

FILED

JUN 25 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

ARTEMIS EXPLORATION COMPANY, a
Nevada Corporation,
Appellant,

vs.

RUBY LAKES ESTATES HOMEOWNER'S
ASSOCIATION,
Respondent.

No. 63338

DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

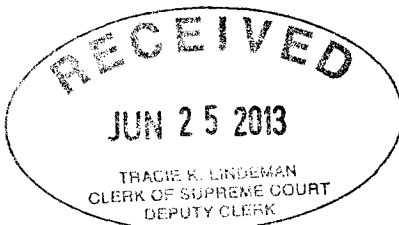
All appellants not in proper person must complete this docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 26 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.



73-18601

1. Judicial District Fourth Department 2
County Elko Judge Hon. Alvin R. Kacin
District Ct. Case No. CV-C-12-175

2. Attorney filing this docketing statement:

Attorney Travis W. Gerber Telephone (775) 738-9258
Firm GERBER LAW OFFICES, LLP
Address 491 4th Street
Elko, Nevada 89801

Client(s) Artemis Exploration Company, a Nevada Corporation

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Gayle A. Kern Telephone (775) 324-5930
Firm KERN & ASSOCIATES, LTD.
Address 5421 Kietzke Lane, Suite 200
Reno, Nevada 89511

Client(s) Ruby Lake Estates Homeowner's Association

Attorney _____ Telephone _____

Firm _____

Address _____

Client(s) _____

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|--|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input checked="" type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input checked="" type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____ |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

None.

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

None.

8. Nature of the action. Briefly describe the nature of the action and the result below:

Artemis Exploration Company ("ARTEMIS") is a lot owner in the Ruby Lake Estates, a rural subdivision of 51 lots that was subdivided in 1989. The recorded Declaration, Restrictions and Covenants of Ruby Lake Estates subdivision does not contain any covenant or provision for the organization of a homeowner's association or for the payment of dues or any common expenses. Ruby Lake Estates Homeowner's Association ("RLEHOA") was organized by a group of lot owners in Ruby Lake Estates in 2006, 17 years after the conveyance of lots, and RLEHOA began assessing mandatory dues and compelling payment under threat of liens.

The matter was submitted for non-binding arbitration through the Nevada Real Estate Division pursuant to NRS 38.300 - NRS 38.360. An Arbitration Award was granted in RLEHOA's favor denying ARTEMIS's claims for relief on February 7, 2012.

ARTEMIS filed the instant case for judicial review on March 2, 2012, . . .

Continued on separate sheet attached hereto.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

- (1) Whether the district court erred by holding that Ruby Lake Estates is a "common-interest community" under the definition of NRS 116.021 when the declaration of Ruby Lake Estates did not obligate lot owners "to pay for a share of real estate taxes, insurance premiums, maintenance or improvement of, or services or other expenses related to, common elements, other units or other real estate described in that declaration." NRS 116.021.
- (2) Whether the district court erred by holding that Ruby Lake Estates Homeowner's Association is a valid homeowner's association and is not bound by NRS 116.3101(1) when the association was organized 17 years after the subdivision was created and after lots were conveyed without notice of an association or dues.

See additional issues listed as (3) and (4) on separate sheet attached hereto.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

None.

8. Nature of action. (Continued)

Artemis Exploration Company ("ARTEMIS") is a lot owner in the Ruby Lake Estates, a rural subdivision of 51 lots that was subdivided in 1989. The recorded Declaration, Restrictions and Covenants of Ruby Lake Estates subdivision does not contain any covenant or provision for the organization of a homeowner's association or for the payment of dues or any common expenses. Ruby Lake Estates Homeowner's Association ("RLEHOA") was organized by a group of lot owners in Ruby Lake Estates in 2006, 17 years after the conveyance of lots, and RLEHOA began assessing mandatory dues and compelling payment under threat of liens.

The matter was submitted for non-binding arbitration through the Nevada Real Estate Division pursuant to NRS 38.300 - NRS 38.360. An Arbitration Award was granted in RLEHOA's favor denying ARTEMIS's claims for relief on February 7, 2012.

ARTEMIS filed the instant case for judicial review on March 2, 2012, pursuant to NRS 38.330(5) seeking a declaratory judgment establishing that Ruby Lake Estates Homeowner's Association is not authorized by the Declaration, Restrictions and Covenants of Ruby Lake Estates to assess or compel the payment of dues.

Both parties submitted Motions for Summary Judgment in the District Court action. The District Court denied ARTEMIS's Motion for Summary Judgment and entered its Order Granting Defendant's Motion for Summary Judgment on February 14, 2013, in favor of RLEHOA.

On May 15, 2013, the District Court entered its final Order Granting Defendant's Motion for Confirmation and Judgment on an Arbitration Award and Award of Attorney's Fees and Costs. The District Court confirmed the award of the arbitrator, although on different grounds, and awarded RLEHOA total of attorney's fees in the amount of \$53,904.00 and additional costs in the amount of \$1,536.14.

On May 20, 2013, RELHOA filed a Request for Amended Order Granting Defendant's Motion for Confirmation and Judgment on an Arbitration Award and Award of Attorney's Fees and Costs. ARTEMIS opposed the motion on May 29, 2013. On May 29, 2013, the Court signed a Judgment for attorney's fees and costs in the amount of \$82,250.81, which Judgment was filed on June 6, 2013.

9. Issues on appeal. (Continued)

- (1) Whether the district court erred by holding that Ruby Lake Estates is a "common-interest community" under the definition of NRS 116.021 when the declaration of Ruby Lake Estates did not obligate lot owners "to pay for a share of real estate taxes, insurance premiums, maintenance or improvement of, or services or other expenses related to, common elements, other units or other real estate described in that declaration." NRS 116.021.
- (2) Whether the district court erred by holding that Ruby Lake Estates Homeowner's Association is a valid homeowner's association and is not bound by NRS 116.3101(1) when the association was organized 17 years after the subdivision was created and after lots were conveyed without notice of an association or dues.
- (3) Whether the district court erred by failing to apply NRS 116.021, as amended, to this case when the 2009 legislative amendment to NRS 116.021 was meant to clarify, not change, the statute and when the district court disregarded the legislative history showing that the amendment was enacted to avoid the over-broad definition of "common-interest community" that that the district court adopted.
- (4) Whether the district court erred by holding that NRS Chapter 116 applies to Ruby Lake Estates when Ruby Lake Estates "was created before January 1, 1992, is located in a county whose population is less than 55,000, and has less than 50 percent of the units within the community put to residential use," and when "a majority of the units' owners" did not "elect in writing" to be governed by the provisions of NRS Chapter 116. NRS 116.1201(2)(d).
- (5) Whether the district court abused its discretion in awarding attorney's fees and costs.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☐ An issue of public policy

☒ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain: This is the first case brought on appeal to the Nevada Supreme Court regarding the application and interpretation of NRS 116.021 as amended in 2009 by the Nevada legislature. This issue has not been addressed by the Nevada Supreme Court. En banc consideration is necessary to maintain uniformity of this court's decisions.

13. Trial. If this action proceeded to trial, how many days did the trial last? _____

Was it a bench or jury trial? No trial. Summary Judgment was granted.

14. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?
No.

TIMELINESS OF NOTICE OF APPEAL

15. Date of entry of written judgment or order appealed from May 15, 2013

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

16. Date written notice of entry of judgment or order was served None

Was service by:

☐ Delivery

☐ Mail/electronic/fax

17. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☒ NRCP 59 Date of filing May 17, 2013

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ___, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion June 6, 2013

(c) Date written notice of entry of order resolving tolling motion was served None

Was service by:

☐ Delivery

☐ Mail

18. Date notice of appeal filed June 3, 2013

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

19. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a)

SUBSTANTIVE APPEALABILITY

20. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

- | | |
|---|--|
| <input checked="" type="checkbox"/> NRAP 3A(b)(1) | <input checked="" type="checkbox"/> NRS 38.205 |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input type="checkbox"/> Other (specify) _____ | |

(b) Explain how each authority provides a basis for appeal from the judgment or order:

NRAP 3A(b)(1) provides a basis for appeal because a final judgment was entered in his case by the district court.

NRS 38.247(c) provides a basis for appeal because the district court entered an order confirming an arbitration award.

21. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Artemis Exploration Company, a Nevada Corporation
Ruby Lake Estates Homeowner's Association

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

22. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

ARTEMIS's claim for declaratory judgment and RLEHOA's counterclaims for breach, negligence, violations, confirmation of award, damages, declaratory relief, and injunction were disposed of by the final Order Granting Defendant's Motion for Confirmation and Judgment on an Arbitration Award and Award of Attorney's Fees and Costs entered May 15, 2013.

ARTEMIS abandoned claims for damages and fraud, which claims were disposed of in Order Granting Defendant's Motion for Summary Judgment entered Feb. 14, 2013.

23. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

24. If you answered "No" to question 23, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☒ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☒ No

25. If you answered "No" to any part of question 24, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

Order is independently appealable under NRAP 3A(b) and NRS 38.247(c).

26. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Artemis Exploration Company
Name of appellant

Travis W. Gerber
Name of counsel of record

Date June 20, 2013

Travis W. Gerber
Signature of counsel of record

State of Nevada, County of Elko
State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 24th day of June, 2013, I served a copy of this completed docketing statement upon all counsel of record:

- ☐ By personally serving it upon him/her; or
- ☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Gayle A. Kern, Esq.
Kern & Associates, Ltd.
5421 Kietzke Lane, Suite 200
Reno, Nevada 89511

Dated this 24th day of June, 2013

Samantha Morgan
Signature

INDEX TO EXHIBITS

Exhibit	Description	Pages
1	Complaint	26
2	Answer to Complaint and Counterclaim	22
3	Order Denying Plaintiff's Motion for Summary Judgment	11
4	Order Granting Defendant's Motion for Summary Judgment	11
5	Notice of Entry of Order Denying Plaintiff's Motion for Summary Judgment	14
6	Notice of Entry of Order Granting Defendant's Motion for Summary Judgment	14
7	Order Granting Defendant's Motion for Confirmation and Judgment on an Arbitration Award and Award of Attorney's Fees and Costs	4
8	Request for Amended Order Granting Defendant's Motion for Confirmation and Judgment on an Arbitration Award and Award of Attorney's Fees and Costs	4
9	Judgment on an Arbitration Award and Award of Attorney's Fees and Costs	7
10	Arbitration Award dated February 7, 2012	4

1 CASE NO. CV-C- 12-175

2 DEPT. NO. 1

3 Affirmation: This document does
4 not contain the social security
5 number of any person.

FILED

2012 MAR -21 P 3:06

ELKO CO DISTRICT COURT

CLERK _____ DEPUTY JS

6
7 **IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
8 **IN AND FOR THE COUNTY OF ELKO**

9
10 **ARTEMIS EXPLORATION COMPANY,**
11 **a Nevada Corporation,**

12 **Plaintiff,**

13 **vs.**

COMPLAINT

14 **RUBY LAKE ESTATES HOMEOWNER'S**
15 **ASSOCIATION AND DOES I-X,**

16 **Defendants.**

17 Plaintiff, ARTEMIS EXPLORATION COMPANY, for its causes of action against
18 Defendant, RUBY LAKE ESTATES HOMEOWNER'S ASSOCIATION, alleges and complains
19 as follows:

20 **JURISDICTION**

- 21 1. Plaintiff, Artemis Exploration Company, is a Nevada corporation with its principle
22 place of business in Elko County, Nevada.
- 23 2. Artemis Exploration Company purchased Lot 6, Block G, of the Ruby Lake Estates and
24 recorded its Deed in the office of the Recorder of Elko County, State of Nevada, in Book 860,
25 Page 625, on June 21, 1994.
- 26 3. Artemis Exploration Company purchased Lot 2, Block H, of the Ruby Lake Estates and
27 recorded its Deed in the office of the Recorder of Elko County, State of Nevada, as Document No.
28 623994, on March 9, 2010.

GERBER LAW OFFICES, LLP

491 4th Street
Elko, Nevada 89801
Ph. (775) 738-9258

4. Defendant, Ruby Lake Estates Homeowners Association, registered itself as a domestic non-profit cooperative association in the State of Nevada on or about January 18, 2006, and purports to represent property owners of the Ruby Lake Estates subdivision located in Elko County, Nevada.

5. Venue is proper in this Court as the claims relate to real property located in the County of Elko, State of Nevada.

COMMON FACTS

6. Plaintiff restates and incorporates paragraphs 1 through 5 above as if fully stated herein.

7. The parcel map that created the Ruby Lake Estates subdivision was recorded in the office of the Recorder of Elko County, State of Nevada, on September 15, 1989, as File No. 281674 and 281674 A. See copies attached hereto as Exhibit A.

8. The Declaration of Reservations, Conditions and Restrictions for the Ruby Lake Estates was recorded on October 25, 1989, in the Office of the Recorder of Elko County in Book 703, Page 287. See copy attached hereto as Exhibit B.

9. The Declaration of Reservations, Conditions and Restrictions does not create or authorize the creation of a homeowners association.

10. The Declaration of Reservations, Conditions and Restrictions provides for an Architectural Review Committee for the “general purpose of maintaining an aesthetically pleasing development of a residential or vacation community in the aforesaid subdivision in conformity with these conditions.”

11. The purpose of the Architectural Review Committee is to review architectural plans and to accept or reject plans, or to give a conditional acceptance thereof, and to determine whether or not the reservations, restrictions, covenants, and conditions, are being complied with.

12. The Declaration of Reservations, Conditions and Restrictions do not authorize or empower the Architectural Review Committee to levy dues or other assessments.

1 13. The Declaration of Reservations, Conditions and Restrictions did not authorize the
2 creation of a homeowner's association to compel the payment of dues or other assessments to
3 maintain roads or provide any other services.

4 14. In 2005, Defendant, Ruby Lake Estates Homeowner's Association and its officers,
5 purported to represent the Architectural Review Committee under authority of the Declaration of
6 Reservations, Conditions and Restrictions, and sought to transform the Architectural Review
7 Committee into a homeowner's association and to levy and collect dues from the property owners
8 of Ruby Lake Estates.

9 15. After the Architectural Review Committee claimed to comprise a homeowner's
10 association, Beth Essington, President of Artemis Exploration Company, began inquiring into the
11 authority and legitimacy of such a body to compel the payment of dues.

12 16. In response to her letter of inquiry concerning the association's legitimacy, Leroy
13 Perks, President of the Ruby Lake Estates Homeowner's Association, replied in a letter dated
14 December 9, 2009, explaining, "We added to the architectural committee to lighten the load of the
15 volunteers, which we researched and is legal. This is now our executive committee." See letter
16 from Lee Perks dated December 9, 2009, attached hereto as Exhibit C.

17 17. Ruby Lake Estates Homeowner's Association is a volunteer association and is not
18 authorized under the Declaration, Restrictions and Covenants to collect dues or assessments, or to
19 otherwise compel property owners within the Ruby Lake Estates to participate in the activities of
20 the Ruby Lake Estates Homeowners Association

21 18. Artemis Exploration Company demanded that the Ruby Lake Estates Homeowner's
22 Association cease sending invoices and collection letters to compel the payment of dues.

23 19. Ruby Lake Estates Homeowner's Association continues to send delinquent account
24 statements to Artemis Exploration Company, and other property owners similarly situated,
25 threatening collections and legal action. See Invoice from Ruby Lake Estates Homeowner's
26 Association dated December 16, 2010, attached hereto as Exhibit D.

27 20. On or about January 3, 2011, Ruby Lake Estates Homeowner's Association engaged
28 Angius & Terry Collections, LLC, a collection agency, to send a notice to Artemis Exploration

1 Company threatening that a "Delinquent Assessment Lien" would be placed on the property of
2 Artemis Exploration Company if the purported dues and assessments were not paid. See Notice
3 of Intent to Record a Notice of Delinquent Assessment Lien dated January 4, 2011, attached
4 hereto as Exhibit E.

5 21. Other property owners of the Ruby Lake Estates have been sent similar notices and
6 threats of collection, liens, and legal action.

7 **FIRST CLAIM FOR RELIEF**
8 **(Declaratory Judgment)**

9 22. Plaintiff restate and re-allege each prior allegation as if set forth fully herein.

10 23. Plaintiff seeks a declaratory judgment to establish that the Ruby Lake Estates
11 subdivision is not a common-interest community as defined by Chapter 116 of the Nevada
12 Revised Statutes.

13 24. Pursuant to NRS 116.021(1), "Common-interest community" means real estate
14 described in a declaration with respect to which a person, by virtue of the person's ownership of a
15 unit, is obligated to pay for a share of real estate taxes, insurance premiums, maintenance or
16 improvement of, or services or other expenses related to, common elements, other units or other
17 real estate described in that declaration."

18 25. Ruby Lake Estates subdivision does not have any common elements nor are any
19 common elements described in the Declaration, Restrictions and Covenants of Ruby Lake Estates
20 subdivision.

21 26. The Declaration, Restrictions and Covenants of Ruby Lake Estates does not obligate
22 the property owners of Ruby Lake Estates subdivision "to pay for a share of real estate taxes,
23 insurance premiums, maintenance or improvement of, or services or other expenses related to,
24 common elements, other units or other real estate." NRS 116.021(1).

25 27. Plaintiff seeks a declaratory judgment to establish that Defendant, Ruby Lake Estates
26 Homeowner's Association, is not authorized under the Declaration, Restrictions and Covenants to
27 collect dues or assessments, or otherwise compel property owners within the Ruby Lake Estates to
28 participate in the activities of the so-called Ruby Lake Estates Homeowner's Association.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

2

3

4

5

6

7

8

O

0

1

1 37. Defendant made these representations for the purpose of inducing Plaintiff to rely
2 on these representations and to coerce payments from Plaintiff which were not legally required or
3 due.

4 38. Defendant acted with an intent to induce Plaintiff to make payments to Defendant.

5 39. Plaintiff, acting reasonably and in ignorance of the falsity of these representations,
6 did, in fact, rely on these representations and was induced to act or refrain from acting to its
7 damage or injury.

8 40. To its detriment, Plaintiff relied on the falsity of these representations which
9 resulted in Plaintiff paying money to Defendant under false pretenses.

10 41. Defendant acted deliberately, maliciously, and with conscious disregard for
11 Plaintiff's rights.

12 42. Defendant's actions were oppressive and constitute fraud, for which Plaintiff is
13 entitled to damages in an amount to be determined at trial, including exemplary or punitive
14 damages.

15 43. Plaintiff has been required to retain the services of a lawyer to prosecute this
16 action. Plaintiff has incurred and will incur costs and fees in this action, and Plaintiff is entitled to
17 recover said costs and fees from Defendant.

18 44. The undersigned counsel hereby swears under penalty of perjury that the issues
19 addressed in this Complaint have been arbitrated pursuant to the provisions of NRS 38.300 to
20 38.360, inclusive, and are now being submitted for a legal decision.

21 WHEREFORE, Plaintiff prays for judgment against Defendant as set forth below.

22 **PRAYER FOR RELIEF**

23 Plaintiffs, therefore, respectfully request that judgment be entered in Plaintiff's favor and
24 against Defendant as follows:

25 1. For a declaratory judgment establishing that Ruby Lake Estates Homeowner's
26 Association is not authorized under the Ruby Lake Estates Declaration, Restrictions and
27 Covenants to compel the payment of dues or assessments, or to otherwise compel property owners
28

1 within the Ruby Lake Estates to participate in the activities of the so-called Ruby Lake Estates
2 Homeowner's Association;

3 2. For an award of restitution and damages against Defendant, including but not limited to
4 the repayment to Plaintiff of all monies collected by the Ruby Lake Estates Homeowner's
5 Association;

6 3. For Plaintiff's reasonable attorney fees and costs of suit;

7 4. For exemplary or punitive damages; and

8 5. For such other and further relief as the Court may deem just and proper.

9 DATED this 2nd day of March, 2012.

10 **GERBER LAW OFFICES, LLP**

11 BY:



12 **TRAVIS W. GERBER, ESQ.**

13 State Bar No. 8083

14 491 4th Street

15 Elko, Nevada 89801

16 (775) 738-9258

17 **ATTORNEYS FOR PLAINTIFF**
18 **ARTEMIS EXPLORATION**
19 **COMPANY**

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28
- 29
- 30
- 31
- 32
- 33
- 34
- 35
- 36
- 37
- 38
- 39
- 40
- 41
- 42
- 43
- 44
- 45
- 46
- 47
- 48
- 49
- 50
- 51
- 52
- 53
- 54
- 55
- 56
- 57
- 58
- 59
- 60
- 61
- 62
- 63
- 64
- 65
- 66
- 67
- 68
- 69
- 70
- 71
- 72
- 73
- 74
- 75
- 76
- 77
- 78
- 79
- 80
- 81
- 82
- 83
- 84
- 85
- 86
- 87
- 88
- 89
- 90
- 91
- 92
- 93
- 94
- 95
- 96
- 97
- 98
- 99
- 100

Gayle A. Kern
Kern & Associates, Ltd
5421 Kietzke Lane, suite 200
Reno, Nevada 89511

DATED: March 2, 2012.

Darlene McGarr
DARLENE MCGARR

EXHIBIT A

DRAWING NUMBER
Sheet 1 of 2

DRAWING NUMBER

DATE
LAST SET

DRAWING NUMBER

DRAWING NUMBER

RUBY LAKE ESTATES ELKO COUNTY, NEVADA

ASSAULT CERTIFICATE

STATE OF NEVADA
COUNTY OF ELKO
I, Robert C. Wright, June 2, 1989
Notary Public for Nevada
My Comm. Expires June 2, 1991

STATE OF NEVADA

COUNTY OF ELKO
I, Robert C. Wright, June 2, 1989
Notary Public for Nevada
My Comm. Expires June 2, 1991



ASSAULT - RUBY LAKE

AT A REGULAR MEETING OF THE BOARD OF DIRECTORS OF THE RUBY LAKE ESTATES, HELD AT THE OFFICE OF THE ELKO COUNTY CLERK, ELKO, NEVADA, ON June 2, 1989, THE FOLLOWING RESOLUTIONS WERE PASSED:

ASSAULT - RUBY LAKE

AT A REGULAR MEETING OF THE BOARD OF DIRECTORS OF THE RUBY LAKE ESTATES, HELD AT THE OFFICE OF THE ELKO COUNTY CLERK, ELKO, NEVADA, ON June 2, 1989, THE FOLLOWING RESOLUTIONS WERE PASSED:

ASSAULT - RUBY LAKE

AT A REGULAR MEETING OF THE BOARD OF DIRECTORS OF THE RUBY LAKE ESTATES, HELD AT THE OFFICE OF THE ELKO COUNTY CLERK, ELKO, NEVADA, ON June 2, 1989, THE FOLLOWING RESOLUTIONS WERE PASSED:

REVIEW OF WATER RESOURCES CERTIFICATE

THIS OFFICIAL PLAY IS APPROVED BY THE STATE OF NEVADA, ELKO COUNTY, ON June 2, 1989, BY THE ELKO COUNTY CLERK, ELKO, NEVADA.

HEALTH REVISION CERTIFICATE

THIS OFFICIAL PLAY IS APPROVED BY THE HEALTH DEPARTMENT OF THE ELKO COUNTY, NEVADA, ON June 2, 1989, BY THE ELKO COUNTY CLERK, ELKO, NEVADA.

APPROVAL - PUBLIC UTILITIES

THIS OFFICIAL PLAY IS APPROVED BY THE PUBLIC UTILITIES DEPARTMENT OF THE ELKO COUNTY, NEVADA, ON June 2, 1989, BY THE ELKO COUNTY CLERK, ELKO, NEVADA.

REVISIONS CERTIFICATE

THIS OFFICIAL PLAY IS APPROVED BY THE ELKO COUNTY CLERK, ELKO, NEVADA, ON June 2, 1989, BY THE ELKO COUNTY CLERK, ELKO, NEVADA.

FILED DATA

FILE NO. 281674
DATE Sept 15
TIME 10:27 A.M.
BY Robert C. Wright
Notary Public, Nevada

SHEET 1 OF 2

OFFICIAL PLAY OF
RUBY LAKE ESTATES
FOR
STEPHEN S. & MAVIS S. WRIGHT
SECTIONS 9&10, T20N-R30E, M20S
ELKO COUNTY, NEVADA

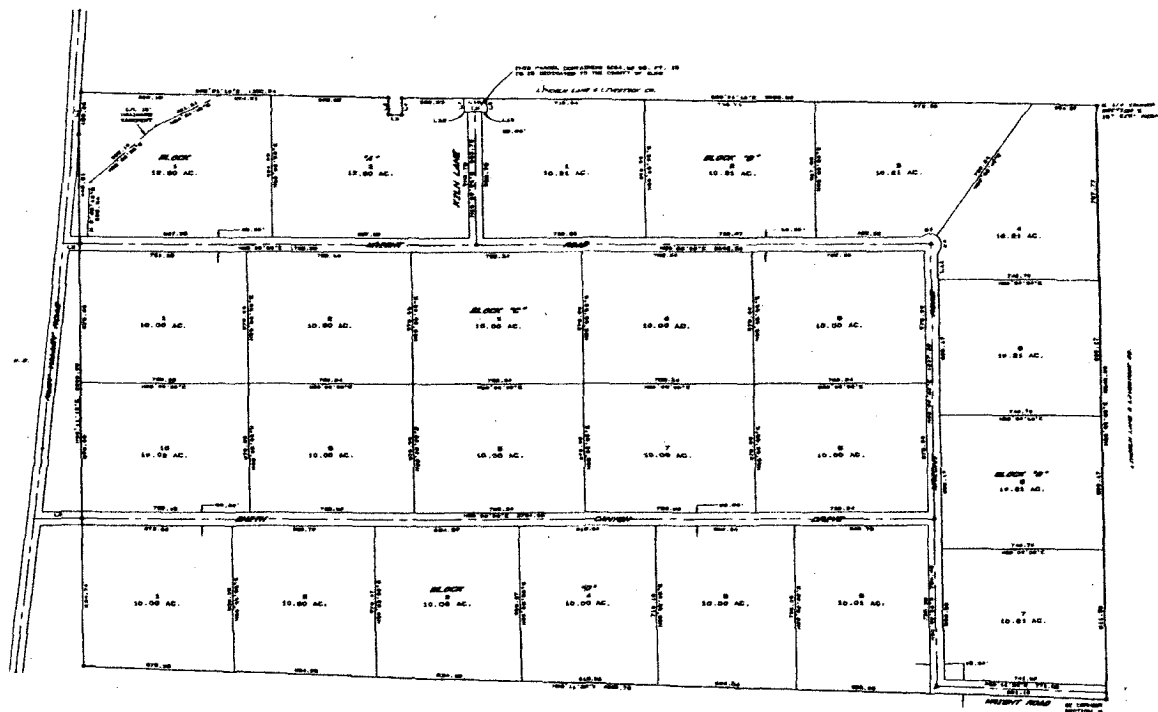
89036
SHEET 1 OF 2

DRAWING NUMBER
Sheet 2 of 3

DRAWING NUMBER

DRAWING NUMBER

DRAWING NUMBER

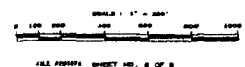


SECTION	ACRES	SECTION	ACRES	SECTION	ACRES
1	10.00	11	10.00	21	10.00
2	10.00	12	10.00	22	10.00
3	10.00	13	10.00	23	10.00
4	10.00	14	10.00	24	10.00
5	10.00	15	10.00	25	10.00
6	10.00	16	10.00	26	10.00
7	10.00	17	10.00	27	10.00
8	10.00	18	10.00	28	10.00
9	10.00	19	10.00	29	10.00
10	10.00	20	10.00	30	10.00

NO.	SECTION	ACRES
1	10.00	10.00
2	10.00	10.00
3	10.00	10.00
4	10.00	10.00
5	10.00	10.00
6	10.00	10.00
7	10.00	10.00
8	10.00	10.00
9	10.00	10.00
10	10.00	10.00

NOTES:
1. THE TOTAL SURVEYED AREA OF THIS MAP SHALL BE 10.00 ACRES.
2. A 10' WIDE STRIP OF LAND SHALL BE SET AS A BUFFER ZONE BETWEEN THE 10' WIDE STRIP OF LAND AND THE 10' WIDE STRIP OF LAND.
3. THE 10' WIDE STRIP OF LAND SHALL BE SET AS A BUFFER ZONE BETWEEN THE 10' WIDE STRIP OF LAND AND THE 10' WIDE STRIP OF LAND.
4. THE 10' WIDE STRIP OF LAND SHALL BE SET AS A BUFFER ZONE BETWEEN THE 10' WIDE STRIP OF LAND AND THE 10' WIDE STRIP OF LAND.
5. THE 10' WIDE STRIP OF LAND SHALL BE SET AS A BUFFER ZONE BETWEEN THE 10' WIDE STRIP OF LAND AND THE 10' WIDE STRIP OF LAND.
6. THE 10' WIDE STRIP OF LAND SHALL BE SET AS A BUFFER ZONE BETWEEN THE 10' WIDE STRIP OF LAND AND THE 10' WIDE STRIP OF LAND.
7. THE 10' WIDE STRIP OF LAND SHALL BE SET AS A BUFFER ZONE BETWEEN THE 10' WIDE STRIP OF LAND AND THE 10' WIDE STRIP OF LAND.
8. THE 10' WIDE STRIP OF LAND SHALL BE SET AS A BUFFER ZONE BETWEEN THE 10' WIDE STRIP OF LAND AND THE 10' WIDE STRIP OF LAND.
9. THE 10' WIDE STRIP OF LAND SHALL BE SET AS A BUFFER ZONE BETWEEN THE 10' WIDE STRIP OF LAND AND THE 10' WIDE STRIP OF LAND.
10. THE 10' WIDE STRIP OF LAND SHALL BE SET AS A BUFFER ZONE BETWEEN THE 10' WIDE STRIP OF LAND AND THE 10' WIDE STRIP OF LAND.

LEGEND:
A - STREET RIGHT-OF-WAY
B - 10' WIDE STRIP OF LAND



SEE PLAT FOR SHEET NO. 3 OF 3

OFFICIAL PLAT OF
RUBY LAKE ESTATES
for
STEPHEN S. & MAVIS B. WRIGHT
SECTIONS 0818, T28N-R10E, H088N
ELKO COUNTY, NEVADA

89036

SHEET 2 OF 3 92

EXHIBIT B

RUBY LAKE ESTATES
DECLARATION OF RESERVATIONS, CONDITIONS AND RESTRICTIONS

This Declaration of Restrictions, made effective this 6 day of Sept, 1989, by Stephen G. Wright and Mavis S. Wright, hereinafter collectively referred to as "DECLARANT".

WHEREAS, DECLARANT is the owner of a parcel of real property situate in the County of Elko, State of Nevada, more particularly described as follows:

WHEREAS, DECLARANT intends to sell, convey, or dispose of, all or a portion of said real property, from time to time, and desires to protect said property by subjecting the same to reservations, covenants, conditions and restrictions as herein set forth, pursuant to a general plan specified herein, binding the future owners of any interest in said property thereto,

NOW, THEREFORE, it is hereby declared that all of the parcels of the above-described real property are hereby fixed with the protective conditions, restrictions, covenants and reservations herein set forth, and the same shall apply to and upon each and every lot, parcel, or division of said property howsoever the same may be held or titled, all to the mutual benefit of the parcels of said real property and of each owner or user thereof, and said covenants, restrictions, conditions and reservations shall run with the land and inure to and pass with the land and apply to and bind respective successors in interest thereto and shall be uniformly imposed and impressed upon each and every lot, parcel, or portion of said land as a mutually enforceable equitable servitude in favor of each and every other parcel included within said land and shall inure to the owners and users thereof and to the DECLARANT herein.

ARTICLE I

**GENERAL PURPOSE OF
RESERVATIONS AND RESTRICTIONS**

The real property affected hereby is subjected to the imposition of the covenants, conditions, restrictions and reservations specified herein to provide for the development and maintenance of an aesthetically pleasing and harmonious community of residential dwellings for the purpose of preserving a high quality of use and appearance and maintaining the value of each and every lot and parcel of said property. All divisions of said real property are hereafter referred to as "lots".

ARTICLE II

ARCHITECTURAL REVIEW COMMITTEE

There shall be an Architectural Review Committee which shall consist of Stephen G. Wright, or his nominee, until such time as 30% of the lots are transferred, at which time DECLARANT shall appoint a committee consisting of DECLARANT and not less than two other owners of lots for the general purpose of providing for the maintenance of a high standard of architectural design, color and landscaping harmony and to preserve and enhance aesthetic qualities and high standards of construction in the development and maintenance of the subdivision.

The DECLARANT shall have the power to fill any vacancies in the Architectural Review Committee, as they may occur from time to time, and may appoint his own successor or temporary nominee.

The Committee shall determine whether or not the reservations, restrictions, covenants, and conditions, are being complied with and may promulgate and adopt reasonable rules and regulations in order to carry out its purpose. The Committee shall, in all respects, except when, in its sound discretion, good planning would otherwise dictate, be controlled by the conditions set forth herein.

The Committee shall be guided by the general purpose of maintaining an aesthetically pleasing development of a residential or vacation community in the aforesaid subdivision in conformity with these conditions.

ARTICLE III

CONDITIONS

The following conditions are imposed upon and apply to each and every lot contained within the aforesaid real property:

A. Commercial lot: One lot shall be designated as a Commercial lot and shall be intended for all reasonable commercial uses consistent with a convenience store, gasoline sales, laundromat, etc., which shall be:

B. Prohibition against re-division: None of the lots contained within the Subdivision as finally authorized by the County of Elko shall be redivided in any manner whatsoever.

C. Single dwellings: All of the lots shall contain a single dwelling in conformity with these conditions, with the exception of temporarily parked recreational vehicles belonging to owners of lots or guests of lot owners. No such temporary guest vehicle may remain on any lot, except for purposes of storage, for longer than six weeks.

D. Building authorization: No construction of any name or nature, including alteration of a structure already built, or original construction, or fence construction, shall be commenced until and unless the plans therefore, including designation of floor areas, external design, structural

details, materials list, elevations, and ground location and plot plan, as may apply, have been first delivered to and approved in writing by the Architectural Review Committee. All construction shall be in conformance with the requirements of the Uniform Building Code, Uniform Plumbing Code, National Electrical Code, and Uniform Fire Code as currently published. All premanufactured, modular or other housing which is not built or constructed on-site must be approved by the Nevada Division of Manufactured Housing or such other Nevada agency or division having jurisdiction over the same. All mobile or modular housing shall be first approved by the Architectural Review Committee and age and external condition shall be factors in the Committee's decision as to whether or not the same may be placed upon any lot. The proposed plans shall be submitted in duplicate to the Architectural Review Committee at the address specified below, or as may be changed from time to time, which amended address will be recorded with the Elko County Recorder.

Steve and Mavis Wright
Ruby Valley, NV 89833

The Committee shall then either accept or reject the plan, or give a conditional acceptance thereof, indicating the conditions, in writing, within thirty (30) days of submission. Any approved plan shall be adhered to by the lot owner. The Committee shall retain one set of plans.

E. Setbacks: No structure shall be erected, altered, placed or permitted to remain on any building plot in this subdivision nearer than 50 feet to the front lot line, nor nearer than 20 feet to any side street line, nor nearer than 20 feet to any side lot line, and no nearer than 30 feet to any rear line of said plot.

F. Materials and Components: All residential dwellings constructed on the lots shall be subject to the following material restrictions:

(1) Exterior material shall be either block or brick veneer or horizontal or vertical siding and no unfinished plywood siding shall be used and no roof may be constructed of plywood or shake shingles;

(2) Manufactured housing with painted metal exteriors, provided the same are in reasonably good condition and appearance, shall be acceptable subject to the Committee's review.

G. Advertising: Except as the same pertains to the Commercial lot provided herein, no advertising sign, billboard, or other advertising media or structure of any name or nature shall be erected on or allowed within the boundary of any lot, save and except temporary signs for political candidates and neat and attractive notices offering the property for sale or indicating the contractor's name.

H. Animals and pets: No livestock of any name or nature will be permitted within the subdivision save and except domestic animals such as dogs, cats, or other household pets and up to four head of livestock (except during hunting and fishing season, at which time there may be more than two horses which may not be kept longer than a 45-day period), which animals may only be kept provided that they are not bred or maintained for any commercial purposes and any kennels or fences constructed for the same must be constructed of substantial materials which will prevent escape of such animals from the lot of their owner. All dogs must be kept on their owners' lot except when attended.

I. Temporary buildings: Except as provided above, temporary buildings of any name or nature shall not be erected or placed upon any lot to be used for human habitation, including but not limited to tents, shacks, or metal buildings.

J. Occupancy of residential dwellings: No residential dwelling shall be occupied or used for the purpose for which it is built as a residence until the same shall have been substantially completed and a certificate of occupancy has been issued by the Architectural Review Committee.

K. Use of premises: No person or entity shall make any use of any premises on any lot except as a single family residential or vacation dwelling and in conformity with these conditions and in compliance with all County ordinances, if any. No commercial enterprises shall be conducted within or upon any lot in the subdivision.

L. Garbage and refuse: No garbage, trash, refuse, junk, weeds or other obnoxious or offensive items or materials shall be permitted to accumulate on any of the lots and the owner of each lot shall cause all such materials and items to be disposed of by and in accordance with accepted sanitary and safety practices.

M. Nuisances: No obnoxious or offensive activity shall be carried on upon any lot nor shall anything be done upon any lot which shall be or may become an annoyance or a nuisance to the general neighborhood, including but not limited to fireworks displays, storage of disabled vehicles, machinery or machinery parts, boxes, bags, trash, dead animals or empty or filled containers. All trash must be taken to a County or City dump. No vehicles may be stored on any streets and no unightly objects or items may be open to public view.

N. Due Diligence in Construction: Upon commencement of construction of any structure upon any lot, the owner thereof shall prosecute said construction in a continual and diligent manner and any structure left partially constructed for a period in excess of two years shall constitute a violation of these restrictions and may be abated as a nuisance.

O. Maintenance of Lot Grade: No construction shall materially alter any existing lot grade.

P. Compliance with Codes, etc. Any lot owner shall comply with all codes, rules and regulations applicable to their lot enforceable by the County of Elko, including but not limited to the clearance of all brush, flammable vegetation and debris within a minimum of 50 feet from all buildings.

ARTICLE IV VARIANCES

The Architectural Review Committee shall be empowered to grant limited variances to the owner of a lot on a lot-by-lot basis in the case of good cause shown but always considering the general purpose of these conditions. A request for a variance shall be made in writing and state with specificity the nature and extent of the variance requested and the reason for the request. No variance may be granted which, in the opinion of the Architectural Review Committee, causes a material change to the high standards of development and maintenance of the subdivision.

The Architectural review committee shall act upon the request within thirty (30) days and shall give its decision in writing, with said decision being final and unappealable. In the event no action is taken on the request, the request shall be deemed to be denied.

ARTICLE V VIOLATION AND ENFORCEMENT

In the event of any existing violation of any of the conditions set forth herein, any owner of any lot, DECLARANT, or any representative of the Architectural Review Committee, may bring an action at law or in equity for an injunction, action for damages, or for any additional remedy available under Nevada law and all such remedies shall be cumulative and not limited by election and shall not affect the right of another to avail himself or itself of any available remedy for such violation. The prevailing party shall be entitled to recover its court costs and attorney's fees. Any injunction sought to abate a nuisance under these conditions and restrictions shall not required a bond as security.

The failure or election of any person having standing to bring any action for violation of any condition herein shall not constitute a waiver of such condition for any purpose and each and every condition hereunder shall continue in full force and effect notwithstanding the length of time of any violation, the person or entity committing the violation, or any change in the nature and character of the violation, and each day such violation continues, shall constitute a new violation of such condition so violated.

DECLARANT:

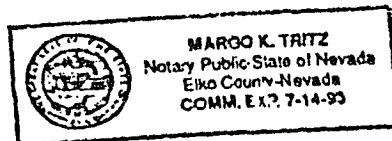
Stephen G. Wright
STEPHEN G. WRIGHT

Mavis S. Wright
MAVIS S. WRIGHT

STATE OF Nevada)
COUNTY OF Elko) ss.

On Sept. 10, 1989, personally appeared before me, a Notary Public,
Stephen G. Wright and Mavis S. Wright, who acknowledged that they executed the
above instrument.

Margo K. Fritz
NOTARY PUBLIC



INDEXED :

FEE 10⁰⁰ FILE # 283750
FILED FOR RECORD
AT REQUEST OF
Marnel + Hansen
89 OCT 25 AIO 43

RECORDED BY 702 287
JERRY D. REYNOLDS
ELKO CO. RECORDER

283750

EXHIBIT C

RUBY LAKE ESTATES HOMEOWNERS ASSOCIATION

765 EAST GREG ST #103
SPARKS, NEVADA 89431
(remit to)

687 6th Street, Suite 1
Elko, Nevada 89801
(correspondence)

December 9, 2009

Elizabeth Essington
HC 60 Box 760
Ruby Valley, NV 89833

Dear Mrs. Essington,

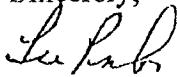
I am in receipt of your letter requesting information on the Ruby Lake Estates Homeowners Association. I will try and answer your questions as best I can.

- 1) The HOA was formed by the developer Steve Wright when he subdivided the properties originally. The formation of a committee was required in the original documents. Your property deed lists the CC&R's so you signed originally for this and agreed to a committee. This is your original signature and agreement. State law is very clear about this.
- 2) Steve Wright had the authority to appoint a committee to manage the CC&R's. Steve Wright had a meeting which I was appointed president, Mike Cecchi, VP, Dennis McIntyre sec/tres, Bill Harmon and Bill Noble, directors.
- 3) Once this happened I began researching the requirements of handling the committee and money required to operate. Federal law required that we obtain a Federal Id number to operate. (Steve Wright could operate under his existing). To do this we had to have a fictitious name and non profit status. This led to having an official name and registration.
- 4) To continue through our research we found out we are required per NRS 116 that insurance and council are required. We have done that.
- 5) We added to the architectural committee to lighten the load of the volunteers, which we researched and is legal. This is now our Executive committee.
- 6) There is no implied obligation or absence of legal documentation; it is there clearly in your deed.

Under the developers requirements Steve Wright did turn over the committee to the homeowners. He had the right to appoint. Steve Wright did not need any particular lot owner's permission to do this, it was strictly his choice. Now we are following the NRS

statues and administration code though the direction of our council Bob Wines. I hope this helps you understand your obligations.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lee Perks".

Lee Perks
President RLEHA

Cc: RLEHA Board members
Robert Wines, Esq.

EXHIBIT D

Ruby Lake Estates

687 6th Street Ste 1
Elko, NV 89801

Invoice

Date	Invoice #
12/16/2010	321

Bill To
ROCKY ROA HC 60 BOX 755 RUBY VALLEY, NV 89833

Payment remit to:
Ruby Lake Estates C/O L. A Perks
765 East Greg Street, Suite 103
Sparks, Nevada 89431

P.O. No.	Terms	Project
	1/1/2011	

Quantity	Description	Rate	Amount
1	2011 YEARLY ASSESSMENT	226.99	226.99
Payment Due By: January 31, 2011			
PLEASE REMIT TO: 765 E. GREG ST #103 SPARKS, NEVADA 89431			Total \$226

EXHIBIT E

**ANGIUS
& TERRY**
COLLECTIONS
LLC
A Division of ANGIUS & TERRY LLP
ATTORNEYS

January 4, 2011

VIA CERTIFIED AND FIRST CLASS MAIL

Artemis Exploration Company
HC 60 Box 755
Ruby Valley, NV 89833

Re: Ruby Lake Estates / 2010-3298
Artemis Exploration Company
3817 Indian Springs Drive
Ruby Valley, NV 89833

Dear Homeowner(s):

Angius & Terry Collections, LLC ("ATC") represents Ruby Lake Estates ("Association"), and has been directed to act on your delinquent account with respect to the above-referenced property ("Property"). This is our **NOTICE OF INTENT TO RECORD A NOTICE OF DELINQUENT ASSESSMENT LIEN ("Demand")**.

As of the date of this Demand, there is a total of \$662.92 owing and unpaid to the Association. Please ensure that all amounts due to the Association, plus all additional amounts which become due and payable to the Association including recoverable fees and costs be paid, in full, and physically received in our office on or before 5:00 P.M. on 2/4/2011. Payment should be made payable to Angius & Terry Collections, LLC. Call our office, at least 48 hours prior to your deadline date, at (702) 255-1124 or (877) 781-8885 to obtain the correct payment amount as the total amount owed is subject to change. Please note, that should a reinstatement amount be provided by our office prior to our receiving notification of a change in the Association's assessments, you will be responsible for the account balance that reflects the change in the Association's assessment. Should you elect to ignore this Demand, a Notice of Delinquent Assessment Lien will be prepared and forwarded to the County Recorder's office and additional collections fees and costs will be added to your account.

If we receive partial payments, they will be credited to your account, however, we will continue with the collection process on the balance owed as described above. You should direct all communications relating to this demand to the above-referenced office.

Please note all payments must be in the form of a cashier's check or money order. Personal check's and cash will not be accepted.

This is a serious matter and your immediate attention is imperative. Should you have any questions, please contact our office at (702) 255-1124 or (877) 781-8885.

Sincerely,


Carolyn Swanson
Angius & Terry Collections, LLC

cc: Ruby Lake Estates
Enclosures: Fair Debt Collection Practices Act Notice

Angius & Terry Collections, LLC is a debt collector and is attempting to collect a debt. Any information obtained will be used for that purpose.

1120 North Town Center Drive, Suite 260 • Las Vegas, NV 89144-6304

tel 877.781.8885 fax 877.781.8886

ATCollections.com

1 CASE NO. CV-C-12-175

2 DEPT. NO. 1

3
4
5 IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF ELKO

7 ARTEMIS EXPLORATION COMPANY, a
8 Nevada Corporation,

9 Plaintiffs,

10 vs.

**ANSWER TO COMPLAINT AND
COUNTERCLAIM**

11 RUBY LAKE ESTATES HOMEOWNER'S
12 ASSOCIATION AND DOES I-X,

13 Defendants.

14 RUBY LAKE ESTATES HOMEOWNER'S
ASSOCIATION,

15 Counterclaimant,

16 vs.

17 ARTEMIS EXPLORATION COMPANY, a
18 Nevada Corporation,

19 Counterdefendant.

20 Defendant Ruby Lake Estates Homeowner's Association ("Ruby Lake"), by and through its
21 attorneys, Kern & Associates, Ltd. answers the Plaintiff's Complaint and counterclaims as follows:

22 **JURISDICTION**

23 1. Answering paragraph 1 of Plaintiff's Complaint, Ruby Lake, on information and
24 belief admits the allegations contained in paragraph 1.

25
26 2. Answering paragraph 2 of Plaintiff's Complaint, Ruby Lake has no information who
27 or what recorded the deed referenced and based thereon, denies the same. Ruby Lake admits there
28 is a deed recorded on June 21, 1994.

1 3. Answering paragraph 3 of Plaintiff's Complaint, Ruby Lake has no information
2 who or what recorded the deed referenced and based thereon, denies the same. Ruby Lake admits
3 there is a deed recorded on March 9, 2010.

4 4. Answering paragraph 4 of Plaintiff's Complaint, Ruby Lake admits that it is a
5 nonprofit corporation incorporated and validly existing under the laws of the State of Nevada. Ruby
6 Lake asserts Nevada law does not provide for a corporation to "register" and based thereon denies
7 the same.

8 5. Answering paragraph 5 of Plaintiff's Complaint, Ruby Lake admits the allegations
9 in paragraph 5.

10 COMMON FACTS

11 6. Answering paragraph 6 of Plaintiff's Complaint, Ruby Lake incorporates by
12 reference each and every answer contained in paragraphs 1 through 5 stated above.

13 7. Answering paragraph 7 of Plaintiff's Complaint, Ruby Lake asserts that there was
14 no Exhibit A and based thereon denies each and every allegation.

15 8. Answering paragraph 8 of Plaintiff's Complaint, Ruby Lake asserts that there was
16 no Exhibit B and based thereon denies each and every allegation.

17 9. Answering paragraph 9 of Plaintiff's Complaint, Ruby Lake denies each and every
18 allegation contained in paragraph 9.

19 10. Answering paragraph 10 of Plaintiff's Complaint, Ruby Lake asserts the Declaration
20 of Reservations, Conditions and Restrictions speaks for itself and Ruby Lake denies any contrary
21 allegations.

22 11. Answering paragraph 11 of Plaintiff's Complaint, Ruby Lake asserts the the
23 Declaration of Reservations, Conditions and Restrictions speaks for itself and Ruby Lake denies any
24 contrary allegations.

25 12. Answering paragraph 12 of Plaintiff's Complaint, Ruby Lake denies each and every
26 allegation contained in paragraph 12.

27 13. Answering paragraph 13 of Plaintiff's Complaint, Ruby Lake denies each and every
28 allegation contained in paragraph 13.

1 14. Answering paragraph 14 of Plaintiff's Complaint, Ruby Lake denies each and every
2 allegation contained in paragraph 14. Ruby Lake admits that in accordance with Nevada law and
3 the governing documents of Ruby Lake, assessments were properly made and collected to pay for
4 the common expenses of the common-interest community.

5 15. Answering paragraph 15 of Plaintiff's Complaint, Ruby Lake denies the allegations
6 regarding action by the Architectural Review Committee. Ruby Lake admits Beth Essington had
7 communications. Ruby Lake denies each and every remaining allegation contained in paragraph 15.

8 16. Answering paragraph 16 of Plaintiff's Complaint, Ruby Lake asserts there was no
9 Exhibit C and based thereon denies each and every allegation contained in paragraph 16.

10 17. Answering paragraph 17 of Plaintiff's Complaint, Ruby Lake denies each and every
11 allegation contained in paragraph 17.

12 18. Answering paragraph 18 of Plaintiff's Complaint, Ruby Lake asserts Artemis
13 Exploration Company wrongfully refused to pay lawful assessments. Ruby Lake denies each and
14 every remaining allegation contained in paragraph 18.

15 19. Answering paragraph 19 of Plaintiff's Complaint, Ruby Lake asserts there was no
16 Exhibit D and based thereon denies each and every allegation contained in paragraph 19.

17 20. Answering paragraph 20 of Plaintiff's Complaint, Ruby Lake asserts there is no
18 Exhibit E and based thereon denies each and every allegation contained in paragraph 20.

19 21. Answering paragraph 21 of Plaintiff's Complaint, Ruby Lake asserts there was no
20 Exhibit E in paragraph 20 and referenced again in paragraph 21, and based thereon denies each and
21 every allegation contained in paragraph 21.

22 **FIRST CLAIM FOR RELIEF**

23 **(Declaratory Judgment)**

24 22. Answering paragraph 22 of Plaintiff's Complaint, Ruby Lake incorporates by
25 reference each and every answer contained in paragraphs 1 through 21 stated above.

26 23. Answering paragraph 23 of Plaintiff's Complaint, Ruby Lake is without knowledge
27 or information sufficient to form a belief as to the truth of the allegations contained in paragraph 23,
28 and based thereon denies the same.

1 24. Answering paragraph 24 of Plaintiff's Complaint, Ruby Lake asserts that the statute
2 speaks for itself.

3 25. Answering paragraph 25 of Plaintiff's Complaint, Ruby Lake denies each and every
4 allegation contained in paragraph 25.

5 26. Answering paragraph 26 of Plaintiff's Complaint, Ruby Lake denies each and every
6 allegation contained in paragraph 26.

7 27. Answering paragraph 27 of Plaintiff's Complaint, Ruby Lake is without knowledge
8 or information sufficient to form a belief as to the truth of the allegations contained in paragraph 27,
9 and based thereon denies the same.

10 **SECOND CLAIM FOR RELIEF**

11 **(Damages)**

12 28. Answering paragraph 28 of Plaintiff's Complaint, Ruby Lake incorporates by
13 reference each and every answer contained in paragraphs 1 through 27 stated above.

14 29. Answering paragraph 29 of Plaintiff's Complaint, Ruby Lake denies each and every
15 allegation contained in paragraph 29.

16 30. Answering paragraph 30 of Plaintiff's Complaint, Ruby Lake denies each and every
17 allegation contained in paragraph 30.

18 31. Answering paragraph 31 of Plaintiff's Complaint, Ruby Lake denies each and every
19 allegation contained in paragraph 31.

20 **THIRD CLAIM FOR RELIEF**

21 **(Fraud)**

22 32. Answering paragraph 32 of Plaintiff's Complaint, Ruby Lake incorporates by
23 reference each and every answer contained in paragraphs 1 through 31 stated above.

24 33. Answering paragraph 33 of Plaintiff's Complaint, Ruby Lake is without knowledge
25 or information sufficient to form a belief as to the truth of the allegations contained in paragraph 33,
26 and based thereon denies the same.

27 34. Answering paragraph 34 of Plaintiff's Complaint, Ruby Lake is without knowledge
28 or information sufficient to form a belief as to the truth of the allegations contained in paragraph 34,

1 and based thereon denies the same.

2 35. Answering paragraph 35 of Plaintiff's Complaint, Ruby Lake denies each and every
3 allegation contained in paragraph 35.

4 36. Answering paragraph 36 of Plaintiff's Complaint, Ruby Lake denies each and every
5 allegation contained in paragraph 36.

6 37. Answering paragraph 37 of Plaintiff's Complaint, Ruby Lake denies each and every
7 allegation contained in paragraph 37.

8 38. Answering paragraph 38 of Plaintiff's Complaint, Ruby Lake denies each and every
9 allegation contained in paragraph 38.

10 39. Answering paragraph 39 of Plaintiff's Complaint, Ruby Lake denies each and every
11 allegation contained in paragraph 39.

12 40. Answering paragraph 40 of Plaintiff's Complaint, Ruby Lake denies each and every
13 allegation contained in paragraph 40.

14 41. Answering paragraph 41 of Plaintiff's Complaint, Ruby Lake denies each and every
15 allegation contained in paragraph 41.

16 42. Answering paragraph 42 of Plaintiff's Complaint, Ruby Lake denies each and every
17 allegation contained in paragraph 42.

18 43. Answering paragraph 43 of Plaintiff's Complaint, Ruby Lake denies each and every
19 allegation contained in paragraph 43.

20 44. Answering paragraph 44 of Plaintiff's Complaint, Ruby Lake is without knowledge
21 or information sufficient to form a belief as to the truth of the allegations contained in paragraph 44,
22 and based thereon denies the same.

23 AS FOR SEPARATE AND AFFIRMATIVE DEFENSES, RUBY LAKE ALLEGES AND
24 AVERS AS FOLLOWS:

25 **FIRST AFFIRMATIVE DEFENSE**

26 Plaintiff's Complaint fails to state a claim upon which relief may be validly granted against
27 Ruby Lake.

28 ///

1 **SECOND AFFIRMATIVE DEFENSE**

2 At all times herein mentioned, Ruby Lake performed its duties in good faith and in a manner
3 in which any ordinarily prudent homeowners association would use.

4 **THIRD AFFIRMATIVE DEFENSE**

5 Plaintiff is estopped from asserting any claims against Ruby Lake.\

6 **FOURTH AFFIRMATIVE DEFENSE**

7 Ruby Lake acted in good faith.

8 **FIFTH AFFIRMATIVE DEFENSE**

9 Plaintiff's claims are barred by the doctrine of collateral estoppel.

10 **SIXTH AFFIRMATIVE DEFENSE**

11 Plaintiff's claims are barred by its own bad faith and unlawful conduct.

12 **SEVENTH AFFIRMATIVE DEFENSE**

13 Ruby Lake acted in accordance with statutory authority and is privileged and protected by
14 applicable Nevada law, the governing documents of Ruby Lake and Chapter 116 of the Nevada
15 Revised Statutes.

16 **EIGHTH AFFIRMATIVE DEFENSE**

17 Ruby Lake has been required to retain Kern & Associates, Ltd. to represent it in this matter
18 and is entitled to attorney's fees and costs.

19 **NINTH AFFIRMATIVE DEFENSE**

20 Plaintiff failed to arbitrate all of the issues raised in its complaint and such issues are
21 therefore barred pursuant to the provisions of NRS 38.300 to 38.260, inclusive.

22 **TENTH AFFIRMATIVE DEFENSE**

23 Plaintiff's Complaint must be summarily dismissed for failure to comply with
24 NRS 38.330(5).

25 **ELEVENTH AFFIRMATIVE DEFENSE**

26 Plaintiff's Complaint is barred by the applicable statute of limitations.

27 **TWELFTH AFFIRMATIVE DEFENSE**

28 Pursuant to the provisions of Rule 11 of the Nevada Rules of Civil Procedure, at the time

1 of the filing of Ruby Lake's answer, all possible affirmative defenses may not have been alleged
2 inasmuch as insufficient facts and other relevant information is unknown at this time. Ruby Lake
3 reserves the right to amend this answer to allege additional affirmative defenses if subsequent
4 investigation warrants the same.

5 **WHEREFORE**, Ruby Lake prays as follows

- 6 1. That Plaintiff takes nothing by reason of its Complaint;
- 7 2. That the Complaint be dismissed;
- 8 3. That judgment be entered in favor of Ruby Lake and against Plaintiff for a
9 reasonable attorneys' fee, for costs of suit; and
- 10 4. For such other and further relief as may be just and proper in the premises.

11 **COUNTERCLAIM**

12 As and for a counterclaim against Artemis Exploration Company ("Artemis"), Ruby Lake,
13 alleges as follows:

14 **GENERAL ALLEGATIONS**

- 15 1. Ruby Lake is organized as a non-profit corporation and operating as a common-
16 interest community association and existing by virtue of the laws of the State of Nevada.
- 17 2. Artemis is a Nevada corporation ("Artemis" or "Claimant"), whose President,
18 Secretary, Treasurer and sole director is Elizabeth E. Essington.
- 19 3. Mrs. Essington's husband is George "Mel" Essington.
- 20 4. For over sixteen years (1994-2010), Mr. and Mrs. Essington implicitly and expressly
21 represented that Mr. Essington had the capacity and authority to act on behalf of Artemis.
- 22 5. There are recorded certain Reservations, Conditions and Restrictions for Ruby Lake
23 Estates ("CC&Rs"). The CC&Rs were recorded on October 25, 1989, in the Office of the Elko
24 County Recorder in Book 703, Page 287.
- 25 6. Artemis acquired Lot 6 of Block G of Ruby Lake Estates on June 21, 1994, and Lot
26 2, Block H of Ruby Lake Estates on March 9, 2010, and that both Lot 6 and Lot 2 ("Lots") are
27 subject to the terms, conditions and restrictions set forth in the CC&Rs.
- 28 7. Articles of Incorporation for RLEHOA were filed with the Nevada Secretary of

1 State on January 16, 2006.

2 8. Prior to the filing of the Articles of Incorporation, the ARC served as the governing
3 body of the Association.

4 9. Newsletters and written communications were regularly sent to the members of the
5 Association, including Mr. and Mrs. Essington, and meetings were held by the Board of Directors.

6 10. Assessments were levied in order to pay for the maintenance of the community
7 roads and other common elements.

8 11. Mr. and Mrs. Essington, representing they were the owners of Lot 6 of Block G
9 individually, regularly paid the assessments, as levied by the ARC and Board of Directors from time
10 to time.

11 12. An overview of the history and establishment of the Association was provided to
12 its members in a letter from Lee Perks, President of RLEHOA, on June 28, 2010 ("June 28, 2010
13 Letter").

14 13. The June 28, 2010 Letter makes clear that Elizabeth and Mel Essington were the
15 owners who demanded in 2005 that an Association be formed and an Association Board elected.

16 14. In 2005, Mel Essington prepared Articles of Incorporation for filing with the
17 Nevada Secretary of State listing himself and Elizabeth Essington as the incorporators and officers
18 of the Association.

19 15. The Articles of Incorporation were filed by Lee Perks on January 16, 2006, and the
20 Association adopted its By-Laws on August 12, 2006.

21 16. Mel Essington seconded the adoption of the Bylaws and was an active participant
22 in the business affairs of the Association.

23 17. Both prior to the filing of the Articles, as well as for more than five years thereafter,
24 Mel Essington served on the Board of Directors.

25 18. Mel Essington represented his authority to act and all members of the Association
26 relied on such representation.

27 19. Artemis is fully bound by his representations and actions. During his tenure on the
28 Board as Artemis' representative, Mr. Essington wrote letters to the members of RLEHOA urging

1 them to "revitalize the Ruby Lakes Estates property owners association", as well as confirming the
2 existence of the HOA, the applicability of NRS Chapter 116, and the ability and responsibility of the
3 RLEHOA to levy and collect assessments. See RLE 021A-021D; RLE 0044- 048; RLE 053; RLE
4 077-080; RLE 083.

5 20. Both before and during his tenure on the Board of Directors, Mel Essington was
6 aware of the various common elements of the Association, including the roads, signs and perimeter
7 fencing, which the Association was, *and is*, required to maintain.

8 21. In his August 22, 2005 letter to all owners of lots within Ruby Lake, Mr. Essington
9 states in part:

10 Each of us purchased lots in the subdivision with the knowledge,
11 understanding, and acceptance of the Covenants, Conditions, and Restriction's
12 (CCR's) [sic] that attended our property deeds. The CCR's [sic] were designed to
13 work for the good of the owners, assure the aesthetic qualities of the subdivision,
14 protect the value of our investments, and the beauty of Ruby Valley. The association
15 also has the capability of providing services for the subdivision that might otherwise
16 elude the individual owners. Those services include: assisting in acquiring
telephone service, periodic road maintenance, coordinating with County officials on
planning issues, . . . and getting regular snow removal on the CCC road, organizing
an annual meeting and BBQ, and publishing an annual news letter. The
effectiveness of the CCR's [sic] and the association is the responsibility of the
owners as expressed through the association; . . .

17 Mr. Leroy Perks and others recognized and accepted the responsibility past
18 [sic] on by Mr. Wright several years ago when they organized the association and
19 worked towards achieving progress toward its stated goals. . . I am proposing to
organize an election of association officers that will be motivated and dedicated to
making and keeping the association the effective representational and oversight
organization it was intended to be. . . ."

20 22. An election was thereafter held and directors of the Association were elected by the
21 members.

22 23. Mr. Essington, on behalf of Artemis, continued to acknowledge the existence of the
23 Association, the applicability of NRS Chapter 116, and the ability of the Association to levy and
24 collect assessments for maintenance of the common elements. In a letter addressed to "Mr. Lee
25 Perks, President, Ruby Lake Homeowners Association," dated January 14, 2007, Mr. Essington
26 wrote:

27 . . . As head of the homeowners association you need to work to protect the value of
28 the investments of all of the individual owners and be able to look beyond your own
more restricted outlook. . . . I assume you are aware Nevada has found it necessary

1 to create a commission to oversee the operation of the many HOA's [sic] in the
2 state. I would also assume you are aware that NRS 116, Section 10, 8(f) now
3 requires that the HOA records including financial records be located within sixty
miles of the physical location of the community for inspection purposes. I presume
that Mr. Wines will fulfill that function for the Association.

4 24. In an e-mail communication dated September 12, 2008, Artemis again
5 acknowledges the need for assessments as well as the applicability of NAC 116 [sic]:

6 Again NAC 116 [sic] stresses the obligation for uniformly enforcing the provisions
7 of the governing documents of the Association. We're way behind on compliance
8 in this area and need to discuss how we are going to achieve compliance. The
document states the board needs to formerly [sic] establish the Association's fiscal
year on page 35. This is mere housekeeping but needs to be done.

9 25. Mr. Essington then followed up with an e-mail communication to his fellow board
10 members covering a letter, which he wrote. Mr. Essington wanted his letter sent to all members of
11 RLEHOA. In this letter, Mr. Essington again acknowledges the Association and the applicability
12 of NRS Chapter 116, as well as the common elements of the Association, and the Association's duty
13 and responsibility to maintain the same. Finally, Mr. Essington clearly acknowledges the
14 Association's right and obligation to levy and collect assessments:

15 The Ruby Lakes Estates is a common-interest ownership community as defined by
16 State statute. The Community has been established by proper recording of the
CCR's [sic] with the county and the Homeowners Association (HOA) through filing
17 with the Secretary of State. Within the State of Nevada the community and the
HOA are governed primarily by Chapter 116 of the Nevada Revised Statutes. The
18 statutes, among many other things, establish guidelines, regulations, and
requirements for the operation and management of the HOA. They also establish
both the rights and obligations of the individual owners. . . .

19
20 Under section 3107 [NRS 116.3107] of the statutes, 'the association is responsible
for maintenance, repair and replacement of the common elements, and each unit's
21 owner is responsible for maintenance, repair and replacement of his unit'. The
common elements in the Ruby Lakes Estates include two small land parcels and
22 several access roads. The two land parcels are comprised of the lot on the north end
of Kiln road and the parcel containing the well, pump, and water truck fill point on
the CCC road near its intersection with the Overland road.

23
24 Under the statutes both the HOA and each individual unit owner share responsibility
and liability for the common elements. It is the expressed responsibility of the HOA
25 executive board to insure sufficient maintenance of the common elements in this
instance the community roads. Our roads are open to the public and carry
26 responsibility and liability. Accepted surface road maintenance standards include
shoulder and drainage features as well as the road surface. Because community
27 roads have not received any maintenance for 8 years the shoulders have become
weed and brush infested, and some sections lack adequate drainage. Obviously, it
is past time to reestablish minimal road maintenance requirements. The HOA's
28 budget does not currently permit meeting a contractor's fee to perform such

1 maintenance. Hence, a temporary annual fee increase is necessary to raise those
2 funds. It is anticipated that once the maintenance work is completed the fees may
be reduced to their former level.

3 26. Mrs. Essington thereafter paid the increased assessment as levied by the Board
4 members, including Mr. Essington ratifying the authority of Mr. Essington as representative of
5 Artemis.

6 27. On June 20, 2010, Mr. Essington wrote a letter to his fellow homeowners in which
7 he again acknowledged the existence and powers of the RLEHOA, including the power to levy
8 assessments:

9 ... Membership in an HOA conveys considerable latitude, discretion, and authority
10 over your deed and individual property rights to its officers and board. That level
11 of authority has a similar affect within the HOA as law in society. Indeed elected
12 HOA officials are considered under State Statute to be the same as elected State
13 officials. The HOA officers and Board can at their sole discretion establish and set
annual dues, fees, fines, rules including their enforcement, enter into financial
obligations, and made errors in judgment subject to financial penalties that affect all
of the landowners equally. ...

14 28. Mr. Essington was active in the Association from the time Lot 6 of Block G was
15 purchased by Artemis in 1994 and served on the RLEHOA Board of Directors from August of 2007,
16 when he was initially elected until 2011.

17 29. During the time that Mr. Essington was on the Board, he was also a member of the
18 ARC.

19 30. On behalf of Artemis, Mr. Essington regularly voiced his opinions regarding the
20 enforcement and interpretation of the CC&Rs; he voted to approve the Reserve Study and regularly
21 voted to approve all budgets, levy assessments, and increase assessments from time to time.

22 31. In 2009 a dispute arose between the Essingtons and the ARC regarding the
23 construction within the Ruby Lake Estates subdivision of a large building used to house machinery
24 and other equipment.

25 32. The ARC and Board took the position that such a structure was permitted and the
26 Essingtons disputed this position.

27 33. In response to the approval of the large building, Mr. and Mrs. Essington then began
28 to assert that the RLEHOA was not validly formed and had no authority to levy or collect

1 assessments.

2 34. Artemis ceased paying its assessments, all of which had been approved by Mr.
3 Essington as a Board member.

4 35. Invoices generated in the ordinary course of business for the Association were sent
5 to the Essingtons.

6 36. On or about December 18, 2009, Mrs. Essington filed an Intervention Affidavit with
7 the Office of the Ombudsman, Department of Business and Industry, Real Estate Division, seeking
8 a determination that RLEHOA was an invalid community association.

9 37. On July 1, 2010, the Ombudsman's Office completed its review and issued its
10 opinion, finding "that this Association is required to comply with the laws pertaining to homeowners
11 associations, specifically, NRS 116 and related laws and regulations."

12 38. Artemis continued to fail to pay its assessments and the Board of Directors took
13 appropriate action to collect the delinquent assessments.

14 39. In April of 2010, for the first time, Artemis asserted that Mr. Essington was not an
15 officer, director, shareholder, or other authorized representative of Artemis.

16 40. The position taken in April of 2010 was directly contrary to the position taken by
17 Artemis for nearly a decade.

18 41. Artemis was asked to pay its delinquent assessments and Mr. Essington was asked
19 to provide proof that he was an officer, director or other authorized representative of Artemis.

20 42. Mr. Essington subsequently resigned from the Board of Directors per letter dated
21 January 6, 2011.

22 **FIRST CLAIM FOR RELIEF**
23 **(Breach of Contract and Breach of Statutory Duties)**

24 43. Ruby Lake incorporates paragraphs 1 through 42 as if set forth in full herein.

25 44. Artemis wrongfully and in violation of Chapter 116 and the governing documents
26 of Ruby Lake caused Ruby Lake to incur expenses that it would not have incurred but for Artemis'
27 wrongful and unlawful conduct.

28 45. Artemis incurred damages in excess of \$10,000.00.

1 46. Ruby Lake was required to retain Kern & Associates, Ltd. and is entitled to
2 attorney's fees and costs in accordance with NRS 18.010, the governing documents of the Ruby
3 Lake, Chapters 116 and 38 of the Nevada Revised Statutes.

4 **SECOND CLAIM FOR RELIEF**
5 **(Negligence)**

6 47. Ruby Lake incorporates paragraphs 1 through 46 as if set forth in full herein.

7 48. Artemis owed a duty to exercise due care in its actions in connection with Ruby
8 Lake.

9 49. Artemis was negligent in its actions with Ruby Lake.

10 50. As a proximate cause of Artemis' negligence, Ruby Lake incurred damages in
11 excess of \$10,000.00.

12 51. Ruby Lake was required to retain Kern & Associates, Ltd. and is entitled to
13 attorney's fees and costs in accordance with NRS 18.010, the governing documents of the Ruby
14 Lake, Chapters 116 and 38 of the Nevada Revised Statutes.

15 **THIRD CLAIM FOR RELIEF**
16 **(Violations)**

17 52. Ruby Lake incorporates paragraphs 1 through 51 as if set forth in full herein.

18 53. Artemis' actions were, and continue to be, violations of the governing documents.

19 54. Artemis should pay all damages sustained.

20 55. Ruby Lake was required to retain Kern & Associates, Ltd. and is entitled to
21 attorney's fees and costs in accordance with NRS 18.010, the governing documents of Ruby Lake,
22 Chapters 116 and 38 of the Nevada Revised Statutes.

23 **FOURTH CLAIM FOR RELIEF**
24 **(Confirmation of Award of Attorneys Fees and Costs)**

25 56. Ruby Lake incorporates by reference the allegations of paragraphs 1 through 55 as
26 though fully set forth herein.

27 57. An Award was entered in favor of Ruby Lake on the substantive portion of the
28 arbitration proceeding NRED Claim 11-82, a copy of which is attached as Exhibit "1".

 58. An Award for attorney's fees in the amount of \$22,092.00 and costs in the amount

1 of \$4,718.67 was in favor of Ruby Lake in the non-binding arbitration proceeding NRED Claim 11-
2 82, a copy of which is attached as Exhibit "1".

3 59. The Award entered should be confirmed and adopted.

4 **FIFTH CLAIM FOR RELIEF**
5 **(Damages - Attorneys Fees)**

6 60. Ruby Lake incorporates paragraphs 1 through 59 as if set forth in full herein.

7 61. Counter-Defendant's actions resulted in Ruby Lake incurring attorney's fees as
8 damages.

9 62. Pursuant to NRS 38.330(7), Ruby Lake should be awarded all attorney's fees and
10 costs incurred in the defense and prosecution of this action as well as all of those attorney's fees and
11 costs incurred in the arbitration proceeding NRED Claim 11-82.

12 63. Artemis should pay all damages sustained.

13 64. Ruby Lake was required to retain Kern & Associates, Ltd., and is entitled to
14 attorney's fees and costs in accordance with *Sandy Valley Associates v. Sky Ranch Estates Owners*
15 *Association*, 117 Nev. Adv. Rep. 78, 35 P.3d 964 (2001); NRS 18.010, the Governing Documents of
16 Ruby Lake, Chapters 116 and 38 of the Nevada Revised Statutes.

17 65. All attorney's fees and costs were and will be incurred as a direct and proximate
18 result of the Counter-Defendant's violations of the Governing Documents of Ruby Lake.

19 **SIXTH CLAIM FOR RELIEF**
(Declaratory Relief - Chapter 30 of the Nevada Revised Statutes)

20 66. Ruby Lake incorporates by reference the allegation of paragraphs 1 through 65 of
21 its Counterclaim as though fully set forth herein.

22 67. A real controversy exists between the parties hereto concerning whether it is a
23 lawfully formed and validly existing non-profit common interest community association in good
24 standing, organized for the purposes of administering and enforcing the CC&Rs and exercising all
25 powers of a community association granted under the provisions of Nevada law, including Chapters
26 81 and 116 of the Nevada Revised Statutes. An order should be entered resolving this controversy
27 in favor of Ruby Lake.

28 ///

SEVENTH CLAIM FOR RELIEF
(Preliminary and Permanent Injunction)

68. Ruby Lake incorporates by reference the allegation of paragraphs 1 through 67 of its Counterclaim as though fully set forth herein.

69. Counter-Defendant's behavior in the past shows that it will continue to interfere with business of Ruby Lake.

70. Counter-Defendant's behavior poses a serious, substantial and irreparable harm to the lawful actions of Ruby Lake.

71. Ruby Lake has no adequate remedy at law or otherwise for the harm or damage done and threatened to be done.

72. The only remedy that will allow Ruby Lake to maintain peace and quiet and comply with the statutory and recorded obligations of a common-interest community is a restraining order from this Court.

73. Ruby Lake will suffer irreparable harm unless Counter-Defendant is ordered by this Court to refrain from interfering with the enjoyment, comfort, rights or convenience of Ruby Lake and its members.

74. On a final hearing, a permanent injunction enjoining and ordering the Counter-Defendants to refrain from interfering with the enjoyment, comfort, rights or convenience of Ruby Lake and its members.

75. On a final hearing, a permanent injunction enjoining and ordering the Counter-Defendants to refrain from taking any action to interfere with Ruby Lake and its lawful requirements under the law as a common-interest community.

WHEREFORE, Ruby Lake prays for judgment against Artemis Exploration Company, as follows;

1. That Ruby Lake recover special and general damages in an amount in excess of \$10,000.00;

2. That Ruby Lake is a lawfully formed and validly existing non-profit common-interest community association in good standing, organized for the purposes of administering and enforcing

1 the CC&Rs and exercising all powers of a community association granted under the provisions of
2 Nevada law, including Chapters 81 and 116 of the Nevada Revised Statutes;

3 3. For a permanent injunction enjoining and ordering the Counter-Defendants to refrain
4 from interfering with the enjoyment, comfort, rights or convenience of Ruby Lake and its members;

5 4. For a permanent injunction enjoining and ordering the Counter-Defendants to refrain
6 from from taking any action to interfere with Ruby Lake and its lawful requirements under the law
7 as a common-interest community;

8 5. For a judgment confirming the Awards entered by the Arbitrator in the arbitration
9 proceeding NRED Claim 11-82 in favor of Ruby Lake;

10 6. That Ruby Lake be awarded its costs;

11 7. That Ruby Lake be awarded its attorney's fees;

12 8. Such other and further relief as the Court deems just and proper in the premises.

13 **AFFIRMATION**

14 **Pursuant to NRS 239B.030**

15 The undersigned does hereby affirm that the preceding document filed in the above-entitled
16 case does not contain the social security number of any person.

17 DATED this 29th day of March, 2012.

18 KERN & ASSOCIATES, LTD.

19 

20 GAYLE A. KERN, ESQ.
21 NEVADA BAR #1620
22 5421 Kietzke Lane, Suite 200
23 RENO, NEVADA 89511
24 Telephone: 775-324-5930
25 Fax: 775-324-6173
26 Email: gaylekern@kernltd.com
27 Attorneys for Ruby Lake Estates
28

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law firm of Kern & Associates, Ltd., and that on this day I served the foregoing document described as follows:

ANSWER TO COMPLAINT AND COUNTERCLAIM

on the parties set forth below, at the addresses listed below by:

X Placing an original or true copy thereof in a sealed envelope place for collection and mailing in the United States Mail, at Reno, Nevada, first class mail, postage paid, following ordinary business practices, addressed to:

 Via facsimile transmission

 Personal delivery, upon:

 United Parcel Service, Next Day Air, addressed to:

Travis Gerber, Esq.
Gerber Law Offices, LLP
491 4th Street
Elko, NV 89801

DATED this 21st day of March, 2012.


TERESA A. GEARHART

EXHIBIT "1"

EXHIBIT "1"

LEONARD I. GANG
ATTORNEY AT LAW
ARTIBRATION * MEDIATION

P.O. Box 4394
Incline Village, Nevada 89450
Tel: (702) 525-2742
Fax: (775) 593-2765
Email: leonardgang@gmail.com

RECEIVED

FEB - 9 2012

GAYLE A. KERN, LTD

February 7, 2012

Travis W. Gerber, Esq.
491 Fourth Street
Elko, NV 89801

Gayle A. Kern, Esq.
5421 Kietzke Lane, #200
Reno, NV 89511

Re: Artemis Exploration Company v. Ruby Lake Estates Architectural Review
Committee & Ruby Lake Estates Homeowner's Association & Leroy Perks &
Valerie McIntyre & Dennis McIntyre & Michael Cecchi
ADR Control No. 11-82

The salient facts in this case are not in dispute. The legal effect of certain provisions of the Uniform Common-Interest Ownership Act (Chapter 116 of NRS) as applied to lots located in Ruby Lakes Estates, a subdivision located in Elko County, forms the essence of this complaint. Only the facts necessary to understanding this decision will be set forth.

FACTS

Artemis Exploration Company, the Complainant (hereinafter Artemis), owns two lots in Ruby Lakes Estates. The first was purchased in June 1994 and the second in March 2010. CC&Rs applicable to Ruby Lake Estates were recorded on October 25, 1989. The deeds clearly reflect that the property is subject to CC&Rs.

NRS 116.3101(1) entitled, "Organization of Unit-Owners Association" provides in part as follows:

"1. A unit-owners association must be organized no later than the date the first unit in the common-interest community is conveyed."

This act was passed by the Nevada legislature in 1991. The Ruby Lakes Homeowner's Association (hereinafter RLHOA or Association) filed its Articles of Incorporation on January 18, 2006. This action was taken after consulting counsel. The RLHOA assessed dues. Artemis paid dues for a period of time but now claims that the Association lacks the authority to "impose any fee, penalty, or assessment for any reason." It basis its argument on the fact that the Association was not formed prior to the conveyance of the first lot as required in NRS 116.3101(1) quoted above..

Artemis filed an "Intervention Affidavit" with the Real Estate Division on December 18, 2009, claiming that Ruby Lakes Estates Homeowner's Association was an invalid homeowner's association. After reviewing the complaint, the Ombudsman's Office of the Real Estate Division opined as follows:

***For these reasons, we are not, as you requested, going to declare that Ruby Lakes Estates Homeowner's Association is invalid. In other words, it is our view that the Association is required to comply with the laws pertaining to homeowner's associations, specifically NRS 116 and related laws and regulations." Emphasis added.

RLHOA filed Articles of Association Cooperative Association with the Secretary of State approximately October 27, 2005. Acting on advice of counsel, RLHOA filed its initial Association Registration Form with the Real Estate Division approximately March 31, 2006. It adopted By Laws on August 12, 2006.

DISCUSSION

Artemis interprets the Ombudsman's Office decision as, "The Ombudsman took no action," in regard to their Intervention Affidavit. It asserts a myriad of reasons why, in its opinion, the RLHOA is not valid. RLHOA continues to comply with the laws and regulations pertaining to homeowner's associations as the Real Estate Ombudsman's office opined it should, including assessing dues to pay for insurance, having a reserve study conducted, leveeing assessments in accordance with the requirements of the reserve study and, in the case of Artemis, referring it to a collection agency due to its refusal to pay its assessments.

Artemis appears to argue that since the RLHOA was not formed until after the first lot was sold, it could never thereafter be brought into compliance with the law. It takes the position even though the law, requiring it to be formed no later than the date the first lot was sold, was not passed until two years after the first lot in the Association was sold.

DECISION

It is difficult to understand why, faced with the overwhelming evidence that RLHOA is a valid HOA, any one would continue to maintain that it is not. The HOA owns property within the subdivision, it maintains roads, signs, gates, culverts and fencing. It is incorporated as required by law. Indeed, Mr. Essington was at one time on the board of directors of RLHOA and was a moving force in its formation and incorporation. He signed and filed a "Declaration of Certification Common -Interest Community Board Member" with the Real Estate Division certifying that he read and understood the governing documents of the Association and the provisions of Chapter 116 of Nevada Revised Statutes and the Administrative Code. His wife, Elizebeth Essington, apparently owns all of the stock in Artemis.

Artemis has filed a complaint against each of the members of the board alleging misrepresentation, fraud and oppression and seeks punitive damages. I have carefully considered all of the many allegations and arguments of the Claimant and find them unpersuasive. Indeed, I find the interpretation of counsel that the Real Estate Ombudsman took no action when it opined that RLHOA had to comply with the laws of Nevada pertaining to homeowner's associations

illogical. The Ombudsman clearly opined that the HOA was subject to the laws of Nevada that applied to HOA's. The Ombudsman took no action on the complaint of Artemis because the HOA was validly formed and obliged to comply with the law relating to HOA's.

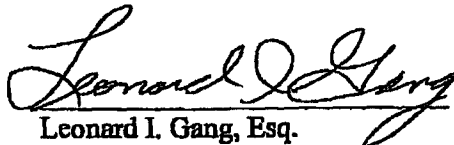
ORDER

1. Ruby Lake Estates is a Common -Interest Community and is subject to NRS Chapter 116. It was lawfully formed and is a validly existing non-profit common interest association.
2. The complaint against the individual board members is dismissed since no evidence was presented that they acted with willful or wanton misfeasance or gross negligence or were guilty of intentional misrepresentation or negligence.
3. Claimant is not entitled to punitive damages as a matter of law and no evidence was presented that would warrant such an award.
4. Respondent is entitled to an award of attorney's fees in the amount of \$22,092.00 and costs in the amount of \$4,718.67. I make this award taking into consideration the Brunzell factors. These factors were clearly articulated in the affidavit of Mrs. Kerns in support of her request for attorney's fees and costs and I find them to be accurate based upon my personal observations of Mrs. Kern's performance as an attorney representing homeowner's associations in these types of matters.

IT IS SO ORDERED.

Dated this 7th day of February, 2012.

ARBITRATOR,


Leonard I. Gang, Esq.

LIG:rg

CERTIFICATE OF MAILING

I hereby certify that on the 8th day of February, 2012 I mailed a copy of the foregoing DECISION AND AWARD in a sealed envelope to the following counsel of record and the Office of the Ombudsman, Nevada Real Estate Division and that postage was fully prepaid thereon.

Travis W. Gerber, Esq.
491 Fourth Street
Elko, NV 89801

Gayle Kern, Esq.
5421 Kietzke Lane, Ste. 200
Reno NV 89511


ROBERTA GANG



FILED

2013 FEB 12 PM 3:23

4TH DISTRICT COURT

CLERK DEPUTY 

1 Case No. CV-C-12-175

2 Dept. No. 2

3
4
5
6 IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
7 OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO
8

9 ARTEMIS EXPLORATION COMPANY,
10 a Nevada Corporation,

11 Plaintiff,

12 v.

13 RUBY LAKE ESTATES HOMEOWNER'S
ASSOCIATION AND DOES I-X,

14 Defendants.
15 _____/

**ORDER DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

16 This is a dispute between a property owner and its homeowners association.

17 On April 20, 2012, Plaintiff/Counterdefendant Artemis Exploration Company (hereinafter
18 "Artemis") filed a Motion for Summary Judgment (hereinafter "MSJ") against
19 Defendant/Counterclaimant Ruby Lake Estates Homeowner's Association (hereinafter "the HOA"). The
20 HOA opposed the MSJ on May 30, 2012. Artemis filed its "Reply to Opposition to Plaintiff's Motion
21 for Summary Judgment" on June 15, 2012.

22 By its MSJ, Artemis seeks the entry of a judgment declaring the HOA invalid.

23 Having carefully considered the matter, the Court is denying the MSJ.

24 **1. Law of Summary Judgment**

25 "A party seeking to recover upon a claim . . . may, at any time after the expiration of 20 days
26 from the commencement of the action . . . move with or without supporting affidavits for a summary
27 judgment in the party's favor upon all or any part thereof." NRCP 56(a).

28 ///

1 NRCP 56(c) reads, in pertinent part:

2 Motions for summary judgment and responses thereto shall include a concise statement
3 setting forth each fact material to the disposition of the motion which the party claims is or
4 is not genuinely in issue, citing the particular portions of any pleading, affidavit, deposition,
5 interrogatory, answer, admission, or other evidence upon which the party relies. The
6 judgment sought shall be rendered forthwith if the pleadings, depositions, answers to
7 interrogatories, and admissions on file, together with the affidavits, if any, show that there
8 is no genuine issue as to any material fact and that the moving party is entitled to a judgment
9 as a matter of law. A summary judgment, interlocutory in character, may be rendered on the
10 issue of liability alone although there is a genuine issue as to the amount of damages. An
11 order granting summary judgment shall set forth the undisputed material facts and legal
12 determinations on which the court granted summary judgment.

8 NRCP 56(e) reads, in relevant part:

9 Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such
10 facts as would be admissible in evidence, and shall show affirmatively that the affiant is
11 competent to testify to the matters stated therein. Sworn or certified copies of all papers or
12 parts thereof referred to in an affidavit shall be attached thereto or served therewith. The
13 court may permit affidavits to be supplemented or opposed by depositions, answers to
14 interrogatories, or further affidavits. When a motion for summary judgment is made and
15 supported as provided in [NRCP 56], an adverse party may not rest upon the mere allegations
16 or denials of the adverse party's pleading, but the adverse party's response, by affidavits or
17 as otherwise provided in [NRCP 56], must set forth specific facts showing that there is a
18 genuine issue for trial. If the adverse party does not so respond, summary judgment, if
19 appropriate, shall be entered against the adverse party.

15 "Summary judgment is appropriate and 'shall be rendered forthwith' when the pleadings and
16 other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the
17 moving party is entitled to a judgment as a matter of law.'" Wood v. Safeway, Inc., 121 Nev. 724, 729
18 (2005) (citing NRCP 56(c); Tucker v. Action Equip. and Scaffold Co., 113 Nev. 1349, 1353 (1997)).
19 "[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn
20 from it, must be viewed in a light most favorable to the nonmoving party." Id. "The burden of proving
21 the absence of triable facts is upon the moving party." Butler v. Bogdanovich, 101 Nev. 449, 451
22 (1985).

23 "The substantive law controls which factual disputes are material and will preclude summary
24 judgment; other factual disputes are irrelevant." Wood, 121 Nev. at 731 (citing Anderson v. Liberty
25 Lobby, Inc., 477 U.S. 242, 248 (1986)). "A factual dispute is genuine when the evidence is such that a
26 rational trier of fact could return a verdict for the nonmoving party." Id. (citations omitted).

27 "While the pleadings and other proof must be construed in a light most favorable to the
28 nonmoving party, that party bears the burden to 'do more than simply show that there is some

1 metaphysical doubt' as to the operative facts in order to avoid summary judgment being entered in the
2 moving party's favor." Id. at 732. "The nonmoving party 'must, by affidavit or otherwise, set forth
3 specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered
4 against him.'" Id. (citing Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110 (1992)). The nonmoving
5 party "'is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture.'" Bulbman, 108 Nev. at 110 (quoting Collins v. Union Fed. Savings & Loan, 99 Nev. 284, 302 (1983)).

7 **2. Undisputed Material Facts**

8 The facts material to the disposition of the MSJ are in the following recitation of undisputed fact.
9 The Court has relied much on the HOA's pinpoint citations to the record.

10 Artemis is a Nevada corporation whose president, secretary, treasurer and sole director is
11 Elizabeth Essington (hereinafter "Mrs. Essington"). Mrs. Essington's husband is George "Mel"
12 Essington (hereinafter "Mr. Essington").

13 The official Plat Map for Ruby Lake Estates was recorded in Elko County on September 15,
14 1989, by Stephen and Mavis Wright (hereinafter "the Wrights") as File No. 281674. Included on the
15 Plat Map are residential lots within the community, as well as roadways, easements, building set-back
16 lines and street monuments.

17 With respect to the roadways, the first sheet of the Plat Map reads:

18 At a regularly held meeting of the Board of Commissioners of Elko County, State of Nevada,
19 held on the 5th day of July, 1989, this Plat was approved as a Final Plat pursuant to NRS
20 278.328. The Board does hereby reject on behalf of the public all streets or roadways for
maintenance purposes and does hereby accept all streets and easements therein offered for
utility, drainage and access purposes only as dedicated for public use.

21 The roads within Ruby Lake Estates have never been accepted for maintenance by Elko County.
22 Yet, Elko County requires the roadways and adjoining ditches and culverts to be maintained for health
23 and safety reasons.

24 On October 25, 1989, the Wrights recorded a Declaration of Reservations, Conditions and
25 Restrictions for Ruby Lake Estates (hereinafter "CC&Rs"). The CC&Rs were recorded in the Office of
26 the Elko County Recorder.

27 Article I of the CC&Rs provides:

28 The real property affected hereby is subjected to the imposition of the covenants, conditions,
restrictions and reservations specified herein to provide for the development and maintenance

1 of an aesthetically pleasing and harmonious community of residential dwellings for the
2 purpose of preserving a high quality of use and appearance and maintaining the value of each
and every lot and parcel of said property . . .”

3 Artemis acquired Lot 6 of Block G (hereinafter Lot G-6) of Ruby Lake Estates on June 21, 1994.

4 Artemis acquired Lot 2 of Block H (hereinafter Lot H-2) of Ruby Lake Estates on March 9, 2010.

5 Both Lot G-6 and Lot H-2 were created by the Plat Map and subject to the CC&Rs. Title to the
6 lots was taken subject to the CC&Rs.

7 The HOA Articles of Incorporation were filed by Lee Perks on January 16, 2006.

8 The Initial Association Registration Form was filed on March 31, 2006, with the Office of the
9 Ombudsman for Common-Interest Communities.

10 In filing the Articles of Incorporation and forming the HOA, the owners of Ruby Lake Estates
11 took action consistent with the opinion of its counsel.

12 For over seventeen years (1994-2011), Mr. and Mrs. Essington represented that Lot G-6 was
13 owned by one or both of them.

14 Mr. Essington represented to members of the Association that he had the capacity and authority
15 to act on behalf of Artemis and/or Mrs. Essington.

16 Mr. Essington served on the HOA's Board of Directors (hereinafter "the Board") from 2007 until
17 he resigned in January, 2011.

18 Following his election to the Board, Mr. Essington signed a Declaration of Certification as a
19 Common-Interest Community Board Member, as required by NRS 116.31034(9).

20 Representing himself to be a lot owner, Mr. Essington seconded a motion to approve its Bylaws.

21 The Bylaws specifically provide, "All officers must be property owners and members of the
22 Ruby Lake Homeowners Association in good standing their entire term of office."

23 Mr. Essington violated this provision when, for sixteen years, he held himself out as an owner of
24 a lot.

25 The Bylaws also read: "An assessment fee will be charged yearly for maintenance, roads, fire
26 protection, and other expenditures as the board allows or required by Elko County."

27 Maintenance of the roadways as well as ditches, culverts and other improvements has repeatedly
28 been recognized as the collective responsibility of the owners of the lots within the Ruby Lake Estates

1 subdivision, including Artemis.

2 Road maintenance by the HOA has been an ongoing topic of communications between members
3 and at HOA meetings in the years since the Wrights turned over maintenance in 1997.

4 After becoming a member of the Board, Mr. Essington voted to levy assessments against all
5 HOA members for roadway maintenance, weed abatement and the repair of signs and culverts.

6 The HOA holds title to real property which was deeded to it by the Wrights. The members of the
7 HOA, including Mr. Essington while serving on the Board and while representing himself to be an
8 owner of Lot G-6, voted to accept title to this real property, pay documentary transfer tax and procure
9 liability insurance in the name of the HOA.

10 On July 14, 2009, the Board caused a Reserve Study to be prepared as required by NRS
11 116.31153. The Reserve Study was prepared by an independent and licensed community association
12 consultant. The Reserve Study identified the reserve items of the Association as cattle guards, dirt road
13 maintenance, fencing, gates, entrance signs and street signs. Mr. Essington voted to approve the Reserve
14 Study at the August 8, 2009, meeting of the Board. Mr. Essington voted to levy assessments in
15 accordance with the Reserve Study and the 2010 budget, which he also approved.

16 Since the HOA's formation, assessments have been levied and budgets were adopted by
17 members to pay for road and real property maintenance, as well as fire protection. Mr. Essington
18 approved these budgets and assessments. Mr. and Mrs. Essington regularly paid assessments from their
19 personal bank account.

20 In 2009, a dispute arose between Mrs. Essington and the Ruby Lakes Estates Architectural
21 Review Committee (ARC) regarding the construction of a large building to house machinery and other
22 equipment at the subdivision. The ARC and the Board took the position that the structure was permitted
23 under the CC&Rs.

24 Artemis stopped paying its HOA assessments, all of which had been approved by Mr. Essington
25 as a Board member. Invoices generated in the ordinary course of business were sent to Artemis care of
26 Mr. and Mrs. Essington. Eventually, the HOA hired a collection agency to try and collect the delinquent
27 assessments. It is the sending of these invoices and notice of the HOA's intent to record a Notice of
28 Delinquent Assessment Lien.

1 **3. Analysis**

2 The Court has spent hour upon hour studying the memoranda of points and authorities and
3 supporting exhibits on file in this case. The Court has decided that it is best to consider the substance of
4 the MSJ even though it is not supported as required by NRCP 56(e).

5 In its MSJ, Artemis makes nonsensical substantive arguments. For example, Artemis argues that
6 the HOA is "invalid" under NRS 116.3101(1) "because the lots of Ruby Lakes Estates [] were not
7 bound by any covenant to pay dues or participate in a homeowner's association prior to the conveyance
8 of the lots." The HOA effectively rebuts this argument and others in its Opposition to Plaintiff's Motion
9 for Summary Judgment.¹ Artemis also unconvincingly argues that Caughlin Homeowners Ass'n v.
10 Caughlin Club, 109 Nev. 264 (1993), a case with facts strikingly different from this one and predating
11 the application of NRS Chapter 116 to common interest communities created before 1992, is
12 dispositive.²

13 In the end, the Court has concluded that Ruby Lakes Estates qualified as a common-interest
14 community to which the Uniform Common-Interest Ownership Act (hereinafter "the Act") applied when
15 the HOA was incorporated. Once the HOA was incorporated as required by the Act, it was entitled to
16 exercise all of the powers vested in it by NRS Chapter 116, including the collection of assessments for
17 common expenses at Ruby Lakes Estates. NRS 116.3102. Valid at its inception, the HOA continues to
18 be so today.

19 The Court has reached this determination for two primary reasons: (1) the CC&Rs are "real
20 estate" within the meaning of NRS 116.081; and (2) the CC&Rs constitute contractual interests for
21 which Ruby Lakes Estates lot owners were obligated to pay at the time of the HOA's incorporation.
22 NRS 116.021.

23 ///

24
25 ¹ Since the Act was adopted in Nevada, NRS 116.3101 has read that "[a] unit-owners' association must be organized no
26 later than the date the first unit in the common-interest community is conveyed." As the HOA notes in its Opposition, if
this argument held water a valid homeowners association for a common interest community that existed before 1992
could never be formed.

27 ² In Caughlin Homeowners Ass'n, the Nevada Supreme Court held that: (1) a deed to commercial property in a
28 residential subdivision could not be made subject to later amendments to CC&Rs that created new covenants for which
notice was not given at the time of acquisition; and (2) the amendment to CC&Rs creating new property classifications
and assessments purporting to burden the commercial parcel had no legal effect. 109 Nev. at 267.

1 The Act was codified as NRS Chapter 116 in 1991. In 1999, the Legislature applied the Act to
2 common-interest communities created prior to 1992. NRS 116.1201.

3 Upon the HOA's incorporation in 2006, a "common-interest community" was defined as "real
4 estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real
5 estate other than that unit." NRS 116.021. As now, "real estate" was defined then as "any leasehold or
6 other estate or interest in, over or under land, including structures, fixtures and other improvements *and*
7 *interests that by custom, usage or law pass with a conveyance of land though not described in the*
8 *contract of sale or instrument of conveyance.*" NRS 116.081 (emphasis added).

9 By 2006, NRS 116.1201 had been amended to provide that the Act does not apply to a common-
10 interest community that was created before January 1, 1992, is located in a county whose population is
11 less than 50,000 and has less than 50 percent of the units within the community put to residential use,
12 unless a majority of the unit owners otherwise elect in writing. However, the Act continued to apply to
13 Ruby Lakes Estates, which in 2006 had at least 50 percent of its units in residential use.

14 In an unofficial 2008 Nevada Attorney General's Opinion (hereinafter "2008 AGO"), a Senior
15 Deputy Attorney General opined that: (1) commonly owned land, structures, fixtures or improvements,
16 separate from an individually-owned unit, were not required for a planned community to be a common-
17 interest community under the Act; and (2) covenants, conditions and restrictions may be "real estate"
18 within the definition set forth in NRS 116.081. Although somewhat flawed in its reasoning in the
19 Court's view, the 2008 AGO turned on the Act's expansive definition of real estate.³

20 A covenant is "[a] formal agreement or promise to do or not do a particular act." Black's Law
21 Dictionary 419 (9th ed. 2009). A covenant running with the land is "[a] covenant intimately and
22 inherently involved with the land and therefore binding subsequent owners and successor grantees
23 indefinitely." *Id.* at 421. "The important consequence of a covenant running with the land is that its
24 burden or benefit will thereby be imposed or conferred upon a subsequent owner of the property who
25 never actually agreed to it." *Id.* (quoting Roger Bernhardt, *Real Property in a Nutshell* 212 (3d ed.

26
27 ³ Artemis has harshly criticized the 2008 AGO, which the Court believes is a faithful interpretation of the text of the
28 statutes at issue. In an era when many are rightfully questioning the use of legislative history to interpret statutes, Artemis
invites the Court to rely on a legislator's 2009 interpretation of NRS 116.021 as support for the proposition that the 2008
AGO is wrong. Respectfully, the Court declines the invitation. See Antonin Scalia and Bryan A. Garner, *Reading Law:
The Interpretation of Legal Texts*, 391-96 (2012).

1 1993)). CC&Rs are a property interest separate from the land with which they run. Thirteen South, Ltd.
2 v. Summit Village, Inc., 109 Nev. 1218, 1221 (1993).

3 The Ruby Lakes Estates CC&Rs specifically provide that they exist for the mutual benefit of all
4 subdivision lots "and of each owner or user thereof." The CC&Rs expressly run with the land "and
5 inure to *and pass with the land and apply to and bind respective successors in interest thereto.*" The
6 CC&Rs are described as mutually enforceable equitable servitudes "in favor of each and every other
7 parcel included within [Ruby Lakes Estates]." "[I]nterests that by custom, usage or law pass with the
8 conveyance of land though not described in the contract of sale or instrument of conveyance" clearly
9 encompass CC&Rs that run with the land. In 2006 and today, no reasonable argument can be made that
10 the CC&Rs do not constitute "real estate" within the meaning of NRS 116.081.

11 Common sense and logic dictate that the substance of the CC&Rs should determine whether they
12 comprised "real estate" *for which lot owners were obligated to pay*, thus rendering Ruby Lakes Estates a
13 "common interest community" to which NRS Chapter 116 applied upon the HOA's incorporation.

14 The CC&Rs include a statement that they exist "to provide for the development and maintenance
15 of an aesthetically pleasing and harmonious community of residential dwellings for the purpose of
16 preserving a high quality of use and appearance and maintaining the value of each and every lot and
17 parcel" of Ruby View Estates.

18 The CC&Rs establish the ARC "for the general purpose of providing for the maintenance of a
19 high standard of architectural design, color and landscaping harmony and to preserve and enhance
20 aesthetic qualities and high standards of construction in the development and maintenance" of Ruby
21 Lake Estates. The ARC is charged in the CC&Rs with: (1) determining CC&R compliance; and (2)
22 promulgating and adopting reasonable rules and regulations in order to perform its duties.

23 The CC&Rs also impose restrictions on what can be constructed on the lots of Ruby Lakes
24 Estates. There are requirements for initial construction and subsequent additions, improvements or
25 changes to any structures built upon the lots. The CC&Rs contain many use conditions, including
26 conditions that: (1) each lot contain only one dwelling; (2) plans for original construction and alterations
27 of structures and fences be approved in writing by an ARC before construction or an alteration begins;
28 (3) all construction conform with current requirements of the Uniform Building Code, Uniform

1 Plumbing Code, National Electric Code and Uniform Fire Code; (4) all housing not built or constructed
2 on site be approved by the Nevada Division of Manufactured Housing; and (5) all mobile or modular
3 housing be approved by the ARC.

4 Finally, the CC&Rs provide the ARC the power to: (1) grant variances; and (2) enforce the
5 CC&Rs by bringing an action at law or in equity.

6 Upon the HOA's incorporation, the CC&Rs provided assurance to those who purchased property
7 within Ruby Lakes Estates that there are legally enforceable standards and requirements with which
8 neighboring homes must comport, making it foreseeable that the subdivision would continue to have
9 consistent quality and value. Then, as now, lot owners cannot change their property to the extent that it
10 might adversely affect the property values within Ruby Lakes Estates. Then, as now, the CC&Rs added
11 value for all units in Ruby Lakes Estates, including the establishment of an enforcement body, the
12 operations for which lot owners were obligated to pay at least by implication. See Evergreen Highlands
13 Ass'n v. West, 73 P.3d 1, 7-9 (Colorado 2003) (even in absence of express covenant, CC&Rs for
14 subdivision in UCIOA jurisdiction were sufficient to create a common interest community by
15 implication with concomitant power to impose mandatory dues on lot owners to pay for maintenance of
16 common areas; implied obligation may be found where the declaration expressly creates body for
17 enforcing use restrictions and design controls, but fails to include a mechanism for providing the funds
18 necessary to carry out its functions, and when such an implied obligation is established the subdivision is
19 a common interest community); Restatement (Third) of Property: Servitudes § 6.2 cmt. a (2000).

20 For all of these reasons, pursuant to the provisions of NRS 116.021, and using the definition for
21 real estate in NRS 116.081, the CC&Rs constituted *real estate, other than the unit owned, for which unit*
22 *owners are obligated to pay* when the HOA was incorporated.⁴ A common interest community at the
23 HOA's incorporation, the HOA is not "invalid" today.

24 ///

25 ///

26
27 ⁴ The Court also concludes that the Ruby Lakes Estates plat also constitutes "real estate," other than the unit owned, for
28 which unit owners are obligated to pay. NRS 116.2101 (common-interest community may be created pursuant to Act
only by recording a declaration executed in the same manner as a deed); NRS 116.2109(1) (plats are part of the
declaration). The plat contains "common elements" as that term is currently defined in NRS 116.017, including fixtures
such as gates.

4. Order

For all of the foregoing reasons, the Plaintiff's Motion for Summary Judgment is hereby DENIED.

DATED this 12 day of February, 2013.

Michael J. Tarr

The Honorable Alvin R. Kacin
District Judge/Department 2

1 CERTIFICATE OF MAILING

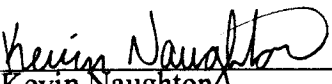
2 Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of Alvin R. Kacin, District
3 Judge, Fourth Judicial District Court, Department 2, and that on this 12 day of February, 2013,
served by the following method of service:

- 4 (X) Regular US Mail () Overnight UPS
5 () Certified US Mail () Overnight Federal Express
6 () Registered US Mail () Fax to # _____
() Overnight US Mail () Hand Delivery
() Personal Service (X) Box in Clerk's Office

7 a true copy of the foregoing document addressed to:

8 Travis Gerber, Esq.
9 491 Fourth Street
Elko, Nevada 89801
[Box in Clerk's Office]

10 Gayle A. Kern, Esq.
11 5421 Kietzke Lane, Suite 200
12 Reno, Nevada 89511
[Regular US Mail]

13 
14 Kevin Naughton



VC

FILED

RECEIVED
CLERK OF DISTRICT COURT

Handwritten signature

Case No. CV-C-12-175

Dept. No. 2

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

ARTEMIS EXPLORATION COMPANY,
a Nevada Corporation,

Plaintiff,

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

v.

RUBY LAKE ESTATES HOMEOWNER'S
ASSOCIATION AND DOES I-X,

Defendants.

This is a dispute between a property owner and its homeowners association.

On May 30, 2012, Defendant/Counterclaimant Ruby Lakes Homeowner's Association (hereinafter "the HOA") filed a Motion for Summary Judgment (hereinafter "MSJ") against Plaintiff/Counterdefendant Artemis Exploration Company (hereinafter "Artemis"). Artemis filed an "Opposition to Defendant's Motion for Summary Judgment" (hereinafter "Opposition") on June 22, 2012. The HOA replied to the Opposition on July 5, 2012.

By its MSJ, the HOA seeks the entry of summary judgment as to all Artemis claims, which include claims for declaratory relief and damages. In its Opposition, Artemis abandoned its claims for damages, one of which is for fraud.

Having carefully considered the matter, the Court is granting the MSJ.

///

///

///

1 **1. Law of Summary Judgment**

2 “A party seeking to recover upon a claim . . . may, at any time after the expiration of 20 days
3 from the commencement of the action . . . move with or without supporting affidavits for a summary
4 judgment in the party's favor upon all or any part thereof.” NRCP 56(a).

5 NRCP 56(c) reads, in pertinent part:

6 Motions for summary judgment and responses thereto shall include a concise statement
7 setting forth each fact material to the disposition of the motion which the party claims is or
8 is not genuinely in issue, citing the particular portions of any pleading, affidavit, deposition,
9 interrogatory, answer, admission, or other evidence upon which the party relies. The
10 judgment sought shall be rendered forthwith if the pleadings, depositions, answers to
11 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 a judgment
as a matter of law. A summary judgment, interlocutory in character, may be rendered on the
issue of liability alone although there is a genuine issue as to the amount of damages. An
order granting summary judgment shall set forth the undisputed material facts and legal
determinations on which the court granted summary judgment.

12 NRCP 56(e) reads, in relevant part:

13 Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such
14 facts as would be admissible in evidence, and shall show affirmatively that the affiant is
15 competent to testify to the matters stated therein. Sworn or certified copies of all papers or
16 parts thereof referred to in an affidavit shall be attached thereto or served therewith. The
17 court may permit affidavits to be supplemented or opposed by depositions, answers to
18 interrogatories, or further affidavits. When a motion for summary judgment is made and
supported as provided in [NRCP 56], an adverse party may not rest upon the mere allegations
or denials of the adverse party's pleading, but the adverse party's response, by affidavits or
as otherwise provided in [NRCP 56], must set forth specific facts showing that there is a
genuine issue for trial. If the adverse party does not so respond, summary judgment, if
appropriate, shall be entered against the adverse party.

19 “Summary judgment is appropriate and ‘shall be rendered forthwith’ when the pleadings and
20 other evidence on file demonstrate that no ‘genuine issue as to any material fact [remains] and that the
21 moving party is entitled to a judgment as a matter of law.’” Wood v. Safeway, Inc., 121 Nev. 724, 729
22 (2005) (citing NRCP 56(c); Tucker v. Action Equip. and Scaffold Co., 113 Nev. 1349, 1353 (1997)).
23 “[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn
24 from it, must be viewed in a light most favorable to the nonmoving party.” Id. “The burden of proving
25 the absence of triable facts is upon the moving party.” Butler v. Bogdanovich, 101 Nev. 449, 451
26 (1985).

27 “The substantive law controls which factual disputes are material and will preclude summary
28 judgment; other factual disputes are irrelevant.” Wood, 121 Nev. at 731 (citing Anderson v. Liberty

1 Lobby, Inc., 477 U.S. 242, 248 (1986)). "A factual dispute is genuine when the evidence is such that a
2 rational trier of fact could return a verdict for the nonmoving party." Id. (citations omitted).

3 "While the pleadings and other proof must be construed in a light most favorable to the
4 nonmoving party, that party bears the burden to 'do more than simply show that there is some
5 metaphysical doubt' as to the operative facts in order to avoid summary judgment being entered in the
6 moving party's favor." Id. at 732. "The nonmoving party 'must, by affidavit or otherwise, set forth
7 specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered
8 against him.'" Id. (citing Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110 (1992)). The nonmoving
9 party "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture."
10 Bulbman, 108 Nev. at 110 (quoting Collins v. Union Fed. Savings & Loan, 99 Nev. 284, 302 (1983)).

11 **2. Undisputed Material Facts**

12 The facts material to the disposition of the MSJ are in the following recitation of undisputed fact.
13 The Court has relied much on the HOA's pinpoint citations to the record.

14 Artemis is a Nevada corporation whose president, secretary, treasurer and sole director is
15 Elizabeth Essington (hereinafter "Mrs. Essington"). Mrs. Essington's husband is George "Mel"
16 Essington (hereinafter "Mr. Essington").

17 The official Plat Map for Ruby Lake Estates was recorded in Elko County on September 15,
18 1989, by Stephen and Mavis Wright (hereinafter "the Wrights") as File No. 281674. Included on the
19 Plat Map are residential lots within the community, as well as roadways, easements, building set-back
20 lines and street monuments.

21 With respect to the roadways, the first sheet of the Plat Map reads:

22 At a regularly held meeting of the Board of Commissioners of Elko County, State of Nevada,
23 held on the 5th day of July, 1989, this Plat was approved as a Final Plat pursuant to NRS
24 278.328. The Board does hereby reject on behalf of the public all streets or roadways for
maintenance purposes and does hereby accept all streets and easements therein offered for
utility, drainage and access purposes only as dedicated for public use.

25 The roads within Ruby Lake Estates have never been accepted for maintenance by Elko County.
26 Yet, Elko County requires the roadways and adjoining ditches and culverts to be maintained for health
27 and safety reasons.

28 ///

1 On October 25, 1989, the Wrights recorded a Declaration of Reservations, Conditions and
2 Restrictions for Ruby Lake Estates (hereinafter "CC&Rs"). The CC&Rs were recorded in the Office of
3 the Elko County Recorder.

4 Article I of the CC&Rs provides:

5 The real property affected hereby is subjected to the imposition of the covenants, conditions,
6 restrictions and reservations specified herein to provide for the development and maintenance
7 of an aesthetically pleasing and harmonious community of residential dwellings for the
purpose of preserving a high quality of use and appearance and maintaining the value of each
and every lot and parcel of said property . . ."

8 Artemis acquired Lot 6 of Block G (hereinafter Lot G-6) of Ruby Lake Estates on June 21, 1994.

9 Artemis acquired Lot 2 of Block H (hereinafter Lot H-2) of Ruby Lake Estates on March 9, 2010.

10 Both Lot G-6 and Lot H-2 were created by the Plat Map and subject to the CC&Rs. Title to the
11 lots was taken subject to the CC&Rs.

12 The HOA Articles of Incorporation were filed by Lee Perks on January 16, 2006.

13 The Initial Association Registration Form was filed on March 31, 2006, with the Office of the
14 Ombudsman for Common-Interest Communities.

15 In filing the Articles of Incorporation and forming the HOA, the owners of Ruby Lake Estates
16 took action consistent with the opinion of its counsel.

17 For over seventeen years (1994-2011), Mr. and Mrs. Essington represented that Lot G-6 was
18 owned by one or both of them.

19 Mr. Essington represented to members of the Association that he had the capacity and authority
20 to act on behalf of Artemis and/or Mrs. Essington.

21 Mr. Essington served on the HOA's Board of Directors (hereinafter "the Board") from 2007 until
22 he resigned in January, 2011.

23 Following his election to the Board, Mr. Essington signed a Declaration of Certification as a
24 Common-Interest Community Board Member, as required by NRS 116.31034(9).

25 Representing himself to be a lot owner, Mr. Essington seconded a motion to approve its Bylaws.

26 The Bylaws specifically provide, "All officers must be property owners and members of the
27 Ruby Lake Homeowners Association in good standing their entire term of office."

28 ///

1 Mr. Essington violated this provision when, for sixteen years, he held himself out as an owner of
2 a lot.

3 The Bylaws also read: "An assessment fee will be charged yearly for maintenance, roads, fire
4 protection, and other expenditures as the board allows or required by Elko County."

5 Maintenance of the roadways as well as ditches, culverts and other improvements has repeatedly
6 been recognized as the collective responsibility of the owners of the lots within the Ruby Lake Estates
7 subdivision, including Artemis.

8 Road maintenance by the HOA has been an ongoing topic of communications between members
9 and at HOA meetings in the years since the Wrights turned over maintenance in 1997.

10 After becoming a member of the Board, Mr. Essington voted to levy assessments against all
11 HOA members for roadway maintenance, weed abatement and the repair of signs and culverts.

12 The HOA holds title to real property which was deeded to it by the Wrights. The members of the
13 HOA, including Mr. Essington while serving on the Board and while representing himself to be an
14 owner of Lot G-6, voted to accept title to this real property, pay documentary transfer tax and procure
15 liability insurance in the name of the HOA.

16 On July 14, 2009, the Board caused a Reserve Study to be prepared as required by NRS
17 116.31153. The Reserve Study was prepared by an independent and licensed community association
18 consultant. The Reserve Study identified the reserve items of the Association as cattle guards, dirt road
19 maintenance, fencing, gates, entrance signs and street signs. Mr. Essington voted to approve the Reserve
20 Study at the August 8, 2009, meeting of the Board. Mr. Essington voted to levy assessments in
21 accordance with the Reserve Study and the 2010 budget, which he also approved.

22 Since the HOA's formation, assessments have been levied and budgets were adopted by
23 members to pay for road and real property maintenance, as well as fire protection. Mr. Essington
24 approved these budgets and assessments. Mr. and Mrs. Essington regularly paid assessments from their
25 personal bank account.

26 In 2009, a dispute arose between Mrs. Essington and the Ruby Lakes Estates Architectural
27 Review Committee (ARC) regarding the construction of a large building to house machinery and other
28 equipment at the subdivision. The ARC and the Board took the position that the structure was permitted

1 under the CC&Rs.

2 Artemis stopped paying its HOA assessments, all of which had been approved by Mr. Essington
3 as a Board member. Invoices generated in the ordinary course of business were sent to Artemis care of
4 Mr. and Mrs. Essington. Eventually, the HOA hired a collection agency to try and collect the delinquent
5 assessments. It is the sending of these invoices and notice of the HOA's intent to record a Notice of
6 Delinquent Assessment Lien.

7 **3. Analysis**

8 The Court has spent hour upon hour studying the memoranda of points and authorities and
9 supporting exhibits on file in this case.

10 In its Opposition, Artemis makes nonsensical substantive arguments. For example, Artemis
11 argues that the HOA is "invalid" under NRS 116.3101(1) "because the lots of Ruby Lakes Estates []
12 were not bound by any covenant to pay dues or participate in a homeowner's association prior to the
13 conveyance of the lots." The HOA effectively rebuts this argument and others in its MSJ.¹ Artemis also
14 unconvincingly argues that Caughlin Homeowners Ass'n v. Caughlin Club, 109 Nev. 264 (1993), a case
15 with facts strikingly different from this one and predating the application of NRS Chapter 116 to
16 common interest communities created before 1992, is dispositive.²

17 In the end, the Court has concluded that Ruby Lakes Estates qualified as a common-interest
18 community to which the Uniform Common-Interest Ownership Act (hereinafter "the Act") applied when
19 the HOA was incorporated. Once the HOA was incorporated as required by the Act, it was entitled to
20 exercise all of the powers vested in it by NRS Chapter 116, including the collection of assessments for
21 common expenses at Ruby Lakes Estates. NRS 116.3102. Valid at its inception, the HOA continues to
22 be so today.

23 ///

24
25 ¹ Since the Act was adopted in Nevada, NRS 116.3101 has read that "[a] unit-owners' association must be organized no
26 later than the date the first unit in the common-interest community is conveyed." As the HOA notes in its Opposition, if
this argument held water a valid homeowners association for a common interest community that existed before 1992
could never be formed.

27 ² In Caughlin Homeowners Ass'n, the Nevada Supreme Court held that: (1) a deed to commercial property in a
28 residential subdivision could not be made subject to later amendments to CC&Rs that created new covenants for which
notice was not given at the time of acquisition; and (2) the amendment to CC&Rs creating new property classifications
and assessments purporting to burden the commercial parcel had no legal effect. 109 Nev. at 267.

1 The Court has reached this determination for two primary reasons: (1) the CC&Rs are “real
2 estate” within the meaning of NRS 116.081; and (2) the CC&Rs constitute contractual interests for
3 which Ruby Lakes Estates lot owners were obligated to pay at the time of the HOA’s incorporation.
4 NRS 116.021.

5 The Act was codified as NRS Chapter 116 in 1991. In 1999, the Legislature applied the Act to
6 common-interest communities created prior to 1992. NRS 116.1201.

7 Upon the HOA’s incorporation in 2006, a “common-interest community” was defined as “real
8 estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real
9 estate other than that unit.” NRS 116.021. As now, “real estate” was defined then as “any leasehold or
10 other estate or interest in, over or under land, including structures, fixtures and other improvements *and*
11 *interests that by custom, usage or law pass with a conveyance of land though not described in the*
12 *contract of sale or instrument of conveyance.*” NRS 116.081 (emphasis added).

13 By 2006, NRS 116.1201 had been amended to provide that the Act does not apply to a common-
14 interest community that was created before January 1, 1992, is located in a county whose population is
15 less than 50,000 and has less than 50 percent of the units within the community put to residential use,
16 unless a majority of the unit owners otherwise elect in writing. However, the Act continued to apply to
17 Ruby Lakes Estates, which in 2006 had at least 50 percent of its units in residential use.

18 In an unofficial 2008 Nevada Attorney General’s Opinion (hereinafter “2008 AGO”), a Senior
19 Deputy Attorney General opined that: (1) commonly owned land, structures, fixtures or improvements,
20 separate from an individually-owned unit, were not required for a planned community to be a common-
21 interest community under the Act; and (2) covenants, conditions and restrictions may be “real estate”
22 within the definition set forth in NRS 116.081. Although somewhat flawed in its reasoning in the
23 Court’s view, the 2008 AGO turned on the Act’s expansive definition of real estate.³

24 A covenant is “[a] formal agreement or promise to do or not do a particular act.” Black’s Law
25 Dictionary 419 (9th ed. 2009). A covenant running with the land is “[a] covenant intimately and

26
27 ³ Artemis has harshly criticized the 2008 AGO, which the Court believes is a faithful interpretation of the text of the
28 statutes at issue. In an era when many are rightfully questioning the use of legislative history to interpret statutes, Artemis
invites the Court to rely on a legislator’s 2009 interpretation of NRS 116.021 as support for the proposition that the 2008
AGO is wrong. Respectfully, the Court declines the invitation. See Antonin Scalia and Bryan A. Garner, Reading Law:
The Interpretation of Legal Texts, 391-96 (2012).

1 inherently involved with the land and therefore binding subsequent owners and successor grantees
2 indefinitely.” Id. at 421. “The important consequence of a covenant running with the land is that its
3 burden or benefit will thereby be imposed or conferred upon a subsequent owner of the property who
4 never actually agreed to it.” Id. (quoting Roger Bernhardt, Real Property in a Nutshell 212 (3d ed.
5 1993)). CC&Rs are a property interest separate from the land with which they run. Thirteen South, Ltd.
6 v. Summit Village, Inc., 109 Nev. 1218, 1221 (1993).

7 The Ruby Lakes Estates CC&Rs specifically provide that they exist for the mutual benefit of all
8 subdivision lots “and of each owner or user thereof.” The CC&Rs expressly run with the land “and
9 inure to *and pass with the land and apply to and bind respective successors in interest thereto.*” The
10 CC&Rs are described as mutually enforceable equitable servitudes “in favor of each and every other
11 parcel included within [Ruby Lakes Estates].” “[I]nterests that by custom, usage or law pass with the
12 conveyance of land though not described in the contract of sale or instrument of conveyance” clearly
13 encompass CC&Rs that run with the land. In 2006 and today, no reasonable argument can be made that
14 the CC&Rs do not constitute “real estate” within the meaning of NRS 116.081.

15 Common sense and logic dictate that the substance of the CC&Rs should determine whether they
16 comprised “real estate” *for which lot owners were obligated to pay*, thus rendering Ruby Lakes Estates a
17 “common interest community” to which NRS Chapter 116 applied upon the HOA’s incorporation.

18 The CC&Rs include a statement that they exist “to provide for the development and maintenance
19 of an aesthetically pleasing and harmonious community of residential dwellings for the purpose of
20 preserving a high quality of use and appearance and maintaining the value of each and every lot and
21 parcel” of Ruby View Estates.

22 The CC&Rs establish the ARC “for the general purpose of providing for the maintenance of a
23 high standard of architectural design, color and landscaping harmony and to preserve and enhance
24 aesthetic qualities and high standards of construction in the development and maintenance” of Ruby
25 Lake Estates. The ARC is charged in the CC&Rs with: (1) determining CC&R compliance; and (2)
26 promulgating and adopting reasonable rules and regulations “in order to carry out its purpose.”

27 The CC&Rs also impose restrictions on what can be constructed on the lots of Ruby Lakes
28 Estates. There are requirements for initial construction and subsequent additions, improvements or

1 changes to any structures built upon the lots. The CC&Rs contain many use conditions, including
2 conditions that: (1) each lot contain only one dwelling; (2) plans for original construction and alterations
3 of structures and fences be approved in writing by an ARC before construction or an alteration begins;
4 (3) all construction conform with current requirements of the Uniform Building Code, Uniform
5 Plumbing Code, National Electric Code and Uniform Fire Code; (4) all housing not built or constructed
6 on site be approved by the Nevada Division of Manufactured Housing; and (5) all mobile or modular
7 housing be approved by the ARC.

8 Finally, the CC&Rs provide the ARC the power to: (1) grant variances; and (2) enforce the
9 CC&Rs by bringing an action at law or in equity.


10 Upon the HOA's incorporation, the CC&Rs provided assurance to those who purchased property
11 within Ruby Lakes Estates that there are legally enforceable standards and requirements with which
12 neighboring homes must comport, making it foreseeable that the subdivision would continue to have
13 consistent quality and value. Then, as now, lot owners cannot change their property to the extent that it
14 might adversely affect the property values within Ruby Lakes Estates. Then, as now, the CC&Rs added
15 value for all units in Ruby Lakes Estates, including the establishment of an enforcement body, the
16 operations for which lot owners were obligated to pay at least by implication. See Evergreen Highlands
17 Ass'n v. West, 73 P.3d 1, 7-9 (Colorado 2003) (even in absence of express covenant, CC&Rs for
18 subdivision in UCIOA jurisdiction were sufficient to create a common interest community by
19 implication with concomitant power to impose mandatory dues on lot owners to pay for maintenance of
20 common areas; implied obligation may be found where the declaration expressly creates body for
21 enforcing use restrictions and design controls, but fails to include a mechanism for providing the funds
22 necessary to carry out its functions, and when such an implied obligation is established the subdivision is
23 a common interest community); Restatement (Third) of Property: Servitudes § 6.2 cmt. a (2000); see
24 also Southeastern Jurisdictional Admin. Council, Inc. v. Emerson, 683 S.E.2d 366 (N.C. 2009)
25 (reversing Southeastern Jurisdictional Admin. Council, Inc. v. Emerson, 655 S.E.2d 719, 721 (N.C. App.
26 2008), in which the North Carolina Court of Appeals opined that "[t]he duty to pay an assessment is an
27 affirmative obligation; strict construction of the [CC&Rs] would require such a duty to have specific
28 authorization, not a secondary authorization under the rubric of rules and regulations").

1 For all of these reasons, pursuant to the provisions of NRS 116.021, and using the definition for
2 real estate in NRS 116.081, the CC&Rs constituted *real estate, other than the unit owned, for which unit*
3 *owners are obligated to pay* when the HOA was incorporated.⁴ A common interest community at the
4 HOA's incorporation, the HOA is valid today.

5 **4. Order**

6 **For all of the foregoing reasons, Artemis is not entitled to the declaratory relief sought in its**
7 **Complaint, and the Defendant's Motion for Summary Judgment is hereby GRANTED.**

8
9 DATED this 14 day of February, 2013.

10
11 
12 The Honorable Alvin R. Kacin
13 District Judge/Department 2
14
15
16
17
18
19
20
21
22
23
24
25
26

27 ⁴ The Court also concludes that the Ruby Lakes Estates plat also constitutes "real estate," other than the unit owned, for
28 which unit owners are obligated to pay. NRS 116.2101 (common-interest community may be created pursuant to Act
only by recording a declaration executed in the same manner as a deed); NRS 116.2109(1) (plats are part of the
declaration). The plat contains "common elements" as that term is currently defined in NRS 116.017, including fixtures
such as gates.

1 CERTIFICATE OF MAILING

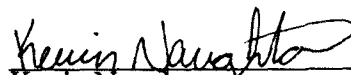
2 Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of Alvin R. Kacin, District
3 Judge, Fourth Judicial District Court, Department 2, and that on this 14 day of February, 2013,
served by the following method of service:

4 (X) Regular US Mail () Overnight UPS
5 () Certified US Mail () Overnight Federal Express
6 () Registered US Mail () Fax to # _____
() Overnight US Mail () Hand Delivery
() Personal Service (X) Box in Clerk's Office

7 a true copy of the foregoing document addressed to:

8 Travis Gerber, Esq.
9 491 Fourth Street
10 Elko, Nevada 89801
[Box in Clerk's Office]

11 Gayle A. Kern, Esq.
12 5421 Kietzke Lane, Suite 200
Reno, Nevada 89511
[Regular US Mail]

13 
14 Kevin Naughton



1 CASE NO. CV-C-12-175

2 DEPT. NO. 1

3

4

5 IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

6 IN AND FOR THE COUNTY OF ELKO

7

8 ARTEMIS EXPLORATION COMPANY, a
Nevada Corporation,

9 Plaintiffs,

10 vs.

**NOTICE OF ENTRY OF ORDER DENYING
PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT**

11 RUBY LAKE ESTATES HOMEOWNER'S
ASSOCIATION AND DOES I-X,

12

Defendants.

13

14 RUBY LAKE ESTATES HOMEOWNER'S
ASSOCIATION,

15

Counterclaimant,

16

vs.

17 ARTEMIS EXPLORATION COMPANY, a
Nevada Corporation,

18

Counterdefendant.

19

20 PLEASE TAKE NOTICE that on February 12, 2013, an Order Denying Plaintiff's Motion
21 for Summary Judgment was entered by the Court. A copy of the Order Denying Plaintiff's Motion
22 for Summary Judgment is attached hereto.

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document filed in the above-entitled case does not contain the social security number of any person.

DATED this 25 day of February, 2013.

KERN & ASSOCIATES, LTD.



GAYLE A. KERN, ESQ.
NEVADA BAR #1620
5421 Kietzke Lane, Suite 200
RENO, NEVADA 89511
Telephone: 775-324-5930
Fax: 775-324-6173
Email: gaylekern@kernltd.com
Attorneys for Ruby Lake Estates

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law firm of Kern & Associates, Ltd., and that on this day I served the foregoing document described as follows:

NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

on the parties set forth below, at the addresses listed below by:

 X Placing an original or true copy thereof in a sealed envelope place for collection and mailing in the United States Mail, at Reno, Nevada, first class mail, postage paid, following ordinary business practices, addressed to:

 Via facsimile transmission

 Via e-mail.

 Personal delivery, upon:

 United Parcel Service, Next Day Air, addressed to:

Travis Gerber, Esq.
Gerber Law Offices, LLP
491 4th Street
Elko, NV 89801

DATED this 20th day of February, 2013.


TERESA A. GEARHART

FILED

2013 FEB 12 PM 3:23
ELKO CO DISTRICT COURT

LEAH DEPUTY

Case No. CV-C-12-175
Dept. No. 2

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

ARTEMIS EXPLORATION COMPANY,
a Nevada Corporation,

Plaintiff,

v.

RUBY LAKE ESTATES HOMEOWNER'S
ASSOCIATION AND DOES I-X,

Defendants.

ORDER DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

This is a dispute between a property owner and its homeowners association.

On April 20, 2012, Plaintiff/Counterdefendant Artemis Exploration Company (hereinafter "Artemis") filed a Motion for Summary Judgment (hereinafter "MSJ") against Defendant/Counterclaimant Ruby Lake Estates Homeowner's Association (hereinafter "the HOA"). The HOA opposed the MSJ on May 30, 2012. Artemis filed its "Reply to Opposition to Plaintiff's Motion for Summary Judgment" on June 15, 2012.

By its MSJ, Artemis seeks the entry of a judgment declaring the HOA invalid.

Having carefully considered the matter, the Court is denying the MSJ.

1. Law of Summary Judgment

"A party seeking to recover upon a claim . . . may, at any time after the expiration of 20 days from the commencement of the action . . . move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof." NRCP 56(a).

///

1 NRCP 56(c) reads, in pertinent part:

2 Motions for summary judgment and responses thereto shall include a concise statement
3 setting forth each fact material to the disposition of the motion which the party claims is or
4 is not genuinely in issue, citing the particular portions of any pleading, affidavit, deposition,
5 interrogatory, answer, admission, or other evidence upon which the party relies. The
6 judgment sought shall be rendered forthwith if the pleadings, depositions, answers to
7 interrogatories, and admissions on file, together with the affidavits, if any, show that there
8 is no genuine issue as to any material fact and that the moving party is entitled to a judgment
9 as a matter of law. A summary judgment, interlocutory in character, may be rendered on the
10 issue of liability alone although there is a genuine issue as to the amount of damages. An
11 order granting summary judgment shall set forth the undisputed material facts and legal
12 determinations on which the court granted summary judgment.

8 NRCP 56(e) reads, in relevant part:

9 Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such
10 facts as would be admissible in evidence, and shall show affirmatively that the affiant is
11 competent to testify to the matters stated therein. Sworn or certified copies of all papers or
12 parts thereof referred to in an affidavit shall be attached thereto or served therewith. The
13 court may permit affidavits to be supplemented or opposed by depositions, answers to
14 interrogatories, or further affidavits. When a motion for summary judgment is made and
15 supported as provided in [NRCP 56], an adverse party may not rest upon the mere allegations
16 or denials of the adverse party's pleading, but the adverse party's response, by affidavits or
17 as otherwise provided in [NRCP 56], must set forth specific facts showing that there is a
18 genuine issue for trial. If the adverse party does not so respond, summary judgment, if
19 appropriate, shall be entered against the adverse party.

15 "Summary judgment is appropriate and 'shall be rendered forthwith' when the pleadings and
16 other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the
17 moving party is entitled to a judgment as a matter of law.'" Wood v. Safeway, Inc., 121 Nev. 724, 729
18 (2005) (citing NRCP 56(c); Tucker v. Action Equip. and Scaffold Co., 113 Nev. 1349, 1353 (1997)).
19 "[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn
20 from it, must be viewed in a light most favorable to the nonmoving party." Id. "The burden of proving
21 the absence of triable facts is upon the moving party." Butler v. Bogdanovich, 101 Nev. 449, 451
22 (1985).

23 "The substantive law controls which factual disputes are material and will preclude summary
24 judgment; other factual disputes are irrelevant." Wood, 121 Nev. at 731 (citing Anderson v. Liberty
25 Lobby, Inc., 477 U.S. 242, 248 (1986)). "A factual dispute is genuine when the evidence is such that a
26 rational trier of fact could return a verdict for the nonmoving party." Id. (citations omitted).

27 "While the pleadings and other proof must be construed in a light most favorable to the
28 nonmoving party, that party bears the burden to 'do more than simply show that there is some

1 metaphysical doubt' as to the operative facts in order to avoid summary judgment being entered in the
2 moving party's favor." Id. at 732. "The nonmoving party 'must, by affidavit or otherwise, set forth
3 specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered
4 against him.'" Id. (citing Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110 (1992)). The nonmoving
5 party "'is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture.'" Bulbman, 108 Nev. at 110 (quoting Collins v. Union Fed. Savings & Loan, 99 Nev. 284, 302 (1983)).

7 **2. Undisputed Material Facts**

8 The facts material to the disposition of the MSJ are in the following recitation of undisputed fact.
9 The Court has relied much on the HOA's pinpoint citations to the record.

10 Artemis is a Nevada corporation whose president, secretary, treasurer and sole director is
11 Elizabeth Essington (hereinafter "Mrs. Essington"). Mrs. Essington's husband is George "Mel"
12 Essington (hereinafter "Mr. Essington").

13 The official Plat Map for Ruby Lake Estates was recorded in Elko County on September 15,
14 1989, by Stephen and Mavis Wright (hereinafter "the Wrights") as File No. 281674. Included on the
15 Plat Map are residential lots within the community, as well as roadways, easements, building set-back
16 lines and street monuments.

17 With respect to the roadways, the first sheet of the Plat Map reads:

18 At a regularly held meeting of the Board of Commissioners of Elko County, State of Nevada,
19 held on the 5th day of July, 1989, this Plat was approved as a Final Plat pursuant to NRS
20 278.328. The Board does hereby reject on behalf of the public all streets or roadways for
maintenance purposes and does hereby accept all streets and easements therein offered for
utility, drainage and access purposes only as dedicated for public use.

21 The roads within Ruby Lake Estates have never been accepted for maintenance by Elko County.
22 Yet, Elko County requires the roadways and adjoining ditches and culverts to be maintained for health
23 and safety reasons.

24 On October 25, 1989, the Wrights recorded a Declaration of Reservations, Conditions and
25 Restrictions for Ruby Lake Estates (hereinafter "CC&Rs"). The CC&Rs were recorded in the Office of
26 the Elko County Recorder.

27 Article I of the CC&Rs provides:

28 The real property affected hereby is subjected to the imposition of the covenants, conditions,
restrictions and reservations specified herein to provide for the development and maintenance

1 of an aesthetically pleasing and harmonious community of residential dwellings for the
2 purpose of preserving a high quality of use and appearance and maintaining the value of each
and every lot and parcel of said property . . .”

3 Artemis acquired Lot 6 of Block G (hereinafter Lot G-6) of Ruby Lake Estates on June 21, 1994.

4 Artemis acquired Lot 2 of Block H (hereinafter Lot H-2) of Ruby Lake Estates on March 9, 2010.

5 Both Lot G-6 and Lot H-2 were created by the Plat Map and subject to the CC&Rs. Title to the
6 lots was taken subject to the CC&Rs.

7 The HOA Articles of Incorporation were filed by Lee Perks on January 16, 2006.

8 The Initial Association Registration Form was filed on March 31, 2006, with the Office of the
9 Ombudsman for Common-Interest Communities.

10 In filing the Articles of Incorporation and forming the HOA, the owners of Ruby Lake Estates
11 took action consistent with the opinion of its counsel.

12 For over seventeen years (1994-2011), Mr. and Mrs. Essington represented that Lot G-6 was
13 owned by one or both of them.

14 Mr. Essington represented to members of the Association that he had the capacity and authority
15 to act on behalf of Artemis and/or Mrs. Essington.

16 Mr. Essington served on the HOA's Board of Directors (hereinafter "the Board") from 2007 until
17 he resigned in January, 2011.

18 Following his election to the Board, Mr. Essington signed a Declaration of Certification as a
19 Common-Interest Community Board Member, as required by NRS 116.31034(9).

20 Representing himself to be a lot owner, Mr. Essington seconded a motion to approve its Bylaws.

21 The Bylaws specifically provide, "All officers must be property owners and members of the
22 Ruby Lake Homeowners Association in good standing their entire term of office."

23 Mr. Essington violated this provision when, for sixteen years, he held himself out as an owner of
24 a lot.

25 The Bylaws also read: "An assessment fee will be charged yearly for maintenance, roads, fire
26 protection, and other expenditures as the board allows or required by Elko County."

27 Maintenance of the roadways as well as ditches, culverts and other improvements has repeatedly
28 been recognized as the collective responsibility of the owners of the lots within the Ruby Lake Estates

1 subdivision, including Artemis.

2 Road maintenance by the HOA has been an ongoing topic of communications between members
3 and at HOA meetings in the years since the Wrights turned over maintenance in 1997.

4 After becoming a member of the Board, Mr. Essington voted to levy assessments against all
5 HOA members for roadway maintenance, weed abatement and the repair of signs and culverts.

6 The HOA holds title to real property which was deeded to it by the Wrights. The members of the
7 HOA, including Mr. Essington while serving on the Board and while representing himself to be an
8 owner of Lot G-6, voted to accept title to this real property, pay documentary transfer tax and procure
9 liability insurance in the name of the HOA.

10 On July 14, 2009, the Board caused a Reserve Study to be prepared as required by NRS
11 116.31153. The Reserve Study was prepared by an independent and licensed community association
12 consultant. The Reserve Study identified the reserve items of the Association as cattle guards, dirt road
13 maintenance, fencing, gates, entrance signs and street signs. Mr. Essington voted to approve the Reserve
14 Study at the August 8, 2009, meeting of the Board. Mr. Essington voted to levy assessments in
15 accordance with the Reserve Study and the 2010 budget, which he also approved.

16 Since the HOA's formation, assessments have been levied and budgets were adopted by
17 members to pay for road and real property maintenance, as well as fire protection. Mr. Essington
18 approved these budgets and assessments. Mr. and Mrs. Essington regularly paid assessments from their
19 personal bank account.

20 In 2009, a dispute arose between Mrs. Essington and the Ruby Lakes Estates Architectural
21 Review Committee (ARC) regarding the construction of a large building to house machinery and other
22 equipment at the subdivision. The ARC and the Board took the position that the structure was permitted
23 under the CC&Rs.

24 Artemis stopped paying its HOA assessments, all of which had been approved by Mr. Essington
25 as a Board member. Invoices generated in the ordinary course of business were sent to Artemis care of
26 Mr. and Mrs. Essington. Eventually, the HOA hired a collection agency to try and collect the delinquent
27 assessments. It is the sending of these invoices and notice of the HOA's intent to record a Notice of
28 Delinquent Assessment Lien.

1 3. Analysis

2 The Court has spent hour upon hour studying the memoranda of points and authorities and
3 supporting exhibits on file in this case. The Court has decided that it is best to consider the substance of
4 the MSJ even though it is not supported as required by NRCP 56(e).

5 In its MSJ, Artemis makes nonsensical substantive arguments. For example, Artemis argues that
6 the HOA is "invalid" under NRS 116.3101(1) "because the lots of Ruby Lakes Estates [] were not
7 bound by any covenant to pay dues or participate in a homeowner's association prior to the conveyance
8 of the lots." The HOA effectively rebuts this argument and others in its Opposition to Plaintiff's Motion
9 for Summary Judgment.¹ Artemis also unconvincingly argues that Caughlin Homeowners Ass'n v.
10 Caughlin Club, 109 Nev. 264 (1993), a case with facts strikingly different from this one and predating
11 the application of NRS Chapter 116 to common interest communities created before 1992, is
12 dispositive.²

13 In the end, the Court has concluded that Ruby Lakes Estates qualified as a common-interest
14 community to which the Uniform Common-Interest Ownership Act (hereinafter "the Act") applied when
15 the HOA was incorporated. Once the HOA was incorporated as required by the Act, it was entitled to
16 exercise all of the powers vested in it by NRS Chapter 116, including the collection of assessments for
17 common expenses at Ruby Lakes Estates. NRS 116.3102. Valid at its inception, the HOA continues to
18 be so today.

19 The Court has reached this determination for two primary reasons: (1) the CC&Rs are "real
20 estate" within the meaning of NRS 116.081; and (2) the CC&Rs constitute contractual interests for
21 which Ruby Lakes Estates lot owners were obligated to pay at the time of the HOA's incorporation.
22 NRS 116.021.

23 ///

24
25 ¹ Since the Act was adopted in Nevada, NRS 116.3101 has read that "[a] unit-owners' association must be organized no
26 later than the date the first unit in the common-interest community is conveyed." As the HOA notes in its Opposition, if
this argument held water a valid homeowners association for a common interest community that existed before 1992
could never be formed.

27 ² In Caughlin Homeowners Ass'n, the Nevada Supreme Court held that: (1) a deed to commercial property in a
28 residential subdivision could not be made subject to later amendments to CC&Rs that created new covenants for which
notice was not given at the time of acquisition; and (2) the amendment to CC&Rs creating new property classifications
and assessments purporting to burden the commercial parcel had no legal effect. 109 Nev. at 267.

1 The Act was codified as NRS Chapter 116 in 1991. In 1999, the Legislature applied the Act to
2 common-interest communities created prior to 1992. NRS 116.1201.

3 Upon the HOA's incorporation in 2006, a "common-interest community" was defined as "real
4 estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real
5 estate other than that unit." NRS 116.021. As now, "real estate" was defined then as "any leasehold or
6 other estate or interest in, over or under land, including structures, fixtures and other improvements *and*
7 *interests that by custom, usage or law pass with a conveyance of land though not described in the*
8 *contract of sale or instrument of conveyance.*" NRS 116.081 (emphasis added).

9 By 2006, NRS 116.1201 had been amended to provide that the Act does not apply to a common-
10 interest community that was created before January 1, 1992, is located in a county whose population is
11 less than 50,000 and has less than 50 percent of the units within the community put to residential use,
12 unless a majority of the unit owners otherwise elect in writing. However, the Act continued to apply to
13 Ruby Lakes Estates, which in 2006 had at least 50 percent of its units in residential use.

14 In an unofficial 2008 Nevada Attorney General's Opinion (hereinafter "2008 AGO"), a Senior
15 Deputy Attorney General opined that: (1) commonly owned land, structures, fixtures or improvements,
16 separate from an individually-owned unit, were not required for a planned community to be a common-
17 interest community under the Act; and (2) covenants, conditions and restrictions may be "real estate"
18 within the definition set forth in NRS 116.081. Although somewhat flawed in its reasoning in the
19 Court's view, the 2008 AGO turned on the Act's expansive definition of real estate.³

20 A covenant is "[a] formal agreement or promise to do or not do a particular act." Black's Law
21 Dictionary 419 (9th ed. 2009). A covenant running with the land is "[a] covenant intimately and
22 inherently involved with the land and therefore binding subsequent owners and successor grantees
23 indefinitely." *Id.* at 421. "The important consequence of a covenant running with the land is that its
24 burden or benefit will thereby be imposed or conferred upon a subsequent owner of the property who
25 never actually agreed to it." *Id.* (quoting Roger Bernhardt, *Real Property in a Nutshell* 212 (3d ed.

26
27 ³ Artemis has harshly criticized the 2008 AGO, which the Court believes is a faithful interpretation of the text of the
28 statutes at issue. In an era when many are rightfully questioning the use of legislative history to interpret statutes, Artemis
invites the Court to rely on a legislator's 2009 interpretation of NRS 116.021 as support for the proposition that the 2008
AGO is wrong. Respectfully, the Court declines the invitation. See Antonin Scalia and Bryan A. Garner, *Reading Law:
The Interpretation of Legal Texts*, 391-96 (2012).

1 1993)). CC&Rs are a property interest separate from the land with which they run. Thirteen South, Ltd.
2 v. Summit Village, Inc., 109 Nev. 1218, 1221 (1993).

3 The Ruby Lakes Estates CC&Rs specifically provide that they exist for the mutual benefit of all
4 subdivision lots "and of each owner or user thereof." The CC&Rs expressly run with the land "and
5 inure to *and pass with the land and apply to and bind respective successors in interest thereto.*" The
6 CC&Rs are described as mutually enforceable equitable servitudes "in favor of each and every other
7 parcel included within [Ruby Lakes Estates]." "[I]nterests that by custom, usage or law pass with the
8 conveyance of land though not described in the contract of sale or instrument of conveyance" clearly
9 encompass CC&Rs that run with the land. In 2006 and today, no reasonable argument can be made that
10 the CC&Rs do not constitute "real estate" within the meaning of NRS 116.081.

11 Common sense and logic dictate that the substance of the CC&Rs should determine whether they
12 comprised "real estate" *for which lot owners were obligated to pay*, thus rendering Ruby Lakes Estates a
13 "common interest community" to which NRS Chapter 116 applied upon the HOA's incorporation.

14 The CC&Rs include a statement that they exist "to provide for the development and maintenance
15 of an aesthetically pleasing and harmonious community of residential dwellings for the purpose of
16 preserving a high quality of use and appearance and maintaining the value of each and every lot and
17 parcel" of Ruby View Estates.

18 The CC&Rs establish the ARC "for the general purpose of providing for the maintenance of a
19 high standard of architectural design, color and landscaping harmony and to preserve and enhance
20 aesthetic qualities and high standards of construction in the development and maintenance" of Ruby
21 Lake Estates. The ARC is charged in the CC&Rs with: (1) determining CC&R compliance; and (2)
22 promulgating and adopting reasonable rules and regulations in order to perform its duties.

23 The CC&Rs also impose restrictions on what can be constructed on the lots of Ruby Lakes
24 Estates. There are requirements for initial construction and subsequent additions, improvements or
25 changes to any structures built upon the lots. The CC&Rs contain many use conditions, including
26 conditions that: (1) each lot contain only one dwelling; (2) plans for original construction and alterations
27 of structures and fences be approved in writing by an ARC before construction or an alteration begins;
28 (3) all construction conform with current requirements of the Uniform Building Code, Uniform

1 Plumbing Code, National Electric Code and Uniform Fire Code; (4) all housing not built or constructed
2 on site be approved by the Nevada Division of Manufactured Housing; and (5) all mobile or modular
3 housing be approved by the ARC.

4 Finally, the CC&Rs provide the ARC the power to: (1) grant variances; and (2) enforce the
5 CC&Rs by bringing an action at law or in equity.

6 Upon the HOA's incorporation, the CC&Rs provided assurance to those who purchased property
7 within Ruby Lakes Estates that there are legally enforceable standards and requirements with which
8 neighboring homes must comport, making it foreseeable that the subdivision would continue to have
9 consistent quality and value. Then, as now, lot owners cannot change their property to the extent that it
10 might adversely affect the property values within Ruby Lakes Estates. Then, as now, the CC&Rs added
11 value for all units in Ruby Lakes Estates, including the establishment of an enforcement body, the
12 operations for which lot owners were obligated to pay at least by implication. See Evergreen Highlands
13 Ass'n v. West, 73 P.3d 1, 7-9 (Colorado 2003) (even in absence of express covenant, CC&Rs for
14 subdivision in UCIOA jurisdiction were sufficient to create a common interest community by
15 implication with concomitant power to impose mandatory dues on lot owners to pay for maintenance of
16 common areas; implied obligation may be found where the declaration expressly creates body for
17 enforcing use restrictions and design controls, but fails to include a mechanism for providing the funds
18 necessary to carry out its functions, and when such an implied obligation is established the subdivision is
19 a common interest community); Restatement (Third) of Property: Servitudes § 6.2 cmt. a (2000).

20 For all of these reasons, pursuant to the provisions of NRS 116.021, and using the definition for
21 real estate in NRS 116.081, the CC&Rs constituted *real estate, other than the unit owned, for which unit*
22 *owners are obligated to pay* when the HOA was incorporated.⁴ A common interest community at the
23 HOA's incorporation, the HOA is not "invalid" today.

24 ///


25 ///

26 _____
27 ⁴ The Court also concludes that the Ruby Lakes Estates plat also constitutes "real estate," other than the unit owned, for
28 which unit owners are obligated to pay. NRS 116.2101 (common-interest community may be created pursuant to Act
only by recording a declaration executed in the same manner as a deed); NRS 116.2109(1) (plats are part of the
declaration). The plat contains "common elements" as that term is currently defined in NRS 116.017, including fixtures
such as gates.

1 4. Order

2 For all of the foregoing reasons, the Plaintiff's Motion for Summary Judgment is hereby
3 DENIED.

4 DATED this 12 day of February, 2013.

5
6 

7 The Honorable Alvin R. Kacin
8 District Judge/Department 2
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF MAILING

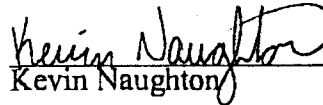
Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of Alvin R. Kacin, District Judge, Fourth Judicial District Court, Department 2, and that on this 12 day of February, 2013, served by the following method of service:

<input checked="" type="checkbox"/> Regular US Mail	<input type="checkbox"/> Overnight UPS
<input type="checkbox"/> Certified US Mail	<input type="checkbox"/> Overnight Federal Express
<input type="checkbox"/> Registered US Mail	<input type="checkbox"/> Fax to # _____
<input type="checkbox"/> Overnight US Mail	<input type="checkbox"/> Hand Delivery
<input type="checkbox"/> Personal Service	<input checked="" type="checkbox"/> Box in Clerk's Office

a true copy of the foregoing document addressed to:

Travis Gerber, Esq.
491 Fourth Street
Elko, Nevada 89801
[Box in Clerk's Office]

Gayle A. Kern, Esq.
5421 Kietzke Lane, Suite 200
Reno, Nevada 89511
[Regular US Mail]


Kevin Naughton



1 CASE NO. CV-C-12-175

2 DEPT. NO. I

3
4
5 IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF ELKO

7 ARTEMIS EXPLORATION COMPANY, a
8 Nevada Corporation,

9 Plaintiffs,

10 vs.

NOTICE OF ENTRY OF ORDER
GRANTING DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

11 RUBY LAKE ESTATES HOMEOWNER'S
12 ASSOCIATION AND DOES I-X,

13 Defendants.

14 RUBY LAKE ESTATES HOMEOWNER'S
15 ASSOCIATION,

16 Counterclaimant,

17 vs.

18 ARTEMIS EXPLORATION COMPANY, a
19 Nevada Corporation,

20 Counterdefendant.

21 PLEASE TAKE NOTICE that on February 14, 2013, an Order Granting Defendant's Motion
22 for Summary Judgment was entered by the Court. A copy of the Order Granting Defendant's Motion
23 for Summary Judgment is attached hereto.

24 ///

25 ///

26 ///

27 ///

28 ///

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document filed in the above-entitled case does not contain the social security number of any person.

DATED this 25 day of February, 2013.

KERN & ASSOCIATES, LTD.



GAYLE A. KERN, ESQ.

NEVADA BAR #1620

5421 Kietzke Lane, Suite 200

RENO, NEVADA 89511

Telephone: 775-324-5930

Fax: 775-324-6173

Email: gaylekern@kernltd.com

Attorneys for Ruby Lake Estates

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law firm of Kern & Associates, Ltd., and that on this day I served the foregoing document described as follows:

NOTICE OF ENTRY OF ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

on the parties set forth below, at the addresses listed below by:

X Placing an original or true copy thereof in a sealed envelope place for collection and mailing in the United States Mail, at Reno, Nevada, first class mail, postage paid, following ordinary business practices, addressed to:

____ Via facsimile transmission

____ Via e-mail.

____ Personal delivery, upon:

____ United Parcel Service, Next Day Air, addressed to:

Travis Gerber, Esq.
Gerber Law Offices, LLP
491 4th Street
Elko, NV 89801

DATED this 20th day of February, 2013.

Teresa A. Gearhart
TERESA A. GEARHART

1 Case No. CV-C-12-175

2 Dept. No. 2

FILED

2013 FEB 14 PM 2:35

ELKO CO DISTRICT COURT

CLERK DEPUTY *VP*

3
4
5
6 IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
7 OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO
8

9 ARTEMIS EXPLORATION COMPANY,
10 a Nevada Corporation,

11 Plaintiff,

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

12 v.

13 RUBY LAKE ESTATES HOMEOWNER'S
14 ASSOCIATION AND DOES I-X,

15 Defendants.
16 _____ /

17 This is a dispute between a property owner and its homeowners association.

18 On May 30, 2012, Defendant/Counterclaimant Ruby Lakes Homeowner's Association
19 (hereinafter "the HOA") filed a Motion for Summary Judgment (hereinafter "MSJ") against
20 Plaintiff/Counterdefendant Artemis Exploration Company (hereinafter "Artemis"). Artemis filed an
21 "Opposition to Defendant's Motion for Summary Judgment" (hereinafter "Opposition") on June 22,
22 2012. The HOA replied to the Opposition on July 5, 2012.

23 By its MSJ, the HOA seeks the entry of summary judgment as to all Artemis claims, which
24 include claims for declaratory relief and damages. In its Opposition, Artemis abandoned its claims for
25 damages, one of which is for fraud.

26 Having carefully considered the matter, the Court is granting the MSJ.

27 ///

28 ///

///

1 **1. Law of Summary Judgment**

2 “A party seeking to recover upon a claim . . . may, at any time after the expiration of 20 days
3 from the commencement of the action . . . move with or without supporting affidavits for a summary
4 judgment in the party's favor upon all or any part thereof.” NRCP 56(a).

5 NRCP 56(c) reads, in pertinent part:

6 Motions for summary judgment and responses thereto shall include a concise statement
7 setting forth each fact material to the disposition of the motion which the party claims is or
8 is not genuinely in issue, citing the particular portions of any pleading, affidavit, deposition,
9 interrogatory, answer, admission, or other evidence upon which the party relies. The
10 judgment sought shall be rendered forthwith if the pleadings, depositions, answers to
11 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 a judgment
as a matter of law. A summary judgment, interlocutory in character, may be rendered on the
issue of liability alone although there is a genuine issue as to the amount of damages. An
order granting summary judgment shall set forth the undisputed material facts and legal
determinations on which the court granted summary judgment.

12 NRCP 56(e) reads, in relevant part:

13 Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such
14 facts as would be admissible in evidence, and shall show affirmatively that the affiant is
15 competent to testify to the matters stated therein. Sworn or certified copies of all papers or
16 parts thereof referred to in an affidavit shall be attached thereto or served therewith. The
17 court may permit affidavits to be supplemented or opposed by depositions, answers to
18 interrogatories, or further affidavits. When a motion for summary judgment is made and
supported as provided in [NRCP 56], an adverse party may not rest upon the mere allegations
or denials of the adverse party's pleading, but the adverse party's response, by affidavits or
as otherwise provided in [NRCP 56], must set forth specific facts showing that there is a
genuine issue for trial. If the adverse party does not so respond, summary judgment, if
appropriate, shall be entered against the adverse party.

19 “Summary judgment is appropriate and ‘shall be rendered forthwith’ when the pleadings and
20 other evidence on file demonstrate that no ‘genuine issue as to any material fact [remains] and that the
21 moving party is entitled to a judgment as a matter of law.’” Wood v. Safeway, Inc., 121 Nev. 724, 729
22 (2005) (citing NRCP 56(c); Tucker v. Action Equip. and Scaffold Co., 113 Nev. 1349, 1353 (1997)).
23 “[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn
24 from it, must be viewed in a light most favorable to the nonmoving party.” Id. “The burden of proving
25 the absence of triable facts is upon the moving party.” Butler v. Bogdanovich, 101 Nev. 449, 451
26 (1985).

27 “The substantive law controls which factual disputes are material and will preclude summary
28 judgment; other factual disputes are irrelevant.” Wood, 121 Nev. at 731 (citing Anderson v. Liberty

1 Lobby, Inc., 477 U.S. 242, 248 (1986)). "A factual dispute is genuine when the evidence is such that a
2 rational trier of fact could return a verdict for the nonmoving party." Id. (citations omitted).

3 "While the pleadings and other proof must be construed in a light most favorable to the
4 nonmoving party, that party bears the burden to 'do more than simply show that there is some
5 metaphysical doubt' as to the operative facts in order to avoid summary judgment being entered in the
6 moving party's favor." Id. at 732. "The nonmoving party 'must, by affidavit or otherwise, set forth
7 specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered
8 against him.'" Id. (citing Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110 (1992)). The nonmoving
9 party "'is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture.'" Bulbman, 108 Nev. at 110 (quoting Collins v. Union Fed. Savings & Loan, 99 Nev. 284, 302 (1983)).
10

11 **2. Undisputed Material Facts**

12 The facts material to the disposition of the MSJ are in the following recitation of undisputed fact.
13 The Court has relied much on the HOA's pinpoint citations to the record.

14 Artemis is a Nevada corporation whose president, secretary, treasurer and sole director is
15 Elizabeth Essington (hereinafter "Mrs. Essington"). Mrs. Essington's husband is George "Mel"
16 Essington (hereinafter "Mr. Essington").

17 The official Plat Map for Ruby Lake Estates was recorded in Elko County on September 15,
18 1989, by Stephen and Mavis Wright (hereinafter "the Wrights") as File No. 281674. Included on the
19 Plat Map are residential lots within the community, as well as roadways, easements, building set-back
20 lines and street monuments.

21 With respect to the roadways, the first sheet of the Plat Map reads:

22 At a regularly held meeting of the Board of Commissioners of Elko County, State of Nevada,
23 held on the 5th day of July, 1989, this Plat was approved as a Final Plat pursuant to NRS
24 278.328. The Board does hereby reject on behalf of the public all streets or roadways for
maintenance purposes and does hereby accept all streets and easements therein offered for
utility, drainage and access purposes only as dedicated for public use.

25 The roads within Ruby Lake Estates have never been accepted for maintenance by Elko County.
26 Yet, Elko County requires the roadways and adjoining ditches and culverts to be maintained for health
27 and safety reasons.

28 ///

1 On October 25, 1989, the Wrights recorded a Declaration of Reservations, Conditions and
2 Restrictions for Ruby Lake Estates (hereinafter "CC&Rs"). The CC&Rs were recorded in the Office of
3 the Elko County Recorder.

4 Article I of the CC&Rs provides:

5 The real property affected hereby is subjected to the imposition of the covenants, conditions,
6 restrictions and reservations specified herein to provide for the development and maintenance
7 of an aesthetically pleasing and harmonious community of residential dwellings for the
purpose of preserving a high quality of use and appearance and maintaining the value of each
and every lot and parcel of said property . . ."

8 Artemis acquired Lot 6 of Block G (hereinafter Lot G-6) of Ruby Lake Estates on June 21, 1994.

9 Artemis acquired Lot 2 of Block H (hereinafter Lot H-2) of Ruby Lake Estates on March 9, 2010.

10 Both Lot G-6 and Lot H-2 were created by the Plat Map and subject to the CC&Rs. Title to the
11 lots was taken subject to the CC&Rs.

12 The HOA Articles of Incorporation were filed by Lee Perks on January 16, 2006.

13 The Initial Association Registration Form was filed on March 31, 2006, with the Office of the
14 Ombudsman for Common-Interest Communities.

15 In filing the Articles of Incorporation and forming the HOA, the owners of Ruby Lake Estates
16 took action consistent with the opinion of its counsel.

17 For over seventeen years (1994-2011), Mr. and Mrs. Essington represented that Lot G-6 was
18 owned by one or both of them.

19 Mr. Essington represented to members of the Association that he had the capacity and authority
20 to act on behalf of Artemis and/or Mrs. Essington.

21 Mr. Essington served on the HOA's Board of Directors (hereinafter "the Board") from 2007 until
22 he resigned in January, 2011.

23 Following his election to the Board, Mr. Essington signed a Declaration of Certification as a
24 Common-Interest Community Board Member, as required by NRS 116.31034(9).

25 Representing himself to be a lot owner, Mr. Essington seconded a motion to approve its Bylaws.

26 The Bylaws specifically provide, "All officers must be property owners and members of the
27 Ruby Lake Homeowners Association in good standing their entire term of office."

28 ///

1 Mr. Essington violated this provision when, for sixteen years, he held himself out as an owner of
2 a lot.

3 The Bylaws also read: "An assessment fee will be charged yearly for maintenance, roads, fire
4 protection, and other expenditures as the board allows or required by Elko County."

5 Maintenance of the roadways as well as ditches, culverts and other improvements has repeatedly
6 been recognized as the collective responsibility of the owners of the lots within the Ruby Lake Estates
7 subdivision, including Artemis.

8 Road maintenance by the HOA has been an ongoing topic of communications between members
9 and at HOA meetings in the years since the Wrights turned over maintenance in 1997.

10 After becoming a member of the Board, Mr. Essington voted to levy assessments against all
11 HOA members for roadway maintenance, weed abatement and the repair of signs and culverts.

12 The HOA holds title to real property which was deeded to it by the Wrights. The members of the
13 HOA, including Mr. Essington while serving on the Board and while representing himself to be an
14 owner of Lot G-6, voted to accept title to this real property, pay documentary transfer tax and procure
15 liability insurance in the name of the HOA.

16 On July 14, 2009, the Board caused a Reserve Study to be prepared as required by NRS
17 116.31153. The Reserve Study was prepared by an independent and licensed community association
18 consultant. The Reserve Study identified the reserve items of the Association as cattle guards, dirt road
19 maintenance, fencing, gates, entrance signs and street signs. Mr. Essington voted to approve the Reserve
20 Study at the August 8, 2009, meeting of the Board. Mr. Essington voted to levy assessments in
21 accordance with the Reserve Study and the 2010 budget, which he also approved.

22 Since the HOA's formation, assessments have been levied and budgets were adopted by
23 members to pay for road and real property maintenance, as well as fire protection. Mr. Essington
24 approved these budgets and assessments. Mr. and Mrs. Essington regularly paid assessments from their
25 personal bank account.

26 In 2009, a dispute arose between Mrs. Essington and the Ruby Lakes Estates Architectural
27 Review Committee (ARC) regarding the construction of a large building to house machinery and other
28 equipment at the subdivision. The ARC and the Board took the position that the structure was permitted

1 under the CC&Rs.

2 Artemis stopped paying its HOA assessments, all of which had been approved by Mr. Essington
3 as a Board member. Invoices generated in the ordinary course of business were sent to Artemis care of
4 Mr. and Mrs. Essington. Eventually, the HOA hired a collection agency to try and collect the delinquent
5 assessments. It is the sending of these invoices and notice of the HOA's intent to record a Notice of
6 Delinquent Assessment Lien.

7 **3. Analysis**

8 The Court has spent hour upon hour studying the memoranda of points and authorities and
9 supporting exhibits on file in this case.

10 In its Opposition, Artemis makes nonsensical substantive arguments. For example, Artemis
11 argues that the HOA is "invalid" under NRS 116.3101(1) "because the lots of Ruby Lakes Estates []
12 were not bound by any covenant to pay dues or participate in a homeowner's association prior to the
13 conveyance of the lots." The HOA effectively rebuts this argument and others in its MSJ.¹ Artemis also
14 unconvincingly argues that Caughlin Homeowners Ass'n v. Caughlin Club, 109 Nev. 264 (1993), a case
15 with facts strikingly different from this one and predating the application of NRS Chapter 116 to
16 common interest communities created before 1992, is dispositive.²

17 In the end, the Court has concluded that Ruby Lakes Estates qualified as a common-interest
18 community to which the Uniform Common-Interest Ownership Act (hereinafter "the Act") applied when
19 the HOA was incorporated. Once the HOA was incorporated as required by the Act, it was entitled to
20 exercise all of the powers vested in it by NRS Chapter 116, including the collection of assessments for
21 common expenses at Ruby Lakes Estates. NRS 116.3102. Valid at its inception, the HOA continues to
22 be so today.

23 ///

24 ¹ Since the Act was adopted in Nevada, NRS 116.3101 has read that "[a] unit-owners' association must be organized no
25 later than the date the first unit in the common-interest community is conveyed." As the HOA notes in its Opposition, if
26 this argument held water a valid homeowners association for a common interest community that existed before 1992
could never be formed.

27 ² In Caughlin Homeowners Ass'n, the Nevada Supreme Court held that: (1) a deed to commercial property in a
28 residential subdivision could not be made subject to later amendments to CC&Rs that created new covenants for which
notice was not given at the time of acquisition; and (2) the amendment to CC&Rs creating new property classifications
and assessments purporting to burden the commercial parcel had no legal effect. 109 Nev. at 267.

1 The Court has reached this determination for two primary reasons: (1) the CC&Rs are “real
2 estate” within the meaning of NRS 116.081; and (2) the CC&Rs constitute contractual interests for
3 which Ruby Lakes Estates lot owners were obligated to pay at the time of the HOA’s incorporation.
4 NRS 116.021.

5 The Act was codified as NRS Chapter 116 in 1991. In 1999, the Legislature applied the Act to
6 common-interest communities created prior to 1992. NRS 116.1201.

7 Upon the HOA’s incorporation in 2006, a “common-interest community” was defined as “real
8 estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real
9 estate other than that unit.” NRS 116.021. As now, “real estate” was defined then as “any leasehold or
10 other estate or interest in, over or under land, including structures, fixtures and other improvements *and*
11 *interests that by custom, usage or law pass with a conveyance of land though not described in the*
12 *contract of sale or instrument of conveyance.*” NRS 116.081 (emphasis added).

13 By 2006, NRS 116.1201 had been amended to provide that the Act does not apply to a common-
14 interest community that was created before January 1, 1992, is located in a county whose population is
15 less than 50,000 and has less than 50 percent of the units within the community put to residential use,
16 unless a majority of the unit owners otherwise elect in writing. However, the Act continued to apply to
17 Ruby Lakes Estates, which in 2006 had at least 50 percent of its units in residential use.

18 In an unofficial 2008 Nevada Attorney General’s Opinion (hereinafter “2008 AGO”), a Senior
19 Deputy Attorney General opined that: (1) commonly owned land, structures, fixtures or improvements,
20 separate from an individually-owned unit, were not required for a planned community to be a common-
21 interest community under the Act; and (2) covenants, conditions and restrictions may be “real estate”
22 within the definition set forth in NRS 116.081. Although somewhat flawed in its reasoning in the
23 Court’s view, the 2008 AGO turned on the Act’s expansive definition of real estate.³

24 A covenant is “[a] formal agreement or promise to do or not do a particular act.” Black’s Law
25 Dictionary 419 (9th ed. 2009). A covenant running with the land is “[a] covenant intimately and
26

27 ³ Artemis has harshly criticized the 2008 AGO, which the Court believes is a faithful interpretation of the text of the
28 statutes at issue. In an era when many are rightfully questioning the use of legislative history to interpret statutes, Artemis
invites the Court to rely on a legislator’s 2009 interpretation of NRS 116.021 as support for the proposition that the 2008
AGO is wrong. Respectfully, the Court declines the invitation. See Antonin Scalia and Bryan A. Garner, Reading Law:
The Interpretation of Legal Texts, 391-96 (2012).

1 inherently involved with the land and therefore binding subsequent owners and successor grantees
2 indefinitely." Id. at 421. "The important consequence of a covenant running with the land is that its
3 burden or benefit will thereby be imposed or conferred upon a subsequent owner of the property who
4 never actually agreed to it." Id. (quoting Roger Bernhardt, Real Property in a Nutshell 212 (3d ed.
5 1993)). CC&Rs are a property interest separate from the land with which they run. Thirteen South, Ltd.
6 v. Summit Village, Inc., 109 Nev. 1218, 1221 (1993).

7 The Ruby Lakes Estates CC&Rs specifically provide that they exist for the mutual benefit of all
8 subdivision lots "and of each owner or user thereof." The CC&Rs expressly run with the land "and
9 inure to *and pass with the land and apply to and bind respective successors in interest thereto.*" The
10 CC&Rs are described as mutually enforceable equitable servitudes "in favor of each and every other
11 parcel included within [Ruby Lakes Estates]." "[I]nterests that by custom, usage or law pass with the
12 conveyance of land though not described in the contract of sale or instrument of conveyance" clearly
13 encompass CC&Rs that run with the land. In 2006 and today, no reasonable argument can be made that
14 the CC&Rs do not constitute "real estate" within the meaning of NRS 116.081.

15 Common sense and logic dictate that the substance of the CC&Rs should determine whether they
16 comprised "real estate" *for which lot owners were obligated to pay*, thus rendering Ruby Lakes Estates a
17 "common interest community" to which NRS Chapter 116 applied upon the HOA's incorporation.

18 The CC&Rs include a statement that they exist "to provide for the development and maintenance
19 of an aesthetically pleasing and harmonious community of residential dwellings for the purpose of
20 preserving a high quality of use and appearance and maintaining the value of each and every lot and
21 parcel" of Ruby View Estates.

22 The CC&Rs establish the ARC "for the general purpose of providing for the maintenance of a
23 high standard of architectural design, color and landscaping harmony and to preserve and enhance
24 aesthetic qualities and high standards of construction in the development and maintenance" of Ruby
25 Lake Estates. The ARC is charged in the CC&Rs with: (1) determining CC&R compliance; and (2)
26 promulgating and adopting reasonable rules and regulations "in order to carry out its purpose."

27 The CC&Rs also impose restrictions on what can be constructed on the lots of Ruby Lakes
28 Estates. There are requirements for initial construction and subsequent additions, improvements or

1 changes to any structures built upon the lots. The CC&Rs contain many use conditions, including
2 conditions that: (1) each lot contain only one dwelling; (2) plans for original construction and alterations
3 of structures and fences be approved in writing by an ARC before construction or an alteration begins;
4 (3) all construction conform with current requirements of the Uniform Building Code, Uniform
5 Plumbing Code, National Electric Code and Uniform Fire Code; (4) all housing not built or constructed
6 on site be approved by the Nevada Division of Manufactured Housing; and (5) all mobile or modular
7 housing be approved by the ARC.

8 Finally, the CC&Rs provide the ARC the power to: (1) grant variances; and (2) enforce the
9 CC&Rs by bringing an action at law or in equity.

10 Upon the HOA's incorporation, the CC&Rs provided assurance to those who purchased property
11 within Ruby Lakes Estates that there are legally enforceable standards and requirements with which
12 neighboring homes must comport, making it foreseeable that the subdivision would continue to have
13 consistent quality and value. Then, as now, lot owners cannot change their property to the extent that it
14 might adversely affect the property values within Ruby Lakes Estates. Then, as now, the CC&Rs added
15 value for all units in Ruby Lakes Estates, including the establishment of an enforcement body, the
16 operations for which lot owners were obligated to pay at least by implication. See Evergreen Highlands
17 Ass'n v. West, 73 P.3d 1, 7-9 (Colorado 2003) (even in absence of express covenant, CC&Rs for
18 subdivision in UCIOA jurisdiction were sufficient to create a common interest community by
19 implication with concomitant power to impose mandatory dues on lot owners to pay for maintenance of
20 common areas; implied obligation may be found where the declaration expressly creates body for
21 enforcing use restrictions and design controls, but fails to include a mechanism for providing the funds
22 necessary to carry out its functions, and when such an implied obligation is established the subdivision is
23 a common interest community); Restatement (Third) of Property: Servitudes § 6.2 cmt. a (2000); see
24 also Southeastern Jurisdictional Admin. Council, Inc. v. Emerson, 683 S.E.2d 366 (N.C. 2009)
25 (reversing Southeastern Jurisdictional Admin. Council, Inc. v. Emerson, 655 S.E.2d 719, 721 (N.C. App.
26 2008), in which the North Carolina Court of Appeals opined that "[t]he duty to pay an assessment is an
27 affirmative obligation; strict construction of the [CC&Rs] would require such a duty to have specific
28 authorization, not a secondary authorization under the rubric of rules and regulations").

1 For all of these reasons, pursuant to the provisions of NRS 116.021, and using the definition for
2 real estate in NRS 116.081, the CC&Rs constituted *real estate, other than the unit owned, for which unit*
3 *owners are obligated to pay* when the HOA was incorporated.⁴ A common interest community at the
4 HOA's incorporation, the HOA is valid today.

5 **4. Order**

6 For all of the foregoing reasons, Artemis is not entitled to the declaratory relief sought in its
7 Complaint, and the Defendant's Motion for Summary Judgment is hereby GRANTED.

8
9 DATED this 14 day of February, 2013.

10
11 

12 The Honorable Alvin R. Kacin
13 District Judge/Department 2
14
15
16
17
18
19
20
21
22
23
24
25
26

27 ⁴ The Court also concludes that the Ruby Lakes Estates plat also constitutes "real estate," other than the unit owned, for
28 which unit owners are obligated to pay. NRS 116.2101 (common-interest community may be created pursuant to Act
only by recording a declaration executed in the same manner as a deed); NRS 116.2109(1) (plats are part of the
declaration). The plat contains "common elements" as that term is currently defined in NRS 116.017, including fixtures
such as gates.

CERTIFICATE OF MAILING

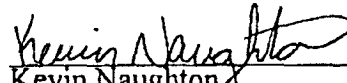
Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of Alvin R. Kacin, District Judge, Fourth Judicial District Court, Department 2, and that on this 14 day of February, 2013, served by the following method of service:

- | | |
|---|---|
| <input checked="" type="checkbox"/> Regular US Mail | <input type="checkbox"/> Overnight UPS |
| <input type="checkbox"/> Certified US Mail | <input type="checkbox"/> Overnight Federal Express |
| <input type="checkbox"/> Registered US Mail | <input type="checkbox"/> Fax to # _____ |
| <input type="checkbox"/> Overnight US Mail | <input type="checkbox"/> Hand Delivery |
| <input type="checkbox"/> Personal Service | <input checked="" type="checkbox"/> Box in Clerk's Office |

a true copy of the foregoing document addressed to:

Travis Gerber, Esq.
491 Fourth Street
Elko, Nevada 89801
[Box in Clerk's Office]

Gayle A. Kern, Esq.
5421 Kietzke Lane, Suite 200
Reno, Nevada 89511
[Regular US Mail]


Kevin Naughton



FILED

Case No. CV-C-12-175

Dept. No. 2

2013 MAY 15 PM 4:03

ELKO CO DISTRICT COURT

CLERK _____ DEPUTY *BR*

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

ARTEMIS EXPLORATION COMPANY,
a Nevada Corporation,

Plaintiff,

v.

RUBY LAKE ESTATES HOMEOWNER'S
ASSOCIATION AND DOES I-X,

Defendants.

**ORDER GRANTING DEFENDANT'S
MOTION FOR CONFIRMATION AND
JUDGMENT ON AN ARBITRATION
AWARD AND AWARD OF ATTORNEY'S
FEES AND COSTS**

On February 12, 2013, the Court entered an Order Denying Plaintiff's Motion for Summary Judgment.

On February 14, 2013, the Court entered an Order Granting Defendant's Motion for Summary Judgment.

On March 1, 2013, Defendant Ruby Lake Estates Homeowner's Association (HOA) filed a Motion for Confirmation and Judgment on an Arbitration Award [NRS 38.239 and NRS 38.330(5)] and Award of Attorney's Fees and Costs, a supporting Affidavit, and a Memorandum of Costs.

On March 15, 2013, Plaintiff Artemis Exploration Company (Artemis) filed an Opposition.

On March 29, 2013, the HOA filed a Reply and a Supplemental Affidavit.

On April 4, 2013, the HOA filed a Request for Review.

1. Confirmation of Arbitration Award

NRS 38.243 provides that upon granting an order confirming an arbitration award, "the court shall enter judgment in conformity therewith." NRS 38.243(2) additionally provides that "[a] court may

1 allow reasonable costs of the motion and subsequent judicial proceedings.” The arbitrator in this case,
2 Leonard Gang, entered an order on February 8, 2012, awarding the HOA attorney’s fees in the amount of
3 \$22,092.00 and costs in the amount of \$4,718.67. Because the HOA was the prevailing party at both the
4 arbitration level and before this Court, the Court hereby affirms the arbitrator’s award of costs and fees
5 in the total amount of \$26,810.67.

6 **2. Additional Attorney’s Fees and Costs**

7 NRS 38.243(3) provides:

8 On application of a prevailing party to a contested judicial proceeding under NRS 38.239,
9 38.241 or 38.242, the court may add reasonable attorney’s fees and other reasonable
10 expenses of litigation incurred in a judicial proceeding after the award is made to a
judgment confirming, vacating without directing a rehearing, modifying or correcting an
award.

11 NRS 38.239 allows a party to move for an order confirming an arbitration award after a party has
12 received notice of an arbitration award. Here, the Court entered summary judgment in the HOA’s favor,
13 thereby arriving at the same ultimate conclusion as the arbitrator. Although the Court’s analysis differed
14 from the arbitrator’s, the Court finds that it confirmed the arbitrator’s award for purposes of the statute.
15 Therefore, the Court “may add reasonable attorney’s fees and other reasonable expenses of litigation” to
16 the arbitration award. NRS 38.243(3).

17 In determining the reasonableness of attorney’s fees, the Court looks to the factors established in
18 Brunzell v. Golden Gate National Bank, 85 Nev. 345, 349 (1969). The Brunzell court held that district
19 courts should consider four factors in determining the reasonableness of attorney’s fees: 1. the qualities
20 of the attorney, 2. the character of the work to be done, 3. the actual work performed by the attorney, and
21 4. the case’s result. Haley v. District Court, 128 Nev. Adv. Op. 16 (2012) *citing* Brunzell, 85 Nev. at
22 349.

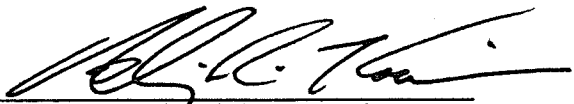
23 Here, the HOA’s attorney, Gayle Kern, submitted an affidavit in support of the request for
24 attorney’s fees outlining her professional accomplishments and extensive expertise in the area of
25 common interest communities. Given Ms. Kern’s experience and having reviewed the pleadings filed in
26 this case, the Court finds that Ms. Kern is highly qualified in this area of the law. The work to be
27 performed in this case consisted of defending the HOA against a claim through several stages of
28 proceedings. The actual work performed by Ms. Kern is outlined in her affidavit and the Court adopts

1 that affidavit as a record of her work in this case. Finally, the Court notes that this case resolved in the
2 HOA's favor. Therefore, the Court finds that Ms. Kern's request for attorney's fees satisfies the
3 Brunzell reasonableness factors and awards the HOA additional attorney's fees in the amount of
4 \$31,812.00 and costs in the amount of \$1,536.14.

5 **3. Order**

6 For all of the foregoing reasons, the Court affirms the award of the arbitrator and awards the
7 HOA total attorney's fees in the amount of \$53,904.00 and additional costs in the amount of \$1,536.14.

8
9 DATED this 14 day of May, 2013.

10
11 
12 The Honorable Alvin R. Kacin
13 District Judge/Department 2
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 CERTIFICATE OF MAILING

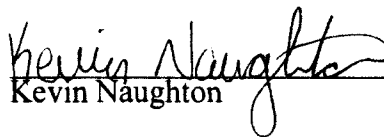
2 Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of Alvin R. Kacin, District
3 Judge, Fourth Judicial District Court, Department 2, and that on this 15 day of May, 2013, served by
the following method of service:

- 4 (X) Regular US Mail () Overnight UPS
5 () Certified US Mail () Overnight Federal Express
6 () Registered US Mail () Fax to # _____
() Overnight US Mail () Hand Delivery
() Personal Service (X) Box in Clerk's Office

7 a true copy of the foregoing document addressed to:

8 Travis Gerber, Esq.
9 491 Fourth Street
Elko, Nevada 89801
[Box in Clerk's Office]

10 Gayle A. Kern, Esq.
11 5421 Kietzke Lane, Suite 200
12 Reno, Nevada 89511
[Regular US Mail]

13 
14 Kevin Naughton
15
16
17
18
19
20
21
22
23
24
25
26
27
28



1 CASE NO. CV-C-12-175

2 DEPT. NO. I

3

4

5

6 IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN AND FOR THE COUNTY OF ELKO

8 ARTEMIS EXPLORATION COMPANY, a
9 Nevada Corporation,

10 Plaintiffs,

11 vs.

12 RUBY LAKE ESTATES HOMEOWNER'S
ASSOCIATION AND DOES I-X,

13 Defendants.

14 _____/
RUBY LAKE ESTATES HOMEOWNER'S
ASSOCIATION,

15 Counterclaimant,

16 vs.

17 ARTEMIS EXPLORATION COMPANY, a
18 Nevada Corporation,

19 Counterdefendant.
20 _____/

21 Ruby Lake Estates Homeowner's Association ("Ruby Lake"), Defendant above-named, by
22 and through its counsel of record, Gayle A. Kern, Esq., of Kern & Associates, Ltd., requests that the
23 Court enter an Amended Order Granting Defendant's Motion for Confirmation and Judgment on an
24 Arbitration Award and Award of Attorney's Fees and Costs ("Order"). It appears an error was
25 included and the court intended to confirm the Arbitration Award and award of fees in the amount
26 of \$26,810.67, and to award all fees and costs incurred in this district court action in the amount of
27 \$55,440.14.¹

28 ///

¹ The Association mistakenly failed to add the fees and costs together from this action.

1 In Paragraph 1 (Confirmation of Arbitration Award) of the Order, the Court states:

2 "...the Court hereby affirms the arbitrator's award of costs and fees in the total
3 amount of \$26,810.67."

4 In Paragraph 2 (Additional Attorney's Fees and Costs) of the Order, the Court awards the
5 additional attorney's fees and costs requested by Ruby Lake, but mis-states the amount:

6 "...awards the HOA additional attorney's fees in the amount of \$31,812.00 and costs
7 in the amount of \$1,536.14."

8 In Paragraph 3 (Order) of the Order, the Court states:

9 "For all of the foregoing reasons, the Court affirms the award of the arbitrator and
10 awards the HOA total attorney's fees in the amount of \$53,904.00 and additional
11 costs in the amount of \$1,536.14."

12 The relief requested in Ruby Lake's Reply to Plaintiff's Opposition to Motion for
13 Confirmation and Judgment on an Arbitration Award [NRS 38.239 and NRS 38.330(5)] and Award
14 of Attorney's Fees and Costs stated:

15 **"C. Conclusion and Relief Requested.**

16 The Association seeks judgment as confirmation of the Arbitration Award
17 and Order of retired Judge Leonard Gang issued in NRED Control 11-82, including
18 confirmation of the **award of attorney's fees and costs incurred in the underlying**
19 **NRED action in the amount of \$26,810.67.**

20 **In addition, the Association seeks an award of attorneys fees and costs**
21 **incurred in this District Court action** in the amount of \$53,904.00. Since filing its
22 Motion for Confirmation and Judgment on Arbitration Award [NRS 38.239 and NRS
23 38.330(5)] and Award of Attorney's Fees and Costs, the Association has spent
24 additional time and incurred additional costs in preparing this Reply to Plaintiff's
25 Opposition. The Supplemental Affidavit of Gayle A. Kern in support of this Motion
26 is filed contemporaneously herewith and is incorporated by reference."

27 It was clearly the Court's intent to affirm and award the combined attorney's fees and costs
28 from the Arbitration Award in the amount of \$26,810.67, and the attorney's fees (\$53,904.00) and
costs (\$1,536.14) incurred in defending this action.

Ruby Lake respectfully requests that the Court enter an Amended Order Granting Defendant's
Motion for Confirmation and Judgment on an Arbitration Award and Award of Attorney's Fees and
Costs to correct the total attorney's fees and costs awarded to be \$82,250.81. A proposed form of
Judgment will be submitted under separate cover reflecting the Court's findings regarding the
Arbitration Award and the fees and costs incurred in this action.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document filed in the above-entitled case does not contain the social security number of any person.

DATED this 17th day of May, 2013

KERN & ASSOCIATES, LTD.



GAYLE A. KERN, ESQ.

NEVADA BAR #1620

5421 Kietzke Lane, Suite 200

RENO, NEVADA 89511

Telephone: 775-324-5930

Fax: 775-324-6173

Email: gaylekern@kernltd.com

Attorneys for Ruby Lake Estates

CERTIFICATE OF SERVICE

Pursuant to NRCPP 5(b), I certify that I am an employee of the law firm of Kern & Associates, Ltd., and that on this day I served the foregoing document described as follows:

**REQUEST FOR AMENDED ORDER GRANTING DEFENDANT'S MOTION FOR
CONFIRMATION AND JUDGMENT ON AN ARBITRATION AWARD AND AWARD
OF ATTORNEY'S FEES AND COSTS**

on the parties set forth below, at the addresses listed below by:

X Placing an original or true copy thereof in a sealed envelope place for collection and mailing in the United States Mail, at Reno, Nevada, first class mail, postage paid, following ordinary business practices, addressed to:

 Via facsimile transmission

 Via e-mail.

 Personal delivery, upon:

 United Parcel Service, Next Day Air, addressed to:

Travis Gerber, Esq.
Gerber Law Offices, LLP
491 4th Street
Elko, NV 89801

DATED this 17th day of May, 2013.

Teresa A. Gearhart
TERESA A. GEARHART



1 CASE NO. CV-C-175

2 DEPT. NO. I

3

4

5

IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

6

IN AND FOR THE COUNTY OF ELKO

7

8 ARTEMIS EXPLORATION COMPANY, a
Nevada Corporation,

9

Plaintiffs,

10

vs.

**JUDGMENT ON AN ARBITRATION
AWARD AND AWARD OF ATTORNEY'S
FEES AND COSTS**

11

RUBY LAKE ESTATES HOMEOWNER'S
ASSOCIATION AND DOES I-X,

12

Defendants.

13

14 RUBY LAKE ESTATES HOMEOWNER'S
ASSOCIATION,

15

Counterclaimant,

16

vs.

17

ARTEMIS EXPLORATION COMPANY, a
Nevada Corporation,

18

Counterdefendant.

19

20

21

22

23

Upon reading the Motion for Confirmation and Judgment on an Arbitration Award [NRS 38.239 and NRS 38.330(5)], Plaintiff's Opposition, Defendant's Reply, the Supplemental Affidavit of Gayle A. Kern in Support of Attorney's Fees and Costs, and the Court being fully informed in the premises;

24

NOW THEREFORE:

25

26

IT IS ORDERED AND ADJUDGED that the Arbitration Award attached hereto as Exhibit "1" is hereby confirmed, incorporated and adopted in its entirety.

27

28

IT IS THEREFORE ORDERED that Judgment is entered in favor of Ruby Lake Homeowner's Association, and against Artemis Exploration Company, as follows:

FILED

2013 JUN -6 AM 8:03

ELKO CO DISTRICT COURT

CLERK ~~NEVADA~~ *[Signature]*

1 1. Ruby Lake Estates is a Common-Interest Community and is subject to NRS Chapter
2 116. It was lawfully formed and is a validly existing non-profit common interest association.

3 2. As to the NRED action, Ruby Lake Estates is entitled to an award of attorney's fees
4 in the amount of \$22,092.00 and costs in the amount of \$4,718.67 for a total of \$26,810.67.

5 3. As to this action, Ruby Lake Estates is entitled to an award of attorney's fees in the
6 amount of \$53,904.00 and costs in the amount of \$1,536.14 for a total of \$55,440.14.

7 4. The total amount of the Judgment is Eighty-two Thousand Two Hundred Fifty Dollars
8 and Eighty-one Cents (\$82,250.81), plus interest at the judgment rate from the date of this Judgment
9 until paid in full.

10 DATED this 29 day of May, 2013.

11
12 
13 DISTRICT COURT JUDGE

14 **AFFIRMATION**

15 **Pursuant to NRS 239B.030**

16 The undersigned does hereby affirm that the preceding document filed in the above-entitled
17 case does not contain the social security number of any person.

18 Submitted by:

19 KERN & ASSOCIATES, LTD.

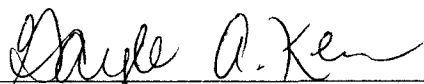
20 By 
21 GAYLE A. KERN, ESQ.
22 Attorneys for Ruby Lake Estates
23 Homeowners Association
24
25
26
27
28

EXHIBIT “1”

EXHIBIT “1”

P.O. Box 4394
Incline Village, Nevada 89450
Tel: (702) 525-2742
Fax: (775) 593-2765
Email: leonardgang@gmail.com

RECEIVED

FEB - 9 2012

GAYLE A. KERN, LTD

February 7, 2012

Travis W. Gerber, Esq.
491 Fourth Street
Elko, NV 89801

Gayle A. Kern, Esq.
5421 Kietzke Lane, #200
Reno, NV 89511

Re: Artemis Exploration Company v. Ruby Lake Estates Architectural Review
Committee & Ruby Lake Estates Homeowner's Association & Leroy Perks &
Valerie McIntyre & Dennis McIntyre & Michael Cecchi
ADR Control No. 11-82

The salient facts in this case are not in dispute. The legal effect of certain provisions of the Uniform Common-Interest Ownership Act (Chapter 116 of NRS) as applied to lots located in Ruby Lakes Estates, a subdivision located in Elko County, forms the essence of this complaint. Only the facts necessary to understanding this decision will be set forth.

FACTS

Artemis Exploration Company, the Complainant (hereinafter Artemis), owns two lots in Ruby Lakes Estates. The first was purchased in June 1994 and the second in March 2010. CC&Rs applicable to Ruby Lake Estates were recorded on October 25, 1989. The deeds clearly reflect that the property is subject to CC&Rs.

NRS 116.3101(1) entitled, "Organization of Unit-Owners Association" provides in part as follows:

"1. A unit-owners association must be organized no later than the date the first unit in the common-interest community is conveyed."

This act was passed by the Nevada legislature in 1991. The Ruby Lakes Homeowner's Association (hereinafter RLHOA or Association) filed its Articles of Incorporation on January 18, 2006. This action was taken after consulting counsel. The RLHOA assessed dues. Artemis paid dues for a period of time but now claims that the Association lacks the authority to "impose any fee, penalty, or assessment for any reason." It basis its argument on the fact that the Association was not formed prior to the conveyance of the first lot as required in NRS 116.3101(1) quoted above..

Artemis filed an "Intervention Affidavit" with the Real Estate Division December 18, 2009, claiming that Ruby Lakes Estates Homeowner's Association was an invalid homeowner's association. After reviewing the complaint, the Ombudsman's Office of the Real Estate Division opined as follows:

****For these reasons, we are not, as you requested, going to declare that Ruby Lakes Estates Homeowner's Association is invalid. In other words, it is our view that the Association is required to comply with the laws pertaining to homeowner's associations, specifically NRS 116 and related laws and regulations." Emphasis added.

RLHOA filed Articles of Association Cooperative Association with the Secretary of State approximately October 27, 2005. Acting on advice of counsel, RLHOA filed its initial Association Registration Form with the Real Estate Division approximately March 31, 2006. It adopted By Laws on August 12, 2006.

DISCUSSION

Artemis interprets the Ombudsman's Office decision as, "The Ombudsman took no action," in regard to their Intervention Affidavit. It asserts a myriad of reasons why, in its opinion, the RLHOA is not valid. RLHOA continues to comply with the laws and regulations pertaining to homeowner's associations as the Real Estate Ombudsman's office opined it should, including assessing dues to pay for insurance, having a reserve study conducted, leveeing assessments in accordance with the requirements of the reserve study and, in the case of Artemis, referring it to a collection agency due to its refusal to pay its assessments.

Artemis appears to argue that since the RLHOA was not formed until after the first lot was sold, it could never thereafter be brought into compliance with the law. It takes the position even though the law, requiring it to be formed no later than the date the first lot was sold, was not passed until two years after the first lot in the Association was sold.

DECISION

It is difficult to understand why, faced with the overwhelming evidence that RLHOA is a valid HOA, any one would continue to maintain that it is not. The HOA owns property within the subdivision, it maintains roads, signs, gates, culverts and fencing. It is incorporated as required by law. Indeed, Mr. Essington was at one time on the board of directors of RLHOA and was a moving force in its formation and incorporation. He signed and filed a "Declaration of Certification Common-Interest Community Board Member" with the Real Estate Division certifying that he read and understood the governing documents of the Association and the provisions of Chapter 116 of Nevada Revised Statutes and the Administrative Code. His wife, Elizebeth Essington, apparently owns all of the stock in Artemis.

Artemis has filed a complaint against each of the members of the board alleging misrepresentation, fraud and oppression and seeks punitive damages. I have carefully considered all of the many allegations and arguments of the Claimant and find them unpersuasive. Indeed, I find the interpretation of counsel that the Real Estate Ombudsman took no action when it opined that RLHOA had to comply with the laws of Nevada pertaining to homeowner's associations

illogical. The Ombudsman clearly opined that the HOA was subject to the laws of Nevada that applied to HOA's. The Ombudsman took no action on the complaint of Artemis because the HOA was validly formed and obliged to comply with the law relating to HOA's.

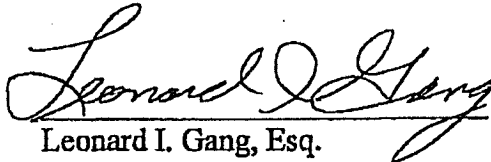
ORDER

1. Ruby Lake Estates is a Common -Interest Community and is subject to NRS Chapter 116. It was lawfully formed and is a validly existing non-profit common interest association.
2. The complaint against the individual board members is dismissed since no evidence was presented that they acted with willful or wanton misfeasance or gross negligence or were guilty of intentional misrepresentation or negligence.
3. Claimant is not entitled to punitive damages as a matter of law and no evidence was presented that would warrant such an award.
4. Respondent is entitled to an award of attorney's fees in the amount of \$22,092.00 and costs in the amount of \$4,718.67. I make this award taking into consideration the Brunzell factors. These factors were clearly articulated in the affidavit of Mrs. Kerns in support of her request for attorney's fees and costs and I find them to be accurate based upon my personal observations of Mrs. Kern's performance as an attorney representing homeowner's associations in these types of matters.

IT IS SO ORDERED.

Dated this 7th day of February, 2012.

ARBITRATOR,


Leonard I. Gang, Esq.

LIG:rg

CERTIFICATE OF MAILING

I hereby certify that on the 8th day of February, 2012 I mailed a copy of the foregoing DECISION AND AWARD in a sealed envelope to the following counsel of record and the Office of the Ombudsman, Nevada Real Estate Division and that postage was fully prepaid thereon.

Travis W. Gerber, Esq.
491 Fourth Street
Elko, NV 89801

Gayle Kern, Esq.
5421 Kietzke Lane, Ste. 200
Reno NV 89511


ROBERTA GANG



LEONARD I. GANG
ATTORNEY AT LAW
ARTIBRATION * MEDIATION

P.O. Box 4394
Incline Village, Nevada 89450
Tel: (702) 525-2742
Fax: (775) 593-2765
Email: leonardgang@gmail.com

RECEIVED

FEB - 9 2012

GAYLE A. KERN, LTD

February 7, 2012

Travis W. Gerber, Esq.
491 Fourth Street
Elko, NV 89801

Gayle A. Kern, Esq.
5421 Kietzke Lane, #200
Reno, NV 89511

Re: Artemis Exploration Company v. Ruby Lake Estates Architectural Review
Committee & Ruby Lake Estates Homeowner's Association & Leroy Perks &
Valerie McIntyre & Dennis McIntyre & Michael Cecchi
ADR Control No. 11-82

The salient facts in this case are not in dispute. The legal effect of certain provisions of the Uniform Common-Interest Ownership Act (Chapter 116 of NRS) as applied to lots located in Ruby Lakes Estates, a subdivision located in Elko County, forms the essence of this complaint. Only the facts necessary to understanding this decision will be set forth.

FACTS

Artemis Exploration Company, the Complainant (hereinafter Artemis), owns two lots in Ruby Lakes Estates. The first was purchased in June 1994 and the second in March 2010. CC&Rs applicable to Ruby Lake Estates were recorded on October 25, 1989. The deeds clearly reflect that the property is subject to CC&Rs.

NRS 116.3101(1) entitled, "Organization of Unit-Owners Association" provides in part as follows:

"1. A unit-owners association must be organized no later than the date the first unit in the common-interest community is conveyed."

This act was passed by the Nevada legislature in 1991. The Ruby Lakes Homeowner's Association (hereinafter RLHOA or Association) filed its Articles of Incorporation on January 18, 2006. This action was taken after consulting counsel. The RLHOA assessed dues. Artemis paid dues for a period of time but now claims that the Association lacks the authority to "impose any fee, penalty, or assessment for any reason." It basis its argument on the fact that the Association was not formed prior to the conveyance of the first lot as required in NRS 116.3101(1) quoted above..

Artemis filed an "Intervention Affidavit" with the Real Estate Division on December 18, 2009, claiming that Ruby Lakes Estates Homeowner's Association was an invalid homeowner's association. After reviewing the complaint, the Ombudsman's Office of the Real Estate Division opined as follows:

"***For these reasons, we are not, as you requested, going to declare that Ruby Lakes Estates Homeowner's Association is invalid. In other words, it is our view that the Association is required to comply with the laws pertaining to homeowner's associations, specifically NRS 116 and related laws and regulations." Emphasis added.

RLHOA filed Articles of Association Cooperative Association with the Secretary of State approximately October 27, 2005. Acting on advice of counsel, RLHOA filed its initial Association Registration Form with the Real Estate Division approximately March 31, 2006. It adopted By Laws on August 12, 2006.

DISCUSSION

Artemis interprets the Ombudsman's Office decision as, "The Ombudsman took no action," in regard to their Intervention Affidavit. It asserts a myriad of reasons why, in its opinion, the RLHOA is not valid. RLHOA continues to comply with the laws and regulations pertaining to homeowner's associations as the Real Estate Ombudsman's office opined it should, including assessing dues to pay for insurance, having a reserve study conducted, leveeing assessments in accordance with the requirements of the reserve study and, in the case of Artemis, referring it to a collection agency due to its refusal to pay its assessments.

Artemis appears to argue that since the RLHOA was not formed until after the first lot was sold, it could never thereafter be brought into compliance with the law. It takes the position even though the law, requiring it to be formed no later than the date the first lot was sold, was not passed until two years after the first lot in the Association was sold.

DECISION

It is difficult to understand why, faced with the overwhelming evidence that RLHOA is a valid HOA, any one would continue to maintain that it is not. The HOA owns property within the subdivision, it maintains roads, signs, gates, culverts and fencing. It is incorporated as required by law. Indeed, Mr. Essington was at one time on the board of directors of RLHOA and was a moving force in its formation and incorporation. He signed and filed a "Declaration of Certification Common -Interest Community Board Member" with the Real Estate Division certifying that he read and understood the governing documents of the Association and the provisions of Chapter 116 of Nevada Revised Statutes and the Administrative Code. His wife, Elizebeth Essington, apparently owns all of the stock in Artemis.

Artemis has filed a complaint against each of the members of the board alleging misrepresentation, fraud and oppression and seeks punitive damages. I have carefully considered all of the many allegations and arguments of the Claimant and find them unpersuasive. Indeed, I find the interpretation of counsel that the Real Estate Ombudsman took no action when it opined that RLHOA had to comply with the laws of Nevada pertaining to homeowner's associations

illogical. The Ombudsman clearly opined that the HOA was subject to the laws of Nevada that applied to HOA's. The Ombudsman took no action on the complaint of Artemis because the HOA was validly formed and obliged to comply with the law relating to HOA's.

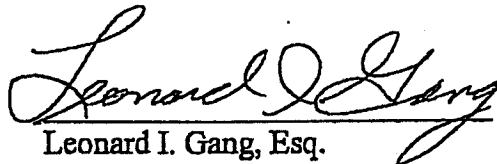
ORDER

1. Ruby Lake Estates is a Common -Interest Community and is subject to NRS Chapter 116. It was lawfully formed and is a validly existing non-profit common interest association.
2. The complaint against the individual board members is dismissed since no evidence was presented that they acted with willful or wanton misfeasance or gross negligence or were guilty of intentional misrepresentation or negligence.
3. Claimant is not entitled to punitive damages as a matter of law and no evidence was presented that would warrant such an award.
4. Respondent is entitled to an award of attorney's fees in the amount of \$22,092.00 and costs in the amount of \$4,718.67. I make this award taking into consideration the Brunzell factors. These factors were clearly articulated in the affidavit of Mrs. Kerns in support of her request for attorney's fees and costs and I find them to be accurate based upon my personal observations of Mrs. Kern's performance as an attorney representing homeowner's associations in these types of matters.

IT IS SO ORDERED.

Dated this 7th day of February, 2012.

ARBITRATOR,


Leonard I. Gang, Esq.

LIG:rg

CERTIFICATE OF MAILING

I hereby certify that on the 8th day of February, 2012 I mailed a copy of the foregoing DECISION AND AWARD in a sealed envelope to the following counsel of record and the Office of the Ombudsman, Nevada Real Estate Division and that postage was fully prepaid thereon.

Travis W. Gerber, Esq.
491 Fourth Street
Elko, NV 89801

Gayle Kern, Esq.
5421 Kietzke Lane, Ste. 200
Reno NV 89511


ROBERTA GANG