# 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 3 (Pages 306-425)

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** |

**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' SECOND 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 Second 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 Exhibits 2-7 are documents and evidence in further support of Plaintiffs' Opposition to Defendants' Special Motion to Dismiss (Anti-SLAPP Motion), including but not limited to, the Declaration of Yohan Lowie.

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' SECOND 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 2

# EXHIBIT 2

**Transcript of Yohan Lowie and Daniel Omerza Video**

YL: I apologize, I can't.... I apologize – you're Dan Omerza?

DO: What's that?

YL: You're Dan Omerza?

DO: Dan Omerza, yeah.

YL: And those letters are? Are you from the HOA?

DO: No, no, no. I'm just a resident here.

YL: Ok.

DO: Ok. And what we're doing is we're putting together a letter to maintain the Master Plan here.

YL: What master plan?

DO: The Master Plan has – when they build the – the development back in 1990, they said so much land will be open space, so much land will be schools, so much land – so they've got a plan the way they put the community together.

YL: But how – how do we know that? How do we know that there's a master plan?

DO: There is a master plan.

YL: How would you know that? How do we know that?

DO: Because I went to the city council meetings. And they – they brought it up. The lawyers said there's a master plan, and this is it.

YL: What do you mean "this is it"?

DO: You're living in it, ok? So, in order for them to build on this golf course and destroy this golf course, they have to change the Master Plan.

YL: But how do we know there's a master plan?

DO: Ya know – I – there is. You can call the HOA. The HOA will tell you about it.

YL: What is that noise?

DO: That's my phone. I was talking to my wife.

YL: Oh, oh, ok. So, you're sure that – this is the sign that we know there was a master plan?

DO: There is a master plan. It's – it's – it's in the HOA. It's in the – it's in the documents they gave you when you bought your home. It points out that Peccole Ranch is part of the – this Master Plan from 1990.

YL: Where do you live?

DO: I live over here in Queensridge.

YL: In Queensridge?

DO: Yeah.

YL: Ok, so you're a resident of Queensridge?

DO: Yes, I am.

YL: And do you – do you know – did you know there was a master plan when you bought the house?

DO: Yes.

YL: You knew there was a master plan when you bought the house?

DO: Yeah, in fact, that's what that's – that's what that's about is I knew that there was a Master Plan and that's why I bought my house here.

YL: How did you know, though? How do you know?

DO: Because I did the – I did a background check on the Q&R's; ok? The Queensridge – the Queensridge Rules and Regulations and it – it talks all about that Master Plan.

YL: So, in the CC&R's it talks about a master plan?

DO: Yes.

YL: K. Are you sure about that?

DO: I am. Yes.

YL: Ok. Do you know who I am?

DO: No.

YL: I'm Yohan Lowie.

DO: Oh.

YL: And I got you on video.

DO: Very good.

YL: And I'm going to sue you today.

DO: Ok, well, that's ok.

YL: I'm taking you on, buddy.

# EXHIBIT 3

# EXHIBIT 3

# URGENT NOTICE

Dear Neighbor:

Please consider signing one of the two enclosed affidavits and return it to Frank Schreck before February 19 in the enclosed addressed envelope.

In the event the developer is granted approval to build housing on the golf course, our community will be deprived of the open space requirement of the building code in effect when Queensridge was conceived.

Many of the people who were original buyers of property, paid lot premiums in consideration for the open space/natural drainage system that we have enjoyed for twenty years.

Those of us who bought homes in the later years relied on the fact that the open space/natural drainage system could not be developed, subsequent to City approval of the original 1990 Peccole Ranch Master Plan.

We will use these signed statements in our legal efforts to preserve all our rights going forward.

Thank you.

*Roger Wagner*
9720 Winter Palace Drive
Las Vegas, NV 89145

**TO: City of Las Vegas**

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

The undersigned made such purchase in reliance upon the fact that the open space/natural drainage system could not be developed pursuant to the City's Approval in 1990 of the Peccole Ranch Master Plan and subsequent formal actions designating the open space/natural drainage system in its General Plan as Parks Recreation – Open Space which land use designation does not permit the building of residential units.

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

_____

Resident

_____

Address

_____

Date

**TO: City of Las Vegas**

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

The Undersigned made such purchase in reliance upon the fact that the open space/natural drainage system could not be developed pursuant to the City's Approval in 1990 of the Peccole Ranch Master Plan and subsequent formal actions designating the open space/natural drainage system in its General Plan as Parks Recreation – Open Space which land use designation does not permit the building of residential units.

_____

Resident Name (Print)

_____

Resident Signature

_____

Address

_____

Date

Frank Schreck
9824 Wintert Palace Drive
Las Vegas, NV 89145

# EXHIBIT 4

# EXHIBIT 4

**To:** Bob Coffin[lvcouncilman@hotmail.com]
**From:** Felipe Ortiz
**Sent:** Tue 7/12/2016 3:03:52 PM
**Subject:** RE: Queensridge redevelopment of the golf course

Ok

**From:** Bob Coffin [mailto:lvcouncilman@hotmail.com]
**Sent:** Monday, July 11, 2016 10:49 PM
**To:** Felipe Ortiz
**Subject:** Fwd: Queensridge redevelopment of the golf course

Print for badlands stuff

Sent on a Samsung phablet for speed so please forgive accidental typos

-------- Original message --------
From: Bob Coffin
Date:07/11/2016 8:53 PM (GMT-08:00)
To: lvcouncilman@hotmail.com
Subject: FW: Queensridge redevelopment of the golf course

---

**From:** Darren Bresee
**Sent:** Monday, July 11, 2016 8:53:22 PM (UTC-08:00) Pacific Time (US & Canada)
**To:** Carolyn G. Goodman; Steven Ross; Stavros Anthony; Ricki Y. Barlow; Bob Beers; Bob Coffin; Lois Tarkanian
**Subject:** Queensridge redevelopment of the golf course

Hello Mayor and councilmen and councilwomen. I am a homeowner in Queensridge located at [redacted] and have been since 1999. I will be unable to attend the 6:00 meeting tomorrow, tuesday, but hope this email will be respectfully considered along with everyone else's voice.

I will keep this brief. I SUPPORT the redevelopment of the golf course even though I live on the golf course. HOWEVER, EHB should be held to their initial 5 million proposal of improvements such as "IMPROVED ENTRY GATES, EXTENSIVE TRAIL NETWORK, 5 ACRES OF ENHANCED ENTRYWAYS AND PARK AREAS, UPGRADED CLUBHOUSE, and 10-FOOT PERIMETER WALL".

This proposal was made at a homeowners meeting but was later withdrawn once a dispute arose with the homeowners. As a governing body with the power to approve this project, you now step into the shoes of the concerned homeowners and Queensridge board. It only makes sense that if this project is approved by the City Council, that the City Council would hold EHB to their initial proposal of the above listed improvements.

Respectfully,

Darren Bresee
[redacted]

# EXHIBIT 5

# EXHIBIT 5

[redacted]

**From:** George West [mailto:gowesq@cox.net]
**Sent:** Wednesday, November 2, 2016 1:30 PM
**To:** Schreck, Frank A.
**Cc:** Julietta Bauman-Freres; Elise Connico; Elaine Wenger-Roesener; Lawrence Weisman; Diane Shremmel
**Subject:** Re: Great job

From the immortal words of the Honorable Admiral yashiro Yamamoto after he successfully bombed Pearl Harbor : "I feel all we have done is awaken a sleeping giant and filled him with great resolve." Frank, that is all you have done, and you are going to lose and lead this community down the Primrose Path a disaster. Too bad we really don't have an independent board who is not self interested.If you think you have benefited the community through your bombastic and scorched earth tactics you are simply wrong. We will see how it goes. Remember yohan has very talented and experienced land-use attorneys is on his side as well and you will never get over the RPD 7 designation. You are stuck with that and you are never going to get away from that and that is your major problem here because you know as well as I do, zoning trumps master planning. So now the commission who has said too much High density so now the high density is gone and now he'll just build single-family homes within the RPD designation. The commission will approve it and there will be a substantial increase in the amount of single family homes built on the 250 acres. Or he may very well just sell it off in parcels to other developers. My money is on Johan and that's the reason why we should have sat down and try to work this out because all you have done is awoken a sleeping giant and essentially gained nothing by it. By the way, looks like the board is in full crisis mode. Not only do they meet yesterday but they met this afternoon doesn't look good. Remember Frank we all know what you and certain members on the board are up to. Don't even think about trying to foot the bill on the back of the community for any litigation against Johan because you will have the fight of your life in your hands as well as a nice big fat lawsuit. Have a nice day.

Sent from my IPhone 6 Plus

Please forgive any typos or bad voice recognition

George O. West III
Consumer Attorneys Against Auto Fraud
10161 Park Run Drive
Suite 150
Las Vegas, NV 89145
www.americasautofraudattorney.com
www.caaaf.net
(702) 318-6570
(702) 664-0459 (Fax)

On Nov 2, 2016, at 12:13 PM, Schreck, Frank A. <FSchreck@BHFS.com> wrote:

> However, I am smart enough to have 3 excellent land use attorneys and a land use specialist to work with and spend hundreds of thousands of dollars having quality research and legal analysis done to reach a

position that we are all very comfortable with regarding the litigation as well as the general argument that QR Master Planned Community has been completed for more than 10 years, there is no existing Declarant and the approvals from the City since 1990 all required conformance with the original Plan approved in 1990 which was done. If you had any interest in the wellbeing of our community, you would be cheering us on not continuing to argue on behalf of the developer against the interests of your neighbors.
We knew from the beginning that the Mayor, Beers and Perrigo had the deck stacked against us. That is why we have always said we would win this in court. However, we have done a pretty good job of prolonging the developer's agony from Sept 2015 to now. We now look forward to the depositions of Perrigo and Lowenstein which have been noticed for this month.

Frank A. Schreck
Brownstein Hyatt Farber Schreck, LLP
FSchreck@bhfs.com
T:702.382.2101



**From:** George West III [mailto:gowesq@cox.net]
**Sent:** Wednesday, November 02, 2016 11:38 AM
**To:** Schreck, Frank A.
**Cc:** Julietta Bauman-Freres; Elise Connico; Elaine Wenger-Roesener; Lawrence Weisman
**Subject:** Re: Great job

Frank, you are truly a three year old, but not surprising, because all you do when you can't argue the facts is go back to your ad hominem attacks, just like you wife has a propensity to do as well. Birds of a feather.

That said, perhaps Frank you may be right, not my wheelhouse, ***but it isn't yours either,*** but even a blind squirrel can find an acorn every so often, and I know you have been storing A LOT of them for the upcoming winter, ***which is going to very very harsh on your North "A" section buddies and Elise's TP.*** Great job Frank.

On Nov 2, 2016, at 10:49 AM, Schreck, Frank A. <FSchreck@BHFS.com> wrote:

It's over the head of an "Auto Fraud Atty".

Frank A. Schreck
Brownstein Hyatt Farber Schreck, LLP
FSchreck@bhfs.com
T:702.382.2101

# EXHIBIT 6

# EXHIBIT 6

**TO: City of Las Vegas**

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

The undersigned made such purchase in reliance upon the fact that the open space/natural drainage system could not be developed pursuant to the City's Approval in 1990 of the Peccole Ranch Master Plan and subsequent formal actions designating the open space/natural drainage system in its General Plan as Parks Recreation – Open Space which land use designation does not permit the building of residential units.

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

_____
Resident Name (Print)

_____
Resident Signature

_____
Address

_____
Date

**TO: City of Las Vegas**

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

The Undersigned made such purchase in reliance upon the fact that the open space/natural drainage system could not be developed pursuant to the City's Approval in 1990 of the Peccole Ranch Master Plan and subsequent formal actions designating the open space/natural drainage system in its General Plan as Parks Recreation – Open Space which land use designation does not permit the building of residential units.

_____
Resident Name (Print)

_____
Resident Signature

_____
Address

_____
Date


Daniel Omerza
800 Petit Chalet Ct
Las Vegas, Nevada 89145

# EXHIBIT 7

# EXHIBIT 7

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

YOHAN LOWIE, under penalty of perjury, does hereby declare:

1. 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. I am personally aware of certain events giving rise to Plaintiffs' Fore Stars, LTD., 180 Land Company LLC, and Seventy Acres, LLC (collectively "Plaintiffs") action against Defendants Daniel Omerza, Darren Bresee, and Steve Caria (collectively, "Defendants"), Case No. A-18-771224-C (the "Action").

3. Attached to the First Supplement to the Opposition as Exhibit 1 is a true and accurate copy of a video (Omerza Video) that I took on March 15, 2018 and identified myself in.

4. Attached to the Second Supplement to the Opposition as Exhibit 2 is a true and accurate copy of the transcript of the events contained in the video from Exhibit 1.

5. Attached to the Second Supplement to the Opposition as Exhibit 3 is a true and accurate copy of written materials, upon information and belief, provided by one or more of the Defendants (or by one or more of the Defendants' co-conspirators) to Queensridge homeowners, with a return envelope to Frank Schreck. Note that this envelope is not addressed to the City of Las Vegas, the City Counsel, or the City Attorney.

6. Attached to the Second Supplement to the Opposition as Exhibit 4 is a true and accurate copy of the public records, upon information and belief, provided by the City of Las Vegas in response to a public records request made by Plaintiffs.

7. Attached to the Second Supplement to the Opposition as Exhibit 5 is a true and accurate copy of email exchange between Frank Schreck and George West dated November 2, 2018 wherein Schreck states, "[W]e have done a pretty good job of prolonging the developer's agony."

8. Attached to the Second Supplement to the Opposition as Exhibit 6 is a true and accurate copy of written materials, upon information and belief, provided by one or more of the Defendants (or by one or more of the Defendants' co-conspirators) to Queensridge homeowners, with a return envelope to Defendant Daniel Omerza. Note that this envelope is not addressed to the City of Las Vegas, the City Counsel, or the City Attorney, just as the envelope from Exhibit 3 is not addressed to the City of Las Vegas, the City Counsel, or the City Attorney.

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 11th day of May, 2018.

YOHAN LOWIE

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

**SB**
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' SUPPLEMENTAL BRIEF 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.

**1.** **Plaintiffs' wrongly suggest nobody knew about the master plan.** Plaintiffs' fundamentally argued that nobody could have known there was a master plan because the Peccole Ranch Master Plan was not recorded. Plaintiffs ignore important content from the Queensridge CCRs. As set forth in Exhibit 2 (excerpts from the CCRs), ¶12.1 specifically provides "[t]he Property and the Annexable Property ***are part of a master-planned community***… ."[1] (emphasis added).

**2.** **Plaintiffs' falsely say there is no Peccole Ranch Master Plan**. Plaintiffs' incorrectly argued that the Peccole Master Plan was "***abandoned***." (Video Transcript ("VT") 22:26). Defendants hereby submit the judicially noticeable Order Granting Plaintiffs' Petition for Judicial Review from Eighth Judicial District Court case number A-17-752344-J (the "Order," attached as Exhibit 3). That Order conclusively refutes nearly all of Plaintiffs' assertions.

Plaintiffs are bound by the findings of fact and conclusions of law in the Order. Issue preclusion bars a plaintiff from relitigating an issue that was decided in a prior litigation once the ruling has become final. *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055 (2015). ***Judgment is final and preclusion applies even while the prior matter is on appeal***. *Edwards v. Ghandour*, 123 Nev. 105, 116 (2007); *City of Las Vegas v. Bluewaters Family Ltd. P'ship*, 55878, 2013 WL 431045, at *1 (Nev. Jan. 31, 2013). Notably, issue preclusion does not require the case to involve the same defendant. *Id.*

Paragraphs 6-12 of the findings make clear that the Peccole Ranch Master Plan was approved by the City and the subject property was designated as open space. Paragraph 13 makes clear that the General Plan for the City also designates the property as open space.

Defendants could submit voluminous city records showing that the Peccole Ranch Master Plan is effective and not "abandoned." But, Judge Crockett summarized many city documents

[1] Plaintiffs' would argue that the "master-planned community" referenced ***is*** Queensridge. This is belied by the fact that ¶12.1 says the ***Annexable Property*** is part of the master-planned community. As Plaintiffs' have argued (and included in their complaint), while the open space used as the golf course was annexable, it was never annexed. Thus, it is not part of Queensridge and the referenced master-planned community is something different than, and more than, Queensridge – it is the Peccole Ranch Master Development Plan approved by the City in 1990.





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

referencing the master plan in his Order. See, ¶¶ 17-18 (staff report referencing that the site is part of the Peccole Ranch Master Plan), 20 (the "site is part of the Peccole Ranch Master Plan"), 23-28, 29 (the "Peccole Ranch Master Plan must be modified to change the land use designations from Golf Course/Drainage… ."), 30, 35, 39, 40. Judge Crockett also made binding conclusions of law that recognized the existence of the Peccole Ranch Master Plan. See, ¶¶ 4, 7 ("***There is no dispute that the Peccole Ranch Master Plan in a Master Development Plan recognized by the City and listed in the City's 2020 Master Plan accordingly***."), 8.

**3.** **Anti-SLAPP applies to all claims**. Plaintiffs' incorrectly assert that the anti-SLAPP statute does not apply to intentional torts (VT, 26:05) and that it has "***never been applied***" to intentional interference claims (VT, 36:27). As set forth in the anti-SLAPP reply (pp. 5-6), anti-SLAPP has been applied to claims for intentional infliction of emotional distress, intentional and negligent misrepresentation, intentional interference, and even conspiracy to obtain false testimony. The Nevada Supreme Court applied anti-SLAPP to an intentional interference claim in *Bullivant Houser Bailey PC v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 128 Nev. 885 (2012).

**4.** **The Litigation Privilege Bars Plaintiffs' Claims, So No Discovery Is Permitted on Prong 2.** Prong 2 of the anti-SLAPP statute requires Plaintiffs to offer admissible evidence on each element of their claims. NRS 41.660(3)(b). As the Court noted at hearing, discovery is ***only*** permissible ***in relation to Prong 2*** and only if it is "***necessary."*** NRS 41.660(4). Here, the litigation privilege bars all of Plaintiffs claims, so they can neither show the need for discovery or that there is evidence to support each element of their claims.

The litigation privilege "affords ***parties*** the same protection from liability as those protections afforded to an attorney… ." *Clark County Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 382-83 (2009)(emphasis added). Contrary to Plaintiffs' assertions, the privilege applies to communications "***even if known to be false or made with malicious intent.***" *Bullivant*, 128 Nev. 885 (emphasis added). The litigation privilege applies to more than just defamation claims. It bars "***any*** civil litigation based on the underlying communication." *Id.* The artificial distinction between communications and conduct is also irrelevant, as the Court intuited during

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

the hearing. *Id.* ("there is no reason to distinguish between *communications* made during the litigation process and *conduct* occurring during the litigation process."). As set forth in Defendants' moving papers, the litigation privilege applies to quasi-judicial proceedings (*Knox v. Dick*, 99 Nev. 514, 581 (1983) and it applies to communications preliminary to proceedings (*Fink v. Oshins*, 118 Nev. 428, 433 (2002). The privilege even applies to fraudulent communications or perjured testimony. *Silberg v. Anderson*, 50 Cal. 3d 205, 218 (1990) (listing numerous cases). As to the request for discovery, the privilege "renders any such [discovery] irrelevant to the court's determination." *Blanchard v. DIRECTV, Inc.*, 20 Cal. App. 4th 903, 922 (2004).

**5.** **Plaintiffs' cannot prevail on the anti-SLAPP**. Because the anti-SLAPP statute applies to any claims, including intentional torts, it is Plaintiffs' burden to show that they have evidence to support all the elements of their claims. Those claims are legally insufficient for the reasons discussed in the prior briefing. But, the Court need not get that far. Defendants' conduct is protected by the absolute litigation privilege. As such, none of the claims can be supported. Because Defendants' intent is irrelevant, no discovery is necessary. The claims must be dismissed.

DATED this 23rd 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

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' SUPPLEMENTAL BRIEF 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 23rd 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

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

# EXHIBIT 1

| | |
|---|---|
| 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 DALE ROESENER |

**DECLARATION OF DALE ROESENER**

I, Dale Roesener, hereby declare as follows:

1. 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 ("QUEENSRIDGE").

3. MY WIFE AND I PURCHASED OUR LOT IN QUEENSRIDGE IN 2001.

4. SUBMITTED WITH THIS DECLARATION AS EXHIBIT 2 ARE TRUE AND CORRECT COPIES OF PORTIONS OF THE VERSION OF THE AMENDED AND RESTATED MASTER DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS FOR QUEENSRIDGE ("CCRS") THAT I RECEIVED AT OR NEAR THE TIME OF CLOSING FOR THE LOT MY WIFE AND I PURCHASED.

5. PARAGRAPH 12.1 OF THE CCRS STATES THAT THE "PROPERTY AND THE ANNEXABLE PROPERTY ***ARE PART OF*** A MASTER-PLANNED COMMUNITY... ." (EMPHASIS ADDED).

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct. Executed on this 23rd day of May, 2018, at Las Vegas, Nevada

Dale Roesener

DALE ROESENER

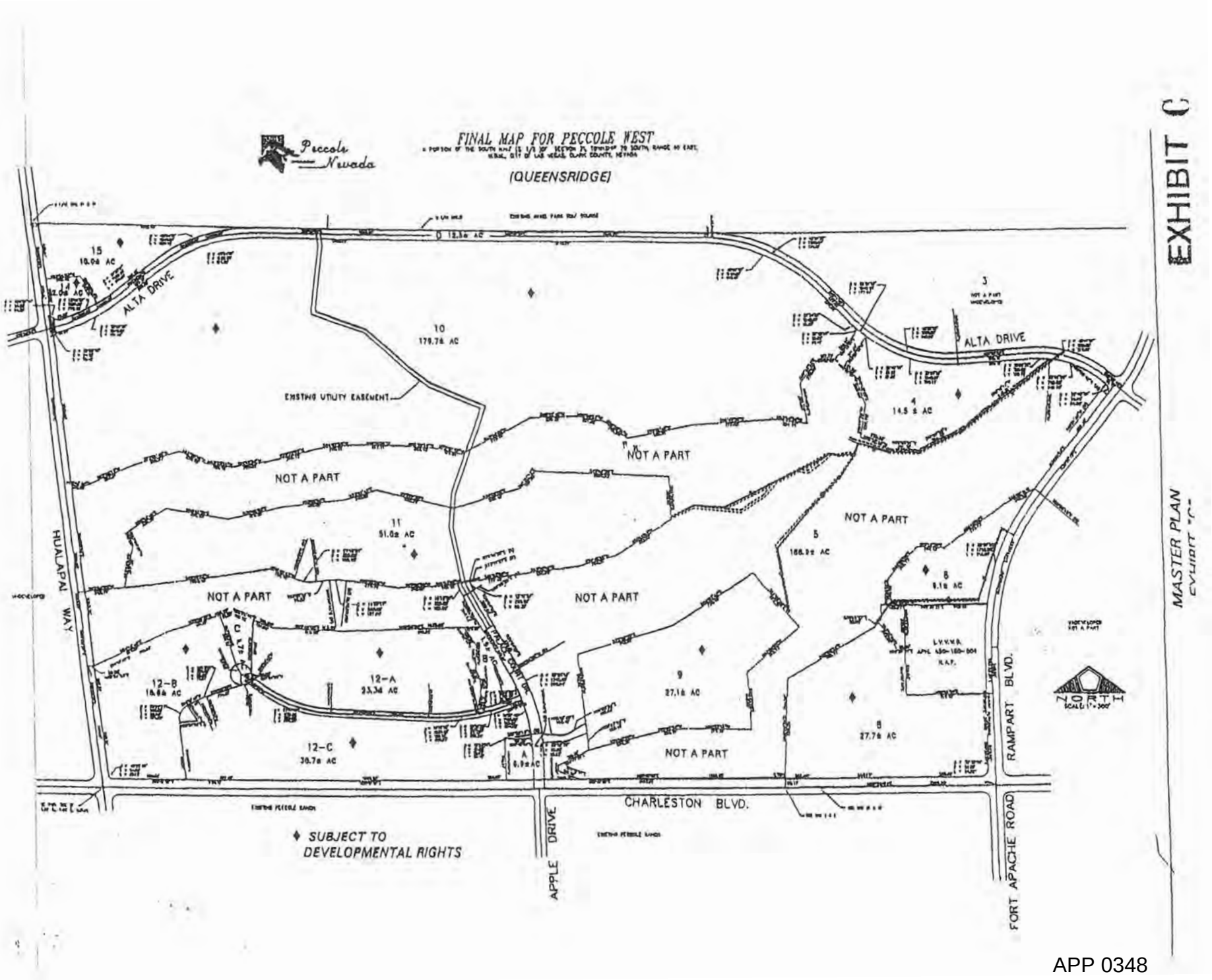
# EXHIBIT 2

WHEN RECORDED, MAIL TO:

Larry Miller
Peccole Nevada Corporation
851 South Rampart, Suite 220
Las Vegas, Nevada 89145

# AMENDED AND RESTATED MASTER DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS FOR QUEENSRIDGE

## TABLE OF CONTENTS


Peccole Nevada
FINAL MAP FOR PECCOLE WEST
(QUEENSRIDGE)
EXHIBIT C
MASTER PLAN
ALTA DRIVE
ALTA DRIVE
HUALAPAI WAY
RAMPART BLVD.
APPLE DRIVE
FORT APACHE ROAD
CHARLESTON BLVD.
EXISTING UTILITY EASEMENT
NOT A PART
NOT A PART
NOT A PART
NOT A PART
NOT A PART
NOT A PART
10
178.7± AC
11
51.0± AC
12-A
23.34 AC
12-B
12-C
30.7± AC
9
27.1± AC
5
166.9± AC
3
1
14.5± AC
8
8.1± AC
SUBJECT TO
DEVELOPMENTAL RIGHTS
NORTH

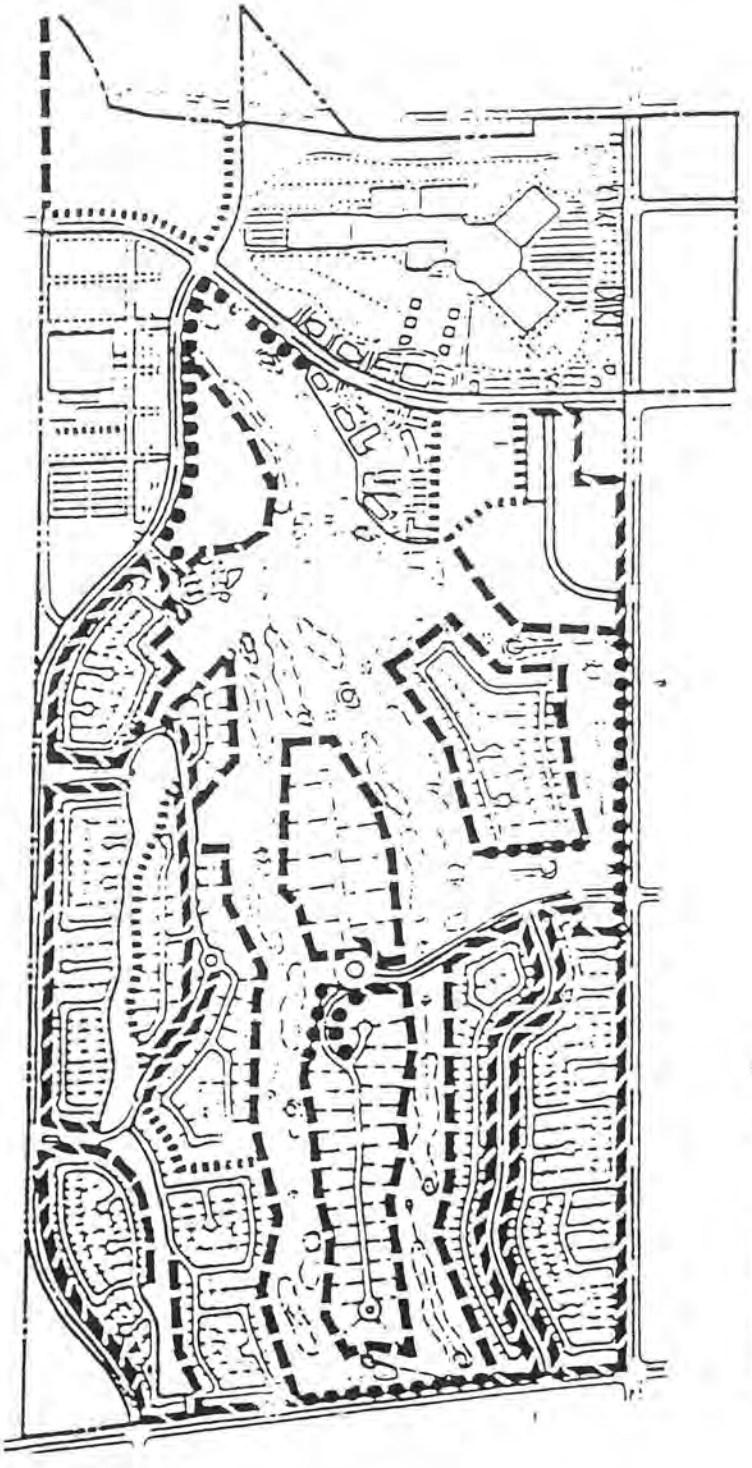
In the event the Association or the Owners are considering any action to terminate the legal status of the Property as a common interest community under this Master Declaration for reasons other than substantial destruction or condemnation, then at least sixty-seven percent (67%) of the Eligible Mortgage Holders and Eligible Insurers shall give their prior written approval.

11.10 **Non-Action As Approval**. In the event any Eligible Mortgage Holder or Eligible Insurer is notified in the manner provided in Section 13.5, below, and at the address designated by such Eligible Mortgage Holder or Eligible Insurer to the Association in the manner provided in such Section 13.5 of any proposed decision or action described in Section 11.9 hereof and fails to submit a written response within thirty (30) days after notice of such proposed decision or action, then such Eligible Mortgage Holder or Eligible Insurer shall be deemed to have given its approval of such decision or action and such implied approval shall be conclusive as to all persons relying thereon in good faith. A certificate signed by the Secretary of the Association as to any Eligible Mortgage Holder's or Eligible Insurer's failure to so respond shall be deemed to be sufficient evidence of such implied approval.

## ARTICLE XII
## SPECIAL DECLARANT'S RIGHTS

12.1 **Purpose and Duration**. Declarant hereby reserves, for the benefit of Declarant, all rights, easements and exemptions set forth in this Article XII ("Special Declarant's Rights"). The Property and the Annexable Property are part of a master-planned community designed to enhance the quality of life for the residents of the Queensridge community and the enhancement of property values within Queensridge. It is essential to the establishment of Queensridge that Declarant possess special rights and exemptions in addition to the other rights of Declarant set forth herein. The Special Declarant's Rights contained in this Article XII are personal to Declarant and any Successor Declarant, and may only be transferred by a written assignment duly Recorded from a Declarant to a Successor Declarant, or from a Successor Declarant to another Successor Declarant, provided, however that Declarant hereby reserves the right to delegate certain Special Declarant's Rights to any number of Builders pursuant to Recorded Development Covenants. Each Owner of a Unit acknowledges by acceptance of a deed or other conveyance therefor, whether or not it shall be so expressed in any such deed or other instrument of conveyance, that Declarant has a substantial interest to be protected in the Property and the Annexable Property, and that the Special Declarant's Rights are necessary to protect Declarant's interests therein. The Special Declarant's Rights set forth herein shall terminate upon the Declarant's Rights Termination Date (defined in Section 1.30 hereof).

12.2 **Right to Construct Development**. Nothing in this Master Declaration nor any action by the Association shall limit, and none of (i) the Owners (including Builders), (ii) the Association, or (iii) any Project Association shall do anything to interfere with, the right of Declarant to master-plan, improve, develop, zone, re-zone, subdivide, re-subdivide, sell, resell, rent or re-rent any portion of the Property, to annex the Annexable Property (subject only to the limitations set forth in Section 2.3.2, hereof) to deannex any portion of the



Site Plan is for conceptual purposes only, and is subject to change at the discretion of the Master Developer. Please refer to Engineering Base Maps for exact site layouts.

*LEGEND*

- MASTER DEVELOPER VIEW WALL
- MASTER DEVELOPER SOLID WALL
- BUILDER VIEW WALL
- BUILDER SOLID WALL

EXHIBIT 3

# EXHIBIT 3

Todd L. Bice, Esq., Bar No. 4534
tlb@pisanellibice.com
Dustun H. Holmes, Esq., Bar No. 12776
dhh@pisanellibice.com
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
Telephone: 702.214.2100
Facsimile: 702.214.2101

*Attorneys for Plaintiffs*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

v.

THE CITY OF LAS VEGAS; and SEVENTY ACRES, LLC, a Nevada Limited Liability Company,

Defendants.

Case No.: A-17-752344-J

Dept. No.: XXIV

**ORDER GRANTING PLAINTIFFS' PETITION FOR JUDICIAL REVIEW**



| | |
|---|---|
| ☐ Voluntary Dismissal | ☒ Summary Judgment |
| ☐ Involuntary Dismissal | ☐ Stipulated Judgment |
| ☐ Stipulated Dismissal | ☐ Default Judgment |
| ☐ Motion to Dismiss by Deft(s) | ☐ Judgment of Arbitration |

On January 11, 2018, Plaintiffs'[1] Petition for Judicial Review came before the Court for a hearing. Todd L. Bice, Esq. and Dustun H. Holmes, Esq. of the law firm PISANELLI BICE PLLC appeared on behalf of Plaintiffs, Christopher Kaempfer, Esq., James Smyth, Esq., Stephanie Allen, Esq appeared on behalf of Defendant Seventy Acres, LLC ("Seventy Acres"), and Philip T. Byrnes, Esq., with the LAS VEGAS CITY ATTORNEY'S OFFICE appeared on behalf of the Defendant City of Las Vegas ("City"). The Court, having reviewed Plaintiffs' Memorandum in Support of the Petition for Judicial Review, the City's Answering Brief, Seventy Acres' Opposition Brief, Plaintiffs' Reply Brief, the Record for Review, and considered the matter and being fully advised, and good cause appearing makes the following findings of fact and conclusions of law:

## FINDINGS OF FACT AND CONCLUSIONS OF LAW[2]

### A. FINDINGS OF FACT

1. Plaintiffs challenge the City's actions and the final decision entered on February 16, 2017 regarding the approval of Seventy Acres' applications GPA-62387 for a General Plan Amendment from parks/recreation/open space (PR-OS) to medium density (M), ZON-62392 for rezoning from residential planned development – 7 units per acre (R-PD7) to medium density residential (R-3), and SDR-62393 site development plan related to GPA-62387 and ZON-62392 (collectively the "Applications") on 17.49 acres at the southwest corner of Alta Drive and

[1] Jack B. Binion, Duncan R. and Irene Lee, individuals and trustees of the Lee Family Trust, Frank A. Schreck, Turner Investments, LTD, Rover P. and Carolyn G. Wagner, individuals and trustees of the Wagner Family Trust, Betty Englestad as trustee of the Betty Englestad Trust, Pyramid Lake Holdings, LLC, Jason and Shereen Awad as trustees of the Awad Asset Protection Trust, Thomas Love as trustee of the Zena Trust, Steve and Karen Thomas as trustees of the Steve and Karen Thomas Trust, Susan Sullivan as trustee of the Kenneth J. Sullivan Family Trust, and Dr. Gregory Bigler and Sally Bigler

[2] Any findings of fact which are more properly considered conclusions of law shall be treated as such, and any conclusions of law which are more properly considered findings of fact shall be treated as such.

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101
702.214.2100

Rampart Boulevard, more particularly described as Assessor's Parcel Number 138-32-301-005 (the "Property").[3]

2. The Property at issue in the Applications is a portion of land which was previously known as Badlands Golf Course and is part of the Peccole Ranch Master Plan.

3. In 1986, the William Peccole Family presented their initial Master Planned Development under the name Venetian Foothills to the City ("Peccole Ranch"). ROR002620-2639.

4. The original Master Plan contemplated two 18-hole golf courses, which would become known as Canyon Gate in Phase I of Peccole Ranch and Badlands in Phase II of Peccole Ranch. Both golf courses were designed to be in a major flood zone and were designated as flood drainage and open space. ROR002634. The City mandated these designations so as to address the natural flood problem and the open space necessary for master plan development. ROR002595—2604.

5. The William Peccole Family developed the area from W. Sahara north to W. Charleston Blvd. within the boundaries of Hualapai Way on the west and Durango Dr. on the east ("Phase I"). In 1989, the Peccole family submitted what was known as the Peccole Ranch Master Plan, which was principally focused on what was then commonly known as Phase I.

6. In 1990 the William Peccole Family presented their Phase II Master Plan under the name Peccole Ranch Master Plan Phase II (the "Phase II Master Plan") and it encompassed the land located from W Charleston Blvd. north to Alta Dr. west to Hualapai Way and east to Durango Dr. ("Phase II"). Queensridge was included as part of this plan and covered W.

[3] The Applications as originally submitted were for a General Plan Amendment from parks/recreation/open space (PR-OS) to high density residential (H), for rezoning from residential planned development – 7 units per acre (R-PD7) to high density residential (R-4). At the February 15, 2017 City Council meeting, Seventy Acres indicated that it was amending its Applications from 720 units on the Property to 435 units. The corresponding effect was an amendment to its General Plan Amendment from PR-OS to medium density (M) and rezoning from R-PD7 to medium density residential (R-3).

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101
702.214.2100

Charleston Blvd. north to Alta Dr., west to Hualapai Way and east to Rampart Blvd. ROR002641-2670.

7. Phase II of the Peccole Ranch Master Plan was approved by the City Council of the City of Las Vegas on April 4, 1990 in Case No. Z-17-90. ROR007612, ROR007702-7704. The Phase II Master Plan specifically defined the Badlands 18 hole Golf Course as flood drainage/golf course in addition to satisfying the required open space necessitated by the City for Master Planned Development. ROR002658-2660.

8. The Phase II golf course open space designation was for 211.6 acres and specifically was presented as zero net density and zero net units. (ROR002666). The William Peccole Family knew that residential development would not be feasible in the flood zone, but as a golf course could be used to enhance the value of the surrounding residential lots. As the Master Plan for Phase II submitted to the City outlines:

> A focal point of Peccole Ranch Phase Two is the 199.8 acre golf course and open space drainage way system which traverses the site along the natural wash system. All residential parcels within Phase Two, except one, have exposure to the golf course and open space areas . . . The close proximity to Angel Park along with the extensive golf course and open space network were determining factors in the decision not to integrate a public park in the proposed Plan."

ROR002658-2660.

9. The Phase II Master Plan amplifies that it is a planned development, incorporating a multitude of permitted land uses as well as special emphasis the open space and:

> Incorporates office, neighborhood commercial, a nursing home, and a mixed-use village center around a strong residential base in a cohesive manner. A destination resort-casino, commercial/office and commercial center have been proposed in the most northern portion of the project area. Special attention has been given to the compatibility of neighboring uses for smooth transitioning, circulation patterns, convenience and aesthetics. An extensive 253 acre golf course and linear open space system winding throughout the community provides a positive focal point while creating a mechanism to handle drainage flows.

ROR00264-2669.

10. As the Plan for Phase II outlined, there would be up to 2,807 single-family residential units on 401 acres, 1,440 multi-family units on 60 acres and open space/golf



PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101
702.214.2100

course/drainage on approximately 211 acres. ROR002666-2667. For the single-family units which would border the proposed golf course/open space, the zoning sought was for R-PD7, which equates to a maximum of seven (7) single-family units per acre on average. ROR002666-2667. Such a zoning approval for a planned development like Peccole Ranch Phase II and its proposed golf course/open space/drainage is common as confirmed by the City's own code at the time because R-PD zoning category was specifically designed to encourage and facilitate the extensive use of open space within a planned development, such as that being proposed by the Peccole Family. ROR02716-2717.

11. Both the Planning Commission and the City Council approved this 1990 Amendment for the Phase II Plan (the "Plan"). ROR007612, ROR007702-7704.

12. The City confirmed the Phase II Plan in subsequent amendments and re-adoption of its own General Plan, both in 1992 and again in 1999. ROR002735-2736.

13. On the maps of the City's General Plan, the land for the golf course/open space/drainage is expressly designated as PR-OS, meaning Parks/Recreation/Open Space. ROR002735-2736. There are no residential units permitted in an area designated as PR-OS.

14. The City's 2020 Master Plan specifically lists Peccole Ranch as a Master Development Plan in the Southwest Sector.

15. In early 2015, the land was acquired by a developer and as a representative of the developer, Yohan Lowie, would testify at the November 16, 2016 City Council meeting that before purchasing the property he had conversations with the City Council members from which he inferred that he would be able to secure approvals to redevelop the golf course/open space of this master planned community with housing units. ROR001327-1328; ROR007364-7365. The purchaser elected to take on the risk of acquiring the property and did not provide for typical contingencies, such as a condition of land use approvals prior to closing.

16. Instead, it was after acquiring the land that one of the developer's entities, Seventy Acres, filed the Applications with the City in November 2015.

17. When the Applications were initially submitted they were set to be heard in front of the City's Planning Commission on January 12, 2016. ROR017362-17377. The Staff Report

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101
702.214.2100

prepared in advance of this meeting states that the City's Planning Department had no recommendation at the time because the City's code required an application for a major modification of the Peccole Ranch Master Plan prior to the approval of the Applications. ROR017365. Specifically, the Staff Report states:

> 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 outline in Title 19.10.040. As this request has not been submitted, staff recommends that the [Applications] be held in abeyance has no recommendation on these items at the time. (*Id.*)

18. Indeed, a critical issue noted by the City pertaining to the Applications was that "[t]he proposed development requires a Major Modification of the Peccole Ranch Master Plan, specifically the Phase Two area as established by Z-0017-90. As such, staff is recommending that these items be held in abeyance." (*Id.*)

19. Following staff's recommendation, the Applications were held over to the March 8, 2016 Planning Commission meeting.

20. Again, the Staff Report prepared in advance of the meeting states, "[t]he 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 outline in Title 19.10.040." ROR017445-17538. As no Major Modification had been submitted the City's staff had no recommendation on the Applications at the time. *Id.*

21. As a result, the Applications were held over to the April 12, 2016 Planning Commission meeting.

22. Consistent with the City's requirements, the developer subsequently filed an application MOD-63600 for a Major Modification of the Peccole Ranch Master Plan to amend the number of allowable units, to change the land use designation of parcel, and to provide standards for redevelopment.

23. As the Staff Report prepared in advance of an April 12, 2016 Planning Commission meeting states, "[p]ursuant to 19.10.040, a request has been submitted for a modification to the Peccole Ranch Master Plan to authorize removal of the golf course, change



PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
702.214.2100

the designated land uses on those parcels to single family and multi-family residential and allow for additional residential units." ROR017550-17566.

24. The Staff Report goes on to state that "[i]t is the determination of the Department of Planning that any proposed development not in conformance with the approved Peccole Ranch Master Plan would be required to pursue a Major Modification of the Plan prior to or concurrently with any new entitlements. *Id.* Such an application (MOD-63600) was filed with the City of Las Vegas on 02/25/16 along with a Development Agreement (DIR-63602) for redevelopment of the golf course parcels." *Id.*

25. As the Staff Report indicates, "[a]n additional set of applications were submitted concurrently with the Major Modification that apply to the whole of the 250.92-acre golf course property." These applications were submitted by entities – 180 Land Co LLC and Fore Stars, Ltd-controlled and related to the developer submitting the Applications at issue here. *Id.*

26. As with the previous Staff Reports, the Staff emphasized that "[t]he proposed development requires a Major Modification of the Peccole Ranch Master Plan, specifically the Phase Two area as established by Z-0017-90." *Id.* However, the City's Staff was now recommending the Applications be held in abeyance as additional time was needed for "review of the Major Modification and related development agreement." *Id.*

27. Over the next several months the Applications were held in abeyance at the request of Seventy Acres and/or the City. Specifically, the Staff Reports prepared in advance of every meeting continuously noted that approval of the Applications was dependent upon an approval of a Major Modification of the Peccole Ranch Master Plan.

28. For example, the May 10, 2016 Staff Report provides "[t]he proposed development requires a Major Modification (MOD-6300) of the Peccole Ranch Master Plan, specifically the Phase Two area as established by Z-0017-90." ROR018033-18150. The Staff findings likewise provide the Applications "would result in the modification of the Peccole Ranch Master Plan. Without the approval of a Major Modification to said plan, no finding can be reached at this time." *Id.*

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101
702.214.2100

29. In the July 12, 2016 Staff Report, staff states "[t]he Peccole Ranch Master Plan must be modified to change the land use designations from Golf Course/Drainage to Multi-Family Residential and Single Family Residential prior to approval of the proposed" Applications. ROR018732-18749. ROR0198882-

30. Less than two months later, in an August 9, 2016 Staff Report, the City's Staff reiterated that "[t]he proposed development requires a Major Modification (MOD-6300) of the Peccole Ranch Master Plan, specifically the Phase Two area as established by Z-0017-90." ROR0198882-19895.

31. Ultimately, the Applications came before a special Planning Commission meeting on October 18, 2016. ROR000725-870. The Applications were heard along with other applications from the developer, including application for a Major Modification of the Peccole Ranch Master Plan. (MOD-63600).

32. The City's Planning Commission denied all other applications, including MOD-63600, except for the Applications at issue in this case by a five-to-two margin. ROR00865-870. In other words, the Planning Commission approved certain applications notwithstanding that it had expressly denied the Major Modification (MOD-63600) that the City's Staff recognized as a required prerequisite to any applications moving forward.

33. The Applications, along with all other applications from the developer, were then scheduled to be heard in front of the City Council on November 16, 2016.

34. Prior to the City Council Meeting the developer requested that the City permit it to withdraw without prejudice all other applications, including the Major Modification (MOD-63600), leaving the Applications at issue relating to the 720 multifamily residential buildings on 17.49 acres located on Alta/Rampart southwest corner. ROR001081-1135.

35. But again, the City's Staff Report prepared in advance of the City Council meeting confirmed that one of the conditions for approving these Applications was that there be a Major Modification of the Peccole Ranch Master Plan. ROR002421-2441. As the City's staff explains, the Applications "are dependent on action taken on the Major Modification and the related Development Agreement between the application and the City for the development of the golf



PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
702.214.2100

course property." ROR002425. This point is reiterated in the report that "[t]he proposed development requires a Major Modification (MOD-63600) of the Peccole Ranch Master Plan." (*Id.*)

36. Yet, as the City's Staff Report confirms, the developer had submitted no request for a Major Modification to the 1990 Peccole Ranch Master Development Plan Phase II to authorize modification for the 17.49 acres of golf course/drainage/open space land use to change the designated land uses, and increase in net units, density, and maximum units per acre. Rather, the application for a Major Modification was submitted on February 25, 2016, relating to the entirety of the Badlands Golf Course, along with an application for a development agreement, and the developer had now withdrawn any request for a major modification.

37. The City Council voted to hold the matter in abeyance. ROR001342.

38. Subsequently, the Applications came back before the City Council on February 15, 2017.

39. The Staff Report again provided that "[p]ursuant to Title 19.10.040, a request has been submitted for a Modification to the 1990 Peccole Ranch Master Plan to authorize removal of the golf course, change the designated land uses on those parcels to single-family and multi-family residential and allow for additional residential units." The City's Staff maintained that Applications "are dependent on action taken on the Major Modification," and that the "the proposed development requires a Major Modification (MOD-63600) of the Peccole Ranch Master Plan." ROR011240.

40. There is no question that the City's own Staff had long recognized that these Applications were dependent upon a Major Modification of the Peccole Ranch Master Plan.

41. At the February 15, 2017 City Council meeting, Seventy Acres announced that it was amending its Applications by reducing the units from 720 to 435 units on 17.49 acres located on Alta/Rampart southwest corner. ROR017237-17358. The corresponding effect was an amendment to its application for a general plan amendment PR-OS to medium density, application for rezoning from R-PD7 to medium density residential, and application for SDR-62393 site development plan subject to certain conditions. *Id.*

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101
702.214.2100

42. Despite no Major Modification as the City had long recognized as required, the City Council by a four-to-three vote proceeded anyway and approved the Applications.

43. On or about February 16, 2017, a Notice of Final Action was issued.

44. On March 10, 2017, Plaintiffs timely filed this Petition seeking judicial review of the City's decision.

**B. CONCLUSIONS OF LAW**

1. The City's decision to approve the Applications is reviewed by the district court for abuse of discretion. *Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 528, 96 P.3d 756, 760 (2004). "A decision that lacks support in the form of substantial evidence is arbitrary or capricious, and thus an abuse of discretion that warrants reversal." *Tighe v. Las Vegas Metro. Police Dep't*, 110 Nev. 632, 634, 877 P.2d 1032, 1034 (1994). Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion." *Id.* Yet, on issue of law, the district court conducts an independent review with no deference to the agency's determination. *Maxwell v. State Indus. Ins. Sys.*, 109 Nev. 327, 329, 849 P.2d 267, 269 (1993).

2. Although the City's interpretation of its land use laws is cloaked with a presumption of validity absent manifest abuse of discretion, questions of law, including Municipal Codes, are ultimately for the Court's determination. *See Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 247, 871 P.2d 320, 326 (1994); *City of N. Las Vegas v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 122 Nev. 1197, 1208, 147 P.3d 1109, 1116 (2006).

3. Here, while the City says that this Court should defer to its interpretation, the Court must note that what the City is now claiming as its interpretation of its own Code appears to have been developed purely as a litigation strategy. Before the homeowners filed this suit, the City and its Planning Director had consistently interpreted the Code as requiring a major modification as a precondition for any application to change the terms of the Peccole Ranch Master Plan. Indeed, it was not until oral argument on this Petition for Judicial Review that the City Attorneys' office suggested that the terms of LVMC 19.10.040(G) only applied to property that is technically zoned for "Planned Development" as opposed to property that is zoned R-PD which is "Residential-Planned Development." This position is completely at odds with the City's



PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101
702.214.2100

own longstanding interpretation of its own Code and that its own Director of Development had long determined that a major modification was required and that the terms of LVMC 19.10.040(G) applied here. Respectfully, interpretations that are developed by legal counsel, as part of a litigation strategy, are not entitled to any form of deference by the judiciary. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155, 132 S. Ct. 2156, 2166, 183 L. Ed. 2d 153 (2012)(no deference is provided when the agency's interpretation is nothing more than a "convenient litigating position."). What is most revealing is the City's interpretation of its own Code before it felt compelled to adopt a different interpretation as a defense strategy to this litigation.

4. The Court finds the City's pre-litigation interpretation and enforcement of its own Code – that a major modification to the Peccole Ranch Master Plan is required to proceed with these Applications – to be highly revealing and consistent with the Code's actual terms.

5. LVMC 19.10.040(G) is entitled "Modification of Master Development Plan and Development Standards." It provides, in relevant part, that:

> The development of property within the Planned Development District may proceed only in strict accordance with the approved Master Development Plan and Development Standards. Any request by or on behalf of the property owner, or any proposal by the City, to modify the approved Master Development Plan or Development Standards shall be filed with the Department. In accordance with Paragraphs (1) and (2) of this Subsection, the Director shall determine if the proposed modification is "minor" or "major," and the request or proposal shall be processed accordingly.

*See* LVMC 19.10.040(G).

6. Accordingly, under the Code, "[a]ny request by or on behalf of the property owner, or any proposal by the City, to modify the approved Master Development Plan or Development Standards shall be filed with the Department." LVMC 19.10.040(G). It is the City's Planning Department who "shall determine if the proposed modification is minor or major, and the request or proposal shall be processed accordingly." *Id.*

7. There is no dispute that the Peccole Ranch Master Plan is a Master Development Plan recognized by the City and listed in the City's 2020 Master Plan accordingly.

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101
702.214.2100

8. Likewise, there is no dispute that throughout the application process, the City's Planning Department continually emphasized that approval of the Applications was dependent upon approval of a major modification of the Peccole Ranch Master Plan. For example, the record contains the following representations from the City:

- "The site is part of the 1,569-acre Peccole Ranch Master Plan. Pursuant to Title 19.10.040, a request has been submitted for a Modification to the 1990 Peccole Ranch Master Plan to authorize removal of the golf course, change the designated land uses on those parcels to single family and multi-family residential and allow for additional residential units."
- "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 outline in Title 19.10.040..."
- "The current General Plan Amendment, Rezoning and Site Development Plan Review requests are dependent upon on action taken on the Major Modification..."
- "The proposed Development requires a Major Modification (MOD-63600) of the Peccole Ranch Master Plan...."
- "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..."
- "The Peccole Ranch Master Plan must be modified to change the land use designations from Golf Course/Drainage to Multi-Family prior to approval of the proposed General Plan Amendment..."
- "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."
- "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

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101
702.214.2100

the proposed for development, staff has required a modification to the conceptual plan adopted in 1989 and revised in 1990."

ROR000001-27; ROR002425-2428; ROR006480-6490; ROR017362-17377.

9. The City's failure to require or approve of a major modification, without getting into the question of substantial evidence, is legally fatal to the City's approval of the Applications because under the City's Code, as confirmed by the City's Planning Department, the City was required to first approve of a major modification of the Peccole Ranch Master Plan, which was never done. That, by itself, shows the City abused its discretion in approving the Applications.

10. Instead of following the law and the recommendations from the City's Planning Department, over the course of many months there was a gradual retreat from talking about a major modification and all of a sudden that discussion and the need for following Staff's recommendation just went out the window.

11. The City is not permitted to change the rules and follow something other than the law in place. The Staff made it clear that a major modification was mandatory. The record indicates that the City Council chose to just ignore and move past this requirement and did what the developer wanted, without justification for it, other than the developer's will that it be done.

12. In light of the foregoing, the Court finds that the City abused its discretion in approving the Applications. The Court interprets the City's Code, just as the City itself had long interpreted it, as requiring a major modification of the Peccole Ranch Master Plan. Since the City failed to approve of a major modification prior to the approval of these Applications the City abused its discretion and acted in contravention of the law.

Based upon the Findings and Facts and Conclusions of Law above:

**IT IS HEREBY ORDERED** that Plaintiffs' Petition for Judicial Review is **GRANTED**.

. . .

. . .

. . .

PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
702.214.2100

**IT IS FURTHER ORDERED** that the approval of the applications GPA-62387, ZON-62392, and SDR-62393 are hereby vacated, set aside, and shall be void, and judgment shall be entered against Defendant City of Las Vegas and Seventy Acres, LLC in favor of Plaintiffs accordingly.

DATED: March 1, 2015

THE HONORABLE JIM CROCKETT
EIGHTH JUDICIAL DISTRICT COURT

Submitted by:

PISANELLI BICE PLLC

By: _____
Todd L. Bice, Esq., Bar No. 4534
Dustun H. Holmes, Esq., Bar No. 12776
400 South 7th Street, Suite 300
Las Vegas, Nevada 89109

Attorneys for Plaintiffs

Approved as to Form and Content by:

KAEMPFER CROWELL

By: NOT SIGNED
Christopher L. Kaempfer, Esq., Bar No. 1625
Stephanie Allen, Esq., Bar No. 8486
1980 Festival Plaza Drive, Suite 650
Las Vegas, Nevada 89135

Attorneys for Seventy Acres, LLC

Approved as to Form and Content by:

By: NOT SIGNED
Philip R. Byrnes, Esq., Bar No. 166
495 South Main Street, Sixth Floor
Las Vegas, Nevada 89101

Attorneys for City of Las Vegas

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101
702.214.2100

ELECTRONICALLY SERVED
5/23/2018 4:58 PM

**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><br>vs.<br><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' SUPPLEMENT IN SUPPORT OF OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS (ANTI-SLAPP)** |

Plaintiffs, Fore Stars, LTD., 180 Land Company LLC, and Seventy Acres, LLC, (collectively "Land Owners" or "Plaintiffs"), by and through their undersigned counsel, James J. Jimmerson, Esq., of THE JIMMERSON LAW FIRM, P.C., hereby supplement the Opposition to the Special Motion to Dismiss as allowed by this Court at the time of hearing to respond to "blatant misrepresentation of the fact(s) or the law."

DATED this 23rd day of May, 2018.

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

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

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



Case Number: A-18-771224-C

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

1. **Statements To This Court By Defendants' Counsel During the Hearing and in the Defendants' Declarations Are False.** *See Exhibit 1, 2, and 4 to Plaintiffs' Supplement 1 & 2.*

Defendant's counsel repeatedly states that "**they're not making an assertion of fact**" mirroring the statement in Defendant Omerza's unsworn declaration. This argument, the primary basis of the motion, is false as Omerza made an affirmative assertion of fact about a "Master Plan" to Lowie. (*See* Omerza Video and transcript Ex 1 and 2).[1]

2. **The Document Circulated To Homeowners Was Not An Act Of Petitioning.**

The document disseminated to the Queensridge neighbors is not a 'petition' as it makes no request to a court or other official body.[2] It is an intentional misrepresentation by the conspirators to their neighbors to deceive them into blindly signing a false statement for the purpose of harming the Land Owners and their business interests.

3. **Defendants Were Not "Finding Witnesses," They Were Manufacturing False Testimony and/or Suborning Perjury**. *Tr. Page 9:24-25.*

Defendants' counsel's statement to the Court that "They're looking for witnesses, they're looking for witness statements" is false. By distributing a document that makes representations of personal reliance with the assertion by the distributor that its contents are true (as opposed to seeking signatures 'if this is true in your case'), the conduct is not witness seeking, but rather, it is the manufacturing of false testimony. Exhibit "3" calls the statement an "Affidavit" and Omerza affirmatively "told" Mr. Lowie the statement was true. In so doing, Defendants may also have committed mail fraud. *See* 18 USC § 1341.

4. **Truth And Falsity To A Court Is Not "Irrelevant."** *Tr. Page 47:6-8.*

At the hearing, Defendant's counsel stated to this Court "truth and falsity is irrelevant." That statement is false. NRS 41.637 says "good faith communication" protections only apply on issues "of public interest" not "private concern" (another factual issue) and **requires** the statements be "truthful or made without knowledge of falsehood." Defendants are required to

[1] **Lowie:** "*How did you know, though? How do you know?*" **Omerza:** "*Because I did the – I did a background check on the Q&R's; ok? The Queensridge – the Queensridge Rules and Regulations and it – it talks all about that Master Plan.*" **Lowie:** "*So, in the CC&R's it talks about a master plan*?" **Omerza**: "*Yes.*" **Lowie**: "*K. Are you sure about that?*" **Omerza:** "*I am. Yes.*" **The "Queensridge Master Plan" is not the same as the "Peccole Ranch Master Plan."**

[2] A petition is "a formal written request presented to a court or other official body." Black's Law Dictionary (10th ed. 2014).

establish by a preponderance of the evidence, that the claim is based upon a good faith (i.e. "truthful") communication. NRS 41.660. Self-serving declarations that contain false statements do not constitute a showing by a preponderance of the evidence that the statements were made in good faith. If an Anti-SLAPP Motion is akin to a motion for summary judgment, there would need to be no genuine issues of material fact. There are multiple genuine issues of material fact here regarding whether these were [1] "good faith communications," [2] made "truthfully or without knowledge of their falsehood," or [3] "in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." If that "first prong" burden has not been met by Defendants "by a preponderance of the evidence," the Motion must be denied outright and the case must be allowed to proceed. NRS 41.660(3)(a).

**5. Defendants' Motion Must Be Denied or Discovery Must Be Permitted.**

Plaintiffs are entitled to investigate the Defendants' actions, including why they chose not to address the return envelopes to the City of Las Vegas, but instead to either Omerza or Schreck. Those are actions, not "communications." Only if Defendants have met their burden "by a preponderance of the evidence," which they have not done, then the burden shifts to Plaintiffs to demonstrate only with prima facie evidence a probability of prevailing on the claim. NRS 41.660(3)(b). And only then the (prima facie) burden shifts to Plaintiffs, and if information is with "another party" the Court "**shall** allow limited discovery for the purpose of ascertaining such information." NRS 41.660(4). Here, the information necessary is with Defendants or third parties, regarding their actions, knowledge, motives, reliance, and understanding. *Id.* When NRS 41.660(4) was enacted, there was extensive debate, a matter of public record upon which this Court can rely, regarding balancing the first amendment right to free speech with another first amendment right, the right to petition, which is infringed if a plaintiff is prevented by this statute from filing suit to address harm to their business interests. Arguing to the Nevada Legislature in favor of this discovery provision was none other than Defendants' counsel, Mitch Langberg! The Court is requested to take judicial notice of the *Minutes of the Meeting of the Assembly Committee on Judiciary, Seventy-Eighth Session, April 24, 2015 regarding SB 444*, attached hereto as Exhibit 8.

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

DATED this 23rd day of May, 2018.

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

/s/ James J. Jimmerson, Esq.
JAMES J. JIMMERSON, ESQ.
Nevada Bar No. 000264
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

**CERTIFICATE OF SERVICE**

I hereby certify that on the 23rd day of May, 2018, I caused a true and correct copy of the foregoing **PLAINTIFFS' SUPPLEMENT IN SUPPORT OF OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS (ANTI-SLAPP)** 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

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

# Exhibit "8"

**EXCERPT OF LANGBERG TESTIMONY FROM MINUTES OF THE MEETING OF THE ASSEMBLY COMMITTEE ON JUDICIARY, SEVENTY-EIGHTH SESSION, APRIL 24, 2015 REGARDING SB 444, WHICH AMENDED NRS 41 IN 2015 (*Highlighted in the attached)***

"I support people exercising their First Amendment rights to review and to make truthfully factual statements in criticism of others. I also support the First Amendment for people to exercise their right to petition and to come to the courts to address grievances." (p. 13)

"...courts across the country have said that the right to discovery is fundamental to access to the courts and therefore fundamental to the First Amendment right to petition." (p. 14)

"The constitutional implications a constitutional balance. We cannot focus on only one constitutional right. The First Amendment not only protects the right of free speech, but it protects the right to petition. The Seventh Amendment gives the right to a jury trial in issues of law. The Nevada Constitution, Article 1, Section 9, recognizes the constitutional right of free speech for Nevada citizens and also says that those citizens must be responsible for the abuse of that right. To deprive a plaintiff with a legitimate defamation claim access to the courts is also to deprive him of his right to protect his reputation under the Nevada Constitution." (p. 14-15)

"Let us assume that somebody knowingly makes a false statement of fact. He will be able to implicate the anti-SLAPP statute. A plaintiff who is seeking to defend his reputation is going to have to prove, in less than seven days, by clear and convincing evidence, every single element of his claim including that the statement is defamatory, false, and in some cases, the defendant knew or had serious doubt about truth at the time the statement was made. While I am familiar with this and I swim in this water all the time, this concept is incredible to me. How can any plaintiff prove the subjective knowledge and intent of a defendant by clear and convincing evidence with no discovery within seven days, unless a defendant has somehow admitted it? The real question here is, as a matter of policy, do we allow people whose reputations have been maligned by significant false and defamatory statements to have a remedy to repair their reputation?" (p. 15)

"To prove a negative by clear and convincing evidence without any discovery and to prove what was in the defendant's mind is an onerous burden." "We have changed it in S.B. 444 (R1) to prima facie evidence, which is consistent with the California statute." (p. 21)

"We took the pendulum from the place where free speech rights were not protected at all, and it has moved to the place where it is too broad and the procedural mechanisms deprive plaintiffs of the right to petition." (p. 24)

"The current statute goes too far by not only protecting against such intimidation, but deprives people of the ability to defend their reputations." (p. 25)

# MINUTES OF THE MEETING
# OF THE
# ASSEMBLY COMMITTEE ON JUDICIARY

## Seventy-Eighth Session
## April 24, 2015

The Committee on Judiciary was called to order by Chairman Ira Hansen at 8 a.m. on Friday, April 24, 2015, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/App/NELIS/REL/78th2015. In addition, copies of the audio or video of the meeting may be purchased, for personal use only, through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

**COMMITTEE MEMBERS PRESENT:**

Assemblyman Ira Hansen, Chairman
Assemblyman Erven T. Nelson, Vice Chairman
Assemblyman Elliot T. Anderson
Assemblyman Nelson Araujo
Assemblywoman Olivia Diaz
Assemblywoman Michele Fiore
Assemblyman Brent A. Jones
Assemblyman James Ohrenschall
Assemblyman P.K. O'Neill
Assemblywoman Victoria Seaman
Assemblyman Tyrone Thompson
Assemblyman Glenn E. Trowbridge

**COMMITTEE MEMBERS ABSENT:**

Assemblyman David M. Gardner (excused)

**GUEST LEGISLATORS PRESENT:**

Senator Pete Goicoechea, Senate District No. 19
Senator Greg Brower, Senate District No. 15

Minutes ID: 930

**STAFF MEMBERS PRESENT:**

Diane Thornton, Committee Policy Analyst
Brad Wilkinson, Committee Counsel
Janet Jones, Committee Secretary
Jamie Tierney, Committee Assistant

**OTHERS PRESENT:**

Henry Krenka, President, Nevada Outfitters and Guides Association
Mitch Buzzetti, Private Citizen, Lamoille, Nevada
Walt Gardner, Private Citizen, Ruby Valley, Nevada
Danny Riddle, Private Citizen, Ruby Valley, Nevada
Alex Tanchek, representing Nevada Cattlemen's Association
Regan Comis, representing Nevada Judges of Limited Jurisdiction
Steve Yeager, representing Clark County Public Defender's Office
Sean B. Sullivan, representing Washoe County Public Defender's Office
Kristin Erickson, representing Nevada District Attorneys Association
Brett Kandt, Special Deputy Attorney General, Office of the Attorney General
Mitchell Langberg, Private Citizen, Los Angeles, California
Allen Lichtenstein, Private Citizen, Las Vegas, Nevada
John L. Smith, representing *Las Vegas Review-Journal*
Trevor Hayes, representing Nevada Press Association
Joseph Guild, representing Motion Picture Association of America
Melissa Patack, Vice President and Senior Counsel, Motion Picture Association of America
Marc Randazza, Private Citizen, Las Vegas, Nevada
Ron Green, Private Citizen, Las Vegas, Nevada
Theresa Haar, Private Citizen, Las Vegas, Nevada
Joe Johnson, representing Toiyabe Chapter, Sierra Club
Anne Macquarie, Private Citizen, Carson City, Nevada
John Mehaffey, Private Citizen, Las Vegas, Nevada
Heather Snedeker, Private Citizen, Las Vegas, Nevada
Homa Woodrum, Private Citizen, Las Vegas, Nevada
Ed Uehling, Private Citizen, Las Vegas, Nevada

**Chairman Hansen:**
[The roll was called and Committee protocol explained.] We have three bills on the docket for today. We are going to start with Senate Bill 129 (1st Reprint).

**Senate Bill 129 (1st Reprint): Limits civil liability of certain persons for injuries or death resulting from certain equine activities. (BDR 3-611)**

**Senator Pete Goicoechea, Senate District No. 19:**
Good morning, Chairman Hansen and members of the Committee. It is good to be back on the Assembly side where I served with several of you. I am here to bring you Senate Bill 129 (1st Reprint) this morning. This bill was very well vetted and amended on the Senate side. Senate Bill 129 (1st Reprint) is what is known as the equine liabilities bill. It provides some protection for those people who are engaged in equine activities. If this bill is passed, Nevada will become the forty-seventh state with an equine liabilities law. It is hard to believe that Maryland, New Hampshire, and Nevada are the states without an equine liabilities law. We are in the West, and horses are second nature to us. I do not know if the Chairman would like for me to walk through the bill. It is fairly basic and was very well vetted with the trial attorneys. We did reach a consensus in the Senate, and it was amended to the bill it is today.

We think there are protections in the bill for the equine owner. There were a couple of pieces we were concerned about. If you have a horse in your backyard and you have a secure fence, this helps with liability. In case the neighbor's child happened to crawl in that fence getting by your horse, it removes some of the liability. You have to know it is a nuisance in order for you to not be covered under this law.

The other piece of the bill clearly states that if you are at an equine event, have indulged in alcoholic beverages, and you are riding intoxicated at the event, this does not grant you immunity. If you are negligent, you are not immune under this bill. I think we have touched on all of the pieces of it to ensure that it is a good bill. However, if you are negligent, this will not provide you with immunity. Under normal conditions, it will grant you a level of immunity for owning, maintaining, or using an equine at an event.

**Assemblyman Nelson:**
I like your bill, Senator. As defined, equine does not include burros. At least I do not see it in the bill. I see horse, pony, mule, hinny, or donkey. By the way, I looked up hinny and now I know what that is.

**Senator Goicoechea:**
A hinny is a cross-bred animal. Technically a donkey is a burro.

**Assemblyman Trowbridge:**
At one time, I was responsible for a couple of arenas. One thing that always came up was the condition of the arena itself, such as the flooring. Does this eliminate the liability for a public agency that may be utilizing fairgrounds or a horse arena? One weekend it might be used for one type of activity whereas the next weekend it may be used for another. I am not a horseman, but people argue the preparation of the arena floor is a big deal.

**Senator Goicoechea:**
Yes, and you will see it in section 1, subsection 5(d) where it says, "'Inherent risk of an equine activity' means a danger or condition that is an essential part of an equine activity, including, without limitation:... (3) A hazardous surface or subsurface or other hazardous condition'." That is part if it; it is something you have in these conditions. There is sometimes an unpredictable reaction of equines to loud noises. These are all things that are part of the bill, and it does not automatically make you liable. This is probably the third time that we have brought this bill forward.

**Chairman Hansen:**
Is this similar to the bill that Assemblyman Munford has brought over the years?

**Senator Goicoechea:**
Assemblyman Munford and I carried the same bill last session.

**Assemblyman Ohrenschall:**
I have seen this bill before, and I am glad you have reached a consensus on it. I am a big believer in equal justice under the law. I do not want to be a "neigh-sayer," but under this bill, will quarter horses and Appaloosas receive the same level of immunity? I would not want inequality under the law.

**Senator Goicoechea:**
Yes, everyone is treated the same. Anytime you are putting a hinny, a donkey, and a horse on the same level, it is equal.

**Henry Krenka, President, Nevada Outfitters and Guides Association:**
I have been in business for over 30 years, and I am a fourth generation resident of Ruby Valley. I will provide you with a little bit of history on this bill. The Nevada Outfitters and Guides Association is asking the Legislature to enact an equine activity liability statute for Nevada. We first became aware of such laws through our insurance companies when we applied for liability insurance.

One of the questions we were always asked was if Nevada had an equine activity liability law. Through research, we learned what an equine activity liability law was and that Nevada is one of five states that does not have such a law.

The goal of this law is to further define the duties of the equine owner, sponsor, or professional to the public. The laws also provide the equine owner, sponsor, or professional some protection from possible civil liabilities arising from the inherent danger of an equine activity. The laws are not only useful in defending a lawsuit, but they may deter the filing of one as well.

The key feature of these laws is that an owner, sponsor, or professional is not liable for an injury that is the result of an inherent risk of equine activities. The potential risks are amended in S.B. 129 (R1) as are the areas where an equine owner, sponsor, or professional would be immune from civil liability under the statute. The Legislative Counsel Bureau (LCB) has taken the Montana law and has done an excellent job in drafting a bill catered to Nevada. Two-thirds of the states where such law exists require notice included in the contract or signs posted to the public. The master guides are required to have contracts with their clients, and we will advise our members to include notice of this law in those contracts even without the specific requirements, if the law is enacted.

**Mitch Buzzetti, Private Citizen, Lamoille, Nevada:**
I would like to thank the Committee for your time today. I think this is a really good bill. I am a horse owner and a guide who takes people into the mountains on horseback. This bill gives me some protection as a responsible horse owner. I would like to see this bill passed.

**Walt Gardner, Private Citizen, Ruby Valley, Nevada:**
I would like to thank you for hearing this bill. I am in support of the bill. As a rancher, I am nervous when people are around our property. Kids are unpredictable, just as horses are. I do not want to be liable for some kid who may run up behind my horse when I have no control over him. At the same time, it would become my responsibility if the horse were to injure him. I think this bill covers that.

**Danny Riddle, Private Citizen, Ruby Valley, Nevada:**
I lived in Las Vegas for 40 years. As a retired certified public accountant, I am spending my golden years subguiding and working as a backcountry horseman. I would hate to lose everything I own just because I have mules. I would like for you to pass this bill.

**Chairman Hansen:**
In front of us are four people who literally spend their lives in the backcountry of Nevada. They have more real-life, on-the-ground experience with wildlife than probably anybody you will meet in Nevada. When I have an opportunity to have four top-notch guides who spend all of these years in the backcountry, it is a unique thing. Being the Chairman of this Committee, I am going to take some liberties to ask you an off-topic question. What is going on with the deer herd?

**Walt Gardner:**
The deer herd in Area 10 has been decimated. It is the lowest that I have ever seen it, and success is the lowest it has ever been. We are killing fawns and bucks that are not mature. If it was any other kind of animal such as sheep, lions, or bears, and 30 percent of the animals being killed were not mature, we would close the season. What the Department of Wildlife's (NDOW) Fisheries and Game Divisions have has done is disgraceful.

**Chairman Hansen:**
What about the predator situation?

**Walt Gardner:**
The predators are rampant. They are running us over, and they are out of control.

**Danny Riddle:**
Ditto.

**Henry Krenka:**
I also would like to mention that I have taken a poll of the members in the state. There are 40 members of the association, and not one of them in the last five years has seen an increase in any deer herd in Nevada.

**Mitch Buzzetti:**
We have struggled with our mule deer herds, especially in northeastern Nevada. I sit on the local advisory board for NDOW in Elko County. It is tough when people come to our local meetings and ask to cut the tag issuance. However, on the state level, we have to deal with the Board of Wildlife Commissioners. Many times we do not get the same recommendation from the state that we got from the locals. It is sometimes hard to go back to those individuals to explain why. When we see the decrease in deer numbers or the increase in

predators, it can be kind of difficult. The hard part of it is that is goes from extremes. It goes from one extreme where we give an overabundance of tags to the other extreme where we have a tough time maintaining a low number of tags. It is frustrating sometimes.

**Assemblyman Jones:**
You mentioned what the NDOW Fisheries and Game Divisions are doing is not very good. You also mentioned deer tag and predators. Can you quickly frame what the issue is?

**Walt Gardner:**
In my mind, we have way too many predators, and we are not handling them. They are out of control. At the same time, we are issuing way too many tags for the number of deer we have. Between the two, it is decimating the herd.

**Chairman Hansen:**
Walt Gardner actually lives in Ruby Valley. The Ruby Range traditionally has had the highest number of big game species of any mountain range in Nevada. Typically, it is one-third of the herd for the entire state. When these guys who live there speak, it carries some weight with me.

**Assemblyman Ohrenschall:**
I served with my late colleague, Assemblyman Jerry Claborn. He was Chairman of the Assembly Committee on Natural Resources, Agriculture, and Mining. The mule deer herd issue was very important to him. When I served with him on that committee, the big predation issue was the mountain lions. I understand there is now an issue with wolves. I wonder if any of the witnesses could testify about how bad the wolf problem is getting, or is it primarily just the cougars?

**Walt Gardner:**
The lions are an issue. The wolves have been spotted, but they are not an issue yet. They will be a huge issue in the future. Coyotes are the biggest issue currently. In sheer numbers, they are taking more deer than the lions are.

**Assemblyman Trowbridge:**
I know where you stand on the issue. I would like to get back to the topic of the bill and my prior question about the preparation of the surface. Does this bill provide any protection for the owner or operator of the facility? This provides protection against people that get hurt. We used to have shows where people would bring in their $5 million show animal. They would always

threaten that if their horse came up lame because the surface was not prepared correctly, they would sue. Does this provide any protection from lawsuits by the owner of the animal?

**Henry Krenka:**
Yes, it does. In section 1, subsection 5(b)(1) it says "Shows, fairs, competitions, performances, parades, rodeos, cutting events, polo matches, steeplechases, endurance rides, trail rides or packing or hunting trips."

**Assemblyman Trowbridge:**
That seems to address the activities that they are involved in. What if someone's horse comes up lame because there were rocks in the area?

**Henry Krenka:**
Section 1, subsection 3(c) says, "Owns, leases, rents or is otherwise in lawful possession and control of the property or facility where the injury or death occurred if the injury or death was the result of a dangerous latent condition that was known or should have been known to the person."

**Assemblyman Trowbridge:**
It is a great bill that needs to be in place. Maybe next year we will have to include the animals. I am not going to make an issue of it.

**Chairman Hansen:**
Thank you for your testimony this morning, gentlemen. I apologize if I took you off topic a little bit. Is there anyone else who would like to testify in favor of S.B. 129 (R1)?

**Alex Tanchek, representing Nevada Cattlemen's Association:**
I am here on behalf of Neena Laxalt representing the Nevada Cattlemen's Association. The Nevada Cattlemen's Association wants to be on record as being in support of S.B. 129 (R1).

**Chairman Hansen:**
Is there anyone else who would like to testify in support? [There was no one.] Is there anyone in opposition or in the neutral position? Seeing no one, we will close the hearing on Senate Bill 129 (1st Reprint), and we will open up the hearing on Senate Bill 449.

**Senate Bill 449: Revises provisions governing the Advisory Commission on the Administration of Justice. (BDR 14-1140)**

**Senator Greg Brower, Senate District No. 15:**
It is a privilege to be back before the Assembly Committee on Judiciary. Senate Bill 449 is a very simple bill which addresses an advisory commission that I am sure many of you are familiar with. The Advisory Commission on the Administration of Justice deals with the administration of justice. This Commission meets every interim and studies a wide range of criminal justice issues. This bill would simply change the governing statute in two ways. First, it would add an additional member, specifically a municipal judge or justice of the peace appointed by the governing body of the Nevada Judges of Limited Jurisdiction. In my view as a veteran of the Commission, this has been a missing piece. I have spoken with a couple of justices of the peace who have expressed an interest in participating in the Commission, and the consensus seems that it would be a welcome addition. That is the first change.

The second change is found in section 2 of the bill. That change would simply require that during the next interim the Commission study the issue of the parole system of our state. This is an issue that has been kicking around for a while and is something that I have been involved with. I think it is time to take a very serious look at our parole system and whether it works, whether it should exist, et cetera. As many of the Committee members may know, many states and the federal system have done away with parole. They have gone to a determinant type of sentencing whereby defendants are sentenced to a number of months of probation, depending on the nature of the offense, and actually serve that number of months. In the federal system, they may get up to 10 percent good-time credit on the back end.

This bill would require the Commission to study the issue and look into whether or not such a change in Nevada might make sense and, ultimately, whether a bill should be introduced during the next legislative session.

**Assemblyman Ohrenschall:**
How do you see the role of the Advisory Commission on the Administration of Justice changing with the new appellate court and possibly using two Supreme Court justices? Do you think they will be able to take on all of the issues they have taken on in the past? Do you think they may have more time and more energy to look at other issues in terms of trying to improve our criminal justice system?

**Senator Brower:**
My answer would be yes. I am not sure if anyone on this Committee has served on the Commission. Wesley Duncan and Jason Frierson, former members of this Committee, served on the Commission. It is a very busy commission with a wide range of issues. It is incumbent upon the chair of the Commission to do his or her best to rein in the scope and focus on the issues that are most pressing in a given interim period. Your question is a great one. There is always the possibility that the Commission looks at too much. As a result, they may not have enough time to focus appropriately on anything. That is a challenge. The parole system, in light of some recent events and trends around the country, really deserves a careful study. That is what this bill proposes.

**Chairman Hansen:**
There are 17 members on the Commission. When you get commissions that are that large trying to get a consensus, it is often very difficult to give everyone an opportunity for discussion. Is 17 members too many? You have served on the Commission. Do you think that is an appropriate number, or should it be decreased?

**Senator Brower:**
That is another great question. I would say that the number works. It sounds like a large number, but in practice, it has not been a problem. We did look at considering the possibility of adding a judge from a court of unlimited jurisdiction. We looked the rest of the list with an eye toward eliminating one or more of the other positions. Quite frankly, they all make sense. We do not have two of anything except legislators, in which case, we have four. We have two members of the Senate and two members of the Assembly. I think we would all agree that is important because we want one member of each party from each body. When you go through the rest of the list, there is really no surplus there. We have considered this factor, and we think that 18 members can work.

**Chairman Hansen:**
Is there anyone else who would like to testify in favor of S.B. 449?

**Regan Comis, representing Nevada Judges of Limited Jurisdiction:**
We would just like to say on the record that we would appreciate the opportunity to serve on the Commission.

**Steve Yeager, representing Clark County Public Defender's Office:**
We are in support of S.B. 449. I look forward to offering my services and input in any way that would help the Commission in the interim.

**Sean B. Sullivan, representing Washoe County Public Defender's Office:**
I want to be on the record showing the Washoe County Public Defender's Office also supports S.B. 449.

**Kristin Erickson, representing Nevada District Attorneys Association:**
We are in support of any efforts to improve the criminal justice system. We support this bill.

**Brett Kandt, Special Deputy Attorney General, Office of the Attorney General:**
On behalf of Attorney General Adam Laxalt who also sits on the Commission, I want to express support for this bill.

**Chairman Hansen:**
Seeing no further testimony in support, is there anyone who would like to testify in opposition or in the neutral position? Seeing none, we will close the hearing on S.B. 449 and open up the hearing on Senate Bill 444 (1st Reprint).

Senate Bill 444 (1st Reprint): **Revises provisions governing civil actions. (BDR 3-1137)**

**Senator Greg Brower, Senate District No. 15:**
It is a pleasure to be here once again to present Senate Bill 444 (1st Reprint). While this is not my own personal bill per se, it was introduced by the Senate Committee on Judiciary, which I chair, and was unanimously approved by that committee. Therefore, I felt compelled to provide introductory remarks.

In addition, I am also here to try to bring some sanity to the debate about this bill. I certainly respect everyone's right to have and to express an opinion about the important matters we take up here in the Legislature, especially bills like this one which implicates the First Amendment. I have been a little surprised by the exaggerated rhetoric that I have seen about this bill. Please know that I, and each member of the Senate Judiciary Committee, care as much about the First Amendment as anyone else in this room. However, there must be a balance.

This is a reasonable bill that would bring Nevada back into the mainstream with respect to important legislation against strategic lawsuits against public participation (SLAPP). These are the facts. First, let us understand that only about half the states even have an anti-SLAPP statute on the books. Nevada has had an anti-SLAPP statute since 1997. I think it is important that we do. Until 2013, when our current statute was changed, it seemed to work pretty well. Our statute was in what we might call the mainstream of anti-SLAPP statutes from around the country. It was not as narrow as most

state's statutes in that it did not require the speech in question to be related to a citizen's right to petition only the government. Also, it was not as broad as a small minority of states whose statutes allow virtually any type of speech to be subject to special protections of the anti-SLAPP statute.

I would submit that ours was sort of in-between and was a very balanced approach. That balance was upset with the change to our statute in 2013. I have to admit to the Committee, what the change brought about in 2013 sort of snuck in under the radar. I think we all know that this happens from time to time. Although I, and a few others on the Senate side, had some discomfort with the 2013 bill, Senate Bill No. 286 of the 77th Session, the opposition was not very strong. None of us are experts in the area, and so the bill was passed without much discussion. Since that time, real experts in this area of the law have had a chance to review the 2013 law and have convinced me and all of the members of the Senate. Although some may now have some reservations, this bill passed 21 to 0 in the Senate.

We were all convinced that the 2013 legislation went a little too far for those who seek justice in the courts when someone has maligned their personal or business reputation by making false and defamatory statements. Nevada's current anti-SLAPP statute substantially infringes on their First Amendment rights. Senate Bill 444 (1st Reprint) is intended to ensure that citizens who speak out on important matters of public concern will have a swift and powerful mechanism to dispose of meritless lawsuits that seek to do nothing more than intimidate and quash such speech. At the same time, S.B. 444 (R1) is also intended that persons in businesses, large and small, who have suffered from false and defamatory accusations and who have evidence to support their defamation claim, will be afforded their constitutional right to a day in court where a jury of their peers can decide the facts. Let me be clear. Under S.B. 444 (R1), defendants accused of defamation will still have all of the constitutional rights and protections afforded by landmark U.S. Supreme Court precedent, like in the case of *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). Mr. Chairman, before I turn it over to a real expert in this area of the law to talk more about the bill and walk the Committee through the bill and answer the Committee's questions, let me share just one example of what I would submit has been the kind of overreaction that I mentioned earlier.

Yesterday, one of Nevada's newspapers of record published an editorial with a particularly egregious misrepresentation regarding this bill. It read, "SB444 would amend Nevada's anti-SLAPP law by erasing the provision that provides defendants with penalty compensation; by shifting the burden of proof to defendants and requiring them to show a plaintiff's claims are false...." This is simply not true. I would submit to you and the Committee to do your best to

keep your collective eye on the ball. Look at the bill, understand the bill, and know what the bill does and what the bill does not do. In cases where the anti-SLAPP statute would apply, under this bill, the plaintiff alleging defamation would be required to present admissible evidence that the challenged speech is false in order to proceed to trial with the case.

As I have acknowledged, I am not an expert in this very specialized area of the law. Therefore, I want to introduce Mr. Mitch Langberg, a real expert in this area. He has litigated dozens of defamation cases, maybe hundreds, on behalf of plaintiffs, defendants, individuals, small businesses, and large corporations. His clients have included a wide range of business clients including the *Las Vegas Sun*. He was one of the first to notice the flaws in the 2013 statute, and he played a central role in drafting this bill. He is here today to explain the bill in detail and answer questions. With that, I will rest for now. Mr. Chairman, I appreciate the Committee hearing the bill.

**Mitchell Langberg, Private Citizen, Los Angeles, California:**
I appreciate the time that you have spent trying to learn these issues. Although I know time is limited, I would like to digress. I am a full supporter of every single aspect of the First Amendment. Even my eight- and ten-year-old daughters search my name on the Internet every week to see what they find. They will see that the chief opponent of this bill has called me names that would get me thrown out of here, if repeated. Then I have to explain to my daughters why somebody would do such a thing. I support his right to do that. I support people exercising their First Amendment rights to review and to make truthfully factual statements in criticism of others. I also support the First Amendment for people to exercise their right to petition and to come to the courts to address grievances.

Before talking about the specifics of S.B. 444 (R1), I think the most important thing to do is to address some aspects of the opposition because they are simply not true. First and foremost, the opposition will tell you that to pass S.B. 444 (R1) will be to deprive Nevada citizens of their First Amendment rights; it will eviscerate the First Amendment in Nevada. I find this to be a curious allegation for several reasons. First, the opposition in 2013 said that the new statute that exists today was based substantially on the anti-SLAPP statutes in Washington and California. Many, if not most, of the changes we propose are also borrowed from Washington and California. If this statute is one that eviscerates the First Amendment, the statutes that the current statute was based on also does. As Senator Brower said, about half of the states provide no First Amendment rights because there is no SLAPP statute or at least one that does not protect speech.

When I say we borrow from Washington's and California's statutes, in the anti-SLAPP context, Washington only protects speeches or matters of public concern, and not public interest. This is something that was added by the now-opposition last term. Washington's statute allows a court to grant limited specified discovery in an appropriate case during the SLAPP process. Our current statute does not, and it was intentionally eliminated, even though courts across the country have said that the right to discovery is fundamental to access to the courts and therefore fundamental to the First Amendment right to petition. The California statute only requires a plaintiff to demonstrate prima facie evidence of their claim. That is what we do to ensure there is not a frivolous lawsuit that goes forward. However, the opposition last session demanded clear and convincing evidence. The California statute, which we borrowed from, says if a defendant successfully files an anti-SLAPP motion that is granted, he is entitled to attorney fees. There are no additional penalties. However, according to the opposition, our making that change today also deprives people of their First Amendment rights.

The opposition says that if S.B. 444 (R1) is passed, businesses, particularly those in the electronic media industry, will flee Nevada or not come to Nevada. They say clearly that the standards from Washington and California that have been adopted into S.B. 444 (R1) would be insufficient. However, in Washington, where the standard is public concern and not public interest, and where there is limited discovery, Amazon, which is one of the largest review websites on the Internet, has not left to come to Nevada. Avvo, which is a review website for lawyers, and Expedia remain in Washington. In California, where the standard is prima facie evidence and not clear and convincing evidence, Yelp, Google, Facebook, LinkedIn, Twitter, and Epinions all remain in California, subject to that onerous statute that violates the First Amendment. By the way, Ripoff Report is in Arizona, TripAdvisor in Maryland, and Consumer Reports in New York, and are all review sites themselves. Some consumer review sites are in states where the anti-SLAPP statute does not protect speech on public concern at all, but only petitioning activity. The sky is not falling; and by the way, New York, where they do not have a SLAPP statute that applies to speech at all, is the media, news, and publishing capitol of the world. When the media representatives say that this statute is somehow onerous, we should remember that this bill is one that protects and gives an early remedy for people who exercise their First Amendment right of free speech on matters of public concern to get rid of frivolous lawsuits.

The constitutional implications are important, but there has to be a constitutional balance. We cannot focus on only one constitutional right. The First Amendment not only protects the right of free speech, but it protects the right to petition. The Seventh Amendment gives the right to

a jury trial in issues of law. The *Nevada Constitution*, Article 1, Section 9, recognizes the constitutional right of free speech for Nevada citizens and also says that those citizens must be responsible for the abuse of that right. To deprive a plaintiff with a legitimate defamation claim access to the courts is also to deprive him of his right to protect his reputation under the *Nevada Constitution*.

Why does the current statute go too far? The current statute goes too far because the person is speaking on merely a matter of public interest, not necessarily a matter of public concern, which is one that has political, social, or other community interest at large. In Nevada currently, if there is a matter of public interest, it may be just mere curiosity. Let us assume that somebody knowingly makes a false statement of fact. He will be able to implicate the anti-SLAPP statute. A plaintiff who is seeking to defend his reputation is going to have to prove, in less than seven days, by clear and convincing evidence, every single element of his claim including that the statement is defamatory, false, and in some cases, the defendant knew or had serious doubt about truth at the time the statement was made. While I am familiar with this and I swim in this water all the time, this concept is incredible to me. How can any plaintiff prove the subjective knowledge and intent of a defendant by clear and convincing evidence with no discovery within seven days, unless a defendant has somehow admitted it?

The real question here is, as a matter of policy, do we allow people whose reputations have been maligned by significant false and defamatory statements to have a remedy to repair their reputation? We are not talking about big corporations alone. As a matter of fact, for big corporations, the anti-SLAPP statute is not nearly the disincentive as it is to individuals and small business owners. Because of the incredible penalties under the anti-SLAPP statute and the fact that the burdens are so high, they will have to consider whether or not to defend their reputation and are willing to risk losing their homes, retirement, and savings to do so. If they do not prove their case, they will be subject to attorney fees, penalties, and a separate suit.

A few years ago, I lectured at the local branch of the Association of Corporate Counsel. Despite what you might read, although I live in California, I am a member of the State Bar of Nevada. I have lived here for six years, and a third of my cases are in Nevada. I honestly wish I still lived here. I have a great passion for this subject. I was speaking to the Association of Corporate Counsel, and the lecture was on protecting reputations on the Internet badlands. Basically, what we now know is there is another side to these review sites, which are important and legitimate places to speak one's opinions. Disgruntled employees, former employees, and competitors are using these sites to put up

false reviews that are devastating. There is no way to get these websites to take down the false statements. It is protected under the Communications Decency Act. The fact of the matter is people rely on them. If somebody is looking for a doctor, they go to Yelp. Let us say there are three doctors on there, and for one doctor, there is a completely fabricated allegation of malpractice. The potential patient will not investigate if it is true. The potential patient will go on to one of the other doctors listed rather than take the risk. I am receiving calls from people every day throughout the country having to do with the attacks they deal with on the Internet. There needs to be a remedy.

People speak on legitimate matters of public concern, which includes reviewing goods and services under Nevada law. It is a matter of public concern. They should have their rights too. If a plaintiff is going to come and say that someone speaking on a matter of public concern has defamed him, that plaintiff should be put to the task of showing he has prima facie evidence that the statement was defamatory and false. Our bill does other things to revise this, but these are the main points of concerns. I am happy to answer any questions.

**Assemblyman Elliot T. Anderson:**
I want to thank you for coming by to help me get through this bill and understand it. It has been a real crash course in the First Amendment and the defamation law. I want to point out that we are academically lucky to have this discussion because it is an interesting area of law. I think we will hear from some very good lawyers, including yourself.

I want to get into the definition of public concern because I think it is a critical piece of this. For better or for worse, we have to talk about it. You sent me some documents yesterday. One of the issues you included was the definition from Washington trying to define what a public concern is. Washington defines it as social, political, et cetera. I am wondering if that definition would be a little bit more inclusive. If the defendant cannot show in their SLAPP motion that it is based on an issue of public concern, the plaintiff could be entitled to attorney fees. With those two elements working together, I think we have to be very careful. I am worried that if the definition is not inclusive enough, it could discourage these motions because people would be on the hook for attorney fees.

Looking at Washington's definition and looking at our definition in section 4, do you think that Washington's definition is a bit more inclusive? It appears to me like it is a little bit broader. Say we have a casino, and someone is concerned about labor policies and how employees are being treated. To me, the Washington definition would protect someone who is speaking out about

employment practices because it fits the social definition. However, under section 4 of the bill, it might be a more general interest definition and it might be excluded. Does that make sense?

**Mitchell Langberg:**
I understand the question, and it makes sense. I will disagree, however. It feels like this is moot court for a moment. The concept of what is a matter of public concern is well defined in cases both federally and at the state level. I pointed out the Washington case because it had a wonderful discussion about matters of public concern are different than matters of public interest. I think under S.B. 444 (R1), the labor dispute at a casino would clearly fall under a matter of public concern. Let me make a distinction that would apply under S.B. 444 (R1). No matter what we do, there is going to be debate in individual cases, and courts are going to have to decide. A labor dispute or a comment about an employer's employment practices in this community, particularly under *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 57 P.3d 82 (Nev. 2002), would be matters of public concern. Perhaps an employment dispute that is about specifics such as, my company says I was drinking on the job and I was not, is not one of general public concern, but rather one of a personal, private interest. Under Washington's definition and the one covered by S.B. 444 (R1), it might be different. I do not think it is difficult to parse out what standards there are. There may be some very marginal calls if the standard of public interest is the California standard. There is a great deal of debate about what public interest is. No one is ever going to agree at the line. There are federal cases, particularly out of the U.S. Court of Appeals for the Tenth and Second Circuits, which talk about public employees and when they have a First Amendment right to speak freely and when they do not. The standard is the government can impinge on First Amendment rights depending on whether someone is speaking on a matter of public concern versus private concern. We adopted that, and it is where the second part of the definition comes from.

**Chairman Hansen:**
Before we go on to further questions, I would like to make it clear that I am going to allow testimony until 9:30 a.m. from the proponents. I will then allow about 45 minutes for the opponents. I just wanted to make sure that you get the people up to testify that you want, Senator Brower. If there are other experts that you intend to have testify, I want to make sure that we can coordinate that correctly. Some of these questions are obviously going to be quite detailed with legalese.

**Senator Brower:**
Thank you for that reminder; we are cognizant of that. Your question is an excellent one, Assemblyman Anderson. When we started talking about drafting the bill, this issue probably generated the most concern and discussion on my part. With all things considered, this is what we came up with. We had an eye towards coming up with not the best bill for a potential plaintiff, not the best bill for a potential defendant, but the most balanced bill that would work for this type of litigation in the public interest for Nevadans. I think your question is right on target, but we think this is about as good as it gets.

**Assemblyman Elliot T. Anderson:**
Can you talk about the attorney fees in section 6? As I understand the bill, the defendant would be the moving party. They would move an anti-SLAPP motion and would have the burden to show that it is a matter of public concern. If they cannot, it would lead to attorney fees if there is no reasonable basis found. I am worried about that because the whole idea of a SLAPP motion is to protect litigants that do not have a ton of money. They may be going against someone with deep pockets. Do those folks with deep pockets need those attorney fees? Many times they have folks on staff. I worry that it is a fundamental shift from the idea of an anti-SLAPP motion to protect those smaller litigants. Can you comment on that?

**Mitchell Langberg:**
Your question is a good one, but it has a false premise. The belief is that defamation plaintiffs tend to be the big guys and defamation defendants tend to be the little guys. If you search Nevada law, you will see that some of our lead cases are public officials or mom-and-pop restaurants that are suing for defamation because they have been financially devastated by the things that have been said about them. If a defendant wins the anti-SLAPP motion, that defendant automatically gets his reasonable attorney fees with no showing of bad faith. If a plaintiff defeats the SLAPP motion, that plaintiff gets his attorney fees only on a showing of bad faith. Remember that plaintiff is also exercising his First Amendment right to petition. Part of my job is difficult because people say First Amendment and everybody thinks free speech. This is a free-speech-protecting statute beyond three-quarters of the states and equal to the rest. The point is that there has to be a remedy. The whole concept behind SLAPP-backs in the current statute recognizes that there are people who will file an anti-SLAPP motion to try to intimidate and financially pressure a plaintiff. There needs to be that remedy, which requires a showing of bad faith.

**Assemblyman Ohrenschall:**
This is a particular concern to me because back in 1997, Assembly Bill No. 485 of the 69th Legislative Session was sponsored by an assemblywoman from Clark County named Genie Ohrenschall. Therefore, she was the sponsor of this law in its original form. She is still very concerned about it, and I have a couple of questions to ask.

The bill shows text to be omitted from *Nevada Revised Statutes* (NRS) 41.670. That is the chapter that has the penalties for a frivolous or vexatious lawsuit for up to $10,000. Why is that not adequate if someone is trying to abuse the SLAPP process?

**Mitchell Langberg:**
The body of S.B. 444 (R1) provides that when a defendant prevails on an anti-SLAPP motion, he is going to be awarded all of his attorney fees. It is the same provision that exists in California, which was one of the alleged models for the bill last term. I appreciate the reference to the statute that preceded last term's statute. It was a good statute and was with the majority of anti-SLAPP statutes. This improves upon it because it expands the First Amendment rights that are covered by the anti-SLAPP statute from that old version.

**Assemblyman Ohrenschall:**
In section 5 of the bill, we are changing the time periods. Let us say that I am an irate consumer who stands outside of Bob's Used Cars, and I am holding a sign that says "Bob's Used Cars sells lemons. Never buy a car here." Let us say that I do that every day. On January 1, I get served with a defamation suit. Under the old law, I would have 60 days to get an attorney and figure out if a SLAPP suit is warranted with the attorney. However, under the new law, you are shortening it to 20 days.

**Mitchell Langberg:**
Under old law, you mean current law right?

**Assemblyman Ohrenschall:**
Under the proposed bill, we are truncating it to 20 days. There are a lot of unsophisticated people who do not have in-house counsel and do not know much about law. It might be that person standing outside of Bob's Used Cars who is worked up and scared who may spend 20 days just trying to figure out which attorney is competent to practice in this area. I wonder if that is wise.

**Mitchell Langberg:**
There is a missing premise there. Anti-SLAPP motion or not, for a defamation case, contract case, fraud case, or negligence case, that person needs to find an attorney within 20 days because in Nevada, an answer and/or motion to dismiss is due within 20 days.

**Assemblyman Ohrenschall:**
That is correct. However, finding an attorney and determining the merits of the case and whether a SLAPP motion is warranted are different things.

**Mitchell Langberg:**
I do agree with that, and the court is allowed to extend it. As a matter of routine, people stipulate to extend motions to dismiss. You will note that in the first instance, the only part of the anti-SLAPP motion is showing that the anti-SLAPP statute applies because it is a matter of speech on a public concern. All of the other issues about the merits of the case are deferred. Honestly, what is required in the first part of the anti-SLAPP motion is much less complicated and takes much less time than a motion to dismiss. With that said, somebody is going to have to find an attorney within 20 days or get an extension to answer or motion. They can do the same thing with regard to the single issue on the anti-SLAPP.

**Assemblyman Ohrenschall:**
Regarding the argument that seven days is not enough time, and going back to the hypothetical situation of me standing outside of Bob's Used Cars from Christmas to New Year's Day with the sign about Bob selling lemons. Let us say that June 1 of the following year, I get served with the lawsuit. There is a two-year statute of limitations from the time the alleged defamation occurred. Bob's Used Cars would have had two years to sue me. In this hypothetical, they waited six months before serving me with a defamation suit. Is it really too much to ask that Bob defend himself within seven days? He has had six months, and he could have had up to two years to file the defamation suit, feeling that he had been injured by my actions. Is it unreasonable to ask for a reply within seven days? Would 14 or 21 days be a reasonable answer?

**Mitchell Langberg:**
It would be unreasonable. Once again, you are assuming that the plaintiff has an attorney on retainer or an in-house counselor.

**Assemblyman Ohrenschall:**
I am not assuming he has an in-house counsel. He does have an attorney because he sued me. I am the alleged defamer, and he is the alleged victim.

**Mitchell Langberg:**
Eventually he has an attorney. The point is that at the time he realized he has been defamed, unless he is sophisticated, he may not recognize he has been defamed. Even if he does, he has to go and get an attorney. He may not know that until close to the statute of limitations is up. More realistically, in my experience, particularly with small businesses and individuals, the damage that is being incurred can be so substantial that there is no time to wait. As soon as the defamation is posted, as in a case where someone is intentionally making a false statement, you need to take action. You need to file your claim, get it out in the public record, and your sole goal is to be vindicated by a jury. You want to get there as quickly as you can. That seven days can be very onerous. What it sometimes takes is to make a showing of falsity by clear and convincing evidence. To prove a negative by clear and convincing evidence without any discovery and to prove what was in the defendant's mind is an onerous burden.

**Assemblyman Nelson:**
Thank you, Mr. Langberg, for presenting this bill. You touched upon one of my main concerns with the statute as it is currently written. The plaintiff would have to establish by clear and convincing evidence a probability of prevailing on the claim without any discovery at all. You changed it back to preponderance of the evidence. Can you comment why you did that for those who may not know the difference between those standards?

**Mitchell Langberg:**
We have changed it in S.B. 444 (R1) to prima facie evidence, which is consistent with the California statute. In the current statute, clear and convincing evidence is something short of beyond a reasonable doubt, which is what is used in criminal court. Some courts have said that clear and convincing evidence is evidence that would give you a 70 percent certainty of truth. Preponderance of the evidence is the standard by which most elements in most civil cases are governed. That just means 50 percent plus a feather to tip the scales. In a defamation case, at trial, the plaintiff only needs to show a preponderance of evidence on all of the elements except for a knowledge of falsity case, which needs to be shown by clear and convincing evidence at trial after discovery.

I appreciate the question about prima facie evidence because I believe that it has been misrepresented. Here is what prima facie evidence has been said to be, but is not. Prima facie evidence is not that you just have to allege the fact and the fact is taken as true until the defendant proves otherwise. That is not true. Prima facie evidence is admissible evidence under the rules of evidence that, if believed, would be sufficient to prove the cause of action. The question

becomes if the legislative intent that was expressed last term is to be accepted. This means that we are looking to find a mechanism to dispose of meritless lawsuits at the beginning of a case. The standard must be one that identifies meritless lawsuits but lets through lawsuits that have merit. The universal standard for that is prima facie evidence. It is the summary judgement standard. For the nonlawyers, a summary judgement is a mechanism by which a defendant or a plaintiff can say that there are no issues of fact that are material and in dispute so the court can decide the case. We do not need a jury because juries decide facts. To oppose a summary judgement motion, all you have to do is show that you have prima facie evidence. This is evidence, which if believed, without regard to the other side's evidence, would carry the day. You have to be allowed to get to trial. A standard at the outset of the case that is already placing an extra burden on the right to petition is understandable when talking about the free speech right on issues of public concern. A standard that is in excess of what everyone else has to prove to get to trial at the outset of the case is not only unreasonable, but it does something different. In meritorious cases, it would be dismissed. We can come up with hypothetical after hypothetical cases that we could agree have merit that would be dismissed under the current statute.

**Assemblyman Araujo:**
I am looking for more clarification, specifically in regard to section 12. The language changed from, "A cause of action against a person who engages in 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 is immune from any civil action for claims based upon the communication." It was changed pretty drastically, to "A cause of action against a person arising from a communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern is subject to a special motion to dismiss, and that motion must be granted by the court unless the plaintiff establishes that the claim is not meritless pursuant to section 8 of this act." I am looking for more clarification as to why we changed it so much. As a follow-up, I want to make sure we are not stripping away rights from folks who genuinely made an accusation in good faith without the intent to harm anyone.

**Mitchell Langberg:**
Thank you for the question, and thank you for your time yesterday. It is a good question. The truth is that the changes in this section of the bill are to provide clarification and give more rights to a defendant. States that have included the immunity language in their anti-SLAPP statutes did so because there was some question in federal court as to whether the federal court would apply states' anti-SLAPP statutes as substantive rights or procedural matters.

Somebody cleverly decided that using the term "immunity" would make it clear that it was a substantive right. It is confusing; it is not accurate to call it an immunity. It is unnecessary, particularly in the U.S. Court of Appeals for the Ninth Circuit, because the Ninth Circuit has made clear that anti-SLAPP statutes are substantive rights that relate to the substantive right of defamation and other claims that may fall under the anti-SLAPP statute. It is not accurate because an immunity is something that is not dependent on whether or not somebody can make a showing if they have enough evidence. That is not an immunity; it is a burden. Therefore, that is not accurate.

We took out the words "who engages in a good faith." We took that out for the protection of defendants because it is my opinion that if somebody is speaking on a matter of public concern, that should be enough to implicate the anti-SLAPP statute putting the plaintiff to the test of showing prima facie evidence. A defendant should not have to show any evidence about whether he believed what he said was true. We are talking about core First Amendment speech while talking about a public matter of public concern. A plaintiff coming into court should be able to show they have some evidence of falsity. We deleted that in order to recognize what I think is an important policy matter in favor of a defendant's First Amendment rights.

**Assemblywoman Diaz:**
I am still trying to reconcile what is in the bill and the points you are trying to make. Regarding section 6 and the awarding of attorney fees, you said the initial burden shift requires the showing of bad faith. As I read the section, it speaks to a reasonable basis and not bad faith. Bad faith is discussed in a different section, maybe section 8. Am I wrong?

**Mitchell Langberg:**
You are not off. In all candor, in practice, I believe that something someone does not have a reasonable basis for is something that is done in bad faith. How do you prove that something has been done in bad faith? By showing there was no reasonable basis. I cannot remember every single word, and I cannot tell you honestly whether it was an oversight or whether it was a matter of intent using different terms that are the corollaries of each other, but I think it has the same effect.

**Senator Brower:**
That is an excellent question, and I was thinking the same thing when I was reading the bill again during this hearing. I think Mr. Langberg is right. Perhaps further clarification or the use of different language might make the bill clearer.

However, with respect to other context, such as Rule 11 of the Federal Rules of Civil Procedure in the civil litigation context, or Hyde Amendment (1997) claims in the federal criminal context, generally bad faith is equated to without reasonable basis. It is an excellent point to raise.

**Assemblyman Jones:**
I have to confess, this bill is an example of third-year law school. There are so many issues that it could take a week of going back and forth. I am a lawyer myself, although not practicing in Nevada. It is unbelievable how many issues you have in this bill. They are all so technical and so specific that it could take years of analysis. My head is swimming looking at this bill, and I am a lawyer. I can imagine how the nonlawyers must feel. Rather than go further into the weeds, I would rather look at this from a practical application. What is it doing in the real world from a practical application? How is this affecting people? First of all, we had an anti-SLAPP law preventing people from making false statements against others. It lasted for almost 15 years until last session when we had a change. My first question is, what brought about the desire for that change? Why is there now a desire to change it back to shift the burden the other way?

**Mitchell Langberg:**
The old anti-SLAPP statute that Assemblyman Ohrenschall spoke of was a good idea at the time. Anti-SLAPP statutes were relatively new throughout the country. The original intent of the people who created the idea of the anti-SLAPP statutes was to protect people when they were exercising their First Amendment right to petition only. I can give you a long history, but we will get too far into the weeds. Nevada joined the small minority of states that started to adopt anti-SLAPP statutes. As time went on, anti-SLAPP statutes started to address not only speech that arises from the right to petition but also First Amendment rights that arise from the right of free speech in certain context. Today, that is still the minority of states. If you count the states with no anti-SLAPP statute at all and the ones that only have it for rights of petition, that leaves somewhere near less than a quarter of the states. Contrary to commentary, I feel strongly about the right to free speech. I think it was very important for Nevada to include the right of free speech in the anti-SLAPP statute. The concept of amending the statute last session was a good idea. We took the pendulum from the place where free speech rights were not protected at all, and it has moved to the place where it is too broad and the procedural mechanisms deprive plaintiffs of the right to petition.

During the Senate hearings for this bill, the chief proponent at the time, who is now the chief opponent, was asked directly whether the now-current law would make us like California. He said yes. While there are aspects of the current statute that are like California, we could not be further from California with our anti-SLAPP statute as far as timing, burdens, penalties, et cetera.

**Senator Brower:**
While this Committee is well aware of our general propensity of not wanting to be like California, I would respectfully submit that on this issue, California has done a pretty good job.

**Assemblyman Jones:**
I appreciate that, but you are again using a lot of legal terms and jargon that does not communicate on a practical level what the comparison is between the old law, the current law, and the proposed law. You talk about a pendulum, but in practical reality, is this now going to allow rich people to squash the smaller people because they will now have the ability to? Or, did it prevent the rich people before from doing anything because people could do anything they wanted to and they had no rights to protect themselves against slander, et cetera? In a practical way, can you talk in real world language and not all these legal terms?

**Mitchell Langberg:**
I owe you an apology because you were clear in that part of the question. When we got to the legislative history, I moved off to the stuff that is really technical and interesting to me. As a practical matter, what is the difference between all of these things? I would say we do not need to go back to the original statute because it did not give any extra protection to anyone exercising their First Amendment rights to free speech. Therefore, if somebody big or large wanted to intimidate a potential defendant, there was no remedy there. The idea of the new statute was, if you are going to sue for defamation, you better have some evidence before you start challenging somebody on a matter of public concern or public interest, depending on which statute you are talking about. Basically, if your case is frivolous, we are going to get rid of it early and you will pay attorney fees so you cannot be so intimidating. Both the current statute and S.B. 444 (R1) are designed with that theory. However, the current statute goes too far by not only protecting against such intimidation, but deprives people of the ability to defend their reputations. Focusing on the big, bad bullies is an interesting thing to do because the people who are most harmed by the statute are not the big companies. The people most harmed by the statute are the individuals and small businesses whose reputations are being attacked and have only one forum to get their reputations vindicated having to face potential costs and burdens to do that.

I am going to give you an example of a case where, under the current statute, it would be thrown out, and under S.B. 444 (R1), it would not be thrown out. We are not talking about bullies. The chief opposition will be familiar with this because he was the plaintiff's counsel in this case. There was this revenge porn website. This website was for people who break up with their girlfriends and can post naked pictures in retaliation. There was also an antibullying website. The antibullying website was publicly calling out the revenge porn website guy. The revenge guy started publicly accusing the antibullying guy of being a pedophile and possessing child pornography. As you can imagine, if you are standing up against bullying, the concept that you might be abusing and bullying children into doing inappropriate things is very harmful to your reputation. The attorney for the antibullying guy filed a defamation suit under the original statute. The revenge porn guy did not respond to the complaint, received a default judgement, and the righteous plaintiff was awarded $250,000.

Let us pretend that same case was filed today. We know that this was a case where the antibullying guy is being knowingly falsely accused of being a pedophile. Today, the revenge porn guy would file an anti-SLAPP motion and say this is a matter of public interest. The guy talks about antibullying and the subject matter of my speech was abuse of children. It could not be more of a public interest and could even be a matter of public concern under our statute. The revenge porn guy would come back and say he has a confidential source who said it was true. Whatever else he says, he lied about the guy and he is now going to lie about his evidence. He now has the anti-SLAPP statute in play. Within seven days, the antibullying guy would have to not only show that he is not a pedophile, but he has to prove by clear and convincing evidence that he is not a pedophile and that the revenge porn guy knew it was false or had serious doubt about the truth at the time. He has to show that by clear and convincing evidence, otherwise the case will be thrown out and he will owe attorney fees plus he can get sued for $10,000.

Under S.B. 444 (R1), there is a different result. The revenge porn guy is going to say this is a matter of public concern. He will file his anti-SLAPP suit. The antibullying guy is going to put in a declaration showing he is not a pedophile. He is going to get people that know him to testify. He will say there has never been a police complaint about him. He will do whatever else he needs to in order to show that he has at least prima facie evidence of falsity and that it was defamatory. The case will go on, and he will have to show actual malice. All of the constitutional protections that exist will remain in the case. Somebody will argue with me about whether this is how it is going to turn out. I do this a lot, and that is how I think the turnouts would be. We can come up with other examples.

**Chairman Hansen:**
We are going to move to opposition now, and you will have the opportunity for rebuttal. However, we have 16 people signed up in opposition. I am going to start in southern Nevada.

**Allen Lichtenstein, Private Citizen, Las Vegas, Nevada:**
I will keep my comments as brief as possible and try to stay out of the weeds. There were a few interesting points made while listening to the proponents. The first point that I always find interesting is that we are among a minority of states that do not have anti-SLAPP laws. It is true, but Nevada is usually ahead of the curve in terms of protecting rights. The fact that most states do not have this, I do not take as a criticism.

I did not hear about any actual case since 2013 that has created the kinds of horror stories that are being presented. We have had a law in effect that does not cause any problems. Some people do not like the language and think it is too far in one particular direction. No one has pointed to a case that egregious results occurred from. The reason for the 2013 amendments was to broaden the scope of the law, which everyone seems to agree was necessary. However, this is all hypothetical.

The one area that concerns me the most is the actual definition in section 4 about an issue of public concern. It describes an issue of public concern as "any topic that concerns not only the speaker and the speaker's audience, but the general public, and is not merely a subject of curiosity or general interest." Just from the plain language, what does that mean? It means everybody. It means stuff like war and peace, the crash of the economy, a volcano, and things that affect everybody. As legislators, you know that a lot of the important work you do which ultimately affects our community does not directly concern everybody in the community. Regulation of particular industries may have some effect in the long run.

Another concern is that matters of general interest are discarded from what is considered public interest. To me, that sounds awfully condescending to the public. I was sitting here trying to imagine each of you going to town hall meetings and telling your constituents the issues that interest them are not really of public concern. None of you would do that because you would have a negative reaction, and rightfully so. The real question for me is a matter of public interest.

What I also found interesting is the case of revenge porn. Does an instance of revenge porn affect the general public, and is it of general concern? I think when we are talking about "of public interest," we have to have a more

expansive definition there because things that start off seemingly of individual interest may end up being something of very important public interest as we dig deeper. If I saw a blog about problems with a homeowners' association (HOA) back in 2006, it does not affect me because I do not live in an HOA. It does not affect a lot of people. Obviously, it had a great deal of effect on Nevada. I can say the same thing about human trafficking or prime mortgages. My biggest concern is to define things that do not affect the general public directly as being equivalent to a simple person-to-person employment type of argument, such as getting caught drinking on the job. There is a lot of law about that in the area of public employment. The law is pretty clear that it takes a pretty expansive view of what is in the public interest and only limits those particular things that truly are purely personal.

Regarding the case of *Pegasus v. Reno Newspapers Inc.*, about restaurant reviews, if you do not go to that particular restaurant, it is really not going to be of a public interest under this definition. Under the normal definitions of the courts, particularly the Nevada Supreme Court as in this case, it would be defined as a matter of public interest. What we are finding in section 4 is a rather severe truncation of what would be considered a public interest. It is to the extent that this section is even saying what interests the public may not be of public concern because the public does not know what is important to them. That is very troubling.

**Chairman Hansen:**
Are you representing the American Civil Liberties Union (ACLU) today?

**Allen Lichtenstein:**
I am not representing the ACLU. I am here as a private attorney who has represented many of these cases.

**Chairman Hansen:**
Vanessa Spinazola sent in a letter in opposition to the bill on behalf of the ACLU of Nevada (Exhibit C). I just wanted to double-check that with you.

**John L. Smith, representing *Las Vegas Review-Journal*:**
Thank you for letting me testify today. I come before you as a long-time Nevada journalist and author to voice strong opposition to S.B. 444 (R1). It would make critical and deleterious changes to Nevada's anti-SLAPP law. Legal experts will speak to the damage the changes will do to a law that helps provide an essential protection of the free speech rights for all Nevadans, whether you are speaking in a public place, blogging on the Internet, writing a column, or writing an investigative story for a newspaper.

The legislation arises out of the desire of Wynn Resorts and Steve Wynn, its Chairman, to change a law specifically designed to change Nevadans from practitioners of SLAPP litigation and lawsuits meant to silence criticism. Wynn certainly qualifies on that account. Last year, Wynn sued stock trader and analyst James Chanos after a public talk during an investigative journalism conference where Mr. Chanos warned of an ongoing upheaval in the immensely lucrative Macau casino market that has been so good to Wynn Resorts. Mr. Chanos warned that a crackdown on corruption by the Chinese government would likely have a powerful negative impact on casino stocks, and he was right. Remember, Mr. Chanos was appearing at an investigative journalism conference. Associated with the investigative reporting program at the University of California, Berkeley, the Logan Symposium is attended by hundreds of reporters and hosted by legendary investigative journalist Lowell Bergman of *60 Minutes*. Mr. Bergman's investigative unit last year was busy putting the final touches on its lengthy investigation of Macau's casino industry for a *FRONTLINE* documentary that was to air on the Public Broadcasting Service (PBS). Was the lawsuit intended not only to silence Mr. Chanos, but to chill out that investigative documentary? The very reasonable conclusion is, yes it was. Fortunately, a California court twice dismissed Wynn's lawsuit. By the way, you did not miss the *FRONTLINE* documentary; it never aired.

I know from firsthand experience that Steve Wynn is not shy about using the courts as his personal whipping post. Following the 1995 publication of my investigative biography of Steve Wynn called *Running Scared*, he sued me in a court of comfort and convenience in Clark County. He did not sue over the book, which was factual and gave a balanced look at his meteoric rise in the casino business. Instead he sued over a fragment of a sentence printed in a publisher's catalog advertising the book's publication. It was not the book, not even a full sentence in the catalog, but a factual fragment advertising that *Running Scared* would tell why a Scotland Yard report called Wynn an associate of organized crime. The report said that, and the chapter in the book accurately and fairly reflected the report. During the litigation, Wynn showed his vindictiveness by explaining to a reporter that he would "get Smith's house and bankrupt the publisher." Let me tell you, I was worried sick over the litigation even if I could not quite imagine Steve Wynn moving into my three-bedroom, 1300-square-foot starter home. I was eventually dismissed from the lawsuit, but the publisher was forced to pay to defend the remainder of the litigation. When Wynn won what I consider a kangaroo court decision, the publisher was forced to endure bankruptcy reorganization. The lawsuit was thrown out on appeal by the Nevada Supreme Court, so technically, Wynn did not prevail in court. That was not his purpose, however. His purpose was to punish anyone who sought to take a close look at his personal and business history.

Wynn never collected a dime and lost the lawsuit. I will say one thing for him, he managed to inflict a lot of pain on myself and my family, and on my publisher and his family. I am proud to say that *Running Scared* is still in publication after 20 years, but that status did not come without a hell of a fight.

Wynn is not the only powerful Nevadan to claim offense at critical coverage and use the courts to punish a critic. He is far from it. Around these parts, SLAPP litigation is the sport of billionaires. Nevada has one of the nation's best anti-Slapp laws, and anything less is an invitation to bullies to attempt to drive working reporters, bloggers, and anyone else with a critical comment to ruination. In other words, all Nevadans, not just journalists, need this law to remain strong. We have an opportunity to correct a mistake made recently by the state Senate. You can do your fellow Nevadans a tremendous service by stopping misguided S.B. 444 (R1) in its tracks.

**Assemblyman Elliot T. Anderson:**
Mr. Lichtenstein, I know you are no longer associated with the ACLU, but I do want to draw on your experience. Can you tell me what you think limited discovery means? That is something that I have some great concern about because discovery can really ratchet up the cost of litigation. It can be used by litigants to abuse other litigants. There are some firms that have entire floors that do discovery requests. I am really concerned about that provision because I can see it being used to ratchet up those costs and bankrupt them even if they technically win the case. What do you think limited discovery means?

**Allen Lichtenstein:**
As a sole practitioner, I see this all of the time. Large firms will try to paper you to death in order to win the case based on cost. As for limited discovery, I would say the key element there is a question of relevance. It should not be a fishing expedition but to determine things that can be shown to have particular relevance to find particular facts to reach that particular kind of conclusion. We can go off on a particular tangent on how courts tend not to do that, but the idea of limited discovery is important in any kind of preliminary type of procedure such as an anti-SLAPP procedure. I do not think it is necessary to have that type of open-ended discovery, but judges have the ability to limit the discovery to things that are relevant for the particular purpose. In this case, it would be relevant to the anti-SLAPP statute.

**Assemblyman Ohrenschall:**
Mr. Smith, it was just about a month and an half ago when we had a bill in this Committee having to do with lay justices of the peace. I was informing

fellow Committee members about an excellent justice of the peace that I met as a kid while tagging along with my mother in Clark County. I am talking about Judge Jan Smith and what a great job she did.

My question is for Mr. Lichtenstein. The proposed bill omits text from NRS Chapter 41.670. My question is, are you aware of any hesitancy among our state's judges to impose the fines listed in subsections 2 and 3 of NRS Chapter 41.670 if there is a finding that a party has filed an anti-SLAPP motion with no merit solely in the effort to vex the other party?

**Allen Lichtenstein:**
I think the answer is going to depend on the judge. I also think that a statement by the Legislature of a very clear intention that these provisions are there to be taken seriously and not just as pro forma would go a long way to avoid those particular problems. Obviously, as we all know, judges have a certain level of independence. However, they also seem to be quite adherent to what they see as legislative intent. Clear legislative intent would be very helpful.

**Assemblywoman Diaz:**
This question is for Mr. Smith. On a national level, we are seeing that First Amendment rights are being annihilated. People in power basically get to dictate what gets printed in the press. As a reporter, if this law were to move forward, what do you think would be the ripple effect to you and fellow journalists? Would you still be willing to report things that you know can put you in a bad situation, or are you just going to say what you think people are going to want to hear?

**John Smith:**
A lot of it depends on the institution. My newspaper stands up for not only what I write but also for the staff in general. The institution is always important. There is a case currently pending in which a *Wall Street Journal* reporter has been sued individually by Sheldon Adelson. It was the reporter that was sued and not the newspaper. Folks who follow anti-SLAPP issues are certainly keeping an eye on that. There are challenges everywhere. I think the more you are out on your own as a freelancer, the tougher the job is. There is an expression that we use in our craft called the chilling effect. What happens quite often is even when lawsuits are not filed, when laws change to favor powerful potential plaintiffs, it seems to have a chilling effect on the ability of folks to be aggressive news gatherers, critics, and commentators. Those protections are essential, in my opinion.

**Chairman Hansen:**
Can I relate to that? The chilling effect of an opinion columnist running for office, Mr. Smith, I think you can appreciate where I am coming from with that. Thank you both for your testimony this morning.

**Trevor Hayes, representing Nevada Press Association:**
As I testified in a committee yesterday on a different bill, the current state of the press and the business model has changed. Mr. Smith talked about how the *Las Vegas Review-Journal* has stood up for him and its reporters throughout history. I believe that some of the other Nevada papers have done so too. In a time where newspapers are struggling to survive, to ask a newspaper to back one of its reporters to the tune of hundreds of thousands of dollars of litigation costs is a tough thing to ask them to do. You are going to have publishers and editors sitting and talking about the financial cost of writing the story, instead of asking if it is important for the readers, for legislators, for citizens to know. Is it going to be a good story, providing good reporting? It is honest and nondefamatory? Instead, the question is going to turn to how much money is it going to cost us to defend ourselves in a defamation case. Having strong anti-SLAPP laws makes that question a whole lot easier to answer.

Mr. Smith's book was written in 1995. Assemblywoman Genie Ohrenschall drafted the first anti-SLAPP law in 1997. He and his publisher could have gone through a lot less hassle on a case they eventually won had there been a strong anti-SLAPP law in place.

I want to apologize to Senator Brower because we missed this bill when it was being heard on the other side. This is a bill that is one of those solutions searching for a problem. We have heard of no case filed because of this statute that has been in place for two years. If you have read anything in the last week on this bill, everyone from bloggers to libertarian groups like *Reason* magazine to general interest newspapers in every corner of our state and others have stood up to say the anti-SLAPP law we have in place currently is a great law that protects free speech.

Mr. Langberg pointed out certain things in S.B. 444 (R1) that exist in other states. He did not point out a state that has all of those things. He said it is not a problem to have the prima facie standard that California has. It is not a problem to have the public concern that Washington has. It is not a problem to have the lack of penalties that this or other states have. Basically, there are bad parts to these other states' laws and no state, until Nevada, has tried to put

together all these bad things into one bill. Let us not do that. We have the best anti-SLAPP law in the country, or close to it. We have taken the good parts from other states. Let us not knock that down.

One of my biggest concerns is shortening the time from 60 days to 20 days for someone to file. If you are hit with a defamation suit, whether you are a sophisticated or unsophisticated defendant, it takes some time to get your bearings about you. You do not see this coming most of the time, even if you are a newspaper reporter and you think you have done a great job. All of a sudden you are hit with this. It takes time to go out and find the right attorney. If you are a less well-heeled defendant, it may take your meeting with several attorneys because you do not have the money to pay and are looking for someone to do it pro bono or on a reduced basis. Giving someone 60 days is not going have a negative impact on the plaintiffs in this case.

Regarding changing the standard to prima facie evidence, prima facie evidence says that if I have admissible evidence, it has to be accepted as truth. The standard is, if I have admissible evidence, the court has to look at it as if it were true. The other side now has to have the burden to prove that it is false. Therefore, it is shifting the burden unlike what was testified to earlier. This will not stop good defamation cases from going forward. If someone makes a defamatory statement, those cases will go forward. What this does is stop someone from having a vexatious, penalizing, chilling effect, defamation suit against the rightful actor who spoke properly and spent three years going bankrupt to defend his right to speak freely. So much of what I wanted to say I believe was covered by Mr. Lichtenstein and Mr. Smith. The Nevada Press Association and I believe the law as it stands is fine the way it is.

**Joseph Gulld, representing Motion Picture Association of America:**
I would like to apologize to the Chairman of the Senate Judiciary Committee. I have talked to him in private about this. Frankly, we missed this bill as well when it was on the Senate side. We do have concerns and believe it is an infringement on First Amendment rights. As most of you know, I am a Nevada lawyer for more than 30 years. I am licensed to practice in California as well. Frankly, I know a whole lot more about equine liability than I do about the First Amendment and SLAPP lawsuits. In that regard, I will introduce my colleague.

**Melissa Patack, Vice President and Senior Counsel, Motion Picture Association of America:**
I appreciate the opportunity to testify regarding S.B. 444 (R1). The Motion Picture Association of America is the trade association for the major producers and distributors of filmed entertainment content across all platforms

from theatrical to motion pictures to programming for cable, over-the-air broadcast, satellite television, and the Internet. Our member companies include The Walt Disney Company, Fox Filmed Entertainment, NBC Universal, Paramount Pictures, Sony Pictures Entertainment, and Warner Brothers. CBS is an associate member. I am here to explain why we oppose S.B. 444 (R1) and to offer our suggestions for amending the bill.

Anti-SLAPP laws exist in some form in 29 states. They are very important to our member companies as entertainment companies are frequently sued on a variety of theories from someone who believes they were not portrayed accurately in a motion picture to a news outlet over the reporting of a news story. These types of lawsuits implicate the First Amendment and are often filed because a plaintiff disagrees with what one of our companies or its affiliates has said or disseminated. The ability of the defendant to bring an anti-SLAPP motion can resolve the case efficiently and economically—preserving the defendant's First Amendment rights.

The bill pending before this Committee moves Nevada's anti-SLAPP law in the wrong direction. It would make the anti-SLAPP motion a complex two-part process. I think that has not really been discussed. That is one of the major changes. It bifurcates the process. The first proceeding would be whether the matter is of public concern. If the moving party establishes that, it goes on to the so-called merit. It is really in two parts and really increases the complexity of a SLAPP motion rather than what the SLAPP motion is designed to do, which is to expedite a resolution of the case.

The bill sets an unrealistic time barrier for the filing of an anti-SLAPP motion. Many defendants will not have the ability to comply with that short 20-day requirement. The bill also narrows the issues that can be subject to an anti-SLAPP motion from an issue of public interest to an issue of public concern. We also believe that narrows the focus. When a plaintiff files a lawsuit that implicates the First Amendment rights of a defendant, the plaintiff should have sufficient information that supports his or her claim. When the defendant files the anti-SLAPP motion, the plaintiff should have to come forward with evidence that is sufficient to support every element of his or her claim. It is important that the court have enough information to determine that the plaintiff can establish a legitimate claim.

The bill also took us by surprise since the Legislature amended Nevada's anti-SLAPP law in 2013. We are not aware of any court decisions that could be motivating this effort to roll back a very good law. To the extent the Legislature has the desire to revisit the law, we respectfully request you consider turning to

your neighbor to the west. The California anti-SLAPP law enacted in 1992 strikes a good balance. It allows the defendant the opportunity to seek dismissal of a case that seeks to stifle the defendant's First Amendment rights, and it does not dissuade plaintiffs from bringing claims in the first instance. I am happy to talk further about California's law. I also have some examples of cases that have been filed against our companies and how the SLAPP motion has worked to resolve these cases expeditiously. Thank you, and I appreciate your consideration.

**Marc Randazza, Private Citizen, Las Vegas, Nevada:**
I am here in opposition of S.B. 444 (R1). I practice defamation law extensively. I am licensed in five states. I am actually sitting for the Ontario, Canada bar exam this summer. I have worked on defamation cases worldwide, including one recently in Zambia. Let us just say that I am obsessed with this area of law, and not just on the defense side. I believe in protecting people's reputations. I believe in people being responsible for the exercise of their right of free speech. I have my name on a number of plaintiff's cases, as pointed out by the proponents. The majority of them have been in states where there is an anti-SLAPP law like the one we have now. I have no fear of this law when I am signing a complaint on behalf of a plaintiff because I do my homework first. I sit down and use some of that statute of limitations time to make sure that we are ready and have our evidence. Frankly, I get calls frequently from people who ask me to file the suit even though there is not much of a chance of winning. They suggest that we drive the defendants into discovery knowing the defendants do not want that. When that happens, I hear the cash registers ringing in my ears, and I think that I can keep this case going for 18 months or so. I do not use my law license that way, and I will not do it because I believe in freedom of expression. I do not believe in bullying people with lawsuits designed to suppress their First Amendment rights.

I want you to think about something. There are a lot of people talking about the technical aspects of this, which I really wanted to talk about. However, they have already expressed it eloquently and perfectly. I just want you to think about the spirit of what is happening here. The intellectual spark of the American Revolution was lit in a defamation suit. It was a seditious libel suit filed pre-Revolution against Mr. John Peter Zenger, by the then-governor of colonial New York. All they had to prove at that time to punish Mr. Zenger was that he published it. It was a prima facie case. The jury in that case refused to convict him despite the fact that the law required them to. From there grew our freedom of the press. From there grew our theories of free expression that continue to this day.

I believe its high-water mark in this country was in 2013 when this body passed the current anti-SLAPP law. I was involved in drafting the current anti-SLAPP law, and I was involved in advocating for it. I did not get everything I wanted. I would have seen it go a little further. We really looked to Washington to our inspiration, which was an evolution of Oregon's law, which was an evolution of California's law. One thing I wish we had put in there from Washington is the fact that these attorney fees can also be imposed on the attorney who brings the action. I am not going to make myself very popular with other members of the bar calling for liability for us, but I think if you want to amend the statute, put that in there.

I want to talk about the functionality of the 2013 law. As soon as it passed, I was able to go to clients of mine who run media companies and tech companies and say now we have the best one; move here. I did move some of them here. I am in the process of trying to move a Yelp competitor here. They are currently in New York. I have explained to them that they will be under this umbrella. It is true that they are protected under federal law from liability for anything that someone puts on that consumer review site. That is not an immunity from a lawsuit, however. I have many active cases on behalf of this client currently. Many of them begin with a phone call from a plaintiff's attorney who says, I know we will not win at the end, but do you really want to spend tens of thousands of dollars defending this? Or, do you want to pull this one review down? That does not infringe on my clients' rights. That infringes on the free market and the marketplace of ideas. That hurts the people who go to this review site looking for information about goods and services that they are going to consume. It is an artificial finger on the scales of justice and on the scales of the free market.

I do not fit into any camp whether liberal or conservative. I am very much a free-market libertarian. I seem to only wind up defending the little guy. This bill really eviscerates the statement that this body made in 2013 that we are going to be a bastion of liberty. Other states do not have laws this strong. Ohio and Pennsylvania are currently looking to us for inspiration. They are working on laws that are going to be mirrors of ours. Florida is on the verge of passing its own anti-SLAPP law partly inspired by us. We are standing at the top of the mountain here, and we want to climb down lower than we were when we passed the law in 2013. This statute is terrifying for a defendant. I can answer any specific questions you may have. I have my head into this thing very deeply, but I do not want to go off on my speech about liberty and the economy too much more.

**Chairman Hansen:**
Before I go to questions, this is just a reminder that I have another six people in southern Nevada that would like to testify. Since three of them are ordinary citizens, I want to make sure I give them an opportunity. Let us question these three and then we will go to the others.

**Assemblyman Jones:**
I do not want to get into the weeds because there are so many constitutional issues and technical legal issues. We had the original law that Assemblywoman Genie Ohrenschall brought about. What caused the change to go to the law that exists now, and what is really driving the change back? I would like the practical application for people and businesses in society. Why did we change it in 2013 and why are we trying to change it again in 2015?

**Marc Randazza:**
The pre-2013 law was way too narrow. It only applied to petitioning activity and not free speech. We expanded it for that purpose. There was also a question as to whether it would provide for an interlocutory appeal; it did not. If you lose an anti-SLAPP motion, it is not much good to you that the plaintiff's case was frivolous and you figure that out three years later on appeal after spending $100,000; you are already dead. It allows you to immediately have that denial reviewed, which is very important. The current statute provides for your immunity from suit as a substantive right. What is beautiful about that is that it applies in federal court. If somebody decides to try to prey upon a Nevadan or a Nevada-based business, bringing them to court in a state that does not have an anti-SLAPP statute, which is a creative approach that is tried once in a while, you can attempt to use choice of law to have our SLAPP law applied in the other state. It is not always successful, but if we want to update our law, we could possibly sure-up that right.

The other things that were in the original law were great. Another issue is S.B. 444 (R1) completely and totally repeals the SLAPP-back law. I do not know why we would do that because it provides penalties for somebody who does abuse this law and is not scared of a $15,000 legal bill that might get imposed on them for trying to take someone to task for simply exercising his First Amendment rights. If you want to know about this in very simple terms, it does not change the end result of the case. All that S.B. 444 (R1) does is narrow the class of cases and makes it harder to employ the statute to get rid of frivolous cases early. The end result of the case is the same. You just do not get there until you have gone through 36 months of litigation.

**Assemblyman Elliot T. Anderson:**
This question is for Mr. Randazza. I would like to ask you about section 12. We have heard some discussion about what section 12 would do. When Mr. Langberg came into my office, he mentioned the Ninth Circuit case which declared SLAPP suits to be substantive and would, therefore, apply if the forum court is outside of Nevada. Is that your understanding? It does look like section 12 crosses out the unity provision, which is loss-allocating and, therefore, substantive under a conflicts analysis. Can you comment generally on the totality of the case law and what this strike would do?

**Marc Randazza:**
I will talk about the Ninth Circuit case issue. The Ninth Circuit did not hold that anti-SLAPP statutes apply in federal court as a blanket statement. In fact, there have been federal appellate courts that have looked at other states' anti-SLAPP laws and said that since they are procedural and not substantive, they do not apply. Most notably, the Eleventh Circuit looked at Georgia's anti-SLAPP law, which is really similar to the West Coast states. However, it threw in a procedural element that controlled the statute. Most states will look at a legal issue and will not say that the whole case is governed by one state's law. Maybe the defendant's immunities are under one state's law, but other issues are under another state's law, or could even be the plaintiff's responsibility. It is not true that anti-SLAPP laws automatically apply in federal court. Only their substantive issues will apply. Assemblyman Anderson, you get an A+ for identifying that issue.

**Ron Green, Private Citizen, Las Vegas, Nevada:**
I am Marc's partner at Randazza Legal Group. I am also a 15-year Nevada resident. Unlike Mr. Randazza, I am not a nationally renowned First Amendment attorney. I practice primarily in trademarks and copyrights. I am not going to discuss the technical aspects of S.B. 444 (R1) or the current anti-SLAPP law. I am just going to tell you about what I have seen over the past 18 months.

**Chairman Hansen:**
Are the both of you with Mr. Randazza at the law firm? He has already testified, and I want to make sure I provide the opportunity for other folks to testify. If all three of you are basically representing the same view, I will have to stop you, unless you have something very specific and new to add that he did not testify to. I would like you to limit your testimony to new material only. Frankly, we are up against a time window.

**Ron Green:**
I am going to testify as to what I have seen the current anti-SLAPP law do. I have seen it interest media, technology, and entertainment companies in Nevada. I have seen those companies relocate to Nevada. After this bill was introduced, I have seen those same companies say that they may have to leave if this bill is passed. This bill is bringing business here and makes our citizens' First Amendment rights arguably the strongest in the nation. It does not make sense to pare that back when we are currently the leader. I do not want to see us become a follower again.

**Theresa Haar, Private Citizen, Las Vegas, Nevada:**
I am also an attorney with the Randazza Legal Group. I am a 25-year resident of Nevada. In addition to being licensed in Nevada, I am also licensed in New York. The difference between the progression in litigation in states that do not have anti-SLAPP laws versus Nevada is remarkably different. As Mr. Smith spoke about the chilling effect in states where there is no anti-SLAPP statute, we have had clients that have had no other option than to simply forgo their rights because they cannot afford the tens and hundreds of thousands of dollars that years of litigation costs. The anti-SLAPP statute that Nevada has is remarkable because it can afford people the opportunity to recover attorney fees. We have taken a number of cases on a contingency basis knowing that they will be made whole again by the award of attorney fees at the end. If you value your own opinions, if you value the opinions of Nevadans, and if you respect your right to express your opinion and to stand on your truth, I urge you to be in opposition of S.B. 444 (R1).

**Joe Johnson, representing Toiyabe Chapter, Sierra Club:**
We are here in opposition of S.B. 444 (R1). I am happy to be here this morning. It has been a long time since I have been before your Committee. I was around here in 1997, when the original bill was passed. I was once an Assembly member and a member of the Assembly Committee on Judiciary. I am testifying today as a geologist. The weeds overwhelm me, but there are very significant reasons to leave the existing law alone. There are some proposed amendments that may clarify things. It is a very good bill, but I would like to go on record as opposing its passage.

**Anne Macquarie, Private Citizen, Carson City, Nevada:**
I am here speaking on behalf of myself and the Sierra Club. I am a citizen of Carson City. I urge you to oppose S.B. 444 (R1). As you have heard, we currently have a strong anti-SLAPP law on the books. If S.B. 444 (R1) is enacted, I believe it will greatly gut this law and diminish our right to free speech in Nevada. As you know, SLAPP lawsuits are used as a way to punish small organizations and individuals with sometimes years of attorney fees in

order to scare us from speaking out against the actions of powerful businesses and individuals. The name really does say it all—strategic lawsuit against public participation. My colleagues and I are all about public participation. I belong to, and have worked for, organizations that can be and have been threatened by such SLAPP suits. This bill would remove the vital protection of the existing law from the active citizens and small businesses of Nevada. I believe it does not help the citizens of our state.

**John Mehaffey, Private Citizen, Las Vegas, Nevada:**
When the 2013 law was enacted, I read about it in tech magazines. It essentially advertised our state as the place to move your tech business, especially if you were involved in the media or speech issues. I was about to leave the media business because I was burned out, but this got me excited about the First Amendment and invigorated my career. Part of my job involves the online poker industry. I help expose scams of the offshore sites from other states. There are a lot of bad characters in that industry. For the past few years, I have been part of exposing them and helping to advocate for players to not only avoid the scams but to get the industry legalized in their own states to protect them. It is a very heated debate. When the anti-SLAPP law was enacted, it gave me the reason to stay. I was going to move and get into another industry. It completely changed my mind.

One benefit of my business is that 100 percent of my revenue comes from outside of Nevada. Some of it even comes from outside of the country. Not only do I not take a job from somebody else, but I am creating jobs when I spend the money in Nevada's economy. I was also able to talk two other businesses into moving here specifically because this law exists. I am prepared to move to Texas if S.B. 444 (R1) passes, because they have an enacted law that is almost identical to ours.

I have been threatened by people who did not like that I exposed their business practices. In 2014, I received a letter from someone who was trying to use me as leverage against somebody he was angry at. I sent this person a link to our current anti-SLAPP law and suggested he read it. I never heard from him again.

My main concern about S.B. 444 (R1) is the change of definition on what is qualified speech. I work in the online poker industry, and most people do not care about that. I do not think that would fall under the new definition. Suddenly, I am going to be exposed to things that are freedom of the press simply because it is not considered to be a wide public concern issue. I feel that all speech should be covered. Whether it is factual or is someone's opinion, I do not think we should separate one thing from another. Just because you disagree with me or think the topic is of no interest to you does

not make it have any less effect. If I can prove that something has an effect, it should fall under this law, and I should be able to get a charge against me dismissed. I have never been involved in a lawsuit like this, but it is a concern when you work in media. You have to protect yourself.

My family planted roots here after this law went into effect. My wife is going to be a teacher in the Clark County School District this fall, and my kids are involved. We are all involved in the community. I want to stay here, but I am really prepared to leave if this passes. I do not see any reason to stay and continue on with the type of business that I operate. [John Mehaffey also submitted written testimony (Exhibit D).]

**Heather Snedeker, Private Citizen, Las Vegas, Nevada:**
I am a current law student at the William H. Boyd School of Law at the University of Nevada, Las Vegas. I am also a member of the Federalist Society at the law school. While I do not believe that First Amendment speech is particularly a partisan issue, I will be especially surprised if the conservative members of this Assembly are for S.B. 444 (R1).

First Amendment principals are the cornerstone of our foundation and our tradition as a nation. From the John Peter Zenger trial of 1735 to *New York Times Co. v. Sullivan*, it is clear that defamation claims must be absolutely proven by the plaintiff just so that we can all protect our rights to free speech. Lowering the standard to prima facie goes against our own principals as a nation.

I would also hope that Senator Brower or other proponents of this bill do not let a personal vendetta against a particular attorney who is leading the opposition against this bill cause them to sell out their own constituents. Voters in 2016 will not take too kindly to their assemblymen and assemblywomen selling out their rights for financial and personal reasons. Therefore, I urge you all to vote no on S.B. 444 (R1).

**Chairman Hansen:**
Thank you, although I would appreciate no ad hominem attacks on the persons bringing the bills forward. Frankly, this is not the place for that.

**Homa Woodrum, Private Citizen, Las Vegas, Nevada:**
I have lived in Nevada for 15 years, both in Las Vegas and Winnemucca. My practice focuses mostly on elder law and guardianship. I am also a food allergy blogger and cofounder of the Allergy Law Project, a blog that focuses on disability rights related to individuals who suffer from food allergies. I mention this because the intersection of being an attorney and being part of a narrow

online community results in contacts who reach out to me when they receive requests to remove content on their personal blogs. These individuals wonder about their rights and may opt to take down information rather than wrangle threatened legal action. Other individuals contact me after anaphylactic reactions wondering what they can or cannot say about their experiences out of a desire to keep others in the food allergy community safe. Some examples are a mother whose son was served real milk instead of soy milk; a college student being served his allergen knowingly by a barista; or a visitor to Las Vegas for a convention being served nuts and being left to administer his own epinephrine by hotel staff. Every single one of these individuals opted not to share their stories because of a commonly held notion that they cannot speak out against companies with big pockets without risking suit.

The way S.B. 444 (R1) is written, I would have to advise them that the risks are indeed too high. A suit can still be filed and the expense of a defense incurred even if you ultimately prevail. There are others, like Mr. Randazza, who I respect as a nationally recognized First Amendment attorney, that can speak more pointedly about the nuances of S.B. 444 (R1). I am here to add my voice because I think this is an access to justice issue. I imagine some attorneys would see S.B. 444 (R1) as job security. I would rather see continued protective measures available to the host who would be crushed by the expense of defending litigation. A plaintiff always has a choice to do a cost-benefit analysis before initiating suit. *Nevada Revised Statutes* 41.670 is a necessity in the digital era. As a Nevadan and attorney and a mommy-blogger, I thank you for your time and I urge you reject S.B. 444 (R1).

**Chairman Hansen:**
I see no questions. Thank you both for your testimonies. We are going to move to the neutral position on S.B. 444 (R1). Seeing none, I will bring Senator Brower and Mr. Langberg back up.

**Senator Brower:**
Mr. Langberg is going to begin by addressing a few points in rebuttal. I will then wrap things up.

**Mitchell Langberg:**
I want to say that I appreciate the policy decisions to be made in this, and I appreciate the portion of the opposition that has engaged in some intellectual debate about it. I think that is important and part of the First Amendment.

Changing the law by adopting S.B. 444 (R1) does not mean defendants do not have all of their constitutional rights and the ability to defend themselves against a defamation claim that has shown initial merit. With apologies to Assemblyman Jones, I realized that I half-answered your question, but I would like to fully answer your question now. People have said that there is no example of a case that has been filed that has somehow been harmed by the existing law. That is because when somebody is considering a case, particularly a case that requires proof of knowledge of falsity, it cannot be filed under this statute. That is not theoretical; that is real. There is more than one case that I have filed for Nevada businesses in other states because we could not proceed here. In other states, courts have found claims to be meritorious enough to proceed past initial motions. It is a practical effect. I also told you about the doctor on Yelp who has been falsely accused of committing malpractice. That is a real case that could not be filed here because he would be putting his finances at risk if he could not show clear and convincing evidence that the person knew it was false even though it was false.

I will reframe the premise because everyone is talking about First Amendment rights and free speech. The question is, when somebody is accessing his or her First Amendment rights to petition, what should be required? Why should he or she be required to do something that no other plaintiff has to do to prove he or she has evidence to support the case at the very beginning of trial? How much are we going to burden the First Amendment right to petition with our SLAPP statute? This is a balancing and a policy decision. The description by the Washington appellate courts, which I can make available to anybody, talks about the difference between matters of public concern and matters of public interest, and why one might get more initial protection than the other. It is a very good analysis to explain this. If it is a matter of public interest, people will still have all of their constitutional rights to be able to defend the lawsuit. Everyone who is a defendant in any lawsuit has to face the possibility that they may have to spend a lot of money to defend themselves. What is going to be subject to this special notion?

I want to clarify how this bill came to be and who is behind it in order to affect the ears with which listening occurs. I missed it the last time around. As soon as the statute that exists came out two years ago, I recognized what I think are very serious issues that impinge on the First Amendment right to petition. I started working very hard and talking to lots of people about how to do this because I am not familiar with the process. I am thankful for a client that I worked for in the litigation context whom I no longer work for today. When the negative impact that this could have on businesses was explained to my former client, he agreed and was willing to put his "know-how" behind it and assisted me to get this bill to you today. That is how we got here.

I want to make something else abundantly clear. I am very familiar with the case that Mr. Smith spoke of. I am talking about the Wynn case out of California against Mr. Chanos, which was recently dismissed. It should not surprise you that I disagree with the court's decision and we are appealing. If the same judge was considering the same case under S.B. 444 (R1), the case would have been dismissed. What S.B. 444 (R1) does is ensure that meritless lawsuits are dismissed. I hear cries for examples which I have now given you. What you have not yet heard is an example of a meritless lawsuit on a matter of public concern that would not be dismissed under S.B. 444 (R1). You will not hear that because we worked very hard to balance the First Amendment rights to have meritless cases dismissed with the interest of plaintiffs having cases that meet the minimal standard get to the next step where there are even more constitutional protections that a defendant might use to have the case dismissed.

Somebody said that we have the best anti-SLAPP statute in the country. With a caveat, that is actually true. We have the best anti-SLAPP statute in the country if you believe that people whose reputations have been maligned and damaged in public should not have a right to seek redress in the courts. Certainly, if I ran a newspaper or media company, my preference would be to repeal all defamation laws because I do not want to answer those questions at all.

Assemblyman Anderson asked about discovery and what limited discovery means. Fortunately, both the states of Washington and California have recognized discovery is a constitutional right when it is controlled by the courts. They have litigated this very well. In the context of an anti-SLAPP motion, discovery can only be granted when the court finds there is good cause and approves the specified discovery request. Therefore, you do not get your discovery templates and send them all out. The court is going to approve the specific discovery requested.

There was a question about the current penalties for SLAPP-backs and whether judges are reluctant. I cannot tell you what happens in Nevada. There is not a lot of anti-SLAPP litigation here because cases are not being filed, and sometimes they are meritorious cases that are not being filed. From experience in California, where I have litigated anti-SLAPP cases, judges are very reluctant to do it. They have just told the defendants that they have lost on their anti-SLAPP motion and will have to spend the money to defend the lawsuit because there is merit to it. They are very reluctant to also say the defendant will have to pay attorney fees on top of that. They usually defer it until the end of the case. As you know, most cases do not ever get to the end.

I believe I have addressed the major concerns that stood out to me. If the Committee has any further questions, I am happy to answer them.

**Senator Brower:**
We appreciate the chance to have this very productive dialogue, and I know Mr. Langberg appreciates all of the excellent questions from the Committee.

I would like to make a few closing remarks. First, I would like to address Ms. Snedeker if she is still listening. I really appreciate law students participating in the process. I, too, am a member of the Federalist Society and have been since law school. I currently serve on the Executive Committee of the Federalist Society's Criminal Law and Procedure Practice Group, and I am a proud member of that group. I am also an adjunct professor at Boyd School of Law. I respectfully suggest to Ms. Snedeker, if she is interested in becoming an effective legislative advocate, she might want to think about taking the course on legislative advocacy. Frankly, I have no idea what she was talking about when she mentioned personal gain or vendetta. I thank you, Mr. Chairman, for trying to restore some decorum to the Committee's process.

From my perspective, we did not make a statement on this issue during the 2013 Legislative Session. That was a bill that probably did not deserve enough debate and scrutiny. A few of us were uncomfortable during various provisions. To say that the 2013 Legislature made a statement about what the policies should be is a gross exaggeration. We can make a statement this session in trying to restore some balance to the situation.

I want to commend Assemblyman Ohrenschall and his mother, whom I served with in this body. I know she is very proud of the 1997 law, and she should be. It is a good law. We think that S.B. 444 (R1) is an improvement upon that and we also think it is necessary change given what happened last session.

As Mr. Langberg said, we only have the best statute in the country currently. If you are a person who wants to engage in defamation with impunity, we have a pretty darn good law. If you are a potential plaintiff or defendant in a defamation case, I would respectfully submit that S.B. 444 (R1) represents a much better law and a much better process for litigating such disputes. The only goal of mine in supporting this bill and testifying before you today is to protect the right of both plaintiffs and defendants in these cases. That is what this bill does and why we think it is important.

I have watched this Committee closely over the last three days, and I have been impressed. I know you will focus on the real issues presented by this bill and that you will do your best to ignore the background noise, some of which we heard today. It is an important issue, and we need to get this right. This is not my bill, but I have interjected myself into this issue because I think it is important. I, Mr. Langberg, and others stand ready to work with this Committee to make this bill the best it can be. We understand your continued concerns and will take your recommendations and suggestions in order to get this right. Thank you very much for your time, and I am happy to answer any questions.

[Items submitted but not discussed, and are included as exhibits for the meeting, include a letter of opposition from Ryan A. Hamilton (Exhibit E), a letter of opposition from TechNet (Exhibit F), a letter of opposition from Reporters Committee for Freedom of the Press (Exhibit G), and letter of opposition from Marc Randazza (Exhibit H).]

**Chairman Hansen:**
Thank you all for your testimony. At this point, we are going to close the hearing on S.B. 444 (R1), and open it up to public comment.

**Ed Uehling, Private Citizen, Las Vegas, Nevada:**
I am a 72-year resident, and I have had two brushes with this issue. I just wanted to talk about those.

**Chairman Hansen:**
Sir, we have actually closed the hearing on that bill. However, you may briefly say whether you are in favor or against the bill.

**Ed Uehling:**
I am totally against the bill and very appalled by allowing this person to present himself as an advocate of the poor when everyone knows who he is representing and the bully he is representing.

**Chairman Hansen:**
Okay, that is all I need to know. Thank you, I appreciate your testimony. We will now close public comment. Is there anything else that needs to be brought to the Committee at this time?

**Assemblyman Elliot T. Anderson:**
I want to make a quick comment to Senator Brower and Mr. Langberg to say that I appreciated the academic discussion. It was invigorating, and I truly enjoyed it.

**Chairman Hansen:**
This meeting is adjourned [at 10:40 a.m.].

RESPECTFULLY SUBMITTED:

_____
Janet Jones
Recording Secretary

_____
Lenore Carfora-Nye
Transcribing Secretary

APPROVED BY:

_____
Assemblyman Ira Hansen, Chairman

DATE: _____

**EXHIBITS**

**Committee Name: Assembly Committee on Judiciary**

**Date: April 24, 2015** **Time of Meeting: 8 a.m.**

| Bill | Exhibit | Witness / Agency | Description |
|---|---|---|---|
| | A | | Agenda |
| | B | | Attendance Roster |
| S.B. 444 (R1) | C | Vanessa Spinazola, ACLU of Nevada | Letter of Opposition |
| S.B. 444 (R1) | D | John Mehaffey, Private Citizen, Las Vegas, Nevada | Written Testimony |
| S.B. 444 (R1) | E | Ryan A, Hamilton, Private Citizen, Las Vegas, Nevada | Letter of Opposition |
| S.B. 444 (R1) | F | John Doherty, Vice President and General Counsel, TechNet | Letter of opposition |
| S.B. 444 (R1) | G | Bruce D. Brown, Executive Director, Reporters Committee for Freedom of the Press, Washington, D.C. | Letter of Opposition |
| S.B. 444 (R1) | H | Marc Randazza, Private Citizen, Las Vegas, Nevada | Testimony in Opposition |

**Committee Action:**
**Do Pass** _____
**Amend & Do Pass** _____
**Other** _____

# Assembly Committee on Judiciary

**This measure may be considered for action during today's work session.**

May 15, 2015

**SENATE BILL 444**

**Revises provisions governing civil actions. (BDR 3-1137)**

| | |
|---|---|
| **Sponsored by:** | **Committee on Judiciary** |
| **Date Heard:** | **April 24, 2015** |
| **Fiscal Impact:** | **Effect on Local Government: No.** |
| | **Effect on the State: No.** |

Senate Bill 444 defines, in relation to Strategic Lawsuits Against Public Participation, or "SLAPP lawsuits," an issue of "public concern" as any topic that concerns the general public beyond a mere curiosity or general interest and provides that any cause of action arising out of communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern is subject to a special motion to dismiss.

The bill also sets forth timelines and other requirements concerning such a motion, including conditions under which such a motion will be denied, when discovery must be allowed, and when appeals can be made. If a court finds that a motion to dismiss has been filed in bad faith, the court must award the plaintiff reasonable attorney's fees and costs. Finally, the bill deletes from statute additional compensatory awards relating to the dismissal of these claims. The bill's provisions apply only to an action commenced on or after October 1, 2015.

**Amendments**: An amended was proposed by C. Todd Mason, Wynn Resorts.

**Proposed Amendment to SB 444 – Anti-SLAPP Reform (Summary of Revised Amendment)**

**Submitted by:** C. Todd Mason, Wynn Resorts; todd.mason@wynnresorts.com
**Date Submitted:** 05/15/15 (1:25 p.m.)

**Intent of the Amendment**

The attached amendment addresses specific issues raised by opponents of the bill and concerns shared by Committee members. The revised amendment:

1) Changes the timeline for filing a motion to dismiss under the Anti-SLAPP statute from 20 days in the original bill to 60 days. **This now matches the current statute.**
2) Changes the standard of evidence for a plaintiff to meet in response to a motion from "prima facie" evidence in the original bill to "clear and convincing evidence." **This language now matches current statute.**
3) Changes the type of speech covered by the Anti-SLAPP statute from an item of "public concern" to an issue "in the public interest," removing the definition of "public concern" in the original bill. **This language now matches current statute.**
4) Allows for limited, reciprocal discovery by a respondent or moving party on a motion to dismiss under the statute. Any discovery is limited to "ascertaining such information necessary to meet or oppose the special motion to dismiss."
5) Alters the timeline for a response and ruling on the motion to dismiss from 7 days in the current statute to 20 judicial days.
6) Restores the awarding of attorneys costs and fees and the potential award of additional award up to $10,000. **This reverts to language in the current statute.**
7) All other provisions of the original bill are deleted.

Thank you for your consideration of this amendment and please contact me should you have any questions.

**Proposed Amendment – Revision 2 to SB 444**

New text not in the original bill is formatted in **green and bolded.**

**NRS 41.635 is amended as follows:**

**NRS 41.635 Definitions.** As used in NRS 41.635 to 41.670, inclusive, unless the context otherwise requires, the words and terms defined in NRS 41.637 and 41.640have the meanings ascribed to them in those sections. ***"Plaintiff" shall include a counterclaimant or other party asserting a claim. "Defendant" shall include a counterdefendant or other party against whom a claim is asserted. "Complaint" shall include a counterclaim or other pleading in which a claim is asserted.***

**NRS 41.660 is amended as follows:**

NRS 41.660 Attorney General or chief legal officer of political subdivision may defend or provide support to person sued for engaging in right to petition or free speech in direct connection with an issue of public concern; special counsel; filing special motion to dismiss; stay of discovery; adjudication upon merits.

1. If an action is brought against a person 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:

(a) The person against whom the action is brought may file a special motion to dismiss; and

(b) The Attorney General or the chief legal officer or attorney of a political subdivision of this State may defend or otherwise support the person against whom the action is brought. If the Attorney General or the chief legal officer or attorney of a political subdivision has a conflict of interest in, or is otherwise disqualified from, defending or otherwise supporting the person, the Attorney General or the chief legal officer or attorney of a political subdivision may employ special counsel to defend or otherwise support the person.

2. A special motion to dismiss must be filed within 60 days after service of the complaint, which period may be extended by the court for good cause shown.

3. If a special motion to dismiss is filed pursuant to subsection 2, the court shall:

(a) Determine whether the moving party has established, by a preponderance of the evidence, that the 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;

(b) If the court determines that the moving party has met the burden pursuant to paragraph (a), determine whether the plaintiff has established by clear and convincing evidence a probability of prevailing on each element of the claim.

(c) If the court determines that the plaintiff has established a probability of prevailing on the claim pursuant to paragraph (b), ensure that such determination will not:

(1) Be admitted into evidence at any later stage of the underlying action or subsequent proceeding; or

(2) Affect the burden of proof that is applied in the underlying action or subsequent proceeding;

(d) Consider such evidence, written or oral, by witnesses or affidavits, as may be material in making a determination pursuant to paragraphs (a) and (b);

(e) Stay discovery pending:

(1) A ruling by the court on the motion; and

(2) The disposition of any appeal from the ruling on the motion; and

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

*information.* (f) Rule on the motion *within 20 judicial days* after the motion is served upon the plaintiff.

(4) If the court dismisses the action pursuant to a special motion to dismiss filed pursuant to subsection 2, the dismissal operates as an adjudication upon the merits.

*(5) The court may modify briefing and hearing schedules or other deadlines set forth in this Section upon a finding that doing so serves the interests of justice.*

**Note: All other provisions of the original bill are deleted.**

*information.* (f) Rule on the motion *within 20 judicial days* after the motion is served upon the plaintiff.

(4) If the court dismisses the action pursuant to a special motion to dismiss filed pursuant to subsection 2, the dismissal operates as an adjudication upon the merits.

*(5) The court may modify briefing and hearing schedules or other deadlines set forth in this Section upon a finding that doing so serves the interests of justice.*

**Note: All other provisions of the original bill are deleted.**