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UNITED STATES DISTRICT COURT

FOR THE STATE OF NEVADA

11
 12 JUNGO LAND & INVESTMENTS, INC., a
 Nevada corporation,

13 Plaintiff- Petitioner,

14 vs.

15 HUMBOLDT COUNTY BOARD OF
 16 COUNTY COMMISSIONERS, and
 HUMBOLDT COUNTY, a political
 17 subdivision of the State of Nevada, CHUCK
 GIORDANO, in his individual and official
 18 capacity as Humboldt County Commissioner,
 MIKE BELL, in his individual and official
 19 capacity as Humboldt County Commissioner,
 DAN CASSINELLI, in his individual and
 20 official capacity as Humboldt County
 Commissioner, GARLEY AMOS, in his
 21 individual and official capacity as Humboldt
 County Commissioner, TOM FRANSWAY,
 22 in his individual and official capacity as
 Humboldt County Commissioner,

23 Defendants-Respondents.

CASE NO.: 3:10-CV-00257-ECR-VPC

MOTION FOR SUMMARY JUDGMENT
OF DEFENDANTS HUMBOLDT
COUNTY, CHUCK GIORDANO, MIKE
BELL, DAN CASSINELLI, GARLEY
AMOS AND TOM FRANSWAY

26 COME NOW Defendants, HUMBOLDT COUNTY BOARD OF COUNTY
 27 COMMISSIONERS, HUMBOLDT COUNTY, CHUCK GIORDANO, MIKE BELL, DAN
 28 CASSINELLI, and GARLEY AMOS, by and through their attorneys, Thorndal, Armstrong,
 Delk, Balkenbush & Eisinger, and TOM FRANSWAY, by and through his attorneys, Lockie &

1 MacFarlan, Ltd., and in accordance with the provisions of FRCP 56, hereby move this Court for
2 its order entering judgment in favor of Defendants and against Plaintiff, Jungo Land &
3 Investments, Inc.

4 This motion is based upon the Memorandum of Points and Authorities filed herewith, the
5 evidence presented herein and all pleadings and papers on file in this matter.

6 DATED: January 27, 2012
THORNDAL, ARMSTRONG,
7 DELK, BALKENBUSH & EISINGER

DATED: January 27, 2012
LOCKIE & MACFARLAN, LTD.

8 By /s/ Stephen C. Balkenbush
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HUMBOLDT COUNTY, a political
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GIORDANO, in his individual and official
18 capacity as Humboldt County Commissioner,
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Commissioner, GARLEY AMOS, in his
21 individual and official capacity as Humboldt
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**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT
OF DEFENDANTS
HUMBOLDT COUNTY, CHUCK
GIORDANO, MIKE BELL,
DAN CASSINELLI, GARLEY AMOS and
TOM FRANSWAY**

24 I

25 **INTRODUCTION**

26 As the Court is well aware, this lawsuit arises out of a Conditional Use Permit for the
27 operation of a solid waste landfill in Humboldt County. On January 19, 2011, Plaintiff Jungo

28 THORNDAL, ARMSTRONG,
DELK, BALKENBUSH
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6590 S. McCarran, Suite B
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(775) 786-2882

1 Land & Investments, Inc., filed its 59 page “Amended Complaint for Declaratory and Injunctive
2 Relief and Damages and Petition for Judicial Review.” (Doc. #92). This pleading contains
3 fourteen claims for relief grounded in both state and federal law. In addition to filing a 59 page
4 pleading, Jungo has taken 17 depositions, including the deposition of one witness three times and
5 two others twice. Jungo filed a Petition for Judicial Review *and* a Petition for Writ of
6 Mandamus and/or Prohibition and two motions to supplement the record on appeal. From the
7 sheer volume of Jungo’s Amended Complaint and the discovery it has conducted during the
8 course of this litigation, one would certainly conclude that this case is complicated and
9 convoluted. Such is simply not the case and, in fact, from the very outset of this matter, the
10 material facts have not been in dispute.

11 The issue in this case is actually relatively simple and the case turns on the answer to the
12 question of whether substantial evidence exists to support the decision of the Humboldt County
13 Board of Commissioners made on April 5, 2010, to reverse the decision of the Regional Planning
14 Commission to extend Jungo’s Conditional Use Permit for a period of five years. This decision
15 was made at an open meeting, attended by Jungo and its legal counsel, John Frankovich, and the
16 facts of what occurred at the meeting are not in dispute.

17 As shall be discussed herein, Jungo is not entitled to injunctive relief or damages against
18 the Defendants under any federal, constitutional claims nor under any of the state tort claims set
19 forth in its Amended Complaint. As such, Defendants respectfully submit that they are entitled
20 to judgment as a matter of law pursuant to FRCP 56.

21 II

22 STATEMENT OF FACTS

23 The instant lawsuit involves a decision of the Humboldt County Board of Commissioners
24 concerning a five year extension of Conditional Use Permit No. UH-07-05 which was originally
25 granted to Jungo on April 12, 2007. *See*, Exhibit “1,” Conditional Use Permit. The CUP
26 contemplated the construction and operation by Jungo of a solid waste landfill in Humboldt
27 County approximately 25 miles west of Winnemucca. *Id.* As it noted in its Amended Complaint
28 and Petition for Judicial Review, Jungo intends to construct the landfill and to ship

1 approximately 4,000 tons per day of waste from the Bay area into Humboldt County by rail. *See*,
2 Amended Complaint, #92, ¶50. The CUP obtained by Jungo on April 12, 2007, provided that the
3 landfill was to commence operations within three years of its approval or would become null and
4 void unless an extension was approved by the Regional Planning Commission. *See*, Exhibit “1,”
5 Condition 7. Further, the CUP required Jungo to obtain all necessary permits prior to operation
6 of the landfill. *Id.* Jungo did neither.

7 On February 11, 2010, the Planning Commission met and voted to extend Jungo’s CUP
8 for an additional five years. *See*, Exhibit “2.” On February 18, 2010, Winnemucca residents
9 Robert Dolan and Massey K. Mayo filed an appeal of the decision of the Planning Commission
10 with respect to the extension of Jungo’s CUP. *See*, Exhibit “3,” Dolan Appeal. On February 24,
11 2010, the Board posted its agenda for its March 1, 2010, public meeting. *See*, Exhibit “4,”
12 Agenda for meeting of March 1, 2010. One of the matters on the agenda was to set a hearing
13 date for the appeal filed by Dolan and Mayo concerning the decision of the Planning
14 Commission rendered on February 11, 2010. *Id.* Also on February 24, 2010, counsel for Jungo
15 wrote a letter to the clerk for the Board which raised the issue of whether Dolan and Mayo had
16 standing to appeal from the decision rendered by the Planning Commission on February 11,
17 2010. *See*, Exhibit “5,” letter dated February 24, 2010. At the Board’s meeting on March 1,
18 2010, in determining when to schedule the appeal for hearing, the Board heard discussion on the
19 issue raised by Jungo in its letter of February 24, 2010, concerning whether Dolan and Mayo had
20 standing to appeal this matter. On March 1, 2010, the Board decided by a three to two vote to set
21 this matter for a hearing for March 15, 2010, which was subsequently moved to April 5, 2010.
22 *See*, Exhibit “6,” Minutes of Meeting of March 1, 2010; *see also*, Exhibit “7,” Agenda for
23 Regular Meeting of Humboldt County Board of Commissioners of March 15, 2010. On March
24 8, 2010, Jungo again raised the issue of standing through a letter sent to the Board. *See*, Exhibit
25 “8,” letter dated March 8, 2010. At its hearing on March 15, 2010, the Board rescheduled the
26 date for the appeal to be heard on April 5, 2010. *See*, Exhibit “7.”

27 At the hearing on April 5, 2010, Jungo once again raised the issue of standing and the
28 Board indicated that Mr. Dolan and Ms. Mayo had standing to proceed with the appeal. *See*,

1 nonmoving party must come forward with 'specific facts showing that there is a genuine issue for
 2 trial.' Where the record taken as a whole could not lead a rational trier of fact to find for the
 3 nonmoving party, there is 'no genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith*
 4 *Radio Corp.*, 475 U.S. 574, 586-587 (1986) (internal citation omitted). The mere existence of a
 5 scintilla of evidence in support of the plaintiff's position will be insufficient to establish a
 6 genuine dispute; there must be evidence on which the jury could reasonably find for the plaintiff.
 7 *Marr v. Anderson*, 611 F. Supp. 2d 1130, 1137 (D. Nev. 2009).

8 **II. ALL CLAIMS AGAINST THE INDIVIDUAL MEMBERS OF THE HUMBOLDT**
 9 **COUNTY BOARD OF COUNTY COMMISSIONERS MUST BE DISMISSED**
 10 **AND JUDGMENT ENTERED IN THEIR FAVOR AS A MATTER OF LAW.**

11 As an initial matter, Jungo should not be permitted to proceed against the individual
 12 members of the Board of County Commissioners in this case. As shall be discussed below, the
 13 individual Defendants are immune from suit under both federal and state law.

14 **A. *The Individual Defendants are Entitled to Absolute Quasi-Judicial Immunity***
 15 ***from Suit.***

16 Jungo's Amended Complaint contains seven claims for relief for alleged violations of its
 17 constitutional rights. However, a number of these claims are duplicative. Specifically, Jungo's
 18 Fourth and Seventh Claims for Relief contain nearly identical factual and legal allegations
 19 premised upon the due process clause of the Fourteenth Amendment. Jungo seeks injunctive
 20 relief only in its Fourth Claim for Relief against Humboldt County, the Board of County
 21 Commissioners, and the Board members in their *official capacities* and damages against
 22 Humboldt County, the Board of County Commissioners, and the Board members in their
 23 *individual capacities* in its Seventh Claim for Relief. Jungo does the same thing in its Fifth and
 24 Eighth Claims for Relief premised upon the Equal Protection Clause of the Fourteenth
 25 Amendment and the Sixth and Ninth Claims for Relief premised upon the dormant Commerce
 26 Clause. Irrespective of the number of different ways in which Jungo has pled its federal,
 27 constitutional claims, the individual Defendants are immune from suit and are entitled to
 28 judgment in their favor as a matter of law.

First, the Board members are immune from suit for damages as to all of Jungo's claims

1 brought against them in their *individual capacities*, and, more specifically, under the doctrine of
 2 quasi-judicial immunity with respect to their actions in reversing the decision of the Regional
 3 Planning Commission to extend Jungo's CUP for an additional five years.³

4 Quasi-judicial immunity, as its name suggests, is a doctrine under which government
 5 actors whose acts are relatively similar to those undertaken by judges are immune from suit.⁴
 6 *Dotzel v. Ashbridge*, 438 F.3d 320, 325 (3rd Cir. 2006); *see also*, *Butz v. Economou*, 438 U.S. 478
 7 (1978). "Quasi-judicial absolute immunity attaches when a public official's role is 'functionally
 8 comparable' to that of a judge." *Dotzel, supra.* at 325. The United States Supreme Court has
 9 provided guidance on which features of an allegedly quasi-judicial job function are most
 10 important. In *Butz*, the court must examine the job function at issue using criteria aptly
 11 summarized by the First Circuit Court of Appeals as follows:

12 "First, does a Board Member, like a judge, perform a traditional 'adjudicatory'
 13 function, in that he decides facts, applies law, and otherwise resolves disputes on
 14 the merits (free from direct political influence)? Second, does a Board member,
 15 like a judge, decide cases sufficiently controversial that in the absence of judicial
 immunity, he would be subject to numerous damages actions? Third, does a
 Board member, like a judge, adjudicate disputes against a backdrop of multiple
 safeguards designed to protect [the parties'] constitutional rights?"

16 *Bettencourt v. Board of Registration*, 904 F.2d 772, 783 (1st Cir. 1990).

17 In *Dotzel, supra*, the Third Circuit Court of Appeals addressed the issue of absolute
 18 quasi-judicial immunity under circumstances factually similar to the case at bar. In *Dotzel*,
 19 landowners, whose application for a permit to conduct a gravel pit mining operation on their
 20 property was denied by the Board of Supervisors of Salem Township, brought a §1983 action
 21 against the Township and the individual board members in their official and individual capacities

23 ³Jungo's Amended Complaint is replete with allegations that Commissioner Fransway acted improperly or with
 24 ill will towards it in connection with the Dolan Appeal. These allegations, including the allegation that Commissioner
 Fransway had some obligation to recuse himself from the April 5, 2010, hearing will be discussed in greater detail herein.
 25 These allegations are of no relevance to the analysis of Commissioner Fransway's entitlement to dismissal of all of
 Jungo's constitutional claims on quasi-judicial immunity grounds, as such immunity applies, "no matter how erroneous
 26 the act may have been, how injurious its consequences, how informal the proceeding, or how malicious the motive."
Brown v. Newberger, 291 F.3d 89, 94 (1st Cir. 2002). Motive and intent are simply not relevant to the analysis of the
 27 application of quasi-judicial immunity.

28 ⁴The Ninth Circuit Court of Appeals has endorsed the doctrine of quasi-judicial immunity under similar
 circumstances. *See, Buckles v. King County*, 191 F.3d 1127 (9th Cir. 1999).

1 alleging that its substantive due process rights had been violated by denial of the permit. *Dotzel*,
2 *supra*. at 320. The individual Board members sought dismissal of the individual-capacity claims
3 under the doctrine of absolute quasi-judicial immunity and the motion was denied. *Id.* at 323.
4 On appeal, the Third Circuit reversed, holding that the individual board members were absolutely
5 immune from suit. *Id.* at 322. With respect to the allegations against the individual Board
6 members in the case, the plaintiffs alleged that the Board's decision was not supported by
7 substantial evidence but, rather, was based on personal animus of the individual Board members,
8 that the Board members failed to review various of their submissions prior to denial of their
9 application, that the Board members ignored the recommendation of the Township solicitor to
10 delay a hearing held on the application, that the Township engineer had advised the Planning
11 Commission to approve the application, and that one of the board members voted to deny the
12 application because his brother owned a quarry operation that would have been in competition
13 with the plaintiffs' quarry. *Id.* at 322.

14 In analyzing those factors outlined by the Supreme Court in *Butz*, the Third Circuit first
15 addressed the public policy issue and the need to assure that the function of the Board members
16 at issue be performed without harassment or intimidation. The Third Circuit noted that, while
17 this consideration obviously applies to all government functions, "zoning disputes can be among
18 the most fractious issues faced by municipalities, and the risk of threats and harassment is great."
19 *Id.* at 325. The Court further noted that, in such cases, "[t]he monetary stakes are often quite
20 high, especially in commercial cases like this one, making the possibility of liability an especially
21 potent adversary of objectivity. In this respect, the Board looks like a court." *Id.* As to the
22 importance of the application of quasi-judicial immunity under such circumstances, the Court
23 stated the following:

24 "The public interest requires that persons serving on planning boards considering
25 applications for development act with independence and without fear that
26 developers, who will frequently have significant financial resources and the ability
27 to litigate, not bring them into court. The possibility of facing expensive and
28 aggravating litigation as a result of making a decision on an application for
development may in a subtle way impact on the decision making process."

Id. at 325-326. The Third Circuit considered this important public purpose to militate in favor of

1 applying absolute quasi-judicial immunity to the individual Board members in connection with
2 their vote on the plaintiffs' permit.

3 The public interest in assuring that the individual members of the Humboldt County
4 Board of County Commissioners cannot be hailed into court and sued for damages under 42
5 U.S.C. §1983 every time they make a decision on land use issues is equally important in the case
6 at bar. Clearly, the decision of the Board concerning the Dolan Appeal has been one of the more
7 fractious decisions faced by the individual Board members during their terms. The possibility
8 that they may face expensive and aggravating litigation as a result of every decision they make on
9 land use issues holds the real danger of affecting the Board members' decisions. Thus, the
10 application of quasi-judicial immunity to such situations is justified and serves an important
11 government purpose.

12 The Third Circuit also cited to the procedural safeguards attendant with the Board's
13 decision on the plaintiffs' zoning application such as the fact that the local zoning ordinance at
14 issue provided for notice to the affected parties and the public, the parties' right to counsel, the
15 issuance of written decisions and the preparation of transcripts. *Id. at 326.*

16 Chapter 17.68 of the Humboldt County Code, as well as NRS 278.3195, provide for
17 similar procedural safeguards. NRS 278.3195 provides direction to local governments
18 concerning appeals of land use decisions. Chapter 17.68 of the Humboldt County Code requires
19 public hearings on decisions related to conditional use permits, as well as public notice of those
20 hearings. *See*, Exhibit "12," HCC §17.68.040, HCC §17.68.050 and §17.68.060. Chapter 17.68
21 of the Humboldt County Code also provides for appeal rights and requires the holding of a public
22 hearing on such appeals. *Id.* at HCC §17.68.110, §17.68.140, and §17.68.150. Further, it is
23 uncontroverted in this case that other procedural safeguards were implemented during the April
24 5, 2010, hearing which resemble those found in a judicial proceeding, including the calling of
25 witnesses by Jungo and the presentation of evidence by Jungo through its legal counsel, John
26 Frankovich.

27 The Third Circuit went on to address the degree of insulation from political influence
28 enjoyed by the Salem Township Board members in the context of their decision to deny the

1 permit at issues. The Court noted that the Board members in the case were elected officials who
2 were removable during their term of office only for cause. *Dotzel, supra.* at 326. In this regard,
3 the Court found that the Board members were similar to judges. *Id.* The same is true in the case
4 at bar. As elected officials, the members of the Humboldt County Board of County
5 Commissioners cannot be removed from office during their terms absent a recall by voters. *See,*
6 *Nevada Constitution, Art. 2, §9; see also, NRS 306.020.* Thus, state law provides for procedures
7 which substantially insulate the Board members from political pressure.

8 As for the adversarial nature of the proceeding at issue in this case, there can be little
9 argument that the Dolan Appeal was an adversarial one. *See, Dotzel, supra.* at 327. Both parties
10 to the appeal called witnesses, proffered evidence on their behalf and made arguments to the
11 Board members. These are the hallmarks of an adversarial proceeding.

12 Finally, the Third Circuit addressed the availability of appellate review of decisions of the
13 Township Board members. *Id.* The Court noted that, by Pennsylvania state statute, decisions of
14 the board members were appealable to the Court of Common Pleas. The same is true of
15 decisions of the Humboldt County Board of Commissioners in that decisions of local
16 governments in land use decisions are appealable to the district court. *See, NRS 278.3195(4)(b).*

17 Based upon all of the foregoing, all of the federal, constitutional claims brought by Jungo
18 against the Board members in their *individual capacities* must be dismissed and judgment
19 entered in the Defendants' favor as a matter of law. This would include Jungo's Seventh, Eighth,
20 Ninth, and Twelfth Claims for Relief.

21 ***B. The Individual Defendants Should be Dismissed from Jungo's Fourth, Fifth***
22 ***and Sixth Claims for Relief.***

23 As was noted above, Jungo has named the individual Board members in their *official*
24 *capacities* in their Fourth, Fifth and Sixth Claims for Relief in which they seek injunctive relief
25 only under various constitutional theories. Section 1983 suits against government actors in their
26 "official capacities" are, in all respects other than names to be treated as a suit against the
27 government entity with which the official is associated. *Kentucky v. Graham, 473 U.S. 159, 165-*
28 *166 (1985).* Given the fact that the individual Board members are entitled to summary judgment

1 of Jungo’s claims against them individually, Jungo’s “official capacity” claims in its Fourth,
2 Fifth, and Sixth Claims for Relief should also be dismissed as against the individual Board
3 members.

4 ***C. The Individual Defendants are Entitled to Summary Judgment of Plaintiff’s***
5 ***Federal Claims Brought Under 42 U.S.C. §1983 Pursuant to the Doctrine of***
6 ***Qualified Immunity.***

7 Although the individual Defendants are clearly entitled to dismissal of this action under
8 the doctrine of absolute, quasi-judicial immunity, in the alternative, summary judgment should be
9 granted in favor of the individual Defendants on qualified immunity grounds. The doctrine of
10 qualified immunity protects government officials from liability for civil damages insofar as their
11 conduct does not violate clearly established statutory or constitutional rights of which a
12 reasonable person would have known. *Pearson v. Callahan*, 555 U.S. 233, 231, 129 S. Ct. 808
(2009).

13 “Qualified immunity balances two important interests - the need to hold public
14 officials accountable when they exercise power irresponsibly and the need to
15 shield officials from harassment, distraction, and liability when they perform their
16 duties reasonably. The protection of qualified immunity applies regardless of
17 whether the government official’s error is ‘a mistake of law, a mistake of fact, or a
18 mistake based on mixed questions of law and fact.’”

19 *Id.*

20 The Court, in addressing the issue of qualified immunity, should consider the following:

21 (1) whether the facts alleged make out a constitutional violation at all and/or (2) whether the right
22 at issue was clearly established at the time of the alleged misconduct. *Id.* at 231. If the law did
23 not place the government official on notice that his actions violated a clearly established
24 constitutional or statutory right, the government official is entitled to qualified immunity. *Id.* at
25 244.

26 _____ Defendants have addressed each of Jungo’s constitutional claims below and have outlined
27 the substantive weakness of each. Thus, as Jungo has failed to make out a constitutional
28 violation at all on the facts of this case, the individual Board members are entitled to judgment in
their favor on qualified immunity grounds. In addition, given all of the facts of this case,
including the fact that the Humboldt County Code authorizes appeals of decisions of the

1 Regional Planning Commission regarding conditional use permits to the Humboldt County
 2 Board of County Commissioners, it simply would not have been clear to a reasonable official in
 3 the Defendants' position that their action in hearing the Dolan Appeal and reversing the decision
 4 of the Regional Planning Commission was in violation of any of Jungo's clearly established
 5 constitutional rights. Therefore, all of the individual Defendants are entitled to summary
 6 judgment on qualified immunity grounds.

7 ***D. The Individual Defendants are Entitled to Summary Judgment of All of***
 8 ***Plaintiff's Claims Premised on State Law, with the Exception of Any Claim***
 9 ***Premised on Chapter 278, by Virtue of NRS 41.032(2) and the Discretionary***
 10 ***Act Immunity Provided by Same.***

11 In addition, the individual Board members (and Humboldt County) are entitled to
 12 summary judgment of all of Plaintiff's claims premised on state law, with the exception of a
 13 claim under Chapter 278, under the discretionary immunity afforded government officials under
 14 NRS 41.032(2).

15 ***E. No Individual Liability May be had Under Chapter 278 of the Nevada Revised***
 16 ***Statutes.***

17 Defendants shall discuss the substantive deficiencies in Jungo's claim allegedly premised
 18 on Chapter 278 of the Nevada Revised Statutes below. Notwithstanding, NRS 278.0233 is
 19 explicit in its prohibition of the maintenance of such actions against individual members of
 20 government agencies sued under this statutory scheme. *See*, NRS 278.0233(2)(h). According to
 21 its Amended Complaint, Jungo seeks damages against Humboldt County, the Board of County
 22 Commissioners, and Commissioner Fransway in its Third Claim for Relief. Commissioner
 23 Fransway and the individual Board members may not be sued under Chapter 278 and, therefore,
 24 are entitled to summary judgment of Jungo's third Claim for Relief.

25 ***F. The Humboldt County Commission is not a Suable Entity.***

26 Throughout its Amended Complaint, Jungo references the "BCC" or the Humboldt
 27 County Board of County Commissioners as a party Defendant in this case. The Board of County
 28 Commissioners is not a suable entity and it should be dismissed as a Defendant in this case. *See*,
Wayment v. Holmes, 112 Nev. 232, 912 P.2d 816 (1996).

///

1 **III. ALL CLAIMS BROUGHT PURSUANT TO 42 U.S.C. §1983 SHOULD BE**
2 **DISMISSED AND JUDGMENT ENTERED IN DEFENDANTS' FAVOR AS A**
3 **MATTER OF LAW.**

4 In total, Jungo brings federal claims for relief under 42 U.S.C. §1983 for four alleged
5 constitutional violations, despite the fact that these federal claims are spread out in seven of its
6 fourteen claims for relief. Specifically, Jungo seeks damages under federal law based upon the
7 following: (1) alleged violation of its Fourteenth Amendment right to due process of law; (2)
8 alleged violation of its Fourteenth Amendment right to equal protection of the law; (3) the
9 alleged violation by the Defendants of the dormant Commerce Clause; and (4) the alleged
10 violation of the Fifth Amendment's prohibition against the taking of private property for public
11 use without just compensation.

12 To prevail in a civil action against state actors for the deprivation of rights, privileges or
13 immunities secured by the Constitution, Jungo must show acts by the Defendants taken under
14 color of state law which deprived it of federal rights and which caused it to sustain damages.
15 *Shoshone-Bannock Tribes v. Idaho Fish & Game Comm'n.*, 42 F.3d 1278, 1284 (9th Cir. 1994).
16 Section 1983 is not, itself, a source of substantive rights, but merely provides a method for
17 vindication of federal rights conferred elsewhere. *Albright v. Oliver*, 510 U.S. 266, 271 (1994).
18 For the reasons set forth *infra*, Jungo cannot demonstrate that its constitutional rights were
19 violated by any conduct attributed to the Defendants and, as such, Jungo's federal claims should
20 be dismissed and judgment entered in favor of the Defendants as a matter of law.

21 **A. *Jungo's Fourth and Seventh Claims for Relief for Violation of the Due Process***
22 ***Clause of the Fourteenth Amendment Should be Dismissed and Judgment***
23 ***Entered in the Defendants' Favor as a Matter of Law.***

24 In their Fourth Claim for Relief, Jungo seeks injunctive relief against Humboldt County,
25 the Board of County Commissioners, and the members of the Humboldt County Commission in
26 their official capacities only for the alleged violation of its Fourteenth Amendment right to due
27 process of law.⁵ Plaintiff's Seventh Claim for Relief is redundant of the Fourth Claim for Relief

28 ⁵Jungo's Fourth Claim for Relief also references the Nevada Constitution and its guarantee of due process of
law as set forth in Article 1, §7 of same. The Nevada Supreme Court has approached due process challenges under
Article 1, §7 with reference to federal case law and this claim is legally indistinguishable from Jungo's claim premised

1 and Jungo seeks damages under same for violation of the Fourteenth Amendment against
 2 Humboldt County, the Board of County Commissioners, and the Board members in their
 3 individual capacities. The due process clause of the Fourteenth Amendment protects individuals
 4 against governmental deprivations of life, liberty or property without due process of law.
 5 *Halverson v. Skagit County*, 42 F.3d 1257, 1260 (9th Cir. 1994).

6 As shall be discussed herein, both Jungo’s Fourth and Seventh Claims for Relief must be
 7 dismissed and judgment entered in favor of the Defendants on a number of grounds, including
 8 that Jungo does not have a protected property interest in the extension of its CUP and because
 9 Jungo received more than adequate “process” within the meaning of the Fourteenth Amendment.

10 **(i) *Jungo does not have a Protected Property Interest in the Extension of its CUP***

11 In its Amended Complaint, Jungo seeks damages and injunctive relief for the alleged
 12 violation of its procedural due process rights guaranteed by the Fourteenth Amendment. In so
 13 alleging, Jungo makes the sweeping allegation that it has a “liberty and/or property interest in the
 14 CUP, the CUP extension, the Property, the Project, contracts in furtherance of same and funds
 15 expended by Jungo in connection with the CUP.” *See*, Amended Complaint, ¶323. As is typical
 16 of Jungo, it has grossly overstated the issue with respect to a due process challenge in this case.
 17 The issue in this case is whether the Board members’ actions in reversing the decision of the
 18 Regional Planning Commission granting a five year extension of the CUP was unconstitutional.
 19 Thus, the focus must be upon whether Jungo has a protected property interest in *the extension of*
 20 *the CUP*. For the reasons discussed *infra*, this inquiry must be answered in the negative.

21 A procedural due process claim hinges on proof of two elements: (1) a protectible liberty
 22 or property interest and (2) a denial of adequate procedural protections. *Thornton v. City of St.*
 23 *Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005). Property interests are not created by the
 24 Constitution but by existing rules or understandings that stem from an independent source, such
 25 as state law that support claims of entitlement to those benefits. *Id.* “To have a property interest
 26 in a government benefit, such as the right to renew a certificate, ‘a person must have more than a
 27

28 on the Fourteenth Amendment. *See, State v. Vezeris*, 102 Nev. 232, 720 P.2d 1208 (1986).

1 unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. The
2 ‘mere fact that a person has received a government benefit in the past, even for a considerable
3 length of time, does not, without more, rise to the level of a legitimate claim of entitlement.’” *Id.*;
4 *citing, Doran v. Houle*, 721 F.2d 1182, 1186 (9th Cir. 1983).

5 The Ninth Circuit Court of Appeals has recognized that a state operating license that can
6 be revoked only “for cause” stands at one end of the spectrum and creates a property interest.
7 *Thornton, supra.* at 1164. At the other end of the spectrum, a statute that grants the reviewing
8 body unfettered discretion to approve or deny an application does not create a property right. *Id.*
9 “Whether a statute creates a property interest in the renewal of an existing operating license falls
10 somewhere in the middle of those extremes.” *Id.* “[I]f the governing statute directs that a
11 license shall be renewed upon compliance with certain criteria, none of which involve the
12 exercise of discretion by the reviewing body, the licensee has a property right in the reissuance of
13 the license.” *Id.* at 1164-1165.

14 Based upon the criteria set forth by the Ninth Circuit Court of Appeals, it is apparent that
15 Jungo does not have a protected property interest in the extension of its CUP. Jungo’s CUP was,
16 and is, subject to the regulations set forth in Chapter 17.68 of the Humboldt County Code.
17 Notably, HCC §17.68.100(A) provides that a conditional use permit is “automatically revoked if
18 not exercised by actual use in conformance with the permit within one year unless a longer
19 period is specified in the approval.” *See*, Exhibit “12.” HCC §17.68.090 grants authority to the
20 Planning Commission to extend a conditional use permit in its discretion and for good cause
21 shown. *Id.* HCC §17.68.100(B) further provides that “[t]he Planning Commission, on its own
22 motion at public hearing with or without recommendation from the governing body, may revoke
23 any conditional use permit granted by it for noncompliance with the conditions set forth by the
24 planning commission in granting the permit.” *Id.* Conditional use permits are further subject to
25 the appeal procedures set forth in Chapter 17.68. The Conditional Use Permit itself expressly
26 advises Jungo that it “shall be subject to an annual review.” *See*, Exhibit “1.”

27 Under the statutory procedure in place in Humboldt County governing conditional use
28 permits, as well as the express terms of the permit itself, it simply cannot be found that Jungo

1 had, or has, a protected property interest in the extension of its CUP, in that the governing
 2 statutes vest discretion in the Planning Commission and the Board of County Commissioners to
 3 make decisions relative to conditional use permits.

4 **(ii) Jungo was Provided All Process Required by the Fourteenth Amendment.**

5 The due process clause does not prohibit every deprivation by the state of an individual's
 6 property. *Halverson, supra* @ 1260. "Only those deprivations carried out without due process
 7 are actionable under 42 U.S.C. §1983." *Id.* Due process of law requires notice and an
 8 opportunity for some kind of hearing prior to the deprivation. *Id.* With respect to procedural
 9 due process, the United States Supreme Court has observed that the Constitution requires some
 10 kind of a hearing before the state deprives a person of liberty or property. *Memphis Light, Gas*
 11 *and Water Div. v. Craft*, 436 U.S. 1, 19 (1978). The Supreme Court has also held that the pre-
 12 deprivation hearing need not be extensive, merely "[t]he opportunity for informal consultation
 13 with designated personnel empowered to correct a mistaken determination. . ." *Craft, supra.* at
 14 16. Under the undisputed facts of this case, it is apparent that Jungo was afforded both notice
 15 and an opportunity to be heard in connection with the April 5, 2010, hearing.⁶

16 As for the "notice" required under the due process clause, the United States Supreme
 17 Court has stated that, "[p]arties whose rights are to be affected are entitled to be heard; and in
 18 order that they may enjoy that right they must first be notified." *Fuentes v. Shevin*, 407 U.S. 67,
 19 80 (1972). Notice must be reasonably calculated to apprise interested parties of the pendency of
 20 the action and inform the person whose protected interests are threatened of an opportunity to
 21 present objections at some kind of a hearing preceding the final deprivation of those interests.
 22 *See, Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) and *Wolff v.*
 23 *McDonnell*, 418 U.S. 539, 577-578 (1974).

24 First, with respect to Jungo's claim that it was not provided notice of the process to be
 25

26 ⁶To the extent Jungo argues that its due process rights were somehow violated by virtue of the March 1, 2010,
 27 regular meeting of the Board, at which the Dolan Appeal was set for a hearing, plain and simply, no due process claim
 28 can be made out. Simply put, the Board on March 1, 2010, took no action whatsoever which implicated *any* property
 interest belonging to Jungo. Thus, any reference to the actions of the Board at this meeting have no bearing on Jungo's
 due process claims in this case.

1 used at the hearing of April 5, 2010, the same is contradicted by the undisputed facts of this case.
 2 Before turning to the specifics of the April 5, 2010, hearing, it is important to remember that
 3 Jungo has, at all times relative to both its conditional use permit generally, and issues associated
 4 with the Dolan Appeal, been represented by counsel.⁷ After the filing of the Dolan Appeal on
 5 February 18, 2010, counsel for Jungo sent several letters to the Board of County Commissioners
 6 outlining its position regarding the Dolan Appeal. *See*, Exhibit “5,” letter dated February 24,
 7 2010, and Exhibit “8,” letter dated March 8, 2010. It is also undisputed that, at the very outset of
 8 the April 5, 2010, hearing, Mr. Smith explained the quasi-judicial nature of the hearing, along
 9 with the procedure be used at the hearing, to all in attendance at same. *See*, Exhibit “13,” partial
 10 transcript of April 5, 2010, hearing. Mr. Smith advised that the parties to the appeal would be
 11 entitled to call witnesses, to introduce documents or other evidence, make objections to witnesses
 12 and evidence and offer closing statements. *Id.* Jungo was represented by Mr. Frankovich at the
 13 hearing. At no time during the April 5, 2010, hearing did Mr. Frankovich or his client request a
 14 continuance of the April 5, 2010, hearing for any reason, let alone that they needed additional
 15 time to prepare because they had not been given notice of the procedure to be utilized at same.⁸
 16 *See*, Exhibit 16.

17 In *Hartland Sportsman’s Club v. Town of Delafield*, 827 F. Supp. 562 (E.D. Wis. 1993);
 18 *aff’d.* at 35 F.3d 1198 (7th Cir. 1994), the United States District Court for the Eastern District of
 19 Wisconsin addressed legal and factual issues remarkably similar to those present in the case at
 20 bar. In *Hartland*, a property owner sued the town of Delafield and the individual members of the
 21 board of supervisors under §1983 and the Fourteenth Amendment after the town modified the
 22 plaintiff’s conditional use permit to operate a gun club. One of the due process complaints of the
 23 plaintiff was that it was not provided notice of the procedures to be followed at the hearing
 24

25 ⁷In fact, according to the affidavit of John Frankovich filed with Jungo’s motion seeking \$571,057.10 in
 26 attorney’s fees and \$41,012.52 in costs, Jungo’s parent company, Recology, Inc., has been represented by McDonald
 27 CaranoWilson since 2006. *See*, Docket No. 150, Exhibit “1.” It is undisputed that Jungo was represented by counsel
before the Dolan Appeal was even filed. *See*, Exhibit “18” deposition of George McGrath, pp. 45-46.

28 ⁸Formal notice of the April 5, 2010, hearing on the Dolan Appeal was sent by Certified Mail to Mr. Frankovich
 by Humboldt County Clerk Tami Spero on March 22, 2010. *See*, Exhibit “15.”

1 pertaining to its conditional use permit until the day of the scheduled hearing. *Id.* at 568. In
2 finding no procedural due process violation, the court noted as follows:

3 “Although Hartland did not receive notice of the procedures to be followed at the
4 December 12, 1991, hearing until the day of the scheduled hearing, the record
5 shows that the officers and members of Hartland, in fact, testified and were
6 represented by counsel for Hartland, who also spoke. The fact that Hartland failed
7 to request an adjournment or continuance of the December 12, 1991, hearing on
8 the ground that it needed more time to prepare, or on any ground, suggests that the
9 notice provided by the defendants sufficiently apprised Hartland of the nature of
10 the hearing and its right to be heard such that Hartland could adequately prepare.”

11 In this instant matter, Jungo was provided written notice that the Board would hold a
12 hearing on the Dolan Appeal by Humboldt County Clerk Tami Spero. *See*, Exhibit “15. In
13 addition, DA Russel also provided detailed information at the beginning of the hearing as to the
14 procedure to be used therein. *See*, Exhibit “13.” It is undisputed that Jungo representatives
15 testified at the hearing, that counsel for Jungo cross-examined witnesses and presented evidence,
16 and that Jungo was permitted to give a closing statement. *See*, Exhibit 16. It is also undisputed
17 that neither Jungo, or its legal counsel, requested a continuance of the hearing on the grounds that
18 it needed more time to prepare, or on any other grounds. *Id.* Under such circumstances, Jungo
19 was provided all the process required by the Due Process Clause of the Fourteenth Amendment
20 and Defendants are entitled to summary judgment of same.⁹

21 ***B. Jungo’s Fifth Claim for Relief Premised Upon the Equal Protection Clause of
22 the Fourteenth Amendment Should be Dismissed and Judgment Entered in
23 Defendants’ Favor as a Matter of Law.***

24 The Fourteenth Amendment’s Equal Protection Clause provides that no state shall deny
25 to any person within its jurisdiction the equal protection of the laws. The Equal Protection
26 Clause requires that “all persons similarly situated should be treated alike.” *City of Cleburne v.
27 Cleburne Living Center*, 473 U.S 432, 439 (1985). In order to state an equal protection claim
28 based upon selective enforcement of law, a plaintiff must show that the law is applied in a
discriminatory manner or imposes different burdens on different classes of people. *Freeman v.*

⁹Jungo also appears to assert that its procedural due process rights were violated because the Board of County Commissioners failed to adhere to an “abuse of discretion” standard at the hearing of April 5, 2010. While this argument has been a common theme in Jungo’s case, there is no legal authority for the conclusory allegation that the Board was required to utilize an abuse of discretion standard and certainly the Board is not directed to use an abuse of discretion standard by the Humboldt County Code.

1 *City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995). To meet this burden, the plaintiff must
 2 identify a similarly situated class against which the plaintiff's class can be compared. *Id.*

3 In the instant matter, Jungo's equal protection claim fails because Jungo has not, and
 4 cannot, identify a "similarly situated" class of persons against which its claims can be compared.
 5 Absent the identification of such a class, and that Jungo has been treated in a dissimilar manner
 6 from such class, Jungo's equal protection claim must be dismissed and the court need go no
 7 further in terms of its evaluation of this claim.¹⁰

8 ***C. Jungo's Sixth and Ninth Claims for Relief Based upon the Commerce Clause***
 9 ***of the United States Constitution Should be Dismissed and Judgment Entered***
 10 ***in Favor of the Defendants as a Matter of Law.***

11 Jungo's Sixth and Ninth Claims for Relief both seek liability under the Commerce Clause
 12 of the United States Constitution for the alleged discrimination by the Defendants against
 13 interstate commerce. Jungo seeks injunctive relief against Humboldt County, the Board of
 14 County Commissioners, and the individual Board members in their official capacities its Sixth
 15 Claim for Relief and damages against Humboldt County and the individual Defendants in their
 16 individual capacities in their Ninth Claim for Relief.

17 The Commerce Clause set forth in Article I, §8 of the United States Constitution provides
 18 that, "[c]ongress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among
 19 the several States." *United Haulers Assoc., Inc. v. Oneida-Herkimer Solid Waste Management*
 20 *Authority*, 550 U.S. 330, 338 (2007). Although the Constitution does not by its terms limit the
 21 power of the States to regulate commerce, the United States Supreme Court has long interpreted
 22 the Commerce Clause as an implicit restraint on state authority. *Id.* In discussing the purpose
 23 behind the dormant Commerce Clause, the Supreme Court has stated as follows:

24 "The opinions of the Court through the years have reflected an alertness to the
 25 evils of 'economic isolation' and protectionism, while at the same time
 26 recognizing that incidental burdens on interstate commerce may be unavoidable

27 ¹⁰Only if a plaintiff identifies a similarly situated class of persons from whom it has been treated differently need
 28 the court move on to an analysis of whether a fundamental right is at issue or whether, in the absence of a fundamental
 right, there is no rational basis for the difference in treatment between the plaintiff and the similarly situated class. *Squaw
 Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944 (9th Cir. 2004). While at all times denying that any of Jungo's
 fundamental rights were implicated by the Board's April 5, 2010, decision, the court need not undertake this analysis
 because Jungo has not, and cannot, identify a class of persons from whom it was treated differently.

1 when a State legislates to safeguard the health and safety of its people. Thus,
2 where simple economic protectionism is effected by state legislation, a virtually
per se rule of invalidity has been erected.”

3 *See, City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-624 (1978).

4 “To determine whether a law violates this so-called ‘dormant’ aspect of the Commerce
5 Clause, we first ask whether it discriminates on its face against interstate commerce. In this
6 context, “‘discrimination’ simply means differential treatment of in-state and out-of-state
7 economic interests that benefits the former and burdens the latter.” *Id.*; citing, *Oregon Waste
8 Systems, Inc. v. Dep’t. of Environmental Quality of Oregon*, 511 U.S. 93, 99 (1994). The
9 Supreme Court has held that, in this context, discriminatory laws motivated by simple economic
10 protectionism are subject to a virtually *per se* rule of invalidity which can only be overcome by a
11 showing that the State has no other means to advance a legitimate local purpose. *United Haulers
12 Assoc., supra.* at 338-339. Thus, “when a law favors in-state business over out-of-state
13 competition, rigorous scrutiny is appropriate because the law is often the product of ‘simple
14 economic protectionism.’” *United Haulers, supra.* at 343.

15 In the absence of evidence of facial discrimination against interstate commerce, the court
16 must look to whether an ordinance or statute imposes a burden on interstate commerce that is
17 clearly excessive in relation to the putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S.
18 137, 142 (1970).

19 Plain and simply, the Commerce Clause has no application to the facts of the instant case.
20 Nothing about the actions of the Board in reversing the decision of the RPC discriminated
21 against Jungo to *its* detriment and the benefit of some in-state interests responsible for waste
22 management. Thus, absent any discrimination on interstate commerce caused by the actions of
23 the Defendants, there can be no violation of the dormant Commerce Clause.

24 Jungo fares no better by arguing that the decision of the Board members relative to the
25 Dolan appeal was “motivated” by an intent to discriminate against an article of commerce based

26
27 ¹¹Interestingly, in refusing to find a violation of the Commerce Clause in *United Haulers, supra.* at 344, the
28 Supreme Court noted that, “[w]e should be particularly hesitant to interfere with the Counties’ efforts under the guise
of the Commerce Clause because ‘[w]aste disposal is both typically and traditionally a local government function.’”

1 upon the “state of its origin.” Dolan raised a number of issues in his appeal of the decision of the
2 RPC, including issues associated with his use of the land upon which the landfill is proposed to
3 be constructed for recreational purposes. After hearing evidence, including the testimony of
4 witnesses presented by Jungo through its attorney, the Board members concluded that Condition
5 7 of the CUP had not been timely fulfilled by Jungo. This decision does not implicate the
6 Commerce Clause, there is no evidence that the decision was motivated by an intent to
7 discriminate against out-of-state waste, and this case does not involve legislation that has as its
8 purpose, or effect, the discrimination against interstate commerce. In this regard, it should not be
9 forgotten that the Humboldt County Board of Commissioners enacted legislation in October of
10 2007, which expressly addressed, and endorsed, the importation of out-of-state waste into
11 Humboldt County. In addition, in connection with an earlier appeal filed by Dolan in July of
12 2009, in which he sought the revocation of Jungo’s CUP, on November 2, 2009, the Board
13 members voted to uphold the decision of the RPC that Jungo’s CUP *not* be revoked. These are
14 not the actions of individuals who were motivated by their desire to discriminate against out-of-
15 state waste and Jungo has provided no evidence to the contrary.

16 ***D. Jungo’s Twelfth Claim for Relief Premised Upon the Fifth Amendment Should***
17 ***be Dismissed and Judgment Entered in Favor of the Defendants as a Matter of***
18 ***Law.***

19 ***(i) Jungo’s Fifth Amendment Takings Claim is not Ripe for Review.***

20 The Fifth Amendment of the United States Constitution prohibits the taking of private
21 property for a public use without just compensation. *See, Penn Central Transportation Comm’n.*
22 *v. City of New York*, 438 U.S. 104, 123 (1978). In determining whether a regulatory taking has
23 occurred under United States Supreme Court precedent, the court must consider: (1) the
24 regulation at issue’s impact on the property owner; (2) the regulation’s interference with
25 investment-backed expectations, and (3) the character of the government action. *Penn Central,*
supra. at 130-131.

26 Under Article III of the United States Constitution, a federal court is prohibited from
27 entertaining a case in which the issues are not yet ripe. If a claim is unripe, federal courts lack
28 subject matter jurisdiction and the claim must be dismissed. “Ripeness is more than a mere

1 procedural question: it is determinative of jurisdiction.” *Southern Pacific Transportation Co. v.*
2 *City of Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990).

3 The United States Supreme Court has held that, “if a State provides an adequate
4 procedure for seeking just compensation, the property owner cannot claim a violation of the Just
5 Compensation Clause until it has used the procedure and been denied just compensation.”
6 *Williamson County Regional Planning Comm’n. v. Hamilton Bank of Johnson City*, 473 U.S.
7 172, 195 (1985). Under the Supreme Court’s decision in *Williamson County, supra.*, “an as-
8 applied taking claim is ripe only if the landowner can establish that: (1) ‘the government entity
9 charged with implementing the regulations has reached a final decision regarding the application
10 of the regulations to the property at issue,’ and (2) the landowner has sought ‘compensation
11 through the procedures the State has provided for doing so.’” *Vacation Village, Inc. v. Clark*
12 *County*, 497 F.3d 902, 912 (9th Cir. 2007)(internal citation omitted).

13 While Jungo in the instant matter may be able to meet the first prong of the *Williamson*
14 *County* requirement in terms of the April 5, 2010, decision of the Board constituting a “final
15 decision,” it cannot meet the second requirement often referred to as the “exhaustion”
16 requirement. *Vacation Village, supra.* at 913. “If a plaintiff has not pursued available state
17 remedies, the case is not ripe because ‘the State’s action . . . is not ‘complete’ until the State fails
18 to provide adequate compensation for the taking.” *Arnett v. Myers*, 281 F.3d 552, 562 (6th Cir.
19 2002); *citing, Williamson, supra.* at 195. The Ninth Circuit Court of Appeals has expressly
20 recognized that Nevada has an acceptable and available state procedure for obtaining just
21 compensation for a taking, that being an action for inverse condemnation. *Vacation Village,*
22 *supra* at 913.

23 Jungo has not pursued the remedy available under Nevada state law to address its
24 allegation that the Board’s action of April 5, 2010, constituted a taking without just
25 compensation. This failure is fatal to its Twelfth Claim for Relief and the same must be
26 dismissed on jurisdictional grounds.

27 ///

28 ///

1 **(ii) *Jungo’s Fifth Amendment Takings Claim Should be Dismissed and Judgment***
 2 ***Entered in Favor of the Defendants as a Matter of Law Because Jungo has no***
 3 ***Protected Property Interest in the Extension of its Conditional Use Permit.***

4 To state a claim under the Fifth Amendment takings clause, a plaintiff must first
 5 demonstrate that he possesses a property interest that is constitutionally protected. *See,*
 6 *Schneider v. California Dep’t. of Corrections*, 151 F.3d 1194, 1198 (9th Cir. 1998). For the
 7 reasons set forth in Section III(A)(i) herein, Jungo’s Twelfth Claim for Relief fails because it
 8 does not possess a constitutionally protected property interest in the extension of its Conditional
 9 Use Permit.

10 **(iii) *Jungo’s Fifth Amendment Takings Claim Must be Dismissed Based Upon its***
 11 ***Failure to Offer Any Evidence of its Actual Damages***

12 In addition, even if Jungo’s Fifth Amendment takings claim were ripe for review, it
 13 suffers from a fatal flaw, that being Jungo’s failure to offer any evidence which demonstrates that
 14 it incurred actual damages as a result of the actions of the Board members relative to the
 15 extension of its conditional use permit. “Where discovery has been completed, summary
 16 judgment is appropriate when a party challenged by motion fails to offer evidence supporting an
 17 element of a claim on which that party bears the burden of proof at trial.” *Celotex Corp. v.*
 18 *Catrett*, 477 U.S. 317, 322-24 (1986). Where a party fails to offer evidence of damages,
 19 summary judgment is appropriate with respect to all claims for which the party bears the burden
 20 of establishing actual harm suffered as a result of the allegedly wrongful government action.
 21 *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 808 (9th Cir. 1988). Summary judgment is
 22 appropriate where the plaintiff has no expert witnesses or designated documents providing
 23 competent evidence from which a jury could fairly estimate damages. *Id.*

24 Both state and federal takings claims are rooted in the notion of adequate compensation.
 25 Jungo’s Fifth Amendment takings claim requires evidence that the actions of the Board deprived
 26 it of all economic use of its property. *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*,
 27 841 F.2d 872, 877 (9th Cir. 1987). Evidence pertaining to damages is essential to the
 28 determination that all economic use of Jungo’s land has been forestalled.

Jungo did not produce any documents or evidence during the discovery phase which

1 would demonstrate whether, or to what extent, it sustained actual damages as a result of the
2 actions of the Board. Not only was the Board decision stayed on April 29, 2010, seven days after
3 Jungo filed its complaint, but Jungo has continued to move forward with its efforts to obtain its
4 Solid Waste Permit from the state. It is uncontroverted that Jungo was nowhere close to
5 commencing operations at the landfill at the time of the decision of the Board.

6 More importantly, Jungo did not identify an expert witness to provide any evidence of its
7 alleged actual damages nor did it produce any documents which would support an actual damage
8 claim. As such, Jungo cannot survive summary judgment on its Fifth Amendment takings claim.

9 **IV. THE COURT SHOULD NOT EXERCISE JURISDICTION OVER PLAINTIFFS’**
10 **STATE LAW CLAIMS FOR RELIEF.**

11 28 U.S.C. §1367(a) allows the federal court to exercise supplemental jurisdiction over a
12 plaintiff’s claims arising out of state law where said claims form part of the same case or
13 controversy as do the federal questions at issue.

14 The court may decline, however, to exercise supplemental jurisdiction over state law
15 claims if the court determines that the federal claims warrant dismissal. See, 28 U.S.C.
16 §1367(c)(3).

17 The exercise of supplemental, or pendent jurisdiction, “is a doctrine of discretion, not of
18 plaintiff’s right.” United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966). “If the
19 federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense,
20 the state claims should be dismissed as well.” Id. Issues of “judicial economy, convenience and
21 fairness to litigants” are relevant when considering the exercise of jurisdiction under §1367(a).

22 Should the Court find in favor of Defendants in regard to Jungo’s claims arising under
23 §1983, Jungo’s state law claims for relief should be dismissed on jurisdictional grounds.

24 **V. PLAINTIFF’S CLAIM PREMISED UPON CHAPTER 241 AND NEVADA’S**
25 **OPEN MEETING LAW SHOULD BE DISMISSED AND JUDGMENT ENTERED**
26 **IN FAVOR OF THE DEFENDANTS AS A MATTER OF LAW.**

27 Nevada’s Open Meeting Law, set forth in Chapter 241 of the Nevada Revised Statutes,
28 requires all meetings of public bodies to be open to the public. *McKay v. Douglas County Board*
of Commissioners, 103 Nev. 490, 491, 746 P.2d 124 (1987). The provisions of the Open

1 Meeting Law seek to give the public clear notice of the topics to be discussed at public meetings
2 so that the public may attend a meeting when an issue of interest will be discussed. *Sandoval v.*
3 *Board of Regents*, 119 Nev. 148, 67 P.3d 902. Under Chapter 241, a “meeting” is defined as
4 “[t]he gathering of members of a public body at which a quorum is present to deliberate toward a
5 decision or to take action on any matter over which the public body has supervision, control,
6 jurisdiction or advisory power.” See, NRS 241.015(1). Further, the term “action” under the
7 statute is defined as, (a) decision made by a majority of the members present during a meeting of
8 a public body; (b) a commitment or promise made by a majority of the members present during a
9 meeting of a public body; (c) if a public body may have a member who is not an elected official,
10 an affirmative vote taken by a majority of the members of the public body; or (d) if all the
11 members of a public body must be elected officials, an affirmative vote taken by a majority of the
12 members of the public body. See, NRS 251.015(1)(a)-(d).

13 With respect to the notice requirements of Chapter 241, written notice of all public
14 meetings must be given at least three working days before the meeting and the notice must
15 include all of the following: (a) the time, place and location of the meeting; (b) a list of the
16 locations where the notice has been posted; (c) an agenda consisting of (1) a clear and complete
17 statement of the topics scheduled to be considered, (2) a list describing the items on which action
18 may be taken and clearly denoting that action may be taken; (3) a period devoted to public
19 comments; (4) notice of whether any portion of the meeting will be closed; and (4) if, during the
20 meeting, the public body will consider whether to take administrative action against a person.
21 See, NRS 241.020(2)(a)-(c). A public body must also provide a copy of the notice to anyone
22 who has requested notice of the meeting. *Id.* at Subsection 3(b).

23 Damages are not recoverable under Chapter 241 of the Nevada Revised Statutes.
24 *Stockmeier v. Nevada Dep’t. of Corrections Psychological Review Panel*, 124 Nev. 313, 315,
25 183 P.3d 133 (2008). Rather, violations of the Open Meeting Law may be remedied only
26 through injunctive or declaratory relief. *Id.*

27 ***A. Meeting of March 1, 2010***

28 In its Amended Complaint, Jungo alleges that the Defendants committed a violation of

1 the Open Meeting Law with respect to its meeting of March 1, 2010. More specifically, Plaintiff
2 alleges that the Board deliberated and took action on whether Mr. Dolan and Ms. Massey had
3 standing to appeal the decision of the RPC granting Plaintiff a five year extension of its CUP.

4 While there was a discussion of standing during this meeting, the Board took one singular
5 action and that action was to set the appeal for a hearing on March 15, 2010. *See*, Exhibit “6,”
6 partial transcript of March 1, 2010, meeting. Indeed, the only motion that was made concerning
7 this issue on March 1, 2010, was as follows: “To set this issue for a public hearing at the next
8 meeting, March 15, 2010.” *Id.* Any arguments to the contrary should be summarily rejected by
9 this Court, as there is simply no evidence to support the contention that the Board deliberated or
10 took any action other than to set the Dolan appeal for a hearing to be held at a later date. As
11 such, Plaintiff’s Open Meeting Law claim premised on the March 1, 2010, meeting of the Board
12 should be dismissed and judgment entered in the Defendants’ favor as a matter of law.

13 ***B. Meeting of April 2, 2010***

14 Plaintiff also alleges that the Defendants violated the Open Meeting Law on or about
15 April 2, 2010, by conducting a “secret meeting” at which they established the procedures to be
16 used at the April 5, 2010, hearing. This claim is equally without merit.

17 Initially, the meeting on April 2, 2010, was a confidential and privileged meeting between
18 District Attorney Russell Smith (attorney) and the Board of County Commissioners (client) to
19 ensure that the Board understood the mechanics of how the hearing would proceed on April 5,
20 2010, in light of threatened litigation. *See*, NRS 241.015(2)(b). In no way, shape or form did
21 this meeting alter the plenary “de novo” review authority of the Board explicitly set forth in HCC
22 §17.68.110 - §17.68.150. There can be no doubt that, regardless of what decision the Board
23 made at its meeting of April 5, 2010, litigation would ensue. *See*, Exhibit 5,” letter dated
24 February 24, 2010, from counsel for Jungo to the Board of County Commissioners challenging
25 the propriety of the appeal; *see also*, Exhibit “8,” letter dated March 8 ,2010, from counsel for
26 Jungo to the Board of County Commissioners challenging the propriety of the appeal; *see also*,
27 Exhibit “17,” letter dated March 29, 2010, from counsel for Jungo to the Board of County
28 Commissioners challenging the propriety of the appeal. Respectfully, it is abundantly clear that

1 the District Attorney had the absolute right to meet with his clients, the Board of County
2 Commissioners, to discuss the impending appeal hearing in light of all of the threats made by
3 Jungo against Humboldt County, Nevada, and the Nevada Revised Statutes specifically provide
4 that such a meeting *is not* a meeting under the provisions of Chapter 241. *See*, NRS
5 241.015(2)(b).

6 Further, it is simply inconceivable for Plaintiff to allege that the Board deliberated
7 “secretly” about the procedures to be used at the April 5, 2010, meeting and that it did not have
8 notice of those procedures. At the outset of the hearing, the procedures to be used in the hearing
9 were specifically set forth by District Attorney Russell Smith and Jungo made no objections to
10 the procedures outlined. Given this notice to Jungo and its attorneys, and given the absolute right
11 of the Board members to meet with their attorney over threatened litigation, no Open Meeting
12 Law violation occurred on April 2, 2010.

13 **3. *No Violation of the Open Meeting Law Occurred by Virtue of the Agenda for***
14 ***the April 5, 2010, Meeting.***

15 Bizarrely, Jungo challenges the notice for the appeal hearing set forth on the agenda for
16 the April 5, 2010, meeting on the basis that there was no mention made in the agenda that the
17 hearing was a quasi-judicial hearing. This position is bizarre because Jungo acknowledged in its
18 letter to the Board of Commissioners dated March 29, 2010, that the hearing *was* a quasi-judicial
19 hearing. *See*, Exhibit “17.” Indeed, counsel for Jungo stated in said letter as follows: “[t]he
20 County Commission’s consideration of Dolan and Massey’s appeal is a quasi-judicial
21 proceeding.” *Id.*

22 Also, and importantly, the procedure for conducting the hearing on April 5, 2010, was
23 clearly spelled out by the District Attorney at the outset of said hearing wherein District Attorney
24 Russell Smith, in detail, recited that each party would be able to present witnesses, cross-
25 examine witnesses, introduce documentary evidence, and be allowed to make closing arguments.
26 *See*, Exhibit “13.” At no time did Jungo ask for a continuance of the matter based upon this
27 procedure. Instead, Jungo cross-examined witnesses, called its own witnesses, and argued its
28 case at the hearing. *See*, Exhibit “16,” transcript of April 5, 2010, hearing.

1 Further, at no time during the hearing did Jungo insist that the appeal hearing on April 5,
 2 2010, be conducted in a similar manner to the appeal hearing conducted on November 2, 2009.
 3 *Id.* Jungo cannot seriously argue that it wanted the entire public to testify at the hearing on April
 4 5, 2010, like it did at the previous Dolan appeal on November 2, 2009.

5 **VI. PLAINTIFF'S THIRD CLAIM FOR RELIEF FOR DAMAGES UNDER NRS**
 6 **278.0233 SHOULD BE DISMISSED AND JUDGMENT ENTERED IN**
 7 **DEFENDANTS' FAVOR AS A MATTER OF LAW.**

8 ***A. Jungo is not Entitled to Recover under the Provisions of NRS 278.0233***
 9 ***Because it has not Proven that it Suffered Any Actual Damages.***

10 NRS 278.0233 allows an entity like Jungo to bring an action against a local agency for
 11 actual damages incurred when said agency imposes requirements, limitations, or conditions upon
 12 the use of property in excess of those authorized by ordinances and which were arbitrary,
 13 capricious or unlawful. In the instant matter, Jungo has not established that it has suffered any
 14 actual damages in this matter and, as such, cannot prevail under NRS 278.0233. *See*, Section
 15 III(D)(iii).

16 ***B. The Actions of the Board of County Commissioners Acting as an Appellate***
 17 ***Board on April 5, 2010, were not Arbitrary or Capricious.***

18 On April 5, 2010, the Board of County Commissioners, acting as an appellate board,
 19 heard an appeal filed by Mr. Dolan and Ms. Mayo concerning the propriety of a 5 year extension
 20 to the conditional use permit at issue in this matter. This appeal was heard under the auspices of
 21 Humboldt County Code §17.68.120. Ultimately, the Board found that there was not reasonable
 22 justification for extending the conditional use permit for five years based upon a number of
 23 factors, including the fact that the landfill had not yet begun operation and Jungo had not yet
 24 received all of the permits as required by the CUP. This being so, the actions of the Board
 25 cannot be described as “baseless” or “despotic, or “a freak whim or mere fancy.” *City of Reno v.*
 26 *Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545 (1994). *See*, Exhibit “16,” transcript of
 27 hearing of April 5, 2010.

28 ***C. The Board of County Commissioners had Authority Under the Humboldt***
County Code to Conduct the Hearing on the Appeal at Issue.

The Board of County Commissioners had the legal authority to conduct the appellate

1 hearing at issue and to issue its decision in accordance with the provisions of HCC §17.68.120.

2 See, Section III(A)(i).

3 ***D. Jungo is Foreclosed from Bringing an Action Under NRS 278.0233 Against the***
4 ***Individual Members of the Board of County Commissioners.***

5 As previously set forth in Section III(E), the individual Board members cannot be sued
6 under the provisions of NRS 278.0233. See, NRS 278.0233(2)(h).

7 ***E. At Most, the Decision to Hear Dolan’s Appeal on April 5, 2010, and the***
8 ***Manner in Which the Appeal was Conducted, were Unintentional, Procedural***
9 ***Errors, for which no Recovery May be Had Under NRS 278.0233(2)(f).***

10 NRS 278.0233(2)(f) provides that no action may be brought pursuant to NRS
11 278.0233(1) for unintentional, procedural errors of the Board of County Commissioners. The
12 Board’s decision to hear the Dolan Appeal and the manner in which it was heard, constitute, at
13 most, unintentional procedural errors precluding a claim under NRS 278.0233(1).

14 ***F. The Board of County Commissioners, Acting as an Appellate Board on April 5,***
15 ***2010, are Entitled to Quasi-Judicial Immunity Foreclosing Any Claim Under***
16 ***NRS 278.0233(1).***

17 As previously set forth in Section II(A), it is clear that the Board of County
18 Commissioners, acting in a quasi-judicial capacity, are absolutely immune from suit. See,
19 Section II(A), *infra*. Further, it is axiomatic that Humboldt County cannot be held legally
20 responsible for the actions of its Board of County Commissioners acting as an appellate board
21 when the Board and its members are absolutely immune from suit.¹² See, *Chrisoffersen v. State*
22 *of Alaska*, 242 P.3d 1032 (Ala. 2010).

23 **VII. JUNGO’S ELEVENTH CLAIM FOR RELIEF FOR BREACH OF THE**
24 **COVENANT OF GOOD FAITH AND FAIR DEALING MUST BE DISMISSED**
25 **AND JUDGMENT ENTERED IN DEFENDANTS’ FAVOR AS A MATTER OF**
26 **LAW.**

27 ***A. Jungo’s Eleventh Claim for Relief Fails on Substantive Grounds.***

28 In its Eleventh Claim for Relief, Jungo seeks damages under state tort law for an alleged
“bad faith” breach of contract in violation of the covenant of good faith and fair dealing. To
make out a prima facie case under this state tort, Jungo must demonstrate all of the following by

¹²This absolute quasi-judicial immunity enjoyed by both the Board of County Commissioners and Humboldt County applies equally to all of Jungo’s state tort claims and compels the dismissal of same.

1 a preponderance of the evidence: (1) that Plaintiff and Defendants entered into a contract; (2) that
2 that the Defendants owed to Plaintiff a duty of good faith and fair dealing arising from the
3 contract; (3) that a special relationship of reliance or fiduciary duty existed between the Plaintiff
4 and the Defendants where Defendants were in a superior or entrusted position; (4) Defendants
5 breached the duty of good faith by engaging in misconduct; and (5) Plaintiff suffered damages as
6 a result of the breach. *Great American Ins. Co. v. General Builders, Inc.*, 113 Nev. 346, 934
7 P.2d 257 (1997). In a tort action for breach of the covenant of good faith and fair dealing, the
8 plaintiff must prove the existence of a special relationship between the parties. *Id.* at 355. The
9 Nevada Supreme Court has denied such liability absent egregious conduct and where agreements
10 have been heavily negotiated and the plaintiff was a sophisticated business person. *Id.*

11 Jungo's Eleventh Claim for Relief fails on a number of grounds. First, and at its most
12 basic, Jungo and the Defendants were not in a contractual relationship with respect to Jungo's
13 conditional use permit. *See, Smith v. City and County of San Francisco*, 225 Cal. App.3d 38
14 (Cal. Ct. App. 1990).

15 Second, it simply cannot be found in this case that a "special relationship" or fiduciary
16 duty existed between the parties to this case so as to implicate this tort. The Nevada Supreme
17 Court has noted that this element of "special reliance" arises where there is a need to protect the
18 "weak from the insults of the stronger" that is not adequately met by ordinary contract damages
19 or where one party holds "vastly superior bargaining power" over the other. *See, Insurance Co. of*
20 *the West v. Gibson Title Co., Inc.*, 122 Nev. 455, 462, 134 P.3d 698 (2006). Certainly, the
21 undisputed facts in the case at bar do not establish such a "special relationship" between the
22 parties to this case upon which such a tort can be based.

23 Nor has Jungo offered any evidence to suggest that it sustained any actual damages as a
24 result of the conduct of the Board members relative to its Conditional Use Permit. Damages are
25 an element of a prima facie case under this tort and Jungo's failure to demonstrate whether, or to
26 what extent it was damaged, as a result of the decision of the Board members, which was in
27 effect for only seven days, is also fatal to its Eleventh Claim for Relief. *McGlinchy v. Shell*
28 *Chem. Co.*, 845 F.2d 802, 808 (9th Cir. 1988).

B. Jungo’s Eleventh Claim for Relief Must be Dismissed Pursuant to the Discretionary Immunity set forth in NRS 41.032(2).

Chapter 41 of the Nevada Revised Statutes provides for a limited waiver of sovereign immunity in suits against the State and its political subdivisions and their agents and employees. NRS 41.032 limits this waiver of sovereign immunity under certain circumstances including for those actions which are, “[b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the State or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused.” See, NRS 41.032(2). The Nevada Supreme Court has clarified that, in order to fall within the scope of discretionary act immunity, a decision must: (1) involve an element of individual judgment or choice and (2) be based on considerations of social, economic or political policy. See, *Martinez v. Maruszczak*, 123 Nev. 433, 446, 168 P.3d 720 (2007). The Nevada Supreme Court has further articulated one of the primary purposes of such immunity as follows:

“to prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.’ Thus, if the injury-producing conduct is an integral part of governmental policy-making or planning, if the imposition of liability might jeopardize the quality of the governmental process, or if the legislative or executive branch’s power or responsibility would be usurped, immunity will likely attach under the second criterion.”

Id. at 729 (*internal citations omitted*).

The Nevada Supreme Court has repeatedly held that decisions concerning the grant or denial of land use permits are discretionary acts. *Reno v. Travelers Hotel*, 100 Nev. 436, 439, 683 P.3d 960 (1984); *Henderson v. Henderson Auto.*, 77 Nev. 118, 122, 359 P.2d 743 (1961); and *Nevada Contractors v. Washoe County*, 106 Nev. 310, 313, 792 P.2d 31 (1990). As such, Jungo’s claim for breach of the covenant of good faith and fair dealing must be dismissed and judgment entered in Defendants’ favor as a matter of law.

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1 **VIII. JUNGO'S THIRTEENTH CLAIM FOR RELIEF FOR TORTIOUS**
 2 **INTERFERENCE WITH CONTRACTUAL RELATIONS MUST BE DISMISSED**
 3 **AND JUDGMENT ENTERED IN FAVOR OF THE DEFENDANTS AS A**
 4 **MATTER OF LAW.**

5 **A. *Jungo's Thirteenth Claim for Relief Fails on Substantive Grounds.***

6 In its Thirteenth Claim for Relief, Jungo makes the equally unavailing claim that the
 7 actions of the Board relative to the extension of its Conditional Use Permit constitute tortious
 8 interference with contractual relations under state law. In order to prevail on such a claim, Jungo
 9 must demonstrate all of the following by a preponderance of the evidence: (1) there exists a valid
 10 contract between the plaintiff and a third party; (2) the defendant knew of the contract; (3) the
 11 defendant committed intentional acts intended or designed to disrupt the contractual relationship;
 12 (4) there was an actual disruption of the contract; and (5) the plaintiff sustained damages as a
 13 result. *Hilton Hotels Corp. v. Butch Lewis Productions, Inc.*, 109 Nev. 1043, 862 P.2d 1207
 14 (1993). Even a cursory review of these elements demonstrates that it is inapplicable in the case
 15 at bar.

16 In its Amended Complaint, Jungo alleges that the Defendants interfered with its contracts
 17 for water rights, rail transport, and those related to the "use and purchase" of the property on
 18 which the landfill is to be constructed. There is no evidence in this case to suggest that the
 19 Defendants had any detailed knowledge of the contractual relationships between Jungo and third
 20 parties or, in fact, that it had entered into all such agreements at the time of the hearing of April
 21 5, 2010. In fact, George McGrath, Chief Operating Officer for Recology (Jungo's parent
 22 company), testified that Jungo had not executed any agreements for water rights as of the date of
 23 his deposition on February 11, 2011, and that no agreements pertaining to water rights had ever
 24 been provided to Humboldt County. *See*, Exhibit "18," deposition of George McGrath, p. 35.
 25 Mr. McGrath also testified that neither he nor Recology ever provided Humboldt County with a
 26 copy of the lease agreement with purchase option for the parcel of land on which the landfill is to
 27 be constructed. *Id.* at 36. Mr. McGrath further testified that Recology had not entered into any
 28 service agreements with Union Pacific relative to the Jungo landfill at the time of his deposition
 and that Recology never provided any contract documents related to its agreements with Union

1 Pacific to Humboldt County. *Id.* at 57. These facts are fatal to Jungo's Thirteenth Claim for
2 Relief.

3 Further, there is absolutely no evidence that the actions of any of the Board members
4 were motivated by an intent to disrupt Jungo's contractual relationships with Union Pacific or
5 any other entity. To even make such an allegation is ludicrous.

6 In addition, there has been no evidence presented in this case that *any* of Jungo's
7 contractual relationships with third parties (to the extent Jungo had even entered into such
8 contracts as of April 5, 2010) were actually disrupted by the actions at issue in this case. This is
9 especially true given the fact that the Board's April 5, 2010, decision was stayed by the Sixth
10 Judicial District Court on April 29, 2010.

11 Finally, this state tort must also be dismissed for failure of Jungo to demonstrate actual
12 damages as a result of the Defendants' actions.

13 ***B. Jungo's Twelfth Claim for Relief Must be Dismissed Pursuant to the***
14 ***Discretionary Immunity set forth in NRS 41.032(2).***

15 In addition, there can be no question that Jungo's Twelfth claim for relief is subject to
16 dismissal under 41.032(2) and the discretionary immunity afforded by that statute. As was
17 discussed above, the Nevada Supreme Court has held unequivocally that government decisions
18 related to the grant or denial of permits are discretionary acts.

19 **IX. JUNGO'S FOURTEENTH CLAIM FOR RELIEF FOR TORTIOUS**
20 **INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE MUST BE**
21 **DISMISSED AND JUDGMENT ENTERED IN DEFENDANTS' FAVOR AS A**
22 **MATTER OF LAW.**

23 ***A. Jungo's Fourteenth Claim for Relief Fails on Substantive Grounds.***

24 In its Fourteenth, and final, Claim for Relief, Jungo seeks damages under yet another state
25 tort theory, interference with prospective economic advantage. In order to recover under this
26 state tort, Jungo must demonstrate all of the following by a preponderance of the evidence: (1) a
27 prospective contractual relationship exists or existed between plaintiff and a third party; (2) the
28 defendant knew of this prospective relationship; (3) the defendant intended to harm plaintiff by
preventing the relationship; (4) the defendant had no privilege or justification; and (5) the
defendant's harm resulted in actual harm to the plaintiff. *See, Consolidated Generator-Nevada,*

1 *Inc. v. Summins Engine Co., Inc.*, 114 Nev. 1304, 971 P.2d 1215 (1998).

2 This state tort claim fails for the same reasons as those outlined in the argument set forth
3 immediately above and this claim should be dismissed and judgment entered in favor of the
4 Defendants as a matter of law.

5 IV

6 CONCLUSION

7 Based upon all of the foregoing, Defendants respectfully request that Jungo's Amended
8 Complaint for Declaratory and Injunctive Relief and Damages and Petition for Judicial Review
9 be dismissed and judgment entered in favor of the Defendants as a matter of law.

10 DATED: January 27, 2012
11 THORNDAL, ARMSTRONG,
DELK, BALKENBUSH & EISINGER

DATED: January 27, 2012
LOCKIE & MACFARLAN, LTD.

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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of Thorndal, Armstrong, Delk, Balkenbush & Eisinger, and that on this date I electronically filed the foregoing **MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS HUMBOLDT COUNTY, CHUCK GIORDANO, MIKE BELL, DAN CASSINELLI, GARLEY AMOS AND TOM FRANSWAY** with the U.S. District Court’s Electronic Filing System (CM/ECF), which will serve the following electronically:

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DATED this 27th day of January, 2012.

/s/ Mary C. Wilson
An employee of Thorndal, Armstrong,
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