No. 19-1375

In the

Supreme Court of the United States

AARON L. KATZ,

Petitioner,

v.

INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada

APPENDIX TO REPLY TO BRIEF IN OPPOSITION

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INDEX FOR APPENDIX TO REPLY TO BRIEF IN OPPOSITION

2010
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * *

AARON L. KATZ,

Plaintiff,

vs.

INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT, a General Improvement District, THE PUBLIC UTILITY DISTRICT OF NEVADA, DOES 1-X, inclusive,

Defendants.
_____/

Case No. CV11-01380

Dept. 7

MOTION FOR ATTORNEY'S FEES

COMES NOW Defendant, INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT (hereinafter, the "District"), by and through its Attorneys of Record, ERICKSON, THORPE & SWAINSTON, LTD., THOMAS P. BEKO, ESQ., and BRENT L. RYMAN, ESQ., and hereby presents the following Motion for Attorney's Fees based upon NRS 18.010(2)(b), NRS 7.085 and this Court's Order of April 10, 2014.

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Defendant's Motion for Attorney's Fees is made and based upon all of the pleadings and papers on file herein, as well as the following Memorandum of Points & Authorities and the arguments of counsel to be offered at the hearing of this matter.

MEMORANDUM OF POINTS & AUTHORITIES

I. BRIEF SUMMARY OF ACTION AND CURRENT MOTION

This Court is familiar with this litigation, in which Plaintiff initially pursued many wide-ranging theories that have since been dismissed. Although Mr. Katz pursued this litigation in proper persona, he is trained as a lawyer and appears to have held an inactive California bar license throughout the life of this case.[1] The parties, along with the Court, have now reached the end of a five-year battle that arose solely by reason of Mr. Katz's objection to paying an annual Recreational Fee of approximately $800.00. The history of this case has demonstrated time and again that Mr. Katz does not do anything easily, succinctly, or in a streamlined or straightforward manner.

A. Plaintiff's vexatious claims have failed in this litigation.

Although he chose to move to one of the most scenic and recreational places in this country, Mr. Katz does not partake in those activities that make Incline Village what it is today. Because he has not availed himself of those activities, he believes he should not be forced to subsidize those costs for those that do. Unfortunately for him, his views are in stark contrast to those of the vast majority of the residents residing within the District who clearly believe this is a very small price to pay for the vast amenities that the District affords to its residents.

Mr. Katz therefore objects to this fee because he claims it is an unlawful tax. He brought many claims pursuant to which he sought to invalidate this recreational fee. This Court has, of course, disagreed. Because his views are so different from the other citizens of the District, Mr. Katz has repeatedly failed to gain election to the District's board. As a

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[1]. Plaintiff was convicted in 1983 on one felony count of perjury involving a personal tax avoidance scheme and subsequently suspended from the practice of law for three years by the State Bar of California. *See, In re: Aaron Lee Katz*, 1991 WL 84192 (Cal. Bar Rev. Dep't, May 21, 1991). A true, accurate and correct copy of the referenced Opinion on Review from the California State Bar is attached to this Motion as "Exhibit 1."

result, he cannot achieve his desired results through the normal political process. Therefore, he has been forced to resort to the only other available option: the misuse of his skills as an unlicensed attorney. Mr. Katz's actions are not motivated by a genuine desire to pursue a legitimate suit regarding public policy, but rather, to disrupt the operation of the District as a means of punishing it for refusing to accede to his desires.

The vast majority of Plaintiff's claims here were dismissed by this Court on motion. The only claim not resolved via dispositive motion was a portion of Plaintiff's Twelfth cause of action alleging he had requested numerous public documents and that the District has "suppressed, evaded, failed and refused to produce" the requested records. That claim was presented before the Court at a two-day bench trial beginning March 21, 2016, and judgment was thereafter entered in Defendant's favor. Defendant has presented a Verified Memorandum of Costs, and now seeks an award of attorney's fees pursuant to NRS 7.085, NRS 18.010(2)(b) and in accord with a prior Order of this Court as discussed below.

B. The Court has previously recognized Plaintiff's improper motivation.

As an initial matter, Defendant was not able, in good conscience, to serve a formal offer of judgment in this case because Plaintiff's claims were frivolous, without merit and advanced solely in an attempt to harass Defendant. Consequently, Defendant is unable to base this Motion for Attorney's Fees on NRCP Rule 68 or NRS 17.115. However, in this case, the lack of an offer of judgment to Mr. Katz is not a basis for denial of attorney's fees to Defendant. Instead, it indicates the lack of good faith underlying Plaintiff's claims, which supports this request for attorney's fees pursuant to NRS 7.085 and NRS 18.010(2)(b).

Before proceeding to that analysis, however, Defendant requests an award of those fees related to the filing of Plaintiff's since-stricken second supplemental complaint in December 2013. (*See*, Order (April 10, 2014), pp. 1-3, ll. 25-27).[2] In issuing that Order, the Court previously found that Plaintiff's Second Supplemental Amendment to his Second Amended Complaint should be dismissed as a result of Plaintiff's "blatant disregard of the

[2]. A true, accurate and correct copy of this Court's Order of April 10, 2014, is attached to this Motion as "Exhibit 2."

rules of procedure," "conflagrant disregard for this court's prior rulings" and "continuing abuse of this court's scant judicial resources . . . ." *Id.*, p. 2, ll. 1-3; ll. 19-20; p. 3, l. 15. In so doing, the Court noted that "[p]rocedural requirements are not mere suggestions," explaining "[t]his court previously cautioned Plaintiff regarding his inability to adhere to Nevada's Rules of Civil Procedure and this court's orders." *Id.*, p. 1, ll. 25-26.

In addition to striking Plaintiff's procedurally-inappropriate pleading, the Court granted Defendants' request for sanctions and set a hearing for May 30, 2014. *Id.*, p. 4, ll. 2-5. While Defendant's counsel was prepared to offer an accounting of the attorney's fees related to the Motion to Strike Plaintiff's Second Supplemental Amendment to the Amended Complaint, that hearing was strategically routed off track by Mr. Katz, and the Court did not have time to reach the issue of sanctions. Defendant has now cataloged and requests those fees as set forth in the attached Affidavit of Counsel.

C. Plaintiff has demonstrated a plain pattern and practice of pursuing meritless pro per lawsuits against public entities for impermissible reasons.

The harassing and vexatious nature of Plaintiff's suit is evident and transparent. Mr. Katz has a tortured and sinuous history of pursuing similar unsuccessful claims against public entities in his own name. While the suits themselves have proved legally untenable, Mr. Katz apparently uses the harassment value of such suits and threats of litigation to achieve his goals. This point was explained in a December 2006 opinion piece by Editor Don Frances in the *Mountain View Voice* as follows:

> Even though he's never scored a legal victory, at least two of his lawsuits – against El Camino and West Valley-Mission – ended well for Katz: The former district paid him $200,000, the latter $60,000, to make his suits go away.
>
> * * *
>
> [Mr. Katz] is not the first lawyer to use lawsuits as personal protest. But particularly when it comes to bond measures – since no district can issue bonds with a lawsuit hanging over them – Katz has touched a weakness which cripples our current system, without even the merit of resolving, legally or politically, the issues he raises.

> So the districts are left twisting in the wind until his suits are resolved, which can take any amount of time. While the bonds are held up, projects are held up, costing many millions ($140 million in the case of the El Camino Hospital). Two districts decided that even victory wasn't worth the cost, and settled.

Frances, D., *What's Eating Aaron Katz,* MOUNTAIN VIEW VOICE, Dec. 15, 2006.[3]

Plaintiff's tactics in this case fit squarely within the strategy he has pursued in the past. For instance, in upholding the dismissal of his case against the Mountain View-Whisman School District, California's Sixth District Court of Appeal noted that Mr. Katz was not the recorded owner of the real property actually relevant to the litigation. *See, Katz v. Mountain View-Whisman Sch. Dist.*, 2006 WL 3293747, **2-3 (Santa Clara Sup. Ct, Nov. 14, 2006).[4] As a result, the Court found that Mr. Katz lacked standing, and also expressed "concern[] that plaintiff, an inactive member of the State Bar of California, was in appropriately acting as [a business entity's] representative before this court." *Id.*, *1. These same actions were, of course, a predicate for dismissal of Plaintiff's claims relevant to real property in this action.

This is also not the first time Plaintiff has had his claims dismissed for failure to follow procedural rules or file in a timely manner. *See, Katz v. Campbell Union High Sch. Dist.*, 144 Cal.App.4th 1024, 50 Cal.Rptr.3d 839 (Cal. App. Dist. 4, Nov. 14, 2006) (dismissal Plaintiff's attempt to invalidate $85 parcel tax approved by voters in high school district upheld for failure to conform to requirements of California validation statutes in publication of summons); *see also, Katz v. United States*, 2006 WL 2418837 (Fed. Cl., July 25, 2006) (dismissing Plaintiff's complaint for refund of income taxes as untimely and barred by the statute of limitations, judgment entered in favor of United States); *Foothill-De Anza Cmty. College Dist. v. Emerich*, 158 Cal.App.4th 11, 69 Cal.Rptr.3d 678, 27-30 688-690 (Cal. App. 6th, Dec. 19, 2007) (upholding dismissal of claims pursued by Mr. Katz

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[3]. A true, accurate and correct copy of this article is attached to this Motion as "Exhibit 3."

[4]. A true, accurate and correct copy of this unpublished opinion is attached to this Motion as "Exhibit 4."

and Melvin Emerich as well as award of costs to prevailing public entity).[5]

D. Plaintiff's motivation for suing the District is purely harassment.

The record before the Court also demonstrates the true intent of Plaintiff's numerous public records requests, which go hand-in-hand with his strategy of pursuing this case. The District submits the record shows with stark clarity that Mr. Katz is not actually interested in public records he continuously demands, he simply requests records which he knows would be enormously burdensome to the District to produce. His requests would require IVGID to sift through thousands of documents to extract information which Mr. Katz knows he has no legal right to request. This Court has now ruled as much, finding in favor of Defendant at the recent bench trial. However, Plaintiff's tactic continued even during that trial, as the Court will see in the attached email demands to Ms. Herron the night after her sworn testimony and before the Court ruled from the bench. (*See*, Exh. 6).[6]

Plaintiff has also demonstrated his intention to continue to pursue this litigation "in the public" by immediately delivering the attached statement to IVGID's board members attempting to explain away the judgment rendered against him. (*See*, Exh. 7).[7] This document was sent to the District immediately after the Court issued its decision finding against Plaintiff and dismissing his final remaining claim. As the Court will see, Plaintiff was obviously upset about the ruling, and went so far as to characterize IVGID staff as "uneducated cheerleaders."

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[5]. . True, accurate and correct copies of these opinions are attached to this Motion as "Exhibit 5."

[6]. A true, accurate and correct email of Plaintiff's email communication to Ms. Herron, sent March 21, 2016, at 10:26 p.m. – the night after the first day of the two-day bench trial – is attached here to as "Exhibit 6."

[7]. A true, accurate and correct copy of the "WRITTEN STATEMENT TO BE ATTACHED TO AND MADE A PART OF THE WRITTEN MINUTES OF THE IVGID BOARD OF TRUSTEES' REGULAR MARCH 30, 2016 MEETING – AGENDA ITEM C – PUBLIC COMMENT SECTION – THE COURT'S RULING ON IVGID'S PUBLIC RECORDS ACT REFUSALS IS A SAD, SAD DAY FOR OUR COMMUNITY," is attached hereto as "Exhibit 7."

Defendant submits Plaintiff should not be permitted to engage in such harassment – which has caused the District to incur substantial attorney's fees, costs and the loss of its employee time and resources – without repercussion. Based thereon, and as described in greater detail below, Defendant now requests that this Court award attorney's fees pursuant to NRS 7.085 and NRS 18.010(2)(b).

II. LEGAL ARGUMENT

A. IVGID's full Attorneys' fees are recoverable here.

NRS 7.085 and NRS 18.010(2)(b) permit an award of attorney's fees when a claim, counterclaim, cross claim, third-party complaint or a defense "was brought or maintained without reasonable ground or to harass the prevailing party." NRS 18.010(2)(b); *see also, Rodriguez v. Primadonna Co.*, 125 Nev 578, 588, 216 P.3d 793, 800 (2009); *United Ins. Co. of Am. v. Chapman Indus.*, 120 Nev. 745, 748, 100 P.3d 664 (2004). To determine whether a claim or defense was groundless when brought, a court reviews the circumstances when the claim or defense was first asserted. *Barozzi v. Benna*, 112 Nev. 635, 639-640, 918 P.2d 301, 303-304 (1996). To determine whether a claim or defense was maintained without reasonable grounds, a court must inquire whether the claim or defense was eventually supported by any credible evidence. *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 995-996, 860 P.2d 720, 724 (1993).[8]

The legislature requires the Court to liberally construe NRS 18.010(2)(b) in favor of awarding attorney's fees in all appropriate situations. *See*, NRS 7.085; NRS 18.010. The legislature has expressed an intent that the Court award attorney's fees and impose sanctions under NRCP Rule 11 in all appropriate situations in order to punish and deter frivolous or vexatious claims and defenses due to the burden such claims and defenses place on judicial resources. *See, Trs. of Plumbers & Pipefitters Union Local 525 Health & Welfare Trust*

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[8]. Defendant would note that NRS 18.010(2)(b) was revised by the legislature in 2003, as the prior version permitted an award of fees only when a claim or defense was baseless when brought. Plaintiff conducted no discovery in this litigation, and has demonstrated no further basis for the maintenance of his untenable claims during the life of this litigation than when those claims were first filed.

Plan v. Devlopers Surety & Indem. Co., 120 Nev. 56, 84 P.3d 59 (2004) (suggesting the portion of the 2003 amendment stating that the court "shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations" also applies to NRS 18.010(2)(a)). For instance, it has been held that NRS 1.230, which prohibits punishment for contempt for seeking a change of judge, does not preclude an attorney's fee award for filing a frivolous disqualification motion. *See, Rivero v. Rivero*, 125 Nev. 410, 440-441, 216 P.3d 213, 233-234 (2009).

A frivolous claim is one that is baseless, *i.e.*, not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and brought by an attorney without a reasonable and competent inquiry; although, the second requirement is generally not applicable to non-attorney litigants proceeding in proper person. *Simonian v. Univ. & Cmty. Coll. Sys.*, 122 Nev. 187, 128 P.3d 1057, 1063-1065 (2006); *see also, Rodriguez*, 125 Nev. at 588, 216 P.3d at 800 (recognizing that claims are groundless or frivolous if they lack credible supporting evidence). A claim is groundless if it is fraudulent, especially if it is brought in bad faith, or if the allegations of the complaint are not supported by any credible evidence at trial. *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 995-996, 860 P.2d 720 (1993).

To support an award of attorney's fees on such grounds, "there must be evidence in the record supporting the proposition that the complaint was brought without reasonable grounds **or to harass the other party**." *Kahn v. Morse & Mowbray*, 1212 Nev. 464, 479, 117 P.3d 227, 238 (2005) (emphasis added); *see also, Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 493, 215 P.3d 709, 726 (2009). The mere fact that a claim survives a motion to dismiss does not preclude a fee award under NRS 7.085 or NRS 18.010(2)(b). *See, Bergmann v. Boyce*, 109 Nev. 670, 674-675, 856 P.2d 560 (1993). "Determining whether attorney fees should be awarded under NRS 18.010(2)(b) requires the court to inquire into the actual circumstances of the case, 'rather than a hypothetical set of facts favoring plaintiff's averments.'" *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev 951, 967-968, 194 P.3d 96, 106-107 (2008) (citation omitted).

Here the actual circumstances easily support an award of attorney's fees against Mr. Katz. As outlined above, Mr. Katz has demonstrated a pattern and practice of pursuing such lawsuits in proper person, despite the fact he no longer possesses the license required to bring such suits on behalf of others. *See, e.g., Foothill-De Anza Cmty. College Dist. v. Emerich,* 158 Cal.App.4th 11, 69 Cal.Rptr.3d 678 (Cal. App. 6th, Jan. 11, 2008); *Katz v. Mountain View-Whisman Sch. Dist.*, 2006 WL 3293747 (Santa Clara Sup. Ct, Nov. 14, 2006); *Katz v. Campbell Union High Sch. Dist.*, 144 Cal.App.4th 1024, 50 Cal.Rptr.3d 839 (Cal. App. Dist. 4, Nov. 14, 2006); *Katz v. United States*, 2006 WL 2418837 (Fed. Cl., July 25, 2006).

In accord with his past vexatious lawsuits, Mr. Katz's motivation here was plainly targeted at harassing IVGID into payment of settlement funds. In fact, as noted above, this Court has previously found harassment to have been Mr. Katz's motivation here:

> Such continuing abuse of this court's scant judicial resources is inexcusable. **In this litigation, Plaintiff has displayed a history of multiple filings which has caused needless expense to the other parties and has posed a burden on this court.** *See, Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047 (9th Cir. 2007). While this court is ever-mindful of protecting every citizen's right to access to justice, there are practical restraints, particularly when court filings do not implicate fundamental rights and impose needless expense to other litigants. **Plaintiff's filings call into question his motives in pursuing this litigation. The four month delay in filing the minor amendments appears to be a dilatory tactic designed to prejudice the Defendants.**

(Order (April 10, 2014), p. 3, ll. 15-24) (emphases added).

Mr. Katz's harassment of IVGID is not limited to the four corners of this lawsuit. As the Court has learned during the various motion hearings and eventual bench trial, Mr. Katz has levied many hundreds of requests for public records at Defendant in a scheme that appears more targeted at inducing a technical violation of Nevada's Public Records Act than obtaining any useful documents. Those tactics were not even stopped during the recent bench trial, as the Court will see in the attached email demands to Ms. Herron the night after her sworn testimony and before the Court ruled from the bench. (*See*, Exh. 6).

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In additional to this civil action, Mr. Katz's attacks on the District came in many other forms including multiple complaints filed with the Nevada Commission on Ethics and complaints of alleged Open Meeting Law ("OML") violations filed with the Nevada Attorney General's Office. Since 2011, the District and its representatives successfully defended allegations brought directly or indirectly by Mr. Katz in no less than 11 ethics complaints and four OML complaints. *See*, RFO Nos. 11-19C, 11-21C, 11-22C, 11-24C, 12-72C, 12-73C, 12-74C, 13-07C, 13-08C, 13-11C, 13-39C; OML No. 13-006, 13-008, 13-010, 13-017. His relentless nature knows no bounds and has cost the District countless hours, expense, and resources in defending administrative complaints that proved to have no legal support. The District has been fighting a battle against Mr. Katz's harassing actions on several different fronts and in and several different forums over the last six years.

Even if this Court were to find some portion of Mr. Katz's claims colorable, attorneys' fees should still be awarded since the bringing of one or more colorable claims does not excuse the bringing of other groundless claims. *See, Barozzi v. Benna*, 112 Nev. 635, 918 P.2d 301 (1996); *Bergmann v. Boyce*, 109 Nev. 670, 856 P.2d 560 (1993). And the dismissal of some causes of action alleging different legal grounds for a party's claim will not preclude a full award of attorney's fees if the claim is groundless. *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095-1096, 910 P.2d 684 (1995).

The Court has addressed Mr. Katz's dogged and misguided persistence in the past. In its Order dated October 9, 2012, the Court denied Mr. Katz's Motion for Reconsideration because it failed to present new evidence or demonstrate the Court's decision was clearly erroneous. Instead, in typical fashion, Mr. Katz simply rehashed his prior unsuccessful arguments. (Order (Oct. 9, 2012), p. 2, ll. 16-21).[9] As predicted by this Court, Mr. Katz's filings tended to "assume the qualities of inert gas which expands to fill all available space" and which did little to "enhance the quality of advocacy." (Order (Aug. 21, 2012), p. 1, ll. 26-28). Harassment and the misery which litigation entails were the motivating purposes

[9]. A true, accurate and correct copy of this Court's Order of October 9, 2012, is attached to this Motion as "Exhibit 8."

behind this lawsuit, easily justifying Defendant's request for reasonable attorney's fees as presented herein.

B. Amount of attorney's fees to be awarded.

"A district court's award of attorney's fees will not be disturbed on appeal absent a manifest abuse of discretion." *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1354, 971 P.2d 383 (1998); *accord, Hornwood v. Smith's Food King No. 1*, 107 Nev. 80, 87, 807 P.2d 208 (1991). However, the district court abuses its discretion if it fails to make findings explaining the basis for the amount of its fee award under NRS 18.010. *Henry Prods., Inc. v. Tarmu*, 114 Nev. 1017, 1020, 967 P.2d 444 (1998); *see also, Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 829-830, 192 P.3d 730, 736-737 (2008); *Schuette v. Beazer Homes Holdings Corp.*, 121 Nev 837, 863-865, 124 P.3d 530, 549-550 (2005); *but see, Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1049-1050, 881 P.2d 638, 642-643 (1994) (holding that while explicit findings are preferred, they are not required if the record clearly reflects that the district court properly considered the relevant factors for a fee award on an offer of judgment).

After a determination is made as to whether fees and costs are to be allowed, the trial court must determine the reasonable amount to be awarded for attorney's fees. The proper factors to be considered in making this determination include the following: (1) the qualities of the advocate, *i.e.*, his ability, training, education, experience, professional standing and skill, (2) the character of the work done, *i.e.*, its difficulty, intricacy, importance, the time and skill required, the responsibility imposed and the prominence and character of the parties when they affect the importance of the litigation, (3) the work actually performed by the lawyer, *i.e.*, the skill, time and attention given to the work; and (4) the result, *i.e.*, whether the attorney was successful and what benefits were received. *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349-350, 455 P.2d 31, 33 (1969); *see also, Schouweiler v. Yancey Co.*, 101 Nev. 827, 712 P.2d 786 (1985) (addressing attorney's fees awarded under NRCP Rule 68).

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The amount of Defendant's fee request is extremely reasonably under each part of this analysis. In accord with Section VI(f) of this Court's Pretrial Order, Defendant has included an Affidavit of Counsel which, along with the actual invoices submitted for payment, states the requested fees, services rendered and specific fees incurred with sufficient specificity to enable both Mr. Katz and the Court to review this request for fees. (*See*, Beko Aff., ¶¶ 2-10).[10] As set forth in Mr. Beko's Affidavit, a total of $226,466.80 in attorney's fees has been incurred in the defense of this matter and should be awarded to Defendant. (Beko Aff., ¶ 10).[11] Of that total, $125,892.50 was charged by this firm and $55,503.50 by former co-defense counsel Keith Loomis, Esq., who has since moved on to public service at the Storey County District Attorney's office. (Beko Aff., ¶¶ 5-7).

In order to assist this public entity, these amounts were billed at rates that are undeniably reasonable in light of the involved attorneys' vast, collective experience and wealth of knowledge regarding the complicated factual and legal issues involved in the defense of claims involving public entities and officials. The undersigned has been practicing for almost 30 years, with the majority of his time spent litigating personal injury, civil rights and governmental tort liability actions, and routinely bills for his services at rates two to three times more per hour than this file depending upon the type of case involved. (Beko Aff., ¶ 1). Defendant has also set forth the factors set out in *Schouwelier v. Yancy*, 101 Nev. 827, 712 P.2d 786 (1985), to the extent they are applicable to this request, with the attached Affidavit of Counsel. (*See*, Pretrial Order (Nov. 7, 2011), p. 6, ll. 4-7).

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[10]. A true, accurate and correct copy of the above-referenced Affidavit of Counsel is attached to this Motion as "Exhibit 9," with additional exhibits as described therein. Should the Court require additional information in order to properly consider this Motion, Defendant will be happy to provide it for *in camera* review upon request.

[11]. Defendant reserves the right to request any additional fees and costs incurred in defense of this matter in the event Plaintiff pursues appeal or other attempts to contest the existing judgment in favor of Defendant.

As also set forth in the Affidavit of Counsel, another $45,070.80 was charged by T. Scott Brooke, Esq., the District's former official attorney who tragically passed away in December 2014. The fees attributable to Mr. Brooke would not otherwise have been incurred but for their necessity in defense of this litigation pursued by Mr. Katz, as calculated by Mr. Brooke and set forth in his attached memorandum. (*See*, Beko Aff., ¶ 9).

C. At a minimum, Defendant is entitled to recover its fees related to the successful Motion to Strike Plaintiff's Second Supplemental Amendment to the Amended Complaint.

Even if the Court were not persuaded to award all of Defendant's incurred fees, Defendant would at a minimum request those fees related to the successful Motion to Strike referenced in the Court's Order of April 10, 2014. As noted above, the Court found sanctions appropriate at that time, and would have already issued an award of related fees were the hearing on that matter not interrupted in accord with its written findings. (Order (April 10, 2014), p. 2, ll. 1-3; ll. 19-20; p. 3, l. 15). The attached Affidavit of Counsel demonstrates that $4,157.50 in fees were incurred by Defendant related directly to that motion as specifically referenced in the attached spreadsheet. (*See*, Beko Aff., ¶ 11). Defendant requests an award of those fees at this time.

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III. CONCLUSION

This Court has previously found that Plaintiff has engaged in "blatant disregard of the rules of procedure," "conflagrant disregard for this court's prior rulings" and "continuing abuse of this court's scant judicial resources . . . ." (Order (April 10, 2014), p. 2, ll. 1-3; ll. 19-20; p. 3, l. 15). Defendant has been forced to deal with these matters for quite some time, both within and outside the confines of this five-year litigation. Plaintiff has demonstrated a pattern and practice of pursuing vexatious harassing lawsuits against public entities such as this District, and Plaintiff's intention to harass the District with this unsuccessful case is evident. Based on the foregoing evidence and argument, and as set forth in the attached Affidavit of Counsel, Defendant requests an award of all attorney's fees incurred as a result of this litigation.

RESPECTFULLY SUBMITTED this 3rd day of May, 2016.

ERICKSON, THORPE & SWAINSTON, LTD.

By _____
THOMAS P. BEKO, ESQ.
BRENT L. RYMAN, ESQ.
Attorneys for Incline Village General Improvement District

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AFFIRMATION
(NRS 239B.030)

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

_____
BRENT L. RYMAN, ESQ.

CERTIFICATE OF SERVICE

I certify that I am an employee of ERICKSON, THORPE & SWAINSTON, LTD. and that on this day I personally served a true and correct copy of the attached document by:

- X U.S. Mail
- ☐ Facsimile Transmission
- ☐ Personal Service
- ☐ Messenger Service

addressed to the following:

Aaron L. Katz
P.O. Box 3022
Incline Village, NV 89450-3022

DATED this 5th day of May, 2016.

Stephanie Gubler

APP16

INDEX TO EXHIBITS

Case No: CV11-01380

Aaron Katz
vs.
Incline Village General Improvement District

MOTION FOR ATTORNEY'S FEES

Exhibit 1	Opinion on Review from the California State Bar
Exhibit 2	Court's Order of April 10, 2014
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Exhibit 4	Unpublished Opinion
Exhibit 5	Opinions
Exhibit 6	Plaintiff's Email Communication to Ms. Herron on March 21, 2016
Exhibit 7	Written Statement to Be Attached to and Made a Part of the Written Minutes of the Ivgid Board of Trustee's Regular March 30, 2016 Meeting-agenda Item C-public Comment Section-the Court's Ruling on Ivgid's Public Records Act Refusals Is a Sad, Sad Day for Our Community.
Exhibit 8	Court's Order of October 9, 2012
Exhibit 9	Affidavit of Counsel

IN THE SUPREME COURT OF THE STATE OF NEVADA

AARON L. KATZ,
Appellant,
vs.
INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT,
Respondent.

No. 70440

ORDER OF AFFIRMANCE

This is an appeal from a district court final judgment in an action against a general improvement district (GID). Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Appellant primarily challenges four district court orders, which we address in turn.[1] Perceiving no reversible error, we affirm.[2]

August 22, 2012, Order

The district court granted judgment on the pleadings with respect to appellant's first, second, third, fourth, fifth, seventh, eighth, ninth, tenth, and eleventh claims. Although those claims sought various

[1]Because appellant's challenges to the district court's other orders appear to be moot if the four primary orders are affirmed, we do not specifically address appellant's challenges to the other orders.

[2]In rendering this disposition, we have attempted to address all of appellant's arguments that were cogently presented in district court and again in the opening brief. *See Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 n.7 (2011); *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). To the extent that this disposition does not specifically address additional arguments that appellant raises, we have determined that those arguments do not warrant reversal.

forms of declaratory relief, the district court determined that the statutes that formed the basis for those claims did not authorize a private right of action. In making this determination, the district court relied on *Builders Association of Northern Nevada v. City of Reno*, which recognized that "[t]he Uniform Declaratory Judgments Act does not establish a new cause of action" and that "[i]f a statute expressly provides a remedy, courts should be cautious in reading other remedies into the statute." 105 Nev. 368, 369-70, 776 P.2d 1234, 1234-35 (1989).

Appellant first contends that these ten claims were viable under NRS 30.040(1). While the language in that statute may arguably be at odds with *Builders Association*, appellant does not address *Builders Association*, much less ask that it be modified or overturned. Thus, appellant's third, fourth, and fifth claims are directly controlled by *Builders Association* because they challenge respondent's alleged violations of NRS Chapter 354's Local Government Budget and Finance Act. 105 Nev. at 370, 776 P.2d at 1235. Similarly, because appellant's remaining seven claims challenge respondent's actions allegedly violating NRS Chapter 318, and because NRS 318.515 provides an express remedy for a GID elector to challenge such actions, the reasoning in *Builders Association* applies with equal effect to those claims.[3]

Appellant next contends that NRS 308.080(4) grants him standing to assert his first claim wherein he seeks a district court order requiring respondent to adopt a service plan. We disagree, as that statute

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[3]Although appellant contends that NRS 318.515(1) demonstrates the Legislature's intent to provide an immediate private remedy for a GID's violation of NRS Chapter 318, we find that argument implausible in light of NRS 318.515(4).

pertains to enjoining a departure from an already-adopted service plan. Because nothing in NRS Chapter 308 or NRS Chapter 318 clearly requires a GID to retroactively adopt a service plan if it was not required to do so when it was created, we are not persuaded that the Legislature intended for NRS 308.080(4) to have the effect that appellant proffers.[4] *See In re CityCenter Constr. & Lien Master Litg.*, 129 Nev. 669, 673, 310 P.3d 574, 578 (2013) ("The ultimate goal of interpreting statutes is to effectuate the Legislature's intent.").

Appellant next contends that he has standing as a taxpayer to assert his first through fifth claims. While we note appellant's reliance on *City of Las Vegas v. Cragin Industries, Inc.*, 86 Nev. 933, 478 P.2d 585 (1970), *disapproved of in part by Sandy Valley Associates v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 955 n.7, 35 P.3d 964, 969 n.7 (2001), this court recently reaffirmed the general rule that a taxpayer lacks standing when he or she has not "suffer[ed] a special or peculiar injury different from that sustained by the general public," *Schwartz v. Lopez*, 132 Nev., Adv. Op. 73, 382 P.3d 886, 894 (2016) (citing *Blanding v. City of Las Vegas*, 52 Nev. 52, 69, 280 P. 644, 648 (1929)). Thus, we are not persuaded that appellant has taxpayer standing. Although *Schwartz* recognized a "public-importance exception" to the general rule, 132 Nev., Adv. Op. 73, 382 P.3d at 894, we are not persuaded that the exception applies here, as appellant is the only GID elector that has chosen to participate this litigation.

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[4]We are not persuaded by appellant's argument that the Legislature implicitly intended to adopt such a requirement by virtue of its 1977 amendment to NRS 308.020.

Appellant finally contends that his eighth and eleventh claims seeking a refund of the Beach and Recreation Facility Fees are viable. In particular, appellant contends that he should not be required to comply with NRS 318.201(12) because the process for seeking a tax refund is ill-suited for seeking a refund of Beach and Recreation Facility Fees. While we recognize that the tax-refund process may provide an awkward means for appellant to seek a refund of the Beach and Recreation Facility Fees, we cannot ignore NRS 318.201(12)'s plain language, and nothing in the records suggests that appellant has tried to comply with the tax-refund process such that the district court or this court would otherwise be justified in excusing appellant's noncompliance.

August 27, 2014, Order

The district court granted what it termed "summary judgment" on appellant's sixth, fifteenth, and seventeenth claims. With respect to the sixth and fifteenth claims, appellant primarily contends that the district court's ruling should be reversed because there was a factual dispute as to whether the utility rate changes set forth in respondent's resolutions were just and reasonable, as well as nondiscriminatory. We disagree for two primary reasons. First, appellant has not persuasively argued that a GID's utility rates are subject to the "just and reasonable" and "not unduly discriminatory" standards in NRS Chapter 704 and NAC Chapter 704 pertaining to public utilities. *See* 1977 Nev. Stat. ch. 293, §§ 1-3, at 541-42 (removing GIDs from the control of the Public Services Commission and instead enacting NRS 318.199's framework).[5] Second, and although

[5]This is not to say that the Legislature intended to condone GIDs imposing wholly unreasonable or extremely discriminatory utility rates. Nonetheless, we are not persuaded that respondent is necessarily bound by

respondent's and the district court's references to "summary judgment" may have caused confusion, the district court's March 21, 2013, order effectively characterized appellant's sixth and fifteenth claims as seeking judicial review of an administrative agency's decision. Thus, in adjudicating appellant's sixth and fifteenth claims, the district court was not required to determine whether a factual dispute existed, but rather, the district court was only required to determine whether respondent's resolutions were supported by substantial evidence. *Cf.* NRS 233B.135(4) (defining "substantial evidence" in the context of judicial review of an administrative decision as "evidence which a reasonable mind might accept as adequate to support a conclusion"). Because respondent followed the procedures outlined in NRS 318.199 for changing the utility rates,[6] and because respondent provided a justification sufficient for a reasonable mind to accept as supporting the rate increases (including but not limited to Joseph Pomroy's memoranda dated February 9, 2011, and February 8, 2012), we are not persuaded that the district court committed reversible error in adjudicating appellant's sixth and fifteenth claims in favor of respondent.

Springfield Gas & Electric Co. v. City of Springfield, 126 N.E. 739, 744 (Ill. 1920)'s definition of "reasonable and just" or appellant's subjective definition of what is unduly discriminatory.

[6]In the absence of a specific statutory mandate, we are unable to conclude that appellant's due process rights were violated by being permitted to speak only for three minutes at the hearings or by respondent allegedly ignoring appellant's opinions that the rate structures were unjust and unreasonable as well as unduly discriminatory. *Ames v. City of N. Las Vegas*, 83 Nev. 510, 513, 435 P.2d 202, 204 (1967) (recognizing that due process is not necessarily violated when a governing body discounts a protestor's objection).

With respect to his seventeenth claim, appellant contends primarily that he was a third-party beneficiary under a deed and that he sufficiently alleged the need for an appointment of a receiver. Assuming appellant was a third-party beneficiary, we conclude that the district court was within its discretion in declining to appoint a receiver. *See Hines v. Plante*, 99 Nev. 259, 261, 661 P.2d 880, 881 (1983) (observing that the decision to appoint a receiver is within the district court's discretion). As the district court recognized, "[t]he appointment of a receiver . . . is a harsh and extreme remedy which should be used sparingly and only when the securing of ultimate justice requires it." *Id.* at 261, 661 P.2d at 881-82. Here, appellant's primary allegation in support of appointing a receiver was that respondent was permitting unauthorized people to access the beaches. Based on the record, we cannot conclude that the district court abused its discretion in determining that this allegation did not warrant the appointment of a receiver. Beyond that allegation, appellant's remaining allegations and requests for relief pertained to whether the Beach Facility Fee was imposed in violation of NRS Chapter 318. As explained above, NRS 318.515(1) provides the mechanism by which those objections must be lodged.[7] Thus, we are not persuaded that the district court committed reversible error in adjudicating appellant's seventeenth claim in favor of respondent.

March 11, 2016, Order

The district court granted partial summary judgment on appellant's twelfth claim relating to the Nevada Public Records Act (NPRA),

[7]Contrary to appellant's contention, the allegations in his seventeenth claim do not clearly implicate the interpretation of respondent's deed, nor does his prayer for judgment ask for any such interpretation.

reasoning that appellant lacked standing to challenge the fee provision in Resolution 1801 because he had never been charged with a fee under that Resolution. Appellant argues that no prior assessment of a fee under the Resolution was required in order for him to challenge the Resolution.

We conclude that partial summary judgment was proper, albeit on ripeness grounds. *See In re T.R.*, 119 Nev. 646, 651, 80 P.3d 1276, 1279 (2003) ("Although the question of ripeness closely resembles the question of standing, ripeness focuses on the timing of the action rather than on the party bringing the action."). In particular, appellant has identified five specific problems he has with the Resolution. Three of these five problems involve a fact-specific interplay between the Resolution and the NPRA's provisions authorizing the imposition of fees in certain instances, and it is not possible to determine whether the Resolution violates the NPRA until appellant has actually been assessed a fee.[8] Accordingly, we conclude that the district court properly granted partial summary judgment on appellant's NPRA claim. *See Pack v. LaTourette*, 128 Nev. 264, 267, 277 P.3d 1246, 1248 (2012) (recognizing that this court will affirm the district court's judgment if the district court reached the right result, albeit for different reasons).

April 22, 2016, Order

Following a bench trial, the district court ruled in favor of respondent with regard to all 24 of appellant's exhibits, concluding respondent had committed no violations of the NPRA. On appeal, appellant

[8]Appellant's other two identified problems appear to involve precatory language in the Resolution that do not actually impose any restriction on a person requesting public records from respondent.

challenges the district court's determination with respect to the following seven exhibits.

Draft internal budget

At trial, Susan Herron testified that she did not provide any draft internal budgets to appellant based on her belief that "draft" documents are not public records. Appellant does not dispute the propriety of Ms. Herron's belief but instead argues that her failure to articulate the basis for refusing to produce the draft documents at the time she responded to appellant's request violated NRS 239.0107. Appellant, however, does not point to any authority suggesting that a violation of NRS 239.0107(1)(d) automatically requires the governmental entity to turn over the otherwise confidential records. Because we are not willing to read such a requirement into the NPRA, we conclude that appellant has failed to establish reversible error with respect to his request for a draft internal budget.

Employee separation agreement

Before trial, the district court reviewed *in camera* an employee separation agreement that Ms. Herron had declined to provide appellant on confidentiality grounds and determined that the agreement was, in fact, confidential. Appellant contends (1) respondent made public another former employee's termination agreement; (2) at the time she denied appellant's request, Ms. Herron did not comply with NRS 239.0107(1)(d); and (3) the district court erred in not ordering the production of a redacted version of the agreement. We are not persuaded by appellant's arguments. His first contention fails because he has not cited any authority that respondent waived the confidentiality of one agreement by making public another agreement. His second argument fails for the same reason as described with respect to his request for the draft internal budget. His third

contention fails because the necessary implication of the district court's determination was that the agreement was incapable of redaction such that respondent was not required to do so under NRS 239.010(3). Thus, we conclude that appellant has failed to establish reversible error with respect to his request for the employee separation agreement.

Attorney memo

Before trial, the district court reviewed *in camera* a memo from respondent's general counsel that Ms. Herron had declined to provide on the ground of attorney-client privilege and determined that the memo was, in fact, a privileged confidential communication. Appellant contends that respondent failed to introduce evidence that the communications in the memo were intended to be "confidential" as that term is defined in NRS 49.055. However, respondent provided the district court with the memo, who in turn reviewed it and concluded that based on the memo's content, the memo was indeed intended to be a privileged confidential communication. Thus, we conclude that appellant has failed to establish reversible error with respect to his request for the attorney memo.

Hyatt Sport Shop sales records

In an email to Ms. Herron, appellant asked for sales records from the Hyatt Sport Shop. In the same email, appellant also asked for various contracts respondent had entered into and for minutes from a meeting of respondent's board of trustees. In response, Ms. Herron provided appellant with the contracts and minutes but responded that the sales records were confidential. At trial, Ms. Herron first testified that she had complied with appellant's NPRA request but she later testified that she withheld the sales records because they contained confidential information. Appellant contends that Ms. Herron's testimony was inconsistent, in that

she testified she complied with his request but also testified she did not comply with the request. We do not necessarily perceive any inconsistency in Ms. Herron's testimony as she correctly testified that she produced *some* documents responding to a portion of appellant's NPRA request and that she withheld the sales records as confidential. In any event, we are not persuaded that this potential inconsistent testimony amounts to reversible error with respect to appellant's request for the sales records.

Food and beverage discount logs

Ms. Herron testified at trial that she did not produce food and beverage discount logs pursuant to appellant's request because any such logs had already been destroyed in conformance with respondent's document-retention policy. Although appellant contends that respondent's destruction of those documents violated NRS 239.124, it does not appear that appellant made this argument in district court, *see Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981), and in any event, a violation of NRS 239.124 would not "un-destroy" the logs such that appellant could have access to them.[9] Thus, appellant has not established reversible error with respect to his request for the food and beverage discount logs.

Computerized data

Appellant observes that the district court used appellant's offers to access respondent's computers as evidence to support the district court's post-judgment imposition of attorney fees. This observation is

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[9]Appellant contends that because NRS 239.310 imposes criminal penalties for willful and unlawful destruction of public records, the district court should have subjected respondent to the consequences of the alleged NRS 239.124 violation. The district court, however, is not the appropriate entity to institute criminal proceedings for an alleged NPRA violation.

irrelevant to the issues presented in this appeal, and thus, does not constitute reversible error.

List of Incline Village residents' names and addresses

Appellant requested from Ms. Herron a list of the names and mailing addresses of all Incline Village residents. In response to this request, Ms. Herron stated that respondent had no such list. At trial, Ms. Herron testified that *at the time of trial,* respondent possessed a list of Incline Village residents' names and addresses, but when questioned whether respondent had that same list when appellant requested it, Ms. Herron answered, "No." In light of Ms. Herron's unequivocal testimony, we are not persuaded that the district court committed reversible error in declining to order respondent to produce a list that did not exist at the time of appellant's NPRA request.

In light of the foregoing, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.
Cherry

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

cc: Hon. Egan K. Walker, District Judge
Richard F. Cornell
Erickson Thorpe & Swainston, Ltd.
Washoe District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

AARON L. KATZ,

Appellant,

vs.

INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT,

Respondent.

/

PETITION FOR EN BANC RECONSIDERATION

COMES NOW, Appellant, AARON L. KATZ, pursuant to NRAP 40A(a), who petitions this Court en banc for reconsideration of the Order of Affirmance filed November 21, 2019 ("OOA"), followed by the Order Denying Rehearing of January 23, 2020.[1]

Appellant contends that the holdings in the OOA on the below issues are contrary to prior published opinions of the United States Supreme Court and the US Court of Appeals for the Ninth Circuit. Further, the Panel's handling of the issue on

[1] The Petition for Rehearing, filed December 30, 2019, raised issues that Petitioner believed the Court overlooked or misapprehended. Thus, it did not raise the main issues regarding the First Amendment and Anti-S.L.A.P.P. presented here. Appellant concedes that, unlike a number of his other issues, the Panel did not overlook the issues of whether First Amendment principles and Nevada's Anti-S.L.A.P.P. statutes apply. Accordingly, those issues were not appropriate for a Rule 40 Petition. But they are appropriate for a Rule 40A Petition because they involve substantial precedential, constitutional and public policy issues.

whether Nevada's Anti-S.L.A.P.P. statutes apply here not only is contrary to the plain language of the statutes in question, but impacts anybody who wishes to petition a government in Nevada for redress of grievances with a complaint that is not a sham. The decision also deters citizens from making public records requests, in that it not only encourages governmental agencies to stonewall until the time of trial, but rewards them with an award of attorney's fees for doing so.

DATED this 3rd day of February, 2020.

Respectfully submitted,

RICHARD F. CORNELL, P.C.
150 Ridge Street, Second Floor
Reno, Nevada 89501

By: */s/RichardCornell*
Richard F. Cornell

1. NRS 18.010(2)(b) cannot apply to a lawsuit serving the public interest, pursuant to the First Amendment of the United States Constitution [where none of the Appellant's claims is baseless]. (AOB at 28-38; RAB at 39-45; ARB at 2-10; OOA at 2-3)

The issue is straightforward: Do the First Amendment principles of Noerr-Pennington[2] apply to a citizen who sues a governmental entity on various theories of declaratory and injunctive relief to address grievances of public concern,

[2] United Mine Workers of America v. Pennington, 381 U.S. 657, 664-65 (1965); E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961)

loses, then is hit with a motion for attorney's fees per NRS 18.010(2)(b)?

The Panel answered this question in the negative based upon two cases: Vargas v. City of Salinas (2011) 200 Cal.App. 4th 1331, 134 Cal.Rptr. 3d 244 and Premier Electric Construction Co. v. National Electric Contractors Association, Inc., 814 F.2d 358, 373 (7th Cir. 1987), holding that attorney fees shifting statutes do not unconstitutionally burden the constitutional right to petition[3].

But those cases have been severely called into doubt by more modern Supreme Court and certainly Ninth Circuit principles. Noerr-Pennington applies, and thus immunizes Appellant from an award of attorney's fees, unless it is proven the citizen's declaratory and injunctive relief lawsuit was a "sham." In this case it was indisputably not a "sham," as defined by the United States Supreme Court. Therefore, Mr. Katz was absolutely immune from an award of any amount of attorney's fees.

We begin with a pithy, accurate summary of the governing law from White v.

[3] The holding assumes NRS 18.010(2)(b) is a "fee shifting statute," like NRS 18.010(1), 18.010(2)(a), and 17.117(10)(c). Appellant does not agree. It is a codification of a malicious prosecution or abuse of process tort, relative to attorney fees incurred in defending a lawsuit, available to the very few victorious defendants who are "maliciously prosecuted" or suffer "an abuse of legal process" as more particularly defined. Applied to our scenario, it is a sanction for petitioning for redress of grievances in a manner that the government and the courts do not like. The "warning" that a true fee shifting statute would give surely cannot "warn" the prospective public interest litigant that, in Nevada, the First Amendment is dead!

Lee, 227 F.3d 1214, 1231-32 (9th Cir. 2000):

> "The Supreme Court has described the right to petition as 'among the most precious of the liberties safeguarded by the Bill of Rights' and 'intimately connected, both in origin and in purpose, with the other First Amendment rights to free speech and free press.' [cite omitted] It is 'cut from the same cloth as the other guarantees of [the First] Amendment, and is an assurance of a particular freedom of expression.' [cite omitted]
>
> The Court has further established that the right to petition extends to all departments of the government, including...**the courts.**" [cite omitted] While the Noerr-Pennington doctrine originally arose in the anti-trust context, it is based on and implements the First Amendment right to petition and therefore, with one exception we discuss infra (See: Section I.B.3.b.), **applies equally in all contexts** [cite omitted].
>
> The Noerr-Pennington doctrine ensures that those who petition the government for redress of grievances remain immune from liability for statutory violations, **notwithstanding the fact that their activity might otherwise be proscribed by the statute involved.** [cite omitted] Noerr-Pennington is a label for a form of First Amendment protections; **to say that one does not enjoy Noerr-Pennington immunity is to conclude that one's petitioning activity is unprotected by the First Amendment.** With respect to petitions brought in the courts, the Supreme Court has held that a lawsuit is unprotected only if it is a "sham" – i.e., 'objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits,' [cites omitted].
>
> In Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 56, 113 S.Ct. 1920 (1993), the Supreme Court rejected the contention that regardless of a lawsuit's objective merit an antitrust defendant can be found liable if the plaintiff showed that it brought the suit for a 'predatory motive.' See: 508 U.S. at 55-56. **Both requirements must be met to establish antitrust liability: 'an objectively reasonable effort to**

> **litigate cannot be sham regardless of subject intent.'** Id. at 57. Furthermore, proof of a lawsuit's objective baselessness is the 'threshold prerequisite': a court may not even consider the defendant's allegedly illegal objective unless it first determines that his lawsuit was objectively baseless. Id. at 55, 60-61, 113 S.Ct. 1920," (emphasis added).

Emphasizing the underscored points of White v. Lee, the Ninth Circuit restated another applicable principle: immunity from liability under Noerr-Pennington **extends to conduct incidental to a lawsuit or ancillary to litigation.** Theme Productions, Inc. v. News Am Marketing, 546 F.3d 991, 1006-07 (9th Cir. 2008). And at 546 F.3d at 1007, the Ninth Circuit declares: There is simply no reason that a common law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust. Noerr-Pennington **applies to state law claims such as tortious interference with prospective economic advantage.**

In fact, Noerr-Pennington immunity applies to **common law torts such as malicious prosecution and abuse of process.** Main Street at Woolich, LLC v. Ammons Supermarket, Inc., 165 A.3d 821 (N.J. Super 2017), citing Nader v. Democratic National Committee, 555 F. Supp. 2d 137, 157 (D.D.C. 2008) and Whelan v. Abell, 48 F.3d 1247, 1254 (D.C. Cir. 1995).

The Ninth Circuit in Theme Productions cited Sousa v. DirectTV, Inc., 437 F.3d 923, 936-38 (9th Cir. 2006), which extended immunity to private presuit

demand letters, and noted that BE&K Construction Co. v. NLRB, 536 U.S. 516, 524-26, 122 S.Ct. 2390, 2395-96, 153 L.Ed. 2d 499 (2002) is consistent with that view.

None of this can be harmonized with Vargas. There, the California Court of Appeals refused to apply Noerr-Pennington to the fee-shifting provision of Anti-S.L.A.P.P. because the Court considered itself bound by Equilon Enterprises, LLC v. Consumer Cause, Inc. (2002) 29 Cal. 4th 53, 62, which distinguished Professional Real Estate Investors and held that holding applied only to antitrust litigation.

In fact, Vargas cannot be reconciled with either People ex rel Harris v. Aguayo (2017) 11 Cal.App. 5th 1150, 1160-61, 218 Cal.Rptr. 3d 221, 231-32 or Tichinin v. City of Morgan Hill (2009) 177 Cal.App. 4th 1049, 1065, 99 Cal.Rptr. 3d 661, 674. Noerr-Pennington immunizes legitimate efforts to influence a branch of government from virtually all forms of civil liability. Noerr-Pennington is a broad rule of statutory construction under which laws are construed so as to avoid burdening the constitutional right to petition.

Based upon everything the Ninth Circuit has since said, the Equilon holding is incorrect. The Ninth Circuit is correct. Vargas (and Equilon Enterprises) should be disapproved as a constitutionally improper reading of the First Amendment. Accord:

Mercatus Group, LLC v. Lake Forest Hospital, 641 F.3d 834 (7th Cir. 2011) [Noerr-Pennington doctrine extended to misrepresentations to the public if negligently made or if immaterial to the issues in the proceeding].

Premier Electric is even easier to distinguish. Its holding is that the First Amendment does not afford immunity for an award of damages based on cost of litigation aimed at preventing an extrinsic violation of antitrust law. As noted in Premier, so long as the violation of the Sherman Act may be established without regard to the point of view embodied in the "petitioning" activity, the Constitution does not prevent the assignment as damages of the full injury inflicted.

Since neither Mr. Katz nor IVGID sued each other for money damages, Premier Electric simply has no applicability. If the Noerr-Pennington doctrine applies to common law tort causes of action occurring in the process of exercising First Amendment rights[4], and if Noerr-Pennington immunity extends to conduct incidental to a lawsuit or ancillary to litigation, per Theme Promotions it certainly applies to a motion for attorney's fees brought under NRS 18.010(2)(b).

As argued in the AOB at 46-50, the gravamen of IVGID's NRS 18.010(2)(b) motion is the tort of malicious prosecution – an action which a governmental agency is barred from bringing against a private citizen. As noted therein, the elements of an

[4] Jourdan River Estates, LLC v. Favre, 278 So.3d 1135, 1152 (Miss. 2019), and cases cited therein.

NRS 18.010(2)(b) motion are the same as for malicious prosecution or abuse of process. If Noerr-Pennington immunizes a citizen who petitions government for redress of grievances for common law tort actions, then it should immunize Mr. Katz from the consequences of an NRS 18.010(2)(b) motion – unless IVGID can establish that his lawsuit was a "sham." However, IVGID did not nor cannot so establish. As noted at AOB at 31-37, every one of Mr. Katz's asserted claims for relief was grounded upon some statutory or case law authority. And as established at AOB 52-53, 16-17, and 19-22, neither IVGID nor the court below ever argued, much less established, that any of Mr. Katz's claims was frivolous – i.e., baseless. That being so, under Noerr-Pennington his motive was and is irrelevant.

Simply put, if NRS 18.010(2)(b) permits awards of attorney's fees based only upon "motive," Noerr-Pennington does not. Per Article VI, Clause II of the United States Constitution, Noerr-Pennington trumps NRS 18.010(2)(b) in this regard.[5]

2. Nevada's Anti-S.L.A.P.P. statutes should apply to this situation. IVGID cannot circumvent their reach by filing a motion for attorney's fees instead of a separate lawsuit or counterclaim for abuse of process, and thus deprive Appellant of his NRS 41.650-41.670 rights. (AOB at 38-45; RAB at 45-52; ARB at 10-16; OOA at 3-4)

Relative to Anti-S.L.A.P.P., this case raises two issues of first impression: 1)

[5] To be clear, Mr. Katz has never contended that NRS 18.010(2)(b) is unconstitutional. Rather, he has contended that the statute simply does not apply in the context of a declaratory and injunctive relief lawsuit against a governmental agency that is not a sham lawsuit.

Does a post-judgment motion for attorney's fees [by a government, following a public interest lawsuit for declaratory and injunctive relief and a judgment for the government] constitute a "complaint" within the meaning of NRS 41.660(7)(a)? 2) Must a defendant file a special motion to dismiss in order to secure Anti-S.L.A.P.P. protections?

The Panel answered these questions "no" and "yes." Appellant submits, however, that a reading of the governing statutes in light of the public policy surrounding Anti-S.L.A.P.P. mandates the answers be the opposite.

Let us review the pertinent statutes:

> NRS 41.650: A person who engages **in a good faith communication** in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern is immune from **any** civil action for claims based upon the communication.
>
> ...
>
> NRS 41.660(1)(a): "If an action is brought upon a person based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern:
>
> a) the person against whom the action is brought **may** file a special motion to dismiss...
>
> ...
>
> NRS 41.660(7)(a): "As used in this section: 'Complaint' means any action brought against a person based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern,

including, without limitation, a counterclaim or cross-claim.

...

NRS 41.665: "The Legislature finds and declares that:

1) NRS 41.660 provides certain protections to a person against whom an action is brought, if the action is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern.

2) When a plaintiff must demonstrate a probability of success of prevailing on a claim pursuant to NRS 41.660, the Legislature intends that in 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 to the first question, the broad language in NRS 41.650 and 41.660(7) must lead to a judicial conclusion that a complaint, in the form of the initial pleading which is issued with a summons and upon which process is served, is not necessary to trigger Anti-S.L.A.P.P. Basically, any proceeding that – as here – can result an executable money judgment would be sufficient to trigger Anti-S.L.A.P.P. protections. Indeed, that is the import of Hawxurst v. Austin's Boat Tours, 550 S.W.3d 220, 226 (Tex. Civ. App. 2008). If the statute is to be interpreted so as to provide protections to a person against whom an "action is brought based upon a good faith communication in furtherance of the right to petition," then NRS 41.660(7) should be interpreted to mean within its scope is a post-judgment motion

that leads to an executable money judgment.

Next, does NRS 41.660 really mean that if an action is brought upon a person based upon a good faith communication in furtherance of his right to petition, and he does not specifically label his pleading as a "special motion to dismiss" and/or does not file his pleading within 60 days of service of process, he has forever waived his right to complain about retaliation against the exercise of his right to petition?

To so hold is to champion form over substance. But equity regards substance and not form in the interest of real justice, unhampered by too great adherence to technicality. Reno Club v. Young Investment Company, 64 Nev. 312, 336, 182 P.2d 1011, 1022 (1947).

To so construe the governing statutes as creating a waiver of First Amendment protection is to effectuate an unconstitutional result. When a statute is susceptible to both a constitutional and an unconstitutional interpretation, this Court is obliged to construe the statute so that it does not violate the Constitution. Whitehead v. Nevada Commission on Judicial Discipline, 110 Nev. 874, 883, 878 P.2d 913, 919 (1994) and cases cited therein.

And NRS 41.660(1) certainly is susceptible to a constitutional interpretation. The operative word in NRS 41.660(1)(a) is may. The person against whom the action is brought **may** file a special motion to dismiss. The statute does not say:

"must file a special motion to dismiss." So, for example, if an action is brought against a person based upon his good faith communication in furtherance of his right to petition, but it is not obvious that is the case until time of trial, an interpretation that the person lost his Anti-S.L.A.P.P. rights simply because he filed his motion after trial effectuates a result that violates the First Amendment right to petition. Rather, the statute simply means that if a defendant is going to make a pre-trial Anti-S.L.A.P.P. attack, he must do so within 60 days after service of the complaint.

The use of the word "may" in a statute is generally permissive, while the use of the word "not" disallows discretion. State v. Second Judicial District Court, 134 Nev. 783, 789 n. 7, 432 P.3d 154, 160 n. 7 (2018), and cases cited therein.

And to champion form over substance in this instance runs contrary to NRS 41.665(1). After all, when a motion which would lead to a money judgment is labeled "motion," wouldn't the logical pleading in response thereto be labeled "opposition"[6]? And this Court, to effectuate justice, will do such things as re-label an appeal in reality an extraordinary petition where appropriate. See: Clark County Liquor and Gaming Licensing Board v. Clark, 102 Nev. 654, 657-58, 730 P.2d 443, 446 (1986), and cases cited therein. Why then can't an opposition to a motion for attorney's fees therefore be considered "re-labeled" as a "special motion to

[6] See: District Court Rule 13(3); WDCR 12(2).

dismiss"?

Certainly, if we are not to champion "form over substance," then that should be the equitably and constitutionally correct result.

Next, the Panel summarily held that Appellant's actions for declaratory and injunctive relief was not "in good faith." But that result cannot legally be correct. Clearly, Anti-S.L.A.P.P. immunity encompasses First Amendment immunity, although it is not confined thereto. See: Delucchi v. Songer, 133 Nev. Ad. Op. 42, 396 P.3d 826, 830 (2017). Thus, Noerr-Penington applies in this context. And per Noerr-Penington and per the cites to the record at page 8, below, a lack of good faith in this context cannot lawfully be proven by "harassment." To the extent that the Panel held or even implied otherwise, that disposition must be revisited en banc.

Finally, the Panel refused to apply NRS 41.650's plain language because of its view Nevada's anti-SLAPP statutes provide nothing more than a "procedural mechanism for parties to seek dismissal of meritless lawsuits that chill free speech." (OOA:3). In support the Panel points to Coker v. Sassone, 135 Nev. Adv. Op. 2, 432 P.3d 746, 748 (2019). Coker did not involve a suit between a citizen and his government, but simply involved the appeal of the denial of a NRS 41.660 special motion to dismiss. So to the extent the OOA suggests the purpose of NRS 41.650 "immunity" is the same as a NRS 41.660 special motion to dismiss (i.e., as a

"procedural mechanism...to seek dismissal of meritless lawsuits that chill free speech"), it is surplusage and should be disregarded. NRS 41.650 immunity has nothing directly to do with the filing a special motion to dismiss a meritless lawsuit. For even if a special motion to dismiss is denied, that does not negate NRS 41.650's grant of absolute immunity (ARB:14-16).

Moreover, the OOA disregards longstanding rules for interpreting statutes. Given "the plain language of" NRS 41.650, it means what it says." Stubbs v. Strickland, 129 Nev. 146, 297 P.3d 326, 329 (2013). Given conduct privileged under Anti-S.L.A.P.P. is defined by statute [Shapiro v. Welt, 133 Nev. Ad. Op. 6, 389 P.3d. 262, 267 (2017)], it must be given its statutory definition. Delucchi v. Songer, Id.

3. Respondent's NRS 18.010(2)(b) motion, insofar as Appellant's NPRA cause of action is concerned, conflicts with the policy behind NRS 239.011(2). For this reason the subject fee award should have been vacated. (AOB:65-66, 66-68; RAB:60-62; ARB:27-29, 29-32; OOA:5)

Unlike the first two issues, this one was not addressed in the OOA, but was at pp. 5-7 of the Petition for Rehearing. It also significantly impacts public interest.

When a Nevada citizen makes a public records request, and the governmental agency to which it is addressed "stonewalls" to the point where the citizen's only remedy is to bring a lawsuit and go to trial on its request, with the requested documents not being produced until the time of trial - and in camera no less - that

agency violates the Public Records Act (NPRA). Without the citizen's lawsuit, the issues cannot be resolved.

Moreover, where as here the district court announces a rule of law for determining whether a governmental record is "public," which involves a balancing of policies on a case-by-case basis, how can any requestor know in advance whether s/he has requested examination of a disclosable public record short of a lawsuit?

Given here there were NPRA violations, per authorities such as Neighborhood Alliance of Spokane County v. County of Spokane, 261 P.3d 119, 126, 131 (Wash. 2011) and State ex. rel. Kesterson v. Kent State University, 126 N.E. 3d 895, 907-08 (Ohio 2018), the requestor (here, Appellant) is actually entitled to attorney's fees, regardless of whether s/he ultimately secures a concealment judgment.

But nothing in NRS Ch. 239 grants the court authority to award attorney's fees to the governmental agency – much less $60,405.20, as here - which successfully defends a public records concealment action after initially refusing to produce anything. Nor should it. Such an award simply chills the public and encourages the governmental agency in the future to act in secrecy. As Kesterson notes, public records are the people's records. The officials in whose custody they happen to be are merely trustees for the people. Open government serves the public

interest and our democratic system. Id., 126 N.E. 3d at 901.

The chilling effect of making the right to attorney's fees mutual in NPRA litigation was considered and rejected by the Legislature. The legislative history for NRS 239.011(2) demonstrates the Legislature expressly refused to make the right to attorney's fees in NRS 239.011(1) litigation mutual because of its chilling effect[7].

The Panel did not address these issues. It should and it should agree with Kesterson. Such a ruling would be consistent with the general principle of Semenza v. Caughlin Crafted Homes, 111 Nev. 1089, 1096, 901 P.2d 684, 688 (1995) and Bobby Berosini, Ltd. v. PETA, 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998). Simply put, and putting aside the fact NRS 239.011(2) precludes an award of attorney's fees in favor of a governmental agency which prevails in NPRA litigation, a cause of action which survives multiple summary dismissal motions and ends up being adjudicated after a full trial on the merits can neither be frivolous nor harassing, regardless of what the trial court concludes in its ultimate decision.

For these reasons, then, the Court en banc should rehear this case on these issues.

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7 See Assembly Committee on Government Affairs' sub-committee meeting of May 7, 1993, page 44 of legislative history. (https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1993/AB365,1993.pdf)

DATED this 3rd day of February, 2020.

Respectfully submitted,

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

I, RICHARD F. CORNELL, hereby certify that this Petition for Rehearing complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6), because:

1. This petition is prepared in proportionally spaced typeface using Microsoft Word 8 in 14 point font in Times New Roman.

2. I further certify that this Petition complies with the page or type volume limitations of NRAP 40(b)(3) and is not in excess of the standard 4,667 words, to wit: 3,893 words.

3. Finally, I hereby certify that I have read this Petition en banc Reconsideration, 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)(1), which requires every assertion in the petition regarding matters on record to be supported by a reference to the page and the volume number. I understand that I may be subject to sanctions in the event that the accompanying petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 3rd February, 2020.

/s/RichardCornell
Richard F. Cornell
Nevada Bar No. 1550

CERTIFICATE OF MAILING

The undersigned certifies that they are an employee of the Richard F. Cornell, P.C., and that on the 30 day of February, 2020, they served a true and correct copy of the foregoing document upon opposing counsel, as set forth below, by way of the court's E-flex filing system:

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