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

APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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

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

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

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

Dated: March 15, 2024

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ROUTING STATEMENT

Under NRAP 17(a), Appellant believes it is proper for the Supreme Court to retain jurisdiction because this appeal comes after the Supreme Court remanded to the District Court on the attorney fee issue and this appeal raises issues of statewide public importance regarding the proper interpretation of attorney fee awards under NRS 41.670. APP 1651-1656; APP 1657-1666; APP 2115-2125; APP 2126-2139.

JURISDICTIONAL STATEMENT

The Supreme Court's jurisdiction arises under NRAP 3A(b)(1) and NRAP 4(a). The district court's orders granting attorney's fees is a final order. One was entered on 9/19/22 and it was tolled by virtue of a Motion to Reconsider filed on 10/03/22. The tolling motion was resolved on 9/18/23 with written notice of entry on 9/19/23. The second order, for supplemental fees was resolved as a final order on 9/18/23 with written notice of entry on 9/19/23. The notice of appeal was timely filed 9/22/23 and amended on 10/12/23.

I. STATEMENT OF ISSUES PRESENTED

1. Whether the district court erred in awarding the Residents attorney fees pursuant to NRS 41.670 under an unwritten contingency fee agreement?

2. Whether the district court abused its discretion and failed to properly apply the *Brunzell* factors in awarding attorney fees?

II. STATEMENT OF THE CASE

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 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

[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.").

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,

[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

1847-1865. 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 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

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("Crocket decision" or "*Binion* case") was later reversed by this Court. *See Seventy Acres v. Binion,* Case No. 75481 (August 26, 2020).

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*.

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

[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.

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 allegedly on a 'contingency basis,' apparently without a written agreement. *See* APP 1359. Schreck's firm purportedly spent nearly 710 hours working on the case since then at hourly rates upwards of $875.[4] *See* APP 1359, 1394-1420, 1899. Defense counsel did so even though the Residents have never asserted any counterclaims and have no other affirmative basis for recovery.

[4] Frank Schreck himself billing for 22.6 hours totaling $19,775 raising ethical concerns whether there was a concurrent conflict of interest under RPC 1.7, arising from Schreck's personal interest in the litigation and under RPC 1.8, with respect to his proprietary interest in the subject matter of the litigation, particularly given the unwritten contingency fee agreement.

D. The Anti-SLAPP Litigation and the First Appeal.

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). APP 163-197. The district court denied that Motion and the Residents appealed to this Court, generating case number 76273 in this Court. *See Omerza v. Fore Stars,* 2020 WL 406783, at *6-7 (Jan. 23, 2020) (unpublished disposition). APP 716-728. On 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. *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. *Id.*. 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. APP 727.

E. Remand Proceedings and Initial Attorney Fee Application.

On remand, very limited discovery was permitted and the parties engaged in supplemental briefing on the Residents' Anti-SLAPP Special Motion to Dismiss. APP 731-737, 738-748, 750-752, 754-799, 823-829, 830-1216, 1223-1254. The

district court then granted the Residents' Motion to Dismiss. APP 1258-1259, 1260-1272.

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. 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.[5] APP 1479. The Landowners also made specific challenges to numerous time entries. APP 1480, 1492-1500, 1575-1591.

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

[5] *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).

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. APP 2184-2188, 2195-2196. The Landowners argued that these facts further demonstrated the unreasonableness of the Residents' attorney fee request. *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, 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. *Id*.

F. The Second Appeal on Orders Granting Motion to Dismiss and Attorney Fees.

The Landowner's timely appealed the order dismissing the case and the Attorney Fee order. APP 1621-1650. This generated cases 82338 and 82880 which were consolidated. On April 29, 2022, this Court affirmed the order dismissing the Landowner's Complaint, but vacated and remanded to the district court on the attorney fee award issue in Docket No. 82880 because the district court had not made any analysis of the attorney's fees award. Specifically, the Court stated: "[w]hile the district court has discretion in determining a reasonable

award of attorney fees, it did not make the required findings to support the amount awarded here. [*Logan v. Abe,* 131 Nev.] at 266, 350 P. 3d at 1143 (reviewing an attorney fee award for an abuse of discretion); *Miller v. Wilfong,* 121 Nev. 619, 623, 119 P.3d 727, 730 (2005) (providing that 'the court must evaluate the factors set forth in *Brunzell'* when exercising its discretion to determine a reasonable amount of attorney fees to award under a statute); *see also Beattie v. Thomas,* 99 Nev. 579, 589, 668 P.2d 268, 274 (1983) (concluding that a district court abuses its discretion if it awards the full amount of attorney fees requested without making 'findings based on evidence that the attorney's fees sought are reasonable and justified')." APP 1655. The Court concluded by holding: "Thus, we agree with appellants that the district court abused its discretion by awarding attorney fees without making the required findings." *Id.* The Court vacated the award of attorney fees and remanded for the district court to conduct the proper analysis inter alia under *Brunzell*. APP 1651-1656.

G. <u>The Second Remand Period</u>.

The district court did not set a hearing or ask for any additional briefing from the parties upon remand. On September 19, 2022, the district court entered an order granting the same attorney's fees it previously granted, adding some limited *Brunzell* language. APP 1657-1666. On October 3, 2022, the Landowners filed a Motion to Reconsider the order, addressing several issues that were never resolved or addressed by the district court. APP 1667-1865. The motion noted

that the Residents had never produced any written contingency fee agreement, that the Residents had not actually incurred any legal fees, that the statute permitting an award of fees is not intended to reward wrongdoers, that the Landowner's challenges to specific time entries had never been addressed, much less resolved by the district court, that it was improper to award any fees in the absence of any fee agreement or obligation to pay for attorney's fees and that the award of attorney's fees was not reasonable under *Brunzell* and given Schreck's involvement in the misconduct. APP 1668-1674.

The Residents filed an Opposition to this motion on October 17, 2022. APP 1866-1875. They did not produce any written contingency fee agreement. The Landowner's also filed a notice of appeal to the order entered on September 19, 2022. APP 1876-1888. The Landowners filed their Reply to the motion on October 28, 2022, again noting that the fee award cannot be reasonable. APP 1889-1895.

On November 23, 2022 the Residents filed a motion seeking Supplemental Attorney's fees, related to their efforts on the appeal. APP 1896-1908. This application requested an additional $40,000 in fees for the Residents' work on the appeal. *Id*. The Landowners filed their Opposition on December 23, 2022 and the Residents filed their Reply on January 6, 2023. APP 1909-2089. In their Opposition the Landowners again asserted that the Residents never produced any written fee agreement. APP 1910. The Opposition also asserts, again, that

rewarding wrongful conduct is not the intended purpose of the statute. *Id*. It points out that there are still unresolved specific objections from the first application, that an award of fees is improper without a written contingency fee agreement as required in Nevada, that there is no evidence that the Residents ever incurred any legal fees and indeed were never even billed and that it was not reasonable to award fees given the involvement of Schreck's firm in the wrongful conduct. APP 1911-1916. It also challenges the reasonableness of counsel's hourly rate, which has increased substantially in this application and points out that fees cannot be awarded where they are not actually incurred. APP 1918-1920.

Allegations made in the Residents' Reply caused the Landowners to seek leave to file a sur-reply on January 17, 2023. APP 2100-2108. Specifically, the Landowners respond to the Residents' request that counsel be referred to the state bar for making statements "they know are false," and for citing a Texas case in their opposition 'when they know that Nevada follows California's anti-SLAPP jurisprudence.' *Id*. The Motion for leave to file a sur-reply pointed out that the statements about Schreck's involvement are not false and are in fact well documented and that there is no authority for the proposition that Nevada follows California only and cannot consider authority in other states regarding fee awards. *Id*.

The Landowner's October 17, 2022 Notice of Appeal of the attorney fee order generated case number 85542 before this Court. While the other motions

were pending, this Court entered an Order to Show Cause as to why that appeal should not be dismissed, essentially because a Motion to Reconsider was pending. APP 2090-2091. The Landowner's filed a Response (APP 2109-2112), and this Court dismissed the appeal without prejudice. APP 2113-2114.

On September 19, 2023 notice of entry of two orders were filed: one granting the Supplemental Motion for Attorney's Fees and the other denying the Motion to Reconsider. APP 2115-2125, 2126-2139. Neither order resolves the issues raised by the Landowners. *Id*.

The Landowners filed a timely notice of appeal on September 22, 2023 and an Amended Notice of Appeal on October 12, 2023. APP 2140-2152, 2153-2179. This appeal follows.

III. SUMMARY OF ARGUMENT

The district court erred in awarding attorney fees under NRS 41.670(1)(a) because it did not consider whether the Residents are actually obligated to pay any attorney fees and costs at all. Nevada law requires a genuine obligation to pay attorney fees and costs before any such award is proper under numerous fee shifting statutes. The award of fees under NRS 41.4670(1)(a) is designed to compensate the person against whom the action was brought only for attorney fees and costs of the action arising from or as a result of the unmeritorious action, not to provide a windfall to that person or punish the non-prevailing plaintiff. But that is exactly what occurs if the prevailing defendants are not genuinely obligated to pay

attorney fees and costs incurred in the action under an unwritten contingency agreement. Moreover, because the Legislature clearly intended the award to go only to "the person against whom the action was brought" under the plain language of NRS 41.670(1)(a), under a contingency agreement with counsel, inquiry must be made by the district court into the specific terms of such contingency agreement because otherwise there is a substantial risk of counsel actually being the real party in interest in the statutory fee award, in derogation of the statutory language and Legislative intent to compensate the person against whom the action was brought. There also is a risk of improper fee sharing, or a risk of an unjust windfall to a prevailing plaintiff, if in fact there is no obligation to pay contingency counsel. Thus, inquiry into the nature and scope of the contingency arrangement is required and the district court erred in refusing to make any such inquiry.

In addition, there is the additional concern in this case of the unwritten nature of the contingency fee agreement, apparently in violation of Nevada Rule of Professional Conduct 1.5 (c). Because attorney fee agreements in violation of this Rule are generally considered void and unenforceable, there is a real risk in this case of an unjustified windfall to the prevailing defendants.

Furthermore, the fee application itself was deficient and unreasonable under the standards set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969): (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. The district court erred in not considering these factors in detail, not considering the Landowner's specific objections to the fees awarded, and refusing to look into the nature of the unwritten contingency agreement and the obligations it imposed (or did not impose) upon the Respondents and counsel. For all of these reasons, the district court's award of attorney fees and costs should be reversed.

IV. ARGUMENT

A. Standard of Review.

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. 65, 72, 481 P.3d 1222, 1230 (2021). "However, if the decision implicates a question of law, including matters of statutory interpretation, we review the ruling de novo." *Id*.; *Capriati Construction Corp., Inc. v. Yahyavi*, 137 Nev. 675, 680, 498 P.3d 226, 231 (2021) ("Insofar as an attorney-fees award invokes a question of law, we review it de novo."); *See also In re Estate & Living Tr. of Miller*, 125 Nev. 550, 553, 216 P.3d 239, 241 (2009) (same). "The party seeking fees bears the burden of establishing entitlement to fees and submitting supporting evidence." *Fifty-Six Hope Road Music, Ltd. v. A.V.E.L.A., Inc.*, 915 F. Supp. 2d 1179, 1188 (D. Nev. 2013) (*citing Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)).

/ / /

B. <u>The District Court Erred by Not Considering Whether the Residents Are Actually Obligated to Pay Any Attorney's Fees.</u>

NRS 41.670(1)(a) provides in pertinent part that:

> (1) If the court grants a special motion to dismiss filed pursuant to NRS 41.660:
>
> (a) The court shall award reasonable costs and attorney's fees to the person against whom the action was brought….

In this case, the court below erred by not considering whether the Residents are actually obligated to pay any attorney fees at all. In its Order Denying Reconsideration entered on September 19, 2023, the court stated:

> 10. This Court considered the *Brunzell* factors and issued its own Order on the matter, filed on September 19, 2022 [Docket #132], which articulated the factors this Court considered and necessary findings to support its decision in granting Defendants' Motion for attorney's fees.
>
> 11. Plaintiffs' new argument that reasonable fees must include fees for which the Defendants are liable is not a basis for reconsideration.
>
> 12. The Court does not need to resolve these issues. As noted above, when an anti- SLAPP motion is granted, the Court "shall award reasonable costs and attorney's fees." NRS 41.670(1)(a). The Nevada Supreme Court has repeatedly directed that application of the *Brunzell* factors are the method by which a reasonable fee is determined, and this Court interprets this to mean that only the *Brunzell* factors shall be analyzed and that it shall award fees that are reasonable pursuant to *Brunzell*.
>
> 13. Thus, whether the Court is considering:
>
> (a) A traditional hourly arrangement;
>
> (b) fees paid by a third party *(Macias v. Hartwell*, 55 Cal. App. 4th 669, 674- 75 (1997)—anti-SLAPP fees awarded even if third party, not defendant, paid fee);

(c) a pro bono relationship (*See Rosenaur v. Scherer*, 88 Cal. App. 4th 260, 281-287 (2001), as modified (Apr. 5, 2001)—anti-SLAPP fees on pro bono matter)

(d) a contingency fee arrangement (*See Ketchum v. Moses*, 24 Cal. 4th 1122, 1132-33 (2001) - granting fees to contingency fee counsel on anti-SLAPP motion); or

(e) a contingency fee arrangement without a written agreement that could somehow be challenged by third parties such as Plaintiffs (Restatement (Third) of the Law Governing Lawyers § 39 (2000)—lawyer entitled to reasonable fee even where there is no valid contract),

the Court's task is the same: to determine and award reasonable attorneys' fees. That is exactly what the Court did.

Order Denying Reconsideration APP 2125. The district court likewise made the same ruling in its Order Awarding Supplemental Attorney's Fees dated September 19, 2023. APP 2126-2139. The court stated:

14. Here, an award of fees is warranted. NRS 41.670(1)(a) is abundantly clear that the Court "shall award" reasonable costs and fees.

15. In opposition to this motion and in other papers filed with this Court, Plaintiffs have repeatedly argued that no fees can be awarded under the anti-SLAPP Statute unless Defendants prove that are actually liable for, or have actually paid attorney's fees, or that they provide a copy of a contingency agreement. Plaintiffs argue that in the absence of evidence that the work performed by defense counsel created a legal obligation for defendants to pay, no fees should be awarded because "[t]his is not a contingency case; it is a pro bono case."

16. The Court does not need to resolve these issues. As noted above, when an anti-SLAPP motion is granted, the Court "shall award reasonable costs and attorney's fees." NRS 41.670(1)(a). The Nevada Supreme Court has repeatedly directed that application of the Brunzell factors are the method by which a reasonable fee is determined, and this Court interprets this to mean that only the

> Brunzell factors shall be analyzed and that it shall award fees that are reasonable pursuant to Brunzell.

APP 2131. Accordingly, the court did not require the Residents to prove that they "are actually liable for, or have actually paid attorneys fees," nor did the court even require the Residents to "provide a copy of a contingency agreement." *Id*. at ¶ 15. The court did not even consider the argument that "in the absence of evidence that the work performed by defense counsel created a legal obligation for defendants to pay, no fees should be awarded." *Id*. Instead, the court held in both Orders that the court "does not need to resolve these issues" because "when an anti-SLAPP motion is granted, the Court 'shall award reasonable costs and attorney's fees.' NRS 41.670(1)(a)." *Id*. at ¶ 16, quoting NRS 41.670(1)(a). Both of these Orders are clearly erroneous as a matter of law and constitute an abuse of discretion.

The district court clearly believed that if an anti-SLAPP motion is granted, because the relevant statute says it "shall award reasonable costs and attorney's fees," the court's review was limited and constrained to a consideration of *only* the *Brunzell* factors and that it had no duty to determine whether the attorney's fees it was awarding had been paid or actually incurred by the prevailing party. This analysis is incorrect under *Logan v. Abe,* 131 Nev. 260, 262, 350 P. 3d 1139, 1141 (2105) (awarding costs and reasonable attorney fees that a third party paid on behalf of a litigant "as long as the party would otherwise be legally obligated to pay the expense"); *Beattie v. Thomas,* 99 Nev. 579, 589, 668 P.2d 268, 274 (1983) (concluding that a district court abuses its discretion if it awards the full amount of

attorney fees requested without making "findings based on evidence that the attorney's fees sought are reasonable and justified"); *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) (requiring that the district court consider (1) the attorney's professional qualities and experience, (2) the complexity and nature of the litigation, (3) the work performed by the attorney, and (4) the result) and the case law discussed below requiring that litigants be "genuinely obligated" to pay or incur attorney fees before being award attorney fees. The words "shall award reasonable costs and attorney's fees" in NRS 41.670(1) do not mean that the court may ignore and not consider the underlying nature and circumstances of the fee arrangement giving rise to the claimed attorney's fees, nor does that language mean "that only the *Brunzell* factors shall be analyzed," as erroneously held by the district court in this case. APP 2125; APP 2131.

In fact, this court has done the exact opposite when construing similar fee shifting statues, instead first determining whether any attorney's fees have been paid or actually incurred by the prevailing litigant, *before* determining whether reasonable attorney's fees should be awarded and applying the *Brunzell* analysis. This procedure has been employed by this court even where the fee shifting statute uses the mandatory term "shall" that the district court below believed restricted its discretion.

This court articulated these essential principles in *Sellers v. Fourth Judicial Dist. Court*, 119 Nev. 256, 71 P. 3d 495 (2003). There the court held that, under the fee-shifting statute for Nevada's justice's court civil actions, NRS 69.030, which provides that the prevailing party shall receive a reasonable attorney fee, an attorney litigant may not recover attorney's fees. *Id*. 119 Nev. at 259, 71 P. 3d at 498. The court surveyed decisions disapproving attorney's fees to attorney litigants who represent themselves, noting some "do so on the basis that an attorney-client relationship is prerequisite to an attorney fees award, or that an attorney proper person must be genuinely obligated to pay attorney fees before he may recover such fees." *Id*. (footnotes omitted). The court adopted the latter rationale:

> We interpret NRS 69.030 to require that all proper person litigants, whether attorney or non-attorney, **be obligated to pay attorney fees as a prerequisite for an award of prevailing party attorney fees**. This interpretation gives effect to the Legislature's clear intent that the prevailing party in justice's court be reimbursed by the losing party for **out-of-pocket costs incurred to prosecute the suit**. To interpret the statute otherwise would require us to redefine what is meant by an attorney fee, which is commonly understood to be the sum paid or charged for legal services.

Sellers, 119 Nev. at 259-260, 71 P.3d at 498 (emphasis added) (footnote omitted).

As noted, NRS 69.030 provides that the prevailing party in a civil action in justice court "**shall receive**…a reasonable attorney fee." (emphasis added). Nevertheless, in *Sellers*, this court stated that a prevailing pro se attorney "litigant must be genuinely obligated to pay attorney fees before he may recover such fees."

Id. 119 Nev. at 259, 71 P. 3d at 497. The court further held that "[t]o interpret the statute otherwise would require us to redefine what is meant by an attorney fee, which is commonly understood to be the sum paid or charged for legal services." *Id*. 119 Nev. at 260 n. 14, 71 P. 3d at 498 n.14 (*citing* Merriam–Webster's Collegiate Dictionary 426 (10th ed.1995) (defining a "fee" as "a fixed charge" or "a sum paid or charged for a service")).

Thus, the Court in *Sellers* did not blindly award attorney's fees even when none were incurred by the prevailing party simply because the fee shifting statute used the term "shall" and its review was not limited to conducting a *Brunzell* analysis, because it first determined that the pro se attorney litigant had to have an actual obligation to pay attorney's fees before he or she became entitled to an award of such fees. Moreover, the court interpreted the term "attorney fee" to mean "the sum paid or charged for legal services," which further supported its construction that the pro se attorney litigant had to either have paid for or been charged for legal services in order to receive an award of attorney's fees. *Id*. 119 Nev. at 260 n. 14, 71 P. 3d at 498 n.14. The court concluded that "[b]ecause [the plaintiff] represented himself and did not pay or incur any obligation to pay attorney fees, the justice's court exceeded its jurisdiction by awarding such fees." *Sellers*, 119 Nev. at 260, 71 P.3d at 498.

In *Frank Settelmeyer & Sons, Inc. v. Smith & Harmer, Ltd.,* 124 Nev. 1206, 1220–21, 197 P. 3d 1051, 1060–61 (2008), this Court expanded this holding,

applying it to attorney's fees awarded pursuant to an offer of judgment under both NRS 17.115 and NRCP 68, which authorize the district court to award attorney's fees where a party declines an offer of judgment and fails to obtain a more favorable judgment. *Frank Settelmeyer*, 124 Nev. at 1220, 197 P. 3d ay 1060. The court said "[t]he reasoning for [the *Sellers*] decision is that 'an attorney must be genuinely obligated to pay attorney fees before he may recover such fees.'" *Id*. 124 Nev. at 1220, 197 P. 3d at 1060-61 (citations and footnotes omitted). Thus, a law firm that represented itself could not recover fees because "it was not genuinely obligated to pay attorney fees." *Id*.

Most recently, this Court applied the rule in *Sellers* and *Settelmeyer* to reverse an award of attorney's fees under yet another fee shifting statute, NRS 18.010(2)(b), imposed as sanctions for a suit initiated to harass the defendants. *See Dezzani v. Kern & Associates, Ltd.*, 134 Nev. 61, 412 P. 3d 56 (2018). In that case, the court reviewed an award of attorney fees under NRS 18.010(2)(b) and NRCP 11 and held the district court had abused its discretion in awarding fees because "attorneys representing themselves or their law firms cannot recover attorney fees because those fees are not actually incurred." *Id*. at 134 Nev. at 71, 412 P. 3d at 63. The court concluded that because the prevailing party "did not actually incur any attorney fees," the district court erred in awarding attorney fees. *Id*.

The principle derived from these cases is that unless a prevailing party litigant has actually paid or incurred an obligation to pay attorney's fees, an award

of attorney's fees under a Nevada fee shifting statute is improper. As noted above, this Court has uniformly applied this principle to awards of attorney's fees arising under numerous Nevada fee shifting statutes and rules, including NRS 69.030, NRS 18.010, NRS 17.115, NRCP 68 and NRCP 11. *See Dezzani*, 134 Nev. at 71, 412 P. 3d at 63; *Frank Settelmeyer*, 124 Nev. at 1220-21, 197 P. 3d at 1060-61; *Sellers*, 119 Nev. at 259-260, 71 P. 3d at 498. Nothing indicates a similar interpretation should not be applied to NRS 41.670(1)(a) and therefore the district court erred by not inquiring whether the Residents have actually paid or incurred an obligation to pay any attorney's fees. Absent such a requirement, an award of attorney's fees under a fee shifting statute is improper under Nevada law because "[t]o interpret the statute otherwise would require us to redefine what is meant by an attorney fee, which is commonly understood to be the sum paid or charged for legal services." *Sellers*, 119 Nev. at 260 n. 14, 71 P. 3d at 498 n.14.

In the present case, awarding attorney's fees to the Residents was improper because they have admitted they did not actually pay or incur any obligation to pay attorney's fees under the highly unorthodox defensive contingency fee agreement with their counsel at Brownstein Hyatt Farber Schreck. APP 2190-2191. In fact, this court recently interpreted NRS 41.670 and stated that "we conclude that the Legislature intended for prevailing defendants to recover reasonable attorney fees and costs *incurred* from the inception of the litigation, rather than just those *incurred* in litigating the anti-SLAPP motion." *Smith v. Zilverberg,* 137 Nev. at 65,

73, 481 P. 3d 1222, 1230 (2021). While the focus of the court's decision in *Smith* was on the period of time for which prevailing defendants can recover attorney fees and costs, not on the language of the statute regarding what was meant by the term "attorney's fees," its use of the term "incurred" is in keeping with the common understanding that only fees and costs actually awarded or for which a party becomes liable to pay are awardable under Nevada's fee shifting statutes. *See, e.g., Dezzani*, 134 Nev. at 71, 412 P. 3d at 63; *Frank Settelmeyer*, 124 Nev. at 1220-21, 197 P. 3d at 1060-61; *Sellers*, 119 Nev. at 259-260, 71 P. 3d at 498.

Other states likewise require attorney's fees to be actually incurred before they are paid to a prevailing SLAPP defendant. For example, a Texas appellate court addressed this issue in an anti-SLAPP case under the Texas 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. App. 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. *Cruz,* 452 S.W. 3d 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."). Many

other cases likewise refuse to award attorneys' fees where they were not actually incurred under a variety of fee shifting statutes, federal and state. *See, e.g., United States v. Paisley*, 957 F.2d 1161 (4th Cir. 1992) (no fees under EAJA); *S.E.C. v. Comserv Corp*., 908 F.2d 1407 (8th Cir. 1990) (no fees under EAJA where fees paid by insurer); *United States v. 122.00 Acres of Land, More or Less, Located in Koochiching County, Minn.*, 856 F.2d 56 (8th Cir. 1988) (fees not "actually incurred" where condemnee represented pursuant to contingency fee agreement); *Andre v. City of West Sacramento*, 92 Cal. App. 4th 532, 111 Cal. Rptr. 2d 891 (3d Dist. 2001) (condemnee represented pursuant to contingent fee agreement); *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665 (Del. 2013) (no fees where attorney represented party free of charge to avoid a malpractice claim); *Matter of Estate of Camacho*, 140 Haw. 404, 400 P. 3d 605 (Haw. Ct. App. 2017), *as amended*, (Nov. 9, 2017); *Marshall v. Cooper & Elliott*, 82 N.E. 3d 1205 (Ohio App. 8th Dist. 2017).

The Residents may argue these cases are limited to situations involving statutes that have different language or differ factually in that they mainly involve attorneys as proper person litigants. But this court does not limit application of the principle that a "litigant must be genuinely obligated to pay attorney fees before he may recover such fees" only to statutes that use the word "incurred." *Sellers*, 119 Nev. at 259-260, 71 P.3d at 498 (interpreting NRS 69.030, which provides a prevailing party "shall receive…a reasonable attorney fee."). Further, the fact

these cases often arise from situations involving pro se attorneys occurs primarily because the issue of whether or not a prevailing party under a fee shifting statute actually incurred attorney's fees or not most frequently arises from situations involving pro se attorneys, because in almost every other scenario, the prevailing party litigant has actually paid and incurred attorney's fees. It is primarily in the pro se attorney cases that the issue frequently arises whether the prevailing litigant actually paid or incurred any attorney's fees.

In fact, the unique circumstance giving rise to the questions about whether the Residents paid or actually incurred any obligation to pay for their attorneys' fees in this case highlights once again the highly unusual nature of the unwritten defensive contingency fee agreement alleged in the present case, where the Residents had no affirmative claims for recovery and yet their counsel allegedly agreed to defend them without any obligation for payment from the Residents, except for a potential award of fees as the prevailing parties under NRS 41.670(1)(a). Of course, the Landowners can only speculate what this contingency agreement actually says because it was never provided by the Residents and was not examined by the district court, despite the moving party bearing the burden of producing all evidence in support of their application for an award of attorneys' fees. *See Fifty-Six Hope Road*, 915 F. Supp. 2d at 1188.

This failure of proof by the Residents also makes it impossible to determine whether the Residents are actually legally obligated to pay any award of attorneys'

fees to their counsel based upon the unwritten contingency fee agreement. *See, e.g., Logan v. Abe*, 131 Nev. 260, 265, 350 P.3d 1139, 1142 (2015) (allowing award of attorneys' fees paid by a third-party insurer so long as prevailing parties "legally obligated to pay" the attorneys' fees) (*citing United Servs. Auto Ass'n. v. Schlang*, 111 Nev. 486, 490, 894 P.2d 967, 969 (1995) ("An expense can only be 'incurred' when one has paid it or become legally obligated to pay it.") (internal quotations omitted))). NRS 41.670(1)(a) states that the court "shall award reasonable costs and attorney's fees **to the person against whom the action was brought**…" (emphasis added). But if the Residents are not legally obligated to pay such an award to their counsel, then the Residents may gain an unjustified windfall to which they are not entitled. *See, e.g., Logan*, 131 Nev. at 265, 350 P. 3d at 1142 (prevailing parties can be awarded fees paid by another only if "legally obligated to pay" the attorneys' fees); *Flannery v. Prentice,* 26 Cal. 4th 572, 586, 28 P. 3d 860, 868-69 ("it seems evident that, in general, where attorney compensation has neither been paid nor forgiven and there is no contract assuring it, allowing a victorious litigant to retain the proceeds of a fee award (in addition to a substantial damages judgment) would confer an unjustified windfall."). Moreover, if the unwritten contingency agreement states that the Residents' have no obligation to pay any attorneys' fees unless and until counsel prevails in this case and is actually awarded prevailing party attorney's fees, as suggested below by the Residents, then this case

is indistinguishable from the pro se attorney fees cases because it is counsel alone that has a financial interest in recovering the attorney fees.

As far as the fee award itself, it may only be awarded to "the person against whom the action was brought…." pursuant to NRS 41.670(a)(1), not counsel directly. However, contingency fee awards have been held to belong to the attorneys. *See Flannery*, 26 Cal. 4th at 590, 28 P. 3d at 871 (attorney fees awarded for legal services provided to the client under a contingency arrangement, absent an enforceable agreement to the contrary, "belong to the attorneys who labored to earn them"); *Lolley v. Campbell* (2002) 28 Cal. 4th 367, 373 n. 2, 48 P.3d 1128, 1131 n.2 (same); *Marron v. Superior Court*, 108 Cal. App. 4th 1049, 1066, 134 Cal. Rptr. 2d 358 (2003) (same). Thus, in this case, where there is no proof of any written contingency agreement requiring payment of the award to counsel and counsel are seeking an award of "attorney fees" under a fee shifting statute, such counsel are merely representing their own interests in seeking the award and not the interests of "the person against whom the action was brought," because those individuals have no stake in the award of attorney's fees and no apparent obligation to pay such an award to their counsel. Thus, once again, this case is indistinguishable from the pro se attorney situation where counsel is representing himself and incurs no liability for fees and therefore no attorney's fees should be awarded.

The Residents argued below that the district court should follow California case law on these issues, relying upon the Nevada cases saying California's anti-SLAPP laws are similar to Nevada's, but California's jurisprudence on attorney's fees under its anti-SLAPP law is irrelevant because there are material differences between the Nevada and California precedents as they relate to an award of attorney fees and costs. *See Smith v. Zilverberg,* 137 Nev. at 65, 73, 481 P. 3d 1222 n. 8, 1231 n. 8 (2021). (refusing to follow California law on awards of attorney fees under anti-SLAPP statute). As this court recently explained in a case involving interpretation of Nevada law dealing with attorney fees in a SLAPP suit that "California's interpretation of its statutory attorney-fees provision has no bearing on Nevada's." *Padda v. Hendrick*, 2020 WL 1903191, *2 (Nev. April 16, 2020).[6] While that ruling was based upon differences in the statutory text between Nevada and California relative to the timing of the award of attorney's fees, the same rationale should be applied where Nevada and California's interpretations of the term "attorney fees" differ markedly, as they do here.

To the extent that California allows recovery of attorney's fees that a litigant is not genuinely obligated to pay, Nevada parts company with California. Thus, the cases relied upon by the district court, such as *Rosenaur v. Scherer*, 88 Cal. App. 4th 260, 281-287 (2001), as modified (Apr. 5, 2001) (anti-SLAPP fees

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

awarded in pro bono matter) and *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132-33 (2001) (granting fees to contingency fee counsel on anti-SLAPP motion), are all based upon the existence of an attorney-client relationship as the sole prerequisite to an award of attorney's fees. *See PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1092, 997 P.2d 511 (2000) (attorney-client relationship determines right to fees under anti-SLAPP statute).

In contrast, this court rejected the mere existence of an attorney-client relationship as sufficient for an attorney fee award under a Nevada fee shifting statute in *Sellers*,119 Nev. at 259-260, 71 P.3d at 498. The court first noted that "[s]ome decisions disapproving fees to attorney proper person litigants, as well as non-attorney proper person litigants, do so on the basis that an attorney-client relationship is a prerequisite to an attorney fees award." *Id*. The court then observed that other cases based their holdings on the ground "that an attorney proper person litigant must be genuinely obligated to pay attorney fees before he may recover such fees." *Id*. The court adopted the latter requirement that "all proper person litigants, whether attorney or non-attorney, be obligated to pay attorney fees as a prerequisite for an award of prevailing party attorney fees." *Id*. The court did so because the Legislature's intent was for the prevailing party to "be reimbursed by the losing party for out-of-pocket costs incurred to prosecute the suit" and because "[t]o interpret the statute otherwise would require us to redefine what is meant by an attorney fee, which is commonly understood to be the sum

paid or charged for legal services." *Sellers*, 119 Nev. at 259-60, 71 P.3d at 497–98 (footnotes and citations omitted).

Accordingly, Nevada precedent rejects fee awards based upon the existence of the attorney-client relationship alone and instead bases an award of attorney fees on the plain meaning of the term "attorney fees," which the Nevada cases hold "is commonly understood to be the sum paid or charged for legal services." *Sellers*, 119 Nev. at 259-60, 71 P.3d at 497–98. In contrast, California bases an award of attorney fees not on actual payment or obligation to pay, but merely upon the existence of an attorney-client relationship. *Musaelian v. Adams*, 45 Cal. 4th 512, 198 P. 3d 560 (Cal. 2009) (surveying cases and noting that "[i]n each case attorney fees were 'incurred' in the sense that there was an attorney-client relationship, the attorney performed services on behalf of the client, and the attorney's right to fees grew out of the attorney-client relationship."). No Nevada case has ever adopted this interpretation and its reasoning was rejected in *Sellers* in favor of the principle that "all proper person litigants, whether attorney or non-attorney, be obligated to pay attorney fees as a prerequisite for an award of prevailing party attorney fees." *Sellers*,119 Nev. at 259-260, 71 P.3d at 498. That standard is more consistent with the common meaning of "attorney fees," which under Nevada law is understood as the sum paid or charged for legal services. *Id*. Here, the Residents neither paid or were charged for legal services and therefore they are not entitled to an award of "attorney's fees" under NRS 41.670(a)(1). The district court erred in not even

considering these arguments and rejecting the award of attorney's fees when the Residents were not actually obligated to pay any attorney's fees.

C. Any Award Of Attorney Fees is Improper and Unenforceable in the Absence of A Written Contingency Fee Agreement.

In addition to there being no evidence that the Residents are liable to pay Mr. Schreck's law firm for any of the legal work it performed, the Residents have also failed to meet their burden of proof because they failed to provide any written contingency fee agreement supporting their entitlement to an award of attorneys' fees. There are no affirmative claims or counterclaims upon which recovery can be had in this case. Mr. Schreck's firm certainly cannot split a statutory fee award or provide a percentage of its fees to its clients, as that would be unlawful. Likewise, the Residents may not simply pocket a statutory award of attorney fees and costs as that would be an unjustified windfall amounting to a punitive damages award. It was therefore required that the Residents produce a written copy of the alleged contingency fee agreement that is the sole basis for the claim for attorneys' fees in this case.

Nevada's Rules of Professional Conduct require that contingency fee agreements be in writing. *See* NRPC 1.5(c). A violation of this rule constitutes professional misconduct. *See* NRPC 8.4 (professional misconduct). In addition to triggering 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).

"Generally, an attorney may not recover fees for services rendered in violation of the rules of professional conduct." *Frank Settelmeyer & Sons, Inc. v. Smith & Harmer, Ltd.*, 124 Nev. 1206, 1217, 197 P.3d 1051, 1059 (2008). *See also Marquis & Aurbach v. Eighth Judicial Dist. Court*, 122 Nev. 1147, 146 P. 3d 1130 (2006) (Interpreting Nevada Rule of Professional Conduct 1.5 and holding that "[a]s the contingency fee agreement was prohibited by this rule, it is unenforceable."). Significantly, this Court recently indicated in *dicta* that it would be improper and clearly erroneous to award attorney's fees based upon a contingency fee without a written agreement. *See Gonzales v. Campbell & Williams,* 2021 WL 4988154, at *8 (Nev. Oct. 26, 2021) ("Although awarding a contingency fee without a written agreement would presumably be a clearly erroneous application of RPC 1.5(c), Gonzales fails to show that the district court awarded a contingency fee.") (unpublished disposition).[7]

Likewise, it would be improper to award attorney fees in this case given the lack of a written contingency fee agreement. Under Nevada's Rules of

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

Professional Conduct, the contingency fee agreement must be in writing, signed by the clients and state that the represented parties are liable for fees incurred regardless of the outcome, in order for them to be liable for attorney's fees. The Rules of Professional Conduct unambiguously require such an agreement to be in writing and signed by the clients, and counsels' failure to comply is a clear and serious ethical violation, particularly given the underlying facts of Mr. Schreck's involvement here, none of which the Residents or their counsel have ever disputed. *See* NRPC 1.5(c); *see also Hawkins*, 133 Nev. at 903-04, 407 P.3d at 770.

In Nevada a contingency fee must also specify the following, in boldface type at least as large as the largest type used in the contingent fee agreement:

> (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;
>
> (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). A contingency fee agreement is required to set forth the sharing of an award, though here, there could not possibly be any award to share, as there are no affirmative claims. Such defensive contingency agreements are even more necessary to be in writing and to be carefully reviewed before awarding fees, to

ensure there is no unlawful sharing of fees between attorneys and non-attorneys and to prevent an unjustified windfall to the prevailing defendants should they retain the award.

Thus, the entire claim for fees in this case fails because there is no written contingency fee agreement signed by the Residents and because one has never been produced. "The party seeking fees bears the burden of establishing entitlement to fees and submitting supporting evidence." *Fifty-Six Hope Road*, 915 F. Supp. 2d at 1188. There has never been any proof of a written contingency fee agreement signed by the Residents in compliance with RPC 1.5 and there is no proof that the Residents actually paid or incurred any legal fees in this case. Therefore, the Residents' motion for attorneys' fees should have been disallowed on this basis as well, but the district court once again failed to even consider the argument.

The Restatement (Third) of the Law Governing Lawyers § 37 (2000) 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).

Here the factors all weigh in favor of denial of fees. Given the years of experience and purported expertise touted by the Residents' counsel, the lack of a written agreement is certainly a knowing violation of the Rules warranting the forfeiture of fees. Anything less than a complete denial of fees would result in a windfall for Mr. Schreck for a situation entirely of his own creation. As such, any other remedy is inadequate, especially since there is no evidence that the Residents have actually incurred any attorney fees whatsoever. Alternatively, the court can remand for the Residents to present their written contingency fee agreement illustrating that they are in some manner actually responsible for attorneys' fees. The district court committed clear error and abused its discretion in failing to require proof of a written contingency agreement satisfying Rule 1.5 before awarding any attorneys' fees thereunder. *See Frank Settelmeyer*, 124 Nev. at 1217, 197 P. 3d at 1059; *Marquis & Aurbach*, 122 Nev. 1147, 146 P. 3d 1130; *Gonzales,* 2021 WL 4988154, at *8.

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

The burden is on the party seeking fees to establish entitlement to fees and submit supporting evidence. *See Fifty-Six Hope Road Music*, 915 F. Supp. 2d at 1188. There was no evidence cited by the court supporting its analysis of the hours worked or the hourly rates requested. 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).

The only "evidence" presented to the district court on every fee application and motion was a declaration of counsel that the clients were represented on a contingency basis and internally generated fee charts prepared by Mr. Schreck's law firm. *See* APP 1359, 1394-1420, 1899. There are no invoices sent to clients, there are no statements sent to clients, nor is there anything suggesting that a "balance is due" from any of the Residents. APP 1393-1420, 1908. There are only internally generated reports, but no invoices or other normal indicia of work performed and billed to actual clients. *Id.* None of the documents attached to the motions are actual invoices to a client, none of them indicate that the Residents are in any way liable to the firm for the services provided and none show any payment

ever being requested or made. *Id.* Nowhere in the record is there any evidence that the Residents have incurred fees, incurred costs, or that they are in any way liable to Mr. Schreck's firm for any payment. As such, they cannot be awarded fees they have not incurred and for which they have no liability and for which no supporting evidence was produced.

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

The second *Brunzell* factor is the character of the work to be done. *See Brunzell,* 85 Nev. at 349, 455 P.2d at 33. In evaluating that factor, 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.*

Co-conspirator Schreck is a senior, name partner at Brownstein Hyatt Farber Schreck LLP, the law firm representing the Defendants in this litigation. Neither the Residents or their counsel dispute Mr. Schreck's role in this case, namely, that he prepared the contents of the declarations 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.[8]

Thereafter, Mr. Schreck and his firm appeared to *defend* the Residents on an

[8] APP 1847-1865, 1924-1942.

alleged "*contingency basis"* in a case he instigated with no counterclaims or other affirmative basis for recovery. The atypical defensive contingency fee arrangement was not in writing and apparently contemplates that there is no liability of the Residents at all for attorneys' fees and that an award under NRS 41.670(1)(a) would be a windfall in attorneys' fees for the Residents and/or Mr. Schreck and his law firm. 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 direct involvement in the case and arises from a law firm protecting one of its senior partners' own personal grievances and interests. As such, the attorney fees sought and awarded below are not reasonable under *Brunzell*.

The attorney fee award is likewise unwarranted under the third *Brunzell* factors relating to the work actually performed. *See id.* Defense counsel purportedly spent over 700 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 what was awarded to 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, Supra,* 137 Nev. At 65, 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.

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. Eckerhart,* 461 U.S. at 434 (fee requests must exclude hours that are "excessive, redundant, or otherwise unnecessary).

F. The Hourly Rate is Unreasonable Given That it was Never Billed to Any of the Residents.

The Residents have never paid a legal fee to their attorneys and Mr. Schreck is not billing them $875 per hour and Mr. Langberg is not billing them $700 per hour, $655 per hour, or even $500 per hour. The actual parties 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 Residents, but Schreck's own personal interest. That is why the district court should have considered the fact that this case is similar to the pro se attorney cases where counsel seeking fees is representing himself or herself. The Residents did not incur any fees and expenses. Instead, Schreck offered to defend these Residents for free not only because he

subjected them to liability by having them circulate false statements, but also to protect himself from liability. Until and unless the Residents produce a contingency fee agreement that states that they are liable for attorney's fees and costs to Schreck's firm if they do prevail, no attorney's fees should be awarded in this case. The Residents 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 or obligated to pay any attorney's fees. Indeed, there is not a single Declaration, Affidavit, or other sworn statement from any Resident in this case submitted with any fee application or motion which asserts that any party has paid, or is liable for, any attorney's fees or costs at all.

Under these circumstances, 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' neighbor, 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.

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 loadstar amount and hourly rate of the Residents' counsel whatsoever. *See* APP 1357-1420; 1615-1620; *see also Hensley*

v. Eckerhart, 461 U.S. at 434 (fee requests must exclude hours that are "excessive, redundant, or otherwise unnecessary").

V. CONCLUSION

For the foregoing reasons, the Landowners respectfully submit that the district court erred by awarding the Residents attorney fees. The district court's decisions awarding attorneys' fees should therefore be reversed in their entirety, or alternatively, vacated and remanded for consideration of the appropriate factors and the proper analysis of the contingency fee agreement in this case.

DATED this 15th day of March, 2024.

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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 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. 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), because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14-point font and contains 11,436 words. Finally, I certify that this brief complies with all applicable procedural rules, in particular, NRAP 28(e), which requires every section of 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 upon is to be found.

DATED this 15th day of March, 2024.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of SKLAR WILLIAMS PLLC. On March 15, 2024, I caused a copy of the foregoing **APPELLANTS' OPENING BRIEF and JOINT APPENDIX VOLUMES 1-15** to be served electronically delivered on the date and to the addressee(s) shown below:

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