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STATE OF NEVADA

DEPARTMENT OF BUSINESS AND INDUSTRY

REAL ESTATE DIVISION

OFFICE OF THE OMBUDSMAN FOR COMMON-INTEREST COMMUNITIES

ADR/HOMEOWNERS ASSOCIATION DISPUTE

November 17th, 2010

John A. Lytle and Trudi L. Lytle, as Trustees of the LYTLE TRUSt, c/o Susan Williams Scann, Esq. Thomas D. Harper, Esq. Claimant, v. Rosemere Estates Property Owners Association, et al. Sean L. Anderson, Esq. Ryan W. Reed, Esq. Respondents.	NRED CONTROL #10-71 **NON-BINDING ARBITRATION**

DECISION OF THE ARBITRATOR

A. JURISDICTION. This claim was filed with the Office of Ombudsman For Common-Interest Communities, Real Estate Division, Department of Business And Industry, State of Nevada.

The dispute occurs in Clark County, Nevada between Property Owners and their Property Owners Association.

B. IDENTIFICATION OF THE PARTIES. Claimants are John Allen Lytle and Trudi Lee Lytle, Mailing Address-1600 River Birch St., Las Vegas, Nevada 89117

Respondent is Rosemere Estates Property Owners Association, Mailing Address-
1861 Rosemere Court, Las Vegas, Nevada 89117-2061

C. NATURE OF DISPUTE*.

There are Two Primary Issues in this Dispute:*

1. The Association Improperly Assessed Claimant and Improperly Recorded and Maintains a Lien on Claimant's Property and Sanctions against Claimant for Non-Payment.

2. The Association Continually Violates its Governance Responsibilities under NRS 116 and its Governing Documents.

* Ancillary References or Examples of Dispute Marked Accordingly in the FINDINGS Section of this Decision.

D. EXECUTION OF ARBITRATION AGREEMENTS. Both Claimant and Respondent agreed to Non-Binding Arbitration.

E. ARBITRATOR. Dee Newell, J.D., Arbitration and Mediation Solutions, Inc. at 5546 Camino Al Norte, Ste. 2-449, North Las Vegas, Nevada 89031.

F. DATE OF ARBITRATION HEARING. An Arbitration Hearing was held at the Office of the Clark County Bar Association located at 725 South Eighth Street, Las Vegas, Nevada 89101, on November 8th, 2010 at the hour of 9:00 a.m. through 5:00 p.m.

G. APPEARANCE AT HEARING.

For the Claimants: John Allen Lytle and Trudi Lee Lytle, Proper Persons, Represented by Susan Williams Scann, Esq. and Thomas D. Harper, Esq.

For the Respondents: Rosemere Estates Property Owners Association, a Properly Recorded Entity, Represented by Sean L. Anderson, Esq. and Ryan W. Reed, Esq.

H. WITNESSES.

The following Witnesses Testified under Oath Administered by the Arbitrator.
On behalf of Claimants:

John Allen Lytle (Allen Lytle), Claimant and Property Owner of Rosemere Estates.

On behalf of Respondent:

Gerry Zobrist, Former President of the Association and Resident of Rosemere Estates;

Sherman L. Kearl, M.D., Former Secretary of the Association and Resident of Rosemere Estates;

Debbie Kluska, Office Manager of Nevada Association Services (NAS).

I. <u>OTHER EVIDENCE.</u> In addition to the testimony of Claimants, Respondent and Witnesses, the Arbitrator also considered the following documents and other categorical evidence:

1. Assignment of Case to Arbitrator Dee Newell from Gordon Milden, Office of the Ombudsman for Owners in Common-Interest Communities, dated April 23, 2010.
2. Arbitrator's Acceptance Letter and Order to Respond with Fee Schedule, dated April 29, 2010.
3. Office of the Ombudsman Response to Claimants' procedural question on the appointment of Arbitrator, dated May 7, 2010.
4. Arbitrator's Demand for Immediate Response Final Order, dated May 12, 2010.
5. Claimants' Claim Form, dated March 16, 2010 with 101 pages of ancillary documentation and exhibits including Bylaws of Rosemere Estates Property Owners Association.
6. Claimants' Motion for Entry of Default, dated May 14, 2010.
7. Arbitrator's Default Denial Order, dated May 16, 2010.
8. Respondent's Response Form, dated May 20, 2010 with 20 pages of ancillary documentation.
9. Arbitrator's Request to Claimants to respond to Respondent's Motion to Consolidate and Dismiss, dated May 21, 2010.
10. Respondent's Motion to Consolidate NRED Control No. 10-71 with NRED Control No. 09-33 with ancillary documentation, dated May 20, 2010.
11. Claimants' Opposition to Motion to Consolidate and Motion to Dismiss and Counter Motion to Renew Motion for Entry of Default, dated May 26, 2010.
12. Arbitrator's Order in Response to Respondent's Motion to Consolidate Case NRED Control No. 10-71 with NRED Control No. 09-33 and Respondent's Motion to Dismiss, dated May 27, 2010.
13. Arbitrator's Order in Response to Respondent's Motion to Consolidate Case NRED No. 10-71 with NRED Control No. 09-33 and Respondent's Motion to Dismiss with Claimants' Counter Motion to Renew Motion for Entry of Default, dated May 31, 2010.
14. Office of the Ombudsman, State of Nevada, Intervention Findings letter to Claimants from Compliance Investigator, dated August 25, 2008.
15. Completion Certificate Issued for Case No. 09-33, dated June 4, 2009.
16. Non Binding Arbitration Award for NRED Case Control No. 09-33, dated May 4, 2009.
17. Claimant's letter to Arbitrator, Regarding the Present Legal Status of the First NRED Claim with Ancillary Documentation, dated June 29, 2010.
18. Arbitration Discovery Order, dated July 3, 2010.

19. Amended Alternative Dispute Resolution Claim Form with Ancillary Documentation, dated July 2, 2010.
20. Respondent's Response to Amended Claim Filed by the Lytle Trust, dated July 9, 2010.
21. Claimants' First Set of Interrogatories, dated July 7, 2010.
22. Claimants' letter to Arbitrator, Regarding Validity of Amended CC&Rs, dated July 14, 2010.
23. Withdrawal Notice to Arbitrator from Respondent's, Attorney, dated July 16, 2010.
24. Arbitrator's Notification to Office of the Ombudsman Regarding Withdrawal of Respondent's Attorney and 30 day Case Hold, dated July 16, 2010.
25. Arbitration Discovery Order, dated July 29, 2010.
26. Respondent's Tentative Witness List Pursuant to Arbitration Order, dated July 29, 2010.
27. Claimants' Document List Provided as a Result of Pre-Arbitration Conference dated July 30, 2010. (215 pages)
28. Claimants' List of Witnesses and Supplemental Document List and Exhibits with 3 duplicate CDs:
    a. Association Special Meeting (Sept. 15, 2008);
    b. August 14, 2009 Association Meeting;
    c. Denying March 24, 2010 Meeting Access dated August 11, 2010. (122 pages)
29. Respondent's Aug. 11, 2010 Initial Disclosure of Documents Pursuant to Arbitration Order dated July 29, 2010 (157 pages)
30. First Set of Respondent's Request for Production of Documents, Interrogatories to Claimants, dated August 16, 2010.
31. Claimants' Request to Move Due Date of Chronology of Events with Arbitration Briefs Due Date, dated August 23, 2010.
32. Arbitrator's Revised Discovery Order to Accommodate Claimants' Request, dated August 24, 2010.
33. Claimants' Letter to Respondents with copy to Arbitrator, Regarding the Supplementation of Respondent's Initial Disclosure Documents, dated August, 23, 2010.
34. Respondent's First Supplemental Disclosure of Documents with Exhibits, dated August 25, 2010. (304 pages)
35. Claimants' Letter to Arbitrator, Regarding Problem with Claimants' Document Production, dated August 26, 2010.
36. Claimants' Restated Arbitration Issues, dated August 27, 2010.
37. Claimants' Letter to Arbitrator, Regarding Additional Issues for August 30, 2010 Parties Telephone Conference with Arbitrator.
38. Arbitration Discovery Telephone Conference (3) and Order, dated August 30, 2010.
39. Claimants' Request to Arbitrator for Evidentiary Hearing, dated August 31, 2010.
40. Claimants' Notice with Ancillary Documentation, of Taking Deposition of Nevada Association Services, dated September 1, 2010.
41. Respondent's Second Supplemental Disclosure of Documents with Exhibits, dated September 1, 2010.
42. Respondent's Motion to Dismiss/Stay of Proceedings with 178 pages of Ancillary Documentation and Exhibits, dated September 3, 2010.

43. Claimants' Supplemental List of Witnesses and Second Supplemental Document list with 23 pages of Ancillary Documentation, Provided as a Result of Pre-Arbitration Conference, dated September 14, 2010.
44. Claimants' Third Supplemental Documents with CDs-Association Special Meeting (July 27, 2010); plus ancillary documentation of Claimants' Attorney's Professional Services Billing, dated September 16, 2010. (261 pages)
45. Claimants' Answers & Production of Documents to Respondent's Request, dated September 16, 2010. (19 pages)
46. Respondent's Third Supplemental Disclosure of Documents, dated September 16, 2010. (37 pages)
47. Respondent's Responses to Claimants' Request for Production of Documents, dated September 16, 2010. (7 pages)
48. Respondent's Responses to Claimants' Request for Admission & Interrogatories, dated September 16, 2010. (12 pages)
49. Claimants' Opposition to Motion to Dismiss/Stay of Proceedings, dated September 20, 2010.
50. Claimants' Letter to Arbitrator, Regarding Points of Discussion for Respondent's Motion to Dismiss, dated September 21, 2010.
51. Respondent's Letter to Claimants with copy to Arbitrator, Regarding Claimants' Late Discovery Deadline, dated September 22, 2010.
52. Arbitrator's Order Regarding Respondent's Motion to Dismiss And Claimants' Request to Re-Open Discovery, dated September 23, 2010.
53. Arbitrator's Signed Subpoenas for Claimants' Request to Subpoena Six (6) Witnesses for Hearing, dated September 24, 2010.
54. Respondents' Fourth Supplemental Disclosure of Documents, dated September 27, 2010.
55. Claimants' Fourth Supplemental Document List Provided as a Result of Pre-Arbitration Conference, dated September 28, 2010.
56. Claimants' Chronology of Events, dated September 29, 2010. (15 pages)
57. Respondent's Chronology of Events, dated September 29, 2010. (5 pages)
58. Claimants' Letter to Respondent with copy to Arbitrator, dated September 28, 2010.
59. Claimants' Letter to Respondent with copy to Arbitrator, dated September 29, 2010.
60. Respondent's Letter to Claimants with copy to Arbitrator, dated September 29, 2010.
61. Claimants' Letter to Arbitrator Regarding Witnesses Subpoenas for November 8, 2010 Hearing, dated September 30, 2010.
62. Claimants' Letter to Respondent with copy to Arbitrator, dated September 30, 2010.
63. Claimants' Letter to Respondent with copy to Arbitrator, dated October 1, 2010.
64. Notice of Taking of Deposition to Respondent with copy to Arbitrator, of Sherman Kearl, dated October 1, 2010.
65. Amended Notice of Taking of Deposition to Respondent with copy to Arbitrator, of Sherman Kearl, dated October 1, 2010.
66. Arbitrator's Order Regarding Claimants' Request to Reschedule October 1, 2010 Hearing to Allow for Deposition of an Essential Witness, dated October 1, 2010.
67. Claimants' Letter, dated October 15, 2010 to Arbitrator Regarding request for all parties telephone conference to resolve Discovery Dispute for Request No. 19; Production of Documents with ancillary documentation. (8 pages)
68. Respondent's Response Letter, dated October 18, 2010 to Claimants' Request, dated October 15, 2010.

69. Claimants' Letter, dated October 19, 2010 to Arbitrator Regarding Continued Request for resolution to Cl's Request No. 19; Production of Documents.(3 pages)
70. Respondent's Amendment to Responses to Request for Admissions, dated October 28, 2010. (22 pages)
71. Claimants' Re-Issuance of Subpoenas, dated October 28, 2010.
72. Claimants' Letter, dated November 1, 2010 to Arbitrator Regarding Continued Request for resolution to Claimants' Request No. 19; Production of Documents.
73. Respondent's Letter, dated November 2, 2010 to Arbitrator Regarding Objection to Claimants' Request No. 19 and Respondent's Second Voluntary Response to Claimants' Untimely Discovery Requests dated October 11, 2010 with ancillary documentation. (9 pages)
74. Respondent's Letter, dated November 5, 2010 to Claimant (w/copy to Arbitrator) Regarding request for Hearing Brief Exhibits.
75. Claimant's Letter, dated November 5, 2010 to Respondent (w/copy to Arbitrator) Regarding providing Exhibit Book with Exhibit List.
76. Claimant's Exhibit List, dated November 5, 2010 to Claimant and Arbitrator. (6 pages)
77. Claimants' Final Arbitration Hearing Brief and Final Witness List, dated November 4, 2010. (21 pages plus Exhibits A through K).
78. Respondent's Final Arbitration Hearing Brief and Final Witness List, dated November 4, 2010.(63 pages plus Exhibits One though Fifty Six).
79. Respondent's Attorney Fees and Costs, dated November 15, 2010.
80. Claimants' Attorney Fees and Costs, dated November 15, 2010.

Arbitrator's total case file-Arbitrator's Exhibit #1-Two thousand one hundred eleven pages (2,111) plus Final Hearing Exhibits (approximately 18%- 20% duplicative pages).

J. INQUIRY CONCERNING FURTHER EVIDENCE. At Hearing, the Arbitrator requested of Claimants and Respondent attorney fees, cost and expenses.

K. FACTS. The following is intended to be a *brief-overview/factual analysis* rather than an exhaustive recitation of the facts relating to this matter. (For complete detailing, reference 2,111 pages of Case File with Claimants' 63 pages plus exhibits and Respondent's 21 pages plus exhibits, Hearing Briefs.) Based on evidence submitted and sworn testimony at Hearing, both Parties agree that in 1997, Claimants purchased an undeveloped lot (1930 Rosemere Court, Las Vegas, Nevada 89117) within the Rosemere Estates Property Owners Association ("the Association"). The Association Community is made up of only nine (9) residential lots. In 2010, Claimants' lot remains undeveloped and is the subject of this claim; propriety of a lien placed on the property (with five reference parts) and propriety of procedural governance (under

NRS 116 and Rosemere Amended Declaration of Covenants, Conditions and Restrictions- "CCRs") by the Association (with six reference parts and subparts).

The Parties are at distinct odds as to the appropriate *timeline of review* for this matter. While the Claimants believe Association activities dating from 2007 to present are not only relevant but integral, the Respondent counters that the Decision of the previous NRED Action No. 09-33 (dated May 4, 2009) strictly prohibits such a dated review. That is, in the 2009 Action, the Arbitrator ruled '…all parties have exhausted their administrative remedies with regard to all claims brought and defended, or *which could have been brought or defended,* in this matter…'

The Parties are also at distinct odds as to the appropriate *standard of review* for determining fault in this matter (the applicable provisions for certain aspects of this case). While Respondent believes the Association is *not obligated* (citing to an Office Of Ombudsman Compliance Advisory Decision Letter, dated August 2008) *to adhere to the entire requirements of Nevada Revised Statute ("NRS") 116*, except as delineated in NRS 116.1203 (limited to NRS 116.1106 & NRS 116.1107) and the Amended CCRs- -the Claimants believe *NRS 116 in its entirety* is the appropriate standard of review with the Amended CCRs.

The Claimants believe the 2009 Association lien recorded against their property/lot and the eventual suspension of their Association Member voting rights and privileges is not only procedurally and statutorily faulty (no hearing, improper lien agent, improper notices/agendas, improper location of Association meetings, improper meeting transcription minutes and Board's failure to respond to Claimants' 'certified' inquiries) but strictly retaliatory with malicious intent– in defiance of the Business Judgment Rule. The retaliation exemplified by the past Board President *physically preventing* the Claimants from attending the March, 2010 Association Annual Meeting.

The Respondent counters that the lien is indeed statutorily appropriate as it is a delinquent assessment based upon the Claimants' failure to pay their Homeowner's Association properly determined assessment; and alternatively not negated as Claimants put forth, by the

November 2009 Supersedeas Bond for the prior NRED Action No. 09-33. Rather than retaliatory, the 2010 suspension of Claimants' voting rights and privileges was strictly dictated by the Association's governing documents (Article 12, Section 12.2 (d) of the Amended CCRs) and Nevada Revised Statute Chapter 116.31031. Further, the Claimants' decision to leave the March, 2010 Annual Meeting was voluntary-not retaliatory; as at the time of the meeting Claimants' membership privileges were suspended in accordance with the Association's governing documents and NRS 116. As a result, the Claimants' membership privileges-voting and seeking office-were properly denied at the March, 2010 Annual Meeting. Since clearly non-retaliatory with no malicious intent, the decisions made by the Board, on behalf of the Association, are protected by the Business Judgment Rule.

Both Parties agree that the decision in the prior NRED Action No. 09-33 directed the Association to prepare (in accordance with Statutory and Amended CCRs guidelines) a reserve and operating budget beginning in fiscal year 2009. Both Parties contentiously disagree as to the validity and final status of this dictum.

Simply put, Claimants declare there is still no budget or ancillary financial statements for Rosemere Estates Property Owners Association. And, this lack of action by Respondent is an affront to the Statutory [NRS 116.3115(1)] and CCRs (amended) mandates. Claimants add that without a formal and approved Budget, there is no authority to support or legitimize the heretofore referenced 2009/2010 assessments placed against their property/lot.

Respondent counters that what Claimants perceive as 'no budget' is in fact a properly executed 2009 draft/2010 Budget put forth in a timely manner by the Rosemere Board of Directors. Respondent notes that the budget approval process is procedurally correct (Board's draft is approved by the Homeowner Membership; approved budgets are then made available to the membership at next meeting). The monthly costs
(three checks for phone, water, electricity) are so minimal and uncomplicated that the Board copies *all* the checks for the year and provides a copy to each Member for their review and

budgetary approval. What Claimants term an intentionally faulty audit and budgetary process, is in fact a direct and open statutorily compliant process involving all the proper Members of Rosemere Estates. Accordingly, the 2009 expenditures direct the 2010 budget. The Respondent puts forth that the Claimants intentionally distort, an honest budgetary process and plan, as non compliant with NRED Action No. 09-33.

The Claimants request the Arbitrator award damages plus all their attorneys' fees and legal costs. The Respondent opposes any award of damages to Claimants because there is simply no recoverable/actual damages resulting from the Association's actions against the Claimants. Respondent concludes that minus the requisite damages, the Claimants' action should be rejected in its entirety.

Historical Perspective Of Attorneys' Positions. It is should be noted for the record that Respondent's original attorney agreed that for the sole purpose of this Arbitration proceeding (NRED No. 10-71), the Amended CCRs were valid and enforceable so that the Arbitrator could determine whether the Respondent Association had complied with its governance responsibilities under the Amended CCRs. However, the Respondent's current attorney has clearly stated on the record that he does not support this contention and asserts this action is not ripe for review because all of the NRED No. 10-71 issues are already before the Supreme Court. In the NRED Action 09-33, dated September 26, 2008, Claimants sought "expungement of the Amended CCRs and the restoration of the Original CCRs". Again for the record, Respondent's current attorney has stated that, 'if the Amended CCRs are set aside on Appeal, this entire proceeding would be for naught. Therefore, as a matter of law, this action is not ripe for adjudication and should be dismissed'. Claimants counter that Respondent's interpretation of the *status* of the present NRED Action No. 10-71 is simply incorrect-as it is not a *part of or entwined with* the prior NRED Action No. 09-33. The Claimants assert that in addition to budgetary matters, the propriety of assessments issued by Respondent and the lien placed on Claimants' lot occurred after the completion of NRED Action No. 09-33. The Clamants conclude that the current

Appeal before the Supreme Court is strictly a Statue of Limitations matter, thereby allowing this NRED Action No. 10-71 action to proceed.

L. FINDINGS.

The Appropriate Timeline of Review: This Arbitrator has often appealed to the Claimants to focus on recent events and issues regarding this current case. The Claimants have clearly 'reached back in time' to put forth the ancillary reference points of both Primary Issues One and Two in this case. The first NRED Action No. 09-33 Decision was clear that in terms of the timeline of review, "Claimants exhausted the administrative remedies with regard to all claims brought or which could have been brought or defended." While in this case, Claimants' references to 2007 thru 2008 incidents could have clearly been put forth in the first NRED action, the Arbitrator is allowing some latitude in the hopes of both Parties having a final opportunity administratively to discuss and conclude their differences. Where integral to the complete understanding of the two primary and current issues of this action, the Arbitrator has included and considered Claimants' references to past incidents (2007 through 2008). Certainly, any future attempts by Claimants to recapitulate any events/incidents of 2007 through 2008 have been distinctly exhausted in both NRED Action No. 09-33 and NRED Action No. 10-71.

1. Issue One. The Association Improperly Assessed Claimants and Improperly Recorded and Maintains a Lien on Claimants' Property and Sanctions against Claimants for Non-payment.

Claimants' references/examples include:

a. NAS is not an authorized agent of the Association;
b. There is no specific authority to assess attorneys' fees in either the previous or current governing documents and the assessment is void because it is not based on a budget;
c. NAS did not comply with the statutory requirements to record the lien;
d. The Lytles bonded around the lien; and
e. The Association wrongfully suspended the Lytle Trust's membership privileges in the Association including, but not limited to, voting rights, running for office and ability to serve on any committee without complying with Article 12, Section 12.2(d) of the Amended CCRs as well as NRS 116.3103(2).

1a. The Claimants own property (a lot) within the Association and failed to pay assessment obligations due the Association. Article 12, Section 12.1 of the Amended CCRs provides the authority that lot owners must comply with the governing documents of the Association and if they do not, such non-action (Claimants not paying assessments) can be deemed an assessment violation-as properly deemed by the Respondent in this action.

1b. The monetary assessments of significance and at issue in this claim originate at an Association Special Meeting of September 15, 2008. The $10,000.00 assessments were allocated to each lot owner to replenish, what the Arbitrator deems from the evidence, the *common expense* of maintaining the Association's Legal Defense Fund (both sides agree as a result of previous actions filed by Claimants against the Association). While the Claimants put forth many instances over a three year period of the Association not properly notifying them of Association meetings, the case file does contain a proper Notice, Agenda/Revised Agenda and Minutes for this Special Meeting. What Respondent correctly deems a past and present failure of Claimants to remit this assessment and others, Claimants deem a non obligatory responsibility as the assessed funds were being allocated toward defending an improper action against the Claimants.

As for Claimant's budgetary concerns, the case file does include both draft 2009 and 2010 Budgets for the Association. The Claimants failed to prove that the assessment is void because of or lack of the referenced budgets.

1c. The BOND in question originates from the findings of NRED Administrative Action No. 09-33 (Certificate of Completion dated June 4, 2009) and the eventual progression to filing with the District Court. Both Actions resulted in Ordered Judgment in favor of the Association and awarded statutory costs in the sum of $7,255.19 and attorneys' fees in the sum of $45,000.00. While continuing the case on Appeal (issue; Statute of Limitations) to the Supreme Court of Nevada, Claimants filed (dated November 4, 2009) a Cash Supersedeas Bond for the awarded amount with an additional one hundred dollars for a total of $52,355.19. Plainly stated

the Supersedeas Bond in the Court System pertains strictly to the above referenced principal amount of Judgment; and is in fact perfecting the appeal process.

2a. Article 12, Sec 12.2 of the Amended CCRs/Rules of Association provides that for late assessments, the Board can place a lien on the assessed property. While Claimants suggest otherwise, the Respondent correctly points to both NRS 116.31031(1) and Article 12, Section 12.2 (d) of the Amended CCRs as not clearly obligating the Association to conduct a hearing for assessments.

2b. Claimants also believe the resulting lien is void for failure to record with notice ('wrongly recorded'). Article 10, Section 10.3 of the Amended CCRs and NRS 116.3116 does not support Claimants position. Article 10.3 (a) Lien, is direct that 'The Association has a lien from the time the Assessments or fine becomes due'. And as Respondent correctly puts forth, Article 10, Section 3 (c) is further supportive, by adding that, 'Recording of the Declaration constitutes *record notice and perfection of the lien.* Further recording of a claim of lien for assessment under this Section is not required'. NRS 116.3116 further defeats Claimants' position that statutory requirements were not met-the key part is the wording in NRS 116.3116 (1), that states 'The Association has a lien on a unit…from the time the assessment becomes due. Unless the declaration otherwise provides…are enforceable as assessments under this section.'

2c. In the case file, A Consent and Authorization, dated July 9, 2009 clearly states the Nevada Association Services (NAS) is the proper agent to perform collections of delinquent assessments; and NAS proceeded to record a delinquent assessment lien against the Claimants in the amount of $12,500 ('Notice of Delinquent Assessment Lien, dated July 16, 2009). The Claimants failed to negate the clear dictum of NRS 116.3116(1) and Article 10, Section 3 (c) referenced above-the Association's lien is valid by operation of law and not void as a result of what Respondent or NAS did or did not do when administering the lien. While Claimants suggest another Rosemere Homeowner, with a delinquent assessment that has since been paid, was treated far more favorably by NAS at the direction of the Association, the other homeowner

is not the subject of this Arbitration. In terms of this action, the case file contains seven letters [dated July 16 (Notice of Delinquent Assessment Lien), August 8th, November 19th; December 1st, 7th, 14th, 2009 and February 16th, 2010] from NAS to Claimants regarding respectful requests to remove the recorded lien through payment. In December 2009 at the direction of the Association, NAS notified the Claimants that they would be giving stays for collection action until 1/2/10 upon written request; the Claimants accepted the proffered extension on enforcement. While Debbie Kluska, Office Manager of NAS, testified at Hearing that she did remember a 'pre-lien' notice being sent to Claimants, the Respondent failed to produce the actual notice. More importantly, the Claimants failed to prove that a 'pre-lien' notice was an essential statutory requirement for perfecting the recording of the lien. While Claimants did prove that it was customary practice (not mandatory) for NAS to provide a pre-lien notice to property owners, Respondent effectively countered that such pre notice did not effect the validity of the actual lien-as the Claimants did indeed receive the notice of lien from NAS.

3a. Claimants failed to prove that the suspension of their membership privileges was anything less than proper. Claimants clearly admit that the assessments were not paid. The Claimants' membership rights were revoked in November 2007 for non payment of assessments, and continue to present. Article 12, Sec 12.3 of the Amended CCRs (Board's authority to adopt rules)/Rules of the Association provides that for late assessments, the Board can place a lien on the assessed property. While Claimants suggests otherwise, the Respondent correctly points to both NRS 116.31031(1) and Article 12, Section 12.2 (d) of the Amended CCRs as <u>not</u> clearly obligating the Association to conduct a hearing for an *assessment* (versus a fine) before suspending membership privileges, including voting rights, running for office and ability to serve on any committee. The operative word in Article 12, subsection 12.2 is "if"' …'if the Board meets' not as Claimants suggest, 'the Board *must* meet'; that is the plain language of Article 12, Section 12.2 (d). Claimants reference to NRS 116.3103 (2) does not support or discuss the 'suspension' of membership privileges'. Respondent properly relies on NRS 116.31031(1) and

the Amended CCRs, as clearly supporting the Board's power to suspend the Claimants' membership privileges. There is nothing sinister or complicated (as based on the evidence and Hearing testimony) about the Board's action against the Claimants-Claimants admittedly did not pay the majority approved assessments and such failure to act resulted in the suspension of its membership rights. By Statute, Amended CCRs or Hearing testimony, the Claimants failed to direct the Arbitrator to a specific/clear mandate or even indirect language requiring a Hearing before their membership privileges were negated for delinquent assessments.

3b. The issue of delinquent assessments precedes the filing of the Supersedeas Bond by almost two years. The Claimants' membership rights were revoked in November 2007 for non payment of assessments, and continue to present. Such a disconnect in time and subject matter makes the Claimants' reliance on the Bond ('bonded around the lien') to pay the lingering assessments an incongruous solution. As Respondent puts forth, it is reasonable to assert the Supersedeas Bond is strictly a ramification of the completed NRED Administrative Action No.09-33 and the District Court Judgment and not pre-dated assessments.

2. Issue Two. **The Association Continually Violates its Governance Responsibilities under NRS 116 and its Governing Documents**. Claimants' references/examples include:

a. Meetings-Noticing, Location, Conduct and Recording;

i. Scheduling, noticing and conducting meetings of the Respondent Association without sending appropriate notices and agendas for meetings.
ii. The statutory propriety of location of the Association Board members meeting in a member's home.
iii. Failure to transcribe minutes accurately for the meeting minutes of the Association including, but not limited to, the minutes from the meeting of July 2, 2007 (which were falsified by creating three versions) and failing audio record certain meetings as required by statute.
iv. Improper agenda and notice for July 27, 2010 meeting.

b. Preventing the Lytle Trust from Participating as Owners;

i. Preventing the Lytle Trust from attending the Annual Meeting of the Respondent Association on March 24, 2010.
ii. Failure to send appropriate notices and agendas for meetings to the Lytle Trust for the purpose, among others, of preventing the Lytle Trust from attending those meetings, failure to send mail to the Lytle Trust's correct

address.

iii. Failure on the part of the Association to provide documents requested by the Lytle Trust including, but not limited to, a copy of the NAS contract that is, the subject of this Arbitration proceeding, as well as failure on the part of the Association and/or the Resident Agent of the Association to accept and/or pick up certified and/or overnight mail sent to it.

c. Failure to Follow Requirements re: Fiscal Matters;

i. Attempting to collect monies for assessments in the year 2010 for alleged assessments in 2009 without a budget as required by NRS 116.3115(1).

ii. Failure to meet statutory and Amended CCRs requirements for the creation and preparation of financial statements, a policy for collections, budgets and reserve budgets.

iii. The Board of Association's refusal to order an audit of Association's accounting practices and/or accounts and refusal to hire accountants to perform accounting services.

d. Failure to Properly Conduct Elections;

Conducting an illegal election March 24, 2010 without proper notice and compliance with either the Amended CCRs or NRS Chapter 116 et seq., and failure to conduct Board elections every three years.

3. The Appropriate Standard of Review:

The Claimants failed to prove that the Board acted improperly or mis-used its authority applying NRS 116.1203 'Exemption for Small Planned Communities' as the determinate for governance. The source of authority that the Board rationally relied on evolved from an unsolicited directive from the Real Estate Division, dated August 25, 2008 (Office of the Ombudsman for Owners in Common-Interest Communities). While the Claimants put forth that the Respondent "blatantly distorted" the contents of the letter, no definitive proof was offered to support this charge-rather the Compliance Investigator's issuance was clear and to the point.

The undisputable salient point of this directive states:

> ….after a thorough investigation, the Division has determined that the issues concerning the amended CCRs of your association *which only has (9) units, pursuant to NRS 116.1203 is subject only to NRS 116.1006 and NRS 116.1107* unless the declaration provides this entire chapter is applicable.

While Claimants are accurate that the declaration (of the amended CCRs) states the Board "has made certain changes to the Original Declaration in order to bring the same into

compliance with the provisions of Nevada Revised Statutes (NRS) Chapter 116", there is in fact no definitive incorporation of the entirety of NRS 116 in the declaration. Although Claimants request the Arbitrator interpret 'references to NRS Chapter 116' within the Amended CCRs as 'NRS Chapter 116 in its totality', a conclusive dictum cannot be made. While Claimants also question the basic interpretative reliability of the Investigator, such a claim does not negate what the Arbitrator deems a very rationale conclusion by the Board. At Hearing, Gerry Zobriest, the former President of the Board, testified in a forthright manner that the unsolicited Ombudsman letter was interpreted as a "letter of instruction" that must be implemented; "It tells us what to do". Sherman Kearl, the former Secretary of the Board, testified that there was no reason to question the information in the letter, as the Investigator stated her determination was based on a "thorough investigation". And while Claimants strongly believe the investigation was anything but thorough, ('never reviewed the governing documents') they made no effort to write the Investigator for clarification in relation to Rosemere Estates Amended CCRs. If it were any other Agency that issued the direction, the Arbitrator might question the Board's motives and actions. But the Board's reliance on a NRS 116 exemption for small planned communities came directly from the sole Agency in the State of Nevada legally authorized to administer and enforce the provisions of NRS Chapter 116. Therefore, the Arbitrator rules in Respondent's favor that the Association is exempt from compliance with all the applicable provisions of NRS Chapter 116.

Issue Two.

2a. The case file suggests that but for the years Mr. Lytle himself served on the Rosemere Board, the Claimants' intense vigilance of the Board's decisions has led to constant criticism of Association governance. From 2007 to present, the Claimants put forth eleven different examples (not issues) of the Board's mistakes (in governance), some even deemed intentionally malicious, retaliatory and fraudulent.

This Arbitrator will not overrule a Board's conduct of its business affairs, or its authority in enforcing and interpreting its governing documents, except where the board acts unlawfully or for reasons of self interest, gain, prejudice or revenge. (Business Judgment Rule). [Shoen v. SAC Holding Corp. 137 P.3d 1171, (Nevada 2006), Horwitz v. Southwest Industries 604 F. Supp 1130 (Nevada 1985), NRS 116.3103, NAC 116.405, NRS 78.138(3), NRS 116.31183, NRS 316.3185.]

The Business Judgment Rule explicitly imposes on the Board of Directors a status as fiduciaries with the standard of care as reasonableness. Within the Community Association realm, it serves not only as a shield to protect directors, but to justify Board decisions and to defend the associations on whose behalf decisions are made. Mr. Lytle was believable during Hearing testimony, that he and Ms. Lytle sincerely felt the Board's decision making was anything but reasonable-resulting in their membership in the Association, "a living hell". The Claimants readily acknowledged that the Association has written CCRs that as property owners they agreed to adhere and abide by as a condition of buying property and living in Rosemere Estates. However, at Hearing Mr. Lytle testified that the Rosemere Estates no longer meets their criteria "to build a dream house" in a community with "not a lot of restrictions". Mr. Lytle continued that with the Amended CCRs there is currently "more than thirty pages" of restrictions-"an insult to my wife and I". As a result, the Arbitrator believes the competing interests, of Claimants desire to live less restrictively and the Board's fiduciary duty to the Association to enforce the more restrictive Amended CCRs, have complicated this 'years in the making' contentious second NRED Action.

2b. What the Board perceives as rationally based decision making (in the best interest of the Association as a whole-not individuals), the Claimants perceive as vindictive/vendetta based decisions pertaining to: Meetings, Owner Participation, Fiscal Matters and Elections.
The more serious accusations by the Claimants involved fraudulent ("cooking or manufacturing" Association documents) and malicious (an evil intent to harm the Lytles) activities of the Board,

particularly by past officers Mr. Zobrist and Mr. Kearl (not parties to this claim). In each instance, the Board effectively countered the Lytles' accusations through appropriate documentation and very cogent testimony.

For example, what Claimants term suspicious versions (3) of the same homeowner meeting minutes, Respondent proved as probable wrongly dated drafts (not final approved minutes). What Claimants term a physical assault/restraint of Ms. Lytle (to enter an annual meeting), the Respondent proved a proper suspension of membership privileges (for non payment of majority approved assessments). What Claimants term a "phantom" meeting (never took place but had draft minutes) of February 16, 2009, the Respondent proved a non malicious cancelled meeting (Mr. Zobrist testified that the meeting was cancelled without ulterior motive rather, Board "just didn't have time"). While Respondent failed to offer a conclusive answer to the cancelled meeting in question, Claimants failed to prove there was a sinister intent to what can best be described as 'ambiguous' written references to a February 16, 2009 meeting. Ultimately, the multitude of accusations/examples put forth by the Claimants in this action were convincingly defended by the Respondents as proper governance decisions (in the best interest of the Association as a whole and not arbitrary, capricious or discriminatory).

2c. While the Claimants did show, the Board made *less than perfect* governing decisions over a three year period, the Claimants failed to prove there was fraud, self-dealing,, unconscionability or other misconduct involved. For example, at Hearing Mr. Kearl testified that as the Secretary of the Board he took notes at the homeowner meetings and tried to not leave out anything. His procedure was to produce a draft immediately after a meeting so the homeowners could take the copy home, make comments and then at next meeting vote on minutes being formally approved by the members in good standing of the Association. When Claimants' Attorney Thomas D. Harper, pointedly asked Mr. Kearl if his notes were always accurate-Mr. Kearl's answer was to the point and honest, "Sure I would get it wrong and other members would help me by giving me the additional information". "Only once that I had to redo

the minutes for leaving something out that was important to one person. I redid, inserted and reissued the notes."

Both past Board Members during testimony clearly proved that they understood and respected their fiduciary roles and governance limitations. Claimants' attempts fail in this action to characterize from 2007 to present the Board's actions as less than lawful.

2d. The Respondent is clearly correct that the Board's fiduciary duty runs to the Association and not as Claimants suggest, individual members such as the Lytles. The elected Board has been tasked to represent Rosemere Estates as a whole and not just the wants and needs of the Claimants. And while the Claimants may not accept it, the Board does have a certain percentage of discretionary power to make decisions on the community's behalf (which in this case negatively impacted the Lytles, but was not proved to be improper).

2e. In this Action, Claimants attempts from 2007 to present to continually re-interpret, counter-interpret or self overrule the Board's decisions has failed to prove the decisions were improper, arbitrary or capricious. The Claimants, other than making charges against the Board, failed to put forth *conclusive* material evidence or witness testimony supporting their allegations in the Amended Claim.

2f. While there was Board activity/decision-making over a three year period that was imperfect, the Business Judgment Rule that Respondent properly relies on, **does not require error-free decision making (perfection) by a Board.** Rather the decision be made in good faith and reasonable in the best interest of the *community as a whole*; in this case, collecting assessments to preserve the financial stability of the Association, conducting and simplifying budgetary mandates including audits for owners' proper comprehension, hand delivering to homeowners and mailing to Claimants (to assure receipt) meeting notices, agendas and arranging within the community conveniently located Homeowner Association meetings. While the Claimants clearly feel offended by Board's decisions that negatively impact their goal of living in a less restrictive community and prefer more Board inaction-NRS 116.3103 (1), requires the

Board **must take action** as it owes a fiduciary duty to the Association and its homeowners to enforce the regulations governing the Association. The Respondent prevails in Issue Two.

M. PREVAILING PARTY:

For purposes of attorney's fees and costs, the Prevailing Party in this Non Binding Arbitration is clearly the Respondent. Pursuant to the Amended CCRs, Respondent, as the Prevailing Party, is awarded its attorney's fees and costs. Arbitrator may award reasonable Attorney's fees to the prevailing party, per request NRS 38.238.

N. ADMINISTRATIVE REMEDIES: There should be a clear, non-interpretive understanding by both Parties that the administrative remedies with regard to all claims brought and defended or which could have been brought or defended, in this matter including all administrative remedies by or against any un-named party relating to the claims presented herein are strictly exhausted. Any Appeal of this non binding Arbitration, belongs before the Court and not a third Arbitration. The Arbitrator's Decision is confined to the facts of this dispute only. It shall in no way be interpreted or construed to affect any other language, provision or application of the governing documents of the Respondent.

The Parties are advised that if either Party commences a civil action based upon any claim which was the subject of the Arbitration, the party shall if he/she fails to obtain a more favorable award or judgment than that which was obtained in the initial arbitration, pay all costs and reasonable attorney's fees, incurred by the opposing Party after the complaint in the civil action was filed. NRS 38.330.

O. DECISION. With all due respect to Claimants, this Arbitrator must find for the Respondent. Arbitration award on all counts and claims in favor of Respondent and against Claimants. Respondent is further awarded its attorney's fees and costs.

1. **ARBITRATOR'S FINDINGS: ISSUE I**

1a. The $10,000.00 plus **ASSESSMENTS** were allocated to each lot owner to replenish, what the Arbitrator deems from the evidence, the *common expense* of maintaining the Association's Legal Defense Fund.

1b. The **BOND** in question originates from the findings of NRED Administrative Action No. 09-33 (Certificate of Completion dated June 4, 2009) and the eventual progression to filing with the District Court. Both Actions resulted in Ordered Judgment in favor of the Association and awarded statutory costs in the sum of $7,255.19 and attorneys' fees in the sum of $45,000.00. While continuing the case on Appeal (issue; Statute of Limitations) to the Supreme Court of Nevada, Claimants filed (dated November 4, 2009) a Cash Supersedeas Bond for the awarded amount with an additional one hundred dollars for a total of $52,355.19. Plainly stated the Supersedeas Bond in the Court System pertains strictly to the above referenced principal amount of Judgment; and is in fact perfecting the appeal process. Claimants' currently overdue assessments (resulting in the valid lien) are not exempt from payment because of the in-place Supersedeas Bond: the moneys are not interchangeable. The Claimants had the burden to prove otherwise and failed to do so.

2. The Claimants failed to negate the clear dictum of NRS 116.3116(1) and Article 10, Section 3 (c) referenced above—the Association's lien is valid by operation of law and not void as a result of what Respondent or NAS did or did not do when administering the lien.

3. There is nothing sinister or complicated as based on the evidence and Hearing testimony about the Board's action against the Claimants-Claimants admittedly did not pay the majority approved assessments and such failure to act resulted in the suspension of its membership rights. While the Arbitrator can understand the Claimants' reliance on the word 'hearing' used within Article 12, Section 12.2 (d) as supporting their rights, in fact there is simply no express dictate that the Association must hold a hearing regarding a violation assessment.

The Claimants had the burden to prove otherwise and failed to do so. Therefore, the Arbitrator rules in favor of Respondent on these issues.

2. **ARBITRATOR'S FINDINGS: ISSUE II**

2a. The Claimants failed to prove that the Board acted improperly or mis-used its authority applying NRS 116.1203 'Exemption for Small Planned Communities' as the determinate for governance. The source of authority that the Board rationally relied on evolved from an unsolicited directive from the Real Estate Division, dated August 25, 2008 (Office of the Ombudsman for Owners in Common-Interest Communities).

2b. While the Claimants did prove there was Board activity/governance over a three year period that was imperfect, the Business Judgment Rule that Respondent properly relies on, does not require error-free decision making (perfection) by a Board. Rather the decision, be made as Respondent proved, in good faith and reasonable (in the best interest of the *community as a whole).*

The Claimants had the burden to prove otherwise and failed to do so. Therefore, the Arbitrator rules in favor of Respondent on these issues.

P. ORDERS.

IT IS HEREBY ORDERED that Claimants' full payment to Respondent to satisfy Assessments and other related costs in the amount of $**21,045.00** be received by Respondent no later than forty five (45) days from the date of this Decision.

IT IS FURTHER ORDERED that Claimants' full payment to Respondent to satisfy Attorneys Fees, Deposition costs and Arbitrator's Fees in the amount of $**56,294.63** be received by Respondent no later than forty five (45) days from the date of this Decision.

Q. LEGAL FEES. This Arbitrator has reviewed the fees and costs submitted by both Parties and finds them reasonable and appropriate. Claimants' Request for Monetary Reimbursement for Attorneys Fees, costs and Arbitrator's Fees is Denied. Reason for Denial: Claimants did not have favorable Rulings for the issues before this Arbitrator. **Pursuant to the Amended CCRs,**

the Respondent, as the prevailing party, is awarded its Attorney's fees and costs. Pursuant to the Amended CCRs, the Respondent, as the prevailing party, is awarded its Arbitration fees, in entirety.

CLAIMANTS-Attorney Fees, Costs & Arbitration Fees in entirety as of Nov. 17th, 2010: **$147,720.00**

RESPONDENT-Attorney Fees, Costs & Arbitration Fees in entirety as of Nov. 17th, 2010): **$56,294.63**

Total Due Arbitrator *prior to release* of this Decision-$2,450.00.

The Billing Period from 15th October, 2010 to 16th November, 2010:

Claimant: 50% **$1,225.00**

Respondent: 50% $**1,225.00**

Dated this 17th day of November, 2010.

_____

Dee Newell, J.D.
ARBITRATOR

CERTIFICATE OF MAILING

I hereby certify that on the 18th day of November, 2010, I mailed in a sealed envelope with proper postage fully prepaid thereon, a copy of the foregoing **ARBITRATOR'S DECISION** to the following parties and or Counsel of record:

Mr. Sean L. Anderson, Esq.
Leach, Johnson Song & Gruchow
5495 South Rainbow Blvd.-Suite 202
Las Vegas, Nevada 89118

Ms. Susan Williams Scann, Esq.
Deaner, Deaner, Scann, Malan & Larsen
720 South Fourth Street
Las Vegas, Nevada 89101

Mr. Thomas D. Harper, Esq.
Thomas D. Harper, LTD
606 S. Ninth Street
Las Vegas, Nevada 89101

Mr. Gordon Milden/Office of the Ombudsman

_____
EMPLOYEE OF ARBITRATOR

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN ALLEN LYTLE AND TRUDI LEE LYTLE, AS TRUSTEES OF THE LYTLE TRUST,
Appellants,
vs.
ROSEMERE ESTATES PROPERTY OWNERS ASSOCIATION,
Respondent.

No. 54886

FILED

SEP 29 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order confirming an arbitration award in a real property action. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellants John and Trudi Lytle owned property in a subdivision governed by Covenants, Conditions, and Restrictions (CC&Rs), the provisions of which were enforced by respondent Rosemere Estates Property Owners Association (the Association). After a dispute between the parties, they entered into arbitration pursuant to NRS Chapter 38. The Association ultimately prevailed, so the Lytles filed a civil action on June 26, 2009, pursuant to NRS 38.330(5), seeking declaratory and injunctive relief from the district court. The Association filed a motion to dismiss the Lytles' complaint and to confirm the arbitration award, arguing that the complaint was untimely pursuant to NRS 38.330(5) because the Lytles filed it more than 30 days after the initial May 4, 2009, arbitration decision and award was served on the parties.

The Lytles opposed the motion, arguing that the complaint was timely because the arbitration decision and award was not final until

the arbitrator assessed the amount of attorney fees and costs, which occurred on June 1, 2009. The district court determined that the service date of the initial May 4, 2009, decision and award, which resolved all issues except for the amount of attorney fees and costs, was the applicable date for purposes of NRS 38.330(5). Thus, the court dismissed the Lytles' complaint, finding it untimely, and confirmed the arbitrator's award. The Lytles now appeal.

"A motion to dismiss is properly granted when there is a lack of subject matter jurisdiction on the face of the complaint." Rosequist v. Int'l Ass'n of Firefighters, 118 Nev. 444, 448, 49 P.3d 651, 653 (2002), overruled on other grounds by Allstate Ins. Co. v. Thorpe, 123 Nev. 565, 573 n.22, 170 P.3d 989, 995 n.22 (2007); cf. Kame v. Employment Security Dep't, 105 Nev. 22, 25, 769 P.2d 66, 68 (1989) (stating that statutory time requirements for filing petitions for judicial review of administrative decisions are mandatory and jurisdictional). Pursuant to NRS 38.310(2), the district court must dismiss any civil action if the matter has not first proceeded through arbitration and all administrative remedies in the CC&R's have been exhausted. Subject matter jurisdiction and statutory construction are questions of law subject to de novo review. Ogawa v. Ogawa, 125 Nev. ___, ___, 221 P.3d 699, 704 (2009); Westpark Owners' Ass'n v. Dist. Ct., 123 Nev. 349, 357, 167 P.3d 421, 426-27 (2007).

NRS 38.330(5) requires a final decision on all issues before a party may commence a civil action

At the time the Lytles filed their civil action in the district court, NRS 38.330(5) provided, in pertinent part, that "any party to the nonbinding arbitration may, within 30 days after a decision and award have been served upon the parties, commence a civil action in the proper court concerning the claim which was submitted for arbitration." The

Lytles contend that NRS 38.330(5) is ambiguous because it is unclear whether the statute requires the resolution of all issues by the arbitrator before proceeding in the district court, or whether a civil action may be filed after service of a decision and award that resolves less than all of the issues before the arbitrator.

"Generally, when a statute's language is plain and its meaning clear, the courts will apply that plain language." Leven v. Frey, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007). However, a statute is ambiguous when it is susceptible to more than one reasonable interpretation, and we resolve that ambiguity by looking to legislative history and "construing the statute in a manner that conforms to reason and public policy." Great Basin Water Network v. State Eng'r, 126 Nev. ___, ___, 234 P.3d 912, 918 (2010). We have "a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized." Hardy Companies, Inc. v. SNMARK, LLC, 126 Nev. ___, ___, 245 P.3d 1149, 1153 (2010). Here, we determine that the prior version[1] of NRS 38.330(5) was ambiguous because it may reasonably be interpreted to refer to the single decision and award that resolves all issues in the arbitration, or to each decision and award issued by the arbitrator.

Because we discern no clear legislative intent regarding whether a "decision and award" means a final decision, we must look to

[1]NRS 38.330(5) was subsequently amended in the 2011 legislative session.

reason and public policy to resolve the ambiguity.[2] In doing so, we recognize important public policy reasons for requiring the arbitrator to adjudicate all issues before a party proceeds in the district court. The general legislative intent for requiring pre-civil action arbitration of disputes between homeowners associations and resident-members of those associations is to reduce the time it takes to resolve those disputes. See Hearing on A.B. 152 Before the Assembly Judiciary Comm., 68th Leg. (Nev., February 14, 1995). Thus, arbitration is designed to expeditiously resolve disputes among parties, without directly involving the district courts, and to avoid costly litigation. Requiring or allowing a party to file multiple actions in the district court stemming from a single arbitration would undermine this goal. Additionally, as the Lytles contend, "it is far less complex and risky to require that a 'final' decision and award be on all issues involved in an arbitration proceeding so as to minimize the amount of trial de novo actions that may be fueled by uncertainty as to the amount of an as-yet-to-be quantified attorney fee award." We agree that it would render arbitration far more cumbersome if trials de novo are sought each time the arbitrator issues multiple decisions and awards adjudicating various aspects of the case—instead, it is more reasonable to infer that the Legislature intended only one civil action to be filed after those proceedings, and that must take place after the entire arbitration has concluded.

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[2]At the time the Lytles filed their complaint in district court, the legislative history for NRS 38.330(5) was inconclusive regarding whether the statute required a final decision.

Further supporting our determination regarding legislative intent, during the 2011 legislative session, the Legislature amended NRS 38.330(5) to address the very issue the Lytles present in this appeal—when, under NRS 38.330(5), the 30-day period for filing a civil action after nonbinding arbitration begins to run. As amended, NRS 38.330(5) now provides that a party to a nonbinding arbitration may not commence a civil action in district court until "after a final decision and award which are dispositive of any and all issues of the claim which were submitted to nonbinding arbitration have been served upon the parties." See A.B. 317, 76th Leg. (Nev. 2011). "Where a former statute is amended, or a doubtful meaning clarified by subsequent legislation, such amendment or subsequent legislation is strong evidence of the legislative intent of the first statute." 2B Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction § 49:11, at 145 (7th ed. 2008); see also Public Employees' Benefits Prog. v. LVMPD, 124 Nev. 138, 157, 179 P.3d 542, 554-55 (2008) (holding that when the Legislature clarifies a statute "through subsequent legislation, we may consider the subsequent legislation persuasive evidence of what the Legislature originally intended"). In adopting this amendment to NRS 38.330(5), the Legislature clarified any confusion stemming from the statute's previous language. Specifically, in presenting the bill to the Senate Committee on Judiciary, Assemblyman Tick Segerblom stated:

> The issue is when you file an appeal from the Real Estate Division to the district court. It is not clear. When you get a judgment from the arbitrator and then ask for attorney's fees, there is an attorney's fees award. The question is whether the appeal is filed. If the attorney's fees award is still being considered, is the appeal filed 30 days after that award? This bill says the appeal is filed 30 days

> after all those things are resolved rather than trying to file the appeal after one award or the other. This would clarify the issue of when to file the notice of appeal.

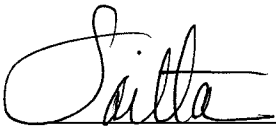
Hearing on A.B. 317 Before the Senate Judiciary Comm., 76th Leg. (Nev., May 10, 2010).

Since the Legislature's amendment addresses the precise issue presented in this appeal, we are persuaded that the Legislature's original intent was to require a final decision and award from the arbitrator that disposes of "all issues of the claim" before the 30-day period for commencing a civil action begins to run. A.B. 317, 76th Leg. (Nev. 2011).

In light of this clarifying amendment to NRS 38.330(5), we conclude that the 30-day period for commencing a civil action does not begin to run until the arbitrator has issued a final decision and award that disposes of all matters involved in the dispute, including attorney fees and costs, and that decision and order is served on the complaining party. Here, the arbitrator's first decision and award issued on May 4, 2009, did not dispose of all matters involved in the dispute because it did not dispose of the attorney fees and costs issue. Thus, the 30-day period for the Lytles to commence civil action did not start to run until the arbitrator's June 1, 2009, award of attorney fees and costs was served on the parties. Accordingly, we conclude that the district court erred in dismissing the Lytles' complaint and confirming the arbitration award.

For the reasons stated above, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for further trial de novo proceedings on the Lytles' complaint.



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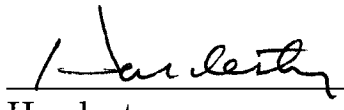

_____, J.
Hardesty

_____, J.
Parraguirre

cc: Hon. Michelle Leavitt, District Judge
Craig A. Hoppe, Settlement Judge
Sterling Law, LLC
Santoro, Driggs, Walch, Kearney, Holley & Thompson
Santoro, Driggs, Walch, Kearney, Holley & Thompson/Reno
Eighth District Court Clerk

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Attorneys for Plaintiff
JOHN ALLEN LYTLE and
TRUDI LEE LYTLE
as Trustees of the Lytle Trust

DISTRICT COURT

CLARK COUNTY, NEVADA

JOHN ALLEN LYTLE and TRUDI LEE LYTLE, as Trustees of the Lytle Trust,

Plaintiffs,

v.

ROSEMERE ESTATES PROPERTY OWNERS' ASSOCIATION; and DOES 1 through 10, inclusive,

Defendants.

CASE NO. A-09-593497-C
Dept.: XII

ORDER GRANTING PLAINTIFFS JOHN ALLEN LYTLE AND TRUDI LEE LYTLE'S MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that on April 1, 2013, the Court heard Plaintiffs JOHN ALLEN LYTLE and TRUDI LYTLE, as TRUSTEES OF THE LYTLE TRUST's ("Plaintiff"), Motion for Summary Judgment, and ROSEMERE ESTATES PROPERTY OWNERS' ASSOCIATION's (the "Association") Motion for Summary Judgment. After considering the motions, oppositions and replies thereto, the declarations, affidavits, and evidence submitted therewith, and hearing oral argument thereon, the Court grants Plaintiffs JOHN ALLEN LYTLE AND TRUDI LEE LYTLE, as TRUSTEES OF THE LYTLE TRUST's Motion for Summary Judgment. The Court further denies ROSEMERE ESTATES PROPERTY OWNERS' ASSOCIATION's Motion for Summary Judgment.

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JUL 25 2013

Pursuant to NRCP 56(c), the Court's findings with respect to the undisputed material facts and legal determinations on which the court granted summary judgment are set forth herein and as follows:

I. FINDINGS OF UNDISPUTED MATERIAL FACTS

1. On January 4, 1994, Baughman & Turner Pension Trust (the "Developer"), as the subdivider of a cul-de-sac to be made up of nine (9) residential lots on a street known as Rosemere Court in Las Vegas, Nevada, recorded with the Clark County Recorder's Office a Declaration of Covenants, Conditions, and Restrictions ("Original CC&Rs.)

2. The Original CC&Rs consist of four (4) pages and 25 paragraphs, with no bylaws annexed, no amendment provision, and no homeowners association, as defined by Chapter 116.

3. The Original CC&Rs create a "property owners' committee" with very limited maintenance duties over specific common area items (exterior walls and planters, entrance way and planters, entrance gate, and the private street), which are specifically set forth in Paragraph 21 of the Original CC&Rs.

4. The Original CC&Rs then grant each homeowner, and not any homeowners' association, the power to enforce the Original CC&Rs against one another.

5. Among other things, there are no rental or pet restrictions or construction deadline in the Original CC&Rs.

6. The Developer then sold the nine (9) undeveloped lots between May 1994 and July 1996.

7. The first of the lots was conveyed by the Developer under the Original CC&Rs on May 19, 1994.

8. Plaintiff's trustees, John Allen Lytle and Trudi Lee Lytle (the "Lytles"), purchased a Rosemere Estates property, assessor's parcel number ("APN") 163-03-313-009 ("Plaintiff's Property"), on November 6, 1996, from the original buyer who first purchased it from the Developer on August 25, 1995.

9. The Lytles later transferred Plaintiff's Property to Plaintiff.

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10. The Lytles purchased the property with the sole purpose of building a custom home thereon.

11. The primary reasons that the Lytles selected the property were the limited restrictions contained in the Original CC&Rs and the lack of a "unit-owners association," as that term is legally defined by Chapter 116 of the Nevada Revised Statutes ("NRS").

12. Further, the Lytles could not meet any restrictive deadline on construction, so Plaintiff purposefully selected in a community with no construction deadline.

13. Plaintiff undertook the design of the new custom built home, and by 2006, Plaintiff had developed preliminary plans that were approved by the Developer.

14. Sometime after Plaintiff purchased its property, a group of property owners formed the Rosemere Estates Property Owners Association (the "Association"), with the sole purpose of maintaining those common areas designated by Paragraph 21 of the Original CC&Rs.

15. In 1997, two owners, acting on behalf of all owners, filed Non-Profit Articles of Incorporation (the "Articles") pursuant to NRS 82, which formalized the property owners' committee and named it "Rosemere Estates Property Owners Association."

16. The property owners recognized that the Association did not have powers granted to it other than those granted by the Original CC&Rs. For example, the Association had no power to assess, fine, issue rules and regulations, or undertake other actions commonly reserved for homeowners' associations.

17. In 1997, some of the property owners prepared and distributed a proposed set of amended CC&Rs, which proposed to empower the Association and drastically increase the scope of the Original CC&Rs.

18. The property owners determined that unanimous consent was required to amend the Original CC&Rs. Due to a failure to obtain unanimous consent, as required, the proposed CC&Rs were not adopted.

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19. At a February 23, 2004 Association meeting, two Board members presented a set of proposed, amended CC&Rs. The newly proposed CC&Rs included various restrictions not within the Original CC&Rs, including animal restrictions, exterior maintenance and repair obligations, prohibitions against "unsightly articles," and other use restrictions and obligations.

20. The proposed amended CC&Rs were not unanimously approved at the February 23, 2004 meeting and, therefore, not adopted.

21. Without warning, consultation or advisement to the Rosemere property owners, on or about July 2, 2007, Amended and Restated CC&Rs were again proposed to the property owners by the Board.

22. This third set of proposed amended CC&Rs increased the complexity, scope, and size of the CC&Rs, from 4 pages to 36 pages, and contained numerous additional restrictions upon the property owners.

23. At the July 2, 2007 homeowners' meeting, the Association's Board presented the property owners with a binder that contained the following: (1) new Articles of Incorporation, dated June 6, 2007, which articles were never filed although represented to be as set forth herein; (2) a letter from the Board to the Association members; (3) a Corporate Charter referencing the February 25, 1997 and June 6, 2007 Articles of Incorporation; (4) a section entitled "Governing Documents" referencing the June 6, 2007 Articles of Incorporation; (5) the "First Statutorily Mandated Amendment to the Bylaws of the Rosemere Estates Homeowners Association," containing the recital "WHEREAS, the Declaration was recorded in the Office of Clark County Recorder on January 4, 1994, which Declaration provides for a method to make amendments to the Declaration and Bylaws...;" (6) the proposed Amended and Restated Covenants, Conditions and Restrictions ("Amended CC&Rs"). Bylaws did not exist prior to 2007.

24. The binders containing all of the foregoing documents were presented to each homeowner together with the following misrepresentations: (1) the June 6, 2007 Articles of Incorporation were filed with the Secretary of State, (2) the original CC&Rs provided a method for amendment, (3) the CC&Rs could be amended without unanimous consent, (4) the 1999 Nevada Legislature, through adoption of Senate Bill 451, "mandated" that the original CC&Rs be changed

to conform to NRS Chapter 116 "without complying with the procedural requirements generally applicable to the adoption of an amendment...," and (5) all of the changes made were under NRS 116.2117.

25. The proposed Amended CC&Rs were far more restrictive than the Original CC&Rs and changed the very nature of property ownership within Rosemere Estates. The Amended CC&Rs contained numerous and onerous new use restrictions including the drastic expansion of the powers, rights, and duties of the Association, a section entitled "Restrictions on Use, Alienation, and Occupancy," pet restrictions, parking restrictions, lease restrictions, the establishment of a Design Review Committee with unfettered discretion, and a new and expansive definition of "nuisance."

26. The Amended CC&Rs also contained a morality clause, providing as follows:

> No use that is reasonably deemed immoral, improper, offensive, or unlawful by the Board of Directors may be made of the Property or any portion thereof.

27. The Amended CC&Rs also contained a pet restriction that permits any animal found off a leash to immediately be turned over to animal control, and any animal causing a "nuisance," a vague and undefined term, to be permanently removed from Rosemere Estates upon three days written notice and hearing before the Board.

28. Finally, the proposed Amended CC&Rs contained a construction timeline that would require Plaintiff to complete the construction of the custom home on the lot within a mere *60 days* of receipt of approval from the proposed Design Review Committee—something never envisioned in the Original CC&Rs and impossible to adhere to.

29. Plaintiff's property is the only Property subject to this restriction as Plaintiff's Property was the only undeveloped lot at the time of amendment.

30. Further, the 60 day deadline is impossible to satisfy, and the homeowner is fined $50.00 per day for failure to comply with this impossible deadline.

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31. Pursuant to the Amended CC&Rs, approval for a home design was (1) entirely within the Board's discretion, (2) based on Design Review Guidelines that have never been published, and (3) not subject "to any objective standards of reasonableness."

32. After the Board presented the proposed Amended CC&Rs to the owners, together with the written misrepresentations set forth above, the Board did not provide the owners with a reasonable time to review or discuss the lengthy pack of legal documents, or to seek legal advice. Rather, the Board insisted that the amendment was "a done deal."

33. Despite the misrepresentations introducing the governing documents, the vast expansion of the Original CC&Rs, the lack of any review time or discussion, and the insistence that the amendment was a "done deal," the Board asked the property owners to sign documents acknowledging their approval, with a notary retained by the Board present to verify signatures.

34. The Amended CC&Rs were not agreed to by all property owners at the July 2, 2007 meeting. In fact, only five of the property owners approved, with three property owners who refused to sign the amendment. A fourth homeowner submitted a disputed proxy that was not counted by the Board.

35. Despite the failure to obtain the required unanimous approval for amending the Original CC&Rs, the Association proceeded, on July 3, 2007, to record the Amended CC&Rs in the office of the Recorder for Clark County, Nevada.

II. LEGAL DETERMINATIONS

A. Summary Judgment Standard

1. Summary judgment shall be rendered in favor of a moving party if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. NRCP Rule 56(c).

2. "Summary Judgment is appropriate and shall be rendered forthwith when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to judgment as a matter of law.'" *Wood v. Safeway*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005) (*quoting* NRCP 56(c).)

3. The Nevada Supreme Court held that "Rule 56 should not be regarded as a disfavored procedural shortcut" but instead as an integral important procedure which is designed "to secure just, speedy and inexpensive determination in every action." *Wood*, 121 Nev. at 730, 121 P.3d at 1030 (internal citation omitted).

B. Plaintiff Is Entitled To Summary Judgment In Its Favor

4. A declaratory relief cause of action is proper where a conflict has arisen between the litigating parties, and the action is brought to establish the rights of the parties. 26 C.J.S. Declaratory Judgments § 1.

5. Plaintiff's Cause of Action for Declaratory Relief seeks (1) a declaration from the Court that the Amended CC&Rs were not properly adopted by the members of the Association and were improperly recorded against Plaintiff's Property, and (2) a permanent injunction against the Association from adopting further amendments without unanimous consent.

6. Summary judgment as to the Declaratory Relief Cause of Action is warranted based on the Court's finding that the Amended CC&Rs were not adopted with unanimous consent, as required, and were, therefore, improperly recorded against Plaintiff's Property.

C. Rosemere Is A *Limited Purpose Association* Under NRS 116.1201 And Not A *Unit-Owners' Association* Within The Meaning Of NRS, Chapter 116

7. In order to create a valid unit-owners' association, as defined by Chapter 116, certain formalities "must" be followed. NRS 116.3101 provides, in pertinent part,

> **Organization of unit-owners' association.**
>
> 1. A unit-owners' association must be organized no later than the date the first unit in the common-interest community is conveyed.. . .

8. The purpose of Section 3101 is to provide the purchaser record notice that he/she/it is purchasing a property that is governed by a homeowners association and will be bound by Chapter 116, *et seq.*

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9. There is a strong public policy in protecting property owners in common-interest communities against any alteration of the burdens of character of the community. Rest. 3d, Property – Servitudes, § 6.10, Comments.[1]

10. A buyer is said to have "record notice" of the recorded covenants, conditions and restrictions on the property, thus the mandate that the homeowners' association be formed prior to conveyance of the first unit in the community, together with the requirement that the CC&Rs be recorded. NRS 116.3101.

11. Here, no Chapter 116 unit-owners' association was formed because no association was organized prior to the date the first unit was conveyed. The Association was not formed until February 25, 1997, more than three years after Rosemere Estates was formed and the Original CC&Rs were recorded.

12. Further, the Association did not have any powers beyond those of the "property owners committee" designated in the Original CC&Rs—simply to care for the landscaping and other common elements of Rosemere Estates as set forth in Paragraph 21 of the Original CC&Rs.

13. The Original CC&Rs provide for the creation of a "property owners' committee," which is a "limited purpose association," as defined by the 1994 version of NRS 116.1201, then in effect. That provision provided that Chapter 116 did not apply to "Associations created for the limited purpose of maintaining. . . "[t]he landscape of the common elements of a common interest community. . . ."

14. In 1997, Rosemere Estates' owners formed the Association for the express and limited purpose of (1) tending to the limited matters set forth in Paragraph 21 of the Original CC&Rs, (2) holding a bank account in which to deposit and withdraw funds for the payment of the limited common area expenses assigned to the Owners Committee, and (3) purchasing liability insurance. The intent was never to form a unit-owners' association within the meaning of Chapter 116.

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[1] "Property owners in common-interest communities are protected against amendments that unfairly change the allocation of burdens in the community or change the character of the community." Rest. Law 3d, Property – Servitudes, § 6.10, Comments.

15. A limited purpose association cannot enforce "any restrictions concerning the use of units by the units' owners, unless the limited-purpose association is created for a rural agricultural residential common-interest community." NRS 116.1201(2)(a)(5). There is no question that Rosemere Estates was not "created for a rural agricultural residential common-interest community," hence the Association cannot enforce "any restrictions concerning the use of units by the units' owners...."

16. In reviewing the language of the Original CC&Rs, the Court must strictly construe the covenants thereto and any "doubt will be resolved in favor of the unrestricted use of the property...." *Dickstein v. Williams*, 93 Nev. 605, 608, 571 P.2d 1169 (1977); *see also, e.g., South Shore Homes Ass'n v. Holland Holidays*, 549 P.2d 1035, 1043 (Kan. 1976); *Duffy v. Sunburst Farms East Mutual Water & Agricultural Company, Inc.*, 604 P.2d 1124 (Ariz. 1980); *Bordleon v. Homeowners Ass'n of Lake Ramsey*, 916 So.2d 179, 183 (La. Ct. App. 2005); *Cummings v. Dosam*, 159 S.E.2d 513, 517 (N.C. 1968); *Long v. Branham*, 156 S.E.2d 235, 236 (N.C. 1967).

17. In keeping with this well-settled and general principle, the Court construes the Original CC&Rs pursuant to the plain meaning of the language therein. Nowhere is there reference in the Original CC&Rs to a "unit-owners' association" or "homeowners association." Rather, the Developer created a 116.1201 *limited purpose association* termed a "property owners' committee," and the Developer provided that committee with limited, rather than comprehensive, duties and powers.

18. Consistent with the absence of a governing body, *e.g.* unit-owners' association, delegated with the duty to enforce the Original CC&Rs, the Developer provided each homeowner the right to independently enforce the Original CC&Rs against one another.

19. The Association is a limited purpose association under NRS 116.1201, is not a Chapter 116 "unit-owners' association," and is relegated to only those specific duties and powers set forth in Paragraph 21 of the Original CC&Rs and NRS 116.1201.

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D. The CC&Rs Can Only Be Amended By Unanimous Consent of All Property Owners

20. Because Rosemere Estates is a limited purpose association under NRS 116.1201, NRS 116.2117, the statutory provision typically governing amendments to the CC&R's, does not apply here.

21. The Original CC&Rs are mutual and reciprocal among all of the Rosemere Estates property owners. The Original CC&Rs "touch and concern" (and thus "run with") the land. Accordingly, under long-standing and well-established common law, the Original CC&Rs are binding, and not subject to amendment, absent a new conveyance properly executed by all Rosemere property owners and in conformance with all of the other legal requirements for a valid transfer of an interest in real property. In short, there can be no valid amendment of the Original CC&Rs absent, at a minimum, the unanimous consent of all Rosemere property owners.

22. There has never been unanimous consent to amend the Original CC&Rs and there has never been a valid conveyance of Plaintiff's interest in the Original CC&Rs. Specifically, unanimous consent was not received in 2007, when the invalid Amended CC&Rs were wrongfully recorded by the Association.

23. Even if the provisions related to amendment within Chapter 116 were to apply, the Amended CC&Rs would still be invalid, and wrongly recorded, because NRS 116.2117 required unanimous consent under these circumstances. NRS 116.2117 specifies the kinds of amendments that require unanimous unit owner approval (as opposed to majority or supermajority approval). In particular, a "change of use" always requires unanimous approval.

NRS 116.2117 provides, in pertinent part:

> 1. . . .the declaration, including any plats, may be amended only by vote or agreement of units' owners of units to which at least a majority of the votes in the association are allocated, unless the declaration specifies a different percentage for all amendments or for specified subjects of amendment. If the declaration requires the approval of another person as a condition of its effectiveness, the amendment is not valid without that approval.
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> 4. Except to the extent expressly permitted or required by other provisions of this chapter, no amendment may change the boundaries of any unit, change the allocated interests of a unit **or change the uses to which any unit is restricted, in the absence of unanimous consent of only those units' owners whose units are affected and the consent of a majority of the owners of the remaining units.**

(Emphasis added.)

24. For the reasons set forth above, the Association's countermotion for summary judgment is without merit.

III. JUDGMENT

IT IS HEREBY ADJUDGED AND DECREED:

A. Declaration

25. Pursuant to the foregoing, this Court declares and orders that the Amended CC&Rs were not properly adopted or recorded, that the Amended CC&Rs are invalid, and that the Amended CC&Rs have no force and effect. This Order, may be recorded in the Office of the Clark County Recorder's Office by any party and, once recorded, shall be sufficient notice of same.

B. Injunctive Relief

26. The Association is permanently enjoined from recording and enforcing the Amended CC&Rs. The Association is hereby ordered to release the Amended CC&Rs, Document Number 20070703-0001934, recorded with the Clark County Recorder on July 3, 2007, within ten (10) court days after the date of Notice of Entry of this Order.

C. Plaintiff's Monetary Damages

27. Plaintiff's monetary damages are subject to a prove-up hearing, and Plaintiff is to submit a separate motion regarding the same.

D. The Association's Motion For Summary Judgment

28. The Association's Motion for Summary Judgment is denied.

E. Costs

29. Plaintiff is deemed the prevailing party in this action. Plaintiff is directed to prepare, file and serve a Memorandum of Costs.

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F. **Attorneys' Fees**

30. Plaintiff is deemed the prevailing party in this action. Any motion for attorney fees will be addressed separately by the Court.

Dated this 29 day of July, 2013.

MICHELLE LEAVITT, DISTRICT COURT JUDGE

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