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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DEL WEBB COMMUNITIES, INC.,

Plaintiff,

v.

CHARLES LESLIE PARTINGTON, d/b/a M.C. MOJAVE CONSTRUCTION, JOHN WILSON, individually, and DOE INDIVIDUALS I-X, inclusive; and ROE ENTITIES I-X, inclusive,

Defendants.

CASE NO. 2:08-cv-00571-RCJ-GWF

MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE SUMMARY ADJUDICATION OF ISSUES; DECLARATION OF MICHAEL J. NUNEZ

[F.R.C.P. 56]

COME NOW defendants CHARLES LESLIE PARTINGTON, dba MC MOJAVE CONSTRUCTION and JOHN WILSON (collectively referred to as "MOJAVE") and hereby move this honorable Court for an order of summary judgment pursuant to Federal Rule of Civil Procedure 56. In the event summary judgment cannot be granted, summary adjudication of plaintiff's causes of action for: 1) Champerty and Maintenance; 2) Violation of Nevada's Deceptive Trade Practices; 3) Violation of Lanham Act under 15 U.S.C. §1125(a)(1); 4) Interference; 5) Temporary Restraining Order / Preliminary injunction; and 6) Recovery of Attorney's Fees under Sandy Valley is requested.

This Motion will be based on this Notice of Motion, the Memorandum of Points and Authorities filed herewith, the pleadings and papers filed herein, and such other and further matters as may be brought to the attention of this court in connection with this motion.

DATED: February 11, 2009

MURCHISON & CUMMING, LLP

By _____

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This case arises out of residential building inspections. As part of a business plan, a company, defendant MC Mojave, provided free home inspections to homeowners. In this case the inspections were provided to homeowners in a development called Sun City Anthem, in Henderson which was built by plaintiff Del Webb. The purpose of the inspection was to check for building code violations. (There is no claim in this case that identified violations were false or fabricated; only that they should not have been disclosed or discovered in this manner.) The homeowners were given options regarding how to proceed with the inspection reports that MC Mojave provided. One option was to obtain legal counsel and/or file a Chapter 40 notice against the builder requesting repair. To the extent the homeowners were successful in obtaining recovery from the builder MC Mojave would be paid for its inspection services from proceeds obtained from the builder.

Del Webb claims this conduct was wrong for a number of reasons.

A. Theories of Liability

The legal theories raised by this case are novel. The novelty manifests in the anchor and medieval claim of Champerty and Maintenance. There are fundamental reasons why this claim fails. Mainly, it is not recognized in the offensive[1] manner in which it is sought to be applied by the law of Nevada, nor are there allegations of purchasing or financing of a lawsuit (the ancient context in which this claim arose.) In fact, no lawsuit ever resulted from alleged conduct by the defendants. This court has no interest in creating new state common law where the Nevada state courts have not done so. (The ability of the federal courts to create federal common law and displace state created rules is severely limited. The Supreme Court has said that "cases in which judicial creation of a special federal rule

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[1] "Offensive" in the sense that it is brought as a claim for affirmative relief.

would be justified ... are ... few and restricted." O'Melveny & Myers v. FDIC, 512 U.S. 79, 87; 114 S.Ct. 2048 (1994).) Moreover, and as set forth in the expert report of Robert Kehr in support of this motion, Rules of Professional Conduct and other state statutes have by and large replaced old doctrines of Champerty and Maintenance where the allegations are, as here, improper initiation of legal proceedings.

The federal claim which brings this matter to the Federal Court is alleged violation of the Lanham Act, which typically involves a claim of trade mark infringement. In this case the federal claim is utilized in the context of unfair or deceptive advertising, i.e., inappropriate commercial speech. Specifically, the speech is a placard or flier that was distributed to homeowners to provide them information about builder inspections that occurred after Chapter 40 claims were initiated. Thus, the subject speech is print material and can be evaluated by the court as a matter of law. (In fact, in ruling on this motion the placard can only be evaluated as a matter of law as plaintiff, in opposing a request to take homeowner depositions, has taken the position that the impact of the placard on the readers, i.e., the homeowners, is irrelevant.)[2] Additionally, deposition testimony is submitted in support of this motion, which provide the context and timing of the placement of the placards which is important for resolution of this claim. Separately, as will be developed further, there is also a free speech issue implicated which provides an overarching ground for summary judgment of all claims and precludes the granting of injunctive relief. Lastly, there are no allegations or proof that the conduct of the defendants affected interstate commerce, i.e., and element of a claim under the Lanham Act.

A state claim for violation of Nevada's Deceptive Trade Practices Act deals only with whether defendants were properly licensed to conduct the subject home inspections. For reasons set forth below, plaintiff's suggested licensing requirement is unsustainable.

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[2] See, Document 38, plaintiff's opposition to motion to extend discovery cut-off, at pg. 3, lns. 4-5; pg. 3, lns. 13-18; pg. 10, lns. 11-15 & pg. 10, ln. 24 – pg. 11, ln. 2.

The remaining statutory and common law claims are factually related to the Champerty, Lanham Act and Deceptive Trade Practices ("DTP") claims. (Certain of plaintiff's claims are not independent claims for relief inasmuch as they are prayers for damages.) To the extent the Champerty, Lanham and DTP claims fail, the remaining claims should also fail.

B. Summary of Factual Basis of Claims

Factually, this case involves residential home building and avenues presented and/or available to homeowners to obtain information on building code compliance or "defects" to their homes and options for repairs of same. The plaintiff DEL WEBB is a very large and resourceful home builder in Southern Nevada with decades of experience in building tens of thousands, if not hundreds of thousands of homes in Southern Nevada. By various claims and legal theories, plaintiff claims that the activities and services of the defendants in this action in providing information to the owners about their homes was inappropriate and provides grounds for imposing liability on the defendants. The primary interest which DEL WEBB seeks to protect in this case is its ability to deal with the homeowners directly and allow (or limit) the homeowners in utilizing the home warranties which exists on the subject properties rather than having free access to other sources of information and the court system. In fact, Del Webb's own PMK on the subject stated as much:

> "The purpose of this statement [a letter to homeowners concerning MC Mojave's activities] is that if you have an issue with your home, call us." (**Exhibit I**, deposition of Del Webb's home warranty PMK at 132:18-21 & Exhibit CC to this deposition.)

The defendants are (were) a small two man operation.[3] Defendant CHARLES PARTINGTON was the owner of MC Mojave and held a general contractor's license. Defendant JOHN WILSON has a background as a roofer and with various building subcontractor's unions. (**Exhibit E**, excerpts of the deposition of J. Wilson, dated 12/1/08 and 1/6/09, at 10:18-13:16:9.) He had worked several years in the home building inspection field in Nevada before joining with CHARLES PARTINGTON to establish the home inspection division of MC Mojave. (**Exhibit E** at 19:3-10; 21:5-23:11 & 24:10-26:14.) (Interestingly, the home inspection field, as that term relates to conduct described in this lawsuit, is not something new. **Exhibit E** at 27:7-23 & 30:5-31:9 In fact JOHN WILSON has been recognized and compensated by mediators and builders, including DEL WEBB, as an expert in the field in other Chapter 40 mediations. **Exhibit E** at 58:16-59:6 & 61:8-23. Focus has only recently been made on this field when the activities ventured into homes constructed by DEL WEBB in the Sun City Anthem project.)

At Sun City Anthem, as with all locations, MOJAVE sought, first and foremost, to provide homeowners with information about their homes. The information came in the form of a free home inspection to determine and identify any problems with the homes or building code violations. (Importantly, there is no claim in this case that the home inspection reports which were generated were inaccurate or that code violations were fabricated or nonexistent. In fact, the costs associated with DEL WEBB being obligated to respond and repair the defects which have been uncovered by the subject home inspection reports are the damages sought in this case.) MOJAVE's incentive in providing these services for free was that in addition to being provided with the home inspection reports, the home owners would be provided with additional information concerning their rights and remedies under Chapter 40 of the Nevada Revised Statute, i.e., the right to repair laws. In the event the homeowners utilized the reports in subsequent Chapter 40 proceedings, a contractual

[3] Because of the initiation of this lawsuit, JOHN WILSON has moved on and is no longer performing home inspection work with MC Mojave. MC Mojave is also no longer performing any work in the home inspection field.

arrangement would permit MOJAVE to recover a fixed fee out of the recovery obtained by the homeowner from the builder. This is the crux of plaintiff's claim for Champerty and Maintenance.

The deceptive advertising aspect of plaintiff's claim deals with the manner in which MOJAVE held themselves out and promoted their services. **First**, plaintiff assets that only "certified home inspectors" as that term is defined under state statute could undertake the home inspections that MOJAVE performed. By undisputed expert testimony (by one of only two "master certified home inspectors" in Clark County), and by evaluation of the applicable statutes themselves and the related Administrative Code, it is undisputed that the services of a "certified home inspector" only relates to real estate transactions and the familiar home inspection reports that accompany any private residential sale. ***The type of inspections involved in this case, i.e., a builder's inspection and one geared towards identifying building code issues and code compliance does not require certification or licensing under NRS 645 and is properly undertaken by persons in the building industry and persons with knowledge and experience in identifying such issues***.

The **second** aspect of the deceptive advertising claim deals with placards that were distributed in DEL WEBB properties. The claim there is that the placards mislead homeowners into believing that the inspections were being undertaken or authorized by DEL WEBB itself. It is important to understand when these placards were distributed. ***Specifically, they were distributed prior to DEL WEBB coming on to the premises to conduct their inspections***. It is inaccurate and misleading for DEL WEBB to assert that the placards were distributed during MOJAVE's initial inspections. Additionally, these placards can be evaluated as a matter of law in ruling on the claim that they are deceptive.

II.

STATEMENT OF UNDISPUTED FACTS

A. Operative Complaint and Facts in Support of Motion

Plaintiff's complaint, filed May 6, 2008, alleges five causes of action for 1) Champerty and Maintenance; 2) Violation of Nevada's Deceptive Trade Practices; 3) Violation of

Lanham Act under 15 U.S.C. §1125(a)(1); 4) Interference; 5) Temporary Restraining Order / Preliminary injunction; and 6) Recovery of Attorney's Fees under Sandy Valley. (See, Complaint, attached hereto as **Exhibit A**.)

In identifying the parties to this action, plaintiff alleges that defendant CHARLES PARTINGTON is the holder of B-2 contractor's license, but that defendants CHARLES PARTINGTON and JOHN WILSON are not licensed "to examine any component of a structure or to communicate an inspection report under NRS 645D.080," but held themselves out as licensed for that purpose. (**Exhibit A** at ¶6, 7 & 9.) NRS 645D.080 states:

> **"Inspector" defined.** "Inspector" means a person who examines any component of a structure and prepares or communicates an inspection report. The term does not include any person who merely relays an inspection report on behalf of the person who prepares it.

(The context and purpose of this statutory scheme is important for ruling on this motion. The expert witness reports of Glenn Curtis and Richard Franklin are offered for this purpose.)

During all applicable times, MC Mojave operated under Charles Partington's B-2 general contractor's license. (**Exhibit D**, excerpts of the deposition of C. Partington, dated 11/18/08, at 10:2-11:3; 12:3-13 & 31:17-32:5.)

Plaintiff DEL WEBB is identified as the builder, between the dates of 1998 and the present, of an age restricted community known as Sun City Anthem in Henderson. (**Exhibit A** at ¶13.) Plaintiff states that it has warranty obligations to homeowners at Sun City. (**Exhibit A** at ¶14.)

The conduct which purportedly imposes liability in this case is straightforward. Specifically, plaintiff alleges that MOJAVE solicited various homeowners in Sun City to accept free home inspections. The purpose of the inspections was to inspect for building code violations. (**Exhibit D** at 16:22-17:10 & 18:16-19:3.) Following the inspection, either an abbreviated or a comprehensive inspection report was provided to the homeowner

(without cost) along with other information informing the homeowner of their options for pursuing remedy of the defects. (**Exhibit D** at 52:2-53:4; 64:6-13 and Exhibit 12 to this deposition; **Exhibit E** at 68:23-69:3; 71:1-5; 89:6-91:9; 97:6-11; 115:4-23 and Exhibits 8, 9, 10 & 11 to this deposition; **Exhibit F** at 67:1-13.) The options available to the homeowners were to: do nothing; pursue redress directly with the builder (through a warranty claim or otherwise), file a Chapter 40 notice; or retain legal counsel. (**Exhibit D** at 64:14-65:3; **Exhibit E** at 91:13-25 & 116:10-118:23; **Exhibit F** at 44:5-21; 48:6-16; 49:6-25 & 97:23-98:9; **Exhibit G** at 91:13-22.)[4] MOJAVE would only be reimbursed a fixed fee "as a result of the initiation of a subsequent demand made under NRS Chapter 40." (**Exhibit A** at ¶15; **Exhibit D** at 63:14-17; **Exhibit E** at 95:8-21; 189:5-8 & 346:11-347:1; **Exhibit F** at 89:25-90:5.) While it is not alleged that any lawsuits have been initiated because of the activities of defendants (and none are known to have), plaintiff states that "a demand made under Chapter 40 is the equivalent of a civil action." (**Exhibit A** at ¶15.)

John Wilson was an employee of MC Mojave and operated the inspection division. (**Exhibit D** at 21:10-14; 24:23-25 & 32:19-21.) Mr. Wilson has a background as a roofing contractor and experience, prior to joining MC Mojave, in inspecting homes for building code violations. (**Exhibit D** at 33:10-19; **Exhibit E** at 19:3-10; 21:5-23:11 & 24:10-26:14.) Specifically, he had been operating a substantially similar home inspection division at a company called Construction Design Specialist ("CDS") prior to creating the MC Mojave Inspection Division. (**Exhibit E** at 36:7-15; 37:24-38:2 & 41:11-17.) The inspection division of MC Mojave only operated in Nevada. (**Exhibit D** at 59:10-24 & 140:17-19; **Exhibit E** at 235:10-18; 244:6-22 and Exhibit 13 to this deposition; **Exhibit G** at 32:22-33:3.) During the limited time that it operated, MC Mojave was never able to make a profit. (**Exhibit D** at 96:10-17; 97:8-22 and Exhibit 23 to this deposition.)

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[4] The fact that these options were provided to the homeowners cannot be disputed by plaintiff. All personnel from Mojave have confirmed this and Del Webb has filed an opposition to a request to extend and enlarge discovery to depose the homeowners themselves to confirm that these options were explained to them. (Document 38, on file herein.)

Mark Diaz and Vince Farruggia were employees of MOJAVE that performed the actual inspections and met with the homeowners. These workers also had a background in construction and received training from MOJAVE on how to perform the building inspections. (**Exhibit F,** M. Diaz deposition at 8:17-9:17; 9:22-10:16; 11:3-14:4; 42:6-14 & 43:3-11; **Exhibit G**, V. Farruggia deposition at 8:18-10:2; 11:23-12:3 & 13:3-21.) Mark Diaz was the person who, the vast majority of the time, initially met with the homeowners after they called. (**Exhibit D** at 81:16-24; **Exhibit F** at 22:21-25 & 44:1-4.)

A writing is alleged to have accompanied MOJAVE's initial solicitations which is attached to the complaint as Exhibit 1. This writing informs the homeowners of the right to repair laws codified in NRS 40.655; informs the homeowners of subsequent inspection services that MOJAVE could provide in the event builder repair process is initiated; and informs the homeowners of names of law firms that could assist the homeowners. (**Exhibit A** at ¶¶17-19 & Exhibit 1 to the complaint.)

The fee agreement between MOJAVE and the homeowner is attached to the complaint as Exhibit 2. This agreement provides a mechanism for the builder or its attorneys to be provided with invoices for MOJAVE's services and defines that MOJAVE will only be paid if recovery is obtained from the builder. (**Exhibit A** at ¶20 & Exhibit 2 to the complaint.) If recovery was obtained from the builder, MOJAVE would be paid a fixed fee for its services which ranged between $1,800.00 per home to $2,500.00 per home. (**Exhibit E** at 53:24-55:23; 62:8-16; 346:11-347:1 and Exhibits 14, 15 & 16 to this deposition.)

Lastly, once an inspection was initiated or agreed to, plaintiff alleges that defendants placed a placard on or around the subject properties which is attached as Exhibit 3 to the complaint. Plaintiff alleges that the language of the placard was misleading to the homeowners inasmuch as it implied to the homeowners that the inspections were being conducted by MOJAVE and DEL WEBB. (**Exhibit A** at ¶22 and Exhibit 3 to the complaint.) Plaintiff identifies no homeowners that were actually misled by this placard, nor do they account for the fact that these placards were utilized only after Chapter 40 claims were initiated to provide advanced warning that DEL WEBB home inspectors would be on the

premises investigating claims. (**Exhibit F** at 25:22-28:22; 33:3-18 & Exhibit 6 to this deposition; **Exhibit G** at 44:22-45:21; 49:6-10; 51:6-52:6 & 63:20-64:4.) Thus, the placard meant exactly what it said.

B. Allegations in support of claim for Champerty and Maintenance

Plaintiff's complaint acknowledges that it is the homeowner's action of initiating a Chapter 40 demand that makes possible the recovery of MOJAVE fees in mediation of the demand or subsequent suit. (Defendants are aware of no lawsuits that have been initiated utilizing MOJAVE inspection reports. Thus, this case only deals with claims resolved at mediation.) Plaintiff alleges that MOJAVE was otherwise without an interest in the claim. (**Exhibit A** at ¶27.)

The complaint also alleges that the agreement between MOJAVE and the homeowners is illusory except for the recovery the homeowner makes through an action against DEL WEBB. (**Exhibit A** at ¶28.) Importantly, there are no allegations that MOJAVE pays or otherwise compensates the homeowners or attorneys for initiation of Chapter 40 claims, only that MOJAVE takes an assignment on potential recovery for inspection services it rendered initially free of charge to the homeowner. (**Exhibit A** at ¶¶28 & 29.) To the contrary, the complaint acknowledges that MOJAVE incurs its own fees and costs, contingent on recovery by the homeowner from the builder at a later date. (**Exhibit A** at ¶30.) In this sense, the interest is similar to a lien a medical provider would take on a personal injury claim.

These actions are alleged to constitute "actionable" Champerty and Maintenance, entitling plaintiff to the recovery of attorney fees and punitive damages. (**Exhibit A** at ¶¶35, 36 & 37.)

C. Allegations is support of claim for Violation of Nevada's Deceptive Trade Practices Act

This is an extremely defined and limited claim for relief. It alleges that CHARLES PARTINGTON and JOHN WILSON were not licensed to prepare or communicate an inspection report under NRS 645D.080. (**Exhibit A** at ¶¶39 & 40.) The claim also alleges

that CHARLES PARTINGTON and JOHN WILSON engaged in a deceptive trade practice by conducting business without the required state licenses required by NRS 598.0923. (**Exhibit A** at ¶41.) This statute states in part:

> **NRS 598.0923 "Deceptive trade practice" defined.** A person engages in a "deceptive trade practice" when in the course of his business or occupation he knowingly:
>
> 1. Conducts the business or occupation without all required state, county or city licenses.

Clearly, to the extent plaintiff fails to establish that a license was required under NRS 645D.080 for the subject work, this claim fails.

D. Allegations in support of claim for violation of Lanham Act

This claim alleges that the representations of MOJAVE were intended to convince homeowners to call MOJAVE because the builder (inferring DEL WEBB) was encouraging them to call and arrange an inspection. (**Exhibit A** at ¶46.) The complaint makes reference to "a placard" which is previously identified as Exhibit 3 to plaintiffs' compliant. (**Exhibit A** at ¶47.) Plaintiff alleges it is the representations themselves which are "commerce" made in connection with MOJAVE's inspection services and are made in the context of commercial advertising or commercial promotion. (**Exhibit A** at ¶¶48 & 49.) The representations contained in Exhibit 3 to plaintiff's complaint are alleged to have competitively injured DEL WEBB and are alleged likely to cause confusion, mistake or to deceive the reader. (**Exhibit A** at ¶¶50 & 51.)

Summary adjudication is uniquely appropriate in this case as plaintiff alleges that the representation (Exhibit 3) on its face has "a tendency to deceive by way of a false description of a connection or in affiliation with Del Webb." (**Exhibit A** at ¶52.) Plaintiff has opposed a request to depose homeowners to determine that actual effect that the placard had on them. (See, Document 38, on file herein.) Thus, the Lanham Act must be evaluated only on the fact of Exhibit 3 to the complaint.

Lastly, this claim is limited to distribution of the specific placard (Exhibit 3 to the complaint.) While plaintiff alleges that the majority of Chapter 40 demands it receives from Sun City Anthem are based on inspection by MOJAVE, the complaint does not allege that material in the inspection report is false or inaccurate. (**Exhibit A** at ¶53.) The resulting damages are alleged to be loss of good will and competitive injury. (**Exhibit A** at ¶54.)

E. Allegations in support of claim for interference

This is the narrowest of plaintiff's claim for relief. It deals with only three (3) homeowners out of the approximate 600 homes that were inspected by MC Mojave. (**Exhibit A** at ¶62.) The claim alleges that MC Mojave prepared inspection reports for these homeowners which identified defects which fell within the scope of a home warranty plan which DEL WEBB offered to residents of Sun City Anthem. (**Exhibit A** at ¶63-65.) The complaint then alleges that Mojave spoke to these homeowners and "***suggested*** that they procure legal counsel and referred them to counsel." (**Exhibit A** at ¶66.) The claim further alleges that during time periods ranging from "one month to six months" these homeowners had no communications directly with Del Webb or under the Del Webb home warranty as they had been "persuaded to pursue their claims by way of a Chapter 40 demand." (**Exhibit A** at ¶67.) Notably absent, is any allegation that the homeowners were directed by MOJAVE to refrain from contacting DEL WEBB or that the warranty contract was breached. Moreover, discovery has revealed that DEL WEBB made the decision ***on its own*** not to communicate with the three homeowners either on alleged direction from attorneys for the homeowners or as a policy determination. (**Exhibit I,** deposition of Wayne Newmiller at 52:18-25; 53:1-18; 58:16-18; 79:7-19; 87:22-88:6 & 108:6-110:15.) These actions are not attributable to MOJAVE. Also telling is the fact that the repair demands, seemingly resulting from the inspection services of MOJAVE, were claims "that fell within the parameters of Del Webb Home Warranty" (**Exhibit A** at ¶68), i.e., the defects uncovered were not false or fabricated and were defects DEL WEBB admits it had an obligation to repair under its warranty.

/ / /

The above described conduct of MOJAVE is alleged to have disrupted DEL WEBB's warranty relationship with three homeowners. (**Exhibit A** at ¶70.) Moreover, the act of providing a free home inspection to the homeowners and suggesting that they procure legal counsel is described as entitling plaintiff to punitive damages. (**Exhibit A** at ¶73.)

F. Allegations in support of plaintiff's claim for an Injunction

The fifth claim for relief is a prayer for remedy. Plaintiff seeks to prohibit further written or verbal representations that have a tendency to deceive, including further dissemination of Exhibit 3 to the complaint. (**Exhibit A** at ¶76.) This is a broad request and inherently infringes upon free speech issues.

Plaintiff also seeks an injunction preventing defendants from holding themselves out as licensed to perform home inspections. (**Exhibit A** at ¶77.) A predicate of this claim is proof that certification under NRS 645D.080 is required for the activities of the defendants.

The last grounds for injunction are to stop defendants from purportedly interfering with warranty agreements and committing Champerty and Maintenance. (**Exhibit A** at ¶¶78 & 79.) Obviously, to the extent those affirmative claims for relief fail as a matter of law, there is no basis for granting injunctive relief.

Lastly, there is no proof that any continuing activity is presently enjoinable.

G. Allegations in support of plaintiff's claim for attorney fees

Plaintiff claims entitlement to attorney fees by alleging that the bad faith conduct of MOJAVE necessitated the expenditure of attorney fees. (**Exhibit A** at ¶82.) Special damages are sought consistent with Sandy Valley Associates v. Sky Ranch Estates Owners Association, 117 Nev. 948, 956; 35 P.3d 964, 969 (2001). (**Exhibit A** at ¶83.)

Again, as with the injunction claim for relief, this claim is contingent on proof of other claims for relief, i.e., that the conduct of defendants was actionable or otherwise improper. Recovery of attorney fees under the "tort of another doctrine" or as special damages arising from a breach of contract claim is uniquely difficult to prove and obtain and is unavailable under the facts of this case.

III.

THERE ARE NO TRIABLE ISSUES OF FACT ON PLAINTIFF'S CLAIM FOR CHAMPERTY AND MAINTENANCE AND/OR THIS CLAIM FAILS AS A MATTER OF LAW

This is an old common law cause of action but is basically the intermeddling of an uninterested party to encourage a lawsuit or "buying into someone else's lawsuit." (Since there is no lawsuit in this case, the claim is immediately suspect.) The basis of this claim is that MC Mojave encouraged or created frivolous Chapter 40 claims for the express purpose of profiting. As set forth in the expert report of Robert Kehr (attached hereto as **Exhibit B**) this claim does not exists as brought by plaintiff and/or there is no basis for asserting this claim under the facts of this case.

A. Champerty and Maintenance Claims Have Been Largely Subsumed by Rules of Professional Conduct and Modern Statutes

Perhaps the best explanation for why claims for Champerty and Maintenance are rare (only 12 reported decisions exist in Nevada – **Exhibit B** at pg.11, lns. 18-21) is because redress for the claims of unnecessary litigation have been replaced by rules of professional conduct and state statutes. Naturally since lawyers are typically involved in claims of unnecessary litigation, rules of professional conduct are the natural and first source for regulating or deterring such conduct. In Nevada, Rules of Professional Conduct 1.7, 1.8, 3.1 and 3.2 are a few of the rules that would now cover the old common law crime of Champerty. (**Exhibit B** at p.5, lns. 1-21.)

Outside of rules of professional conduct for attorney misconduct, individual states and federal law have codified prior common law claims for Champerty and Maintenance. Notably, none of the states that have acted to codify the common law claims have adopted the definition that plaintiff seeks to advance in this case. (**Exhibit B** at p.5, ln. 21 – p.6, ln. 14.) Nevada has no state statute for Champerty and Maintenance.

What remains of the claims must therefore find support in the common law of Nevada.

B. Common Law Application of the Doctrine

As noted in the declaration of R. Kehr, a problem with defining actionable Champerty and Maintenance as it exists under the common law, is that the common law is widely varied from state to state. Explanation for this is because the doctrines of Champerty and Maintenance are of such ancient lineage that their evolution has varied significantly in the jurisdictions where still recognized and based on changing social and economic conditions. (Thus, plaintiff's expert's reliance of decisions of other jurisdictions is not particularly helpful or reliable in this case.) The only thing that is certain is that none of the states in the United States adhere to the rigor of the original Champerty and Maintenance doctrines. (**Exhibit B** at p.6, ln. 24 – p.7, ln. 23.) Thus, plaintiff's reliance on English common law as a basis for the instant complaint is also not helpful or reliable and reveals the fragility of the claim. (**Exhibit A** at ¶25.) It is elementary that old English common law concepts are not always directly adopted, applicable or adhered to in modern day Nevada. (**Exhibit B** at p.7, ln. 24 – p.9, ln. 4.)

A larger problem for plaintiff is the fact that the common law concepts of Champerty and Maintenance are largely only recognized as a defense to a contract claim and provide no basis for affirmative relief as asserted in this case. (**Exhibit B** at p.9, ln. 5 – p.11, ln. 10.) The undisputed facts and allegations of this complaint are that plaintiff is asserting an affirmative claim for relief. As a matter of law, then, unless plaintiff can show authority for maintaining an affirmative claim for relief under Nevada law, the case should be dismissed. This cannot be done.

Under a strictly Nevada case law analysis, which is the correct analysis to apply, the claim for Champerty and Maintenance is completely unsustainable. As set forth in the declaration of R. Kehr, there is simply no authority in the state of Nevada which would permit Champerty and Maintenance as an affirmative claim for relief. (**Exhibit B** at p.11 ln. 14 – p.15, ln. 11.)

C. The Conduct of MC Mojave Amounts to Nothing More than Commercial Speech Which is Protected under the U.S. Constitution

The Supreme Court has held that commercial speech, usually defined as speech that does no more than propose a commercial transaction, is protected by the First Amendment. Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762; 96 S.Ct. 1817 (1976). Equally, the First Amendment protects the right of the citizenry to "receive information and ideas," and freedom of speech "necessarily protects the right to receive" information and ideas. Kleindienst v. Mandel, 408 U.S. 753, 762-763; 92 S.Ct. 2576 (1972). In this case, the crux of MC Mojave's activity involved providing information to homeowners in the form of a home inspection report. The decision on what to do with that information was left to the homeowner and there is no allegation or proof that the homeowners were compelled to litigate or that MC Mojave financed a lawsuit or impermissibly shared in its proceeds. For reasons set forth above, this conduct does not amount to Champerty and Maintenance. But more important, this amounts to protected activity which provides a basis for dismissing all causes of action against MC Mojave.

The case of New.Net, Inc. v. Lavasoft, 356 F.Supp.2d 1071 (C.D.Cal.,2003) provides and analogous set of facts and support for granting the instant motion for summary judgment on all counts on free speech grounds. While arising in a very different context (the internet and a dispute between computer software companies) and dealing with the issue of whether granting a request for a preliminary injunction would amount to a prior restraint, the case is on point and supports granting summary judgment.

The dispute in New.Net was between Plaintiff New.net, Inc., a company that downloads software to individual computers through the internet, often without the knowledge or request of the computer user, and Lavasoft, which produces and distributes ***free*** software that locates programs like the one written by New.net, notifies computer users of their presence, and, if requested by the computer user, removes these programs from the user's hard drive. Lavasoft's incentive in providing its software for free was the prospect that the computer users, at a later date, would elect to download upgraded Lavasoft programs at a cost. New.Net, through various theories of liability (similar to Del Webb in this

action) asserted that the means by which Lavasoft provided information to the consumer was impermissible and damaging to its business.

Not unlike the present suit to stop the activities of MC Mojave in uncovering building code violations and providing this information to the homeowners, New.net filed a complaint for damages and sought injunctive relief prohibiting Lavasoft from distributing its software or an order compelling Lavasoft to delete New.net's software from its target list. New.net complained that Lavasoft had: (1) unfairly targeted and mislabeled New.net's software; (2) inaccurately associated New.net's software with "the worst of the worst" internet downloaders; and (3) recommended to computer users that New.net's program be uninstalled. This activity, according to New.net, constituted false advertising, unfair competition, common law trade libel, and tortious interference with prospective economic advantage. Similar claims are being asserted in this case. Specifically, Del Webb, like New.net, is alleging that its reputation and interest are being harmed because of information being provided to consumers.

In defeating the request for a preliminary injunction, Lavasoft contended that its activities in distributing its software constituted speech and that New.net sought an impermissible prior restraint, even if New.net's allegations were found to be true. An important assertion raised by Lavasoft, which assisted in defeating the request for a preliminary injunction was that, by its services, Lavasoft did not recommend deletion of the New.net software, ***but rather left that decision to the computer user***. Lavasoft also noted that it distributed its program, a version of which could be obtained without cost, only to individuals who request it because of their desire to identify programs that have found their way onto users' computers without their knowledge or consent. Thus, from Lavasoft's perspective, the case impacted on the right of computer users to control what resides on their hard drives and the uses to which their computers are put. In this case, the right of homeowners to obtain information on their homes, i.e., requesting the services of MC Mojave, is also an important interest to protect. The following excerpt from New.Net supports defendants' instant request for summary judgment:

> "In this case, Lavasoft's identification of New.Net for consumers conveys factual information sought out by millions of users. The message clearly conveyed is: 'New.net is on your computer,' or, taking the facts in the light most advantageous to Defendants, 'New.net is on your computer, and we recommend that you delete it.' Lavasoft conveys this information with particularity, in words, and the heart of New.Net's complaint is that users understand the message clearly. Under *Spence v. Washington, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974)*, this is enough to consider it speech.
>
> This conclusion finds support in several analogous cases. *See Isuzu Motors Ltd. v. Consumers Union of U.S., Inc., 12 F.Supp.2d 1035 (C.D.Cal.1998)* (concluding that safety review of Isuzu Troopers in Consumer Reports, and other print, broadcast, and Internet publications was speech); *Bihari v. Gross, 119 F.Supp.2d 309 (S.D.N.Y.2000)* (finding that website informing public of difficulties with plaintiff's interior decorating business was speech); *Taucher v. Born, 53 F.Supp.2d 464 (D.D.C.1999)* (holding that a regulation aimed at preventing dissemination of fraudulent investment advice constituted an impermissible prior restraint of speech rather than a valid regulation of a profession in that it barred conveyance of investment "advice and recommendations" to customers). Because the message conveyed by Lavasoft's program is speech, any effort to stifle it must comport with those principles enunciated in First Amendment jurisprudence. New.Net, Inc. v. Lavasoft, 356 F.Supp.2d 1071, 1082 -1083 (C.D.Cal.,2003)

In this case, MOJAVE's free inspection report is speech inasmuch as it conveys information to homeowners. MOJAVE's conduct in conveying that speech is not only not actionable under any theory of liability, it is protected activity providing grounds for dismissing the complaint in its entirety.

IV.

THERE ARE NO TRIABLE ISSUES OF FACT ON PLAINTIFF'S CLAIM FOR VIOLATION OF NEVADA'S DECEPTIVE TRADE PRACTICES ACT

Resolution of this claim requires answering only one question: was a licensed required under NRS 645D.080 for the inspection activities of MOJAVE.[5] Alleged requirement to posses this license is the sole and exclusive basis for this claim. (**Exhibit A**

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[5] While MOJAVE did operate under a general contractor's license and felt this was the proper means to conduct business, to be entitled to summary judgment, MOJAVE does not have to prove that a general contractor's license was required for its activities as this is not an express basis in plaintiff's complaint for imposing liability on MOJAVE.

at ¶¶39, 40 & 41.) As established by the expert witness reports of Glenn Curtis and Richard Franklin, the answer is clearly no.

A. Glenn Curtis

Mr. Curtis is a certified master inspector in the state of Nevada. (See, **Exhibit C**, defendants' expert witness disclosure and Mr. Curtis' report and C.V., attached thereto as Exhibit A.) As explained by Mr. Curtis, his field of "home inspectors" and NRS 645D and NAC 645D deals with home inspections prepared in advance of real estate sales. Most importantly, certified home inspectors ***do not perform municipal inspections to verify local building code compliance issues***. (See, Curtis report at pgs. 2 & 5.) The discovery of building code violations, an area inherently within the ability of persons with building and construction background and experience, was the function and purpose of MOJAVE's activities. Stated another way, MOJAVE was performing home inspections different from and not contemplated to be under the auspices of NRS 645D.

Mr. Curtis' report also describes the history and enactment of NRS and NAC 645d and identifies the home inspectors and real estate interests that were behind the enactment. His report states that "The intent and purpose for creation of NRS 645d and NAC 645d was to provide a regulated home inspector training, certification, mentoring and monitoring program which would create a pool of viable home inspectors to service ***the real estate profession*** including agents, brokers and buyers." (See, Curtis report at pg. 3.) Mr. Curtis' report continues with notating the American Society of Home Inspectors' (ASHI) description of Nevada's certification program:

> "**Nevada Certification** (NRS 645D.120 and NAC 645D.210) enacted in 1997. Nevada provides for the certification of home inspectors of structures by the Real Estate Division of the Department of Business and Industry. An applicant for certification as a certified residential inspector: (a) must furnish proof to the Division that he has successfully completed 1) not less that 40 hours of academic instruction in subjects related to structural inspections in courses approved by the Division or equivalent experience as an inspector; and 2) an examination approved by the Division, and (b) must possess a high school diploma or its equivalent... The law also provides that a purchaser may not recover damages from a seller's reliance upon information provided to the seller by a certified inspector of real estate." (See, Curtis report at pgs. 3-4.)

> (Mr. Cutis actually teaches this certification program at the Community College of Southern Nevada. See, Mr. Curtis' C.V. attached to his report.)

As explained in the expert report of Richard Franklin, the activities of MOJAVE as undertaken by persons within background and experience in the construction industry, brought experience and qualification beyond and different from the 40 hours of classroom instruction mandated by the Nevada Certification program.

B. Richard Franklin

Richard Franklin is a construction consultant and a licensed general contractor. (See, **Exhibit C**, defendants' expert witness disclosure and Mr. Franklin's report and C.V., attached thereto as Exhibit B.) In addition to having over 40 years of experience in the construction industry in Nevada, Mr. Franklin has been active as a "home inspector" for almost as long. (See, Franklin Report at pg. 1.)

Mr. Franklin's report details some of the history behind enactment of NRS 645D and, importantly, persons and trades that are exempt from its application. Specifically, NRS 645D.100 provides:

> Applicability of chapter. The provisions of this chapter do not apply to:
>
> * * * * *
>
> 6. A person who provides an estimate of cost, repair or replacement of any improvements upon real estate.

A focus of Mr. Franklin's report, then, is on persons qualified to prepare such estimates and home inspection reports and why a certified home inspector, as certified under NRS 645D and the Real Estate Division of the Department of Business and Industry, ***would not*** be the appropriate person for such tasks. Specifically, Mr. Franklin explains that "certified home inspectors" as licensed by NRS 645D would not and do not have the qualifications and background to evaluate construction defects; that E&O coverage for certified home inspectors would prohibit them from performing code compliance inspections; and that contractors have significantly more experience in the building industry than

"certified home inspectors" that only under go 40 hours of classroom training. (See, Franklin Report at pg. 4.)

Mr. Franklin also opines that a "certified home inspector" only performs a "visual" inspection and not a "construction evaluation," such as the kind of evaluation that MC Mojave provided. Further, Mr. Franklin opines that a "certified home inspector" would not even have all of the equipment, such as the right sized ladder, to perform an inspection that would be helpful or useful to the homeowners in this case. (See, Franklin Report at pg. 4.) As the whole purpose of the inspection in this case was to provide homeowners with information about code compliance and potential defects within their home, a "certified home inspector" – as Del Webb would define and seek to have applied to the facts of this case – would not be qualified to perform the job.

Lastly, Mr. Franklin opinions that a "certified home inspector," as licensed under NRS 645D provides a "general opinion" about the state or quality of real estate and is not an "expert" as that term is defined under NRS 40.645. (Ultimately, expert services that MC Mojave provided is what would have entitled them to compensation from the builder for any resulting Chapter 40 claims.)[6] As an example of this point, Mr. Franklin notes that MKA Consultants, is employed by Del Webb as their primary construction defect experts in construction defect claims. As with MC Mojave, Mr. Franklin notes that "only a B-2 license is found with a qualified employee" of MKA. Moreover, the deposition of DEL WEBB's warranty PMK has revealed that persons who inspect Del Webb homes for purposes of warranty claims hold no licenses or certifications and only have on the job training. (**Exhibit I** at 13:10-14:16; 17:1-21; 20:2-21:4; 21:11-22:7; 22:16-23:6; 23:23-24:22; **Exhibit J**, Del Webb's response to Special Interrogatories, Set 1, Response No. 15.) These warranty personnel have discretion to determine whether building defects are warrantable. **(Exhibit I**

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[6] As with any legal proceeding, Del Webb was and is permitted to challenge the qualifications of any expert that offers testimony against them and/or the basis of their opinions. By challenging the services of Mojave in this forum, Del Webb may hope to avoid addressing the actual merits or substance of claims directed against them in other forums.

at 25:20-26:21; 27:14-17; 38:8-24 & Exhibit C to this deposition.) To the PMK's best knowledge no person at Pulte / Del Webb hold a residential inspection license under NRS 645. (**Exhibit I** at 43:19-21.) Finally, even when inspecting or evaluating the alleged building code violations that MOJAVE uncovered, DEL WEBB relied only on other contractors, similarly situated to MOJAVE, not "certified" residential building inspectors. (**Exhibit I** at 130:5-131:2 & Exhibit CC to this deposition.) Thus, by plaintiff Del Webb's own standards, experts employed by Del Webb to evaluate homes; conduct home inspections; and/or participate in Chapter 40 mediations are not "certified home inspectors" as that term is defined under NRS 645D. (See, Franklin Report at pg. 5.) Nor are the persons that inspect homes for Del Webb's warranty department certified home inspectors.

V.

THERE ARE NO TRIABLE ISSUES OF FACT ON PLAINTIFFS CLAIM FOR VIOLATION OF THE LANHAM ACT

Plaintiff's complaint alleges violation of the Lanham Act by a false and misleading representation made in the context of commercial advertising or commercial promotion. (**Exhibit A** at ¶49.) To establish standing for a false advertising claim brought pursuant to the Lanham Act, a party must allege: (1) a commercial injury based upon a misrepresentation about a product; and (2) that the injury is competitive, or harmful to the plaintiff's ability to compete with the defendant. Lanham Act, § 43(a)(1)(B), 15 U.S.C.A. § 1125(a)(1)(B); Healthport Corp. v. Tanita Corp. of America, 563 F.Supp.2d 1169, 1177 (D.Or.,2008). There must also be proof by the plaintiff that the defendants caused the advertisement to enter interstate commerce. Id. at 1178.

Two different theories of recovery are available to a plaintiff who brings a false advertising action under § 43(a) of the Lanham Act. First, the plaintiff can demonstrate that the challenged advertisement is literally false, i.e., false on its face. When an advertisement is shown to be literally or facially false, consumer deception is presumed, and "the court may grant relief without reference to the advertisement's [actual] impact on the buying public." Alternatively, a plaintiff can show that the advertisement, while not literally false, is

nevertheless likely to mislead or confuse consumers. "[P]laintiffs alleging an implied falsehood are claiming that a statement, whatever its literal truth, has left an impression on the listener [or viewer] that conflicts with reality"-a claim that "invites a comparison of the impression, rather than the statement, with the truth." Therefore, whereas "plaintiffs seeking to establish a literal falsehood must generally show the substance of what is conveyed, ... a district court must rely on extrinsic evidence [of consumer deception or confusion] to support a finding of an implicitly false message." Time Warner Cable, Inc. v. DIRECTV, Inc., 497 F.3d 144, 153 (C.A.2 (N.Y.),2007). In this case, ***plaintiff is only claiming that the representation is literally face***, i.e., false on its face.

The subject misrepresentation is attached as Exhibit 3 to plaintiff's complaint and states as follows:

> * * * **Notice to Neighbors** * * *
>
> As a courtesy, we are informing you that, due to a 'Builder' home inspection, you may experience a few hours of extra vehicular traffic in your neighborhood. These vehicles belong to representatives & experts from both MC Mojave Construction & your Builder, his subcontractors and agents.
>
> This inspection has been scheduled for
>
> _____
>
> address & date
>
> Once the Builder inspections are concluded, a repair plan and time-frame are provided to the homeowner for their review and approval. The Builder's repairs are also 'free' to ALL homeowners under a Chapter 40 claim, even if you are not the original owner.
>
> If you have any question or if you want to know
>
> if you qualify for a FREE home evaluation
>
> Please Call (702) 439-8504
>
> MC Mojave Construction-Lic. #B-0025771 N604

An initial an immediate problem with this representation is that it makes no representation about a "product" and element of a claim under Lanham. All the notice

purports to do is notify homeowners of an event. Moreover, the representation cannot be construed as injurious, competitive, or "harmful to the plaintiff's ability to compete with the defendant" as Del Webb (a home builder) is not in competition with MOJAVE (an inspection business.) "Competitive injury" is another element of a claim under Lanham. Thus, as a matter of law, a claim for violation of the Lanham Act cannot be established.

Second, and assuming plaintiff can surmount the first hurdles in proceeding with this claim, there is no information on this placard which is "literally or facially false." Specifically, there is no claim that Del Webb, its experts and/or agents did not undertake inspections. Thus, to prevail on a Lanham claim, plaintiff must come forth with proof that the advertisement, while not literally false, was nevertheless likely to mislead or confuse consumers. "To satisfy its burden, the plaintiff must show how consumers have actually reacted to the challenged advertisement rather than merely demonstrating how they could have reacted." Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co., 228 F.3d 24, 33 (1st Cir. 2000). First and foremost, this cannot be done as plaintiff has opposed a request to take homeowner deposition, deeming their testimony irrelevant. Second, as set forth in deposition excerpts in support of this motion, this cannot be done given the context and timing of the distribution of these placards. Specifically, while plaintiff alleges that the subject placards were distributed when MOJAVE "initiated an inspection or otherwise obtained an owner's consent to conduct an inspection" (**Exhibit A** at ¶21), the evidence in this case does not support this allegation. Rather, the placards were only circulated after a Chapter 40 claim was initiated and preceding an inspection ***by Del Webb and its agents***. (**Exhibit E** at 79:5-81:7; **Exhibit F** at 25:22-28:22; **Exhibit G** at 44:22-45:21; 49:6-10 & 51:6-52:6.) Thus, the placards were not intended to confuse the homeowners into believe that Del Webb would be on the premises conducting inspections. They were intended to notify the homeowners just what the placard states: that the builder, i.e., Del Webb would be on the premises conducting inspections.

Another important element of a claim under the Lanham Act, which cannot be supported in this case is that the defendant's "advertised products traveled in interstate

commerce." Third Party Verification, Inc. v. Signaturelink, Inc., 492 F.Supp.2d 1314, 1324 (M.D.Fla.,2007). As noted above, the subject representation in this case did not deal with a product, it dealt with an event. An event, by its very nature cannot travel in interstate commerce. In the case of Highmark, Inc. v. UPMC Health Plan, Inc., 276 F.3d 160, 165 -166 (3rd Cir. 2001) court gave an example of where advertisement of effect interstate commerce for purposes of a Lanham Act claim. There an ad was placed in a newspaper. The court observed that first, the newspaper was distributed interstate and, therefore, the Ad appeared outside Pennsylvania. Second, the health plans referred to in the advertisements offer emergency care to patients outside of Pennsylvania. Third, the subject health care plan applied to subscribers residing outside of Pennsylvania, and services may be provided to a subscriber's dependents who reside outside of Pennsylvania. Fourth, subscribers may be referred to a hospital or medical facility outside of Pennsylvania. Finally, the Ad might have an impact on the parties outside of Pennsylvania. The court ruled that these facts were sufficient to give the Court Lanham Act jurisdiction. Highmark, supra, 276 F.3d at 166.

In this case, the fliers at issue, only a few hundred of them, were only distributed in the Sun City Anthem development, as a courtesy, not for marketing purposes, and to notify the homeowners of an event. Moreover, the fliers were posted on only a few houses on either side of the house that was the subject of the builder inspection. Truly, only a neighborhood or block event. (**Exhibit F** at 28:23-29:7; 30:21-31:7; 31:12-32:10; **Exhibit G** at 44:22-45:21; 51:6-52:6 & 90:10-91:12.) They did not enter interstate commerce. This, as a matter of law, fails to satisfy the commerce element of a claim under Lanham and summary judgment should be granted as requested.

VI.

THERE ARE NO TRIABLE ISSUES OF FACT REGARDING PLAINTIFF'S CLAIM FOR INTERFERENCE WITH CONTRACT

In an action for intentional interference with contractual relations, a plaintiff must establish: (1) a valid and existing contract; (2) the defendant's knowledge of the contract; (3) intentional acts intended or designed to disrupt the contractual relationship; (4) actual

disruption of the contract; and (5) resulting damage. J.J. Industries, LLC v. Bennett, 119 Nev. 269, 274; 71 P.3d 1264 (2003). Elements three, four and five cannot be established in this case.

A. There are no Allegations or Proof of Intentional Acts Intended or Designed to Disrupt a Contractual Relationship

As expressly stated in the complaint in this matter, all that is alleged is that MOJAVE "***suggested*** that they [the homeowners] procure legal counsel and referred them to counsel." (**Exhibit A** at ¶66.) While MOJAVE expressly denies that it suggested any particular course of conduct to the 600 plus homeowners (and it is telling that only three (3) homeowners have been identified who are claiming such), and while MOJAVE asserts that the ultimate decision on what to do with information provided to them was left to the homeowner, a "suggestion", is insufficient to establish a claim for intentional interference with contract.

The case of J.J. Industries, LLC v. Bennett, 119 Nev. 269, 275-276; 71 P.3d 1264 (2003) describes the proof of ***intent*** required to establish this claim:

> "At the heart of [an intentional interference] action is whether Plaintiff has proved intentional acts by Defendant intended or designed to disrupt Plaintiff's contractual relations.... one does not commit the necessary intentional act-inducement to commit breach of contract-merely by entering into an agreement with knowledge that the other party cannot perform because there is an existing contract between the other party and a third person. Indeed, the United States District Court of Nevada, interpreting Nevada law, explained that the plaintiff must establish that the defendant had a motive to induce breach of the contract with the third party:
>
> 'The fact of a general intent to interfere, under a definition that includes imputed knowledge of consequences, does not alone suffice to impose liability. Inquiry into the motive or purpose of the actor is necessary. The inducement of a breach, therefore, does not always vest third or incidental persons with a tort action against the one who interfered. ***Where the actor's conduct is not criminal or fraudulent, and absent some other aggravating circumstances, it is necessary to identify those whom the actor had a specific motive or purpose to injure by his interference and to limit liability accordingly***.' *Nat. Right to Life P.A. Com., 741 F.Supp. at 814 (emphasis in original) (quoting DeVoto v. Pacific Fid. Life Ins. Co., 618 F.2d 1340, 1347 (9th Cir.1980)'*
>
> * * * * *

> As previously noted, in *Sutherland* we provided the necessary elements to establish the tort of intentional interference with contractual relations. In doing so, we relied on *Ramona Manor Convalescent Hospital v. Care Enterprises*. In that case, the California Court of Appeal explained that the plaintiff must prove that the defendant intended to induce the other person to breach its contract with the plaintiff. The court noted that because the action involves an intentional tort, the inquiry usually concerns the defendant's ultimate purpose or the objective that he or she is seeking to advance. Thus, mere knowledge of the contract is insufficient to establish that the defendant intended or designed to disrupt the plaintiff's contractual relationship; instead, the plaintiff must demonstrate that the defendant intended to induce the other party to breach the contract with the plaintiff. Accordingly, ***the plaintiff must inquire into the defendant's motive***." J.J. Industries, LLC, supra, 119 Nev. at 275-276.

Thus, relying on the beliefs and impressions of the three homeowners alone is insufficient to prove this claim. As set forth in the accompany deposition excerpts, there is no proof of such intent in this case. Specifically, in all cases in this matter, MOJAVE only provided information to the homeowners and did not suggest or imply any particular course of conduct. (**Exhibit E** at 246:5-12; **Exhibit F** at 97:23-98:9; **Exhibit G** at 91:13-22.) The ultimate decision was left up to the homeowner. There was no intent to cause a breach of the warranty contract the homeowners had with DEL WEBB. In fact, in a great many instances, homeowners had already attempted to obtain satisfaction from DEL WEBB through the home warranty program. It was only after not receiving response or satisfaction from DEL WEBB that homeowners received the information from MOJAVE to evaluate other option that were available to them. (**Exhibit E** at 246:13-247:5; **Exhibit G** at 76:2-10.) If three, out of six hundred homeowners, attribute a different intent to the actions of MOJAVE, this is insufficient evidence to carry the burden of proof in establishing an interference claim.

In addition to insufficient evidence of intent to establish the claim, the nature of MOJAVE's conduct, i.e., providing information to homeowners regarding defects to their home and options for remedying same, is not conduct contemplated to be actionable under the tort of interference with contract. Support for this is found in the restatement of torts[7]:

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[7] Nevada state courts often follow the Restatement approach to the interference torts. *See, e.g., Las Vegas-Tonopah-Reno Stage Lines v. Gray Line Tours, 106 Nev. 283, 792 P.2d 386, 388 n. 1 (1990).*

Restatement (Second) of Torts § 767 states:

> In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is *improper* or not, consideration is given to the following factors:
>
> (a) the nature of the actor's conduct,
>
> (b) the actor's motive,
>
> (c) the interests of the other with which the actor's conduct interferes,
>
> (d) the interests sought to be advanced by the actor,
>
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
>
> (f) the proximity or remoteness of the actor's conduct to the interference and
>
> (g) the relations between the parties.

Under these guidelines, the conduct of MOJAVE cannot be found to be improper. Specifically, and returning to an earlier theme, issues of freedom of speech, a free market and freedom to contract are implicated in this case. See, Friedman v. Rogers, 440 U.S. 1, 8-9; 99 S.Ct. 887 (1979) ("Society has a strong interest in the free flow of commercial information, both because the efficient allocation of resources depends on informed consumer choices and because even an individual advertisement, though entirely commercial, may be of general public interest.") At the crux of this case is whether homeowners should be permitted to obtain information, from any source (be it a neighbor, a brother-in-law or a company like MOJAVE), about the condition of their own home and be permitted to make decisions as to how to proceed with such information. Under no interpretation under the law can such conduct be deemed "culpable." See, National Right To Life Political Action Committee v. Friends of Bryan, 741 F.Supp. 807, 814 (D.Nev.,1990) ("In *Sutherland, 772 P.2d at 1290*, the Nevada Supreme Court made its most recent pronouncement of the elements necessary to establish the tort of intentional interference with contractual relations. There the Court did not discuss in detail the quality of intent required to sustain liability. However, in setting forth the elements of the tort, the Nevada Supreme Court relied on the opinion of the California Court of Appeals in *Ramona Manor*

Convalescent Hospital, 177 Cal.App.3d 1120, 225 Cal.Rptr. 120, wherein the California Court reiterated the requirement of "***culpable intent***" and noted that given the intention to interfere with a contract, liability usually will turn upon the ultimate purpose or object which a defendant is seeking to advance.")

B. <u>There are no Allegations or Proof of Disruption of a Contract</u>

Plaintiff does not allege that its warranty contracts with homeowners have been breached. All that is alleged is that during time periods ranging from "one month to six months" these homeowners had no communications directly with Del Webb or under the Del Webb home warranty as they had been "persuaded to pursue their claims by way of a Chapter 40 demand." (**Exhibit A** at ¶67.) All this alleges is that for a period of time, no claims were made under the home warranties. DEL WEBB has admitted that there were only gaps in time when they chose not honor warranty requests, not actual breaches of the warranty contracts. (**Exhibit I** at 58:19-59:7; 59:23-60:7; 63:19-64:2; 72:18-73:25; 77:4-12; 84:23-85:6; 90:6-21; 98:9-17 & Exhibits D, E, F, H, I, K, M, N, P & Q to this deposition; **Exhibit J**, Del Webb's response to Special Interrogatories, Set 1, Response Nos. 3 & 25.) Moreover, it is not suspected that in opposition to this motion, plaintiff will take the position that it believes its warranty contracts have been breached with the three homeowners or that it no longer has warranty obligations to any of these homeowner who make a request for repairs under the warranties. Most important, DEL WEBB has now admitted that none of its warranties were breached and that all allegedly disrupted warranties are fully in place and being honored. (**Exhibit I** at 50:23-51:9; 56:2-7; 60:8-11; 60:22-61:5; 69:8-13; 74:1-6; 76:18-24; 79:20-25; 80:1-7; 80:14-22; 83:16-20; 85:7-13; 85:16-19; 88:7-13; 90:22-91:4; 95:8-14; 98:18-25; 99:1-7; 102:19-103:2 & Exhibits D, E, F, H, I, K, M, N, P & Q to this deposition.) With out allegation and proof of an actual breach or disruption of contract with these three homeowners, a claim for interference cannot be maintained.

C. <u>Damages Cannot be Established</u>

"A plaintiff who proves a claim of intentional interference with contractual relations is entitled to recover damages for the pecuniary loss of the benefits of the contract; damages

for actual harm to reputation, if they are reasonably to be expected to result from the interference; and consequential losses for which the interference is a legal cause. Restatement (Second) of Torts § 774A (1979). However, although damages need not be proved to a mathematical certainty, Plaintiff bears the burden of introducing sufficient facts to enable the Court to arrive at an intelligent estimate of damage without speculation or conjecture." National Right To Life Political Action Committee v. Friends of Bryan, 741 F.Supp. 807, 812 -813 (D.Nev.,1990)

In this case, there was no pecuniary benefit that DEL WEBB was to receive from its warranty contracts with four homeowners. Thus, plaintiff's damages, if the claim is proven, are limited to proof of loss of harm to reputation and consequential losses for which the interference is a legal cause. No expert has been designated to support a claim for loss of reputation nor have documents been disclosed showing proof of same. (See, **Exhibit H**, plaintiff's Rule 26 disclosure of damages.) Thus, the remaining damages that are sought in this case are for attorney fees incurred in responding to Chapter 40 claims. However, such damages cannot be awarded as there is no allegation in this case that the Chapter 40 claims were meritless and/or that the defects identified by MOJAVE were fabricated or false, i.e., these were claims that DEL WEBB was legally obligated to respond to. This leaves the cause of action for attorney's fees, pursuant to Sandy Valley Associates v. Sky Ranch Estates Owners Association, 117 Nev. 948, 956; 35 P.3d 964, 969 (2001), as the sole basis for claiming damages in this case. There is no support for an award of attorney's fees under this authority.

VII.

THERE ARE NO TRIABLE ISSUES OF FACT ON PLAINTIFF'S CAUSE OF ACTION FOR ATTORNEY'S FEES

The case of Sandy Valley Associates v. Sky Ranch Estate Owners Ass'n, 117 Nev. 948, 956; 35 P.3d 964 (2001), *receded from* by Horgan v. Felton, 170 P.3d 982 (Nev. 2007), only provides for the principle that "when a party claims it has incurred attorney fees as foreseeable damages arising from ***tortious conduct or a breach of contract***, such fees

are considered special damages." This doctrine is sometimes referred to as the "tort of another doctrine." See, e.g., Restatement (Second) of Torts § 914(2) ("One who through the tort of another has been required to act in the protection of his interests by bringing of defending an action against a third person is entitled to recover attorney's fees.") This is a limited doctrine and such damages will be permitted only when an independent wrong, or tort, has been committed by the defendant where attorney's fees are a direct and proximate result of such wrong. In this case, and to the extent all other causes of action not proven, there is no basis upon which attorney's fees can be claimed or recovered as damages.

VIII.

THERE ARE NO TRIABLE ISSUES OF FACT ON PLAINTIFF'S CLAIM FOR INJUNCTIVE RELIEF

Injunctive relief is extraordinary relief and the irreparable harm before issuance of such relief must be clearly shown. Department of Conservation and Natural Resources, Div. of Water Resources v. Foley, 121 Nev. 77, 80; 109 P.3d 760 (2005).

In this case, plaintiff does not seek injunctive relief as a matter of right under any particular statute. Rather, this claim for relief is entirely contingent upon proof of plaintiff's affirmative claims for relief in this matter. Specifically, plaintiff seeks to prohibit further written or verbal representations that have a tendency to deceive, including further dissemination of Exhibit 3 to the complaint, i.e., plaintiff's Lanham Act claim. (**Exhibit A** at ¶76.) Plaintiff seeks an injunction preventing defendants from holding themselves out as licensed to perform home inspections, i.e, plaintiff's Deceptive Trade Practices Act. (**Exhibit A** at ¶77.) The last grounds for injunction are to stop defendants from purportedly interfering with warranty agreements and committing Champerty and Maintenance. (**Exhibit A** at ¶¶78 & 79.) To the extent all of these claims are found to be without merit, there is no basis to grant plaintiff's request for a permanent injunction and the court's granting of a preliminary injunction in this matter should be discharged.

IX.

CONCLUSION

For all the forgoing reasons, this court should grant summary judgment on all claims for relief. In the event summary judgment cannot be granted. Summary adjudication of plaintiff's causes of action for: 1) Champerty and Maintenance; 2) Violation of Nevada's Deceptive Trade Practices; 3) Violation of Lanham Act under 15 U.S.C. §1125(a)(1); 4) Interference; 5) Temporary Restraining Order / Preliminary injunction; and 6) Recovery of Attorney's Fees under Sandy Valley is requested.

DATED: February 11, 2009

MURCHISON & CUMMING, LLP

By _____

Michael J. Nuñez, Esq.
Nevada Bar No. 10703
Jeremiah Pendleton, Esq.
Nevada Bar No. 9148
6900 Westcliff Drive, Suite 605
Las Vegas, Nevada 89145
Attorneys for Defendants, CHARLES LESLIE PARTINGTON, d/b/a/ M.C. MOJAVE CONSTRUCTION and JOHN WILSON

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DECLARATION OF MICHAEL J. NUÑEZ

I, Michael J. Nuñez, declare and state:

I am an attorney-at-law licensed to practice in the State of Nevada and I am a partner with Murchison & Cumming LLP, counsel of record herein for Defendants CHARLES LESLIE PARTINGTON dba MC MOJAVE CONSTRUCTION and JOHN WILSON. I am one of the attorneys at our firm responsible for handling the defense of this matter on behalf of Defendants CHARLES LESLIE PARTINGTON dba MC MOJAVE CONSTRUCTION ("MOJAVE") and JOHN WILSON, and, on this basis, and upon such other bases set forth below, I have personal knowledge of the matters set forth in this Declaration, except where stated on information and belief, and could and would competently testify to them under oath if called as a witness.

1. This declaration is made in support of MOJAVE's motion for summary judgment.

2. Attached hereto and concurrently lodged in Appendixes as **Exhibit A** is a true and correct copy of Plaintiff's Complaint dated 05/06/08.

3. Attached hereto and concurrently lodged in Appendixes as **Exhibit B** is a true and correct copy of Robert Kehr's expert report.

4. Attached hereto and concurrently lodged in Appendixes as **Exhibit C** is a true and correct copy of Defendant's expert witness disclosure, dated 11/14/08.

5. Attached hereto and concurrently lodged in Appendixes as **Exhibit D** is a true and correct copy of excerpts of the deposition of Charles Partington dated 11/18/08.

6. Attached hereto and concurrently lodged in Appendixes as **Exhibit E** is a true and correct copy of excerpts of the deposition of John Wilson, dated 12/01/08.

7. Attached hereto and concurrently lodged in Appendixes as **Exhibit F** is a true and correct copy of excerpts of the deposition of Mark Diaz, dated 12/16/08

8. Attached hereto and concurrently lodged in Appendixes as **Exhibit G** is a true and correct copy of excerpts of the deposition of Vincent Farruggia, dated 12/18/08.

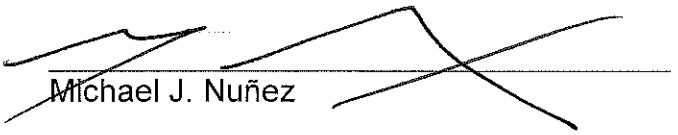
9. Attached hereto and concurrently lodged in Appendixes as **Exhibit H** is a true and correct copy of Plaintiff's Rule 26 disclosure of damages, dated 08/14/08.

10. Attached hereto and concurrently lodged in Appendixes as **Exhibit I** is a true and correct copy of excerpts of the deposition of Wayne Newmiller, dated 01/07/09.

11. Attached hereto and concurrently lodged in Appendixes as **Exhibit J** is a true and correct copy of Del Webb's response to Special Interrogatories, Set 1, dated 12/29/08.

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

Executed this 11th day of February, 2009, at Las Vegas, Nevada.



Michael J. Nuñez

J:\MJN\28554\MTN\DECLARATION OF MICHAEL J

PROOF OF SERVICE

STATE OF NEVADA, COUNTY OF CLARK

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Clark, State of Nevada. My business address is 6900 Westcliff Drive, Suite 605, Las Vegas, Nevada 89145.

On February 11, 2009, I served true copies of the following document(s) described as **MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE SUMMARY ADJUDICATION OF ISSUES** on the interested parties in this action as follows:

SEE ATTACHED LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Murchison & Cumming's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on February 11, 2009, at Las Vegas, Nevada.

Conrad M. Voigt

SERVICE LIST
Del Webb Communities, Inc. vs. Charles Leslie Partington, et al.

Todd M. Touton/Jennifer L. Braster Lionel Sawyer & Collins 1700 Bank of the America Plaza 300 South Fourth Street Las Vegas, NV 89101 Telephone: 702-383-8888 Facsimile: 702-383-8845	Attorneys for Plaintiff, Del Webb Communities, Inc.
Charles M. Pollock, Esq. Law Offices of Charles M. Pollock 10161 Park Run Drive Suite 150 Las Vegas, Nevada 89145 Telephone: 702-515-7442 Facsimile: 702-515-7443	Co-Counsel for Defendants, Charles Leslie Partington dba M.C. Mojave Construction; John Wilson