

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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4 FORE STARS, LTD., a Nevada Limited
5 Liability Company; 180 Land Co., LLC,
6 A Nevada Limited Liability Company;
7 and SEVENTY ACRES, LLC, a Nevada
8 Limited Liability Company,

9 Appellants,

10 v.

11 DANIEL OMERZA; DARREN
12 BRESEE; AND STEVE CARIA,

13 Respondents.

Supreme Court No. 87354 Electronically Filed
Mar 15 2024 03:31 PM
District Court Case No. A771224
Elizabeth A. Brown
Clerk of Supreme Court

14 **JOINT APPENDIX**

15 **VOLUME 2**

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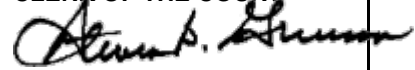
	Opposition to Mtn for Discovery		
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DANIEL OMERZA, DARREN BRESEE,
and STEVE CARIA

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

CASE NO. A-18-771224-C

**DEFENDANTS' REQUEST FOR
JUDICIAL NOTICE IN SUPPORT OF (1)
DEFENDANTS' SPECIAL MOTION TO
DISMISS (ANTI-SLAPP MOTION)
PLAINTIFFS' COMPLAINT PURSUANT
TO NRS §41.635 ET. SEQ. AND (2)
DEFENDANTS' MOTION TO DISMISS
PURSUANT TO NRCP 12(b)(5)**

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

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

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

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

DATED this 13th day of April, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

BY: /s/ Mitchell J. Langberg
MITCHELL J. LANGBERG, ESQ., Bar No. 10118
mlangberg@bhfs.com LAURA B. LANGBERG, ESQ.,
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Facsimile: 702.382.8135

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

CERTIFICATE OF SERVICE

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

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

Attorneys for Plaintiffs

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

EXHIBIT A

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TRAN

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

JACK BINION,)
)
Plaintiff,)
)
vs.)
)
LAS VEGAS CITY OF, ET AL,)
)
Defendants.)

Case No.A-17-752344-J
Dept. No. 24

HEARING

Before the Honorable Jim Crockett
Thursday, January 11, 2018, 9:00 a.m.
Reporter's Transcript of Proceedings

REPORTED BY:

BILL NELSON, RMR, CCR #191
CERTIFIED COURT REPORTER

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APPEARANCES:

For the Plaintiff: Todd Bice, Esq.
 Dustun Holmes, Esq.

For the Defendants: Christopher Kaempfer, Esq.
 James Smyth, Esq.
 Stephanie Allen, Esq.
 Philip Byrnes, Esq.
 Todd Davis, Esq.

1 Las Vegas, Nevada, Thursday, January 11, 2018

2

* * * * *

3

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

7

THE COURT REPORTER: No, Judge.

8

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

10

Todd Bice and Dustun Holmes on behalf of
11 the Plaintiff.

12

13 MR. HOLMES: Dustun Holmes on behalf of
Plaintiff.

14

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

18

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

20

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

22

THE COURT: All right.

23

Have a seat.

24

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

1 behalf of Seventy Acres are here in court.

2 THE COURT: Mr. Lowie and who?

3 MR. KAEMPFER: Vickie DeHart.

4 THE COURT: Okay.

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

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

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

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

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

8 I find the Petitioners' arguments
9 persuasive.

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

19 The question is, what do they say?

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

25 Historically this is a project that had --

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

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

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

16 Keep in mind that I've lived here since
17 1952, 1-9-5-2, so I am familiar with how things
18 looked before master planning became the way things
19 are done here in the Vegas Valley.

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

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

1 residential lots.

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

7 The staff said, the site is part of the
8 1569 acre Peccole Ranch Master Plan. This is the
9 staff speaking.

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

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

15 In terms of the record I'm referring to,
16 I'm referring to pages 1 through 27 -- pages 2425,
17 through 2428, pages 6480 to 6490, and pages 17,362 to
18 17,377.

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

25 Quoting again, the staff says, the current

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 I note that a Michael Buckley made a very
21 cogent but succinct presentation as to why he opposed
22 this application, and that is in the record at page
23 17,261 and 17,262.

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

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

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

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

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

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

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

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

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

1 And I mention this parenthetically because whether he
2 did or didn't is of no consequence to me, I think
3 that's the purely legal determination that LVMC
4 19.040 was not complied with means necessarily that
5 city council abused its discretion, and their
6 approval of the application was legally improper.

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

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

18 So that's my intended ruling.

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

25 I'm asking you to augment anything you wish

1 to augment.

2 Mr. Kaempfer.

3 MR. KAEMPFER: Thank you, Your Honor.

4 I will deal with just three points.

5 First of all, with regard to purchasing the
6 property as a pig in the poke, Mr. Lowie received a
7 letter from the City Of Las Vegas that is part of our
8 record indicating that the property is zoned for
9 17.49 acres RPD-7, so you rely -- You know, I've done
10 a little bit of this over the last 40 years, you rely
11 on representations that you get from the city as to
12 what property is zoned before you make that purchase.

13 So that is point number 1.

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

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

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

1 modification.

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

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

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

12 Now, that is the first point.

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

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

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

25 MR. KAEMPFER: This part was all part of

1 the golf course.

2 THE COURT: Right.

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

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

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

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

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

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

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

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

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

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

15 We knew in our minds that this was not
16 something that the law required or the code required,
17 but we said we would do it with regard to the whole
18 250.

19 Now, I do want to address one thing.

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

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

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

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

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

1 Golf Course by virtue of its purchase of the lot.

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

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

14 I agree with Your Honor absolutely that if
15 in fact that major mod is a requirement, that that
16 was not complied with, but it doesn't apply to the
17 17, and I can't emphasize that enough, it applies --
18 they wanted it applied when we were doing the whole
19 thing, not the 17, and when we took it down here from
20 720 units to 435 units, and we fit within that, the
21 city will tell you that clearly no major modification
22 was required.

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

25 THE COURT: All right.

1 Thank you, Mr. Kaempfer.

2 Mr. Byrnes.

3 MR. BYRNES: Thank you, Your Honor.

4 The Court's essentially made a legal
5 finding that a major modification is required under
6 19.10.040.

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

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

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

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

16 MR. BYRNES: Okay.

17 Then I want to point something out.

18 THE COURT: All right.

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

21 MR. BICE: What provision are we reading
22 from?

23 MR. BYRNES: 19.10.040.

24 MR. BICE: Very good.

25 I got a copy right here.

1 MR. BYRNES: This is a zoning code.
2 If you look at the first line --
3 THE COURT: I can't read it.
4 MR. BYRNES: You can't read it?
5 THE COURT: No.
6 THE WITNESS: It's the planned development
7 district.
8 This was a zoning classification. It
9 applies to parcels that are zoned PD.
10 Now, the only place I could find in the
11 code where you talk about major mods is 19.10.040(G).
12 That is what everyone is talking about here.
13 If you read the first line, the development
14 of property within the planned development district
15 may proceed only in strict accordance with the
16 approved master development plan.
17 This is not a planned development district.
18 Now, if you go look at the City's website
19 where this section is, there's this map, they
20 referred to this planned development district map.
21 If you click on it -- Would it help if I
22 moved this up a little further?
23 THE COURT: Yeah.
24 MR. BYRNES: If you look on the map, here's
25 the entire city, the pink areas show where the

1 planned development is.

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

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

8 THE COURT: Okay.

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

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

15 MR. BYRNES: Correct.

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

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

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

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

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

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

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

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

7 MR. BYRNES: I believe that's correct.

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

11 MR. BYRNES: Correct.

12 THE COURT: Okay.

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

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

18 THE COURT: Okay.

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

23 He's an attorney for the Seventy Acres.

24 THE COURT: Okay.

25 MR. DAVIS: Thank you, Your Honor.

1 Todd Davis, in-house counsel for Seventy
2 Acres.

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

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

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

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

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

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

24 THE COURT: Okay.

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

1 impossibility for us to put this property into his
2 association.

3 THE COURT: Okay.

4 MR. BYRNES: Should I continue now?

5 THE COURT: Sure.

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

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

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

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

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

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

25 The Court's entire finding is based upon

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

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

5 THE COURT: Was the staff unfamiliar with
6 that?

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

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

13 MR. BYRNES: They make representations.
14 The city council is never bound by staff,
15 and staff makes mistakes, but the code is clear.

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

18 MR. BYRNES: Lawyers make mistakes too.

19 THE COURT: So do Judges.

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

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

24 MR. BYRNES: The Court's function --

25 THE COURT: Yes, counsel provided me with

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

4 MR. BYRNES: Correct, Your Honor.

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

11 THE COURT: Well, I'm not.

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

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

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

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

1 decision warrants upholding it.

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

5 My determination is a purely legal one.

6 MR. BYRNES: But your determination is
7 based completely on a finding that Subsection (D) of
8 19.10.040 applies to this property.

9 THE COURT: Yes.

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

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

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

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

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

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

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

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

8 THE COURT: Right.

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

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

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

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

21 THE COURT: Hold on.

22 I want to make sure Mr. Byrnes is finished.
23 Everybody will get a chance to address
24 this.

25 MR. BYRNES: I have said my piece.

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

3 THE COURT: Thank you.

4 Mr. Kaempfer.

5 Mr. Kaempfer: One more quick COMMENT.

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

13 So thank you, Your Honor.

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

16 MR. KAEMPFER: The U, meaning undeveloped.

17 THE COURT: Right.

18 THE COURT: Mr. Bice.

19 MR. BICE: Briefly, Your Honor.

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

1 Your Honor, they don't use that anymore.

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

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

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

18 The original application --

19 THE COURT: Is that from the 180 code?

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

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

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

10 THE COURT: Yes, you told me that.

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

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

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

2 MR. BICE: MOD-63600.

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

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

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

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

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

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

7 THE COURT: Well, in the Exhibit 1 the City
8 Of Las Vegas provided they referenced actually
9 excerpts of Exhibit 1, which they referred to as
10 Exhibits 33 and 35, but I went back and looked at the
11 entirety of Exhibit 1, which included Exhibit 33 and
12 35, that there were some pages from it, and that is
13 the staff report to the February 15th, 2017 council
14 meeting, which is even after the November 16th, 2016
15 you are talking about --

16 MR. BICE: Correct.

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

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

1 with any new entitlement.

2 It goes on to say, in order for this site
3 development plan review request to be approved, the
4 1990 Peccole Ranch Master Plan land use designation
5 over this site must be amended from golf course
6 drainage to multi-family.

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

18 That is from record 11,243.

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

21 They also say on page 11,243, item number
22 4, the proposed general plan amendment does not
23 conform to the 1990 Peccole Ranch Master Plan, which
24 designates the site for golf course drainage land
25 uses.

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

4 MR. BICE: Exactly, Your Honor.

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

7 I wanted to respond.

8 THE COURT: Don't worry about my time.

9 We're here to deal with this.

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

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

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

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

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

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

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

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

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

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

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

11 I thank the Court for its time.

12 THE COURT: All right.

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

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

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

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

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

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

7 Staff puts conditions of approval on all of
8 their applications.

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

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

1 acres.

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

5 The answer is, no.

6 THE COURT: Understand the code requires
7 it.

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

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

16 THE COURT: Yes.

17 MR. KAEMPFER: All right.

18 I would like also finally to make one other
19 point.

20 This master plan was never recorded.

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

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

1 Thank you.

2 THE COURT: Mr. Bice, anything further?

3 MR. BICE: No, Your Honor.

4 Well --

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

7 THE COURT: Okay.

8 Mr. Byrnes.

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

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

19 THE COURT: Was this a new development?

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

22 THE COURT: Okay.

23 MR. BYRNES: It says --

24 THE COURT: I mean, the application.

25 MR. BYRNES: They actually rezoned it for

1 out of RPD when we did this.

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

6 I think the Court needs to look at
7 19.10.040 and 19.10.050 as you will see the major
8 modification requirement doesn't apply here, this is
9 done under site development comparing apples and
10 oranges.

11 THE COURT: All right.

12 Anything else?

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

15 THE COURT: Okay.

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

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

25 I referenced some of it by naming the

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

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

18 I realize you will want the transcript.

19 MR. BICE: Yes, I will.

20 That's true.

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

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

1 THE COURT: All right.

2 MR. BICE: I'm going to get out a business

3 card to hand to the Court Reporter right now.

4 THE COURT: Anything further before we

5 adjourn on this matter?

6 MR. BICE: No.

7 Thank you, Your Honor.

8 MR. KAEMPFER: Obviously we thank you for

9 your time.

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

11 MR. HOLMES: Thank you, Your Honor.

12 THE COURT: All right.

13 (Proceedings concluded.)

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EXHIBIT B

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

DEPARTMENT: PLANNING

DIRECTOR: ROBERT SUMMERFIELD

☐ Consent ☒ Discussion

SUBJECT:

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

PROTESTS RECEIVED BEFORE:

Planning Commission Mtg.

67

City Council Meeting

152

APPROVALS RECEIVED BEFORE:

Planning Commission Mtg.

44

City Council Meeting

28

RECOMMENDATION:

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

BACKUP DOCUMENTATION:

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

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

Passed For: 5; Against: 0; Abstain: 0; Did Not Vote: 0; Excused: 1

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

CITY COUNCIL MEETING OF: FEBRUARY 21, 2018

Minutes:

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

Appearance List:

CAROLYN G. GOODMAN, Mayor

STEVEN G. SEROKA, Councilman

BRADFORD JERBIC, City Attorney

PETER LOWENSTEIN, Deputy Planning Director

LUANN D. HOLMES, City Clerk

BOB COFFIN, Councilman (via teleconference)

MICHELE FIORE, Councilwoman

STAVROS S. ANTHONY, Councilman

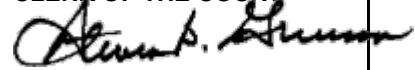
STEPHANIE ALLEN, Legal Counsel for the Applicant

MARK HUTCHISON, Legal Counsel for 180 Land Co, LLC, Seventy Acres LLC and Fore Stars, Ltd.

FRANK SCHRECK, Queensridge Resident

TODD BICE, Legal Counsel for the Queensridge Homeowners

LISA MAYO, Concerned Citizen



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

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

CASE NO. A-18-771224-C

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

Hearing Date: 05/15/18

Hearing Time: 9:30 AM

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

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

1 DATED this 13th day of April, 2018.

2 BROWNSTEIN HYATT FARBER SCHRECK, LLP

3
4 By /s/ Mitchell J. Langberg
5 MITCHELL J. LANGBERG, ESQ. Bar No. 10118
6 mlangberg@bhfs.com
7 100 North City Parkway, Suite 1600
8 Las Vegas, NV 89106
9 Telephone: 702.382.2101
10 Facsimile: 702.382.8135

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

NOTICE OF MOTION

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD:

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

DATED this 13th day of April, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By /s/ Mitchell J. Langberg
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Attorneys For Defendants Daniel Omerza, Darren Bresee,
and Steve Caria

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

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

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

II. FACTUAL BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

25 10. These declarations state that the undersigned purchased his or her Queensridge
26 residence or lot "in reliance upon the fact that the open space/natural drainage system could not
27 be developed pursuant to the City's Approval in 1990 of the Peccole Ranch Master Plan and
28 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." *Id.* The declarations further state that "[a]t the time of purchase, the undersigned paid a significant lot premium to the original developer as consideration for the open space/natural drainage system." *Id.*

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

III. ARGUMENT

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

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

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

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

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

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

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

3 [T]here was a phase 1 of Peccole Ranch, and Badlands, which was
4 a golf course in phase 2 of Peccole Ranch. Both golf courses were
5 designed to be in a major flood zone and were designated as flood
6 drainage and open space.

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

10 * * *

11 The people who bought into this Peccole Ranch Master Plan 1 and
12 2 did so in reliance upon what the master planning was. They
13 bought their homes, some of them made a very substantial
14 investment, but no one making an insubstantial investment, and
15 they moved into the neighborhood.

16 Binion Transcript, at 6:1-9, 9:20-25.¹ Judge Crockett obviously reached these conclusions in
17 good faith based on his review of the record in the Binion Litigation; thus, Plaintiffs' insistence
18 that Defendants could not assert in good faith that they purchased their homes in reliance upon
19 the terms of the Peccole Ranch Master Plan—including the designation of Badlands for open
20 space and natural drainage—is untenable.

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

27 1. Intentional or Negligent Interference

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

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

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

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

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

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

19 Finally, Plaintiffs cannot identify any actual harm resulting from the unspecified
20 interference they imagine. They make conclusory allegations that damage occurred, Complaint,
21 ¶¶ 46, 55, but these allegations are meaningless in the absence of any factual allegations to
22 explain how such purported damage has taken place.

23 2. Conspiracy

24 "In Nevada, an actionable civil conspiracy is defined as a combination of two or more
25 persons, who by some concerted action, intend to accomplish some unlawful objective for the
26 purpose of harming another which results in damage." *Flowers v. Carville*, 266 F. Supp. 2d
27 1245, 1249 (D. Nev. 2003) (citations omitted). The Complaint entirely fails to identify any such
28 "unlawful objective," however. To the contrary, Plaintiffs allege that Defendants' objective was

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

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

18 3. Intentional or Negligent Misrepresentation

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

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

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

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

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

1. Absolute Privilege

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

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

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

3 In *State ex rel. Bd. of Parole Comm'rs v. Morrow*, 127 Nev. 265, 273, 255 P.3d 224
4 (2011), the Nevada Supreme Court discussed the judicial function test, which "is a means of
5 determining whether an administrative proceeding is *quasi-judicial* by examining the hearing
6 entity's function.[]" *Id.* at 273 (citation omitted)(emphasis added). Then the Court discussed:

7 If the hearing entity's function is judicial in nature, its acts qualify
8 as quasi-judicial. [] In determining whether a hearing entity's
9 function is judicial, other jurisdictions consider whether the hearing
10 entity has authority to: "(1) exercise judgment and discretion; (2)
11 hear and determine or to ascertain facts and decide; (3) make
12 binding orders and judgments; (4) affect the personal property
13 rights of private persons; (5) examine witnesses and hearing the
14 litigation of the issues on a hearing; and (6) enforce decisions or
15 impose penalties." *Craig v. Stafford Constr., Inc.*, 271 Conn. 78,
16 856 A.2d 372 (Conn. 2004)(quoting *Kelley v. Bonney*, 221 Conn.
549, 606 A.2d 693, 703 (Conn. 1992), and considering, also,
whether a sound policy basis exists for protecting the hearing entity
from suit). [] These factors are not exclusive, and determining
whether a proceeding is quasi-judicial is an imprecise exercise
because many different types of entities perform judicial functions."
[citation] We have previously used the judicial function test in this
state to determine whether entities act in a quasi-judicial manner
when performing their administrative duties,[] and we now
expressly adopt the judicial function test for doing so in the future.

17 *Id.* at 273-74.

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

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

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

6 The City Council has the authority to "may make and adopt all *ordinances, resolutions*
7 *and orders*... which are necessary for the municipal government, the management of the affairs
8 of the City and the execution of all of the powers which are vested in the City." Las Vegas City
9 Charter § 2.090(1)(emphasis added). In accordance, the General Plan Amendment process results
10 in a binding written decision containing "reasons for the decision" that is provided to the
11 "applicant, agent or both" and the notice is formally filed with the City Clerk. UDC
12 19.16.030(H)(3). There is also no question that the decision by the City Council would affect the
13 "personal property and rights of private persons." Indeed, at a minimum, the dispute at issue
14 implicates Plaintiffs' property rights in the Land. Additionally, as a general matter the City
15 Council has the power to examine and hear witnesses to assist the City Council in making its
16 decisions. In fact, the City Council has authority to "[o]rder the attendance of witnesses and the
17 production of all documents which relate to any business before the City Council" and the "City
18 Council ... may apply to the clerk of the district court for a subpoena which commands the
19 attendance of that person before the City Council." Las Vegas City Charter § 2.080(1)(d), (2)(a).
20 Finally, the City, including the City Council, has the ability to enforce decisions or impose
21 penalties.³ Based on the foregoing, the proceedings of the City Council relating to Plaintiffs'

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

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

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

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

11 2. Qualified Privilege

12 Even if absolute privilege did not apply, Defendants cannot be liable to Plaintiffs because
13 any statements in the declarations are also subject to a qualified or conditional privilege. Under
14 Nevada law, "[a] qualified or conditional privilege exists where a defamatory statement is made
15 in good faith on any subject matter in which the person communicating has an interest, or in
16 reference to which he has a right or duty, if it is made to a person with a corresponding interest or
17 duty." *Circus Circus*, 99 Nev. at 62 (citations omitted). Where any such privilege applies,
18 alleged defamatory statements "are not actionable unless the privilege is abused by publishing the
19 statements with malice." *Bank of America Nevada v. Bordeaux*, 115 Nev. 263, 267, 982 P.2d 474
20 (1999) (citations omitted). "[P]laintiff must prove by a preponderance of the evidence that the
21 defendant abused the privilege by publishing the defamatory communication with actual malice. [
22] Actual malice is a stringent standard that is proven by demonstrating that "a statement is
23 published with knowledge that it was false or with reckless disregard for its veracity." *Pope v.*
24 *Motel 6*, 121 Nev. 307, 317, 114 P.3d 277 (2005).

25
26 and to protect the public health, safety and general welfare" and that the "provisions of this Title,
27 and any conditions of development approval which have been imposed thereunder, may be
28 enforced by the Director; the Las Vegas Metropolitan Police Department; and any other City of
Las Vegas officer and employee designated to do so." UDC 19.00.090(A)(1), (2).

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

9 **IV. CONCLUSION**

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

13 DATED this 13th day of April, 2018.

14 BROWNSTEIN HYATT FARBER SCHRECK, LLP

15
16
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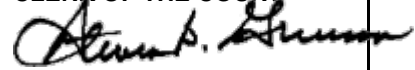
CERTIFICATE OF SERVICE

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

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DANIEL OMERZA, DARREN BRESEE,
and STEVE CARIA

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

CASE NO. A-18-771224-C

Department 24

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

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

Hearing Time: **9:00 am**

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

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

///

1 DATED this 13th day of April, 2018.

2 BROWNSTEIN HYATT FARBER SCHRECK, LLP

3
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12 and Steve Caria
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NOTICE OF MOTION

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD:

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

DATED this 13th day of April, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

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

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

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

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

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

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

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

15 **II. FACTUAL BACKGROUND**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. ARGUMENT

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

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

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

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

Good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern means any:

1. Communication that is aimed at procuring any governmental or electoral action, result or outcome;

2. Communication of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity;

///

1 3. Written or oral statement made in direct connection with an issue
2 under consideration by a legislative, executive or judicial body, or
any other official proceeding authorized by law; or

3 4. Communication made in direct connection with an issue of
4 public interest in a place open to the public or in a public forum,
which is truthful or is made without knowledge of its falsehood.

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

8 In the recent case of *Delucci v. Songer*, 396 P.3d 826 (2017), the Nevada Supreme Court
9 adopted the reasoning of *City of Montebello v. Vasquez*, 1 Cal.5th 409, 205 Cal. Rptr. 3d 499, 376
10 P.3d 624 (2016), where the Supreme Court of California² explained that this statutory definition
11 (which is identical in Nevada and California) relieves the court of any need to determine whether
12 the speech at issue under the anti-SLAPP statute directly implicates First Amendment rights:

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

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

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

25
26 ² The Nevada Supreme Court has made clear that California cases should be considered when
27 interpreting the anti-SLAPP statute. *John v. Douglas Cnty. Sch. Dist.*, 125 Nev. 746, 756, 219
28 P.3d 1276, 1283 (2009) (“we consider California case law because California's anti-SLAPP
statute is similar in purpose and language to Nevada's anti-SLAPP statute.”).

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

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

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

8 The conduct at the heart of Plaintiffs’ Complaint is Defendants’ efforts to gather
9 declarations from fellow residents, for the purpose of providing information about the residents’
10 reliance on the Master Development Plan to the City Council, in hopes of influencing the
11 Council’s decision as to whether to permit an amendment to the General Plan. This constitutes a
12 good faith communication on an issue of public concern as to *each* category included in NRS §
13 41.637.

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

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

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

28 ///

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

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

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

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

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

obtaining declarations stating the recollections of other witnesses.

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

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

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

* * *

The people who bought into this Peccole Ranch Master Plan 1 and 2 did so in reliance upon what the master planning was.

They bought their homes, some of them made a very substantial investment, but no one making an insubstantial investment, and they moved into the neighborhood.

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

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

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

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

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

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

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

(a) Intentional or Negligent Interference

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

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

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

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

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

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

(b) Conspiracy

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

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

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

9 (c) **Intentional or Negligent Misrepresentation**

10 Finally, Plaintiffs’ Complaint does not allege *any* of the elements for a claim for
11 intentional misrepresentation or negligent misrepresentation. A misrepresentation claim in
12 Nevada “is established by three factors: (1) a false representation that is made with either
13 knowledge or belief that it is false or without a sufficient foundation, (2) an intent to induce
14 another’s reliance, and (3) damages that result from this reliance.” *Nelson v. Heer*, 123 Nev. 217,
15 225-26, 163 P.3d 420, 426 (2007); *see also Wild Game Ng, LLC v. IGT*, 2015 WL 7575352, *1
16 (Nev. Nov. 24, 2015) (“instead of deceitful intent, negligent misrepresentation arises when one
17 fails to exercise reasonable care in ascertaining the truth”).

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

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

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

1 minimum, subject to an applicable qualified privilege.

2 (a) **Absolute Privilege**

3 Nevada recognizes "the long-standing common law rule that communications uttered or
4 published in the course of judicial proceedings are absolutely privileged so long as they are in
5 some way pertinent to the subject matter of the controversy." *Circus Circus Hotels, Inc. v.*
6 *Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101 (1983). This rule includes "statements made in the
7 course of quasi-judicial proceedings" *Knox v. Dick*, 99 Nev. 514, 518, 665 P.2d 267
8 (1983)(citation omitted); *see also Circus Circus*, 99 Nev. at 61 ("the absolute privilege attached to
9 judicial proceedings has been extended to quasi-judicial proceedings before executive officers,
10 boards, and commissions....")(citations omitted).

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

21 The Nevada Supreme Court has explained when an administrative action constitutes a
22 "quasi-judicial" proceeding. *State ex rel. Bd. of Parole Comm'rs v. Morrow*, 127 Nev. 265, 273,
23 255 P.3d 224 (2011), The judicial function test "is a means of determining whether an
24 administrative proceeding is **quasi-judicial** by examining the hearing entity's function.[]" *Id.* at
25 273 (citation omitted)(emphasis added). The Court explained:

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

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

Id. at 273-74.

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

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

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

1 The City Council has the authority to "may make and adopt all *ordinances, resolutions*
2 *and orders*... which are necessary for the municipal government, the management of the affairs
3 of the City and the execution of all of the powers which are vested in the City." Las Vegas City
4 Charter § 2.090(1)(emphasis added). In accordance, the General Plan amendment process results
5 in a binding written decision containing "reasons for the decision" that is provided to the
6 "applicant, agent or both" and the notice is formally filed with the City Clerk. UDC
7 19.16.030(H)(3). There is also no question that the decision by the City Council would affect the
8 "personal property and rights of private persons." Indeed, at a minimum, the dispute at issue
9 implicates the way in which Plaintiffs can use their property. Additionally, as a general matter,
10 the City Council has the power to examine and hear witnesses to assist the City Council in
11 making its decisions. In fact, the City Council has authority to "[o]rder the attendance of
12 witnesses and the production of all documents which relate to any business before the City
13 Council" and the "City Council ... may apply to the clerk of the district court for a subpoena
14 which commands the attendance of that person before the City Council." Las Vegas City Charter
15 § 2.080(1)(d), (2)(a). Finally, the City, including the City Council, has the ability to enforce
16 decisions or impose penalties.⁵ Based on the foregoing, the proceedings of the City Council
17 relating to Plaintiffs' pending application for amendment of the General Plan are quasi-judicial.

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

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

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

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

6 **(b) Qualified Privilege**

7 Even if absolute privilege did not apply, Defendants cannot be liable to Plaintiffs because
8 any statements in the Declarations are also subject to a qualified or conditional privilege. Under
9 Nevada law, "[a] qualified or conditional privilege exists where a defamatory statement is made
10 in good faith on any subject matter in which the person communicating has an interest, or in
11 reference to which he has a right or duty, if it is made to a person with a corresponding interest or
12 duty." *Circus Circus*, 99 Nev. at 62 (citations omitted). Where any such privilege applies,
13 alleged defamatory statements "are not actionable unless the privilege is abused by publishing the
14 statements with malice." *Bank of America Nevada v. Bordeaux*, 115 Nev. 263, 267, 982 P.2d 474
15 (1999) (citations omitted). "[P]laintiff must prove by a preponderance of the evidence that the
16 defendant abused the privilege by publishing the defamatory communication with actual malice. [
17] Actual malice is a stringent standard that is proven by demonstrating that "a statement is
18 published with knowledge that it was false or with reckless disregard for its veracity." *Pope v.*
19 *Motel 6*, 121 Nev. 307, 317, 114 P.3d 277 (2005).

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

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

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

IV. CONCLUSION

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

DATED this 13th day of April, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: /s/ Mitchell J. Langberg
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Attorneys For Defendants Daniel Omerza, Darren Bresee,
and Steve Caria

CERTIFICATE OF SERVICE

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

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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

EXHIBIT 1

Declaration of Daniel Omerza

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

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

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

12 Plaintiffs,

13 v.

14 DANIEL OMERZA, DARREN BRESEE,
STEVE CARIA, and DOES 1 THROUGH
15 1000,

16 Defendants.

CASE NO. A-18-771224-C

DECLARATION OF DANIEL OMERZA

A-18-771224-C

DECLARATION OF DANIEL OMERZA

I, Daniel Omerza, hereby declare as follows:

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

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

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

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

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

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

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

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

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

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

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

7 12. The declarations (which are attached to Plaintiff's complaint) state that the
8 signatory purchased his or her Queensridge residence or lot "in reliance upon the fact that the
9 open space/natural drainage system could not be developed pursuant to the City's Approval in
10 1990 of the Peccole Ranch Master Plan and subsequent formal actions designating the open
11 space/natural drainage system in its General Plan as Parks Recreation – Open Space which land
12 use designation does not permit the building of residential units." One version of the declarations
13 further states that "[a]t the time of purchase, the undersigned paid a significant lot premium to the
14 original developer as consideration for the open space/natural drainage system."

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

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

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

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

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

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

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8 DANIEL OMERZA
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EXHIBIT 2

Declaration of Darren Bresee

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

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

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

12 Plaintiffs,

13 v.

14 DANIEL OMERZA, DARREN BRESEE,
STEVE CARIA, and DOES 1 THROUGH
15 1000,

16 Defendants.

CASE NO. A-18-771224-C

DECLARATION OF DARREN BRESEE

A-18-771224-C

DECLARATION OF DARREN BRESEE

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

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

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

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

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

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

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

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

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

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

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

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

24
25 

26 DARREN BRESEE

EXHIBIT 3

Declaration of Steve Caria

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

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

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Liability Company; 180 LAND CO., LLC,
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12 Plaintiffs,

13 v.

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STEVE CARIA, and DOES 1 THROUGH
15 1000,

16 Defendants.

CASE NO. A-18-771224-C

DECLARATION OF STEVE CARIA

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

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

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

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

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

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

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

7 12. The declarations (which are attached to Plaintiff's complaint) state that the
8 signatory purchased his or her Queensridge residence or lot "in reliance upon the fact that the
9 open space/natural drainage system could not be developed pursuant to the City's Approval in
10 1990 of the Peccole Ranch Master Plan and subsequent formal actions designating the open
11 space/natural drainage system in its General Plan as Parks Recreation – Open Space which land
12 use designation does not permit the building of residential units." One version of the declarations
13 further states that "[a]t the time of purchase, the undersigned paid a significant lot premium to the
14 original developer as consideration for the open space/natural drainage system."

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

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

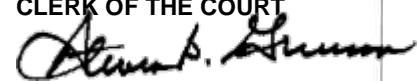
24 15. I participated in obtaining these declarations to assist the Las Vegas city council in
25 its deliberations, to the extent it considers whether to approve any changes requested by the
26 developer.

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

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

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

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8 STEVE CARIA
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OPPS

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**DISTRIC COURT
CLARK COUNTY, NEVADA**

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

Plaintiffs,

vs.

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

Defendants.

Case No.: A-18-771224-C

Dept. No.: II

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

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

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

4 DATED this 4th day of May, 2018.

5 THE JIMMERSON LAW FIRM, P.C.

6 By: /s/ James J. Jimmerson, Esq.

7 JAMES J. JIMMERSON, ESQ.

8 Nevada Bar No. 000264

9 JAMES M. JIMMERSON, ESQ.

10 Nevada Bar No. 12599

11 415 S. 6th Street, #100

12 Las Vegas, Nevada 89101

13 *Attorneys for Plaintiffs*

14 MEMORANDUM OF POINTS AND AUTHORITIES

15 I. INTRODUCTION.

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

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

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

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

13 The Court should summarily deny Defendants’ special motion because Nevada’s
14 anti-SLAPP statute is not implicated here. Indeed, the Defendants’ claim of “good faith
15 communication in furtherance of the right to ... free speech” is a ruse. They are not
16 entitled to immunity under NRS 41.635 *et seq.* for several important reasons: (1)
17 Nevada’s anti-SLAPP statute does not protect against intentional torts; (2) the alleged
18 claims against the Defendants are based on their wrongful conduct rather than free
19 speech; (3) even if Defendants’ conduct could be characterized as “communications,” it
20 was not “truthful or made without knowledge of its falsehood” and therefore doesn’t
21 constitute good faith communications; and (4) no absolute or qualified privilege applies.
22 Alternatively, the Landowners respectfully request that they be allowed to conduct
23 limited discovery pursuant to NRS 41.660(4) should the Court determine that the
24 Defendants have established by a preponderance of the evidence that the Landowners’
25 claims are based on “a good faith communication in furtherance of ... the right to free
26 speech” under NRS 41.660(3)(a).
27
28

II. RELEVANT FACTS.

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

III. ARGUMENT.

A. Nevada's Anti-SLAPP Statute.

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

1 comments by State Senator on S.B. 405 Before the Senate, 67th Leg. (Nev., June 17,
2 1993)). Importantly, however, Nevada's anti-SLAPP statute only protects from civil
3 liability those citizens who engage in *good-faith communications*. See NRS 41.637
4 (emphasis added). Thus, Nevada's anti-SLAPP statute is not an absolute bar against
5 substantive claims. See *id.* Instead, it only bars claims from persons who seek to abuse
6 other citizens' rights to participate in the political process, and it allows meritorious
7 claims against citizens who do not act in good faith. See *id.*; see also *John v. Douglas*
8 *Cnty. Sch. Dist.*, 125 Nev. at 753, 219 P.3d at 1281. In other words, Nevada's anti-SLAPP
9 statute does not apply in cases such as this where the Defendants have mischaracterized
10 their wrongful conduct as "good faith participation in the political process" so that they
11 can continue to harm the Land Owners with impunity.

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

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

24 NRS 41.637.

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

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

10 B. Nevada’s Anti-SLAPP Statute Does Not Protect Against Intentional
11 Torts.

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

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

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

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

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

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

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

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

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

21 Courts may take judicial notice of facts that are "not subject to reasonable
22 dispute." NRS 47.130(2). Generally, the court will not take judicial notice of facts in a
23 different case, even if connected in some way, unless the party seeking such notice
24 demonstrates a valid reason for doing so. *Mack v. Estate of Mack*, 125 Nev. 80, 91, 206
25 P.3d 98, 106 (Nev. 2009) (holding that the court will generally not take judicial notice of
26 records in other matters); *Carson Ready Mix v. First Nat'l Bk.*, 97 Nev. 474, 476, 635
27 P.2d 276, 277 (Nev. 1981) (providing that the court will not consider evidence not
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1 appearing in the record on appeal). In this case, a decision on a petition for judicial
2 review, such as the order from Judge Crockett (which, incidentally, is under appeal) does
3 not allow for “findings of fact” and should be disregarded. Findings in the case before
4 Judge Smith, however, were proper and made after receipt of substantial evidence upon
5 which this Court can rely.³

6 Even if the statements and/or declarations were consistent with the “ruling in the
7 Binion Litigation” as the Defendants argue, they were controverted by at least three
8 other court orders which are public records attached to the Complaint and which the
9 Defendants should have disclosed to their neighbors, particularly given their discussions
10 with them about the court order in *Binion et al v. Fore Stars et al*, Dkt. No. A-17-729053.
11 See Comp., Exs. 2, 3, and 4. See also *Brelient v. Preferred Equities Corp.*, 109 Nev. at
12 845, 858 P.2d at 1260 (In ruling on a motion to dismiss, the court may consider matters
13 of public record, orders, items present in the record and any exhibits attached to the
14 complaint.). The Defendants’ omission of these material facts from the statements and/or
15 declarations they prepared, executed, promulgated, solicited, and circulated to other
16 homeowners in Queensridge is equivalent to a false representation. See Comp., Ex. 1;
17 see also *Nelson v. Heer*, 123 Nev. 217, 225-26, 163 P.3d 420, 426 (2007) (“With respect to
18 false-representation element of intentional-misrepresentation claim, the suppression or
19 omission of a material fact which a party is bound in good faith to disclose is equivalent
20 to a false representation, since it constitutes an indirect representation that such fact
21 does not exist.”).

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

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

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

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

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

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

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

16 D. The Defendants’ Conduct Does Not Constitute “Good Faith
17 Communications”.

18 Even if the Defendants’ conduct is characterized as “communication” under
19 Nevada’s anti-SLAPP statute (which it is not), that communication is not protected
20 unless it is in “good faith.” NRS 41.637(4) (good faith communication is “truthful or is
21 made without knowledge of its falsehood”); *see also Adelson v. Harris*, 133 Nev. ___, ___
22 n. 5, 402 P.3d 665, 670-71 n. 5 (2017)(Even if the communication in this case was “aimed
23 at procuring a[] governmental or electoral action, result or outcome,” that
24 communication is not protected unless it is “truthful or is made without knowledge of its
25 falsehood.”)(*citing Delucchi v. Songer*, 133 Nev. ___, 396 P.3d 826, 829–30 (2017)). Here,
26 in order for the Defendants’ purported “communications” to be in good faith, they must
27 demonstrate them to be “truthful or made without knowledge of [their] falsehood.” NRS
28 41.637(4). In particular, the phrase “made without knowledge of its falsehood” has a

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

6 Specifically, the Defendants executed purchase agreements when they purchased
7 their residences within the Queensridge Common Interest Community which expressly
8 acknowledged their receipt of, among other things, the following: (1) Master Declaration
9 of Covenants, Conditions, Restrictions and Easements for Queensridge (Queensridge
10 Master Declaration), which was recorded in 1996; (2) Notice of Zoning Designation of
11 Adjoining Lot which disclosed that the Land was zoned RPD 7; (3) Additional Disclosures
12 Section 4 – No Golf Course or Membership Privileges which stated that they acquired no
13 rights in the Badlands Golf Course; (4) Additional Disclosure Section 7 – Views/Location
14 Advantages which stated that future construction in the planned community may
15 obstruct or block any view or diminish any location advantage; and (5) Public Offering
16 Statement for Queensridge Towers which included these same disclaimers. *See Comp.*
17 at ¶¶ 10-12, 15-20. Furthermore, the deeds to the Defendants' respective residences "are
18 clear by their respective terms that they have no rights to affect or control the use of
19 Plaintiffs' real property." *Comp.* at ¶ 21. It is broadly accepted that CC&Rs create
20 contractual obligations binding upon the homeowners. *see Sandy Valley Assocs. V. Sky*
21 *Ranch Estates Owners Ass'n.* 117 Nev. 948, 954, 35 P 3d 964, 968 (2001), receded from
22 on other grounds by *Horgan v. Felton*, 123 Nev. 577, 170 P. 3d 982 (2007) ("the CC&Rs
23 constituted a written contract to convey land"); *see also Diaz v. Ferne*, 120 Nev. 70, 73,
24 84 P.3d 664, 665-66 (2004) (using contract interpretation rules to interpret CC&Rs). The
25 Defendants nevertheless prepared, promulgated, solicited, circulated, and executed the
26 following declaration to their Queensridge neighbors in March 2018:

27 TO: City of Las Vegas
28

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

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

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

12 Comp., Ex. 1.

13 In their special motion, the Defendants don't acknowledge the statements in the
14 declarations as their own or affirmatively assert their truthfulness. *See* Def. Mot. at pp.
15 11-12. Coincidentally, however, they all feign ignorance of falsity in paragraph 13 of their
16 respective affidavits, claiming to "have no understanding that any of these statements
17 are false." Def. Mot., Ex. 1 at ¶ 13, Ex. 2 at ¶ 13, Ex. 3 at ¶ 13. Yet they don't dispute
18 any of the allegations in the Complaint about the Queensridge Master Declaration, the
19 Land Owners having the absolute right to develop the Land based solely on the RPD 7
20 zoning, or their having received notice that any views and/or locations advantages they
21 enjoyed could be obstructed in the future. *See gen.*, Def. Mot., Exs. 1, 2, and 3. Nor do
22 they dispute knowledge of the other court orders which involved their similarly situated
23 neighbors in Queensridge, which are public records attached to the Complaint, and which
24 expressly found that: (1) the Land Owners have complied with all relevant provisions of
25 NRS Chapter 278 and properly followed procedures for approval of a parcel map over
26 their property; (2) Queensridge Common Interest Community is governed by NRS
27 Chapter 116 and not NRS Chapter 278A because there is no evidence remotely
28 suggesting that the Land is within a planned unit development; (3) the Land is not
subject to the Queensridge Master Declaration, and the Land Owners' applications to
develop the Land are not prohibited by, or violative of, that declaration; (4) Queensridge
residents have no vested rights in the Land; (5) the Land Owners' development
applications are legal and proper; (6) the Land Owners have the right to close the golf

1 course and not water it without impacting the Queensridge residents' rights; (7) the
2 Land is not open space and drainage because it is zoned RPD 7; and (8) the Land Owners
3 have the absolute right to develop the Land because zoning – not the Peccole Ranch
4 Master Plan – dictates its use and the Land Owners' rights to develop it. *See id.; see also*
5 Comp., Ex. 2 at ¶¶ 41-42, 52, 56, 66, 74, 78-79, and 108; Ex. 3 at ¶¶ 8, 12, 15-23, 26, 61,
6 64-67, and 133. Instead, the Defendants claim to have “no understanding that any of the
7 statements are false” based solely on “conversations with other Queensridge residents”
8 and the court order in *Binion et al v. Fore Stars et al*, Dkt. No. A-17-729053. *See* Def.
9 Mot., Ex. 1 at ¶¶ 7-9, Ex. 2 at ¶¶ 7-9, Ex. 3 at ¶¶ 7-9. In other words, the Defendants
10 fraudulently procured signatures by picking and choosing the information they shared
11 with their neighbors to manipulate them into signing the declaration. *See id.*⁴ At best,
12 they simply ignored or disregarded known, material facts that directly conflicted with
13 the statements in the declaration and undermined their plan to present a false narrative
14 to the City of Las Vegas and mislead council members into delaying and ultimately
15 denying the Land Owners' development applications. *See id.; see also* Comp., Ex. 1. Such
16 conduct hardly constitutes “good faith” for purposes of immunity under Nevada's anti-
17 SLAPP statute. *See* NRS 41.637. For these reasons, the Defendants are not entitled to
18 immunity under NRS 41.635 *et seq.* as a matter of law.

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

20 Finally, the Defendants concede authorship of the statements in the declaration
21 and devote the last five pages of their special motion to the absurd notion that their
22

23
24 ⁴ Defendants' reliance on Judge Crockett's order in the *Binion* case is wholly misplaced and, in
25 fact, evidences their improper conduct. As the Court knows, the *Binion* matter is completely
26 different and does not involve the Queensridge development. That Defendants rely upon a
27 decision that post-dates all of the earlier events and decisions concerning the Queensridge
28 development is evidence that they were (and still are) cherry-picking the information they were
communicating to their neighbors. Such behavior constitutes fraud when material information
is concealed. *See Epperson v. Roloff*, 102 Nev. 206, 212, 719 P.2d 799, 803 (1986) (“[W]e also note
that a defendant may be found liable for misrepresentation even when the defendant does not
make an express misrepresentation, but instead makes a representation which is misleading
because it partially suppresses or conceals information.”).

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

6 Second, only the fair, accurate, and impartial reporting of judicial proceedings is
7 privileged and nonactionable. *See Adelson v. Harris*, 133 Nev. at ___, 402 P.3d at 667.
8 Nevada “has long recognized a special privilege of absolute immunity from defamation
9 given to the news media and the general public to report newsworthy events in judicial
10 proceedings.” *Id.* (quoting *Sahara Gaming Corp. v. Culinary Workers Union Local 226*,
11 115 Nev. 212, 214, 984 P.2d 164, 166 (1999); citing *Circus Circus Hotels, Inc. v.*
12 *Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101, 104 (1983) (“[There] is [a] long-standing
13 common law rule that communications uttered or published in the course of judicial
14 proceedings are absolutely privileged so long as they are in some way pertinent to the
15 subject of controversy.” (citation omitted)). “[T]he ‘fair, accurate, and impartial’ reporting
16 of judicial proceedings is privileged and nonactionable ... affirming the policy that Nevada
17 citizens have a right to know what transpires in public and official legal proceedings.”
18 *Lubin v. Kunin*, 117 Nev. 107, 114, 17 P.3d 422, 427 (2001) (quoting *Sahara Gaming*, 115
19 Nev. at 215, 984 P.2d at 166). Not only are the Defendants’ purported “communications”
20 in this case far from “fair or accurate” as analyzed above, but they were not “uttered or
21 published in the course of judicial proceedings” under any stretch of the allegations in
22 the Complaint. *See Adelson v. Harris*, 133 Nev. at ___, 402 P.3d at 667; *see also* Comp.
23 at ¶¶ 23-30.

24 Likewise, there were no good faith “communications preliminary to a proposed
25 judicial proceeding or quasi-judicial proceeding.” *Bank of America Nevada v. Bordeau*,
26 115 Nev. 263, 267, 982 P.2d 474, 476 (1999) (statements made to investigator during a
27 statutorily required fact-finding investigation by the FDIC not protected by absolute
28

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

9 Third, the qualified or conditional privilege alternatively sought by the
10 Defendants only applies where “a defamatory statement is made in good faith on any
11 subject matter in which the person communicating has an interest, or in reference to
12 which he has a right or a duty, if it is made to a person with a corresponding interest or
13 duty.” *Bank of America Nevada v. Bordeau*, 115 Nev. at 266-67, 982 P.2d at 476
14 (statements made to FDIC investigators during background check of employee are
15 subject to conditional privilege). As a party claiming a qualified or conditional privilege
16 in publishing a defamatory statement, the Defendants must have acted in good faith,
17 without malice, spite or ill will, or some other wrongful motivation, and must believe in
18 the statement's probable truth. *See id.; see also Pope v. Motel 6*, 121 Nev. 307, 317, 114
19 P.3d 277, 284 (2005) (statements made to police during investigation subject to
20 conditional privilege). Not only are the purported “communications” in this case beyond
21 those contemplated by the Nevada Supreme Court as privileged, but the Defendants did
22 not act in good faith as detailed above. At minimum, a factual issue exists whether any
23 privilege applies and/or the Defendants acted in good faith, both of which are not properly
24 decided in this special motion. *See Fink v. Oshins*, 118 Nev. at 433, 49 P.3d at 645
25 (factual issue on whether privilege applied); *Bank of America Nevada v. Bordeau*, 115
26 Nev. at 266-67, 982 P.2d at 476 (factual issue on whether publication was made with
27 malice). The Court should reject their claim of privilege accordingly.
28

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

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

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

4 **IV. CONCLUSION.**

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

9 DATED this 4th day of May, 2018.

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

11 /s/ James J. Jimmerson, Esq.
12 JAMES J. JIMMERSON, ESQ.
13 Nevada Bar No. 000264
14 James M. Jimmerson, Esq.
15 Nevada Bar. No. 12599
16 415 S. 6th Street, #100
17 Las Vegas, Nevada 89101
18 *Attorneys for Plaintiffs*
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DECLARATION OF JAMES M. JIMMERSON ESQ. IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS (ANTI-SLAPP MOTION) PLAINTIFFS' COMPLAINT PURSUANT TO NRS 41.635 ET SEQ.

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

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

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

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

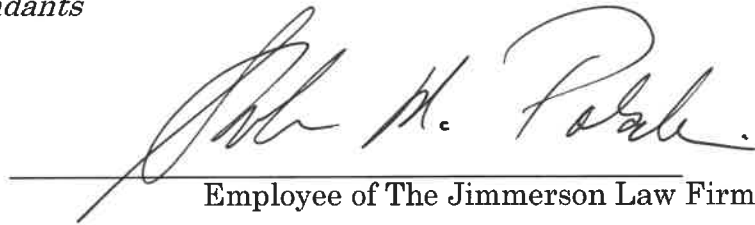
3 Executed on this 4th day of May, 2018.

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6 JAMES M. JIMMERSON, ESQ.
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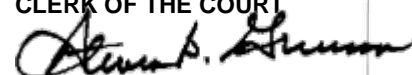
CERTIFICATE OF SERVICE

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

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



Employee of The Jimmerson Law Firm, P.C.



OPPS

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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,

Plaintiffs,

vs.

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

Defendants.

Case No.: A-18-771224-C

Dept. No.: II

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

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

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

DATED this 7th day of May, 2018.

THE JIMMERSON LAW FIRM, P.C.

/s/ James M. Jimmerson, Esq.
JAMES J. JIMMERSON, ESQ.
Nevada Bar No. 000264
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Attorneys for Plaintiffs

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

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

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

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

1 **II. RELEVANT FACTS**

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

18 According to the Complaint, the Defendants executed purchase agreements when
19 they purchased their residences within the Queensridge Common Interest Community
20 which expressly acknowledged their receipt of, among other things, the following: (1)
21 Master Declaration of Covenants, Conditions, Restrictions and Easements for
22 Queensridge (Queensridge Master Declaration), which was recorded in 1996; (2) Notice
23 of Zoning Designation of Adjoining Lot which disclosed that the Land was zoned RPD 7;
24 (3) Additional Disclosures Section 4 – No Golf Course or Membership Privileges which
25 stated that they acquired no rights in the Badlands Golf Course; (4) Additional Disclosure
26 Section 7 – Views/Location Advantages which stated that future construction in the
27 planned community may obstruct or block any view or diminish any location advantage;
28

1 and (5) Public Offering Statement for Queensridge Towers which included these same
2 disclaimers. *See* Comp. at ¶¶ 10-12, 15-20. The Complaint further alleges that the deeds
3 to the Defendants' respective residences "are clear by their respective terms that they have
4 no rights to affect or control the use of Plaintiffs' real property." Comp. at ¶ 21. The
5 Defendants nevertheless prepared, promulgated, solicited, circulated, and executed the
6 following declaration to their Queensridge neighbors in March 2018:

7 TO: City of Las Vegas

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

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

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

19 Comp., Ex. 1.

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

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

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

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

24 **III. ARGUMENT**

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

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

1 (1993) (*quoting Squires v. Sierra Nev. Educational Found.*, 107 Nev. 902, 905, 823 P.2d
2 256, 257 (1991)). All factual allegations of the complaint must be accepted as true. *See*
3 *Breliant*, 109 Nev. at 846, 858 P.2d at 1260 (*citing Capital Mort. Holding v. Hahn*, 101
4 Nev. 314, 315, 705 P.2d 126, 126 (1985)). A complaint will not be dismissed for failure to
5 state a claim “unless it appears beyond a doubt that the plaintiff could prove no set of facts
6 which, if accepted by the trier of fact, would entitle him [or her] to relief.” *See Breliant*,
7 109 Nev. at 846, 858 P.2d at 1260 (*quoting Edgar v. Wagner*, 101 Nev. 226, 228, 699
8 P.2d 110, 112 (1985) (citation omitted)).

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

23 Furthermore, Nevada is a “notice pleading” state, which means that the ultimate
24 facts alleged within the pleadings need not be recited with particularity. *See Hall v. SSF,*
25 *Inc.*, 112 Nev. 1384, 1391, 930 P.2d 94, 98 (1996) (“[A] complaint need only set forth
26 sufficient facts to demonstrate the necessary elements of a claim for relief so that the
27 defending party has adequate notice of the nature of the claim and the relief sought.”)
28

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

B. The Complaint States Cognizable Claims For Relief

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

1 others with the intended action of delaying or denying the [Land Owners'] land rights and
2 their intent to develop their property." Comp. at ¶ 58. The Complaint further alleges that
3 the "co-conspirators agreement was implemented by their concerted actions to object to
4 [the Land Owners'] development and to use their political influence" to delay and
5 sabotage any development projects to the detriment of the Land Owners and their
6 livelihoods. Comp. at ¶¶ 58-60; *see also Flowers v. Carville*, 266 F.Supp.2d at 1249
7 (actionable civil conspiracy is defined as a combination of two or more persons, who by
8 some concerted action, intend to accomplish some unlawful objective for the purpose of
9 harming another which results in damage). Based on these allegations, the Land Owners
10 have set forth sufficient facts to demonstrate the necessary elements of their interference
11 with prospective economic relations and conspiracy claims such that the Defendants have
12 adequate notice of the nature of these claims and the relief sought. *See* NRCP 8.
13 Accordingly, they should not be dismissed.

14 With respect to their intentional and negligent misrepresentation claims (Fifth and
15 Sixth Claims for Relief), the Land Owners allege the Defendants' actions were intentional
16 and/or negligent and were undertaken "with the intent of causing homeowners and the
17 City of Las Vegas to detrimentally rely upon their misrepresentation of fact being falsely
18 made...." Comp. at ¶¶ 62-68. According to the Complaint, the Defendants solicited and
19 procured the statements and/or declarations, *i.e.*, false misrepresentations of fact, as part
20 of a scheme to mislead council members into denying the Land Owners' applications. *See*
21 *id.* The Defendants did so despite having received prior, express written notice that,
22 among other things, the Land is developable and any views or location advantages they
23 have enjoyed may be obstructed by future development. *See* Comp. at ¶¶ 12-22. They did
24 so despite also being aware of court orders determining, among other things, that
25 homeowners in Queensridge don't have any "vested rights" with respect to the Land and
26 that the Land Owners have the absolute right to develop it. *See* Comp., Ex. 2 at ¶¶ 81-82,
27 108; Ex. 3. Even if the statements and/or declarations were consistent with the "ruling in
28

1 the Binion Litigation” as the Defendants argue, they were controverted by at least three
2 other court orders which are public records attached to the Complaint and which the
3 Defendants should have disclosed to their neighbors, particularly given their discussions
4 with them about the court order in *Binion et al v. Fore Stars et al*, Dkt. No. A-17-729053.
5 See Comp., Exs. 2, 3, and 4; see also *Brelient v. Preferred Equities Corp.*, 109 Nev. at 845,
6 858 P.2d at 1260 (In ruling on a motion to dismiss, the court may consider matters of
7 public record, orders, items present in the record and any exhibits attached to the
8 complaint.). The Defendants omission of these material facts from the statements and/or
9 declarations they prepared, executed, promulgated, solicited, and circulated to other
10 homeowners in Queensridge is equivalent to a false representation. See Comp., Ex. 1; see
11 also *Nelson v. Heer*, 123 Nev. 217, 225-26, 163 P.3d 420, 426 (2007) (“With respect to
12 false-representation element of intentional-misrepresentation claim, the suppression or
13 omission of a material fact which a party is bound in good faith to disclose is equivalent
14 to a false representation, since it constitutes an indirect representation that such fact does
15 not exist.”).

16 In sum, these allegations set forth sufficient facts to demonstrate the necessary
17 elements of intentional and/or negligent misrepresentation claims. See *Squires v. Sierra*
18 *Nevada Ed. Found. Inc.*, 107 Nev. at 906 and n. 1, 823 P.2d at 258 and n. 1
19 (misrepresentation allegations sufficient to avoid dismissal under NRCP 12(b)(5)).
20 Should the Court determine, however, that the misrepresentation claims are not plead
21 with sufficient particularity pursuant to NRCP 9, the Land Owners respectfully request
22 leave to amend their Complaint and/or conduct discovery pursuant to *Rocker v. KPMG*
23 *LLP*, 122 Nev. 1185, 148 P.3d 703 (2006). See NRCP 9(b) (“In all averments of fraud or
24 mistake, the circumstances constituting fraud or mistake shall be stated with
25 particularity....”); cf. *Rocker*, 122 Nev. at 1192-95, 148 P.3d at 707-10 (A relaxed pleading
26 standard applies in fraud actions where the facts necessary for pleading with particularity
27 are peculiarly within the defendant’s knowledge or are readily obtainable by him. In such
28

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

3 **C. The Defendants' Conduct Is Not Privileged**

4 The Defendants devote the last five pages of their motion to the absurd notion that
5 they "could not be liable to Plaintiffs for the solicitation of the declarations, or for any
6 statements contained in" them because they are privileged. Def. Mot. at p. 10-15. This
7 contention fails for at least three reasons. First, the absolute litigation privilege is limited
8 to defamation claims, and this is not a defamation action. *See Fink v. Oshins*, 118 Nev.
9 428, 433, 49 P.3d 640, 645 (2002)(absolute privilege limited to defamation cases).
10 Second, only the fair, accurate, and impartial reporting of judicial proceedings is
11 privileged and nonactionable. *See Adelson v. Harris*, 133 Nev. ___, ___, 402 P.3d 665,
12 667 (2017). Nevada "has long recognized a special privilege of absolute immunity from
13 defamation given to the news media and the general public to report newsworthy events
14 in judicial proceedings." *Id.* (quoting *Sahara Gaming Corp. v. Culinary Workers Union*
15 *Local 226*, 115 Nev. 212, 214, 984 P.2d 164, 166 (1999); citing *Circus Circus Hotels, Inc.*
16 *v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101, 104 (1983) ("[There] is [a] long-standing
17 common law rule that communications uttered or published in the course of judicial
18 proceedings are absolutely privileged so long as they are in some way pertinent to the
19 subject of controversy." (citation omitted)). "[T]he 'fair, accurate, and impartial' reporting
20 of judicial proceedings is privileged and nonactionable ... affirming the policy that Nevada
21 citizens have a right to know what transpires in public and official legal proceedings."
22 *Lubin v. Kunin*, 117 Nev. 107, 114, 17 P.3d 422, 427 (2001) (quoting *Sahara Gaming*, 115
23 Nev. at 215, 984 P.2d at 166). Not only are the Defendants' purported "communications"
24 in this case far from "fair or accurate" as analyzed above, but they were not "uttered or
25 published in the course of judicial proceedings" under any stretch of the allegations in the
26 Complaint. *See Adelson v. Harris*, 133 Nev. at ___, 402 P.3d at 667; *see also* Comp. at
27 ¶¶ 23-30. Thus, an absolute privilege is inapplicable here.
28

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

14 Specifically, the Complaint alleges the Defendant prepared, promulgated,
15 circulated, solicited, and executed false declarations “solely for the purposes of harassing
16 and maliciously attacking” the Land Owners as part of an overall scheme to “cause
17 economic damage and harm” to them and their livelihoods, to slander title to the Land,
18 delay their developments applications, and to suborn and mislead the City of Las Vegas
19 and its council members with the false declarations into rejecting those applications so
20 the Land Owners are ultimately prevented from ever redeveloping the Land. *See Comp.*
21 *at ¶¶ 23-30*. The Complaint further alleges that Defendants were aware of and had notice
22 of public records and other information that directly controverted the statements in the
23 declarations which they ignored and disregarded. *See id.* Despite this, the Defendants
24 still sought signatures from their neighbors on the declarations with the intent to use
25 those false declarations to sabotage the Land Owners’ redevelopment of the Land. *See id.*
26

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

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

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

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

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

DATED this 7th day of May, 2018.

THE JIMMERSON LAW FIRM, P.C.

/s/ James M. Jimmerson, Esq.
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DECLARATION OF JAMES M. JIMMERSON ESQ.
IN SUPPORT OF PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS PURSUANT TO NRCP 12(b)(5)

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

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

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

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

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

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


JAMES M. JIMMERSON, ESQ.

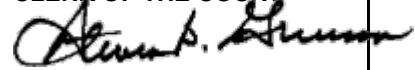
CERTIFICATE OF SERVICE

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

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and STEVE CARIA

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

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

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

Hearing Date: May 14, 2018

Hearing Time: 9:00 am.

I. INTRODUCTION

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

1 prevailing on the claim.” NRS 41.660(3)(b).

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

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

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

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

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

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

14 **II. ARGUMENT**

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

24 **A. PLAINTIFFS' OPPOSITION MISPERCEIVES THE OPERATION AND** 25 **IMPORT OF THE ANTI-SLAPP STATUTE.**

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

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

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

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

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

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

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

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

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

1 conspiracy to obtain false testimony).

2 This same line of cases also dispels Plaintiffs' peculiar theory that the anti-SLAPP statute
3 cannot apply when Plaintiffs allege wrongful conduct by Defendants (as if any plaintiff would fail
4 to make such an allegation). Opposition, at 7-9. The predictable allegation of some wrongdoing
5 by Defendants does not dispel the fact that the claims arise in significant part from their
6 participation in the political arena. "Where, as here, a cause of action is based on both protected
7 activity and unprotected activity, it is subject to [the anti-SLAPP statute] 'unless the protected
8 conduct is merely incidental to the unprotected conduct.'" *Haight Ashbury Free Clinics, supra*, at
9 1551 (quoting *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*, 133 Cal.
10 App. 4th 658, 672, 35 Cal. Rptr. 3d 31 (2005)); *see also Baral v. Schnitt*, 1 Cal. 5th 376, 396, 205
11 Cal. Rptr. 3d 475, 376 P.3d 604, 617 (2016) ("When relief is sought based on allegations of both
12 protected and unprotected activity, the unprotected activity is disregarded at this [first prong]
13 stage. If the court determines that relief is sought based on allegations arising from activity
14 protected by the statute, the second step is reached."). This is consistent with the rule in Nevada
15 that courts need only determine whether a claim involves conduct meeting the definition of NRS
16 41.637, without need to undertake an analysis of First Amendment law. *Delucchi*, 396 P.3d at
17 833 (quoted in Motion, at 8). Plaintiffs' insistence that the statute does not apply to intentional
18 torts or alleged wrongful conduct is nonsense, underscoring their misunderstanding of the nature
19 and purpose of the anti-SLAPP statute.

20 **B. DEFENDANTS MET THEIR INITIAL BURDEN OF SHOWING THAT**
21 **PLAINTIFFS' CLAIMS ARISE FROM DEFENDANTS' EXERCISE OF**
22 **THEIR FIRST AMENDMENT RIGHTS.**

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

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

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

17 Plaintiffs only response in their Opposition is to insist that the communications at issue
18 are not *good faith* communications, because Defendants know that nobody relied on the
19 designation in the Master Development Plan of the Badlands golf course as Parks Recreation –
20 Open Space. Their only support for this assertion is the Court's decision in *Peccole v. Peccole*,
21 Case A-16-739654-C, which Plaintiffs claim held just that. But this Court will search the
22 Findings of Fact in that action in vain for any such holding. To the contrary, that case analyzed
23 another resident's contention that the Queensridge CC&R's apply to Plaintiffs and somehow
24 *forbid* them from developing the Badlands property. Defendants here have not taken the position
25 that Plaintiffs are bound by the Queensridge CC&R's, nor do the declarations they secured make
26 any such assertion. Rather, the declarations state that the signing residents purchased their
27 residence or lot "in reliance upon the fact that the open space/natural drainage system could not
28 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." Mot., Exs. 1-3, ¶ 12. These declarations do *not* rely on the terms of the Queensridge CC&R's, and thus are not in any way inconsistent with the court's holding in *Peccole v. Peccole*. They are, however, entirely consistent with Judge Crockett's determination in the Binion Litigation, Case No. A-17-752344-J, that approval of Plaintiffs' plans requires a major modification of the Peccole Ranch Master Plan, which may run afoul of the reasonable expectations of residents of the area who relied on the existing master planning. *See* Request for Judicial Notice, Ex. A, at 5-10. Since Judge Crockett himself obviously raised this concern in good faith, there can be no reasonable inference that Defendants could not believe the same thing in good faith.²

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

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

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

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

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

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

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

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

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

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

4 Second, Plaintiffs request is untimely. An anti-SLAPP motion is designed to be an
5 expedited procedure, with the statute calling for a decision within 20 days of filing. NRS
6 41.660(3)(f). Any serious need for discovery is one that should naturally be raised immediately
7 with the Court, not belatedly requested as an alternative, in the event Plaintiffs should lose on
8 their other arguments. By waiting to make a request for discovery for the first time in the
9 alternative in their responsive pleading, Plaintiffs have failed to reasonably attempt to meet their
10 burden of showing a probability of prevailing on their claims. Instead, they have invited the
11 Court to give them an additional opportunity for delay and for imposing costs and burdens on
12 Defendants, exactly what the anti-SLAPP statute is supposed to prevent. The Court should not
13 indulge Plaintiffs in such gamesmanship.

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

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

20 First, without any legal authority and ignoring Nevada Supreme Court authority directly
21 on point, Plaintiffs argue that the absolute privilege cannot apply because "this is not a
22 defamation action." *Opp.* at 16. The truth is that both absolute and qualified privileges apply
23 regardless of how the claim for relief is styled. As explained by the Nevada Supreme Court,
24 when applicable, "[a]n absolute privilege bars **any** civil litigation based on the underlying
25 communication." *Hampe v. Foote*, 118 Nev. 405, 409, 47 P.3d 438, 440 (2002) (emphasis
26 added), *overruled in part on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev.
27 224, 228 n. 6, 181 P.3d 670, 672 n. 6 (2008); *see also Bank of America Nevada v. Bourdeau*, 115
28 Nev. 263, 267, 982 P.2d 474, 476 (1999)(recognizing that conditional privilege can bar an

1 interference with a prospective business relation claim).

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

16 Defendants' efforts to gather statements for use in a public proceeding does not involve
17 news media or members of the general public attempting to report on judicial proceedings, so any
18 limitations specific to the fair report privilege do not apply here.³ The absolute privilege that is
19 applicable here is completely different. Mr. Caria and Mr. Omerza's efforts relate to their
20 opposition to development of the subject Badlands property, and their hope that others would also
21 voice their opposition to the City. They were merely gathering statements to be submitted in the
22 City Council proceedings from potential witnesses in the form of declarations by residents of
23 Queensridge who could review and sign them *if the resident agreed with the statements contained*
24

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

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

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

13 Although Defendants deny they said anything that was inaccurate or unfair, *as a matter of*
14 *law*, there simply is no requirement that the communications be "fair or accurate," as Plaintiffs
15 contend. In fact, it is well-established that "*absolute privilege precludes liability even where the*
16 *defamatory statements are published with knowledge of their falsity and personal ill will*
17 *toward the plaintiff*." *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101,
18 104 (1983) (citations omitted).⁵ "The policy underlying the privilege is that in certain situations
19 the public interest in having people speak freely outweighs the risk that individuals will
20 occasionally abuse the privilege by making false and malicious statements." *Circus Circus*, 99
21 Nev. at 61 (citations omitted).

22 Plaintiffs also argue that "there were no good faith 'communications preliminary to a
23

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

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

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

12 The Nevada Supreme Court has instructed that "because the scope of the absolute
13 privilege is broad, a court determining whether the privilege applies should resolve any doubt in
14 favor of a broad application." *Clark County Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev.
15 374, 382, 213 P.3d 496, 502 (2009)(citation omitted). Thus, even if there were some doubt that
16 the privilege applies here – and there should be none – such doubt must be resolved in favor of
17 protecting Defendants' petitioning activities.

18 Even if an absolute privilege did not apply, Defendants' are still protected under a
19 qualified or conditional privilege. Plaintiffs arguments on this issue are also wholly inadequate.
20 As an initial matter, Plaintiffs fail to dispute that the subject matter at issue here may be subject to
21 conditional or qualified privilege. Indeed, they do not dispute that any communications or
22

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

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

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

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

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

20 ///

21 ///

22 ///

23 ///

24 ///

25
26 ⁸ *See also Circus Circus*, 99 Nev. at 62-63 (recognizing that whether a conditional privilege exists
27 is a question of law for the court and plaintiff's burden to show malice is a question that "goes to
28 the jury only if there is sufficient evidence for the jury to reasonably to infer that the publication
was made with malice in fact")(citations omitted).

1 **III. CONCLUSION**

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

4 DATED this 9th day of May, 2018.

5 BROWNSTEIN HYATT FARBER SCHRECK, LLP
6

7
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CERTIFICATE OF SERVICE

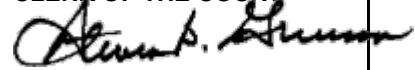
I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and pursuant to NRCP 5(b), EDCR 8.05, Administrative Order 14-2, and NEFCR 9, I caused a true and correct copy of the foregoing **DEFENDANTS' REPLY IN SUPPORT OF SPECIAL MOTION TO DISMISS (ANTI-SLAPP MOTION) PLAINTIFFS' COMPLAINT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

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DISTRICT COURT

CLARK COUNTY, NEVADA

FORE STARS, LTD., a Nevada limited
liability company; 180 LAND CO., LLC; a
Nevada limited liability company;
SEVENTY ACRES, LLC, a Nevada
limited liability company,

Plaintiffs,

v.

DANIEL OMERZA, DARREN BRESEE,
STEVE CARIA, and DOES 1 THROUGH
100,

Defendants,

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

**DEFENDANTS' REPLY BRIEF IN
SUPPORT OF MOTION TO DISMISS
PURSUANT TO NRCP 12(B)(5)**

Hearing Date: May 14, 2018

Hearing Time: 9:00 a.m.

I. INTRODUCTION

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

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

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

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

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

12 **II. DEFENDANTS' MOTION TO DISMISS SHOULD BE GRANTED IN ITS**
13 **ENTIRETY.**

14 **A. Plaintiffs Fail to Adequately Allege a Claim For Relief.**

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

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

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

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

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

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

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

22 **a) Intentional or Negligent Interference**

23 The first flaw in Plaintiffs' claims for intentional or negligent interference is that there are
24 no allegations to identify the prospective contractual relationships at issue. While stating a claim
25

26 ¹ Judge Crockett's concerns do not in any way exclude Queensridge, but apply to any Peccole
27 Ranch residents and Badlands neighbors, which would include the Queensridge residents in
28 question. Defendants are simply at a loss to understand why Plaintiffs believe that it is significant
that Judge Crockett's ruling post-dates the *Peccole v. Peccole* decision (and Defendants' purchase
of their properties), Opposition at 1, when the two cases address different issues.

1 for interference with "prospective" relationships does not require an allegation of a specific,
2 existing contract, *see LT Inten. Ltd. v. Shuffle Master, Inc.*, 8 F. Supp. 3d 1238, 1248 (D. Nev.
3 2014) (relied upon by Plaintiffs, *see* Opposition, at 6), it *does* require allegations sufficient to
4 identify the *prospective* relationships at issue. *See Valley Health Sys. LLC v. Aetna Health, Inc.*,
5 No. 2:15-CV-1457 JCM (NJK), 2016 U.S. Dist. LEXIS 83710, at *14 (D. Nev. Jun. 28, 2016)
6 (dismissing a claim for intentional interference with prospective economic advantage where
7 plaintiff "has not properly alleged a prospective contractual relationship between [it] and a third
8 party with which [the defendant] could have interfered"); *Bustos v. Dennis*, No. 2:17-CV-00822-
9 KLD-VCF, 2018 U.S. Dist. LEXIS 45764, at *10-11 (D. Nev. Mar. 20, 2018) (dismissing
10 intentional interference with prospective economic advantage claim where plaintiff did not meet
11 "his burden in alleging interference with a specific prospective contractual relationship" and did
12 not allege that "Defendants were aware of the prospective relationship") (emphasis added). By
13 the same token, Plaintiffs cannot claim they have adequately alleged that Defendants knew of the
14 prospective relationships at issue, when Plaintiffs themselves cannot identify what they were.

15 Further, Plaintiffs have failed to allege—beyond bald conclusory allegations—any
16 specific harm from Defendants' purported conduct, or that Defendants acted with intent to harm
17 Plaintiffs. *See Rimini St., Inc. v. Oracle Int'l Corp.*, No. 2:14-cv-1699-LRH-CWH, 2017 U.S.
18 Dist. LEXIS 184597, at *47-49 (D. Nev. Nov. 7, 2017) (finding plaintiff failed to sufficiently
19 plead a claim for intentional interference with prospective economic advantage, including
20 because plaintiff failed to identify "either a prospective client or prospective contract" and that "to
21 allege actual harm, a plaintiff must allege that he would have been awarded the contract but for
22 the defendant's interference") (citations omitted).

23 Finally, Plaintiffs cannot even establish that a claim for negligent interference with
24 prospective economic advantage even exists in Nevada law. *See Valley Health Sys.*, 2016 U.S.
25 Dist. LEXIS 83710, at *6 (dismissing the negligent interference with prospective economic
26 advantage claim where "parties agree that [the] claim should be dismissed because it is not a
27 recognized cause of action under Nevada law").

28 ///

b) Conspiracy

Plaintiffs' Opposition only underscores the flaw in their conspiracy claim. Plaintiffs repeat their conclusory allegation that Defendants acted "improperly," but they cannot articulate what Defendants actually sought to do that was improper. Instead, Plaintiffs concede that Defendants' objection has simply been to obtain a desired outcome in the political process. Opposition, at 8-9. If this were held sufficient to state a claim for relief, then every action undertaken in the political realm, indeed most water cooler conversations across the state, would suddenly become a conspiracy in the eyes of the law. There is no reason for such a dramatic transformation of both the law and politics in the State of Nevada.

c) Intentional or Negligent Misrepresentation

As demonstrated in Defendants' Motion and again above, Plaintiffs cannot contend that it was an actionable misrepresentation for Defendants to attest to, or to ask other residents about, reliance that this Court has itself acknowledged in the Binion Litigation. Plaintiffs again argue incorrectly that the outcome of other past litigation is also relevant to the issue, and they suggest a new rule of law requiring private citizens discussing a political issue with other private citizens to give a complete recitation of every item of arguable support for either point of view. Opposition, at 7-8. Although this rule might have the desirable effect of destroying Facebook forever, it has not been adopted or even considered in any jurisdiction.

In the alternative, Plaintiffs request a relaxed pleading standard until they can conduct discovery in order to determine some cognizable basis for their misrepresentation claims. But their own support for this request held that a plaintiff must still "state facts supporting a strong inference of fraud" and further that "the plaintiff must aver that this relaxed standard is appropriate and show in his complaint that he cannot plead with more particularity because the required information is in defendant's possession." *Rocker v. KPMG LLP*, 122 Nev. 1185, 1195, 148 P.3d 703 (2006). Plaintiffs have failed to support a strong inference of fraud, and the Court need not tolerate their stab-in-the-dark method of pleading.

///

///

1 **B. Plaintiffs' Claims Fail Because Defendants are Protected by Absolute and**
2 **Qualified Privileges.**

3 Even if Plaintiffs' claims for relief were tenable on their face, the court should dismiss the
4 Complaint based upon Defendants' applicable privileges. Plaintiffs dispute that Defendants'
5 actions are protected by privilege, but each of their arguments is based on mischaracterizations of
6 the law and/or unsupported conclusory statements.

7 First, without any legal authority and ignoring Nevada Supreme Court authority directly
8 on point, Plaintiffs argue that the absolute privilege cannot apply because "this is not a
9 defamation action." Opposition, at 9. The truth is that both absolute privileges apply regardless
10 of how the claim for relief is styled. As explained by the Nevada Supreme Court, when it applies,
11 when applicable, "[a]n absolute privilege bars *any* civil litigation based on the underlying
12 communication." *Hampe v. Foote*, 118 Nev. 405, 409, 47 P.3d 438, 440 (2002) (emphasis
13 added), *overruled in part on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev.
14 224, 228 n. 6, 181 P.3d 670, 672 n. 6 (2008); *see also Bank of America Nevada v. Bourdeau*, 115
15 Nev. 263, 267, 982 P.2d 474, 476 (1999) (recognizing that conditional privilege can bar an
16 interference with a prospective business relation claim).

17 Plaintiffs also misrepresent the criteria for asserting the absolute litigation privilege.
18 Whether by intent or neglect, Plaintiffs argue that reliance on the absolute litigation privilege
19 requires that the statements at issue be "fair" and "accurate." However, that requirement relates to
20 an entirely distinct privilege—the "fair report" privilege—which has not even been asserted by
21 the Defendants. Plaintiffs correctly note that "Nevada 'has long recognized a special privilege of
22 absolute immunity from defamation given to the news media and the general public to report
23 newsworthy events in judicial proceedings'" and that "only the fair, accurate, and impartial
24 reporting of judicial proceedings is privileged and nonactionable." Opposition, at 9 (citations
25 omitted). Misapplying this privilege, Plaintiffs advance the red-herring argument that the
26 "communications" at issue were not "fair or accurate" and were not "uttered or published in the
27 course of judicial proceedings" *Id.* (citations omitted). The fair report privilege (which is
28 designed to protect those who report *about* what is said in official proceedings) is not at issue in

1 this motion. Thus, cases discussing the requirements of the fair report privilege are inapposite.

2 Defendants' efforts to gather statements for use in a public proceeding does not involve
3 news media or members of the general public attempting to report on judicial proceedings, so any
4 limitations specific to the fair report privilege do not apply here.² The absolute privilege that is
5 applicable here is completely different. Defendants' actions relate to their opposition to
6 development of the subject Badlands property, and their hope that others would also voice their
7 opposition to the City. More specifically, the conduct at issue involves gathering statements from
8 potential witnesses in the form of declarations by residents of Queensridge who could review and
9 sign them *if the resident agreed with the statements contained therein*.

10 Moreover, Plaintiffs have not—and cannot—rebut the well-settled rule that the privilege's
11 protections go beyond communications that occur *during* the course of any judicial proceedings.
12 It is well-established that communications *preliminary* to a proposed judicial or quasi-judicial
13 proceeding are also absolutely privileged. *See, e.g., Fink v. Oshins*, 118 Nev. 428, 433, 49 P.3d
14 640 (2002) ("the privilege applies not only to communications made during actual judicial
15 proceedings, but also to 'communications preliminary to a proposed judicial
16 proceeding'")(footnote citation omitted). Here, Defendants sought out to gather and/or provide
17 input from witnesses for consideration by the City to the extent it considers whether to approve an
18 amendment to the General Plan.³ Thus the Defendants' efforts were directly related to anticipated
19 quasi-judicial proceedings before the City Council, and an absolute privilege may be extended to
20 statements by witnesses, like the Defendants here.⁴ Notably, Plaintiffs do not even attempt to

21 _____
22 ² In *Adelson v. Harris*, 402 P.3d 665 (Nev. 2017), the Court explained that "the fair report
23 privilege is most commonly asserted by media defendants" and "extends to any person who
24 makes a republication of a judicial proceeding from material that is available to the general
public." *Adelson*, 402 P.3d at 667 (citation omitted). The fair report privilege relates to
"Nevada's policy that citizens have a right to a fair account of what occurs during official
proceedings." *Id.* at 668 (citation omitted).

25 ³ As noted in the Motion, Plaintiffs had already filed an application to change the General Plan to
26 allow for their development plans. Mot. at 5.

27 ⁴ *Cf. Knox v. Dick*, 99 Nev. 514, 517, 665 P.2d 267 (1983)(recognizing that statements by
28 witnesses can be subject to privilege); *Lebbos v. State Bar*, 165 Cal. App. 3d 656, 668, 211 Cal.
Rptr. 847 (Cal. Ct. App. 1985) ("[I]t is well settled that absolute privilege extends in quasi-
judicial proceedings to preliminary interviews and conversations with potential witnesses.").

1 rebut the factors in Defendants' analysis (Motion at 11-12), which demonstrated that the
2 anticipated City Council proceedings at issue are quasi-judicial in nature. In fact, Plaintiffs own
3 counsel has *already* admitted during a meeting before the City that the relevant City Council land
4 use proceedings are quasi-judicial in nature.⁵

5 Although Defendants deny they said anything that was inaccurate or unfair, *as a matter of*
6 *law*, there simply is no requirement that the communications be "fair or accurate," as Plaintiffs
7 contend. In fact, it is well-established that "*absolute privilege precludes liability even where the*
8 *defamatory statements are published with knowledge of their falsity and personal ill will*
9 *toward the plaintiff.*" *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101,
10 104 (1983)(citations omitted).⁶ "The policy underlying the privilege is that in certain situations
11 the public interest in having people speak freely outweighs the risk that individuals will
12 occasionally abuse the privilege by making false and malicious statements." *Circus Circus*, 99
13 Nev. at 61 (citations omitted).

14 The Nevada Supreme Court has instructed that "because the scope of the absolute
15 privilege is broad, a court determining whether the privilege applies should resolve any doubt in
16 favor of a broad application." *Clark County Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev.
17 374, 382, 213 P.3d 496, 502 (2009)(citation omitted). Thus, even if there were some doubt that
18 the privilege applies here—and there should be none—such doubt must be resolved in favor of
19 protecting Defendants' petitioning activities.

20 Even if an absolute privilege did not apply, Defendants' are still protected under a
21

22 ⁵ See Request for Judicial Notice (concurrently filed herewith), Ex. 1 (Transcript of City Council
23 Meeting of February 21, 2018, at 16:411-419 (Plaintiffs' counsel argues that "when a body like a
24 city council is sitting on a land use application or business license application.... [¶] ... you are
25 now in a quasi-judicial proceeding[y]ou have to act in conformity with a quasi-judicial
capacity....").

26 ⁶ This is even true under the "fair report privilege" discussed by Plaintiffs. See *Sahara Gaming*
27 *Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212, 219, 984 P.2d 164 (1999)(noting that
28 because a Union's statements "were a fair and accurate report of a judicial proceeding, they are
absolutely privileged ... even if the statements were made maliciously and with knowledge of
their falsity.").

1 qualified or conditional privilege. Plaintiffs' arguments on this issue are also wholly inadequate.
2 As an initial matter, Plaintiffs fail to dispute that the subject matter at issue here may be subject to
3 conditional or qualified privilege. Indeed, they do not dispute that any communications or
4 interactions at issue here were made between persons with interests in the subject matter at issue
5 (the development of the Badlands golf course). *See Circus Circus*, 99 Nev. at 62 (indicating that
6 qualified or conditional privilege exists where the subject matter related to one "in which the
7 person communicating has an interest ..., if made to a person with a corresponding interest ...").

8 Plaintiffs contend that "Defendants didn't act in good faith" (Opposition, at 10) but as
9 shown by the form declaration attached to Plaintiffs' complaint, the form requested signatures
10 only if the resident believed the statements to be accurate. Plaintiffs' conclusory allegations that
11 Defendants knew the statements contained therein were false or that they only solicited or
12 executed declarations "solely for the purposes of harassing and maliciously attacking" the Land
13 Owners" is nothing more than an empty, conclusory allegation, which is wholly inadequate.
14 *Strack v. Morris*, No. 3:15-CV-00123-LRH-VPC, 2015 U.S. Dist. LEXIS 157965, at * (D. Nev.
15 Nov. 20, 2015) (noting that "to survive a motion to dismiss, the non-conclusory 'factual content,'
16 and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the
17 plaintiff to relief")(citation omitted). Moreover, Plaintiffs do not dispute that they must prove
18 actual malice in order to successfully rebut any application of a conditional or qualified privilege.
19 That burden can only be met by providing evidence that a "statement is published with
20 knowledge that it was false or with reckless disregard for its veracity." *Pope v. Motel 6*, 121 Nev.
21 307, 317, 114 P.3d 277 (2005). Again, Plaintiffs cannot possibly meet that burden because the
22 form declarations were only requesting signatures if the resident believed that the statements were
23 accurate, and the declarations are consistent with the conclusions of Judge Crockett, in which he
24 determined that residents purchased property in the community in reliance on the Master
25 Development Plan.⁷

26
27 ⁷ *See also Circus Circus*, 99 Nev. at 62-63 (recognizing that whether a conditional privilege exists
28 is a question of law for the court and plaintiff's burden to show malice is a question that "goes to
the jury only if there is sufficient evidence for the jury to reasonably to infer that the publication
was made with malice in fact")(citations omitted).

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

4 C. **The Motion To Dismiss Should Be Granted Now, And Discovery Should Not**
5 **Be Permitted Prior to Making That Determination.**

6 Finally, in the alternative, Plaintiffs request discovery to find a basis for a claim for relief
7 that they have not yet been able to identify. But simply stated, that is not how this process works.
8 Under NRCP 11, Plaintiffs and their counsel must know of an actionable claim *before* they bring
9 suit, not start a lawsuit in hopes that something will turn up during discovery. There is no basis
10 for Plaintiffs' suggestion that *Rocker v. KPMG, LLP*, 122 Nev. 1185, 148 P.3d 703 (2006),
11 approves their backward approach. Rather, as discussed above, that decision becomes applicable
12 only after Plaintiffs have "state[d] facts supporting a strong inference of fraud," 122 Nev. at 1195,
13 which they have yet to manage here.

14 **III. CONCLUSION**

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

18 DATED this 9th day of May, 2018.

19 BROWNSTEIN HYATT FARBER SCHRECK, LLP

20 BY: /s/ Mitchell J. Langberg

21 MITCHELL J. LANGBERG, ESQ., Bar No. 10118

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24 Las Vegas, NV 89106-4614

25 Telephone: 702.382.2101

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27 *Counsel for Defendants*

28 DANIEL OMERZA, DARREN BRESEE, and
STEVE CARIA

CERTIFICATE OF SERVICE

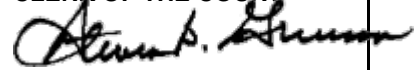
I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and pursuant to NRCP 5(b), EDCR 8.05, Administrative Order 14-2, and NEFCR 9, I caused a true and correct copy of the foregoing **DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS PURSUANT TO NRCP 12(B)(5)** submitted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

James J. Jimmerson, Esq.
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Attorneys for Plaintiffs
FORE STARS, LTD., 180 LAND CO., LLC;
and SEVENTY ACRES, LLC

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

16802994



RFJN

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

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

v.

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

Defendants.

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

**DEFENDANTS' REQUEST FOR
JUDICIAL NOTICE IN SUPPORT OF (1)
DEFENDANTS' REPLY IN SUPPORT OF
SPECIAL MOTION TO DISMISS (ANTI-
SLAPP MOTION) PLAINTIFFS'
COMPLAINT PURSUANT TO NRS §41.635
ET. SEQ. AND (2) DEFENDANTS' REPLY
IN SUPPORT OF MOTION TO DISMISS
PURSUANT TO NRCP 12(B)(5)**

Hearing Date: May 14, 2018

Hearing Time: 9:00 a.m.

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

(1) City Council Meeting of February 21, 2018, Verbatim Transcript – Agenda Items 122 through 131, publicly available at:
http://www5.lasvegasnevada.gov/sirepub/view.aspx?cabinet=published_meetings&fileid=151114
21, attached hereto as **Exhibit 1**.

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

DATED this 9th day of May, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

BY: /s/ Mitchell J. Langberg

MITCHELL J. LANGBERG, ESQ., Bar No. 10118
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Counsel for Defendants
DANIEL OMERZA, DARREN BRESEE, and
STEVE CARIA

CERTIFICATE OF SERVICE

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

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

Attorneys for Plaintiffs

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

16799254

EXHIBIT 1

CITY COUNCIL MEETING OF

FEBRUARY 21, 2018

VERBATIM TRANSCRIPT – AGENDA ITEMS 122 THROUGH 131

1 **ITEM 122 - GPA-72220 - GENERAL PLAN AMENDMENT - PUBLIC HEARING -**
2 **APPLICANT/OWNER: 180 LAND CO, LLC - For possible action on a request for a**
3 **General Plan Amendment FROM: PR-OS (PARKS/RECREATION/OPEN SPACE) TO:**
4 **ML (MEDIUM LOW DENSITY RESIDENTIAL) on 132.92 acres on the east side of**
5 **Hualapai Way, approximately 830 feet north of Charleston Boulevard (APNs 138-31-601-**
6 **008; and 138-31-702-003 and 004), Ward 2 (Seroka) [PRJ-72218]. The Planning**
7 **Commission vote resulted in a tie, which is tantamount to a recommendation of DENIAL.**
8 **Staff recommends APPROVAL.**

10 **ITEM 123 - WVR-72004 - WAIVER - PUBLIC HEARING - APPLICANT/OWNER: 180**
11 **LAND CO, LLC, ET AL - For possible action on a request for a Waiver TO ALLOW 40-**
12 **FOOT PRIVATE STREETS WITH NO SIDEWALKS WHERE 47-FOOT PRIVATE**
13 **STREETS WITH FIVE-FOOT SIDEWALKS ON BOTH SIDES ARE REQUIRED**
14 **WITHIN A PROPOSED GATED RESIDENTIAL DEVELOPMENT on a portion of 71.91**
15 **acres on the north side of Verlaine Court, east of Regents Park Road (APN 138-31-601-008;**
16 **138-32-202-001; 138-32-210-008; and 138-32-301-007), R-PD7 (Residential Planned**
17 **Development - 7 Units per Acre) and PD (Planned Development) Zones, Ward 2 (Seroka)**
18 **[PRJ-71990]. The Planning Commission (4-2-1 vote) and Staff recommend APPROVAL.**

20 **ITEM 124 - SDR-72005 - SITE DEVELOPMENT PLAN REVIEW RELATED TO WVR-**
21 **72004 - PUBLIC HEARING - APPLICANT/OWNER: 180 LAND CO, LLC, ET AL - For**
22 **possible action on a request for a Site Development Plan Review FOR A PROPOSED 75-**
23 **LOT SINGLE FAMILY RESIDENTIAL DEVELOPMENT on a portion of 71.91 acres on**
24 **the north side of Verlaine Court, east of Regents Park Road (APNs 138-31-601-008; 138-32-**
25 **202-001; 138-32-210-008; and 138-32-301-007), R-PD7 (Residential Planned Development -**
26 **7 Units per Acre) and PD (Planned Development) Zones, Ward 2 (Seroka) [PRJ-71990].**
27 **The Planning Commission (4-2-1 vote) and Staff recommend APPROVAL.**

CITY COUNCIL MEETING OF

FEBRUARY 21, 2018

VERBATIM TRANSCRIPT – AGENDA ITEMS 122 THROUGH 131

ITEM 125 - ABEYANCE - TMP-72006 - TENTATIVE MAP RELATED TO WVR-72004 AND SDR-72005 - PARCEL 2 @ THE 180 - PUBLIC HEARING - APPLICANT/OWNER: 180 LAND CO, LLC - For possible action on a request for a Tentative Map FOR A 75-LOT SINGLE FAMILY RESIDENTIAL SUBDIVISION on 22.19 acres on the north side of Verlaine Court, east of Regents Park Road (APN 138-31-601-008), R-PD7 (Residential Planned Development - 7 Units per Acre) Zone, Ward 2 (Seroka) [PRJ-71990]. The Planning Commission (4-2-1 vote) and Staff recommend APPROVAL.

ITEM 126 - WVR-72007 - WAIVER - PUBLIC HEARING - APPLICANT/OWNER: 180 LAND CO, LLC, ET AL - For possible action on a request for a Waiver TO ALLOW 40-FOOT PRIVATE STREETS WITH NO SIDEWALKS WHERE 47-FOOT PRIVATE STREETS WITH FIVE-FOOT SIDEWALKS ON BOTH SIDES ARE REQUIRED on a portion of 126.65 acres on the east side of Hualapai Way, approximately 830 feet north of Charleston Boulevard (APN 138-31-702-003; 138-32-202-001; 138-32-210-008; and 138-32-301-007), R-PD7 (Residential Planned Development - 7 Units per Acre) and PD (Planned Development) Zones, Ward 2 (Seroka) [PRJ-71991]. The Planning Commission (4-2-1 vote) and Staff recommend APPROVAL.

ITEM 127 - SDR-72008 - SITE DEVELOPMENT PLAN REVIEW RELATED TO WVR-72007 - PUBLIC HEARING - APPLICANT/OWNER: 180 LAND CO, LLC, ET AL - For possible action on a request for a Site Development Plan Review FOR A PROPOSED 106-LOT SINGLE FAMILY RESIDENTIAL DEVELOPMENT on a portion of 126.65 acres on the east side of Hualapai Way, approximately 830 feet north of Charleston Boulevard (APNs 138-31-702-003; 138-32-202-001; 138-32-210-008; and 138-32-301-007), R-PD7 (Residential Planned Development - 7 Units per Acre) and PD (Planned Development) Zones, Ward 2 (Seroka) [PRJ-71991]. The Planning Commission (4-2-1 vote) and Staff

CITY COUNCIL MEETING OF

FEBRUARY 21, 2018

VERBATIM TRANSCRIPT – AGENDA ITEMS 122 THROUGH 131

55 **recommend APPROVAL.**

56
57 **ITEM 128 - ABEYANCE - TMP-72009 - TENTATIVE MAP RELATED TO WVR-72007**
58 **AND SDR-72008 - PARCEL 3 @ THE 180 - PUBLIC HEARING -**
59 **APPLICANT/OWNER: 180 LAND CO, LLC - For possible action on a request for a**
60 **Tentative Map FOR A 106-LOT SINGLE FAMILY RESIDENTIAL SUBDIVISION on**
61 **76.93 acres on the east side of Hualapai Way, approximately 830 feet north of Charleston**
62 **Boulevard (APN 138-31-702-003), R-PD7 (Residential Planned Development - 7 Units per**
63 **Acre) Zone, Ward 2 (Seroka) [PRJ-71991]. Staff recommends APPROVAL.**

64
65 **ITEM 129 - WVR-72010 - WAIVER - PUBLIC HEARING - APPLICANT/OWNER: 180**
66 **LAND CO, LLC, ET AL - For possible action on a request for a Waiver TO ALLOW 40-**
67 **FOOT PRIVATE STREETS WITH NO SIDEWALKS WHERE 47-FOOT PRIVATE**
68 **STREETS WITH FIVE-FOOT SIDEWALKS ON BOTH SIDES ARE REQUIRED**
69 **WITHIN A PROPOSED GATED RESIDENTIAL DEVELOPMENT on a portion of 83.52**
70 **acres on the east side of Palace Court, approximately 330 feet north of Charleston**
71 **Boulevard (APN 138-31-702-004; 138-32-202-001; 138-32-210-008; and 138-32-301-007), R-**
72 **PD7 (Residential Planned Development - 7 Units per Acre) and PD (Planned Development)**
73 **Zones, Ward 2 (Seroka) [PRJ-71992]. The Planning Commission (4-2-1 vote) and Staff**
74 **recommend APPROVAL.**

75
76 **ITEM 130 - SDR-72011 - SITE DEVELOPMENT PLAN REVIEW RELATED TO WVR-**
77 **72010 - PUBLIC HEARING - APPLICANT/OWNER: 180 LAND CO, LLC, ET AL - For**
78 **possible action on a request for a Site Development Plan Review FOR A PROPOSED 53-**
79 **LOT SINGLE FAMILY RESIDENTIAL DEVELOPMENT on a portion of 83.52 acres on**
80 **the east side of Palace Court, approximately 330 feet north of Charleston Boulevard (APNs**
81 **138-31-702-004; 138-32-202-001; 138-32-210-008; and 138-32-301-007), R-PD7 (Residential**

CITY COUNCIL MEETING OF

FEBRUARY 21, 2018

VERBATIM TRANSCRIPT – AGENDA ITEMS 122 THROUGH 131

Planned Development - 7 Units per Acre) and PD (Planned Development) Zones, Ward 2 (Seroka) [PRJ-71992]. The Planning Commission (4-2-1 vote) and Staff recommend APPROVAL.

ITEM 131 - TMP-72012 - TENTATIVE MAP RELATED TO WVR-72010 AND SDR-72011 - PARCEL 4 @ THE 180 - PUBLIC HEARING - APPLICANT/OWNER: 180 LAND CO, LLC - For possible action on a request for a Tentative Map FOR A 53-LOT SINGLE FAMILY RESIDENTIAL SUBDIVISION on 33.80 acres on the east side of Palace Court, approximately 330 feet north of Charleston Boulevard (APN 138-31-702-004), R-PD7 (Residential Planned Development - 7 Units per Acre) and PD (Planned Development) Zones, Ward 2 (Seroka) [PRJ-71992]. The Planning Commission (4-2-1 vote) and Staff recommend APPROVAL.

Appearance List:

CAROLYN G. GOODMAN, Mayor

STEVEN G. SEROKA, Councilman

BRADFORD JERBIC, City Attorney

PETER LOWENSTEIN, Deputy Planning Director

LUANN D. HOLMES, City Clerk

BOB COFFIN, Councilman (via teleconference)

MICHELE FIORE, Councilwoman

STAVROS S. ANTHONY, Councilman

STEPHANIE ALLEN, Legal Counsel for the Applicant

MARK HUTCHISON, Legal Counsel for 180 Land Co, LLC, Seventy Acres LLC and Fore Stars, Ltd.

FRANK SCHRECK, Queensridge Resident

CITY COUNCIL MEETING OF

FEBRUARY 21, 2018

VERBATIM TRANSCRIPT – AGENDA ITEMS 122 THROUGH 131

108 **Appearance List (cont'd):**

109 TODD BICE, Legal Counsel for the Queensridge Homeowners

110 LISA MAYO, Concerned Citizen

111

112 (38 minutes, 17 seconds) [02:59:21 - 03:37:38]

113 Typed by: Speechpad.com

114 Proofed by: Debra A. Outland

115

116 **MAYOR GOODMAN**

117 Now, goodness, we are gonna pull forward at your request?

118

119 **COUNCILMAN SEROKA**

120 Yes, Ma'am.

121

122 **MAYOR GOODMAN**

123 Okay. We are pulling forward Agenda Items 122 through 131. And so, shall I start, or shall you
124 start, Mr. Jerbic?

125

126 **CITY ATTORNEY JERBIC**

127 If you could ask the Clerk —

128

129 **MAYOR GOODMAN**

130 Can you turn on your mic? Or it's not hearing you.

131

132 **CITY ATTORNEY JERBIC**

133 I'm sorry. It's on, but it's just away from my mouth.

CITY COUNCIL MEETING OF

FEBRUARY 21, 2018

VERBATIM TRANSCRIPT – AGENDA ITEMS 122 THROUGH 131

134 **MAYOR GOODMAN**

135 Thank you.

136

137 **CITY ATTORNEY JERBIC**

138 It was my understanding that the motion to abey included Items 122 through 131. Is that correct?

139

140 **MAYOR GOODMAN**

141 No.

142

143 **CITY ATTORNEY JERBIC**

144 No. They were on the call-off sheet, but they were not part of your motion.

145

146 **MAYOR GOODMAN**

147 And – Right.

148

149 **CITY ATTORNEY JERBIC**

150 Okay.

151

152 **MAYOR GOODMAN**

153 They were not – I did not speak to those. So, at the request of Councilman Seroka, we've asked

154 to pull those forward. And so I – think before I even begin to discuss those, you on legal have

155 some issues to address before I even speak.

156

157 **CITY ATTORNEY JERBIC**

158 Just very quickly, Your Honor. Prior to today's hearing, there have been two letters sent to

159 Councilman Coffin and to Councilman Seroka by the law firm of Hutchison & Steffen. Both

CITY COUNCIL MEETING OF

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160 letters claim, for different reasons, that they each have conflicts that should prevent them from
161 voting.

162

163 With respect to Councilman Coffin, who is on the line, this is the same argument that, to my
164 knowledge, was made earlier when Coffin, Councilman Coffin voted on similar items in the past,
165 and we advised that he did not have a conflict of interest. There's an objective and a subjective
166 portion to the test. One is, is he objectively disqualified under Nevada law? We don't believe so.
167 Of course, if somebody has a feeling of prejudice that would cause them to feel that they couldn't
168 make an impartial judgment, they should always abstain. Councilman Coffin made a record
169 before that he does not feel that he is prejudiced by anything that would cause him to not be
170 objective, and so he was advised that he could vote then. And I'm giving that same advice today.

171

172 With respect to Councilman Seroke, it has been argued that, during the campaign, he made
173 comments and at other meetings he made comments regarding an application, which is not
174 before this body today, a development agreement, that have indicated some mindset that causes
175 him to not be impartial today and therefore denies the Applicant due process of law as he sits in a
176 quasi-judicial capacity.

177

178 Before I begin, I had asked Mr. Lowenstein, prior to today's meeting, Items 121 [sic] through
179 131 involve applications for three separate projects, but they are in 10 items on today's agenda.
180 Can you tell me, Mr. Lowenstein, when those items first came to the City's attention? Not the
181 City Council's attention, but the City of Las Vegas, when those applications were submitted for
182 processing?

183

184 **PETER LOWENSTEIN**

185 Through you, Madame Mayor, the first time the projects were created in our database system
186 was October 26th and then the subsequent child applications later that month, on October 30th.

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187 **CITY ATTORNEY JERBIC**

188 That was October 26th of 2017?

189

190 **PETER LOWENSTEIN**

191 That is correct.

192

193 **CITY ATTORNEY JERBIC**

194 Okay. The, I have opined to Councilman Seroka that these applications came long after the
195 election. Any comments made during the campaign about a development agreement are
196 completely unrelated to the three applications here today. Furthermore, these arguments were not
197 made at the time Councilman Seroka voted on the development agreement, and if they had any
198 relevance at all, which I don't believe they do, they should have been made at that point in time
199 regarding the development agreement. He could not possibly have made comments during the
200 campaign about applications that didn't even exist until months later.

201

202 Therefore, I have opined for that and other reasons that Councilman Seroka does not have a
203 conflict of interest and he can vote on both the abeyance item and any, if it comes back in the
204 future, on the merits of these items. So having made that record, I understand there's going to be
205 a suggestion by Councilman Seroka or you, Your Honor, that these items be continued at this
206 point in time.

207

208 **MAYOR GOODMAN**

209 I should read these all into the record, correct, first?

210

211 **CITY ATTORNEY JERBIC**

212 I think – you can state generally what was stated on the callout sheet, which is –

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213 **MAYOR GOODMAN**

214 And that would – Okay.

215

216 **CITY ATTORNEY JERBIC**

217 I think you can state that this involves Items 122 through 131, and then –

218

219 **MAYOR GOODMAN**

220 And just read those numbers?

221

222 **CITY ATTORNEY JERBIC**

223 If you want, I'll read them, or you can read them, if you want.

224

225 **MAYOR GOODMAN**

226 No, I prefer you read them.

227

228 **CITY ATTORNEY JERBIC**

229 Sure. It's Item 122 through 131, which is GPA-72220 –, WVR-72004, SDR-72005, TMP-72006,

230 WVR-72007, SDR-72008, TMP-72009, WVR-72010, SDR-72011, and TMP-72012,

231 Applicant/Owner 180 Land Company, LLC and 180 Land Company, LLC, et al. regarding these

232 multiple parcels. The request is to abey these items until May 16th, 2018 made by the –

233

234 **MAYOR GOODMAN**

235 And could you make a statement as to the fact that we are a body sitting here of four with

236 another Councilperson on the line and that in order for that abeyance to pass, it will need – I'd

237 like you to speak to that.

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238 **CITY ATTORNEY JERBIC**

239 It will need four votes. Under Nevada law, anything that comes before this Council requires a
240 majority of the governing body. The governing body in this case is seven members. A majority is
241 four. No matter how many people are absent or sick, it's going to require four votes on anything.
242 The only exception to that is if an individual receives a written opinion from the Chief Legal
243 Counsel of the City indicating they have an ethical conflict under Nevada law 281A. Then you
244 reduce the governing body by whatever number of written opinions are given.
245 No written opinions have been given in this case. So the governing body remains seven, and
246 anything today requires four votes. So a motion to hold this in abeyance is going to require four
247 votes, and a motion on any one of these applications, 122 through 131, if they were heard today,
248 would also require four votes.

249

250 **MAYOR GOODMAN**

251 And that does include the fact that we have a vacancy with no one serving as Councilperson in
252 Ward 5?

253

254 **CITY ATTORNEY JERBIC**

255 That's correct. Nevada law does not grant you a – pass because somebody is not in office.

256

257 **MAYOR GOODMAN**

258 Okay. Well, with that under consideration and knowing that we will have someone, and I'd like
259 to hear from the City Clerk again what is the timeline for the vote on Ward 5, and then what
260 would be the opportunity for seating that individual once that individual is voted in.

261

262 **LUANN HOLMES**

263 So, election day for Ward 5 will be March 27th. We will canvas the votes the first meeting in
264 April, which is April 4th. We will seat them on April 18th. That's when they'll actually be seated.

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265 And the May 16th date that you're speaking of is approximately 30 days after that new
266 Councilperson seats.

267

268 **MAYOR GOODMAN**

269 Okay. Well, having spoken to legal staff and knowing Councilwoman is not here – Are you still
270 there, Councilman? Are you still there?

271

272 **COUNCILMAN COFFIN**

273 I'm still here. (Inaudible) phone ringing.

274

275 **MAYOR GOODMAN**

276 Okay.

277

278 **COUNCILWOMAN FIORE**

279 I don't think he's got his phone on mute. Tell him to put his phone on mute.

280

281 **MAYOR GOODMAN**

282 Oh yes, you can put your phone on mute. Anyway because of —

283

284 **COUNCILMAN COFFIN**

285 (Inaudible)

286

287 **MAYOR GOODMAN**

288 Thank you.

289

290 **COUNCILMAN COFFIN**

291 (Inaudible)

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292 **MAYOR GOODMAN**

293 Okay, thank you. Because of the vacancy and because Councilwoman isn't here today to
294 participate in this discussion and because of the fact, obviously, Councilman Coffin is abroad
295 and unable to be here as well, to me, it is, it's a really, it's a disservice to this two-and-a-half-year
296 process to go ahead and hold hearings on this and make some decisions.

297 So the recommendation to abey it, giving enough time to the new Councilperson in Ward 5 to be
298 brought up to speed and have opportunity to consult with Staff and Councilmembers as they
299 choose, additionally to have Councilwoman here and Councilman Coffin back in – place with us,
300 I really believe the best thing for us to be doing is to go ahead and abeying this until we can get
301 that together. I have from day one, when we first heard this back, I think it was in October of '16,
302 said that there's going to be no winner in this unless this is mediated and a, an agreement
303 somehow is reached among the parties.

304

305 And as you all well know, there are several lawsuits out there, and my feeling is, even though
306 there's been a district judge determination, that will be appealed and it will end up at the Nevada
307 Supreme Court. There is not a one of us that sits on this Council that's an attorney that can make
308 a determination as to what in the language prevails and takes precedent.

309

310 And therefore, being in that and with the vacancy in 5 and with Councilwoman not here and
311 Councilman Coffin here on the phone, my motion is going to be to abey it for these reasons. And
312 asking too for this, I'm gonna to turn to guidance from our staff as to hearing on this. The vote, is
313 it best to hear from everyone first, or am I at liberty to ask for a motion and –

314

315 **CITY ATTORNEY JERBIC**

316 I believe since you would not be hearing it on the merits if the motion passes, you are not under
317 obligation to have a hearing today on anything since the hearing will be – we'll see how the
318 motion goes. If the motion doesn't pass and you're gonna hear it today, then you'll have a

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319 hearing. And if you, the motion does pass, then there will be a hearing on whatever given date
320 you set the – items to.

321

322 **MAYOR GOODMAN**

323 Okay. Councilman Anthony?

324

325 **COUNCILMAN ANTHONY**

326 What's – the date again, Luann?

327

328 **LUANN HOLMES**

329 May 16th.

330

331 **COUNCILMAN ANTHONY**

332 May 16th. **So, I will make a motion to abey Agenda Items 122 through 131 until May 16th.**

333

334 **MAYOR GOODMAN**

335 So there is a motion. I'm holding off on you, Councilman Coffin, until all of us have voted. And
336 then once I see everybody there, now I'll ask for your vote?

337

338 **COUNCILMAN COFFIN**

339 I vote aye.

340

341 **STEPHANIE ALLEN**

342 Your Honor, before the vote, do we have an opportunity on – Oh, I guess not.

343

344 **MAYOR GOODMAN**

345 And so, if you would post this. Did I miss – It – was, It's all ayes on the abeyance. **(Motion**

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346 **carried with Tarkanian excused)** So, at this point, it will be heard on the 16th of May, and can
347 we make it the first item on the agenda, the first item on the afternoon agenda, if that would
348 work? And Mr. Jerbic, do – Is there appropriate to hear from anybody or no?

349

350 **CITY ATTORNEY JERBIC**

351 Since you've already voted the – If anybody wants to make a record, I know that Mr. Hutchinson
352 is here; I'm sure he wants to make a record.

353

354 **MARK HUTCHISON**

355 Thank you.

356

357 **CITY ATTORNEY JERBIC**

358 I – would give him a certain amount of time. I wouldn't give an indefinite amount of time since
359 we're not hearing this on the merits. I assume you just want to make a record on the two letters
360 that you sent regarding disqualification?

361

362 **MARK HUTCHISON**

363 I am.

364

365 **CITY ATTORNEY JERBIC**

366 Okay.

367

368 **MARK HUTCHISON**

369 Yes, Mr. Jerbic and – Madame Mayor, if I may make a record on – that matter, and just for the
370 record, we – vehemently oppose any kind of abeyance and continued delay of this matter.

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371 **MAYOR GOODMAN**

372 Oh, I'm sorry.

373

374 **MARK HUTCHISON**

375 I under –

376

377 **MAYOR GOODMAN**

378 Could you repeat your name for the record? Thank you.

379

380 **MARK HUTCHISON**

381 Sure. This is Mark Hutchison. And Your Honor and members of the – City Council, I am
382 appearing on behalf of my clients in my private capacity as legal counsel for 180 Land, Seventy
383 Acres, and Fore Stars, which are applications that you have just abated and a question was, has
384 surfaced that we raised before this vote occurred in terms of the impartiality, the prejudice, the
385 bias of two members of this body.

386

387 And as a result, we sent out last week two letters, one dated February 15th and one dated
388 February 16th, as you noted, Madame Mayor, and I'd like to have those presented to the Clerk
389 and a matter of record for the purposes of this proceeding.

390

391 And I appreciate the opportunity to make a record. Appreciate the opportunity to be here to
392 respectfully request this action by Councilman Coffin and by Councilman Seroka that they
393 recuse themselves. We had asked before this vote that they recuse themselves. We heard nothing
394 back, and so I'm just simply gonna make a record, and I will not belabor the points, Your Honor,
395 that we have made previously in our letters, but I do think it's important for the City Council to
396 hear this and for this to be a matter of record as we proceed.

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397 Mr. Coffin is a member of this Council who has served admirably. Mr. Seroka is a member of
398 this Council who's served admirably. But on these applications, they should not be permitted to
399 participate.

400

401 Mr. Coffin has repeatedly and publicly demonstrated a personal animus towards the Applicant's
402 principal, Mr. Yohan Lowie, for reasons that are completely unconnected with the merits of the
403 application. Mr. Lowie is of Israeli nationality. He's of the Jewish faith. Mr. Coffin, perhaps, the
404 most egregious examples of why he should not be allowed to participate and continue to be
405 involved in either the deliberations or the votings on the applicants, applications of my clients is
406 that he has publicly stated on multiple occasions that my client, Mr. Lowie, is treating the
407 residents of Queensridge like the Jewish state of Israel allegedly treats "unruly Palestinians."

408

409 That's not the end of the factual bases for the request for recusal, however. And again, I want to
410 be clear on the record, Mr. Jerbic. I'm not seeking recusal based on the ethics in government laws
411 or 28, 281A. That may be part of the analysis. What I'm basing the recusal on is the U.S. and the
412 Nevada Constitution that guarantees a fair tribunal when a body like a city council is sitting on a
413 land use application or a business license application.

414

415 Once this body assumes that position, you are now in a quasi-judicial proceeding. You are no
416 longer strictly in some sort of a policy-making proceeding or a legislative-making decision,
417 proceeding. This body is unlike the Nevada legislature. You sit on, adjudge people's property
418 rights. And when you adjudge people's property rights, the due process clause of the Constitution
419 applies. You have to act in conformity with a quasi-judicial capacity, and that quasi-judicial
420 capacity requires you to be fair and impartial. Fair and impartial.

421

422 And that's the basis of our request for recusal. We don't believe that my client can receive a fair
423 hearing when Councilman Coffin has expressed the sentiments he has towards my client's

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424 nationality and religion. In a early meeting in 2015, in a meeting with my client, he simply told
425 him that he would not, as well, take an interest adversed to a friend of his who lived in
426 Queensridge and would not be going against an interest, his interest.

427

428 In April of 2016, in another meeting with representatives of the property owners and with his
429 friend present at that meeting, he instructed my clients to hand over the 183 acres with certain
430 water rights in perpetuity and that was a fair deal and they should accept it.

431

432 In a January 2017 meeting, when meeting with Mr. Lowie, he once again compared Mr. Lowie's
433 personal actions in pursuing the development of the properties to Netanyahu's settlement of the
434 West Bank. He then doubled down on this in a letter to Todd Polikoff, who's the President of
435 Jewish Nevada, when he protested in a letter to Councilman Coffin and Mr. Lowie accused
436 Mr. Lowie of pursuing the acquisition of the properties in an opportunistic manner. He classified
437 his actions as inconsiderate and again compared Mr. Lowie's business decisions to the highly
438 political and divisive issue of the Jewish settlements in the West Bank.

439

440 In an April 17th, 2000 meeting with Mr. Spiegel, he told him that the only issue that mattered to
441 Councilman Coffin was a statement that was made to Mr. Lowie regarding the unruly
442 Palestinians, and he stated that the issue, until that issue was remedied, he could not be impartial
443 in any application that the property owners would bring forward. He made then good on his
444 comments and denied every application that came before him submitted by my – clients, the
445 property owners.

446

447 Mr. Seroka has, and – in contrary again, Mr. Jerbic, to your – points, it's just not about what
448 happened during the campaign. It's that and more. But once you – move from being in a judicial
449 role to being in an advocate role, you cease to be a fair and impartial arbiter of facts. And

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450 Councilman Seroka has become an advocate in opposition to the applications that are before this
451 City Council.

452

453 Beginning with his campaign handouts, he says that the property owners would be required to
454 participate in a property swap – regardless of the property rights currently held by the property
455 owners. He also – His plan highlighted that he was unwilling to even consider the property
456 owner's rights and development plans.

457

458 In a February 14th, 2017 Las Vegas Planning Commission meeting, while wearing the Steve
459 Seroka for Las Vegas City Council pin, he strongly advocated against my client's property rights
460 and development plans, stating “Over my dead body will I allow a project that will drive
461 property values down 30 percent. Over my dead body will I allow a project that will set a
462 precedent that will ripple across the community, that those property values not affected in
463 Queensridge, but throughout the entire community.”

464

465 He then asked the County – Mr. Seroka then asked the Commissioners to reject the Staff's
466 approval and recommendation to deny the applications. The following day at the City Council
467 meeting, he stated “I'm against this project.”

468

469 After Mr. Seroka's election, at a town hall meeting in November 29th, 2017, the Queensridge
470 Clubhouse, he stated that having the City Staff follow the letter of the law when reviewing
471 development applications is “The stupidest thing in the world in this case.”

472

473 He continued then by encouraging Queensridge homeowners to send in opposition to the
474 Planning Commissions and to the City Council.

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475 At the August 2nd, 2017 City Council hearing for the proposed development agreement for the
476 entire properties, negotiated by City Staff, including the City Attorney, and after delivering what
477 appeared to be pre-scripted remarks, he made a motion to deny the development agreement
478 shortly thereafter.

479

480 At another City Council meeting, September 6th, 2017, he then proposed a six-month
481 moratorium, specifically targeting development of my client's property, further delaying what
482 has already been a long and tortured and delayful process.

483

484 In short, Councilman Seroka has become an outspoken advocate against my client's property
485 rights and have actively squelched timely consideration of my client's application. As I say, why
486 does – all this matter? Because you're a government body. The Constitution applies to you. My
487 client has Constitutional rights and property interests that must be protected. And if you are
488 unfair or if you're biased, the due process clause of the Nevada Constitution and the U.S.
489 Constitution is violated.

490

491 You are – You sit in judicial roles in a quasi-judicial fashion, and the law adjudges you by the
492 principles that we would judge a judge in terms of impartiality. We would never allow a judge to
493 be both an advocate and then sit and be the judge of that case. That's exactly what Councilman
494 Seroka is doing. We would never allow a judge to express anti-religious and anti-nationality
495 comments and then to sit as a judge.

496

497 So the basis of all of these points, Madame Mayor, is that my client cannot receive a fair hearing
498 or have a fair and impartial tribunal as is required under the Constitution, and I respectfully ask,
499 again, that Councilman Seroka and Councilman Coffin no longer participate in these proceedings
500 and no longer vote.

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501 I do have, I do have one – suggestion for you, Your Honor, and that's this. If – it really is so
502 important to this Council that this property not be developed, then just simply concede to inverse
503 condemnation, and then we'll just be arguing about value. You can get rid of all of these
504 applications. You can get rid of all the neighbors. You can get rid of all of the headaches that you
505 have. If it really is your intention not to allow the property owner to develop, just concede to the
506 inverse condemnation –

507

508 **CITY ATTORNEY JERBIC**

509 Mr. Hutchison?

510

511 **MARK HUTCHISON**

512 – because you've got one of two choices.

513

514 **CITY ATTORNEY JERBIC**

515 Mr. Hutchison? You were given time to make your record on disqualification. You are going
516 way afar from the two letters that you filed talking about inverse condemnation. Do you have
517 anything else to say with respect to your attempt to recuse both Councilman Coffin and
518 Councilman Seroka, specifically?

519

520 **MARK HUTCHISON**

521 My – Mr. Jerbic, my follow-up remarks were addressed to that point that you can avoid all of
522 this by simply ceding the inverse condemnation. Those are my remarks. Madame Mayor, thank
523 you for the time. Members of the City Council, thank you for your time, and I ask that you take
524 these matters very seriously. They involve Constitutional rights and my client's property interest.
525 Thank you.

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526 **MAYOR GOODMAN**

527 Mr. Jerbic, the only other item would be anybody who wishes to comment on the abeyance
528 alone?

529

530 **CITY ATTORNEY JERBIC**

531 I – don't know that any comment is necessary, but I have a couple of comments that I would like
532 to put on the record. And, you can make a decision if you want to comment at the end of that.

533

534 This is really between right now Mr. Hutchison's letters and the City Council. I will say that we
535 looked at these matters and take them very seriously. I can say there was a court ruling just
536 recently where the judge took the bench and read the decision before he took any oral argument.

537 This Council reads background information all the time before hearing testimony of the public.

538 Everybody comes to this Council with some feeling one way or the other on just about every
539 item. And, if it were true that you have to be Caesar's wife to sit on a City Council and not have
540 any opinion about anything before you sit down, then nobody's ever voting on any issue ever. So

541 I – don't agree with the characterization of the frame of mind that individuals have to have.

542

543 If an individual were to say I'm against alcohol and therefore I will never vote for any application
544 that approves a liquor store, or I'm against a strip club and because it's against my religious
545 belief, I can never vote for one, or because I'm against any golf course conversion and can never
546 vote for one, I would understand the point. But for an individual during a campaign to talk about
547 a development agreement and these issues weren't even raised when he voted on the
548 development agreement, and today he's got three issues before him that are completely different
549 from the development agreement, which involved over 2,000 multi-family homes, this doesn't.
550 This involves 235 single-family homes, and he hasn't made a single comment, to my knowledge,
551 other than I want to work with the Applicant and the neighbors.

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552 Further, let me state that advocating for neighbors is not the same as advocating against an
553 applicant. I think every good elected official, in my opinion, advocates for their constituents.
554 And if the standard is that by advocating for your constituents, you have somehow placed
555 yourself in an adversary position to any applicant and can never vote, then nobody on this
556 Council is ever voting on any application ever in the planning session of the Council meeting. So
557 I – wanted to put that on record.

558
559 The other thing I will state is that I have been directed by Councilman Seroka many times to
560 reach out to the Applicant and the neighborhood to see if a deal can still be reached. So, with that
561 in mind, we have given the advice that Councilman Seroka does not need to disqualify himself,
562 unless he feels for some subjective reason that he can't be fair, and he's indicated that he can.
563 Second, let me state, and this is probably controversial, but let me state that the comments stated
564 by Councilman Coffin, and he made this record earlier, and I don't know – Councilman Coffin,
565 are you still on the phone?

566
567 **COUNCILMAN COFFIN**

568 Oh, yes. I'm eagerly listening.

569
570 **CITY ATTORNEY JERBIC**

571 Okay. Councilman Coffin has stated earlier, and I'm – paraphrasing here that you can read
572 comments sometimes made by people two separate ways. To – compare somebody to a tough
573 national leader, who negotiates very effectively on behalf of his people and says you don't have
574 to behave that way, can be read one way as admiring somebody and saying you don't need to be
575 that way in this negotiation, or it can be read the way you're choosing to read it, which is there is
576 some anti-Jewish or anti-Israeli prejudice here. I think Councilman Coffin needs to address that
577 directly and has in the past. Councilman, do you care to make a comment on that issue?

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578 **COUNCILMAN COFFIN**

579 Yes, I'm delighted to talk to all of this. First of all, I am following the advice of legal counsel on
580 this – vote, so I will be voting. Perhaps (inaudible) has to take place soon, because there are
581 many false statements in this letter, which I finally received a copy of it yesterday. It was
582 delivered to our offices after the close of business, before a long weekend, and so Tuesday was
583 the first day that I saw an email description of the letters which seems to repeat the same
584 misstatements and falsehoods that were said earlier during the campaign against (inaudible).

585

586 So my point is that first of all, Mayor, I'd like – I'm sorry I can't be there to see the Lieutenant
587 Governor's face, but I (inaudible) – Is he looking at you while he's making these statements or if
588 he is righteously indignant. No answer. Therefore, he must be righteously indignant.

589

590 I have many times been on the campaign trail and seen a person make a statement, for example,
591 Candidate A might say in advance during the campaign they are pro-life. Well, they know what
592 that means, and I know what that means. However, (inaudible) but they make that position clear
593 in order that people might rely on their vote to ensure their policy is continued. So the pro-life
594 people vote for the candidate who is pro-life, perhaps Lieutenant Governor Hutchinson is of that
595 mind, in which case if I like him, I'd vote for him because he's pro-life. Well, he hasn't even
596 heard a case or a bill on pro-life or voted on one. So it could be that these kinds of circumstances
597 can occur in the heat of a campaign.

598

599 Now, regarding my position, my position was that Bibi Netanyahu, the Prime Minister of Israel,
600 who is a buffoon and who is leading his country into an eternal state of war. I am here in Korea
601 with several hundred religious, political leaders who are trying to help get peace in the North
602 Korean Peninsula and the South Korean. They are comprised of members of many faiths.

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603 I discussed this last night with a rabbi from Israel, as well as a couple of friends from Israel, all
604 (inaudible) who said and they almost rolled off their chairs when they heard this argument that
605 somehow those settlements would have anything to do with politics or anti-Semitism, because
606 half of Israel is opposed to the settlements. So that is their statement. They could be wrong. They
607 (inaudible) a few percentage points off, but I just wanted to say that this is an arguable
608 proposition.

609

610 In any event, I grew up with members of many faiths and 66 years I have lived in Las Vegas, and
611 the first time I have been accused of being bigoted would have been last year. He seems to
612 continue to rely upon this, on this half-truth in order to secure my abstention, which would rob
613 me of my vote and rob one-seventh of the citizens of Southern Nevada in the City of Las Vegas
614 of a vote on this issue. I will not do that. I will vote for abeyance.

615

616 **MAYOR GOODMAN**

617 Well, and I believe just in response, the abeyance did carry. So it's on for the 16th of May. Now,
618 Mr. Jerbic, we have some gentlemen in front of us. May they speak to the abeyance and that's it?

619

620 **CITY ATTORNEY JERBIC**

621 It is your call, Your Honor. There's no, nothing that legally prohibits them. It's your – It's only
622 with your permission.

623

624 **MAYOR GOODMAN**

625 All right.

626

627 **FRANK SCHRECK**

628 Your – Honor.

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629 **MAYOR GOODMAN**

630 We will stay on the abeyance.

631

632 **FRANK SCHRECK**

633 No, we – would like to just address –

634

635 **TODD BICE**

636 We need to make –

637

638 **FRANK SCHRECK**

639 – the Lieutenant Governor's statements. Mine's very brief –

640

641 **TODD BICE**

642 We need to make –

643

644 **FRANK SCHRECK**

645 – and his is very brief.

646

647 **TODD BICE**

648 Yeash. We need to make our record on this as well. You allowed them to make a record on this.

649 We believe that it's appropriate that the record be accurate –

650

651 **FRANK SCHRECK**

652 Complete.

653

654 **TODD BICE**

655 – and complete on this –

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656 **MAYOR GOODMAN**

657 Okay.

658

659 **TODD BICE**

660 – as opposed to one-sided.

661

662 **MAYOR GOODMAN**

663 You're together –

664

665 **TODD BICE**

666 Yes.

667

668 **MAYOR GOODMAN**

669 – so can you share the time?

670

671 **FRANK SCHRECK**

672 No. I – Mine is going to be very short on one specific item that's personal.

673

674 **TODD BICE**

675 As is –

676

677 **FRANK SCHRECK**

678 He's going to be more general.

679

680 **TODD BICE**

681 As is mine. With all due respect to my friend, Mr. Hutchison, the legal, the – standard is not as

682 he articulates it. In fact, I almost wish it were, because if it were, the votes of this City Council in

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the past on behalf of this developer were blatantly unlawful if Mr. Hutchison were right. With all due respect to Councilman Beers, who's no longer here, he was this Applicant's biggest advocate and everybody knew it. And there have been other advocates for him on this, on the Council. So that is not the legal standard, number one.

Number two, I do not think it is an accident that this slander against the two Councilmen has escalated now after the district court has ruled that the developer bullied the City into violating the rights of the homeowners, and that is exactly what Judge Crockett has found is that this Applicant bullied the City into changing the rules to accommodate him.

And, this is exactly – I'm taking this right out of the judge's transcript, out of his statements. Is that one of the problems developed here is that this Applicant represented that he had secured pre-approval from every member on the City Council at the time he bought this property, outside of a public meeting in blatant violation of the open meeting law, if it's true. But Mr. – Lowie, I'll leave it to the others to assess his credibility, but Mr. Lowie's version of what happened is that he secured an unlawful agreement by the City Council to pre-approve his project outside of a public meeting. And that's what Judge Crockett called him on that, because that is exactly what he is – contending.

So, with all due respect to Mr. Hutchison, the party here who was trying to, by his own, by his words, rig the outcome of a vote was this Applicant. And the judge has set it aside. And he doesn't like that fact, and so now he's resorted to slandering Councilmembers. I think that just speaks volumes about this Applicant and why this problem, why this has escalated in the fashion that it has.

So, with that in mind, under the actual law, there is no violation of anybody's rights here. The only rights that have been violated were the rights of the homeowners, and the court has so found

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710 that. And, I'll turn it over to Mr. Schreck –

711

712 **MAYOR GOODMAN**

713 Only –

714

715 **TODD BICE**

716 – with one final observation.

717

718 **MAYOR GOODMAN**

719 Only after you state your name, which you forgot.

720

721 **TODD BICE**

722 Madame Mayor, my apologies. Todd Bice, Pisanelli Bice, 700 or 400 South 7th Street. My
723 apologies. So, in paragraph number 12 of his counterclaim, where this Applicant has sued the
724 City, he specifically claims, again, that he had this pre-approval at the time that he purchased the
725 property, which again, if he's telling the truth, he's the one who's admitting to the violations of
726 the law and the violations of my client's rights. I thank you for your time.

727

728 **FRANK SCHRECK**

729 Is this on? Okay. Frank Schreck, 9824 Winter Palace Drive. I just want to briefly touch on the –
730 anti-Semitic statements about Mr. Coffin. All of us know Mr. Coffin, and all of us know he's not
731 an anti-Semite. But it seems that this Applicant, Mr. Lowie, has a propensity, when he loses or
732 gets angry at someone, to call them anti-Semite. He did in a letter in the primary election. He
733 called Councilman Seroka and Christina Roush anti-Semites. He's called Councilman Coffin an
734 anti-Semite.

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735 And one week before I was to be honored by the – Anti-Defamation League, which you know is
736 a Jewish organization, to get their annual Jurisprudence of the Year Award, which goes to an
737 attorney who's exhibited work in terms of civil rights, equal rights for everyone, a week before
738 that, he told the Director of the ADL that he was gonna tell people not to go to the luncheon
739 honoring me because I was an anti-Semite.

740

741 So this is a, this is a – pattern that this Applicant has that if you don't agree with him, he will call
742 you a name. I was called an extortionist. Jack Binion was called an extortionist. There's no limit
743 to what he will call you if he doesn't get his way. And I don't have to tell you when he said that
744 he had gone to each one of your Council, each Councilperson and – got a commitment, that was
745 one of his rants in front of you about a year and a half ago, and that's just how he acts. But he
746 chooses to call people names that don't fit, and it certainly doesn't fit with Councilman Coffin.
747 Thank you.

748

749 **MAYOR GOODMAN**

750 Okay. I think this is closed at this point. And, is this on the abeyance?

751

752 **STEPHANIE ALLEN**

753 Yes, Ma'am, please.

754

755 **MAYOR GOODMAN**

756 Okay. And only the abeyance?

757

758 **STEPHANIE ALLEN**

759 Only the abeyance.

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760 **MAYOR GOODMAN**

761 Okay.

762

763 **STEPHANIE ALLEN**

764 Thank you, Your Honor, Council. Stephanie Allen, 1980 Festival Plaza, here on behalf of the
765 Applicant. I'd like to just speak to the zoning item. I know there's a lot of personalities here and a
766 lot of issues –

767

768 **MAYOR GOODMAN**

769 No.

770

771 **STEPHANIE ALLEN**

772 – that are being discussed that are outside of the zoning, but the zoning applications that are on
773 the agenda –

774

775 **MAYOR GOODMAN**

776 No.

777

778 **STEPHANIE ALLEN**

779 – and the abeyance in particular

780

781 **MAYOR GOODMAN**

782 No.

783

784 **STEPHANIE ALLEN**

785 – are what I want to talk about.

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786 **MAYOR GOODMAN**

787 Only the abeyance –

788

789 **STEPHANIE ALLEN**

790 Only the abeyance.

791

792 **MAYOR GOODMAN**

793 Not the, not the zoning.

794

795 **STEPHANIE ALLEN**

796 Correct. So the – What I'd like to put onto the record is that we're three years into this, and I
797 know you didn't ask and the Council has already voted, but three years into this, where we've
798 been trying to get something approved so we can develop this property, do something with this
799 property. We've had a number of different applications before you.

800

801 We believe this is the final application, probably, where it's a conforming application, no request
802 for a zone change, just an application to develop the property under its existing R-PD7 zoning.
803 Three more months is tantamount to a denial. Every time this gets abeyed, whether it's these
804 applications or the prior applications, it directly harms the property owner, and it directly harms
805 the community.

806

807 So I – know the vote has already taken place, but for purposes of this Council, we would
808 appreciate a vote on these applications and due process and the ability for you all to hear the
809 zoning facts, not the personality discrepancies, just the facts of the zoning case and make a
810 determination as to whether or what he can do with this property so that we can move on for the
811 betterment of him and the overall community, because that's really what your job is as a Council
812 and the leadership of this Council is, is to decide what's best for the community and the

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813 constituents, not the few folks that come up here every single time, but the overall community,
814 and we'd like to do something with this property and we'd like to have a hearing on the
815 application. So –

816

817 **MAYOR GOODMAN**

818 Thank you.

819

820 **STEPHANIE ALLEN**

821 I just wanted to put that on the record.

822

823 **MAYOR GOODMAN**

824 Thank you.

825

826 **STEPHANIE ALLEN**

827 Also, I would like to defend my client's character. I don't think it's fair to say that he comes up
828 here and calls everyone names. He has been called a lot of names that are unfair as well. He's a
829 man of integrity. He does beautiful work. And all that this Council should be doing is looking at
830 this application on its face from a zoning standpoint. So we'd appreciate that opportunity in a
831 couple months. Thanks.

832

833 **MAYOR GOODMAN**

834 Thank you very much. Okay. We are gonna move on now to Agenda Item 88. This issue –

835

836 **LISA MAYO**

837 Mayor –

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838 **MAYOR GOODMAN**

839 – is closed.

840

841 **LISA MAYO**

842 I'm sorry. Lisa Mayo. I was told that only on this Item, 122, could I ask the question regarding
843 the report that was given, per Councilwoman Fiore's request, to find out how much taxpayer
844 money has been spent on this project. And I called yesterday to find out if we could get a report
845 on that, and they said I had to just come up during Item 122 in order to talk to that. So I'd like to
846 see if we could get a report on this item as to how much taxpayer money has been spent by Staff
847 to this. And now we're adding another three months to it. So I think whatever that number is, add
848 another \$300,000 to it and the taxpayers of this community are seeing the number go way up.
849 Can we have a report on that –

850

851 **CITY ATTORNEY JERBIC**

852 Ms. Mayo –

853

854 **LISA MAYO**

855 – please?

856

857 **CITY ATTORNEY JERBIC**

858 Ms. Mayo, I gotta – I've got to cut you off because we are, first of all, not even agendaed for that,
859 and that would be more appropriate under public comment. But I can tell you, Staff will get back
860 to you with whatever information you requested and give you a reason, either give you the
861 answer or reason why they can't give you the answer.

862

863 **LISA MAYO**

864 Okay. But – it really needs to be in public comment. The public needs to know about this. How

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865 do we get it into the public record?

866

867 **CITY ATTORNEY JERBIC**

868 You can wait until public comment at the end of the meeting.

869

870 **LISA MAYO**

871 Okay, I will. Thank you.

872

873 **CITY ATTORNEY JERBIC**

874 You got it.

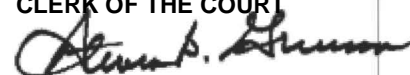
875

876 **MAYOR GOODMAN**

877 Thank you. Okay.

878 **(END OF DISCUSSION)**

879 /dao



SUPP

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DISTRIC COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No.: A-18-771224-C

Dept. No.: II

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

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

///

///

///

1 Darren Bresee ("Bresee"), and Steve Caria ("Caria") (collectively "Homeowners" or
2 "Defendants"). Attached hereto as Supplement Exhibit 1 is a thumb drive containing a
3 video file (.mov) labelled Omerza Video. Pursuant to EDCR 8.02(e), this Supplement
4 must be filed conventionally as it is not feasible for the video to be converted to an
5 electronic document suitable for e-filing.

6 DATED this 11th day of May, 2018.

7 THE JIMMERSON LAW FIRM, P.C.

8 By: /s/ James J. Jimmerson, Esq.

9 JAMES J. JIMMERSON, ESQ.

10 Nevada Bar No. 000264

11 JAMES M. JIMMERSON, ESQ.

12 Nevada Bar No. 12599

13 415 S. 6th Street, #100

14 Las Vegas, Nevada 89101

15 *Attorneys for Plaintiffs*

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of May, 2018, I caused a true and correct copy of the foregoing PLAINTIFFS' FIRST SUPPLMENT TO THEIR OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS (ANTI-SLAPP MOTION) PLAINTIFFS' COMPLAINT PURSUANT TO NRS 41.635 ET SEQ. to be submitted electronically for filing and service with the Eighth Judicial District Court via the Electronic Filing System to the following:

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

/s/ Shahana Polselli
Employee of The Jimmerson Law Firm, P.C.

EXHIBIT 1

EXHIBIT 1

