



BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

**b) Conspiracy**

Plaintiffs' Opposition only underscores the flaw in their conspiracy claim. Plaintiffs repeat their conclusory allegation that Defendants acted "improperly," but they cannot articulate what Defendants actually sought to do that was improper. Instead, Plaintiffs concede that Defendants' objection has simply been to obtain a desired outcome in the political process. Opposition, at 8-9. If this were held sufficient to state a claim for relief, then every action undertaken in the political realm, indeed most water cooler conversations across the state, would suddenly become a conspiracy in the eyes of the law. There is no reason for such a dramatic transformation of both the law and politics in the State of Nevada.

**c) Intentional or Negligent Misrepresentation**

As demonstrated in Defendants' Motion and again above, Plaintiffs cannot contend that it was an actionable misrepresentation for Defendants to attest to, or to ask other residents about, reliance that this Court has itself acknowledged in the Binion Litigation. Plaintiffs again argue incorrectly that the outcome of other past litigation is also relevant to the issue, and they suggest a new rule of law requiring private citizens discussing a political issue with other private citizens to give a complete recitation of every item of arguable support for either point of view. Opposition, at 7-8. Although this rule might have the desirable effect of destroying Facebook forever, it has not been adopted or even considered in any jurisdiction.

In the alternative, Plaintiffs request a relaxed pleading standard until they can conduct discovery in order to determine some cognizable basis for their misrepresentation claims. But their own support for this request held that a plaintiff must still "state facts supporting a strong inference of fraud" and further that "the plaintiff must aver that this relaxed standard is appropriate and show in his complaint that he cannot plead with more particularity because the required information is in defendant's possession." *Rocker v. KPMG LLP*, 122 Nev. 1185, 1195, 148 P.3d 703 (2006). Plaintiffs have failed to support a strong inference of fraud, and the Court need not tolerate their stab-in-the-dark method of pleading.

/ / /

/ / /



BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

**B. Plaintiffs' Claims Fail Because Defendants are Protected by Absolute and Qualified Privileges.**

Even if Plaintiffs' claims for relief were tenable on their face, the court should dismiss the Complaint based upon Defendants' applicable privileges. Plaintiffs dispute that Defendants' actions are protected by privilege, but each of their arguments is based on mischaracterizations of the law and/or unsupported conclusory statements.

First, without any legal authority and ignoring Nevada Supreme Court authority directly on point, Plaintiffs argue that the absolute privilege cannot apply because "this is not a defamation action." Opposition, at 9. The truth is that both absolute privileges apply regardless of how the claim for relief is styled. As explained by the Nevada Supreme Court, when it applies, when applicable, "[a]n absolute privilege bars *any* civil litigation based on the underlying communication." *Hampe v. Foote,* 118 Nev. 405, 409, 47 P.3d 438, 440 (2002) (emphasis added), *overruled in part on other grounds by Buzz Stew, LLC v. City of N. Las Vegas,* 124 Nev. 224, 228 n. 6, 181 P.3d 670, 672 n. 6 (2008); *see also Bank of America Nevada v. Bourdeau,* 115 Nev. 263, 267, 982 P.2d 474, 476 (1999) (recognizing that conditional privilege can bar an interference with a prospective business relation claim).

Plaintiffs also misrepresent the criteria for asserting the absolute litigation privilege. Whether by intent or neglect, Plaintiffs argue that reliance on the absolute litigation privilege requires that the statements at issue be "fair" and "accurate." However, that requirement relates to an entirely distinct privilege—the "fair report" privilege—which has not even been asserted by the Defendants. Plaintiffs correctly note that "Nevada 'has long recognized a special privilege of absolute immunity from defamation given to the news media and the general public to report newsworthy events in judicial proceedings'" and that "only the fair, accurate, and impartial reporting of judicial proceedings is privileged and nonactionable." Opposition, at 9 (citations omitted). Misapplying this privilege, Plaintiffs advance the red-herring argument that the "communications" at issue were not "fair or accurate" and were not "uttered or published in the course of judicial proceedings …." *Id.* (citations omitted). The fair report privilege (which is designed to protect those who report ***about*** what is said in official proceedings) is not at issue in



BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

this motion. Thus, cases discussing the requirements of the fair report privilege are inapposite.

Defendants' efforts to gather statements for use in a public proceeding does not involve news media or members of the general public attempting to report on judicial proceedings, so any limitations specific to the fair report privilege do not apply here.[2] The absolute privilege that is applicable here is completely different. Defendants' actions relate to their opposition to development of the subject Badlands property, and their hope that others would also voice their opposition to the City. More specifically, the conduct at issue involves gathering statements from potential witnesses in the form of declarations by residents of Queensridge who could review and sign them *if the resident agreed with the statements contained therein.*

Moreover, Plaintiffs have not—and cannot—rebut the well-settled rule that the privilege's protections go beyond communications that occur *during* the course of any judicial proceedings. It is well-established that communications *preliminary* to a proposed judicial or quasi-judicial proceeding are also absolutely privileged. *See, e.g., Fink v. Oshins,* 118 Nev. 428, 433, 49 P.3d 640 (2002) ("the privilege applies not only to communications made during actual judicial proceedings, but also to 'communications preliminary to a proposed judicial proceeding'")(footnote citation omitted). Here, Defendants sought out to gather and/or provide input from witnesses for consideration by the City to the extent it considers whether to approve an amendment to the General Plan.[3] Thus the Defendants' efforts were directly related to anticipated quasi-judicial proceedings before the City Council, and an absolute privilege may be extended to statements by witnesses, like the Defendants here.[4] Notably, Plaintiffs do not even attempt to

---

[2] In *Adelson v. Harris*, 402 P.3d 665 (Nev. 2017), the Court explained that "the fair report privilege is most commonly asserted by media defendants" and "extends to any person who makes a republication of a judicial proceeding from material that is available to the general public." *Adelson*, 402 P.3d at 667 (citation omitted). The fair report privilege relates to "Nevada's policy that citizens have a right to a fair account of what occurs during official proceedings." *Id.* at 668 (citation omitted).

[3] As noted in the Motion, Plaintiffs had already filed an application to change the General Plan to allow for their development plans. Mot. at 5.

[4] *Cf. Knox v. Dick*, 99 Nev. 514, 517, 665 P.2d 267 (1983)(recognizing that statements by *witnesses* can be subject to privilege); *Lebbos v. State Bar*, 165 Cal. App. 3d 656, 668, 211 Cal. Rptr. 847 (Cal. Ct. App. 1985) ("[I]t is well settled that absolute privilege extends in quasi-judicial proceedings to preliminary interviews and conversations with potential witnesses.").



BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

rebut the factors in Defendants' analysis (Motion at 11-12), which demonstrated that the anticipated City Council proceedings at issue are quasi-judicial in nature. In fact, Plaintiffs own counsel has *already* admitted during a meeting before the City that the relevant City Council land use proceedings are quasi-judicial in nature.[5]

Although Defendants deny they said anything that was inaccurate or unfair, ***as a matter of law***, there simply is no requirement that the communications be "fair or accurate," as Plaintiffs contend. In fact, it is well-established that "***absolute privilege precludes liability even where the defamatory statements are published with knowledge of their falsity and personal ill will toward the plaintiff***." *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101, 104 (1983)(citations omitted).[6] "The policy underlying the privilege is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements." *Circus Circus*, 99 Nev. at 61 (citations omitted).

The Nevada Supreme Court has instructed that "because the scope of the absolute privilege is broad, a court determining whether the privilege applies should resolve any doubt in favor of a broad application." *Clark County Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 382, 213 P.3d 496, 502 (2009)(citation omitted). Thus, even if there were some doubt that the privilege applies here—and there should be none—such doubt must be resolved in favor of protecting Defendants' petitioning activities.

Even if an absolute privilege did not apply, Defendants' are still protected under a

---

[5] *See* Request for Judicial Notice (concurrently filed herewith), Ex. 1 (Transcript of City Council Meeting of February 21, 2018, at 16:411-419 (Plaintiffs' counsel argues that "when a body like a city council is sitting on a land use application or business license application…. [¶] … you are now in a quasi-judicial proceeding ….[y]ou have to act in conformity with a quasi-judicial capacity….").

[6] This is even true under the "fair report privilege" discussed by Plaintiffs. *See Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212, 219, 984 P.2d 164 (1999)(noting that because a Union's statements "were a fair and accurate report of a judicial proceeding, they are absolutely privileged … even if the statements were made maliciously and with knowledge of their falsity.").





BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

qualified or conditional privilege. Plaintiffs' arguments on this issue are also wholly inadequate. As an initial matter, Plaintiffs fail to dispute that the subject matter at issue here may be subject to conditional or qualified privilege. Indeed, they do not dispute that any communications or interactions at issue here were made between persons with interests in the subject matter at issue (the development of the Badlands golf course). *See Circus Circus,* 99 Nev. at 62 (indicating that qualified or conditional privilege exists where the subject matter related to one "in which the person communicating has an interest …, if made to a person with a corresponding interest …").

Plaintiffs contend that "Defendants didn't act in good faith" (Opposition, at 10) but as shown by the form declaration attached to Plaintiffs' complaint, the form requested signatures only if the resident believed the statements to be accurate. Plaintiffs' conclusory allegations that Defendants knew the statements contained therein were false or that they only solicited or executed declarations "solely for the purposes of harassing and maliciously attacking" the Land Owners" is nothing more than an empty, conclusory allegation, which is wholly inadequate. *Strack v. Morris*, No. 3:15-CV-00123-LRH-VPC, 2015 U.S. Dist. LEXIS 157965, at * (D. Nev. Nov. 20, 2015) (noting that "to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief")(citation omitted). Moreover, Plaintiffs do not dispute that they must prove actual malice in order to successfully rebut any application of a conditional or qualified privilege. That burden can only be met by providing evidence that a "statement is published with knowledge that it was false or with reckless disregard for its veracity." *Pope v. Motel 6*, 121 Nev. 307, 317, 114 P.3d 277 (2005). Again, Plaintiffs cannot possibly meet that burden because the form declarations were only requesting signatures if the resident believed that the statements were accurate, and the declarations are consistent with the conclusions of Judge Crockett, in which he determined that residents purchased property in the community in reliance on the Master Development Plan.[7]

[7] *See also Circus Circus*, 99 Nev. at 62-63 (recognizing that whether a conditional privilege exists is a question of law for the court and plaintiff's burden to show malice is a question that "goes to the jury only if there is sufficient evidence for the jury to reasonably to infer that the publication was made with malice in fact")(citations omitted).



BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

In sum, Defendants cannot be liable for the claims asserted by Plaintiffs relating to their actions in gathering, soliciting and/or executing the form declarations, because they are subject to absolute and qualified privilege protection.

### C. The Motion To Dismiss Should Be Granted Now, And Discovery Should Not Be Permitted Prior to Making That Determination.

Finally, in the alternative, Plaintiffs request discovery to find a basis for a claim for relief that they have not yet been able to identify. But simply stated, that is not how this process works. Under NRCP 11, Plaintiffs and their counsel must know of an actionable claim *before* they bring suit, not start a lawsuit in hopes that something will turn up during discovery. There is no basis for Plaintiffs' suggestion that *Rocker v. KPMG, LLP*¸ 122 Nev. 1185, 148 P.3d 703 (2006), approves their backward approach. Rather, as discussed above, that decision becomes applicable only after Plaintiffs have "state[d] facts supporting a strong inference of fraud," 122 Nev. at 1195, which they have yet to manage here.

## III. CONCLUSION

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

DATED this 9th day of May, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

BY: */s/ Mitchell J. Langberg*
MITCHELL J. LANGBERG, ESQ., Bar No. 10118
mlangberg@bhfs.com
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
Telephone: 702.382.2101
Facsimile: 702.382.8135

*Counsel for Defendants*
DANIEL OMERZA, DARREN BRESEE, and STEVE CARIA

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

## CERTIFICATE OF SERVICE

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

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

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

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

16802994

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

**RFJN**

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

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

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiff,

v.

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

Defendants.

CASE NO.: A-18-771224-C
DEPT. NO.: II

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

Hearing Date: May 14, 2018

Hearing Time: 9:00 a.m.

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

(1) City Council Meeting of February 21, 2018, Verbatim Transcript – Agenda Items 122 through 131, publicly available at: http://www5.lasvegasnevada.gov/sirepub/view.aspx?cabinet=published_meetings&fileid=15111421, attached hereto as **Exhibit 1**.

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

DATED this 9th day of May, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

BY: */s/ Mitchell J. Langberg*
MITCHELL J. LANGBERG, ESQ., Bar No. 10118
mlangberg@bhfs.comLAURA B. LANGBERG, ESQ.,
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
Telephone: 702.382.2101
Facsimile: 702.382.8135

*Counsel for Defendants*
DANIEL OMERZA, DARREN BRESEE, and
STEVE CARIA

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and pursuant to NRCP 5(b), EDCR 8.05, Administrative Order 14-2, and NEFCR 9, I caused a true and correct copy of the foregoing **DEFENDANTS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF (1) DEFENDANTS' REPLY IN SUPPORT OF SPECIAL MOTION TO DISMISS (ANTI-SLAPP MOTION) PLAINTIFFS' COMPLAINT PURSUANT TO NRS §41.635 ET. SEQ. AND (2) DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS PURSUANT TO NRCP 12(b)(5)** be submitted electronically for filing and/or service with the Eighth Judicial District Court via the Court's Electronic Filing System on the 9th day of May, 2018, to the following:

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

*Attorneys for Plaintiffs*

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

16799254

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

# EXHIBIT 1

**CITY COUNCIL MEETING OF**

**FEBRUARY 21, 2018**

**VERBATIM TRANSCRIPT – AGENDA ITEMS 122 THROUGH 131**

**ITEM 122 - GPA-72220 - GENERAL PLAN AMENDMENT - PUBLIC HEARING - APPLICANT/OWNER: 180 LAND CO, LLC - For possible action on a request for a General Plan Amendment FROM: PR-OS (PARKS/RECREATION/OPEN SPACE) TO: ML (MEDIUM LOW DENSITY RESIDENTIAL) on 132.92 acres on the east side of Hualapai Way, approximately 830 feet north of Charleston Boulevard (APNs 138-31-601-008; and 138-31-702-003 and 004), Ward 2 (Seroka) [PRJ-72218]. The Planning Commission vote resulted in a tie, which is tantamount to a recommendation of DENIAL. Staff recommends APPROVAL.**

**ITEM 123 - WVR-72004 - WAIVER - PUBLIC HEARING - APPLICANT/OWNER: 180 LAND CO, LLC, ET AL - For possible action on a request for a Waiver TO ALLOW 40-FOOT PRIVATE STREETS WITH NO SIDEWALKS WHERE 47-FOOT PRIVATE STREETS WITH FIVE-FOOT SIDEWALKS ON BOTH SIDES ARE REQUIRED WITHIN A PROPOSED GATED RESIDENTIAL DEVELOPMENT on a portion of 71.91 acres on the north side of Verlaine Court, east of Regents Park Road (APN 138-31-601-008; 138-32-202-001; 138-32-210-008; and 138-32-301-007), R-PD7 (Residential Planned Development - 7 Units per Acre) and PD (Planned Development) Zones, Ward 2 (Seroka) [PRJ-71990]. The Planning Commission (4-2-1 vote) and Staff recommend APPROVAL.**

**ITEM 124 - SDR-72005 - SITE DEVELOPMENT PLAN REVIEW RELATED TO WVR-72004 - PUBLIC HEARING - APPLICANT/OWNER: 180 LAND CO, LLC, ET AL - For possible action on a request for a Site Development Plan Review FOR A PROPOSED 75-LOT SINGLE FAMILY RESIDENTIAL DEVELOPMENT on a portion of 71.91 acres on the north side of Verlaine Court, east of Regents Park Road (APNs 138-31-601-008; 138-32-202-001; 138-32-210-008; and 138-32-301-007), R-PD7 (Residential Planned Development - 7 Units per Acre) and PD (Planned Development) Zones, Ward 2 (Seroka) [PRJ-71990]. The Planning Commission (4-2-1 vote) and Staff recommend APPROVAL.**

**ITEM 125 - ABEYANCE - TMP-72006 - TENTATIVE MAP RELATED TO WVR-72004 AND SDR-72005 - PARCEL 2 @ THE 180 - PUBLIC HEARING - APPLICANT/OWNER: 180 LAND CO, LLC - For possible action on a request for a Tentative Map FOR A 75-LOT SINGLE FAMILY RESIDENTIAL SUBDIVISION on 22.19 acres on the north side of Verlaine Court, east of Regents Park Road (APN 138-31-601-008), R-PD7 (Residential Planned Development - 7 Units per Acre) Zone, Ward 2 (Seroka) [PRJ-71990]. The Planning Commission (4-2-1 vote) and Staff recommend APPROVAL.**

**ITEM 126 - WVR-72007 - WAIVER - PUBLIC HEARING - APPLICANT/OWNER: 180 LAND CO, LLC, ET AL - For possible action on a request for a Waiver TO ALLOW 40-FOOT PRIVATE STREETS WITH NO SIDEWALKS WHERE 47-FOOT PRIVATE STREETS WITH FIVE-FOOT SIDEWALKS ON BOTH SIDES ARE REQUIRED on a portion of 126.65 acres on the east side of Hualapai Way, approximately 830 feet north of Charleston Boulevard (APN 138-31-702-003; 138-32-202-001; 138-32-210-008; and 138-32-301-007), R-PD7 (Residential Planned Development - 7 Units per Acre) and PD (Planned Development) Zones, Ward 2 (Seroka) [PRJ-71991]. The Planning Commission (4-2-1 vote) and Staff recommend APPROVAL.**

**ITEM 127 - SDR-72008 - SITE DEVELOPMENT PLAN REVIEW RELATED TO WVR-72007 - PUBLIC HEARING - APPLICANT/OWNER: 180 LAND CO, LLC, ET AL - For possible action on a request for a Site Development Plan Review FOR A PROPOSED 106-LOT SINGLE FAMILY RESIDENTIAL DEVELOPMENT on a portion of 126.65 acres on the east side of Hualapai Way, approximately 830 feet north of Charleston Boulevard (APNs 138-31-702-003; 138-32-202-001; 138-32-210-008; and 138-32-301-007), R-PD7 (Residential Planned Development - 7 Units per Acre) and PD (Planned Development) Zones, Ward 2 (Seroka) [PRJ-71991]. The Planning Commission (4-2-1 vote) and Staff**

**recommend APPROVAL.**

**ITEM 128 - ABEYANCE - TMP-72009 - TENTATIVE MAP RELATED TO WVR-72007 AND SDR-72008 - PARCEL 3 @ THE 180 - PUBLIC HEARING - APPLICANT/OWNER: 180 LAND CO, LLC - For possible action on a request for a Tentative Map FOR A 106-LOT SINGLE FAMILY RESIDENTIAL SUBDIVISION on 76.93 acres on the east side of Hualapai Way, approximately 830 feet north of Charleston Boulevard (APN 138-31-702-003), R-PD7 (Residential Planned Development - 7 Units per Acre) Zone, Ward 2 (Seroka) [PRJ-71991]. Staff recommends APPROVAL.**

**ITEM 129 - WVR-72010 - WAIVER - PUBLIC HEARING - APPLICANT/OWNER: 180 LAND CO, LLC, ET AL - For possible action on a request for a Waiver TO ALLOW 40-FOOT PRIVATE STREETS WITH NO SIDEWALKS WHERE 47-FOOT PRIVATE STREETS WITH FIVE-FOOT SIDEWALKS ON BOTH SIDES ARE REQUIRED WITHIN A PROPOSED GATED RESIDENTIAL DEVELOPMENT on a portion of 83.52 acres on the east side of Palace Court, approximately 330 feet north of Charleston Boulevard (APN 138-31-702-004; 138-32-202-001; 138-32-210-008; and 138-32-301-007), R-PD7 (Residential Planned Development - 7 Units per Acre) and PD (Planned Development) Zones, Ward 2 (Seroka) [PRJ-71992]. The Planning Commission (4-2-1 vote) and Staff recommend APPROVAL.**

**ITEM 130 - SDR-72011 - SITE DEVELOPMENT PLAN REVIEW RELATED TO WVR-72010 - PUBLIC HEARING - APPLICANT/OWNER: 180 LAND CO, LLC, ET AL - For possible action on a request for a Site Development Plan Review FOR A PROPOSED 53-LOT SINGLE FAMILY RESIDENTIAL DEVELOPMENT on a portion of 83.52 acres on the east side of Palace Court, approximately 330 feet north of Charleston Boulevard (APNs 138-31-702-004; 138-32-202-001; 138-32-210-008; and 138-32-301-007), R-PD7 (Residential**

**Planned Development - 7 Units per Acre) and PD (Planned Development) Zones, Ward 2 (Seroka) [PRJ-71992]. The Planning Commission (4-2-1 vote) and Staff recommend APPROVAL.**

**ITEM 131 - TMP-72012 - TENTATIVE MAP RELATED TO WVR-72010 AND SDR-72011 - PARCEL 4 @ THE 180 - PUBLIC HEARING - APPLICANT/OWNER: 180 LAND CO, LLC - For possible action on a request for a Tentative Map FOR A 53-LOT SINGLE FAMILY RESIDENTIAL SUBDIVISION on 33.80 acres on the east side of Palace Court, approximately 330 feet north of Charleston Boulevard (APN 138-31-702-004), R-PD7 (Residential Planned Development - 7 Units per Acre) and PD (Planned Development) Zones, Ward 2 (Seroka) [PRJ-71992]. The Planning Commission (4-2-1 vote) and Staff recommend APPROVAL.**

**Appearance List:**

CAROLYN G. GOODMAN, Mayor

STEVEN G. SEROKA, Councilman

BRADFORD JERBIC, City Attorney

PETER LOWENSTEIN, Deputy Planning Director

LUANN D. HOLMES, City Clerk

BOB COFFIN, Councilman (via teleconference)

MICHELE FIORE, Councilwoman

STAVROS S. ANTHONY, Councilman

STEPHANIE ALLEN, Legal Counsel for the Applicant

MARK HUTCHISON, Legal Counsel for 180 Land Co, LLC, Seventy Acres LLC and Fore Stars, Ltd.

FRANK SCHRECK, Queensridge Resident

**Appearance List (cont'd):**

TODD BICE, Legal Counsel for the Queensridge Homeowners

LISA MAYO, Concerned Citizen

(38 minutes, 17 seconds) [02:59:21 - 03:37:38]

Typed by: Speechpad.com

Proofed by: Debra A. Outland

**MAYOR GOODMAN**

Now, goodness, we are gonna pull forward at your request?

**COUNCILMAN SEROKA**

Yes, Ma'am.

**MAYOR GOODMAN**

Okay. We are pulling forward Agenda Items 122 through 131. And so, shall I start, or shall you start, Mr. Jerbic?

**CITY ATTORNEY JERBIC**

If you could ask the Clerk —

**MAYOR GOODMAN**

Can you turn on your mic? Or it's not hearing you.

**CITY ATTORNEY JERBIC**

I'm sorry. It's on, but it's just away from my mouth.

**MAYOR GOODMAN**

Thank you.

**CITY ATTORNEY JERBIC**

It was my understanding that the motion to abey included Items 122 through 131. Is that correct?

**MAYOR GOODMAN**

No.

**CITY ATTORNEY JERBIC**

No. They were on the call-off sheet, but they were not part of your motion.

**MAYOR GOODMAN**

And – Right.

**CITY ATTORNEY JERBIC**

Okay.

**MAYOR GOODMAN**

They were not – I did not speak to those. So, at the request of Councilman Seroka, we've asked to pull those forward. And so I – think before I even begin to discuss those, you on legal have some issues to address before I even speak.

**CITY ATTORNEY JERBIC**

Just very quickly, Your Honor. Prior to today's hearing, there have been two letters sent to Councilman Coffin and to Councilman Seroka by the law firm of Hutchison & Steffen. Both

letters claim, for different reasons, that they each have conflicts that should prevent them from voting.

With respect to Councilman Coffin, who is on the line, this is the same argument that, to my knowledge, was made earlier when Coffin, Councilman Coffin voted on similar items in the past, and we advised that he did not have a conflict of interest. There's an objective and a subjective portion to the test. One is, is he objectively disqualified under Nevada law? We don't believe so. Of course, if somebody has a feeling of prejudice that would cause them to feel that they couldn't make an impartial judgment, they should always abstain. Councilman Coffin made a record before that he does not feel that he is prejudiced by anything that would cause him to not be objective, and so he was advised that he could vote then. And I'm giving that same advice today.

With respect to Councilman Seroka, it has been argued that, during the campaign, he made comments and at other meetings he made comments regarding an application, which is not before this body today, a development agreement, that have indicated some mindset that causes him to not be impartial today and therefore denies the Applicant due process of law as he sits in a quasi-judicial capacity.

Before I begin, I had asked Mr. Lowenstein, prior to today's meeting, Items 121 [sic] through 131 involve applications for three separate projects, but they are in 10 items on today's agenda. Can you tell me, Mr. Lowenstein, when those items first came to the City's attention? Not the City Council's attention, but the City of Las Vegas, when those applications were submitted for processing?

**PETER LOWENSTEIN**

Through you, Madame Mayor, the first time the projects were created in our database system was October 26th and then the subsequent child applications later that month, on October 30th.

**CITY ATTORNEY JERBIC**

That was October 26th of 2017?

**PETER LOWENSTEIN**

That is correct.

**CITY ATTORNEY JERBIC**

Okay. The, I have opined to Councilman Seroka that these applications came long after the election. Any comments made during the campaign about a development agreement are completely unrelated to the three applications here today. Furthermore, these arguments were not made at the time Councilman Seroka voted on the development agreement, and if they had any relevance at all, which I don't believe they do, they should have been made at that point in time regarding the development agreement. He could not possibly have made comments during the campaign about applications that didn't even exist until months later.

Therefore, I have opined for that and other reasons that Councilman Seroka does not have a conflict of interest and he can vote on both the abeyance item and any, if it comes back in the future, on the merits of these items. So having made that record, I understand there's going to be a suggestion by Councilman Seroka or you, Your Honor, that these items be continued at this point in time.

**MAYOR GOODMAN**

I should read these all into the record, correct, first?

**CITY ATTORNEY JERBIC**

I think – you can state generally what was stated on the callout sheet, which is –

**MAYOR GOODMAN**

And that would – Okay.

**CITY ATTORNEY JERBIC**

I think you can state that this involves Items 122 through 131, and then –

**MAYOR GOODMAN**

And just read those numbers?

**CITY ATTORNEY JERBIC**

If you want, I'll read them, or you can read them, if you want.

**MAYOR GOODMAN**

No, I prefer you read them.

**CITY ATTORNEY JERBIC**

Sure. It's Item 122 through 131, which is GPA-72220 –, WVR-72004, SDR-72005, TMP-72006, WVR-72007, SDR-72008, TMP-72009, WVR-72010, SDR-72011, and TMP-72012, Applicant/Owner 180 Land Company, LLC and 180 Land Company, LLC, et al. regarding these multiple parcels. The request is to abey these items until May 16th, 2018 made by the –

**MAYOR GOODMAN**

And could you make a statement as to the fact that we are a body sitting here of four with another Councilperson on the line and that in order for that abeyance to pass, it will need – I'd like you to speak to that.

**CITY ATTORNEY JERBIC**

It will need four votes. Under Nevada law, anything that comes before this Council requires a majority of the governing body. The governing body in this case is seven members. A majority is four. No matter how many people are absent or sick, it's going to require four votes on anything. The only exception to that is if an individual receives a written opinion from the Chief Legal Counsel of the City indicating they have an ethical conflict under Nevada law 281A. Then you reduce the governing body by whatever number of written opinions are given.

No written opinions have been given in this case. So the governing body remains seven, and anything today requires four votes. So a motion to hold this in abeyance is going to require four votes, and a motion on any one of these applications, 122 through 131, if they were heard today, would also require four votes.

**MAYOR GOODMAN**

And that does include the fact that we have a vacancy with no one serving as Councilperson in Ward 5?

**CITY ATTORNEY JERBIC**

That's correct. Nevada law does not grant you a – pass because somebody is not in office.

**MAYOR GOODMAN**

Okay. Well, with that under consideration and knowing that we will have someone, and I'd like to hear from the City Clerk again what is the timeline for the vote on Ward 5, and then what would be the opportunity for seating that individual once that individual is voted in.

**LUANN HOLMES**

So, election day for Ward 5 will be March 27th. We will canvas the votes the first meeting in April, which is April 4th. We will seat them on April 18th. That's when they'll actually be seated.

And the May 16th date that you're speaking of is approximately 30 days after that new Councilperson seats.

**MAYOR GOODMAN**

Okay. Well, having spoken to legal staff and knowing Councilwoman is not here – Are you still there, Councilman? Are you still there?

**COUNCILMAN COFFIN**

I'm still here. (Inaudible) phone ringing.

**MAYOR GOODMAN**

Okay.

**COUNCILWOMAN FIORE**

I don't think he's got his phone on mute. Tell him to put his phone on mute.

**MAYOR GOODMAN**

Oh yes, you can put your phone on mute. Anyway because of —

**COUNCILMAN COFFIN**

(Inaudible)

**MAYOR GOODMAN**

Thank you.

**COUNCILMAN COFFIN**

(Inaudible)

**MAYOR GOODMAN**

Okay, thank you. Because of the vacancy and because Councilwoman isn't here today to participate in this discussion and because of the fact, obviously, Councilman Coffin is abroad and unable to be here as well, to me, it is, it's a really, it's a disservice to this two-and-a-half-year process to go ahead and hold hearings on this and make some decisions.

So the recommendation to abey it, giving enough time to the new Councilperson in Ward 5 to be brought up to speed and have opportunity to consult with Staff and Councilmembers as they choose, additionally to have Councilwoman here and Councilman Coffin back in – place with us, I really believe the best thing for us to be doing is to go ahead and abeying this until we can get that together. I have from day one, when we first heard this back, I think it was in October of '16, said that there's going to be no winner in this unless this is mediated and a, an agreement somehow is reached among the parties.

And as you all well know, there are several lawsuits out there, and my feeling is, even though there's been a district judge determination, that will be appealed and it will end up at the Nevada Supreme Court. There is not a one of us that sits on this Council that's an attorney that can make a determination as to what in the language prevails and takes precedent.

And therefore, being in that and with the vacancy in 5 and with Councilwoman not here and Councilman Coffin here on the phone, my motion is going to be to abey it for these reasons. And asking too for this, I'm gonna to turn to guidance from our staff as to hearing on this. The vote, is it best to hear from everyone first, or am I at liberty to ask for a motion and –

**CITY ATTORNEY JERBIC**

I believe since you would not be hearing it on the merits if the motion passes, you are not under obligation to have a hearing today on anything since the hearing will be – we'll see how the motion goes. If the motion doesn't pass and you're gonna hear it today, then you'll have a

hearing. And if you, the motion does pass, then there will be a hearing on whatever given date you set the – items to.

**MAYOR GOODMAN**

Okay. Councilman Anthony?

**COUNCILMAN ANTHONY**

What's – the date again, Luann?

**LUANN HOLMES**

May 16th.

**COUNCILMAN ANTHONY**

May 16th. **So, I will make a motion to abey Agenda Items 122 through 131 until May 16th.**

**MAYOR GOODMAN**

So there is a motion. I'm holding off on you, Councilman Coffin, until all of us have voted. And then once I see everybody there, now I'll ask for your vote?

**COUNCILMAN COFFIN**

I vote aye.

**STEPHANIE ALLEN**

Your Honor, before the vote, do we have an opportunity on – Oh, I guess not.

**MAYOR GOODMAN**

And so, if you would post this. Did I miss – It – was, It's all ayes on the abeyance. **(Motion**

**carried with Tarkanian excused)** So, at this point, it will be heard on the 16th of May, and can we make it the first item on the agenda, the first item on the afternoon agenda, if that would work? And Mr. Jerbic, do – Is there appropriate to hear from anybody or no?

**CITY ATTORNEY JERBIC**

Since you've already voted the – If anybody wants to make a record, I know that Mr. Hutchinson is here; I'm sure he wants to make a record.

**MARK HUTCHISON**

Thank you.

**CITY ATTORNEY JERBIC**

I – would give him a certain amount of time. I wouldn't give an indefinite amount of time since we're not hearing this on the merits. I assume you just want to make a record on the two letters that you sent regarding disqualification?

**MARK HUTCHISON**

I am.

**CITY ATTORNEY JERBIC**

Okay.

**MARK HUTCHISON**

Yes, Mr. Jerbic and – Madame Mayor, if I may make a record on – that matter, and just for the record, we – vehemently oppose any kind of abeyance and continued delay of this matter.

**MAYOR GOODMAN**

Oh, I'm sorry.

**MARK HUTCHISON**

I under –

**MAYOR GOODMAN**

Could you repeat your name for the record? Thank you.

**MARK HUTCHISON**

Sure. This is Mark Hutchison. And Your Honor and members of the – City Council, I am appearing on behalf of my clients in my private capacity as legal counsel for 180 Land, Seventy Acres, and Fore Stars, which are applications that you have just abated and a question was, has surfaced that we raised before this vote occurred in terms of the impartiality, the prejudice, the bias of two members of this body.

And as a result, we sent out last week two letters, one dated February 15th and one dated February 16th, as you noted, Madame Mayor, and I'd like to have those presented to the Clerk and a matter of record for the purposes of this proceeding.

And I appreciate the opportunity to make a record. Appreciate the opportunity to be here to respectfully request this action by Councilman Coffin and by Councilman Seroka that they recuse themself. We had asked before this vote that they recuse themself. We heard nothing back, and so I'm just simply gonna make a record, and I will not belabor the points, Your Honor, that we have made previously in our letters, but I do think it's important for the City Council to hear this and for this to be a matter of record as we proceed.

Mr. Coffin is a member of this Council who has served admirably. Mr. Seroka is a member of this Council who's served admirably. But on these applications, they should not be permitted to participate.

Mr. Coffin has repeatedly and publicly demonstrated a personal animus towards the Applicant's principal, Mr. Yohan Lowie, for reasons that are completely unconnected with the merits of the application. Mr. Lowie is of Israeli nationality. He's of the Jewish faith. Mr. Coffin, perhaps, the most egregious examples of why he should not be allowed to participate and continue to be involved in either the deliberations or the votings on the applicants, applications of my clients is that he has publicly stated on multiple occasions that my client, Mr. Lowie, is treating the residents of Queensridge like the Jewish state of Israel allegedly treats "unruly Palestinians."

That's not the end of the factual bases for the request for recusal, however. And again, I want to be clear on the record, Mr. Jerbic. I'm not seeking recusal based on the ethics in government laws or 28, 281A. That may be part of the analysis. What I'm basing the recusal on is the U.S. and the Nevada Constitution that guarantees a fair tribunal when a body like a city council is sitting on a land use application or a business license application.

Once this body assumes that position, you are now in a quasi-judicial proceeding. You are no longer strictly in some sort of a policy-making proceeding or a legislative-making decision, proceeding. This body is unlike the Nevada legislature. You sit on, adjudge people's property rights. And when you adjudge people's property rights, the due process clause of the Constitution applies. You have to act in conformity with a quasi-judicial capacity, and that quasi-judicial capacity requires you to be fair and impartial. Fair and impartial.

And that's the basis of our request for recusal. We don't believe that my client can receive a fair hearing when Councilman Coffin has expressed the sentiments he has towards my client's

nationality and religion. In a early meeting in 2015, in a meeting with my client, he simply told him that he would not, as well, take an interest adversed to a friend of his who lived in Queensridge and would not be going against an interest, his interest.

In April of 2016, in another meeting with representatives of the property owners and with his friend present at that meeting, he instructed my clients to hand over the 183 acres with certain water rights in perpetuity and that was a fair deal and they should accept it.

In a January 2017 meeting, when meeting with Mr. Lowie, he once again compared Mr. Lowie's personal actions in pursuing the development of the properties to Netanyahu's settlement of the West Bank. He then doubled down on this in a letter to Todd Polikoff, who's the President of Jewish Nevada, when he protested in a letter to Councilman Coffin and Mr. Lowie accused Mr. Lowie of pursuing the acquisition of the properties in an opportunistic manner. He classified his actions as inconsiderate and again compared Mr. Lowie's business decisions to the highly political and divisive issue of the Jewish settlements in the West Bank.

In an April 17th, 2000 meeting with Mr. Spiegel, he told him that the only issue that mattered to Councilman Coffin was a statement that was made to Mr. Lowie regarding the unruly Palestinians, and he stated that the issue, until that issue was remedied, he could not be impartial in any application that the property owners would bring forward. He made then good on his comments and denied every application that came before him submitted by my – clients, the property owners.

Mr. Seroka has, and – in contrary again, Mr. Jerbic, to your – points, it's just not about what happened during the campaign. It's that and more. But once you – move from being in a judicial role to being in an advocate role, you cease to be a fair and impartial arbiter of facts. And

Councilman Seroka has become an advocate in opposition to the applications that are before this City Council.

Beginning with his campaign handouts, he says that the property owners would be required to participate in a property swap – regardless of the property rights currently held by the property owners. He also – His plan highlighted that he was unwilling to even consider the property owner's rights and development plans.

In a February 14th, 2017 Las Vegas Planning Commission meeting, while wearing the Steve Seroka for Las Vegas City Council pin, he strongly advocated against my client's property rights and development plans, stating “Over my dead body will I allow a project that will drive property values down 30 percent. Over my dead body will I allow a project that will set a precedent that will ripple across the community, that those property values not affected in Queensridge, but throughout the entire community.”

He then asked the County – Mr. Seroka then asked the Commissioners to reject the Staff's approval and recommendation to deny the applications. The following day at the City Council meeting, he stated “I'm against this project.”

After Mr. Seroka's election, at a town hall meeting in November 29th, 2017, the Queensridge Clubhouse, he stated that having the City Staff follow the letter of the law when reviewing development applications is “The stupidest thing in the world in this case.”

He continued then by encouraging Queensridge homeowners to send in opposition to the Planning Commissions and to the City Council.

At the August 2nd, 2017 City Council hearing for the proposed development agreement for the entire properties, negotiated by City Staff, including the City Attorney, and after delivering what appeared to be pre-scripted remarks, he made a motion to deny the development agreement shortly thereafter.

At another City Council meeting, September 6th, 2017, he then proposed a six-month moratorium, specifically targeting development of my client's property, further delaying what has already been a long and tortured and delayful process.

In short, Councilman Seroka has become an outspoken advocate against my client's property rights and have actively squelched timely consideration of my client's application. As I say, why does – all this matter? Because you're a government body. The Constitution applies to you. My client has Constitutional rights and property interests that must be protected. And if you are unfair or if you're biased, the due process clause of the Nevada Constitution and the U.S. Constitution is violated.

You are – You sit in judicial roles in a quasi-judicial fashion, and the law adjudges you by the principles that we would judge a judge in terms of impartiality. We would never allow a judge to be both an advocate and then sit and be the judge of that case. That's exactly what Councilman Seroka is doing. We would never allow a judge to express anti-religious and anti-nationality comments and then to sit as a judge.

So the basis of all of these points, Madame Mayor, is that my client cannot receive a fair hearing or have a fair and impartial tribunal as is required under the Constitution, and I respectfully ask, again, that Councilman Seroka and Councilman Coffin no longer participate in these proceedings and no longer vote.

I do have, I do have one – suggestion for you, Your Honor, and that's this. If – it really is so important to this Council that this property not be developed, then just simply concede to inverse condemnation, and then we'll just be arguing about value. You can get rid of all of these applications. You can get rid of all the neighbors. You can get rid of all of the headaches that you have. If it really is your intention not to allow the property owner to develop, just concede to the inverse condemnation –

**CITY ATTORNEY JERBIC**

Mr. Hutchison?

**MARK HUTCHISON**

– because you've got one of two choices.

**CITY ATTORNEY JERBIC**

Mr. Hutchison? You were given time to make your record on disqualification. You are going way afar from the two letters that you filed talking about inverse condemnation. Do you have anything else to say with respect to your attempt to recuse both Councilman Coffin and Councilman Seroka, specifically?

**MARK HUTCHISON**

My – Mr. Jerbic, my follow-up remarks were addressed to that point that you can avoid all of this by simply ceding the inverse condemnation. Those are my remarks. Madame Mayor, thank you for the time. Members of the City Council, thank you for your time, and I ask that you take these matters very seriously. They involve Constitutional rights and my client's property interest. Thank you.

**MAYOR GOODMAN**

Mr. Jerbic, the only other item would be anybody who wishes to comment on the abeyance alone?

**CITY ATTORNEY JERBIC**

I – don't know that any comment is necessary, but I have a couple of comments that I would like to put on the record. And, you can make a decision if you want to comment at the end of that.

This is really between right now Mr. Hutchison's letters and the City Council. I will say that we looked at these matters and take them very seriously. I can say there was a court ruling just recently where the judge took the bench and read the decision before he took any oral argument. This Council reads background information all the time before hearing testimony of the public. Everybody comes to this Council with some feeling one way or the other on just about every item. And, if it were true that you have to be Caesar's wife to sit on a City Council and not have any opinion about anything before you sit down, then nobody's ever voting on any issue ever. So I – don't agree with the characterization of the frame of mind that individuals have to have.

If an individual were to say I'm against alcohol and therefore I will never vote for any application that approves a liquor store, or I'm against a strip club and because it's against my religious belief, I can never vote for one, or because I'm against any golf course conversion and can never vote for one, I would understand the point. But for an individual during a campaign to talk about a development agreement and these issues weren't even raised when he voted on the development agreement, and today he's got three issues before him that are completely different from the development agreement, which involved over 2,000 multi-family homes, this doesn't. This involves 235 single-family homes, and he hasn't made a single comment, to my knowledge, other than I want to work with the Applicant and the neighbors.

Further, let me state that advocating for neighbors is not the same as advocating against an applicant. I think every good elected official, in my opinion, advocates for their constituents. And if the standard is that by advocating for your constituents, you have somehow placed yourself in an adversary position to any applicant and can never vote, then nobody on this Council is ever voting on any application ever in the planning session of the Council meeting. So I – wanted to put that on record.

The other thing I will state is that I have been directed by Councilman Seroka many times to reach out to the Applicant and the neighborhood to see if a deal can still be reached. So, with that in mind, we have given the advice that Councilman Seroka does not need to disqualify himself, unless he feels for some subjective reason that he can't be fair, and he's indicated that he can. Second, let me state, and this is probably controversial, but let me state that the comments stated by Councilman Coffin, and he made this record earlier, and I don't know – Councilman Coffin, are you still on the phone?

**COUNCILMAN COFFIN**

Oh, yes. I'm eagerly listening.

**CITY ATTORNEY JERBIC**

Okay. Councilman Coffin has stated earlier, and I'm – paraphrasing here that you can read comments sometimes made by people two separate ways. To – compare somebody to a tough national leader, who negotiates very effectively on behalf of his people and says you don't have to behave that way, can be read one way as admiring somebody and saying you don't need to be that way in this negotiation, or it can be read the way you're choosing to read it, which is there is some anti-Jewish or anti-Israeli prejudice here. I think Councilman Coffin needs to address that directly and has in the past. Councilman, do you care to make a comment on that issue?

**COUNCILMAN COFFIN**

Yes, I'm delighted to talk to all of this. First of all, I am following the advice of legal counsel on this – vote, so I will be voting. Perhaps (inaudible) has to take place soon, because there are many false statements in this letter, which I finally received a copy of it yesterday. It was delivered to our offices after the close of business, before a long weekend, and so Tuesday was the first day that I saw an email description of the letters which seems to repeat the same misstatements and falsehoods that were said earlier during the campaign against (inaudible).

So my point is that first of all, Mayor, I'd like – I'm sorry I can't be there to see the Lieutenant Governor's face, but I (inaudible) – Is he looking at you while he's making these statements or if he is righteously indignant. No answer. Therefore, he must be righteously indignant.

I have many times been on the campaign trail and seen a person make a statement, for example, Candidate A might say in advance during the campaign they are pro-life. Well, they know what that means, and I know what that means. However, (inaudible) but they make that position clear in order that people might rely on their vote to ensure their policy is continued. So the pro-life people vote for the candidate who is pro-life, perhaps Lieutenant Governor Hutchinson is of that mind, in which case if I like him, I'd vote for him because he's pro-life. Well, he hasn't even heard a case or a bill on pro-life or voted on one. So it could be that these kinds of circumstances can occur in the heat of a campaign.

Now, regarding my position, my position was that Bibi Netanyahu, the Prime Minister of Israel, who is a buffoon and who is leading his country into an eternal state of war. I am here in Korea with several hundred religious, political leaders who are trying to help get peace in the North Korean Peninsula and the South Korean. They are comprised of members of many faiths.

I discussed this last night with a rabbi from Israel, as well as a couple of friends from Israel, all (inaudible) who said and they almost rolled off their chairs when they heard this argument that somehow those settlements would have anything to do with politics or anti-Semitism, because half of Israel is opposed to the settlements. So that is their statement. They could be wrong. They (inaudible) a few percentage points off, but I just wanted to say that this is an arguable proposition.

In any event, I grew up with members of many faiths and 66 years I have lived in Las Vegas, and the first time I have been accused of being bigoted would have been last year. He seems to continue to rely upon this, on this half-truth in order to secure my abstention, which would rob me of my vote and rob one-seventh of the citizens of Southern Nevada in the City of Las Vegas of a vote on this issue. I will not do that. I will vote for abeyance.

**MAYOR GOODMAN**

Well, and I believe just in response, the abeyance did carry. So it's on for the 16th of May. Now, Mr. Jerbic, we have some gentlemen in front of us. May they speak to the abeyance and that's it?

**CITY ATTORNEY JERBIC**

It is your call, Your Honor. There's no, nothing that legally prohibits them. It's your – It's only with your permission.

**MAYOR GOODMAN**

All right.

**FRANK SCHRECK**

Your – Honor.

**MAYOR GOODMAN**

We will stay on the abeyance.

**FRANK SCHRECK**

No, we – would like to just address –

**TODD BICE**

We need to make –

**FRANK SCHRECK**

– the Lieutenant Governor's statements. Mine's very brief –

**TODD BICE**

We need to make –

**FRANK SCHRECK**

– and his is very brief.

**TODD BICE**

Yeash. We need to make our record on this as well. You allowed them to make a record on this. We believe that it's appropriate that the record be accurate –

**FRANK SCHRECK**

Complete.

**TODD BICE**

– and complete on this –

**MAYOR GOODMAN**

Okay.

**TODD BICE**

– as opposed to one-sided.

**MAYOR GOODMAN**

You're together –

**TODD BICE**

Yes.

**MAYOR GOODMAN**

– so can you share the time?

**FRANK SCHRECK**

No. I – Mine is going to be very short on one specific item that's personal.

**TODD BICE**

As is –

**FRANK SCHRECK**

He's going to be more general.

**TODD BICE**

As is mine. With all due respect to my friend, Mr. Hutchison, the legal, the – standard is not as he articulates it. In fact, I almost wish it were, because if it were, the votes of this City Council in

the past on behalf of this developer were blatantly unlawful if Mr. Hutchison were right. With all due respect to Councilman Beers, who's no longer here, he was this Applicant's biggest advocate and everybody knew it. And there have been other advocates for him on this, on the Council. So that is not the legal standard, number one.

Number two, I do not think it is an accident that this slander against the two Councilmen has escalated now after the district court has ruled that the developer bullied the City into violating the rights of the homeowners, and that is exactly what Judge Crockett has found is that this Applicant bullied the City into changing the rules to accommodate him.

And, this is exactly – I'm taking this right out of the judge's transcript, out of his statements. Is that one of the problems developed here is that this Applicant represented that he had secured pre-approval from every member on the City Council at the time he bought this property, outside of a public meeting in blatant violation of the open meeting law, if it's true. But Mr. – Lowie, I'll leave it to the others to assess his credibility, but Mr. Lowie's version of what happened is that he secured an unlawful agreement by the City Council to pre-approve his project outside of a public meeting. And that's what Judge Crockett called him on that, because that is exactly what he is – contending.

So, with all due respect to Mr. Hutchison, the party here who was trying to, by his own, by his words, rig the outcome of a vote was this Applicant. And the judge has set it aside. And he doesn't like that fact, and so now he's resorted to slandering Councilmembers. I think that just speaks volumes about this Applicant and why this problem, why this has escalated in the fashion that it has.

So, with that in mind, under the actual law, there is no violation of anybody's rights here. The only rights that have been violated were the rights of the homeowners, and the court has so found

that. And, I'll turn it over to Mr. Schreck –

**MAYOR GOODMAN**

Only –

**TODD BICE**

– with one final observation.

**MAYOR GOODMAN**

Only after you state your name, which you forgot.

**TODD BICE**

Madame Mayor, my apologies. Todd Bice, Pisanelli Bice, 700 or 400 South 7th Street. My apologies. So, in paragraph number 12 of his counterclaim, where this Applicant has sued the City, he specifically claims, again, that he had this pre-approval at the time that he purchased the property, which again, if he's telling the truth, he's the one who's admitting to the violations of the law and the violations of my client's rights. I thank you for your time.

**FRANK SCHRECK**

Is this on? Okay. Frank Schreck, 9824 Winter Palace Drive. I just want to briefly touch on the – anti-Semitic statements about Mr. Coffin. All of us know Mr. Coffin, and all of us know he's not an anti-Semite. But it seems that this Applicant, Mr. Lowie, has a propensity, when he loses or gets angry at someone, to call them anti-Semite. He did in a letter in the primary election. He called Councilman Seroka and Christina Roush anti-Semites. He's called Councilman Coffin an anti-Semite.

And one week before I was to be honored by the – Anti-Defamation League, which you know is a Jewish organization, to get their annual Jurisprudence of the Year Award, which goes to an attorney who's exhibited work in terms of civil rights, equal rights for everyone, a week before that, he told the Director of the ADL that he was gonna tell people not to go to the luncheon honoring me because I was an anti-Semite.

So this is a, this is a – pattern that this Applicant has that if you don't agree with him, he will call you a name. I was called an extortionist. Jack Binion was called an extortionist. There's no limit to what he will call you if he doesn't get his way. And I don't have to tell you when he said that he had gone to each one of your Council, each Councilperson and – got a commitment, that was one of his rants in front of you about a year and a half ago, and that's just how he acts. But he chooses to call people names that don't fit, and it certainly doesn't fit with Councilman Coffin. Thank you.

**MAYOR GOODMAN**

Okay. I think this is closed at this point. And, is this on the abeyance?

**STEPHANIE ALLEN**

Yes, Ma'am, please.

**MAYOR GOODMAN**

Okay. And only the abeyance?

**STEPHANIE ALLEN**

Only the abeyance.

**MAYOR GOODMAN**

Okay.

**STEPHANIE ALLEN**

Thank you, Your Honor, Council. Stephanie Allen, 1980 Festival Plaza, here on behalf of the Applicant. I'd like to just speak to the zoning item. I know there's a lot of personalities here and a lot of issues –

**MAYOR GOODMAN**

No.

**STEPHANIE ALLEN**

– that are being discussed that are outside of the zoning, but the zoning applications that are on the agenda –

**MAYOR GOODMAN**

No.

**STEPHANIE ALLEN**

– and the abeyance in particular

**MAYOR GOODMAN**

No.

**STEPHANIE ALLEN**

– are what I want to talk about.

**MAYOR GOODMAN**
Only the abeyance –

**STEPHANIE ALLEN**
Only the abeyance.

**MAYOR GOODMAN**
Not the, not the zoning.

**STEPHANIE ALLEN**
Correct. So the – What I'd like to put onto the record is that we're three years into this, and I know you didn't ask and the Council has already voted, but three years into this, where we've been trying to get something approved so we can develop this property, do something with this property. We've had a number of different applications before you.

We believe this is the final application, probably, where it's a conforming application, no request for a zone change, just an application to develop the property under its existing R-PD7 zoning. Three more months is tantamount to a denial. Every time this gets abeyed, whether it's these applications or the prior applications, it directly harms the property owner, and it directly harms the community.

So I – know the vote has already taken place, but for purposes of this Council, we would appreciate a vote on these applications and due process and the ability for you all to hear the zoning facts, not the personality discrepancies, just the facts of the zoning case and make a determination as to whether or what he can do with this property so that we can move on for the betterment of him and the overall community, because that's really what your job is as a Council and the leadership of this Council is, is to decide what's best for the community and the

constituents, not the few folks that come up here every single time, but the overall community, and we'd like to do something with this property and we'd like to have a hearing on the application. So –

**MAYOR GOODMAN**

Thank you.

**STEPHANIE ALLEN**

I just wanted to put that on the record.

**MAYOR GOODMAN**

Thank you.

**STEPHANIE ALLEN**

Also, I would like to defend my client's character. I don't think it's fair to say that he comes up here and calls everyone names. He has been called a lot of names that are unfair as well. He's a man of integrity. He does beautiful work. And all that this Council should be doing is looking at this application on its face from a zoning standpoint. So we'd appreciate that opportunity in a couple months. Thanks.

**MAYOR GOODMAN**

Thank you very much. Okay. We are gonna move on now to Agenda Item 88. This issue –

**LISA MAYO**

Mayor –

**MAYOR GOODMAN**

– is closed.

**LISA MAYO**

I'm sorry. Lisa Mayo. I was told that only on this Item, 122, could I ask the question regarding the report that was given, per Councilwoman Fiore's request, to find out how much taxpayer money has been spent on this project. And I called yesterday to find out if we could get a report on that, and they said I had to just come up during Item 122 in order to talk to that. So I'd like to see if we could get a report on this item as to how much taxpayer money has been spent by Staff to this. And now we're adding another three months to it. So I think whatever that number is, add another $300,000 to it and the taxpayers of this community are seeing the number go way up. Can we have a report on that –

**CITY ATTORNEY JERBIC**

Ms. Mayo –

**LISA MAYO**

– please?

**CITY ATTORNEY JERBIC**

Ms. Mayo, I gotta – I've got to cut you off because we are, first of all, not even agendaed for that, and that would be more appropriate under public comment. But I can tell you, Staff will get back to you with whatever information you requested and give you a reason, either give you the answer or reason why they can't give you the answer.

**LISA MAYO**

Okay. But – it really needs to be in public comment. The public needs to know about this. How

do we get it into the public record?

**CITY ATTORNEY JERBIC**

You can wait until public comment at the end of the meeting.

**LISA MAYO**

Okay, I will. Thank you.

**CITY ATTORNEY JERBIC**

You got it.

**MAYOR GOODMAN**

Thank you. Okay.

**(END OF DISCUSSION)**

/dao

SUPP

THE JIMMERSON LAW FIRM, PC.
James J. Jimmerson, Esq.
Nevada Bar No. 000264
James M. Jimmerson, Esq.
Nevada Bar No. 12599
415 S. 6th Street, #100
Las Vegas, Nevada 89101
Telephone: (702) 388-7171
Facsimile: (702) 387-1167
Email: ks@jimmersonlawfirm.com
*Attorneys for Plaintiffs*

DISTRIC COURT
CLARK COUNTY, NEVADA

| | |
|---|---|
| FORE STARS, LTD., a Nevada Limited Liability Company; 180 LAND CO., LLC, a Nevada Limited Liability Company; SEVENTY ACRES, LLC, a Nevada Limited Liability Company,<br><br>Plaintiffs,<br>vs.<br>DANIEL OMERZA, DARREN BRESEE, STEVE CARIA, and DOES 1-1000,<br><br>Defendants. | Case No.: A-18-771224-C<br><br>Dept. No.: II<br><br>**PLAINTIFFS' FIRST SUPPLEMENT TO THEIR OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS (ANTI-SLAPP MOTION) PLAINTIFFS' COMPLAINT PURSUANT TO NRS 41.635 ET SEQ.** |

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

///

///

///

Darren Bresee ("Bresee"), and Steve Caria ("Caria") (collectively "Homeowners" or "Defendants"). Attached hereto as Supplement Exhibit 1 is a thumb drive containing a video file (.mov) labelled Omerza Video. Pursuant to EDCR 8.02(e), this Supplement must be filed conventionally as it is not feasible for the video to be converted to an electronic document suitable for e-filing.

DATED this 11th day of May, 2018.

**THE JIMMERSON LAW FIRM, P.C.**

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

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

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

## CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of May, 2018, I caused a true and correct copy of the foregoing **PLAINTIFFS' FIRST SUPPLMENT TO THEIR OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS (ANTI-SLAPP MOTION) PLAINTIFFS' COMPLAINT PURSUANT TO NRS 41.635 ET SEQ.** to be submitted electronically for filing and service with the Eighth Judicial District Court via the Electronic Filing System to the following:

Mitchell Langberg, Esq.
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway
Suite 1600
Las Vegas, Nevada 89106
*Attorneys for Defendants*

*/s/ Shahana Polselli*
Employee of The Jimmerson Law Firm, P.C.

# EXHIBIT 1

# EXHIBIT 1


Stay
WATER
SMART
snwa.com