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11 **DISTRICT COURT**  
12 **CLARK COUNTY, NEVADA**  
13

14 THE CITY OF BOULDER CITY,  
15 NEVADA,

16 Plaintiff,

17 vs.

18 DANIEL D. JENSEN; LINDA F. HENRY-  
19 SCHRICK; NANCY A. NOLETTE;  
20 JAMES C. DOUGLASS; AND NORBERT  
KASTL,

21 Defendants.

) CASE NO. A-10-629989-C

) DEPARTMENT: XIX

) REPLY TO PLAINTIFF'S OPPOSITION TO  
) DEFENDANTS' MOTION TO DISMISS  
) PURSUANT TO NRS 41.660 [ANTI-SLAPP]  
) AND REQUEST FOR RECOVERY OF  
) ATTORNEYS FEES AND COSTS  
) [NRS 41.670]; MEMORANDUM OF POINTS  
) AND AUTHORITIES; DECLARATION OF  
) L. G. STRICKLAND IN SUPPORT THEREOF

22 DATE: January 21, 2011  
23 TIME: 9:00 a.m.  
24 DEPT: 29

24 TO THE COURT, TO ALL PARTIES, AND TO THEIR COUNSEL OF RECORD:

25 Defendants herein hereby reply to Plaintiff's Opposition to Defendants' Motion to  
26 Dismiss brought pursuant to NRS 41.660, and request for the recovery of attorneys fees and costs  
27 brought pursuant to NRS 41.670, as follows:

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**TABLE OF CONTENTS**

<b>TITLE</b>	<b>PAGE</b>
I. INTRODUCTION.....	1
A. Litigation Background.....	1
B. SLAPP Complaints and Boulder City.....	2
II. RES JUDICATA DOES NOT APPLY.....	4
III. NEVADA ANTI-SLAPP LAWS AND THEIR APPLICABILITY TO THE CURRENT LAWSUIT.....	6
IV. THE CITY’S ADULTERATION OF NEVADA ANTI-SLAPP LAWS....	7
V. PLAINTIFF’S RELIANCE ON CITY OF RIVERSIDE IS MISPLACED.....	11
VI. CONCLUSION.....	12

**TABLE OF AUTHORITIES**

<b>CITATION</b>	<b>PAGE(S)</b>
<b>CASE CITATIONS</b>	
<u>Bower v. Harrah’s Laughlin</u> 215 P3d 709, 125 Nev. Adv. Rep. 37 (2009).....	5
<u>CKE Restaurants Inc. v. Moore</u> 159 Cal. App. 4 <sup>th</sup> 262 (2008).....	9
<u>City of Cotati v. Cashman</u> 29 C 4 <sup>th</sup> 69 at 74-75, 52 P3d 95 [2002].....	7,10
<u>City of Riverside v. Stansbury</u> 155 Cal. App. 4 <sup>th</sup> 1582, 66 Cal. Tprt. 3d 862 (2008)..	11
<u>City of Santa Monica v. Stewart</u> 126 Cal. App. 4 <sup>th</sup> 43 at 75 (2005).....	9
<u>County of Kauai ex. rel. Nakazawa v. Baptiste</u> 165 P3d 916 (2007).....	3
<u>Equilon Enterprises LLC v. Consumer Cause Inc.</u> 29 C. 4 <sup>th</sup> 53 (2002).....	11,13
<u>Five Star Capital Corp. v. Ruby</u> 194 P3d 709, 124 Nev. Adv. Rep. 88 (2008).....	4
<u>John v. Douglas County School District</u> 219 P. 3d 1276, 125 Nev. Rep. 55 (2009)....	4,6
<u>Nevadans for Nevada v. Beers</u> 122 Nev. 930, 142 P3d 339 (2006).....	10
<u>Paradise Palms v. Paradise Homes</u> 89 Nev. 27, 30-31, 505 P2d 596, 598-599 (1973).....	5

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**TABLE OF AUTHORITIES**

**CITATION**

**PAGE(S)**

**STATUTORY CITATIONS**

Nevada Constitution Article 6 § 14.....9  
NRS 41.637.....6  
NRS 41.650.....6  
NRS 41.660.....5,6,8,9  
NRS Chapter 43.....3,9,13  
NRS 295.061.....9  
NRCF Rule 2.....9  
California Code of Civil Procedure §425.16.....10,12  
Nevada Civil Practice Manual §3.02.....9

**REFERENCE TO EXHIBITS**

Exhibit "1" (Caption page from In the Matter of the Petition of City  
of Mesquite).....3  
Exhibit "2" (Article from Boulder City Review January 13, 2011).....5

1 **I. INTRODUCTION**

2 **A. Litigation Background**

3 In brief explanation, and in apology to this Court, the original brief was written in full  
4 anticipation that it would be read by Judge Allan Earl who had ruled on a prior Special Motion to  
5 Dismiss involving a pre-election challenge to a citizen initiative. Since this Court does not have  
6 a full picture of the background of this case, and as the City has chosen to include the Court's  
7 Order and a transcript from the hearing, further explanation is required.

8 Boulder City, with a population of approximately 16,000 people, is comprised of a  
9 number of people who are civically minded, and are either outwardly politically active and/or  
10 have extensive knowledge regarding the City's municipal affairs. The City Council chambers are  
11 regularly filled, often times to capacity, with people offering their opinions and comments on  
12 issues. There are always a number of issues that are hotly debated in Boulder City, the most  
13 recent of which involved term limits of City appointed committee and commission members, the  
14 debt of the City, the position of the City Attorney as an appointed position, and the City's  
15 ownership of golf courses. Despite a public request that ballot questions be presented to the  
16 voters to voice their opinion on these issues, the City refused. Consequently, exercising their  
17 constitutional rights to petition, several Boulder City voters, including Defendants herein, formed  
18 various initiative committees for the purpose of circulating initiatives with the goal to ultimately  
19 have the voters of Boulder City express their opinions at the voting booth. 4 citizens initiatives  
20 were circulated, and sufficient signatures obtained to place the initiatives on the November 2010  
21 ballot.

22 Thereafter, the City Attorney filed a Complaint seeking declaratory and/or injunctive  
23 relief, challenging the legal sufficiency of the initiatives, said Complaint assigned to Dept. 19.  
24 Said lawsuit sued all of the members of the Initiative Committees. The City Council refused to  
25 authorize the lawsuit as to the term limit (herein designated the "Appointment Initiative") and  
26 debt limit initiatives, and the Complaint was amended to remove the Appointment Initiative and  
27 debt limit initiative from the Complaint, and dismiss the Defendants associated therewith. The  
28 case proceeded forward as to the golf course initiative only.



1 Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New York, New  
2 Mexico, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Washington and our  
3 own state of Nevada have all enacted some form of anti-SLAPP statutes and Colorado and West  
4 Virginia have case precedent protecting against said suits (*see* [http://www.citmedialaw.org/legal-  
5 guide/responding-strategic-lawsuits-against-public-participation-slapps](http://www.citmedialaw.org/legal-guide/responding-strategic-lawsuits-against-public-participation-slapps)). Our US Congress is  
6 considering federal anti-SLAPP legislation (HR 4364). Local governmental entities across the  
7 country have gone out of their way to ensure that freedom of expression, for which many have  
8 fought and died, are not sacrificed by their quest to ascertain the legal sufficiency of an initiative  
9 or law; instead of suing private individuals which chills free expression and subjects the entity to  
10 anti-SLAPP attorneys fees and costs as well as possible compensatory and punitive damages for  
11 violations of constitutional rights, entities have named public officials and public entities in their  
12 suits. [In Hawaii, for example, a county city attorney sued the Mayor and councilmembers to  
13 determine the constitutionality of a property tax measure (County of Kauai ex rel Nakazawa v.  
14 Baptiste 165 P3d 916 [2007]). In Nevada, our Legislature has enacted the Judicial Confirmation  
15 Law [NRS Chapter 43] which allows governmental entities to seek judicial review of ordinances  
16 without suing anyone, a procedure wisely utilized by the City of Mesquite in seeking a judicial  
17 determination regarding the legal sufficiency of ordinances enacted pursuant to passage of citizen  
18 initiatives (solely for purpose of example, *see* the caption page of City of Mesquite’s Petition  
19 utilizing Judicial Confirmation Law, a copy of which is attached hereto as Exhibit “1”).

20 **AND THEN THERE IS BOULDER CITY.** Boulder City has brought lawsuits against  
21 initiative sponsors of 7 of the last 8 initiatives, all of said lawsuits filed by its City Attorney and  
22 armed with the name recognition and prestige of Lionel, Sawyer & Collins as co-counsel. Since  
23 the only initiative for which sponsors have not been sued has one more election before becoming  
24 law, the “jury is still out” as to whether the City will sue initiative sponsors on that one. Clearly  
25 the democratic process is under attack in Boulder City.

26 With something as fundamental as freedom of expression and constitutionally guaranteed  
27 rights to petition in the cross-hairs, we turn to the Opposition filed by the City. With pure  
28 adulteration of the anti-SLAPP protections afforded by our state, and the principles upon which  
they were enacted, the City presents a brief which proposes additional requirements to Nevada’s

1 anti-SLAPP laws. Why? The City's actions clearly violate the rights of Defendants and  
2 Nevada's anti-SLAPP laws, and therefore if the law is not "modified" the City cannot meet its  
3 burden of proof as articulated in John v. Douglas County School District 219 P3d 1276, 125  
4 Nev. Rep. 55 (2009). Therefore, one can only conclude that the City's actions are solely to  
5 silence those who had the audacity to write an initiative to limit the number of years that a person  
6 may serve on a City committee or commission, an initiative solidly approved by Boulder City  
7 voters, and an initiative which closely resembles Nevada's term limits on elected officials.

## 8 **II. RES JUDICATA DOES NOT APPLY**

9 Since the City is attempting to stifle this entire discussion by claiming res judicata, this  
10 issue must be addressed at the forefront. *Res judicata*, recently clarified and re-termed "*issue*  
11 *preclusion*" in the context claimed by Plaintiff herein (Five Star Capital Corp. v. Ruby 194 P3d  
12 709, 713, 124 Nev. Adv. Rep. 88 [2008]) has 4 elements: (1) the issue decided in the prior  
13 litigation must be **identical** to the issue presented in the current action; (2) the initial ruling must  
14 have been on the merits and have become final; (3) the party against whom the judgment is  
15 asserted **must** have been a **party** or **in privity with a party** to the prior litigation, and (4) the  
16 issue was actually and necessarily litigated. Regarding the matter at hand, arguably elements (2)  
17 and (4) are satisfied. However, **review of the pleadings on file and Judge Earl's ruling**  
18 **reveals that elements (1) and (3) are not.**

19 ● **The issues are not identical.** Judge Earl's ruling was based on 3 reasons, one of which  
20 was predicated on the fact that the prior matter was a pre-election challenge to an initiative. (See  
21 Order attached as Exhibit "A" to Plaintiff's Opposition). The present action is not an action to  
22 challenge the constitutionality of an initiative, but rather an action to determine the legal  
23 sufficiency of an already duly enacted ordinance. In the present situation, Defendants herein  
24 have absolutely nothing to do and no connection with the initiatives enactment as Boulder City  
25 voters placed the initiative into law.

26 ● Additionally, **Defendant James Douglass and Defendant Nancy Nolette were not**  
27 **parties to or in privity with anyone in the prior matter.**<sup>1</sup> At hearing of the Special Motion to  
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<sup>1</sup>"Nevada ensures due process by limiting the application of issue preclusion to those who were a party in the prior case or who were in privity with a party in the prior case. [Citations

1 Dismiss on A-10-621582-C neither Mr. Douglass nor Ms. Nolette were Defendants in the suit,  
2 they did not have representation in the suit, nor did they have any interest in that litigation as it  
3 did not involve an initiative which they sponsored. Consequently, at the prior hearing there was  
4 no one present that represented the interests of Mr. Douglass and Ms. Nolette, requiring that the  
5 instant Motion be fully heard and ruled upon by this Court in order to protect Mr. Douglass and  
6 Ms. Nolette's due process rights.<sup>2</sup>

7 Finally, it should be pointed out that NRS 41.660 (3) (c) expressly states that the Court  
8 **shall** rule on the subject Special Motion to Dismiss. Therefore, it is Defendants' position that,  
9 regardless of whether the elements of issue preclusion exist, the statute explicitly requires this

10 \_\_\_\_\_  
11 omitted]" (Paradise Palms v. Paradise Homes 89 Nev. 27, 30-31, 505 P2d 596, 598-599 [1973]  
12 cited in Bower v. Harrah's Laughlin 215 P3d 709, 125 Nev. Adv. Rep. 37 [2009]) "To be in  
13 privity the person must have 'acquired an interest in the subject matter affected by the judgment  
14 through one of the parties, as by inheritance, succession, or purchase [citations omitted] accord  
15 Restatement (Second) of Judgments § 41 (1) (1982) (enumerating representatives to include:  
16 trustees of an interest to which the person is a beneficiary, someone who the person invested with  
17 authority to represent him, a fiduciary to the person, an official or agency legally authorized to  
18 represent the persons interests, and a class representative in a certified class action.)" Paradise  
19 Palms v. Paradise Homes, *supra* at 31.

20 <sup>2</sup>The City knows that Mr. Douglass and Ms. Nolette were not Defendants in the prior matter,  
21 and that their due process rights were not represented at the previous hearing. The City  
22 obviously also knows that a another district court judge's opinion is not citable authority. So  
23 why assert res judicata? Certainly if the City actually believed that these matters were identical,  
24 and that the subject Motion was barred by the doctrine of issue preclusion, the doctrine of issue  
25 preclusion (res judicata) would be first and foremost in the City's Opposition rather than limited  
26 discussion at the end of the brief. Additionally the City could have opted to file a Notice of  
27 Related Case, and have the instant lawsuit heard by Judge Earl. The City was crafty - it knew  
28 that the matters were not identical but wished this Court to be improperly influenced by Judge  
Earl's ruling, one that he was so uncertain about that he invited Defendants to appeal to the  
Supreme Court. The inappropriate use of Judge Earl's ruling is evident by recent remarks by City  
Attorney Dave Olsen to a reporter for the Boulder City Review: "The beauty of this is that if we  
win the initiative on the debt-limit one in one judge's court, and we win the initiative on the term  
limits on the volunteers in another judge's court, clearly it would have demonstrated that the  
District Court of Southern Nevada is unanimous on these kinds of issues." Of course, this  
strategic move by the City is much more costly for the City and for the Defendants. As reported,  
"But, of course, the downside of multiple suits is more time in court and more legal costs. Olsen  
said the city has spent over \$70,000 on all three lawsuits, and anticipates spending more. The  
defendants' costs are currently estimated to be about \$40,000." See article entitled "City Splits  
Lawsuits on Passed Questions" reported in the Boulder City Review January 13, 2011, a true and  
correct copy of which is attached hereto as Exhibit "2".

1 Court to exercise its own **independent** analysis and provide a ruling thereon, thereby precluding  
2 the application of the doctrine of issue preclusion.

3 **III. NEVADA ANTI-SLAPP LAWS AND THEIR APPLICABILITY TO THE**  
4 **CURRENT LAWSUIT**

5 In order to avoid losing sight of Nevada's express anti-SLAPP provisions, they are worth  
6 repeating:

7 NRS 41.637 provides:

8 "Good faith communication in furtherance of the right to petition' means  
9 any:

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

12 NRS 41.650 provides:

13 "A person who engages in a good faith communication in furtherance of the  
14 right to petition is **immune from civil liability for claims based upon the  
communication.**"

(Emphasis added.)

15 NRS 41.660 provides:

16 "1. If **an action** is brought against a person based upon a good faith  
17 communication in furtherance of the right to petition;

18 (a) The person against whom **the action** is brought may file a special motion  
19 to dismiss...

20 In John v. Douglas County School District 219 P. 3d 1276, 125 Nev. Rep. 55  
(2009), the Nevada Supreme instructs:

21 "When a party moves for a special motion to dismiss under Nevada's anti-  
22 SLAPP statute, it bears the initial burden of production and persuasion.  
23 This means the moving party must first make a threshold showing that the  
24 lawsuit is based on "good faith communication[s made] in furtherance of  
25 the right to petition" the government. NRS 41.650; .... If the moving party  
26 satisfies this threshold showing, then the burden of production shifts to the  
27 nonmoving party, who must demonstrate a genuine issue of material fact.  
28 ...If the nonmoving party successfully meets its burden, then the case  
proceeds to discovery and, potentially, trial. Otherwise, the district court  
**must** dismiss the action, and that dismissal operates as an adjudication on  
the merits. NRCP 56(c); NRS 41.660(3)-(4)."

(Emphasis added) Id. at 1282.

1 purpose behind the Noerr-Pennington immunity doctrine which provides that those who  
2 petition all departments of the government for redress are generally immune from liability.  
3 “The basis of this doctrine is that representative democracy demands that citizens and public  
4 officials have the ability to openly engage in discussions of public concern.” Id. at 1281.

5 The Special Motion to Dismiss filed by Defendants asserted the following:

6 ● **Defendants were sued for engaging in good faith communications** consisting of  
7 their membership in the Initiative Committee, and because they “failed to draft the  
8 Appointment Initiative ...to a valid and legal standard” (Plaintiff’s Complaint at paragraph 14,  
9 lines 18-19 and Exhibit “A” thereto). Plaintiff’s assertion that the lawsuit merely “recognizes”  
10 Defendants is laughable - clearly recognition is generally not doled out in the form of lawsuits  
11 which harass, violate constitutional civil rights, and subject one to attorneys fees and costs to  
12 defend oneself.

14 ● **Defendants Jensen, Douglass and Nolette were all sued because of their exercise**  
15 **of their good faith communication; there is no other basis of liability asserted against**  
16 **them.**

17 With this, the burden shifted to the City to show that the suit did not arise from an act in  
18 furtherance of the right to petition. The City did not sustain this burden - the City did not even  
19 attempt to address this burden. Therefore, pursuant to the express statutory provisions of  
20 Nevada anti-SLAPP statutes and the Supreme Court’s instruction in the John decision,  
21 Defendants are **entitled** to granting of this Special Motion to Dismiss.

23 **IV. THE CITY’S ADULTERATION OF NEVADA ANTI-SLAPP LAWS**

24 Instead of following Nevada’s anti-SLAPP laws, the City has attempted to create its  
25 own law by inserting conditions and requirements not found anywhere in Nevada statutes,  
26 Nevada case law, or even California case law.

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1 ● **Plaintiff's Assertion That the Action Must Seek a Recovery of "Damages" is**  
2 **Completely Unsupported**

3 This Court is respectfully requested to look at the statutory language and at the John  
4 decision - the requirement of "damages" or "monetary damages" is no where to be found.<sup>3</sup>

5 This Court is aware that there is a clear distinction between civil liability and criminal liability,  
6 and in looking at the Legislative history, the Legislature clearly did not want to provide  
7 immunity from criminal liability (page 4 of Exhibit 5 to Defendants' Special Motion to  
8 Dismiss). The Legislature did, however, provide immunity for all civil actions. Of course,  
9 since Plaintiff's Complaint is a civil action in equity, Plaintiff asserts that equitable civil  
10 actions are exempt from Nevada's anti-SLAPP statutes. However, **no where in the**  
11 **Legislative history, in the statutes ultimately enacted, or in the Supreme Court's analysis**  
12 **of the statutes [John decision] is there any indication that any civil actions are exempt.**

13 Plaintiff craftily repeats that an anti-SLAPP motion can only be maintained if the  
14 SLAPP Complaint is "a civil action for damages" (as if repeating it over and over again makes  
15 it true.) Certainly had the Legislature wished to restrict anti-SLAPP motions to those seeking  
16 financial redress, the Legislature could have clearly stated so. In this regard the Legislature is  
17 mindful of what damages are as is illustrated by the fact that anti-SLAPP statute NRS 41.660  
18 provides that in addition to an award of reasonable costs and attorney's fees upon grant of  
19 special motion to dismiss, persons sued for engaging in their right to petition may bring  
20 separate actions for both compensatory and punitive "**damages**". Even Professor Pring, upon  
21 whom Plaintiff relies, acknowledged the need for anti-SLAPP protection for those sued in  
22 actions seeking injunctive relief.<sup>4</sup>

23 \_\_\_\_\_  
24  
25 <sup>3</sup>This is, unfortunately, one of the errors of Judge Earl's ruling on the Special Motion to  
26 Dismiss filed in A-10-621582-C, a ruling that Judge Earl invited Defendants to appeal.

27 <sup>4</sup> "Furthermore...the chilling effect...upon a [defendant's] willingness to engage in  
28 [constitutionally] protected activity is multiplied where the complaint seeks damages in addition  
to **injunctive relief**." [Emphasis added] (Pring treatise, found at Exhibit F to Plaintiff's  
Opposition, at pages 5-6.)

1 Further, **the Defendants are immune from all civil claims, which of course includes**  
2 **claims which are framed as actions in equity.** In a broader sense, NRS 41.660 not only  
3 pertains to cases of “civil liability” but also to any civil action. In this regard NRS 41.660  
4 provides “if an action” is brought against a person based upon a good faith communication in  
5 furtherance of the right to petition, the person against whom the action is brought may file a  
6 Special Motion to Dismiss. A Complaint seeking equitable relief is a “civil action” pursuant to  
7 the Nevada Constitution Article 6 §14: “There shall be but one form of civil action, and law and  
8 equity may be administered in the same action.”; see also NRCP Rule 2: “There shall be one  
9 form of action to be known as ‘civil action’”. Both Article 6 §14 and Rule 2 effectively abolish  
10 for procedure purposes the multiple forms of action and eliminate any separate equity practice.  
11 Nevada Civil Practice Manual § 3.02 Therefore, the “action” referred to in NRS 41.660  
12 includes, by definition, both civil actions and actions in equity. Consequently, as Plaintiff’s  
13 Complaint seeks equitable relief, it is a civil action and falls within the parameters of the anti-  
14 SLAPP provisions. (See City of Santa Monica v. Stewart , supra , or CKE Restaurants Inc. v.  
15 Moore 159 Cal. App. 4<sup>th</sup> 262 (2008) which evidence that declaratory relief actions, just as other  
16 civil actions, are dismissed pursuant to anti-SLAPP provisions.)

17  
18 ● **There is No Statutory Authority for Plaintiff to Bring the Subject Lawsuit Naming**  
19 **Initiative Sponsors as Defendants**

20 Plaintiff alleges that the instant Complaint finds support in NRS 295.061(2). NRS  
21 295.061(2) allows for the filing of a complaint in district court to test the legal sufficiency of an  
22 initiative petition. This statute is, of course, inapplicable to the present Complaint since the  
23 present Complaint seeks to test the legal sufficiency of a duly enacted ordinance. Irrespective of  
24 NRS 295.061(2) and in light of Nevada anti-SLAPP protections, **there is no statutory**  
25 **authority for Plaintiff to bring an action against initiative sponsors.** The appropriate  
26 statutory mechanism to test the legal sufficiency of a duly enacted ordinance is NRS Chapter 43  
27 [Judicial Confirmation Law.] Nevada’s anti-SLAPP provisions do not provide any exemption  
28

1 for governmental entities; if the Legislature wanted to provide governmental entities with  
2 exemption, it could have done so (example: California’s anti-SLAPP provisions state that the  
3 provisions “shall not apply to any enforcement action brought in the name of the people of the  
4 State of California by the Attorney General, district attorney, or city attorney, acting as a public  
5 prosecutor.” (California Code of Civil Procedure §426.16 [d])

6 Further, the City’s reliance on Nevadans for Nevada v. Beers 122 Nev. 930, 142 P3d 339  
7 (2006) is misplaced. Beers involves a pre-election challenge to an initiative petition, unlike the  
8 instant matter involving a legal challenge to a duly enacted ordinance, in which Beers did not  
9 choose to avail himself of anti-SLAPP protections. This Court is aware that the applicability  
10 and appropriateness of a procedural defense to a lawsuit [anti-SLAPP] is not governed by  
11 whether a party chooses to utilize it. Procedural bars to litigation [example: statutes of  
12 limitations or standing] are inadvertently or intentionally not asserted for a number of strategic  
13 legal and political reasons. The fact that Beers exists, an anomaly in a sea of published cases in  
14 which legal challenges name as Defendants public figures or public entities, is reflective of the  
15 fact that a Defendant must affirmatively assert the protections afforded by Nevada anti-SLAPP  
16 statutes by the filing of a Special Motion to Dismiss within 60 days of service of the Complaint.  
17 In this regard, Plaintiff’s assertion that the protections afforded by anti-SLAPP statutes are  
18 “automatic” is specious. It does exemplify that governmental entities do not file lawsuits, suing  
19 private citizens, challenging the legal validity of initiatives.

22 ● **Intent is Irrelevant to an Anti-SLAPP Analysis.**

23 It is entirely irrelevant and not a subject of debate as to why the lawsuit was brought or  
24 whether the lawsuit has had, or will have, the actual effect of chilling the Defendants’ exercise  
25 of speech of Constitutional rights. (See City of Cotati v. Cashman 29 C 4<sup>th</sup> 69 at 74-75, 52 P3d  
26 95 [2002].) To allow anti-SLAPP litigation to hinge on the intention of the SLAPP complainant  
27 in filing suit would allow the fox to guard the henhouse. As explained by the California  
28

1 Supreme Court in Equilon Enterprises LLC v. Consumer Cause Inc. 29 C 4<sup>th</sup> 53 [2002]):

2 “...A requirement that courts confronted with anti-SLAPP motions inquire into the  
3 plaintiffs subjective intent would commit scarce judicial resources to an inquiry inimical  
4 to the legislative purpose that unjustified SLAPP's be terminated at an early stage.  
5 ‘Imposing a requirement of establishing bad faith or ulterior motive adds a needless  
6 burden to SLAPP targets seeking relief, and destroys the relatively value-free nature of  
7 existing anti-SLAPP structures under which actions become suspect because of the  
8 circumstances of their arising and the relief sought, without need to litigate motive.’  
9 [Citations] By requiring that a moving defendant demonstrate that the targeted cause of  
10 action is one arising from protected speech or petitioning (§ 425.16, subd. (b)), our anti-  
11 SLAPP statute utilizes a reasonable, objective test that lends itself to adjudication on  
12 pretrial motion. Such early resolution is consistent with the statutory design ‘to prevent  
13 SLAPPs by ending them early and without great cost to the SLAPP target’ [Citations] , a  
14 purpose reflected in the statute's short time frame for anti-SLAPP filings and hearings (§  
15 425.16, subd. (f)) and provision for a stay of discovery (*id.*, subd. (g)).”

16 Id. at 65.

17 **“While it may well be, as Equilon asserts, that it had pure intentions when  
18 suing Consumer Cause, such intentions are ultimately beside the point. As  
19 demonstrated, Equilon's action for declaratory and injunctive relief  
20 expressly was based on Consumer Cause's activity in furtherance of its  
21 petition rights. The Court of Appeal correctly held that Consumer Cause, having  
22 satisfied its initial burden under the anti-SLAPP statute of demonstrating that  
23 Equilon's action was one arising from protected activity (§ 425.16, subd. (b)(1)),  
24 faced no additional requirement of proving Equilon's subjective intent”.**

25 Id. at 67-68. (Emphasis added.)

26 Hence, the Court is to look solely to the allegations of the Complaint to assess  
27 Defendant's actions; to do otherwise would destroy the expediency of anti-SLAPP protections.

#### 28 **V. PLAINTIFF'S RELIANCE ON CITY OF RIVERSIDE IS MISPLACED**

Plaintiff relies on City of Riverside v. Stansbury 155 Cal. App. 4<sup>th</sup> 1582, 66 Cal. Rptr.  
3d 862 (2008). Riverside involves a lawsuit brought against initiative proponents seeking  
judicial invalidation of an initiative. Initiative proponents filed an anti-SLAPP motion. The  
Superior Court granted the Motion and the City appealed. While the appeal was pending, the  
initiative proponent failed to complete the process for placing the initiative on the ballot,  
rendering the appeal moot. Nevertheless, the City asked the Court of Appeals to proceed with  
the hearing. In a largely uncontested hearing, the Riverside Court proceeded to swallow hook,

1 line, and sinker the comments made by the City regarding its intentions in filing the action,  
2 violating California statutes and judicial precedent. In fact though California anti-SLAPP  
3 statutes (CCP §425.16) require that the Court look solely to the operative Complaint to  
4 determine whether the Complaint arose out of Defendant's exercise of constitutionally  
5 protected activity, in a footnote the court notes that the record on appeal was devoid of this  
6 document "FN5. None of the documents are included in the record on appeal." According to  
7 Peter Eliasberg, Manheim Family Attorney for First Amendment Rights at the ACLU of  
8 Southern California, the Riverside case "runs counter to California's tradition of direct  
9 democracy." (<http://www.aclu-sc.org/releases/view102691>) Defendants do not believe that  
10 this Court, and the State of Nevada, want to proceed down the path taken by one rogue decision  
11 in California, which is not even consistent with California's statutes and decisions.<sup>5</sup>  
12

## 13 **VI. CONCLUSION**

14 If this Court were to accept Plaintiff's analysis of Nevada anti-SLAPP law, the citizens  
15 of Nevada who engage in good faith communications and the democratic process would be  
16 unjustly exposed to costly and protracted litigation. Plaintiff could claim that its lawsuit  
17 against citizens is "merely trying to have the Court determine Defendant's acts were legal."  
18 This would render Nevada's encouragement to participate in the democratic process nothing  
19 more than a trap for the unwary or at best a "right" available only to those who have the  
20 financial resources to participate and fend off frivolous lawsuits. In quoting a New York judge,  
21 Professor Pring writes (Plaintiff's Opposition, at page 944 of Exhibit "F"): "**SLAPP suits**  
22 **function by forcing the target into the judicial arena...short of a gun to the head, a greater**  
23 **threat to First Amendment expression can scarcely be imagined.**" (Emphasis) Certainly it is  
24 for these reasons that our Legislature did not exempt equitable actions from anti-SLAPP  
25

---

26  
27  
28 <sup>5</sup>Defendants wish to point out that the copy of the City of Riverside case, lodged with this Court as Plaintiff's exhibit "E" has underlines and delineations in it, obviously to persuade the Court to pay attention to specific aspects of the case. Those underlines and delineations are inappropriate.

1 protection and why California is replete with cases wherein equitable actions are subject to  
2 anti-SLAPP suits. (See Equilon Enterprises LLC v. Consumer Cause Inc. 29 C 4<sup>th</sup> 53 [2002]).

3 It is undisputed and obvious based on the Complaint filed herein, that Defendants were  
4 sued for their membership in the Initiative Committee, their circulation of the subject  
5 initiative, and because they “failed to draft the Appointment Initiative ...to a valid and legal  
6 standard”, all of which constitutes protected good faith communications (speech) under the  
7 purview of Nevada’s anti-SLAPP statutes. Based thereon the Defendants are clearly entitled  
8 to this Court’s granting of this Special Motion to Dismiss and an award of attorneys fees and  
9 costs in the amount of \$11783.55 as documented in the Declaration of L. G. Strickland Esq.  
10 attached hereto. If Plaintiff truly was interested in having the ordinance subject to judicial  
11 review, it could have proceeded under Chapter 43. As a municipality whose goal should be to  
12 uphold constitutional rights, this lawsuit is clearly a sad state of affairs.  
13

14  
15 Dated: January 14, 2011

By:



TRACY STRICKLAND ESQ.

Nevada Bar #8683

L. G. STRICKLAND ESQ.

Nevada Bar #6134

1022 Nevada Highway, #128

Boulder City, NV 89005

(702) 293-7658

*Attorneys for Defendants Walt Rapp; Daniel D. Jensen;  
James C. Douglass; Frank L. Fisher and Cynthia Harris*

**DECLARATION OF  
L. G. STRICKLAND ESQ.**

1 **DECLARATION OF L. G. STRICKLAND IN SUPPORT OF REPLY TO PLAINTIFF'S**  
2 **OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS PURSUANT TO**  
3 **NRS. 41.660; REQUEST FOR ATTORNEY FEES AND COSTS AND IN SUPPORT OF**  
4 **DEFENDANTS' SPECIAL MOTION TO DISMISS**

5 I, L. G. Strickland do hereby declare and state that if called as a witness in this matter I  
6 would and could competently testify as follows.

7 1. I am an attorney at law, duly licensed to practice law in all of the Courts of the State of  
8 California and State of Nevada. I was admitted to practice law in the State of California in 1983,  
9 and was admitted to practice law before the U.S. District Court, Central District of California in  
10 1984. I was admitted to practice law in the State of Nevada in 1996 and was also admitted to  
11 practice law before the Supreme Court, State of Nevada in 1996.

12 2. I have been assisting attorney Tracy Strickland in defense of the three (3) named  
13 Defendants in the instant litigation and was primarily involved in writing the legal briefs.

14 3. I charge two hundred and fifty dollars (\$250) an hour for my services.

15 4. I believe my hourly rate is reasonable, fair and in conformity with the legal community  
16 of Clark County.

17 5. In the Declaration submitted to this Court in support of the Special Motion to  
18 Dismiss, attorney hours spent in defense of the Defendants herein was set forth as 37.00 hours  
19 totaling to \$9250.00 in attorneys fees incurred. This amount factored in the amount of time  
20 expected to spent on travel to and from and appearance on the motion (based on prior experience  
21 of the anti-SLAPP hearing on A-10-621582-C and the fact that originally the date of this hearing  
22 corresponded with the date of another hearing resulting in only one travel to and from charge  
23 [that hearing date changed later on.]) The declaration did not include time spent preparing a  
24 reply to Plaintiff's opposition, any research needed to accomplish this task, and preparation for  
25 the hearing.

26 6. Upon conclusion of research regarding and preparation of this Reply, and preparation  
27 for the hearing, an additional 8.50 hours of attorney time has been incurred in this matter which  
28 results in additional attorney fees of \$2125.00. Consequently, assuming that my estimate of  
attorney time needed for travel to and from, and appearance on the motion is correct, there will  
be a total of 45.5 attorney hours spent in defense of the Defendants totaling to \$11375.00.

1 7. Based thereon, upon conclusion of the hearing, attorneys fees incurred in defense of  
2 this matter on behalf of five Defendants will total to \$11375.00.

3 8. In addition thereto, Defendants' request for the recovery of costs is hereby amended  
4 as follows:

5	<b>POSTAGE:</b>	<b>\$ 6.65<sup>1</sup></b>
6	<b>PHOTOCOPY CHARGES:</b>	<b>\$ 44.40</b>
7	<b>MILEAGE (@ .50 PER MILE)</b>	<b>\$ 30.00</b>
8	<b>FILING FEE</b>	<b>\$283.00</b>
	<b>RESEARCH FEE (LEXISNEXIS)</b>	<b>\$ 44.50<sup>2</sup></b>
	<b>TOTAL COSTS INCURRED:</b>	<b>\$408.55</b>

9 9. Costs are amended for the following reasons: Additional postage will be incurred for  
10 service of the Reply, additional copy costs were incurred for copying of the Reply, and the filing  
11 fee was incorrectly stated in the original declaration and has been amended accordingly.  
12 Therefore, upon conclusion of this hearing on the Special Motion to Dismiss, total costs incurred  
13 in defense of the Defendants equals \$408.55.

14 10. Consequently total costs and fees incurred in defense of this matter total to  
15 \$11783.55.

16 11. Attached hereto and identified in the Reply as Exhibit "1" is a true and correct copy  
17 of the Petition filed by the City of Mesquite pursuant to Judicial Confirmation Law (NRS  
18 Chapter 43). This is attached to be illustrative of the statutory procedure that was available to,  
19 and should have been used by, Boulder City.

20 12. Attached hereto and identified in the Reply as Exhibit "2" is a true and correct copy  
21 of an article written in the Boulder City Review January 13, 2011 which discusses the instant  
22 matter. City Attorney Dave Olsen is quoted in that article.

23 I declare under penalty of perjury the aforementioned is true and correct.

24 Executed this day 16<sup>th</sup> day of January, 2011, in Boulder City, Nevada.

25   
26 L. G. STRICKLAND ESQ.  
Declarant

27 <sup>1</sup>This postage cost is an estimate since, at the time of filing of the Motion, the Motion had not  
28 yet been served. A more definitive amount will be provided at the time of the hearing.

<sup>2</sup>This cost reflects ½ the charge; the other ½ has been billing to A-10-629988-C which is the  
other initiative lawsuit currently pending in Dept. 20.

# EXHIBIT 1

ORIGINAL

98

1 CODE: PTAT  
Terrance P. Marren, City Attorney  
2 BAR NUMBER: 1730  
10 East Mesquite Boulevard  
3 Mesquite, NV 89027  
(702) 346-5181

FILED

DEC 16 1 51 PM '02

*Shirley E. Rungius*  
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

A 460710

In the Matter of:

7 THE LEGAL VALIDITY OR INVALIDITY )  
8 OF TWO INITIATIVE ORDINANCES )  
9 RECENTLY ADOPTED BY THE VOTERS )  
10 OF THE CITY OF MESQUITE, NEVADA )  
REQUIRING THAT (1) ALL PUBLIC LAND )  
11 SALES BY THE CITY OF MESQUITE BE )  
CONDUCTED ONLY BY EITHER SEALED )  
12 BID OR PUBLIC AUCTION, AND (2) )  
REQUIRING AN ELECTED OFFICIAL )  
13 WHO FILES AS A CANDIDATE FOR OTHER )  
CITY ELECTIVE OFFICE MID-TERM MUST )  
14 FILE A DECLARATION OF RESIGNATION )  
TEN CALENDAR DAYS PRIOR TO THE )  
OPENING OF FILING. )

CASE NO. \_\_\_\_\_

DEPT. NO. XIII

DOCKET: \_\_\_\_\_

15 POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR JUDICIAL  
16 CONFIRMATION OR, IN THE ALTERNATIVE,  
17 FOR DECLARATORY JUDGMENT

18 I.

19 INTRODUCTION

20 The City of Mesquite, Nevada ("the City") is a political subdivision and Municipal  
21 Corporation of the State of Nevada duly organized under Chapter 266 of Nevada Revised Statutes.  
22 Recently, the voters of the City of Mesquite adopted two initiative ordinances. The City has  
23 herewith filed a PETITION FOR JUDICIAL CONFIRMATION OR, IN THE ALTERNATIVE,  
24 FOR DECLARATORY JUDGMENT contemporaneous with the filing of these POINTS AND  
25 AUTHORITIES. The purpose of the Petition is to determine the validity or invalidity of the two  
26 initiative ordinances.

27 ////

28 ////

COUNTY CLERK

DEC 16 2002

# EXHIBIT 2

# City splits lawsuits on passed questions

## Motion hearing next week

by Jack Johnson  
Boulder City Review

The defendants in the city's ballot initiative lawsuits filed a motion to have the city's two most recent cases dismissed, and to have about \$20,000 in attorneys' fees paid.

The motions, filed Dec. 20, are scheduled to be heard Jan. 20 and 21 in Clark County District Court by separate judges.

The city's initial complaints, which were served in December, challenge the legality of Ballot Question 9 which limits the city's ability to incur debt, and Ballot Question 10 which requires term limits for members of the city's advisory committees, commissions and boards.

According to the City Attorney Dave Olsen, the suits allege the questions overstep the administrative authority of the city. They also allege the paperwork required for filing the initiatives was incorrectly filled out.

The eight residents who circulated petitions in order to get the questions on the ballot are named as defendants in the suits, but the city has maintained that the suits are nothing more than a means to have the legality of the initiatives examined.

"The only reason the defendants are in there is because we don't have any other choice," City Attorney Dave Olsen said.

Olsen said the ballot questions are contained in two separate lawsuits to make the issues at hand as understandable as possible.



PHOTO BY JACK JOHNSON

City Attorney Dave Olsen listens as City Manager Vicki Moyes discusses an issue in August. Olsen said the city is separating its initiative lawsuits to keep the issues clear in the judges' minds.

"They are very similar, but we're trying to keep these issues clear in the judge's mind by not combining everything all together in the same case," he said.

City Councilwoman Linda Strickland who, with her husband Tracy Strickland, is representing six of the eight residents named in the lawsuits, said she believes the city filed individual suits to make things more difficult for the defendants.

"I'm sure (the city) must have a strategy behind it. I think this whole thing is aimed at ensuring people no longer sponsor initiatives in Boulder City," she said.

These are not the first lawsuits the city has filed questioning the legality of the recent ballot questions. Last July, Olsen filed a lawsuit against Questions 9 and 10, as well as Question 11,

an initiative which dealt with limiting the city's golf course ownership, circulated by the same group.

The City Council, however, later requested that any legal action pertaining to 9 and 10 be dropped until after the November election, waiting to see if voters approved the initiative.

Olsen, however, was allowed to proceed with a suit against the golf course initiative, but in September District Court Judge Allan Earl allowed it to stay on the ballot because he did not wish to rule on its legality prior to the election.

Ballot Question 11 was not approved by voters in November, while questions 9 and 10 were.

After Earl ruled favorably for the defendants in September, they filed a motion for a case

See LAWSUITS 13A

## Ballot Questions

### BALLOT QUESTION 9 Limit on Debt Obligation

Shall Boulder City Code be amended to provide that the City and its agencies and enterprises shall not incur any new debt obligations of \$1 million or more, as defined under NRS 350.0045 to NRS 350.0075 inclusive, without the approval of the electors of Boulder City in a general or special election?

**YES 57.7 %**

### BALLOT QUESTION 10 Term Limits for Committee and Commission Members

Shall Boulder City Code be amended so that maximum amount of service of any person appointed to any particular city committee, board or commission shall be 12 years for that committee, board, or commission?

**YES 59.6 %**

## INDEX

- Public Safety ..... 2A
- Opinion ..... 4A
- Community ..... 7A
- Sports ..... 10A



## ► LAWSUIT: Strickland: City should ask for judicial examination

CONTINUED FROM PAGE 1A

dismissal and payment of attorneys' fees. The main argument for dismissal of that case, as well as the two recent cases, is that the city's suits are what is called SLAPP lawsuits, or strategic lawsuit against public participation, that were filed to stop the defendants from exercising their constitutional right to petition their government.

But in October, Earl did not grant their motion. According to the judge, the city was not suing the defendants for damages, and Nevada SLAPP law protects against "civil liability," language the judge interpreted to mean damages. The judge, however, did tell the Stricklands they had a good case, and recommended a state Supreme Court appeal.

The opening briefs for the Supreme Court case related to the golf course initiative are due in March, Linda Strickland said.

Though all three lawsuits are similar, Linda Strickland said there is a new twist in the defense of Ballot Questions 9 and 10 that did not exist for Ballot Question 11.

Now that Ballot Questions 9 and 10 have been approved by voters and have become law, there is a state statute, NRS 43.100, which allows for a municipality to

request a judicial examination to see if the law is, in fact, legal, she said. By such a request, the city wouldn't have to file a lawsuit where the residents are named and have to incur legal fees.

"If people want to intervene and argue the legality of it, they have the ability to do so, but they're not thrust into a battle," she said. "(The city's attorneys) are going about it in a way that completely destroys the democratic process in Boulder City," Linda Strickland said.

Olsen said he's not familiar with the statute. He did say, however, that there is also a benefit for the city with multiple suits.

"The beauty of this is that if we win the initiative on the debt-limit one in one judge's court, and we win the initiative on the term limits on the volunteers in another judge's court, clearly it would have demonstrated that the District Court of Southern Nevada is unanimous on these kinds of (legislative vs. administrative authority) issues," he said.

But, of course, the downside of multiple suits is more time in court and more legal costs. Olsen said the city has spent over \$70,000 on all three lawsuits, and anticipates spending more.

The defendants' costs are currently estimated to be about \$40,000.

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**CERTIFICATE OF MAILING**

(THE CITY OF BOULDER CITY, NEVADA v. DANIEL JENSEN et. al.)

I hereby certify that on the 16<sup>th</sup> day of January, 2011, while located in the City of Boulder City, Nevada, I mailed the following document entitled:

**REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PURSUANT TO NRS 41.660 [ANTI-SLAPP] AND REQUEST FOR RECOVERY OF ATTORNEYS FEES AND COSTS [NRS 41.670]; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF L. G. STRICKLAND IN SUPPORT THEREOF**

in a sealed envelope, to the following counsel of record, said envelopes this date deposited in a mailbox of the United States Postal Service with postage fully prepaid thereon :

David Olsen Esq., City Attorney  
CITY OF BOULDER CITY  
401 California Street  
Boulder City, Nevada 89005

Paul E. Larsen Esq.  
Jennifer J. Dimarzio Esq.  
LIONEL SAWYER & COLLINS  
300 South Fourth Street, 17<sup>th</sup> Floor  
Las Vegas, Nevada 89101

  
\_\_\_\_\_  
LINDA STRICKLAND  
Declarant