IN THE SUPREME COURT OF THE STATE OF NEVADA

FORE STARS, LTD., a Nevada Limited Liability Company; 180 Land Co., LLC, A Nevada Limited Liability Company; and SEVENTY ACRES, LLC, a Nevada Limited Liability Company,

Appellants,

v.

DANIEL OMERZA; DARREN BRESEE; AND STEVE CARIA,

Respondents.

Supreme Court No. 87354

District Court Case No. A771224

JOINT APPENDIX

VOLUME 14

PAGES 1909-2089

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CHRONOLOGICAL INDEX

Vol.	Description	Date	Bates No.
1	Complaint with Exhibits	3/15/18	**1-95**
2	Request for Judicial Notice in Support of Special Motion to Dismiss	4/13/18	**96-147**
2	Motion to Dismiss 12(b)(5)	4/13/18	**148-162**
2	Special Motion to Dismiss	4/13/18	**163-197**
2	Opposition to Special MTD	5/4/18	**198-219**
2	Opposition to MTD 12(b)(5)	5/7/18	**220-235**
2	Reply to Special Motion to Dismiss	5/9/18	**236-251**
2	Reply to MTD 12(b)(5)	5/9/18	**252-262**
2	Request for Judicial Notice in support of Reply to Special MTD	5/9/18	**263-300**
2	Plaintiff's First Supplement to their Opposition to Special MTD	5/11/18	**301-305**
3	Plaintiff's Second Supplement to their Opposition to Special MTD	5/11/18	**306-327**
3	Defendants' Supplement in Support of MTD	5/23/18	**328-365**

3	Plaintiff's Supplement in Support of Opposition to Special MTD	5/23/18	**366-425**
4	Plaintiffs' Errata to Complaint	6/11/18	**426-523**
4	Findings of Fact, Conclusion of Law denying Motion to Dismiss	6/20/18	**524-537**
4	Notice of Appeal to FFCOL	6/27/18	**538-572**
5	Plaintiffs' Motion for an Order Permitting Discovery	9/14/18	**573-631**
5	Defendants' Opposition to Mtn for Discovery	10/1/18	**632-639**
5	Plaintiffs' Reply to Mtn for Discovery	10/12/18	**640-664**
5	Plaintiffs' Supplemental Exhibit in Further Support of Discovery Mtn	10/17/18	**665-670**
5	Defendants' Supplemental Exhibits in Further Support of Opposition to Mtn for Discovery	10/18/18	**671-679**
5	Minutes and Order from Discovery Commissioner	10/19/18	**680-681**
5	Defendants' Objections to the Discovery Commissioner's Report and Recommendation	1/3/19	**682-688**
5	Plaintiffs' Response to Objections to R&R	1/30/19	**689-712**
5	Order Denying Mtn for Discovery	4/11/19	**713-715**

5	Nevada Supreme Court Order on remand	1/23/20	**716-728**
6	Nevada Supreme Court Order on Rehearing	2/27/20	**729-730**
6	Supplemental brief for limited discovery	5/6/20	**731-737**
6	Opposition to request for discovery	5/11/20	**738-748**
6	May 29, 2020, Minute Order		**749**
6	Defendants' Request for Clarification	5/29/20	**750-752**
6	Minute Order on Request for Clarification	6/5/20	**753**
6	Defendants' Motion for protective order	7/2/20	**754-799**
6	Plaintiff' response to motion for protective order	7/7/20	**800-815**
6	Reply in support of protective order	7/9/20	**816-821**
6	July 21. 2020 Minute order	7/21/20	**822**
6	Order granting protective order	8/3/20	**823-829**
7	Plaintiffs' Supplemental opposition to Motion to Dismiss (Part 1)	10/14/20	**830-995**
8	Plaintiffs' Supplemental opposition to Motion to Dismiss (Part 2)	10/14/20	**996-1216**

9	Errata to Supplemental opposition to Motion to Dismiss	10/14/20	**1217-1222**
9	Defendants' Supplemental Reply to Motion to Dismiss	10/30/20	**1223-1254**
9	Declaration of Mitchell Langberg in Support of Supplemental Brief (Reply) to Special MTD	10/30/20	**1255-1257**
9	November 9, 2020, Minute Order	11/9/20	**1258-1259**
9	Findings of Fact and Conclusions of Law granting Motion to Dismiss	12/3/20	**1260-1272**
9	Plaintiffs' Objections to Proposed Findings of Fact, Conclusions of Law as Proposed by Plaintiff	12/3/20	**1273-1286**
9	Notice of Entry of Order on FF, COL and Order granting Special MTD	12/10/20	**1287-1302**
9	Motion to Reconsider Order Granting Special MTD	12/24/20	**1302-1356**
9	Motion for Attorneys Fees and Costs	12/31/20	**1357-1420**
10	Defendants' Opposition to MTN to Reconsider Order Dismissing	1/7/21	**1421-1428**
10	Plaintiffs' Reply to Mtn to Reconsider	1/14/21	**1429-1440**

10	Errata to Reply to Mtn Reconsider	1/14/21	**1441-1477**
10	Opposition to Motion for Attorney's Fees and Costs	1/22/21	**1478-1591**
11	Minute Order Denying Motion to Reconsider	1/25/21	**1592**
11	Mtn to Reconsider Minute Order dated 1/25/21	2/2/21	**1593-1596**
11	Order Denying Mtn to Reconsider Order Dismissing	2/4/21	**1597-1604**
11	Declaration of Lisa Rasmussen submitted as Supplement to Mtn for Attorney's Fees	2/12/21	**1605-1607**
11	Reply in support of Motion for Attorney's Fees and Costs	2/12/21	**1608-1614**
11	Order Granting Motion for Attorney's Fees and Costs	4/16/21	**1615-1620**
11	Notice of Appeal Case No. 82338	1/8/21	**1621-1639**
11	Notice of Appeal Case No. 82880	5/5/21	**1640-1650**
11	NSC Order Remanding on Attorney Fee Issue	4/21/22	**1651-1656**
11	Notice of Entry of Order Granting Attorney's Fees	9/19/22	**1657-1666**
12	Motion to Reconsider Order Granting Attorney's Fees	10/3/22	**1667-1865**
13	Opposition to Motion to Reconsider	10/17/22	**1866-1875**

13	Notice of Appeal to Order Granting Attorney's Fees	10/17/22	**1876-1888**
13	Reply to Motion to Reconsider Order Granting Attorney's Fees	10/28/22	**1889-1895**
13	Supplemental Motion for Attorney's Fees	11/23/22	**1896-1908**
14	Opposition to Supplemental Motion for Attorney's Fees	12/23/22	**1909-2089**
15	NSC Order to Show Cause as to Why Appeal Should Not Be Dismissed	1/4/23	**2090-2091**
15	Reply to Opposition to Supplemental Motion for Attorney's Fees	1/6/23	**2092-2099**
15	Motion for Leave to File Sur-Reply	1/17/23	**2100-2108**
15	Appellant's Response to NSC Order to Show Cause	2/3/23	**2109-2112**
15	NSC Order Dismissing Appeal	3/8/23	**2113-2114**
15	Notice of Entry of Order Denying Motion to Reconsider Attorney Fee Order	9/19/23	**2115-2125**
15	Notice of Entry of Order Granting Supplemental Attorney's Fees	9/19/23	**2126-2139**
15	Notice of Appeal	9/22/23	**2140-2152**
15	Amended Notice of Appeal	10/12/23	**2153-2179**

15	Reporter's Transcript of Hearing on Motion for Attorney's Fees	3/31/21	**2180-2202**
15	Docket	3/15/24	**2203-2248**

APHABETICAL INDEX

Vol.	Description	Date	Bates No.
15	Amended Notice of Appeal	10/12/23	**2153-2179**
15	Appellant's Response to NSC Order to Show Cause	2/3/23	**2109-2112**
1	Complaint with Exhibits	3/15/18	**1-95**
11	Declaration of Lisa Rasmussen submitted as Supplement to Mtn for Attorney's Fees	2/12/21	**1605-1607**
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6	Defendants' Motion for protective order	7/2/20	**754-799**
5	Defendants' Objections to the Discovery Commissioner's Report and Recommendation	1/3/19	**682-688**
5	Defendants' Opposition to Mtn for Discovery	10/1/18	**632-639**
10	Defendants' Opposition to MTN to Reconsider Order Dismissing	1/7/21	**1421-1428**
6	Defendants' Request for Clarification	5/29/20	**750-752**
3	Defendants' Supplement in Support of MTD	5/23/18	**328-365**
5	Defendants' Supplemental Exhibits in Further Support of	10/18/18	**671-679**

	Opposition to Mtn for Discovery		
9	Defendants' Supplemental Reply to Motion to Dismiss	10/30/20	**1223-1254**
15	Docket	3/15/24	**2203-2248**
10	Errata to Reply to Mtn Reconsider	1/14/21	**1441-1477**
9	Errata to Supplemental opposition to Motion to Dismiss	10/14/20	**1217-1222**
9	Findings of Fact and Conclusions of Law granting Motion to Dismiss	12/3/20	**1260-1272**
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6	July 21. 2020 Minute order	7/21/20	**822**
6	May 29, 2020, Minute Order		**749**
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9	Motion for Attorneys Fees and Costs	12/31/20	**1357-1420**
15	Motion for Leave to File Sur-Reply	1/17/23	**2100-2108**
2	Motion to Dismiss 12(b)(5)	4/13/18	**148-162**

12	Motion to Reconsider Order Granting Attorney's Fees	10/3/22	**1667-1865**
9	Motion to Reconsider Order Granting Special MTD	12/24/20	**1302-1356**
11	Mtn to Reconsider Minute Order dated 1/25/21	2/2/21	**1593-1596**
6	Nevada Supreme Court Order on Rehearing	2/27/20	**729-730**
5	Nevada Supreme Court Order on remand	1/23/20	**716-728**
15	Notice of Appeal	9/22/23	**2140-2152**
11	Notice of Appeal Case No. 82338	1/8/21	**1621-1639**
11	Notice of Appeal Case No. 82880	5/5/21	**1640-1650**
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15	Notice of Entry of Order Denying Motion to Reconsider Attorney Fee Order	9/19/23	**2115-2125**
11	Notice of Entry of Order Granting Attorney's Fees	9/19/22	**1657-1666**
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6	Opposition to request for discovery	5/11/20	**738-748**
2	Opposition to Special MTD	5/4/18	**198-219**
14	Opposition to Supplemental Motion for Attorney's Fees	12/23/22	**1909-2089**
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7	Plaintiffs' Supplemental opposition to Motion to Dismiss (Part 1)	10/14/20	**830-995**
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15	Reply to Opposition to Supplemental Motion for Attorney's Fees	1/6/23	**2092-2099**
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2	Request for Judicial Notice in support of Reply to Special MTD	5/9/18	**263-300**
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DISTRICT COURT

CLARK COUNTY, NEVADA

FORE STARS, LTD., a Nevada limited liability company; 180 LAND CO., LLC; A NEVADA LIMITED LIABILIITY COMPANY; SEVENTY ACRES, LLC, a Nevada limited liability company, Plaintiffs, vs. DANIEL OMERZA, DARREN BRESEE, STEVE CARIA, and DOES 1 THROUGH 100, Defendants.	Case No.: A-18-771224-C Dept: XIX **OPPOSITION TO DEFENDANTS' SUPPLEMENTAL MOTION FOR ATTORNEY'S FEES POST REMAND**

I. INTRODUCTION AND BACKGROUND.

Plaintiffs Fore Stars, Ltd., 180 Land Co., LLC, and Seventy Acres, LLC (collectively "Plaintiffs" or "Landowners") oppose the Supplemental Motion for Attorney's fees filed by Defendants Daniel Omerza, Darren Bresee and Steve Caria (Collectively "Defendants" or "Residents"). This Opposition is based on several critical factors that have been raised previously by the Landowners, but have yet to be addressed by this Court. This Opposition further expands on the issues previously raised.

First, defense counsel has never produced the alleged contingency fee agreement and requests that it be produced were forbidden by defense counsel. It is extraordinary and most unusual to have a contingency fee agreement where a firm is representing defendants, versus plaintiffs, and this is particularly true where the actions of a member of the firm, Frank Schreck, are what generated the conduct of the defendants in this case, which in turn led to the allegations in the Complaint.

Second, undisputed facts regarding the wrongful conduct by the defendants' counsel should have been considered as relevant to the reasonableness of the attorney fee request under the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349 (1969). As the Court may recall, the defendants, also referred to herein as "Residents" promulgated, solicited, circulated, and executed false declarations to their Queensridge neighbors in March 2018. *See Complaint, 1-90.* The Residents did so at the behest of Frank Schreck ("Schreck"), a neighbor and local attorney, who prepared the contents of the declaration based on a district court order that was later reversed by the Supreme Court of Nevada and then lobbied them to circulate and solicit signatures on copies of the declaration as part of a plan to sabotage the Landowners' development

of their Land. [1] *See Id.* p. 2-16, *See also* **Exhibit A**. Upon filing of the complaint, co-conspirator Schreck engaged his firm, Brownstein Hyatt Farber & Schreck LLP, to defend the Residents on a contingency basis even though there were no counterclaims or other affirmative basis for recovery. *See* Defs' Initial Mot. for Atty Fees, filed in December 2020, p. 3. Since then, Schreck's firm has purportedly spent nearly 700 hours working on the case at hourly rates upwards of $500 and up to $875. *See* Instant Motion for Supplemental Fees *and* Exhibit 3 to the initial Motion for Attorney's Fees filed on December 31, 2020. Although ***the Residents have not incurred any attorney fees*** because Schreck and his firm defended them on a "contingency basis" in a case he instigated and against claims in which he was a co-conspirator, he nevertheless now stands to get paid an exorbitant amount of attorney fees for his own wrongdoing. *See* Pltfs' Opp. to Mot. for Atty Fees, filed in January 2021, pp. 4-30; *see also* Motion to Reconsider pending before this Court. All of this is undisputed yet it was never evaluated under the *Brunzell* factors. Attorney fees in anti-SLAPP cases are supposed to reimburse *attorney fees* ***incurred by defendants*** improperly sued for exercising their First Amendment rights, because **incurring fees poses a burden on the defendants.** *See, e.g., Graham-Sult v. Clainos,* 756 F.3d 724, 752 (9th Cir. 2014) (legislative purpose of anti-SLAPP statutes is to reimburse the prevailing defendant for expenses incurred in extracting itself from a baseless lawsuit); *see also Shapiro v. Welt,* 133 Nev. ___, 389 P.3d 262, 268 (2017) (looking to California law for guidance because California's and Nevada's anti-SLAPP statutes are similar in purpose and language). They are not intended to reward wrongdoers such as Schreck with a windfall of over $400,000 in attorney fees for his misconduct[2]. *See Id.*

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[1] The Landowners sought to develop approximately 250 acres of land they own and control in Las Vegas, Nevada formerly known as the Badlands Golf Course property (hereinafter the "Land").

[2] Schreck boasted to others how he had been successful in "prolonging the agony of the developer". *See* **Exhibit B**.

Third, this Court has not yet resolved, post-remand, the host of other issues Plaintiffs raised in their Motion to Reconsider the award of attorney's fees entered post-remand. A broad outline of the Motion to Reconsider's unresolved challenges are as follows and the Motion remains pending:[3]

1. Defendants have not established that they have incurred a single dollar liability in fees or costs to Schreck's firm.

2. Defendants have repeatedly refused to produce a contingency fee agreement and at this point it is doubtful that one exists.

3. The number of hours counsel alleges to have spent and the hourly rates charged are not reasonable and are instead part of a strategy to increase the amount of money defense counsel would receive for working on this case.

4. Entire entries are blocked billed and it is impossible to determine how much time was spent on individual tasks.

5. Defendants are only entitled to their fees related to the Motion to Strike (anti-SLAPP motion), not all other defense efforts.

6. An unreasonable inflated fee request may be a reason to deny it in its entirety.

7. Due to block billing, the Court cannot easily separate out efforts for the 12(b)(5) motion, fees for which they are not entitled to recover, and the court should deny any such fees or make further inquiry.

8. Schreck did not provide legal analysis, he provided facts (he is a witness) and he billed at $875 per hour for a total of $19,775 for being a witness.

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[3] The Motion to Reconsider was set for a chambers hearing on November 9, 2022.

9. Defendants provided no evidence that their prevailing rates in the community for similar work by attorneys of comparable skill are appropriate.

10. Plaintiffs incurred approximately $132,000 for the same amount of work that Defendants seek $347,000 for.

11. Defendants billed 241 hours of their total 650 billable hours for preparing and briefing a Nevada Supreme Court appeal.

12. Langberg's rate is $190 higher than Ms. Rasmussen's and Schreck's rate is $375 higher than Ms. Rasmussen's for providing "facts."

13. Specific examples of how three attorneys billed a total of over $14,500 for reviewing and analyzing the complaint.

14. Defendants' counsel billed a total of approximately $60,000 for preparing the Anti-SLAPP motion. This is a total of 116 hours and the Nevada District Court has found much lesser sums unreasonable for filing the same motion to dismiss. Plaintiffs spent only $9100 responding to the Motion, and that included filing an amendment for comparative purposes.

15. Plaintiffs spent 91.7 hours drafting a Reply to the Opposition. The opposition was 22 pages and the Reply was 16 pages. The Nevada District Court has found 51 hours spent on a Reply at $450 unreasonable, and this far exceeds amounts previously determined to be unreasonable.

16. As to the Supplements filed, Plaintiffs, who had the burden, billed 9.8 hours and Defendants billed 23.4 hours responding to it.

17. Defendants spent $40,000 for a denied writ on the denial of their 12(b)(5) motion which should not be considered as part of their award. They are not awarded attorney's fees by statute on these amounts.

18. There are numerous other disparities provided by Plaintiffs on pages 19-20 of the Opposition that this Court has not addressed. For example, Langberg billed 1.4 for a hearing that Rasmussen billed at 1.0. It was the same hearing and both parties attended via Blue Jeans.

19. Defendants engaged in multiple unnecessary filings. For example, they filed a "request for clarification" which was really a motion to reconsider, and they moved for a protective order because they still thought that 15 interrogatories was "too much."

20. Defendants billed over $4000 providing cookie cutter responses to the very limited discovery requests (15 in total).

21. Defendants filed a motion to strike that was denied and that generated fees totaling $6,000. Plaintiffs were forced to incur $2,500 in fees just to respond to the frivolous motion that was not granted.

II. ARGUMENT

A. Any Award Of Attorney Fees Is Improper In The Absence Of A Written Contingency Fee Agreement.

Nevada's Rules of Professional Conduct requires that contingency fee agreements be in writing. *See* NRPC 1.5(c). A violation of this rule – or any other Rule of Professional Conduct – constitutes professional misconduct. *See* NRPC 8.4 (professional misconduct). In addition to triggering prosecution and/or disciplinary proceedings, a lawyer's misconduct can reduce or eliminate the fee that the lawyer may reasonably charge. *See Hawkins v. Eighth Jud. Dist. Ct.*, 133 Nev. 900, 407 P.3d 766 (2017). Indeed, the Restatement (Third) of the Law Governing Lawyers provides for complete denial of fees for some ethical violations even where no harm is proved. *See* Restatement (Third) of the Law Governing Lawyers § 37 cmt. a (2000) (forfeiture of attorney fees is justified for clear and serious violations). The Restatement also includes factors for the Court to consider in analyzing whether violation of duty warrants fee forfeiture. *See id.,* § 37 cmt. d. The factors are: (1) the extent of the misconduct; (2) whether the breach involved knowing violation or conscious disloyalty to a client; (3) whether forfeiture is proportionate to the seriousness of the offense; and (4) the adequacy of other remedies. *See id.; see also Hawkins,* 133 Nev. at 903-04, 407 P.3d at 770 (payment of attorney fees is not due for services not properly performed). Importantly, the Supreme Court of Nevada recently indicated that it would be

improper to award a contingency fee without a written agreement. *See Gonzales v. Campbell & Williams,* 2021 WL 4988154, at *8 (Nev. Oct. 26, 2021) (unpublished disposition).[4]

Likewise, it would be improper to award attorney fees in this case given the lack of a written contingency fee agreement. The Rules of Professional Conduct unambiguously require such an agreement to be in writing, and counsels' failure to comply is a clear and serious ethical violation particularly given the underlying facts of Schreck's involvement here, none of which the Residents or their counsel have ever disputed.[5] *See* NRPC 1.5(c); *see also Hawkins,* 133 Nev. at 903-04, 407 P.3d at 770. Given the years of experience and purported expertise touted by the Defendants' counsel, the lack of a written agreement is certainly a knowing violation warranting the forfeiture of fees. Anything less than a complete denial of fees would result in a windfall to Schreck for a situation entirely of his doing[6]. As such, any other remedy is inadequate, especially since there is **no evidence that the Residents have actually incurred any attorney fees whatsoever.** Alternatively, this Court can request that the Residents present their contingency fee agreement illustrating that they are in any way actually responsible for attorney's fees. In the absence of such, this is just exactly what it appears: Schreck leading the Resident defendants astray and then agreeing to defend them at no cost because of his conduct.

In Nevada a contingency fee must specify the following:

> **(1) The method by which the fee is to be determined,** including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal;

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[4] *See also* NRAP 36(c)(3) (unpublished dispositions issued by the Supreme Court of Nevada after January 1, 2016 may be cited for their persuasive value).

[5] In addition to violating NRPC 1.5, Schreck arguably violated NRPC 1.7 (conflict of interest) and NRPC 3.5 (impartiality), and his conflict of interest may be imputed to his firm under NRPC 1.10 (imputation of conflicts of interest).

> **(2)** Whether litigation and other expenses are to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated;
> **(3)** Whether the client is liable for expenses regardless of outcome;
> **(4)** That, in the event of a loss, the client may be liable for the opposing party's attorney fees, and will be liable for the opposing party's costs as required by law; and
> **(5)** That a suit brought solely to harass or to coerce a settlement may result in liability for malicious prosecution or abuse of process.

NRPC 1.5(c)(emphasis added). A contingency fee agreement is required to set forth the sharing of an award, though here, there is no award to share, there is only attorney's fees for Schreck's firm to "get," and the Defendants presumably will not share in anything with the attorney's. Thus, there likely is no contingency fee agreement because one has never been produced. This Court must request it because otherwise, this is simply Schreck's firm behaving badly, promising to defend the people that they urged to make untruthful statements who were sued in this case **at no cost to them** and then asking to be paid for doing it. There has never been any request that the Defendants actually pay legal fees, the Defendants have not paid legal fees and instead, their co-conspirator law firm seeks a windfall of fees for Schreck's bad conduct. There could not be a more fundamentally unfair dynamic here.

B. Given The Undisputed Facts Regarding Schreck's Involvement, The Attorney Fee Award Is Not Reasonable Under The *Brunzell* Factors.

The *Brunzell* factors must be considered in determining whether the requested amount of attorney fees is reasonable are: 1) the qualities of the advocate; 2) the character of the work to be done; 3) the work actually performed; and 4) the results achieved. *See id.* at 349, 455 P.2d at 33. In evaluating those factors, the undisputed facts regarding Schreck's actions as a co-conspirator in this case should be considered because they are relevant to the reasonableness of the award under *Brunzell* and the second factor in particular, i.e., the character of the work to be done or the nature of the litigation, its difficulty and intricacy. *See id.* Although this Court has previously

acknowledged the contingency fee arrangement between the Defendants and their counsel, the Court must also consider Schreck's involvement as a co-conspirator in the analysis of the *Brunzell* factors. Further, there is no evidence that a contingency fee agreement exists and it would in fact be most unusual to defend someone on a "contingency basis" where there is no claim upon which anyone can recover as a defendant.

Co-conspirator Schreck is a partner at Brownstein Hyatt Farber & Schreck LLP, the law firm representing the Defendants in this litigation. Neither the Defendants or their counsel dispute Schreck's role in this case, namely, that he prepared the contents of the declarations, including the false statements therein, and lobbied Omerza, Bresee, and Caria to circulate and solicit signatures on copies of that declaration as part of a plan to sabotage development of the Land and ruin the Landowners' business interests.[7] Thereafter, Schreck engaged his firm to *defend* the Defendants on a "*contingency basis"* in a case he instigated with no counterclaims or other affirmative basis for recovery. Attorneys and clients typically use this fee arrangement in cases where money is being sought and there is a reasonable likelihood of recovery – most often in cases involving personal injury, civil rights violations, social security claims or workers' compensation claims. The atypical fee arrangement further suggests something nefarious here, i.e., Schreck is covering his tracks as a conspirator because his behind-the-scenes actions were shady or unethical, and/or he thought his co-conspirators could feign ignorance and get away with their improper actions, and then he could use NRS 41.670 to collect a windfall in attorney fees for a situation entirely of his doing. At best, Schreck used the Defendants – unbeknownst to them – to do his bidding and was thereafter obligated to defend them to avoid accountability, but that does not mean that Schreck's firm is entitled to a windfall in fees for doing something they were morally or even legally obligated to do **for other reasons.** Again, the Defendants have not

[7] See **Exhibits** **B**, **C**, **D**, **E** and **F**, attached hereto.

incurred any attorney fees given their odd arrangement and Schreck now stands to get paid for his wrongdoing. At a minimum, these undisputed facts defeat any finding that the second *Brunzell* factor can be met. In other words, the character of the work or nature of the litigation is not significant, difficult, or intricate as a matter of law if it is merely the result of counsel's misconduct and where the work is done to protect Schreck's liability from his clients' interests. As such, the attorney fees sought here and in the initial application under reconsideration are not reasonable under *Brunzell*.

C. The Hourly Rate Cannot Be Whatever Mr. Langberg Says It Is Just Because He Thinks it is Reasonable.

With all due respect to Mr. Langberg, who devotes significant effort to explaining that his hourly rate was $655 and it is now $700 because he is well-educated and experienced, that is not the point. The point is that the Defendants have never paid a legal fee, Mr. Langberg is not billing them $700 per hour, $655 per hour, or even $500 per hour. All counsel here are well educated and experienced in their practice of law and all counsel here have great reputations in this community. But the actual party represented by Schreck's firm did not seek out Mr. Langberg for his expertise in Anti-SLAPP cases, they sought out Schreck's assistance because they got sued for circulating and collecting false statements that were created by Schreck and Schreck passed this over to Langberg to defend not only the Defendants, but Schreck. This Court should consider the fact that had another firm litigated this issue, the Defendants would have been billed for the firm's time and they would have actually incurred fees and expenses. The other firm likely would have made a third party claim against Schreck for his involvement in this matter because all of the false statements begin with Schreck. Instead, Schreck offered to defend these Defendants not only because he subjected them to liability by having them circulate false statements, but also to protect himself from liability. This is not a contingency case; it is a pro bono case. Until and unless Defendants produce a contingency fee agreement that states that they

are liable for attorney's fees and costs to Schreck's firm if they do not prevail, no attorney's fees should be awarded in this case. Defendants have not shown, nor do they ever state, that they have paid any attorney's fees or expenses, nor do they state that they are expected to. Indeed there is not a single Declaration, Affidavit or other sworn statement from any Defendant to this case submitted with any fee application or motion which asserts that any party has paid, or is liable for any attorneys fees or costs.

D. Attorney's Fees and Costs Cannot Be Awarded Where They are Not Actually Incurred

Defendants have not incurred any fees or costs. A Texas appellate court addressed this very issue in an Anti-SLAPP case under their statute, which also states that fees shall be awarded to the prevailing party. In *Cruz v. Van Sickle*, 452 S.W.3d 503 (Tx. Ct. Appeals, 2014), appellant challenged an award of fees to two different firms who had prevailed under the Texas Anti-SLAPP statute against him. The Texas Court of Appeals analyzed each firm's documentary evidence and concluded it was clear with regard to one of the firms that no fees were actually incurred by the party it represented and as such an award of attorney's fees was improper. *Id.*at 525 ("Because the undisputed evidence before us establishes that their attorneys represented them pro bono, the BOR defendants did not incur any attorney's fees in defending against Cruz's lawsuit. Accordingly they were not entitled to an award of attorney's fees pursuant to the Act.") The Court in *Cruz v. Van Sickle* noted that "incurred" means liable for payment. *Id.* at 522 and citing to *American Heritage Capital, L.P. v. Gonzalez*, 436 S.W.3d 865, 877 (Tex. Ct. Appeals 2014). Here, not only is there is zero evidence that the movants (Defendants) are liable to pay Schreck's law firm for any of the legal work it performed. Defendants' attorneys have stated that it is a contingency case, but they refuse to provide the contingency fee agreement. The contingency fee agreement must state that Defendants are liable for fees incurred regardless of the outcome in order for them to be liable for attorney's fees. We have no evidence of that

because it has never been provided to the Plaintiff much less to the Court. It does not even make sense that there would be a contingency fee agreement because what would the law firm be getting a percentage of? There are no affirmative claims or counterclaims upon which recovery can be had. Schreck's firm certainly cannot provide a percentage of its fees to its clients, that would be unlawful. What percentage of anything could even be stated in a contingency fee agreement? It cannot and that is why it has not been produced. What Schreck's firm is doing is representing these Defendants pro bono and they are not entitled to fees for that because the Defendants have not actually incurred legal fees and costs and there is no evidence that they are liable to Schreck's firm for anything.

The "evidence" presented to this Court on all fee applications and motions are internally generated charts prepared by the Defendants' law firm. They are not invoices sent to clients, they are not statements sent to clients, nor is there anything suggesting that a "balance is due." *See* text chart prepared by Mr. Langberg on Page 4 of the instant motion; *see also* Exhibit 2 to the instant motion, which is an internally generated report, but not an invoice; *see* the original Motion for Attorney's Fees, filed on December 31, 2020, an internal chart prepared by Mr. Langberg at pages 12-23; and Exhibit 3 thereto, another internally generated report. None of these are invoices to a client, none of them indicate that the Defendants are in any way liable to the firm for the services provided. It is all the same. It is Mr. Langberg saying, 'this is how much work I/we have done.' Nowhere has anyone asserted that the Defendants have incurred fees, incurred costs or that they are in any way liable to Schreck's firm for anything of the sort. As such, they cannot be awarded fees they have not incurred or for which they have no liability.

. . .

. . .

. . .

. . .

CONCLUSION

Based on the foregoing, it is respectfully requested that this Court deny the Defendants' Supplemental Motion for Attorney's Fees in its entirety.

DATED: December 22, 2022. Respectfully submitted,

THE LAW OFFICES OF KRISTINA WILDEVELD & ASSOCIATES,

/s/ Lisa A. Rasmussen
LISA A. RASMUSSEN, ESQ.
NEVADA BAR NO. 7491
ATTORNEYS FOR PLAINTIFFS

DECLARATION IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER GRANTING DEFENDANTS' MOTION FOR ATTORNYES' FEES AND ADDITIONAL MONETARY RELIEF PURSUANT TO NRS 41.670 AND NRS 18.010(2)

I, LISA A. RASMUSSEN, hereby declare under penalty of perjury of the laws of the State of Nevada as follows:

1. I am counsel of record in the above-captioned matter. I am over eighteen years of age, an attorney duly licensed to practice law in the State of Nevada since December 2000, and I am employed as a senior attorney at the Law Offices of Kristina Wildeveld & Associates.

2. I make this Declaration in support of Plaintiffs' Opposition to Defendants' Supplemental Motion for Attorney's Fees Pursuant to NRS 41.670.

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

4. During the discovery phase of this litigation, Plaintiffs sought to ask the Residents' about their attorney fee arrangement with their counsel. These questions were disallowed by counsel for the Residents. It is unknown whether any contingency fee agreement exists and this

Court ought to request it from defense counsel as it is extremely rare for a firm to defend a party on a contingency fee basis, particularly where there is no counterclaim or no actual claim for monetary recovery.

5. Although we have repeated raised this issue, no fee agreement or contingency agreement has ever been produced to us or to this Court.

6. **Exhibit A** attached hereto is a copy of the Notice circulated to residents of Queensridge and the false statements they were asked to return to Frank Schreck. The Defendants have not disputed that the statements are indeed false, but they have worked hard to thread a needle asserting that they "believed them to be true" at the time they made them in order to avoid liability.

7. **Exhibit B** attached hereto is an email from Frank Schreck in 2016 where he boasts about prolonging the "developer's" agony. Here, the developer refers to the Plaintiff properties in this case.

8. **Exhibit C** attached hereto is the Declaration of Vickie DeHart dated January 28, 2017 where she states that on December 29, 2015, Schreck bragged that his group is politically connected and could stop development plans for the Land from moving forward and that he would insist on acquiring 180 acres of land and valuable water rights and only then would he "allow" the Landowner to develop the remainder of the property. He also stated that he would acquire the 180 acres and the water rights for free.

9. **Exhibit D** attached hereto is email exchanges between Steve Seroka, then a City Councilman, and Frank Schreck.

10. **Exhibit E** attached hereto are additional email exchanges between Seroka and Schreck, this time with Schreck criticizing Brad Jerbic (the City Attorney) and his "undermining of the City's "defense."

11. **Exhibit F** attached hereto is a January 2018 email from Schreck to various persons bragging about a court hearing where a Judge stated that Yohan (Landowner) bought a "pig-in-a-poke." This decision was of course overturned.

12. As part of the appeals in Docket Nos. 82338 and 82880, the parties filed opening, answering, and reply briefs. Like their district court pleadings, the Residents have never disputed Frank Schreck's involvement as a co-conspirator in this case or his wrongdoing. True and correct copies of the appellate briefs are maintained within my office's files and attached hereto as **Exhibits G, H, and I.**

Executed this 22nd day of December, 2022, at Las Vegas, Nevada.

/s/ Lisa A. Rasmussen

LISA A. RASMUSSEN, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing OPPOSITION TO MOTION FOR SUPPLEMENTAL ATTORNEY'S FEES via this court's Efile and Serve program on all parties receiving service in this case on this 23rd day of December 2022, including, but not limited to:

Mr. Mitchell Langberg, Esq.
Counsel for the Defendants

/s/ Lisa A. Rasmussen

Lisa A. Rasmussen, Esq.

EXHIBIT A

EXHIBIT A

URGENT NOTICE

Dear Neighbor:

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

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

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

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

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

Thank you.

Roger Wagner
9720 Winter Palace Drive
Las Vegas, NV 89145

TO: City of Las Vegas

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

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

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

_____
Resident

_____
Address

_____
Date

TO: City of Las Vegas

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

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

_____

Resident Name (Print)

_____

Resident Signature

_____

Address

_____

Date

Frank Schreck
9824 Wintert Palace Drive
Las Vegas, NV 89145

EXHIBIT B

EXHIBIT B

against Johan because you will have the fight of your life in your hands as well as a nice big fat lawsuit. Have a nice day.

Sent from my IPhone 6 Plus

Please forgive any typos or bad voice recognition

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

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

> However, I am smart enough to have 3 excellent land use attorneys and a land use specialist to work with and spend hundreds of thousands of dollars having quality research and legal analysis done to reach a position that we are all very comfortable with regarding the litigation as well as the general argument that QR Master Planned Community has been completed for more than 10 years, there is no existing Declarant and the approvals from the City since 1990 all required conformance with the original Plan approved in 1990 which was done. If you had any interest in the wellbeing of our community, you would be cheering us on not continuing to argue on behalf of the developer against the interests of your neighbors.
> We knew from the beginning that the Mayor, Beers and Perrigo had the deck stacked against us. That is why we have always said we would win this in court. However, we have done a pretty good job of prolonging the developer's agony from Sept 2015 to now. We now look forward to the depositions of Perrigo and Lowenstein which have been noticed for this month.
>
> Frank A. Schreck
> Brownstein Hyatt Farber Schreck, LLP
> FSchreck@bhfs.com
> T:702.382.2101
>
>
>
> **From:** George West III [mailto:gowesq@cox.net]
> **Sent:** Wednesday, November 02, 2016 11:38 AM
> **To:** Schreck, Frank A.
> **Cc:** Julietta Bauman-Freres; Elise Connico; Elaine Wenger-Roesener; Lawrence Weisman
> **Subject:** Re: Great job

Exhibit C

Exhibit C

DECL

James J. Jimmerson, Esq.
Nevada State Bar No. 00264
JIMMERSON LAW FIRM, P.C.
415 South 6th Street, Suite 100
Las Vegas, Nevada 89101
Telephone: (702) 388-7171
Facsimile: (702) 380-6422
Email: jjj@jimmersonlawfirm.com
Attorneys for Fore Stars, Ltd., 180 Land Co., LLC and Seventy Acres, LLC

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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; and THE CITY OF LAS VEGAS,

Defendants.

CASE NO. A-15-729053-B

DEPT. NO. XXVII

Courtroom #3A

DECLARATION OF VICKIE DEHART

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

DECLARATION OF VICKIE DEHART

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

VICKIE DEHART, declares, alleges and states as follows:

1. I am one of the Managers of Defendants in this matter. I have personal knowledge of all matters contained herein, and am competent to testify thereto, except for those matter stated on information and belief, and to those matters, I believe them to be true. I make this Declaration in support of Defendants' DEFENDANTS FORE STARS, LTD., 180 LAND CO., LLC AND SEVENTY ACRES, LLC'S REPLY in support of MOTION TO DISMISS FIRST AMENDED COMPLAINT and OPPOSITION TO COUNTERMOTION UNDER NRCP 56(f).

2. On or about December 29, 2015, Mr. Schreck bragged that his group is "politically connected" and could stop the development plans for the Land from moving forward. Mr. Schreck accused us of having "colluded" with the City, threatened to go to the newspaper, and declared that we needed to understand how powerful Schreck's group is. It was then that Mr. Schreck openly revealed that he wanted 180 acres, with valuable water rights deeded to him and his group, and only then would they "allow" us to develop the remainder of the Land. When Mr. Schreck was asked what he wanted to pay for the 180 acres and water rights, Schreck said "not a penny." This attempt at extortion was promptly reported to the FBI.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

VICKIE DEHART

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b)(2)(D) and E.D.C.R. 8.05, I certify that on this day, I caused a true and correct copy of the foregoing ***Declaration of Vickie Dehart*** to be filed and e-served via the Court's Wiznet E-Filing system on the parties listed below. The date and time of the electronic proof of service is in place of the date and place of deposit in the mail.

Todd L. Bice, Esq.
Dustun H. Holmes, Esq.
Pisanelli Bice, PLLC
400 South 7th Street, Suite 300
Las Vegas, NV 89101
Counsel for Plaintiffs

Bradford R. Jerbic, Esq.
Jeffry M. Dorocak, Esq.
495 South Main Street
Sixth Floor
Las Vegas, Nevada 89101
Attorneys for the City of Las Vegas

AN EMPLOYEE OF THE JIMMERSON LAW FIRM, P.C.

Exhibit D

Exhibit D

Re: Second Draft of Queensridge Briefing

Steven Seroka

Thu 11/16/2017 10:35 PM

To Schreck, Frank A. <FSchreck@BHFS.com>;

Thanks Frank. I have learned that simple is definitely more effective

Also. Heads up. The tentative maps proposed by the developer may meet dec 6 planning commission. Will know more later. There may be some delays...

Respectfully
Steve

Sent from my iPhone

On Nov 16, 2017, at 10:30 PM, Schreck, Frank A. <FSchreck@BHFS.com> wrote:

> See comments
>
> Sent from my iPhone
>
> Begin forwarded message:
>
> **From:** "Schreck, Frank A." <FSchreck@BHFS.com>
> **Date:** November 16, 2017 at 1:34:38 PM PST
> **To:** 'Kenneth Thompson' <kenneth.thompson@swgas.com>
> **Subject: RE: Second Draft of Queensridge Briefing**
>
> Chip
> Thanks for the second draft. Most of the points we want to make are found within it. However, it suffers from the same level of complexity that Steve wanted us to dumb down. I think we should meet again to narrow our focus on the
> zoning issues and make the presentation meet a 6th grade level. For example, I envision the first slide Showing what an R-PD District is and allows for. This would entail a brief reference slide to the City's Master Plan that existed and its description of what an R-PD District is and allows for (Multi-family, single family, open space, golf course etc). The a brief slide to show that definition in the City's ordinances existing in 1990 which define a R-PD District. Then a further explanation of the use of the number attached to the R-PD by the developer which is used to determine the number of dwelling units the developer is seeking approval to build, once again showing the ordinance slide that states just that. Then a slide with the 12/2014 letter from the city Planner used by EHB to support his claim to 7.49 units per acre and highlight that part of the letter that restates the ordinance we previously exhibited.
> Now that the foundation is laid, we show the land use slide from the original PRMP to show what the developer was asking the city to approve under the R-PD7 zoning district. These are all uses allowed under the R-PD District. We then show the slide from the City Council minutes of 4/1990 with the same land uses which then City then approved. The emphasis is on these uses are permitted uses under a R-PD District.
> How were these uses implemented?

In order to determine the number of dwelling units, Peccole, consistent with the ordinance, multiplied the GROSS ACRE in the R-PD District (Show a slide of the entire District which was 936 acres (996.4 acres – 60 acres of right-of-way) which acreage included the 211 acres of golf course/drainage, resulting in Peccole having the right to build 6,552. Slide showing the math. He then voluntarily gave up 2200 units at the Planning Commission hearing in 3/1990 (show slide of minutes). He then further reduce the number of units he wanted to 4247 which the City approved as the MAXIMUM number of dwelling units that could be built in the R-PD DISTRICT-show slide of City's final approval letter.
Next, he asked the City to change the current N-U zoning on the properties to match the uses he requested. Show the uses slides again. Then show the City approval of the reclassification from N-U to R-PD7 on ONLY 401 acres to get the 2807 single family units, R-3 on 60 acres to get the 1440 multi-family units which totaled the 4247 MAXIMUM residential units that could be built within the R-PD District. Slides showing actual City zoning approval minutes and final approval. What did the City approve relative to the Badlands Golf course.
.211 acres of drainage /golf course with no residential units allowed on the golf course (show land use slides again) which designation also satisfied the City requirements for open space in a R-PD District. (Slide showing 20% requirement and golf course being 21%)
Slide showing that in 1992. after a thorough study of land uses within the City of LV, the City adopted a new GP which aligned the GP to the actual existing land uses. The land use requested by Peccole and approved by the City in 1990. The badlands golf course as well as the other 7-8 master planned communities were designated PR-OS with no residential density allowed to consistent to their current uses.(slide). The city reaffirmed the PR-OS in its subsequent GPs in __ and 2005 _Show slides.
Have to stop now but you can get a feel for what I think we need to do.

Frank A. Schreck
Brownstein Hyatt Farber Schreck, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106
702.464.7058 tel
FSchreck@BHFS.com

From: Kenneth Thompson [mailto:kenneth.thompson@swgas.com]
Sent: Thursday, November 16, 2017 11:14 AM
To: Schreck, Frank A.; stevenseroka@live.com
Subject: Second Draft of Queensridge Briefing

Frank,
Please disregard the first two emails with the PDF files and look at this draft when you get a chance.
Again, please let me know if I am on the right path with anything important that I have missed, additions, deletions, mistakes, etc.

Strokeman,
Is this what you are looking for? Don't quote anything in it until Frank removes the "untruths."

Chip
****
****

by the attorney-client privilege and/or attorney work product doctrine. It is intended solely for the addressee. Access to this e-mail by anyone else is unauthorized by the sender. If you are not the intended recipient, you are hereby notified that any disclosure, copying, or distribution of the contents of this e-mail transmission or the taking or omission of any action in reliance thereon or pursuant thereto, is prohibited, and may be unlawful. If you received this e-mail in error, please notify us immediately of your receipt of this message by e-mail and destroy this communication, any attachments, and all copies thereof.

Southwest Gas Corporation does not guarantee the privacy or security of information transmitted by facsimile (fax) or other unsecure electronic means (including email). By choosing to send or receive information, including confidential or personal identifying information, via fax or unencrypted e-mail, you consent to accept any associated risk.

Thank you for your cooperation.

****
****

Exhibit E

Exhibit E

Re: Lawsuit

Steven Seroka

Sat 4/21/2018 8:28 AM

To: Schreck, Frank A. <FSchreck@BHFS.com>;

Cc: Newman Marc [redacted] Garcia George <ggarcia@gcgarciainc.com>;

Hello Frank,
...are you saying there is an new additional suit against the city and the judge? If so, I am not aware so this is news to me.

Thank you.
Respectfully
Steve

Sent from my iPad

> On Apr 21, 2018, at 7:50 AM, Schreck, Frank A. <FSchreck@BHFS.com> wrote:
>
> Suing Judge Crockett and the City shows that the developer realizes that Crockett's decision destroys his claim for inverse condemnation. The only argument he makes is that Jerbic said the City should appeal. Once again Jerbic is providing the developer with an argument for inverse condemnation against the City. When will the City get an Atty to protect it rather than provide support for the developer's claim against the City for hundreds of millions of dollars.
> By refusing to appeal Crockett's decision, you have have protected the City against an inverse condemnation judgment. They recognize that and are now so desperate they are suing a Judge whose decision is based upon the City's staff reports which in turn are based upon the City's own ordinance. Without Jerbic's continued undermining of the City's defense, the developer would have no argument at all.
> Enjoy the weekend. I sure will.
>
>
> Sent from my iPhone
>
>
> STATEMENT OF CONFIDENTIALITY & DISCLAIMER: The information contained in this email message is attorney privileged and confidential, intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this email is strictly prohibited. If you have received this email in error, please notify us immediately by calling (303) 223-1300 and delete the message. Thank you.

Exhibit F

Exhibit F

----- Forwarded Message -----
From: Schreck, Frank A. <fschreck@bhfs.com>
To: 'BUCKLEY, MICHAEL' <mbuckley@fclaw.com>; 'Shauna Hughes' <shughes@lynchhopper.com>
Cc: Jack Binion (tina@blizzardam.com) <tina@blizzardam.com>; rogerpwagner@hotmail.com <rogerpwagner@hotmail.com>; Clyde Turner (ctt@turnerinvestments.net) <ctt@turnerinvestments.net>; Jeffrey Fine (JFine@finelv.com) <jfine@finelv.com>; Elaine Wenger-Roesener (elaine@queensridgehoa.com) <elaine@queensridgehoa.com>; Elise Canonico (elisesellslvhomes@gmail.com) <elisesellslvhomes@gmail.com>; tim@timmcgarry.net <tim@timmcgarry.net>; 'Steven Seroka' <stevenseroka@live.com>; 'Steve Caria' <stevecaria@yahoo.com>; Christina Roush (ceroush@gmail.com) <ceroush@gmail.com>; Kenneth Thompson (kenneth.thompson@swgas.com) <kenneth.thompson@swgas.com>
Sent: Thursday, January 11, 2018, 02:23:18 PM PST
Subject: RE: help [FC-Email.FID7068920]

A-17-752344-J The Judge spent at least 30 minutes explaining why the city violated its own ordinance and staff recommendations. He hit every point imaginable including stating Yohan bought the property without any contingency on entitlements so he bought a "pig-in-a-poke". He pointed out Yohan said he didn't buy the property until he had received the approval of each Council person. He said Yohan wore the city down until it just caved. He also spoke of the open space and the reliance QR residents placed in the approved Master Plan when they bought expensive lots. The transcript will be priceless and very useful in everything we do going forward.

Frank A. Schreck
Brownstein Hyatt Farber Schreck, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106
702.464.7058 tel
FSchreck@BHFS.com

Exhibit G

Exhibit G

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

FORE STARS, LTD., A NEVADA LIMITED LIABILITY COMPANY; 180 LAND CO., LLC, A NEVADA LIMITED LIABILITY COMPANY; SEVENTY ACRES, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellants v. DANIEL OMERZA, DARREN BRESEE, STEVE CARIA, Respondents.	Case No.: 82338 (lead case)
FORE STARS, LTD., A NEVADA LIMITED LIABILITY COMPANY; 180 LAND CO., LLC, A NEVADA LIMITED LIABILITY COMPANY; SEVENTY ACRES, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellants v. DANIEL OMERZA, DARREN BRESEE, STEVE CARIA, Respondents.	Case No.: 82880

APPELLANTS' OPENING BRIEF

THE LAW OFFICES OF KRISTINA WILDEVELD & ASSOCIATES
LISA A. RASMUSSEN, ESQ.
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NRAP 26.1 DISCLOSURE STATEMENT

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

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

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

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

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TABLE OF CONTENTS

.

TABLE OF AUTHORITIES

Cases

Statutes

Codes

Rules

Miscellaneous

I. STATEMENT OF ISSUES PRESENTED.

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

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

II. STATEMENT OF FACTS.

A. The Parties.

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

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

present RDP 7 zoning, which means that up to 7.49 dwelling units per acre may be constructed on it. *See* APP 0003-0004. The Land is adjacent to the Queensridge Common Interest Community ("Queensridge") which was created and organized under the provisions of NRS Chapter 116. *See* APP 0003-0007. Respondents Daniel Omerza ("Omerza"), Darren Bresee ("Bresee"), and Steve Caria ("Caria") (collectively "Respondents" or "Residents") are certain residents of Queensridge who strongly oppose any development of the Land. *See* APP 0002. Rather than properly participate in the political process, however, the Residents used unjust and unlawful tactics to sabotage the Landowners' development rights and their livelihoods. *See* APP 0001-00095. They did so despite having received and being bound by prior, express written notice that, among other things, the Land is developable and any views or location advantages they have enjoyed may be obstructed by future development. *See* APP 0003-0007.

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

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

Queensridge ("Queensridge Master Declaration" or "CC&Rs"), recorded in 1996; (2) Notice of Zoning Designation of Adjoining Lot disclosing that the Land was zoned RPD 7; (3) Additional Disclosures Section 4 – No Golf Course or Membership Privileges stating Residents acquired no rights in the Badlands Golf Course; (4) Additional Disclosure Section 7 – Views/Location Advantages stating that future construction in the planned community may obstruct or block any view or diminish any location advantage; and (5) Public Offering Statement for Queensridge Towers which included these same disclaimers. *See* APP 0003-0007.

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

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

APP 0018.

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

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

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

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

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

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

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

C. Frank Schreck's Engagement As Defense Counsel.

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

D. The Residents' Motions To Dismiss.

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

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

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

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

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

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

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

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

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

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

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

On remand, the Landowners sought to depose Omerza, Bresee, and Caria regarding their actions, knowledge, and motives surrounding their efforts to conjure up false opposition to the Landowners' development plans in order to disrupt their business interests, delay or defeat development of their Land, harm their reputation, and ruin their livelihood. *See* APP 0731-0737, 0800-0815. The Landowners also requested limited written discovery, including requests for production, requests for admissions, and interrogatories on the Residents prior to taking their depositions.

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

Rather than simply responding, the Residents immediately sought to circumvent any discovery, filing a request to further limit discovery disguised as a "request for clarification." *See* APP 0750-0752. The Landowners were not permitted to respond, and the district court issued a subsequent order on June 5, 2020 which further limited the discovery. *See* APP 0753.

Thereafter, the Landowners served requests for production on the Residents, seeking information as to the beliefs formed by the Residents related to the statements in the Declaration (i.e., their state of mind) and the documents that supported those beliefs. *See* APP 0800-0815. The Residents refused to answer the discovery, claiming it was overbroad. *See* APP 0738-0748, 07544444-0799. In a good faith effort to resolve the matter, the Landowners served amended requests for production and ultimately only posed eight (8) questions to Omerza, four (4) to Caria, and three (3) to Bresee. *See* APP 0800-0815.

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

Once again, the Residents objected, refused to answer the discovery requests, and instead filed a motion for protective order claiming that the discovery was still overbroad. *See* APP 0754-0799, 0816-0821. According to the Residents,

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

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

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

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

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

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

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

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

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

H. The Residents' Deposition Testimony.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

K. The District Court's Attorney Fee Award.

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

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

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

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

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

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

II. SUMMARY OF ARGUMENT.

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

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IV. ARGUMENT.

A. Standard Of Review.

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

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

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

Under NRS 41.660, the district court "shall allow limited discovery for the limited purpose of ascertaining such information" necessary to "demonstrate with prima facie evidence a probability of prevailing on the claim." NRS 41.660(3)(b); NRS 41.660(4). As such, plaintiffs are entitled to *all* discovery that would afford them the opportunity to obtain information necessary for their opposition, *i.e.*, presentation of prima facie evidence of a probability of prevailing on their claims. *See id.* Moreover, discovery into a defendant's state of mind is appropriate for purposes of ascertaining information necessary to demonstrate a claim has minimal merit. *See Toll v. Wilson,* 135 Nev. at ___, 453 P.3d at 1219 (district court properly ordered discovery to determine whether defendant made statements with actual malice).

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

Post-remand, the Landowners sought limited discovery so that they could ascertain, among other things, facts and evidence of the Residents' knowledge, and motives surrounding their efforts to conjure up false opposition to the Landowners' development plans in order to disrupt their business interests, delay or defeat development of their Land, harm their reputation, and ruin their livelihood. *See*

APP 0731-0737, 0800-0815. In other words, the Landowners sought discovery into the Residents' state of mind when they purchased their residences/lots as well as around the time they circulated and solicited signatures on copies of the Declaration. *See id*. Unfortunately, none of this discovery was permitted by the district court. Because the requested discovery was proper under NRS 41.660(4) and *Toll*, the district court's refusal to allow it constitutes an abuse of discretion.

Significantly, the district court's order devoted several findings and conclusions to this Court's previous decision, stating this Court's order reversing and remanding was the law of the case. *See* APP 1294. In particular, the district court noted that the only "task on remand was to determine whether [the Landowners] were entitled to discovery under NRS 41.660(4)." APP 1294-1295. In doing so, however, the district court mistakenly believed that, because this Court concluded the Residents met their step-one burden to establish good faith communications under NRS 41.660(3)(a), the law of the case prohibited further inquiry into their state of mind. *See id*. As *Toll* indisputably recognizes, discovery into the Residents' knowledge and motives surrounding their efforts to conjure up false opposition to the Landowners' development plans is entirely permissible under NRS 41.660(4) for purposes of the Landowners' step-two burden. *See Toll v. Wilson,* 135 Nev. at ___, 453 P.3d at 1219 (district court properly ordered discovery to determine defendant's state of mind when statements were made). That the

Residents established "good faith communications" for purposes of their step-one burden should not have – as the district court erroneously thought – precluded the Landowners from discovering evidence to demonstrate otherwise, namely, that the Residents negligently or intentionally omitted, misstated, and/or shaded material facts when they circulated, solicited and procured the statements and/or declarations as part of a scheme to sabotage the Landowners' development plans.

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

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

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

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

First, the absolute litigation privilege is limited to defamation claims, and this is not a defamation action. *See Fink v. Oshins,* 118 Nev. 428, 433, 49 P.3d 640, 645 (2002) (absolute privilege limited to defamation cases). As such, Nevada law does not support the district court's determination that the absolute litigation privilege applies beyond the defamation context. *See* APP 1297-1298. Indeed, all of the cases relied on by the district court for that proposition are indisputably defamation cases.[8] *See id*. That these cases also alleged other claims as well does not mean

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

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

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

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

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Stew, L.L.C. v. City of N. Las Vegas, 124 Nev. 224, 181 P.3d 670 (2008); *Circus Circus Hotels, Inc. v. Witherspoon,* 99 Nev. 56, 60, 657 P.2d 101, 104 (1983); *Knox v. Dick,* 99 Nev. 514, 518, 665 P.2d 267, 270 (1983).

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

2. City Council Proceedings Are Not Quasi-Judicial.

Second, some undetermined, future city council proceedings hardly constitute the quasi-judicial proceedings contemplated by Nevada courts. *See, e.g., Knox v. Dick,* 99 Nev. at 518, 665 P.2d at 270 (guidelines for grievance board indicated that hearing was conducted in manner consistent with quasi-judicial administrative proceeding). In Conclusion nos. 45-49, however, the district court nevertheless concluded that the "city council proceedings were quasi-judicial." APP 1296-1297. In doing so, the district court misguidedly conflated the showing required at step one of the anti-SLAPP analysis under NRS 41.660, i.e., that the plaintiff's claims for relief are based on activist communications to a political subdivision of the state (the city council) in a public forum, with the required showing for application of the absolute litigation privilege, i.e., the defendant's defamatory statements were made during or in anticipation of judicial or quasi-judicial proceedings. *See id*. Indeed, this Court's conclusion that the Residents' communications were made in connection with an issue of public interest does not

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

In fact, this Court's order reversing and remanding expressly recognized that the city council is a *legislative* body, referring only to city council proceedings as a "public forum." *See Omerza v. Fore Stars,* 2020 WL 406783, at *6-7. And once again, the Nevada law cited by the district court does not support its conclusion that city council proceedings are quasi-judicial. *See* APP 1296-1297. Indeed, the district court's reliance on *State ex rel. Bd. of Parole Comm'rs v. Morrow*, 127 Nev. 265, 273, 255 P.3d 224, 229 (2011), is entirely misplaced. *Morrow* is a criminal case which addressed whether parole board hearings constitute "quasi-judicial proceedings." *Id.* In concluding that they are not quasi-judicial proceedings, the Court recognized that county boards of commissioners, the Public Utilities Commission, the Board of Architecture, and other entities should not be considered quasi-judicial simply because they afford some due process protections. *See id.* at 275, 255 P.3d at 230.

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

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

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

At issue on appeal in *Spencer* was whether such meetings were quasi-judicial proceedings for purposes of the absolute privilege. *See id.* In determining that they were not, this Court held that to qualify as a quasi-judicial proceeding for purposes of the absolute privilege, a proceeding must, at minimum "(1) provide the opportunity to present and rebut evidence and witness testimony, (2) require that such evidence and testimony be presented upon oath or affirmation, and (3) allow opposing parties to cross-examine, impeach, or otherwise confront a witness." *Id.; cf. Knox*, 99 Nev. at 518, 665 P.2d at 270 (concluding that a grievance board hearing was a quasi-judicial proceeding because the guidelines governing it required evidence to be taken upon oath or affirmation, allowed witnesses to testify, provided for impeachment of those witnesses, and allowed for rebuttal). Because the county planning commission meetings, and the public comment periods in particular, did not require an oath or affirmation for testimony presented during the meetings, nor was the testimony subject to cross-examination or impeachment, they lacked basic due-process protections and were not quasi-judicial in nature. *See Spencer,* 136 Nev. ___, 466 P.3d at 1248.

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

no. 45 does not even specify any particular period of city council proceedings, referring only to "those in connection with issues under consideration by a legislative body," namely, "the city council's consideration of an "amendment to the Master Plan/General Plan affecting Peccole Ranch." APP 1296. Furthermore, Las Vegas City Charter § 2.080 merely bestows subpoena power on the city council to assure the attendance of witnesses and the production of documents. *See id.* It does not require evidence and testimony to be presented under oath or allow opposing parties to cross-examine, impeach, or otherwise confront a witness. *See id.* Quite simply, the city council proceedings anticipated in this case do not afford the basic due-process protections required by *Spencer* and are therefore not quasi-judicial for purposes of the absolute privilege.

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

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

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

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

case-specific, fact-intensive inquiry).

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

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

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

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

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

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

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

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

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

misinformation will be communicated to a third party. *See Epperson v. Roloff,* 102 Nev. 206, 719 P.2d 799 (1986), *overruled on other grounds by GES, Inc. v Corbitt,* 117 Nev. 265, 21 P.3d 11 (2001). Furthermore, the suppression or omission of information is equivalent to a false representation. *See Nelson v. Heer,* 123 Nev. 217, 225-26, 163 P.3d 420, 426 (2007); *see also Epperson,* 102 Nev. at 212, 719 P.2d at 803 (A defendant may be found liable for misrepresentation even when the defendant does not make an express misrepresentation, but instead makes a representation which is misleading because it partially suppresses or conceals information.)

With respect to their misrepresentation claims, the Landowners allege the Residents' actions were intentional and/or negligent and were undertaken "with the intent of causing homeowners and the City of Las Vegas to detrimentally rely upon their misrepresentation of fact being falsely made…." APP 0001-0016. According to the Complaint, the Residents solicited and procured the statements and/or declarations, *i.e.*, false misrepresentations of fact, as part of a scheme to mislead council members into denying the Landowners' applications. *See id.* During their depositions, the Residents confirmed receipt of their CC&Rs, which was prior, express written notice that, among other things, the Land is developable and any views or location advantages they have enjoyed may be obstructed by future development. *See, e.g.,* APP 1004-1005, 0862; 0941, 0945. The Residents also

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

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

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

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

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

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

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

In the Complaint, the Landowners' interference with prospective economic advantage claims allege the Residents engaged in wrongful conduct through the

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

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

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

In Nevada, an actionable civil conspiracy is defined as a "combination of two or more persons, who by some concerted action, intend to accomplish some unlawful objective for the purpose of harming another which results in damage." *Flowers v. Carville,* 266 F.Supp.2d 1245, 1249 (D. Nev. 2003). The Landowners' conspiracy claim in this case is based on the Residents' clandestine, behind-the-scenes "concerted action to improperly influence and/or pressure third-parties, including officials with the City of Las Vegas, and others with the intended action of delaying or denying the [Landowners'] land rights and their intent to develop their property." APP 0001-0016. The Complaint further alleges that the "co-conspirators agreement was implemented by their concerted actions to object to [the Landowners'] development and to use their political influence" to delay and sabotage any development projects to the detriment of the Landowners and their livelihoods. *Id*.

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

deceive members of city council into voting against any development of the Land. *See* APP 0853-1216. Schreck's reference to "everything we do going forward" in the email attached to Caria's discovery responses is just one example and a direct admission of the conspiracy. *See id*. The evidence also shows communications between the Residents and city council members regarding development of the Land, as well as those same council members relationship with Schreck and their adversity to any development of the Land. *See id.; see also* APP 1007-1011, 1014-1015, 1019-1020, 1060-1061, 1066-1069. That Bresee and Caria sought to delay a city council vote until their friend Seroka took office and could "get rid of [the] development" of the Land further evidences the concerted action of these conspirators. *Id*. Again, it is public knowledge that the Landowners have lost economic opportunities to develop the Land and that it remains undeveloped today. *See Brelient,* 109 Nev. at 845, 858 P.2d at 1260 (court may consider matters of public record). Even though the Residents deny anything untoward, all of this is sufficient evidence from which a reasonable inference of conspiracy may be drawn. As with their other claims, the Landowners therefore met their step-two burden under NRS 41.660, and the district court erred in granting the Residents' anti-SLAPP motion to dismiss.

. . .

. . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. CONCLUSION.

For the foregoing reasons, the Landowners respectfully submit that the district court erred in granting the Residents' special motion to dismiss (anti-SLAPP motion). Likewise, the district court erred in awarding the Residents attorney fees. The district court's decisions should therefore be reversed in their entirety.

DATED this 11th day of October, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this **APPELLANTS' OPENING BRIEF**, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I also certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6). The font type is Times New Roman, font size is 14, page length is **53** pages, inclusive of the verification and required certificates, and the word count is 12,807. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 11th day of October, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of October, 2021, I caused service of a true and correct copy of the above and foregoing **APPELLANTS' OPENING BRIEF** to be submitted for filing and service with the Supreme Court of the State of Nevada via the Electronic Filing System to the following:

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Exhibit H

Exhibit H

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case Nos.: 82338 (Lead Case)/82880

FORE STARS, LTD., A NEVADA LIMITED LIABILITY COMPANY; 180 LAND CO., LLC, A NEVADA LIMITED LIABILITY COMPANY; SEVENTY ACRES, LLC, A NEVADA LIMITED LIABILITY COMPANY,

Appellants,

v.

DANIEL OMERZA, DARREN BRESEE, and STEVE CARIA,

Respondents.

Appeal From the Eighth Judicial District Court,
In and for the County of Clark
The Honorable Richard F. Scotti & The Honorable Crystal Eller, Presiding
District Court Case No.: A-18-771224-C

RESPONDENTS' CONSOLIDATED ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the foregoing are persons or entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Respondents Daniel Omerza, Darren Bresee and Steve Caria are individuals, so there is no parent corporation or any publicly held company that owns 10% of the party's stock.

DATED this 24th day of November, 2021.

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Local Authorities

I. ROUTING STATEMENT

These consolidated appeals are the second time this anti-SLAPP case comes before this Court. In Supreme Court Case No. 76273, this Court considered the prior denial of the underlying defendants anti-SLAPP motion. This Court reversed and remanded for further proceedings below. The district court has now granted the anti-SLAPP motion and awarded attorneys' fees. These consolidated appeals, in part, involve disputes over the interpretation of this Court's prior decision and remand order. Therefore, Respondents (Defendants below) believe this case remains appropriate for decision by this Court.

II. STATEMENT OF THE CASE

This is an appeal of the district court's **granting** of a special motion to dismiss under the anti-SLAPP statute, NRS § 41.635 *et seq.*, (the "anti-SLAPP motion") filed by Defendants/Appellants Daniel Omerza, Darren Bresee and Steve Caria ("Residents").

The Residents were part of a grass roots effort to gather written statements to present to the Las Vegas City Council in advance of its consideration of a requested modification to a master plan and the City's general plan by Plaintiffs Fore Stars, Ltd., 180 Land Co., LLC, and Seventy Acres, LLC (collectively, "Landowners"). Landowners filed their complaint asserting a host of claims for relief based upon their allegation that Residents' efforts were improper and not in

good faith. Residents submitted their special motion to dismiss under the anti-SLAPP statute.

The district court initially denied the anti-SLAPP motion finding that the first prong of anti-SLAPP analysis did not apply to the tort claims asserted by Landowners. On appeal, this Court reversed, holding that the Residents had met their burden of showing the claims in the complaint arose from the Residents' good faith communications in furtherance of relevant First Amendment rights. Further, this Court found that the Landowners had failed to meet their burden to demonstrate their claims had merit by offering admissible evidence to support those claims. But, because the district court had not considered the Landowners' request for discovery under the anti-SLAPP statute, the Court remanded with instructions that the district court consider whether discovery pursuant to the anti-SLAPP statute was appropriate.

After further briefing on remand, the district court allowed limited discovery pursuant to the anti-SLAPP statute. Thereafter, the parties submitted supplemental briefing on the anti-SLAPP statute. The district court then granted the Residents' anti-SLAPP motion, dismissed Landowners' claims, and awarded mandatory attorneys' fees.

III. OBJECTION TO APPELLANT'S STATEMENT OF FACTS

NRAP 28(e)(1) requires that: "every assertion in briefs regarding matters in

the record shall be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found."

This Court reviews the grant of an anti-SLAPP motion *de novo*. *Smith v. Zilverberg*, 137 Nev. Adv. Op. 7, 481 P.3d 1222, 1226 (2021). As this Court explained in its prior decision in this case, when opposing an anti-SLAPP motion, "the plaintiff cannot rely on the allegations of the complaint, but must produce evidence that would be admissible at trial." *Omerza v. Fore Stars, Ltd*, 455 P.3d 841, *3 (Nev. 2020) (quoting *HMS Capital, Inc. v. Lawyers Title Co.*, 12 Cal. Rptr. 3d 786, 791 (Ct. App. 2004)).

Nonetheless, all of the "facts" set out in the first six pages of the Landowner's "Statement of Facts" are either unsupported by any citation to the record or merely make reference to the Landowner's complaint (APP 1:0001-0095). Of course, the claims for relief set out in a complaint frame the scope of an anti-SLAPP motion. But, what Landowners attempt do in their appeal brief for this *de novo* review repeats the same error this Court recognized on the prior appeal—citation to "facts" alleged in the complaint is not sufficient to meet the evidentiary burden a plaintiff has in opposing an anti-SLAPP motion.

Therefore, the Residents request that this Court strike and/or disregard the "facts" set out in pages 1 through 6 of the Landowners' Opening Brief because the facts alleged in their complaint are not properly considered when determining

whether the Landowners met their evidentiary burden under the anti-SLAPP statute.

IV. COUNTER-STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

A. The Residents and Their Opposition to The Landowners' Development

As set out in this Court's prior decision in this case:

> [Residents] live in the Queensridge community and oppose residential development of adjacent land that is the site of the now-closed Badlands Golf Course. They circulated a form declaration to other Queensridge residents to sign, representing to the City of Las Vegas that the signatory purchased a residence/lot in Queensridge with the understanding that land designated as open space/natural drainage system in the Peccole Ranch Master Plan would remain as such and could not be developed.

Omerza, 455 P.3d 841, *1.

While Badlands is not subject to the Queensridge Master Declaration or Amended Master Declaration (*id.* at *3), just before the time the Residents circulated the declarations, Judge Crockett (in another matter related to the Landowners' development of Badlands) had "observed during a hearing that purchasers of property subject to the Peccole Ranch Master Plan relied on that master plan in purchasing their homes." *Id.* The declaration the Residents offered to other residents simply invited those other residents to affirm that, when purchasing property in Queensridge, they relied on the open space/natural draining

system designation and that such land could not be developed under the Peccole Ranch Master Plan or the city's General Plan.[1] *Id.*

With their anti-SLAPP motion, the Residents' provided declarations supporting their understanding and intent. Their understanding was that Badlands was not subject to the Queensridge CC&R's but was part of Peccole Ranch and subject to the Peccole Ranch Master Plan. APP 2:0186, 0191, 0195. They were aware that the City had approved plans for the Landowners to build residential units on the Badland site, but that those plans had been challenged in separate litigation. APP 2:0186, 0191, 0195. They knew that Judge Crockett determined that some people relied on the master plan. APP 2:0186, 0191, 0195. They were aware that the Landowners had applied for a change to the General Plan to allow for development of Badlands. App 2:187, 192, 196.

The Residents opposed the changes. Two of the Residents hoped that others who shared their view would voice their opposition to the City. App 2:187, 196. To that end, they handed out the forms of declarations to other residents. App 2:187, 196. Among other things, based on Judge Crockett's ruling and conversations with other residents, the Residents believed that some other residents had relied on the terms of the Peccole Ranch Master Plan when purchasing their

[1] Notably, there is no evidence in the record that the Residents attempted to persuade any resident to sign the declaration if the resident did not believe it to be true.

properties. App 2:187, 192, 196.

B. The Landowners File a Complaint

The Landowners sued the Residents claiming that the form declaration and efforts to have other residents sign them supported six separate claims for relief. *Omerza*, 455 P.3d 841, *1. The claims were for "equitable and injunctive relief," intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, conspiracy, intentional misrepresentation, and negligent misrepresentation.

C. The anti-SLAPP Motion and the First Appeal

The Residents filed an anti-SLAPP motion. The district court denied the motion, finding that the Residents could not meet the first prong of the anti-SLAPP analysis because the complaint asserted tort claims and because there were factual issues that needed to be resolved.

1. <u>This Court's decision on the first prong of anti-SLAPP</u>

On appeal, this Court explained that the anti-SLAPP statute can apply to any claim for relief if the alleged wrongful activity arises from covered protected activity. *Id.* The Court went on to find that the Residents' activities with respect to the declarations was protected activity. Critically, the Court expressly held that the Residents had met their burden under the first prong of the anti-SLAPP analysis. *Id.* at *2. More specifically, this Court held that the Residents "met their burden of showing that the communications were truthful or made without

knowledge of their falsehood." *Id.*

2. This Court's decision on the second prong of anti-SLAPP

As to the second prong of the anti-SLAPP analysis, the Court held that the Landowners "failed to meet their burden by demonstrating with *prima facie* evidence a probability of prevailing on the claims." *Id.* at *3. The Court explained that the Landowners were require to "point to competent, admissible evidence" to make their *prima facie* showing. *Id.* However, the Court noted that the Landowners did to present such evidence, instead relying on their challenge to the first prong of the analysis. *Id.* The Court expressly found that the exhibits submitted with Landowners' supplemental briefing on the anti-SLAPP motion did not provide the requisite evidentiary showing. *Id.* at *4.

3. This Court's ruling on Landowners' request for discovery

Though the Court found that the Residents had met their burden on the first prong of the anti-SLAPP analysis and the Landowners did not meet their burden on the second prong of the analysis, the Court also determined that the district court failed to address Landowners' request for limited discovery under NRS 41.660(3). *Id.* The Court ruled that the district court was required to address that issue in the first instance. *Id.*

4. This Court's limited remand order

In light of the discovery issue, the Court reversed and issued a very limited order remanding to the district court "for it to determine whether respondents are

entitled to discovery under NRS 41.660(4)."[2] *Id.*

D. The anti-SLAPP Motion on Remand

On remand, the Landowners attempted to defy this Court's remand order, seeking excessive discovery and attempting to relitigate the first prong of the anti-SLAPP analysis. But the district court was faithful to this Court's direction.

1. Discovery on remand

At a status hearing shortly after remand, the parties debated whether any discovery was appropriate. The Landowners' counsel asked for additional briefing, acknowledging that "there was an initial request made by Plaintiffs…for discovery, but 100 thing have happened since that time." App 11:1737. Therefore, counsel argued in order to "allow the Court to make an educated decision, an informed decision, based on everything that's happened since that initial request for discovery," "***[l]et me do some additional briefing just on what discovery is requested, why it's relevant, and how it comports with the Nevada Supreme Court's ruling."*** APP 11:1737 (emphasis added).

The district court allowed additional briefing. After promising the district court that the brief would identify "what discovery is requested," the Landowners expressly described the topics on which they sought discovery. The Landowners

[2] Importantly, NRS 41.660(4) only allows limited discovery (after a requisite showing) to address ***the second prong*** of the anti-SLAPP analysis. No discovery is permitted in relation to the first prong.

requested depositions, requests for production of documents, and request for admission whereby they would "be able to ask the Defendants what documents they are relying on, what information they are relying on, or if that information was provided to them by third persons." APP 6:735.

The district court permitted some limited discovery. As explained in a protective order the district court ultimately issued, the district court first issued a minute order authorizing discovery and then clarified that order. APP 6:0826. However the Residents sought a protective order because the Landowners propounded discovery that was beyond the scope authorized by the district court and NRS 41.660(4). APP 6:0826-0827.

In response, the district court withdrew its prior orders. APP 6:0827. Instead, it issued the protective order. In that order, the district court explained that "the only discovery that might be permitted is discovery authorized by NRS 41.660(4)." APP 6:0827. The district court noted that section recognizes there is an automatic stay of discovery upon the filing of an anti-SLAPP motion. APP 6:0827. However, if a plaintiff makes a showing that discovery is necessary to meet its burden on the second prong of anti-SLAPP analysis, a court must allow discovery. APP 6:0827. Critically, the district court quoted the Landowners' brief in support of discovery and found:

> The Court finds that the only subjects on which Plaintiffs attempted to make a showing of such necessity were,

> with respect to the declarations to the City Council at issue in this case, "what documents [Defendants were] relying on, what information [Defendants were] relying on, or if that information was provided to [Defendants] by third persons."

APP 6:0827.

Therefore, the district court explained that the Landowners' "discovery should be limited to those topics." APP 6:0827. As a result, the district court ordered a limited quantity of discovery requests and depositions and restricted the scope "to the topics of what documents Defendants relied on, what information Defendants relied on, or whether the information was provided to Defendants by third persons, all with respect to the declarations to the City Council." APP 6:0827-0828.

The Landowners assert that the Residents did not properly respond to the discovery requests. However, the record does not reflect that the Landowners ever filed a motion to compel—because they never did so.

2. <u>Supplemental briefing on the anti-SLAPP motion</u>

After discovery was completed, the parties were allowed to submit supplemental briefs on the anti-SLAPP motion. APP 6:0828, APP 7:830-995, APP 8:996-1216, APP 9:1217-1257.

Remarkably, the Landowners spent almost the entirety of their brief rearguing what this Court had already decided and was not part of the remand

order—whether the Residents had met the burden under the first prong of the anti-SLAPP analysis. APP 7:0830-0849. Worse, even though this Court had determined that the Landowners prior briefing failed to make a *prima facie* showing with admissible evidence to support each of its claims (*Omerza*, 455 P.3d 841, *3-*4), and even though the Landowners had been permitted discovery to gather such evidence (if it existed), the Landowners dedicated ***only 23 lines*** of their brief to arguing that they had sufficient evidence to meet their burden under prong two of the anti-SLAPP analysis. APP 7:0845-0846. In those 23 lines of argument, ***the Landowners only addressed their claim for conspiracy, ignoring every one of the other 5 claims asserted in their complaint.*** APP 7:0845-0846.

3. <u>The district court's order granting the anti-SLAPP motion</u>

After hearing, the district court issued a minute order granting the anti-SLAPP motion. APP 9:1258-1259. On December 10, 2020, the district court entered its Findings of Fact and Conclusions of Law ("FFCL") granting the anti-SLAPP motion. APP 9:1260-1270.

Among other things, the district court discussed that the Landowners asserted they were entitled to discovery on both the first and second prong of the anti-SLAPP analysis and that this Court's prior decision in the case required the district court to reconsider both the first and second prong of the anti-SLAPP analysis on remand. APP 9:1262. However, the district court again explained that

Landowners had requested supplemental briefing on discovery and promised to identify the discovery to which they were entitled. APP 9:1262-1263. The district court repeated that NRS 41.660(4) required the Landowners to make a showing of necessity for limited discovery and that they had been allowed discovery on the only topics for which they "even attempted to make such a showing." APP 9:1263.

With respect to the supplemental briefing on the anti-SLAPP motion, the district court found that "[w]ith respect to Prong 2, the only one of the Claims that Plaintiffs addressed in their supplemental briefing was the claim for Conspiracy." APP 9:1263. "Moreover, with respect to the claim for Conspiracy, Plaintiffs did not offer any admissible evidence or make any argument regarding alleged damages resulting from the purported conspiracy." APP 9:1263.

In its conclusions of law, the district court found that this Court's prior decision constituted law of the case. APP 9:1264. After quoting this Court, the district court concluded that the only issue it was directed to consider on remand was whether discovery should be permitted under NRS 41.660(4). APP 9:1264. And, once discovery was allowed, the district court concluded it was required to determine whether the Landowners could now meet their burden under the second prong of the anti-SLAPP analysis. APP 9:1265.

The district court concluded that the Landowners failed to meet their burden

for two separate and independent reasons. First, the district court found that the litigation privilege applied to the Residents' solicit of statements from other residents to be considered in a City Council proceeding. APP 9:1266-1268.

"As a separate and additional basis for dismissing Plaintiffs' claims pursuant to the anti-SLAPP statute," the district court concluded that the Landowners failed to meet their burden under Prong 2 "even if the litigation privilege did not apply." APP 9:1268. Noting that this Court already determined that the Landowners had not met their burden in their prior briefing, the district court considered whether the Landowners "offered any new evidence or legal argument in an attempt to meet their burden on remand." APP 9:1268.

The district court noted that the "civil conspiracy claim is the only claim for which Plaintiffs have made any new argument." APP 9:1268. However, the district court concluded that the Landowners did not offer any admissible evidence of an agreement to do something unlawful as required by applicable authority. APP 9:1268-1269. Further, the district court concluded that the Landowners had not (and could not) provide any evidence of damages resulting from the form declarations because the relevant City Council proceedings did not take place and Landowners successfully appealed Judge Crockett's decision, meaning that the City Council's prior decisions to allow development without modification (the modification which the Residents opposed) of the master plan were affirmed. APP

9:1269.

The district court concluded, "Plaintiffs have failed to show an agreement to achieve an unlawful objective and failed to show any damage. Therefore, Plaintiffs have failed to meet their Prong 2 anti-SLAPP burden." 9 APP 1269.

The district court granted the anti-SLAPP motion and denied the Landowners' subsequent reconsideration motion. APP 11:1600-1601.

E. The District Court Grants the Resident's Motion for Attorneys' Fees

The Residents filed a motion for mandatory attorneys' fees pursuant to the anti-SLAPP statute. APP 9:1357-1420. The fee motion requested an award of hourly fees of just over $350,000 (based on a lodestar analysis) and an enhancement of an equal amount because the Residents' counsel handled the defense on a contingency basis.

1. The hours worked

Because the Residents were seeking fees for more than 650 attorney hours, in the motion they provided a timeline of all of the major events that occurred in the case (mostly necessitated by the Landowners' litigation tactics) between March 15, 2018 and December 24, 2020. APP 9:1360-1364. The Residents also included detailed billing entries for all tasks performed, along with coding that identified the billings by 13 major tasks. APP 9:1394-1420. In addition, the Residents provided a summary of the hours and fees for each of those 13 tasks. APP 9:1368-1369.

Notably, when considering the fee motion, the district court was aware that it reflected a total of roughly 650 hours worked by the Residents' counsel, which the Landowners' counsel compared to the 481.5 hours worked by the Landowners' counsel (Landowners' Opening Brief, 50:8-11). However, at the time of ruling on the motion, the district court was also aware that the Landowners' in-house counsel had substantively participated in the lawsuit, including by taking depositions. Yet, none of her hours were included by Landowners when comparing total hours worked. APP 11:1610.

2. <u>The quality of the advocates</u>

The Residents provided short biographical information about the three attorneys who performed 95% of the work on the case. APP 9:1366-1367.

3. <u>The billing rates</u>

When considering the fee motion the district court was aware that lead counsel charged between $655 and $690 per hour over the course of the 2 1/2 year litigation. APP 9:1366. That rate was compared to other attorneys in the market who had less specialized experience—specifically the ***Landowners'*** counsel who had attested to having a regular hourly rate of $600 per hour (App 9:1366, APP 11:1606) and their initial lead counsel who charged $595 per hour (APP 11:1610, APP 10:1509-1545). Likewise, in the fee motion and reply, the Residents showed that the Residents' lead counsel was supported by a class of 1990 attorney who

billed at $485 and a class of 2004 attorney who billed at $450, while the Landowners' initial lead counsel was supported by a class of 2012 attorney who billed at $400. APP 11:1610, APP 10:1509-1545.

4. The district court's ruling on the fee motion

At the hearing on the fee motion, the district court made clear that it considered all of the required factors for considering a fee award. The district court had read the papers and knew that the Landowners' counsel addressed the fees "line-by-line." APP 11:1810. The district court expressly stated that it "reviewed the billing" and made its award:

> [u]nder the circumstances with how long this case took, with how much work went into it, how much expertise went into it, noting the normal rates of attorneys with this type of experience and this type of law, I don't find it unreasonable the initial amount asked for prior to Lodestar calculations.

APP 11:1813.

In its order awarding fees, the district court denied the Residents any enhancement or additional penalty under the anti-SLAPP statute. Pursuant to NRCP 52(a)(3)[3], incorporating the reasons stated on the record, the district court awarded fees of $363,244.00.

[3] "The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion. The court should, however, state on the record the reasons for granting or denying a motion."

V. SUMMARY OF THE ARGUMENT

On the prior appeal, this Court found that the Residents had met their burden under the first prong of the anti-SLAPP analysis by demonstrating by a preponderance of the evidence that the Landowners claims arise from good faith communications in furtherance of the right of free speech and the right to petition on matters of public interest.

This Court also determined that the Landowners failed to meet their burden under prong two to demonstrate a likelihood of success on the merits of their claims with admissible *prima facie* evidence.

The only basis for remand (rather than full reversal) was this Court's determination that the district court should consider whether the Landowners should have been permitted limited discovery pursuant to NRS 41.660(4) in order to meet their burden under the second prong. Indeed, this Court's remand order ***only*** allowed for consideration of the discovery issue. Under the mandate rule, all the district court could do was consider whether discovery was appropriate and, if discovery was allowed, provide the Landowners with an opportunity to reargue their burden under the second prong. That is exactly what the district court did.

NRS 41.660(4) only allows discovery if the requesting party makes a "showing" that information necessary to meet its burden on the second prong of the anti-SLAPP analysis is in the possession of another party or third party and not

otherwise available without discovery. In such a case, the district court can only "allow limited discovery for the purpose of ascertaining such information." NRS 41.660(4).

In this case, after Landowners requested the opportunity to brief exactly what discovery they were requesting and the basis for it. The district court allowed the Landowners the discovery they requested. When they sought more, the district court properly issued a protective order. Any allegation by the Landowners that the Residents did not properly respond to the authorized discovery was abandoned when the Landowners chose not to file a motion to compel.

Once discovery was completed, the Landowners had the opportunity to supplement their argument on the second prong of the anti-SLAPP analysis. Instead, for the most part, they tried to relitigate the issue on Prong 1 which had already been decided by this Court.

As to the Landowners' efforts to make a *prima facie* showing with admissible evidence supporting their claims, this Court need not even reach the complex analysis of the litigation privilege and whether the City Council hearings ***would have*** been quasi-judicial proceedings. Mindful that this Court already ruled that the Landowners' initial anti-SLAPP opposition was devoid of evidence to support any of their claims, it was incumbent on the Landowners to address each of their claims in the supplemental opposition to the anti-SLAPP motion and

demonstrate *prima facie* evidence to support each of them. Yet the Landowners abandoned all but their claim for conspiracy.

Even at that, Landowners failed to make the requisite evidentiary showing. They offered no evidence to support an explicit or tacit agreement to do something unlawful, as required under Nevada law. Moreover, by failing to make out any of their other substantive claims, the conspiracy claim failed, as a matter of law. Finally, the *sine qua non* of a conspiracy is resulting injury. However, because the Landowners successfully appealed the district court ruling (in another case) that would have required them to obtain a modification of the mater plan or General Plan, the City Council hearing for which the form declaration were being distributed never occurred and, therefore, there could have been no damages from those declarations.

Therefore, the anti-SLAPP motion was properly granted because the Landowners could not meet their burden under the second prong of the anti-SLAPP analysis.

As to the award of attorneys fees, the Landowners have not demonstrated that the district court abused its discretion. The record is clear that the district court applied the correct law and considered all of the necessary factors in making

the award. Therefore, because substantial evidence[4] supports the award, the district court's discretion awarding the fees should not be disturbed.

VI. LEGAL ARGUMENT

A. The Landowners Were Granted All the Discovery to Which They Were Entitled (if Not More)

The Landowners devote much of their discovery argument to discussing standard by which a party resisting an anti-SLAPP motion might be entitled to discovery. But the Landowners ignore that pursuant to NRS 41.660(4), it was their burden to make a "showing" that information "necessary" to meet their burden under the second prong of anti-SLAPP analysis was "not reasonably available without discovery." The Landowners also ignore that ***they*** told the district court they would provide a supplemental brief setting out what discovery they were requesting and why it was relevant.

The Landowners argue that there were many requests for discovery in the course of this case. But they are responsible for what they told the district court. Landowners' counsel asked for additional briefing. She told the district court that "there was an initial request made by Plaintiffs…for discovery, but 100 thing have happened since that time." App 11:1737. Therefore, in order to "allow the Court to make an educated decision, an informed decision, based on everything that's

[4] "[E]vidence that a reasonable mind might accept as adequate to support a conclusion. *Winchell v. Schiff*, 124 Nev. 938, 944, 193 P.3d 946, 950 (2008)

happened since that initial request for discovery," she argued for additional briefing in which she promised she would explain what discovery was being requested: "***[l]et me do some additional briefing just on what discovery is requested, why it's relevant, and how it comports with the Nevada Supreme Court's ruling."*** APP 11:1737 (emphasis added).

The district court allowed the additional briefing. The Landowners were quite specific about what discovery they were seeking. They expressly requested depositions, requests for production of documents, and requests for admission whereby they would "be able to ask the Defendants what documents they are relying on, what information they are relying on, or if that information was provided to them by third persons." APP 6:735.

The requirement for a "showing" under NRS 41.660(4) has meaning. The Landowners were only eligible to obtain discovery for which they were able to make a showing of necessity. And, even then, the district court could only allow "limited discovery for the purpose of ascertaining such information." Thus, the district court's grant of limited discovery to address Prong 2 was limited to that which was requested by the Landowners in their brief (the only thing on which the Landowners made any showing).

Moreover, as discussed above and below, because the Landowners could not satisfy the critical damages element of their claims, no amount of discovery on the

issues about which Landowners now argue would have been sufficient to make out their claims. Therefore, it was impossible to make a showing that any additional discovery was necessary or warranted.

The Landowners also suggest that more discovery should have been permitted because (they claim) the Residents did not properly respond to the discovery that was authorized. However, the Landowners never filed a motion to compel (for reasons that appear obvious). They had every right to seek relief from the discovery commissioner or, perhaps, directly from the district court. Having failed to do so, they have waived any objection to the discovery responses. *See*, *Valley Health Sys., LLC v. Eighth Jud. Dist. Ct. of State ex rel. Cty. of Clark*, 127 Nev. 167, 172, 252 P.3d 676, 679 (2011) (discussing waiver of discovery issues not raised with the discovery commissioner in the first instance).

B. The Landowners Were Not Entitled to Relitigate Whether the Residents Met Their Burden on the First Prong of the Anti-SLAPP Analysis

In the appeal of the prior ruling on the anti-SLAPP motion, this Court expressly held:

> [i]n sum, we conclude that the district court erred by finding that appellants had not met their burden under NRS 41.660(3)(a) to establish by a preponderance of the evidence that respondents' claims are grounded on appellants' good faith communications in furtherance of their petitioning rights on an issue of public concern.

The Court was also clear in its remand order to the district court:

> …we vacate the portion of the district court's order denying appellants' anti-SLAPP special motion to dismiss and remand to the district court for it to determine whether respondents are entitled to discovery under NRS 41.660(4).

Pursuant to the "mandate rule," a court must effectuate a higher court's ruling on remand. *Estate of Adams By & Through Adams v. Fallini*, 132 Nev. 814, 819, 386 P.3d 621, 624 (2016). The law-of-the-case doctrine directs a court not to "re-open questions decided (i.e., established as law of the case) by that court or a higher one in earlier phases." *Id*.

In considering the Prong 1 issues, this Court explained that the Landowners failed to present "evidence the clearly and directly overcomes" the declarations that were offered by the Residents. *Omerza*, 455 P.3d 841, *2. As a result, the Court explained that the Residents:

> …met their burden of showing by a preponderance of the evidence that their communications were truthful or made without knowledge of their falsehood (i.e., that they were "good faith" communications) through the sworn declarations attached to their special motion to dismiss, which is sufficient to satisfy the good-faith component of the step-one inquiry under NRS 41.660(3)(a).

Id. Thus, this Court found (and the law of the case is) that the Residents "met their burden of showing that the communications were truthful or made without knowledge of their falsehood." *Id*.

The Landowners were not entitled to relitigate Prong 1. Instead, in its clear

mandate, the Court simply instructed the district court to "determine whether respondents are entitled to discovery under NRS 41.660(4)." As discussed above, NRS 41.660(4) only allows discovery related to Prong 2 of the anti-SLAPP analysis. That is the portion of the analysis in which the Landowners were required to demonstrate that they had *prima facie* evidence to support their claims.

Thus, all of the Landowners' direct and indirect arguments that the Residents failed to meet their burden on the first prong of the anti-SLAPP analysis should be disregarded as inconsistent with this Court's prior decision.

C. The Landowners Failed to Meet Their Burden on Prong 2 to Demonstrate a Probability of Success by Providing Admissible Evidence to Make a *Prima Facie* Showing on Their Claims

In order to meet the burden on Prong 2, "in addition to stating a legally sufficient claim, the plaintiff must demonstrate that the claim is supported by a prima facie showing of facts that, if true, would support a favorable judgment." *Omerza*, 455 P.3d 841, *3.

In its prior decision, this Court expressly held that the Landowners' pre-appeal anti-SLAPP briefing "did not present 'prima facie evidence,' as required by NRS 41.660(3)(b), to demonstrate a probability of prevailing on their claim." *Id.* Therefore, on remand, if discovery was allowed (as it was), the Landowners were obligated to present ***new*** arguments with admissible evidentiary support to make out a *prima facie* showing on each of their claims.

The Landowners failed to do so.

1. The Landowners abandoned all claims other than the conspiracy claim

Even though this Court's prior decision expressly informed the Landowners that they had failed to make ***any*** evidentiary showing on any of their claims and explained what was required to meet their burden (*see*, *id* at *4), the Landowners did not offer any new evidence or argument in their supplemental opposition for any of their claims ***other than*** conspiracy. APP 7:0845-0846.

Not once did the Landowners present any evidence or offer any argument to support their interference, misrepresentation, or injunctive relief claims. As a result, any opposition to the anti-SLAPP motion on those claims has been abandoned and the Landowners' arguments on those claims in their Opening Brief should be disregard.

Perhaps the Landowners believe the *de novo* standard of review that applies to anti-SLAPP motions allows them to offer new evidence and raise new arguments for the first time on appeal. But that would be incorrect, as a matter of law. "[A] *de novo* standard of review does not trump the general rule that a point not urged in the trial court, unless it goes to jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010).

Because the ***only*** arguments on these five claims were contained in the

Landowners' initial anti-SLAPP opposition and because this Court already determined that those arguments did not meet the Landowners' Prong 2 burden, the failure to offer new argument as to those claims on remand was a waiver of any further argument and those claims have been abandoned. They cannot be raised for the first time on this appeal.

2. The Landowners failed to meet their Prong 2 burden on the conspiracy claim

The district court correctly found that the Landowners did not offer *prima facie* evidence to support their conspiracy claim.

This Court explained that the Landowners were required to "demonstrate that the claim is supported by a prima facie showing of facts" that is supported by "competent, admissible evidence." *Omerza*, 455 P.3d 841, *3. This is the same standard as a court applies in a summary judgment motion. *Id.*

The Landowners hardly tried to meet this burden, devoting only one page to the entire factual and legal argument. Neither the "evidence" offered nor the legal argument met the burden set out by this Court.

An actionable civil conspiracy "consists of a combination of two or more persons who, by some concerted action, intend to accomplish an unlawful objective for the purpose of harming another, and damage results from the act or acts." *Consol. Generator-Nevada, Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1311 (1998) (affirming summary judgment for defendant on the plaintiff's

conspiracy claim because there was no evidence that the two defendants had agreed and intended to harm the plaintiff). The evidence must be "of an explicit or tacit agreement between the alleged conspirators." *Guilfoyle v. Olde Monmouth Stock Transfer Co.*, 130 Nev. 801, 813, 335 P.3d 190, 198 (2014) (upholding district court's grant of summary judgment where plaintiff "has presented no circumstantial evidence from which to infer an agreement between [defendants] to harm" plaintiff). Here, the Landowners did not offer any evidence of an agreement to do something unlawful.

The lack of evidence of damages is also fatal to the Landowners' conspiracy claim. Such a claim fails where the plaintiff cannot show that he suffered any actual harm. *Sutherland v. Gross*, 105 Nev. 192, 197 (1989); see also *Aldabe v. Adams*, 81 Nev. 280, 286 (1965), *overruled on other grounds by Siragusa v. Brown*, 114 Nev. 1384 (1998) ("The damage for which recovery may be had in a civil action is not the conspiracy itself but the injury to the plaintiff produced by specific overt acts."). "The gist of a civil conspiracy is not the unlawful agreement but the damage resulting from that agreement or its execution. The cause of action is not created by the conspiracy ***but by the wrongful acts done by the defendants to the injury of the plaintiff***." *Eikelberger v. Tolotti*, 96 Nev. 525, 528 (1980) (emphasis added).

The Landowners' entire set of claims is based on the Residents signing

and/or circulating the form declarations to community members to oppose the Landowners' efforts to change the land use restrictions on the Badlands. The Landowners offered no evidence they were damaged. Why? Perhaps because the City Council proceedings never took place. Instead, the Landowners appealed (successfully) Judge Crockett's decision and the City Council's prior decisions to allow development without a modification to the Peccole Ranch Master Plan were affirmed.

The fact that the Landowners offered no evidence to support any of their other claims also demonstrates the invalidity of the conspiracy claim. Where a plaintiff cannot demonstrate an unlawful act because it cannot prevail on the other claims it has alleged form the basis for the underlying wrong, dismissal of the civil conspiracy claim is appropriate. *Goldman v. Clark Cty. Sch. Dist.*, 471 P.3d 753 (Nev. 2020) (unpublished) (*citing Consol. Generator-Nevada, Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998)).

In sum, the Landowners failed to provide admissible evidence to support each of the elements of its conspiracy claim. Therefore, they failed to meet their Prong 2 anti-SLAPP burden.

3. <u>The conspiracy claim is barred by the litigation privilege</u>

Because the Landowners failed to present *prima facie* evidence that supports each element of its conspiracy claim, the Court can end its Prong 2 analysis.

However, even if the Landowners had set out evidence to support the conspiracy claim, it would still be barred by the litigation 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 of controversy." *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101, 104 (1983) (citation omitted). This rule includes "statements made in the course of quasi-judicial proceedings." *Knox v. Dick*, 99 Nev. 514, 518, 665 P.2d 267, 270 (1983) (citation omitted); *see also Circus Circus*, 99 Nev. at 61, 657 P.2d at 105 ("the absolute privilege attached to judicial proceedings has been extended to quasi-judicial proceedings before executive officers, boards, and commissions") (citations omitted).

Critically, the statement at issue does not have to be made during any actual proceedings. *See Fink v. Oshins*, 118 Nev. 428, 433, 49 P.3d 640, 644 (2002) ("the privilege applies not only to communications made during actual judicial proceedings, but also to communications preliminary to a proposed judicial proceeding") (footnote omitted). "[B]ecause the scope of the absolute privilege is broad, a court determining whether the privilege applies should resolve any doubt in favor of a broad application." *Clark Cty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 382, 213 P.3d 496, 502 (2009) (citation omitted) (citing *Fink,*

supra).

This Court already determined the statements underlying each of Landowners' claims were made in good faith in connection with issues under consideration by a legislative body. That was the City Council's consideration of "amendment to the Master Plan/General Plan affecting Peccole Ranch." *Omerza*, 455 P.3d 841, *2.

Those City Council proceedings are quasi-judicial. Unified Development Code (UDC) section 19.16.030, et. seq. addresses amendments to the General Plan. It provides an extensive set of standards establishing how the City Council must exercise judgment and discretion, hear and determine facts, and render a reasoned written decision. In the course of those proceedings, the Council has the power to order the attendance of witnesses and the production of documents. Las Vegas City Charter §2.080(1)(d),(2)(a). This entire process meets the judicial function test for "determining whether an administrative proceeding is quasi-judicial." *State, ex rel. Bd. of Parole Comm'rs v. Morrow*, 127 Nev. 265, 273, 255 P.3d 224, 229 (2011). Moreover, the Landowners admitted it was a quasi-judicial proceeding. APP 0282 (p. 16, lines 415-420 with Mr. Hutchison as counsel for these Landowners explaining that the proceedings are quasi-judicial).

Critically, the absolute litigation privilege applies without regard to how the Landowners styles their claims. "An absolute privilege bars any civil litigation

based on the underlying communication." *Hampe v. Foote*, 118 Nev. 405, 409, 47 P.3d 438, 440 (2002), overruled in part on other grounds by *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 n. 6, 181 P.3d 670, 672 n.6 (2008).

The Landowners attempt to escape application of the litigation privilege by relying on *Spencer v. Klementi*, 136 Nev. 325, 466 P.3d 1241, 1247 (2020). As Landowners' argue it, *Spencer* establishes that no proceeding is quasi-judicial unless the proceeding requires evidence to be taken under oath, allows for cross-examination, and provides other due process protections that are the hallmark of traditional judicial proceedings. However, the Landowners ignore that this Court expressly stated that these were the standards for "a quasi-judicial proceeding in the ***context of defamations suits***." *Id.* at ____, 1247 (emphasis added).

While the distinction as to whether the case is one for defamation or not may seem meaningless at first blush, it is quite significant because this Court has created rules that treat particular proceedings as quasi-judicial based on one standard in some contexts (*id* the judicial function test) and not in other contexts (*ie* the requirement that particular due-process protections to be available). This incongruent treatment can be harmonized. In a defamation case, the plaintiff is attempting to hold the person asserting the privilege liable for what was said in a proceeding. There is good policy reason for this because "[s]tatements made during proceedings that lack basic due-process protections generally do not

engender fair or reliable outcomes." *Id.* at ___, 1248. However, the Landowners' claims are not for defamation. In truth, they are attempting to hold the Residents liable (for conspiracy, interference, and misrepresentation) for encouraging others to participate in a City Council proceeding (albeit offered by way of a form declaration). The circumstance is different than in a defamation case and the judicial function test should be applied to determine if the proceedings are quasi-judicial.

No fact-intensive inquiry was required. Because this Court already determined that the Residents' activities were made in connection with the City Council proceedings, and because those activities were quite obviously an attempt to solicit witnesses to submit testimony in the form of declarations, the Residents' statements were all made in connection with, and preliminary to, a quasi-judicial proceeding and, therefore, were protected by the absolute litigation privilege.

D. The District Court Properly Awarded Attorneys' Fees

An award of attorneys' fees is reviewed for an abuse of discretion. *Smith*, 137 Nev. Adv. Op. 7, 481 P.3d at 1231. Landowners do not prevail simply because they disagree with the district court's decision or because this Court might have decided the motion differently. "So long as the district court considers the *Brunzell* factors, ***its award of attorney fees will be upheld if it is supported by substantial evidence.*** *Id.* (emphasis added)(internal citations and quotations

omitted). Substantial evidence is a bit of a misnomer. It does not require a large amount of evidence. Rather, it is "evidence that a reasonable mind might accept as adequate to support a conclusion." *Winchell*, 124 Nev. at 944, 193 P.3d at 950. In the context of a fee award, it is enough that the district court considered billing logs for the work performed, as well as declarations supporting the reasonableness of the rates and the work performed. *Smith*, 481 P.3d at 1231, fn. 9.

The Landowners complain that the district court's fee order does not indicate that it considered the *Brunzell* factors. But there is no requirement for a district court to lay out its analysis in the form of findings of fact and conclusion of law when deciding a motion. NRCP 52(a)(3) ("The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion. The court should, however, state on the record the reasons for granting or denying a motion."). The district court did what NRCP 52(a)(3) suggests. The district court expressly stated on the record that it had considered "how long this case took, with how much work went into it, how much expertise went into it, noting the normal rates of attorneys with this type of experience and this type of law." APP 11:1813. The district court had all the billing records, the analysis of how much time was spent on each category of task, the declaration of counsel regarding the experience of the team members including the division of labor, and the comparison of the similarity of rates

between the Residents' counsel and the Landowners' counsel. APP 9:1357-1420, APP 11:1608-1614.

Still, the Landowners want to second guess the district court's analysis. They claim that the amount of fees awarded is disproportionate to fees awarded in other anti-SLAPP cases. But they provide no real analysis. For example, in *Smith*, the court awarded $66,615 in attorneys fees in a case where there is no indication that, as here, there was also an entire appeal, discovery, discovery motions, and supplemental briefing. *Id.* Nor do the Landowners cite to a case that was addressed during the fee hearing: *Gunn v. Drage*, No. 219CV2102JCMEJY, 2021 WL 848640, at *5 (D. Nev. Mar. 5, 2021) (applying 1.5 times multiplier in awarding $257,286.75 in attorney's fees related to anti-SLAPP motion, and an additional $77,206.50 in fees related to post-judgment motions), amended by No. 219CV02102JCMEJY, 2021 WL 1160943, at *1 (D. Nev. Mar. 17, 2021) (amended to include additional fees incurred in connection with fee motion, for total fees and costs amounting to $387,653.75).

The Landowners also challenge the rates charged even though there is little difference in regular rates for lead counsel (Landowners' counsel normally bills at $600 and the Residents' lead counsel billed at between $655 and $690 over 2 1/2 years). They also ignore the district court's statements on the record indicated familiarity with rates for similar work.

Then the Landowners attempt to compare the total number of hours spent by the attorneys for the respective parties. However, as discussed in the facts (above), the Landowners' litigation team was supplemented by an in-house counsel who participated substantively in the case, including by taking depositions. There is no telling how many hours she spent on the case that would be relevant to a comparative analysis. Nor do the Landowners consider that on the anti-SLAPP motion, the Residents had to file an opening brief ***and*** reply. So too on the motion to dismiss under NRCP 12(b)(5). And the discovery motion for protective order. And on the successful initial appeal to this Court. In other words, the Residents simply had more work to do. Candidly, in many cases, the quality of the work was different, too. Thus, when briefing the initial anti-SLAPP motion, the Residents addressed both prongs of the anti-SLAPP analysis. On the other hand, as this Court noted in its prior decision, the Landowners did not even brief the second prong of the analysis in their initial opposition.

This analysis could continue. But the detailed process of parsing these facts and analyzing these issues is exactly why this Court only reverses a fee award for abuse of discretion, deferring to the district court if there was substantial evidence to support its decision which, in this context, merely requires consideration of the information addressing each of the *Brunzell* factors, just as the district court did.

Simply, the district court did not abuse its discretion. The fee award was

proper.

VII. CONCLUSION

After years of litigation, a prior appeal, discovery, and substantial briefing, the district court properly found that the Landowners failed to meet their burden under the second prong of the anti-SLAPP analysis and granted the Residents' anti-SLAPP motion. The district court did not abuse its discretion when deciding the scope of discovery the Landowners would be permitted or the award of attorneys' fees.

Therefore, the district courts order granting the anti-SLAPP motion and awarding fees should be affirmed in full. Further, the Residents should be award their fees and costs on appeal.

DATED this 24th day of November, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), the type style requirements of NRAP 32(a)(6), and the length requirements of NRAP 32(a)(7), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 font in double-spaced Times New Roman, and is 8,136 words in length. I further certify that I have read this brief and that it complies with NRAP 21(d).

Finally, I hereby certify that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure

DATED this 24th day of November, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and that on this 24th day of November, 2021, I electronically filed and served by electronic mail a true and correct copies of the above and foregoing **RESPONDENTS' CONSOLIDATED ANSWERING BRIEF** properly addressed to the following:

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

Exhibit I

Exhibit I

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

FORE STARS, LTD., A NEVADA LIMITED LIABILITY COMPANY; 180 LAND CO., LLC, A NEVADA LIMITED LIABILITY COMPANY; SEVENTY ACRES, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellants v. DANIEL OMERZA, DARREN BRESEE, STEVE CARIA, Respondents.	Case No.: 82338 (lead case)
FORE STARS, LTD., A NEVADA LIMITED LIABILITY COMPANY; 180 LAND CO., LLC, A NEVADA LIMITED LIABILITY COMPANY; SEVENTY ACRES, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellants v. DANIEL OMERZA, DARREN BRESEE, STEVE CARIA, Respondents.	Case No.: 82880

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Codes

Rules

Miscellaneous

I. INTRODUCTION.

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

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

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

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

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

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

II. LEGAL ARGUMENT.

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

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

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

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

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

Under NRS 41.660, the district court "shall allow limited discovery for the limited purpose of ascertaining such information" necessary to "demonstrate with prima facie evidence a probability of prevailing on the claim." NRS 41.660(3)(b); NRS 41.660(4). As such, the Landowners were entitled to *all* discovery that would afford them the opportunity to obtain information necessary for their opposition, *i.e.*, presentation of prima facie evidence of a probability of prevailing on their claims. *See id.* Moreover, discovery into a defendant's state of mind is appropriate for purposes of ascertaining information necessary to demonstrate a claim has minimal merit. *See Toll v. Wilson,* 135 Nev. at ___, 453 P.3d, 1215, 1219 (2019) (district court properly ordered discovery to determine whether defendant made statements with actual malice).

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

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

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

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

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

B. A Motion To Compel Would Have Been Futile.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Third, not only do the potential city council proceedings fail to meet minimal due process standards, but they also fail to meet the judicial function test the Residents urge the Court to apply here. *See* AOB 32-35; *cf*. RAB 30. In *Morrow,* the court adopted the judicial function test as a means of determining whether an administrative proceeding such as a parole board hearing is quasi-judicial by examining the hearing entity's function. *See id.,* 127 Nev. at 273, 255 P.3d at 229. If a hearing entity's function is judicial in nature, its acts qualify as quasi-judicial. *See id.* In determining whether a hearing entity's function is judicial, courts consider whether the hearing entity has authority to: "(1) exercise judgment and discretion; (2) hear and determine or to ascertain facts and decide; (3) make binding orders and judgments; (4) affect the personal property rights of private persons; (5) examine witnesses and hear the litigation of the issues on a hearing; and (6) enforce decisions or impose penalties." *Id.* at 274, 255 P.3d at 229 (citations and internal quotations omitted).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. CONCLUSION.

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

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

DATED this 24th day of January 2022.

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CERTIFICATE OF COMPLIANCE

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

DATED this 24th day of January 2022.

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CERTIFICATE OF SERVICE

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

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