IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT THOMAS, individually; JANE DUNLAP, individually; JOHN DUNLAP, individually; BARRY HAY, individually; MARIE-ANNE ALEXANDER, as Trustee of the MARIE-ANNE ALEXANDER LIVING TRUST; MELISSA VAGUJHELYI and GEORGE VAGUJHELYI, as Trustees of the GEORGE VAGUJHELYI AND MELISSA VAGUJHELYI 2001 FAMILY TRUST AGREEMENT, U/T/A APRIL 13, 2001; D' ARCY NUNN, individually; HENRY NUNN, individually; MADELYN VAN DER BOKKE, individually; LEE VAN DER BOKKE, individually; ROBERT R. PEDERSON, individually and as Trustee of the PEDERSON 1990 TRUST; LOU ANN PEDERSON, individually and as Trustee of the PEDERSON 1990 TRUST; LORI ORDOVER, individually; WILLIAM A. HENDERSON, individually; CHRISTINE E. HENDERSON, individually; LOREN D. PARKER, individually; SUZANNE C. PARKER, individually; MICHAEL IZADY, individually; STEVEN TAKAKI, as Trustee of the STEVEN W. TAKAKI & FRANCES S. LEE REVOCABLE TRUSTEE AGREEMENT, UTD JANUARY 11, 2000; FARAD TORABKHAN, individually; SAHAR TAVAKOLI, individually; M&Y HOLDINGS, LLC; JL&YL HOLDINGS, LLC; SANDI RAINES, individually; R. RAGHURAM, as Trustee of the RAJ AND USHA RAGHURAM LIVING TRUST DATED APRIL 25, 2001; USHA RAGHURAM, as Trustee of the RAJ AND USHA RAGHURAM

No. 70498

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Clerk of Supreme Court

APPELLANTS'

OPENING BRIEF

LIVING TRUST DATED APRIL 25, 2001; LORI K. TOKUTOMI, individually; GARRET TOM, as Trustee of THE GARRET AND ANITA TOM TRUST, DATED 5/14/2006; ANITA TOM, as Trustee of THE GARRET AND ANITA TOM TRUST, DATED 5/14/2006; RAMON FADRILAN, individually; FAYE FADRILAN, individually; PETER K. LEE and MONICA L. LEE, as Trustees of the LEE FAMILY 2002 REVOCABLE TRUST; DOMINIC YIN, individually; ELIAS SHAMIEH, individually; JEFFREY QUINN, individually; BARBARA ROSE QUINN individually; KENNETH RICHE, individually; MAXINE RICHE, individually; NORMAN CHANDLER, individually; BENTON WAN, individually; TIMOTHY D. KAPLAN, individually; SILKSCAPE INC.; PETER CHENG, individually; ELISA CHENG, individually; GREG A. CAMERON, individually; TMI PROPERTY GROUP, LLC; RICHARD LUTZ, individually; SANDRA LUTZ, individually; MARY A. KOSSICK, individually; MELVIN CHEAH, individually; DI SHEN, individually; NADINE'S REAL ESTATE INVESTMENTS, LLC; AJIT GUPTA, individually; SEEMA GUPTA, individually; FREDERICK FISH, individually; LISA FISH, individually; ROBERT A. WILLIAMS, individually; JACQUELIN PHAM, as Manager of Condotel 1906 LLC; MAY ANNE HOM, as Trustee of the MAY ANNE HOM TRUST; MICHAEL HURLEY, individually; DUANE WINDHORST, as Trustee of DUANE

H. WINDHORST TRUST U/A dtd. 01/15/2003 and MARILYN L. WINDHORST TRUST U/A/ dtd. 01/15/2003; MARILYN WINDHORST, as Trustee of DUANE H. WINDHORST TRUST U/A dtd. 01/15/2003 and MARILYN L. WINDHORST TRUST U/A/ dtd. 01/15/2003; VINOD BHAN, individually; ANNE BHAN, individually; GUY P. BROWNE, individually; GARTH A. WILLIAMS, individually; PAMELA Y. ARATANI, individually; DARLEEN LINDGREN, individually; LAVERNE ROBERTS, individually; DOUG MECHAM, individually; CHRISTINE MECHAM, individually; KWANG SOON SON, individually; SOO YEU MOON, individually; JOHNSON AKINBODUNSE, individually; IRENE WEISS, as Trustee of the WEISS FAMILY TRUST; PRAVESH CHOPRA, individually; TERRY POPE, individually; NANCY POPE, individually; JAMES TAYLOR, individually; RYAN TAYLOR, individually; KI NAM CHOI, individually; YOUNG JA CHOI, individually; SANG DAE SOHN, individually; KUK HYUN (CONNIE) YOO, individually; SANG SOON (MIKE) YOO, individually; BRETT MENMUIR, as Manager of CARRERA PROPERTIES, LLC; WILLIAM MINER, JR., individually; CHANH TRUONG, individually; ELIZABETH ANDRES MECUA, individually; SHEPHERD MOUNTAIN, LLC; ROBERT BRUNNER, individually; AMY BRUNNER, individually; JEFF RIOPELLE, as Trustee of the RIOPELLE FAMILY TRUST; PATRICIA M.

MOLL, individually; DANIEL MOLL, individually,

Appellants,

vs.

MEI-GSR HOLDINGS, LLC, a Nevada Limited Liability Company, GRAND SIERRA RESORT UNIT OWNERS' ASSOCIATION, a Nevada nonprofit corporation, GAGE VILLAGE COMMERCIAL DEVELOPMENT, LLC, a Nevada Limited Liability Company; AM-GSR HOLDINGS, LLC, a Nevada Limited Liability Company,

Respondents.

APPEAL FROM DISMISSAL
SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE
HONORABLE ELLIOTT SATTLER, DISTRICT JUDGE

APPELLANTS' OPENING BRIEF

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No. 70498

NRAP 26.1 Disclosure

FAYE FADRILAN, individually; PETER K. LEE and MONICA L. LEE, as Trustees of the LEE FAMILY 2002 REVOCABLE TRUST; DOMINIC YIN, individually; ELIAS SHAMIEH, individually; JEFFREY QUINN, individually; BARBARA ROSE QUINN individually; KENNETH RICHE, individually; MAXINE RICHE, individually; NORMAN CHANDLER, individually; BENTON WAN, individually; TIMOTHY D. KAPLAN, individually; SILKSCAPE INC.; PETER CHENG, individually; ELISA CHENG, individually; GREG A. CAMERON, individually; TMI PROPERTY GROUP, LLC; RICHARD LUTZ, individually; SANDRA LUTZ, individually; MARY A. KOSSICK, individually; MELVIN CHEAH, individually; DI SHEN, individually; NADINE'S REAL ESTATE INVESTMENTS, LLC; AJIT GUPTA, individually; SEEMA GUPTA, individually; FREDERICK FISH, individually; LISA FISH, individually; ROBERT A. WILLIAMS, individually; JACQUELIN PHAM, as Manager of Condotel 1906 LLC; MAY ANNE HOM, as Trustee of the MAY ANNE HOM TRUST; MICHAEL HURLEY, individually; DUANE WINDHORST, as Trustee of DUANE H. WINDHORST TRUST U/A dtd. 01/15/2003 and MARILYN L. WINDHORST TRUST U/A/ dtd. 01/15/2003; MARILYN WINDHORST, as Trustee of DUANE H. WINDHORST TRUST U/A dtd. 01/15/2003 and MARILYN L. WINDHORST TRUST U/A/ dtd. 01/15/2003; VINOD BHAN, individually; ANNE BHAN, individually; GUY P. BROWNE, individually; GARTH A. WILLIAMS, individually; PAMELA Y. ARATANI, individually; DARLEEN LINDGREN, individually; LAVERNE ROBERTS, individually; DOUG MECHAM, individually; CHRISTINE MECHAM, individually; KWANG SOON SON, individually;

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Respondents.

NRAP 26.1 Disclosure

The undersigned counsel of record certifies that the following appellants are persons and entities as described in NRAP 26.1(a), and must be disclosed. These

representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of an appellant's stock: *None*

2. Names of all law firms whose attorneys have appeared for appellants or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

Robertson, Johnson, Miller & Williamson

Lemons, Grundy & Eisenberg

3. If an appellant is using a pseudonym, the true name: *None*

DATED Oct. 5, 2016

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INTRODUCTION[1]

Respondents MEI-GSR, Gage Village and AM-GSR (defendants) are the owners and operators of the Grand Sierra Resort (GSR) in Reno.[2] Appellants (plaintiffs) purchased individual units, referred to as hotel condominium units in the GSR, for the primary purpose of revenue-generating investments. Plaintiffs had a limit on the number of days each year in which they could stay in their units. For all other days in the year, defendants were allowed to rent the units to the general public. Plaintiffs were to receive money from the GSR for the rentals, subject to certain fees and expenses.

In March of 2011, MEI-GSR purchased the GSR and embarked on a scheme to defraud plaintiffs and steal their money. This scheme was intended to increase profits for defendants, reduce payments for plaintiffs, depress the value of plaintiffs' units, and force owners to sell their units to MEI-GSR at greatly reduced prices.

When income for the owners drastically declined as a result of defendants' scheme, a few owners stopped paying fees, and defendants sued these owners in justice court in Washoe County for the arrearages. Some owners/plaintiffs filed their

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[1] For ease of reading, this introduction will omit appendix citations, but the facts in this introduction will be discussed later, with appropriate appendix citations.

[2] Another party, the Unit Owners' Association (UOA), was a nominal defendant in the district court. In this brief, "defendants" will refer only to MEI-GSR, Gage and AM-GSR. These three defendants have interests that are entirely different from, and contrary to, the interests of the UOA, as this brief will explain below.

own lawsuits against defendants in district court. The parties stipulated that defendants' justice court lawsuits would be dismissed, and all claims by all parties would be litigated within the jurisdiction of the district court.

Plaintiffs' lawsuit requested damages and equitable relief based upon various theories, all essentially arising out of the fraud that defendants were committing regarding the hotel condominium units. The case was litigated for nearly four years, without defendants ever hinting that there might be a jurisdictional issue. During this time, defendants committed gross discovery abuses, and the district court ordered case-terminating sanctions against defendants. In doing so, the district court found that defendants committed multiple violations of court orders; defendants willfully and deliberately failed to disclose more than 200,000 relevant emails; and defendants' discovery abuses were pervasive and severely prejudicial to plaintiffs.

The district court then held a two-day evidentiary hearing, after which the district court found multiple violations of statutes and contracts by defendants, on the merits of plaintiffs' claims. Based upon evidence admitted at the hearing, the district court awarded plaintiffs more than $8 million in compensatory damages, and the district court scheduled a hearing on punitive damages.

A few days before the hearing on punitive damages, defendants filed a motion to dismiss, contending that plaintiffs had not complied with a statute dealing with alternative dispute resolution (ADR). Defendants contended that this statute

somehow rose to the level of subject matter jurisdiction. Plaintiffs made numerous arguments in opposition to the motion to dismiss, showing, among other things, that the statute was not applicable.

The district court reluctantly granted defendants' motion to dismiss. We use the word "reluctantly" because the district court's order stated the following:

> This matter has been the subject of extensive motion practice. The Court finds this result to be inimical and unjust after the course of the Defendants' conduct throughout this litigation. The record speaks for itself regarding the lackadaisical and inappropriate approach the Defendants have exhibited toward the Nevada Rules of Civil Procedure, the District Court Rules, the Washoe District Court Rules, and the Court's orders. The Defendants have done everything possible to make the proceedings unjust, dilatory, and costly in abject contravention of NRCP 1. The Court is bound to following the law and its application and interpretation by the Supreme Court. Should this Court feel it had the authority to decide the issue presented based on what was "fair" or "just" it would deny the Motion out of hand. The Defendants clearly do not deserve the result they will receive, but it is the law.

5 A.App. 1094.

This result cries out for reversal. The dismissal was repugnant to reason, contrary to public policy, and wrong as a matter of law. It would be a novel and absurd interpretation of the statute to allow dismissal in these circumstances. The district court essentially found that its own order was revolting to fundamental notions of common sense and justice, yet the district court entered the order anyway. This court should also view the order as contrary to common sense and justice, but unlike the district court, this court should find that dismissal was not required.

JURISDICTIONAL STATEMENT

This is an appeal from an order dismissing the complaint, which is appealable as a final judgment under NRAP 3A(b)(1). The appeal was timely because notice of entry of the order was served on May 11, 2016 (5 A.App. 1096), and the notice of appeal was filed within 30 days thereafter, on June 7, 2016 (5 A.App. 1114).

ROUTING STATEMENT

This appeal is presumptively retained by the supreme court under NRAP 17(a)(13) and (14), because the case involves questions of first impression and issues of statewide public importance.

STATEMENT OF ISSUES

1. Whether NRS 38.310 establishes subject matter jurisdictional limitations.
2. Whether NRS 38.310 may be raised after nearly four years of litigation.
3. Whether waiver or estoppel may apply to NRS 38.310.

4. Whether NRS 38.310 is applicable in the present case.

5. Whether the district court erred in applying NRS 38.310 to dismiss the case, after the court had already entered case-terminating sanctions due to defendants' repeated abuses of the judicial process.

STATEMENT OF THE CASE

Plaintiffs filed their complaint on August 27, 2012. 1 A.App. 1. The district court ordered case-terminating sanctions against defendants, based upon pervasive discovery abuses and violations of court orders. 4 A.App. 877. The district court then entered a judgment in favor of plaintiffs, against defendants, in the total amount of approximately $8 million. 7 A.App. 1423-24. A few days before a scheduled hearing on punitive damages, defendants filed a motion to dismiss, and plaintiffs filed an opposition. 1 A.App. 120; 2 A.App. 305. The district court granted the motion and dismissed the case on May 9, 2016. 5 A.App. 1082. This appeal followed.

STATEMENT OF FACTS

1. Background of condominium units.

In 2006, the prior owner of GSR converted 670 of its approximately 2,000 hotel rooms into condominium units. 2 A.App. 308. The condominium units are part of a Unit Owners' Association (UOA), and they are governed by CC&Rs. 2 A. App. 308, 344. Approximately 331 units were sold to the public at prices ranging

from $200,000 to $500,000. 3 A.App. 503. Ownership of the remaining units stayed with GSR's owner. 3 A.App. 503-07.

Unit owners were required to enter into maintenance agreements. 2 A.App. 309, 351; 3 A.App. 457, 478. The maintenance agreements allowed GSR's owner to provide services such as reception desk staffing, housekeeping, repairs and maintenance. 3 A.App. 457-58. Almost all owners also signed rental agreements, which allowed GSR to rent the privately-owned condominium units to the public, with rental revenue being paid to the unit owners after certain deductions. 3 A.App. 478-93.

Plaintiffs purchased condominium units as investments, with the understanding that plaintiffs could not use their units as dwellings for 28 days or more in any 12-month period. 2 A.App. 309; 3 A.App. 475.

2. MEI-GSR takes over the condominium program.

In March 2011, respondent MEI-GSR purchased the GSR. 2 A.App. 309; 3 A.App. 496. There is no evidence of substantive problems with the rental program prior to MEI-GSR's purchase. But shortly after MEI-GSR purchased the resort, MEI-GSR terminated the original rental agreement and replaced it with a new agreement. 3 A.App. 496. Under the original rental agreement, GSR could rent privately owned condominium units to the public before the hotel achieved full occupancy; but under the new agreement, hotel rooms and condominium units

owned by GSR would be rented to the public before the rental of the privately-owned units. *Id.* MEI-GSR also increased daily fees and contributions for capital improvements. *Id.*

MEI-GSR presented these changes to the private unit owners on a take-it-or-leave-it basis. 2 A.App. 310; 3 A.App. 496, 565. The new agreements generally resulted in the private unit owners actually owing money each month to MEI-GSR, instead of receiving revenue. 2 A.App. 310; 3 A.App. 496.

Additionally, under the prior system, condominium units were rented to the public on a rotation system. Under the new system, however, plaintiffs' units would only be rented to the public during peak occupancy. 2 A.App. 310. Yet MEI-GSR charged the individual owners full fees for units that were seldom used. *Id.* Plaintiffs eventually found out that MEI-GSR and other defendants were trying to create an economic situation that would force individual unit owners to sell their units to defendants, which would allow defendants to acquire 80 percent of the total units, so defendants could terminate the UOA and thereby reacquire all of the individually owned units. 2 A.App. 310; 3 A.App. 582-83, 585, 587-93, 595-98.

3. Defendants defraud plaintiffs, steal money and usurp possession of plaintiffs' units.

MEI-GSR and other defendants defrauded plaintiffs in the new rental program by not reporting room usage, improperly comping plaintiffs' units, sending false

invoices, and not paying plaintiffs money that was owed under the program. 3 A.App. 505-28. Defendants also defrauded those plaintiffs who were not part of the new rental program, by renting their units without their permission, and by simply keeping the income from those rentals as if defendants themselves owned the units. 3 A.App. 508-10.

After taking over the condominium rental operations, MEI-GSR repeatedly took possession of plaintiffs' units, even after being instructed that defendants could not use the rooms. *E.g.* 2 A.App. 311-13; 3 A.App. 600-02. These practices were confirmed by the testimony of MEI-GSR's vice president, who cited "business demand" as the reason why defendants rented out units that were not part of the rental program. 2 A.App. 313; 3 A.App. 589:16-18.

The rental agreement allowed defendants to provide complimentary use ("comps") of the privately owned units up to five nights per year, for GSR guests such as gamblers and travel agents. 2 A.App. 273(¶11). Defendants improperly took possession of plaintiffs' condominium units by comping their rooms to gaming customers and not reporting the use of the rooms to plaintiffs. 2 A.App. 313. This was documented by an internal email. 3 A.App. 605. In another email, an MEI-GSR employee observed that one condominium owner's unit was comped eight days in one month alone, even though defendants "are only allowed 5 comps per condo per year." 3 A.App. 607.

4. MEI-GSR ran a third-party rental company out of business.

Some plaintiffs attempted to use the services of a third-party rental company, when MEI-GSR changed the rental program. 2 A.App. 314; 3 A.App. 609-13. MEI-GSR prevented the company from helping these plaintiffs. 3 A.App. 609-20. An internal email stated that MEI-GSR employees "stole" reservations from the third-party company. 3 A.App. 622-23.

5. Defendants wrongfully acquired title to condominium units.

Within less than two years of acquiring the GSR, defendants reduced revenue to plaintiffs by eliminating the equal rotation system, charging inappropriate fees, and driving the third-party rental agent out of business. As a result of these measures, in addition to sending false monthly statements, defendants purchased and thereby took possession and title to 98 private condominium units, at an average price of only about $12,000. 2 A.App. 315; 3 A.App. 625. Defendants also admitted telling lies to condominium unit owners, to induce the owners to sell the units back to MEI-GSR. 2 A.App. 315-16; 3 A.App. 628-30. Plaintiffs contended that the fraud committed by defendants resulted in multiple transfers of plaintiff-owned units to defendants, and in this action plaintiffs sought return of those units, thereby placing title to the units in question. 2 A.App. 316.

6. MEI-GSR abandoned the UOA by failing to collect all reserves, and by stealing funds from plaintiff-owned units as reserves.

As noted above, plaintiffs owned many of the condominium units, but defendant themselves also owned many units. CC&Rs and other documents required all unit owners to make capital reserve contributions, with the money to be maintained in a separate account by the UOA. 2 A.App. 317-18. Defendants billed individual unit owners for reserve contributions in excess of what should have been charged. 2 A.App. 317; 3 A.App. 502-03, 520-34. In addition, defendants failed to contribute to the reserve accounts for defendant-owned units, and defendants intentionally failed to place plaintiffs' reserve money into separate reserve accounts. Instead, defendants placed the funds into MEI-GSR's general account, and the money was eventually traced to the casino cage to fund gaming operations. 2 A.App. 317-18; 4 A.App. 735; 6 A.App. 1198, 1220, 1274.

7. Defendants filed lawsuits against plaintiffs first, then stipulated that all claims between the parties would be resolved in this action.

After MEI-GSR defrauded plaintiffs and stole money from them, MEI-GSR actually sued some of the individual unit owners, in April 2012, in small claims actions filed in the justice court of Washoe County; MEI-GSR sought money

allegedly owed by the unit owners. *E.g.*, 4 A.App. 743-44. MEI-GSR's lawsuits expressly relied upon the CC&Rs and other governing documents. 4 A.App. 744. In fact, MEI-GSR's lawsuits had attached exhibits consisting of portions of the CC&Rs. 4 A.App. 747. All of MEI-GSR's lawsuits against plaintiffs were filed before plaintiffs filed this action in district court. 4 A.App. 743 (April 26, 2012), 761 (June 21, 2012), 777 (June 21, 2012), 789 (July 23, 2012). MEI-GSR's lawsuits did not allege anything about statutory or contractual requirements for ADR. E.g., 4 A.App. 743-44.

Plaintiffs filed their district court lawsuit in August 2012, alleging numerous causes of action. 1 A.App. 1. In September of 2012, after plaintiffs filed this action in district court, MEI-GSR and plaintiffs entered into a stipulation to dismiss MEI-GSR's lawsuits and to proceed with the district court case. 4 A.App. 791-92. The stipulation recited that MEI-GSR's justice court lawsuits and plaintiffs' district court lawsuit "concern common issues of fact and law." 4 A.App. 791. The parties stipulated that MEI-GSR's lawsuits against the unit owners would be dismissed, without prejudice, and that "all claims between the parties can be resolved in the District Court action." *Id.* The justice court judge approved the stipulation. 4 A.App. 793. The stipulation did not mention a word about ADR.

Defendants filed answers to plaintiffs' complaint and an amended complaint. 1 A.App. 48, 97. The answers asserted numerous affirmative defenses. 1 A.App.

59-60, 108-09. Defendants never alleged that plaintiffs failed to comply with any statutory or contractual requirements for ADR. *Id.*

Defendants also filed a counterclaim against plaintiffs. 1 A.App. 109. Defendants alleged that plaintiffs breached CC&Rs and other governing documents. 1 A.App. 110. Defendants requested damages for breach of the documents, as well as a judicial declaration regarding validity of the documents, regarding the rights of the parties under the governing documents, and determining the parties' "rights, entitlement, obligations and duties" under the documents. 1 A.App. 110-11. Defendants also requested an injunction against plaintiffs, to require plaintiffs to comply with obligations in the governing documents. 1 A.App. 111. Defendants' counterclaim contained no mention of applicability or compliance with statutory or contractual ADR requirements. 1 A.App. 109-11.

8. After stipulating to the district court's jurisdiction to resolve all claims between the parties, defendants engaged in persistent litigation misconduct.

Shortly after defendants stipulated to the district court's jurisdiction to resolve all claims between the parties, defendants embarked on a systematic effort to obstruct discovery and abuse the litigation process. The appendix contains a 23-page timeline identifying dozens of defendants' abuses. 4 A.App. 848-70. Among other things, defendants refused to respond to discovery requests, failed to obey rules

of procedure, failed to obey court orders, and engaged in extreme dilatory conduct. *Id.*; see also 2 A.App. 319-21. Frustrated by defendants' shenanigans, plaintiffs filed a motion for case-concluding sanctions in September 2013, and the district court held a three-day hearing in October 2013. 4 A.App. 878. Although the district court declined to impose case-concluding sanctions on defendants, the court struck defendants' counterclaims and ordered defendants to pay all attorneys' fees and costs associated with the hearing. *Id.*

Despite the sanctions imposed in October 2013, defendants' misconduct continued. When defendants' misconduct became intolerable again, plaintiffs filed another motion for case-terminating sanctions in January 2014. 7 A.App. 1368. The district court held hearings in August 2014. 4 A.App. 878.

On October 3, 2014, the district court entered a detailed 12-page order granting plaintiffs' motion and striking defendants' answer. 4 A.App. 877-88. Among other things, the district court found:

1. Defendants violated three discovery commissioner rulings and three confirming orders. 4 A.App. 880:21-22.
2. Defendants violated four district court orders. 4 A.App. 880:23-24.
3. Defendants initially disclosed between 200 and 300 emails, and represented to the court in October 2013 that the number of emails not disclosed "was going to be inconsequential." After plaintiffs pressed for additional searches,

defendants identified 224,226 emails. The discrepancy was not a good faith error, and was most likely "a deliberate failure to comply with discovery rules." 4 A.App. 881-82.

4. "The Defendants have consistently violated Nevada Rules of Civil Procedure, orders compelling discovery, and the Court's directives. The Defendants have not proffered any legitimate or lawful explanation for their conduct." 4 A.App. 883:1-3. The district court reversed its October 2013 decision and found that defendants' "discovery failures are in fact willful." 4 A.App. 883:8-9.
5. Defendants "have abused and manipulated the discovery rules." 4 A.App. 884:21.
6. Although defendants received four discovery sanctions in October 2013 for discovery failures, these sanctions "have not been sufficient to modify the Defendants' behavior." 4 A.App. 885:7-8.
7. "The discovery abuse in this case is pervasive and colors the entirety of the case. The previous discovery sanctions have been unsuccessful in deterring the Defendants' behavior. Due to the severity and pattern of the Defendants' conduct there are no lesser sanctions that are suitable." 4 A.App. 886:14-18.

Based upon these findings, the district court granted plaintiffs' motion for case-terminating sanctions, struck defendants' answer, and scheduled the matter for a prove-up hearing on damages. 4 A.App. 888.

9. Proceedings after the case-terminating sanctions.

As a result of the district court's order, a hearing on damages was held during three days in March, 2015. 7 A.App. 1405:16-17. The court considered expert testimony and other evidence, ultimately issuing a 23-page "Findings of Fact, Conclusions of Law and Judgment" on October 9, 2015. 7 A.App. 1403. During the hearing leading up to this judgment, counsel for defendants specifically and expressly acknowledged that "[t]he Court retains jurisdiction" in this action. 4 A.App. 892:13.

Among other things, the district court's order/judgment determined that defendants used and controlled the UOA to advance defendants' own economic objectives, to the detriment of plaintiffs (7 A.App. 1414:8-10); defendants manipulated rentals of plaintiffs' units, sometimes "giving away the use of units owned by the Individual Unit Owners" (7 A.App. 1416:26-27); and defendants rented individual units to third parties without providing owners with any notice or compensation for the use of the owners' unit (7 A.App. 1417:3-4). The district court also found that defendants' conduct devalued the units owned by plaintiffs, and defendants engaged in such conduct with the intent to purchase the devalued units

at nominal, distressed prices. 7 A.App. 1417:7-11. Also, defendants breached their agreements with plaintiffs and failed to act in good faith. 7 A.App. 1417:18-22.

The district court's conclusions of law determined, among other things, that defendants violated numerous statutes; defendants committed numerous acts of dominion and control over plaintiffs' property; defendants' actions constituted conversion of plaintiffs' property; some of the governing documents are unconscionable; and defendants took money paid by plaintiffs and placed the money in its general operating account. 7 A.App. 1420-21.

The district court then awarded eight categories of dollar-specific compensatory damages, including, among other things: $4,152,669.13 for rental of units of owners who had no rental agreements; $1,399,630.44 for discounting owners' rooms without credits; and $1,706,798.04 for improperly calculating and assessing hotel fees. 7 A.App. 1423-24. The compensatory damages totaled approximately $8 million. *Id.* A receiver previously appointed was ordered to remain in place. 7 A.App. 1424. Finally, the court ordered another hearing to determine whether punitive damages are appropriate, and if so, the amount of punitive damages. 7 A.App. 1425.

10. The motion to dismiss.

As noted above, this litigation commenced with the justice court lawsuits MEI-GSR filed against the condominium unit owners, seeking enforcement of the

CC&Rs and other governing documents relating to the units. MEI-GSR's own lawsuits were silent on any statutory or contractual ADR requirements. While MEI-GSR's lawsuits were still pending, plaintiffs filed the present action in district court. Thereafter, the parties stipulated to dismiss MEI-GSR's cases, and to litigate all claims between the parties in the district court action. The stipulation did not mention a word about ADR. Defendants then filed their answer, which contained numerous affirmative defenses and a counterclaim that sought interpretation, application and enforcement of CC&Rs and other governing documents. The affirmative defenses and counterclaim were silent about ADR.

The parties then engaged in years of hard-fought litigation. During all of this time, defendants never once whispered a word suggesting that the district court lacked jurisdiction over the case, or that plaintiffs needed to comply with procedural ADR requirements before filing the district court action. On March 23, 2015, at the prove-up hearing, during a discussion about the receiver, counsel for defendants specifically and expressly acknowledged that "[t]he Court retains jurisdiction" in this action. 4 A.App. 892:13 (emphasis added).

On December 1, 2015—barely a week before the scheduled hearing on punitive damages, and after years of litigation—defendants filed a motion to dismiss. 1 A.App. 120. The motion was filed after the district court already granted case-terminating sanctions against defendants, after the district court already awarded

approximately $8 million in compensatory damages, and after the district court already entered a judgment on all claims except punitive damages. The motion was obviously a desperate, last-minute attempt by defendants to avoid the consequences of their fraud and theft, to avoid the $8 million judgment for compensatory damages already entered, and to avoid the potential for millions more in punitive damages.

The day after defendants filed their motion to dismiss, the district court held an in-chambers conference regarding the motion. The clerk's minutes reflect that the district court expressed frustration and disdain regarding the last-minute motion. The court "indicated that he should not be shocked that the Motion to Dismiss was just filed, given all the other abuses that have occurred in this case, and this is just one more example to be added to the litany of things that demonstrate the lack of good faith in which the Defendants have handled this case." 7 A.App. 1427.

The motion to dismiss was based largely upon NRS 38.310, which provides for ADR procedures (mediation and/or arbitration) in cases involving residential property within common-interest communities. 1 A.App. 122. Defendants' counsel contended that he had not raised the statute earlier in the lawsuit because he was unaware of it, and he only became aware of it a few days before the scheduled hearing on punitive damages. 2 A.App. 299:6-9. He provided no explanation regarding how his professed ignorance of the statute squared with the fact that statutory ADR requirements were expressly cited in governing documents which

were drafted by defendants, and which defendants' counterclaim was seeking to enforce. 1 A.App. 211 (Dispute Resolution Addendum Agreement, sub¶(5), citing "Nevada Revised Statutes, Sections 38.300 to 38.369 inclusive").

Plaintiffs opposed the motion, arguing, among other things, that the statute is not applicable to this case, the statute does not impose subject matter jurisdictional limitations, and doctrines such as waiver precluded defendants from asserting the statute at the eleventh hour. 2 A.App. 305.

The district court granted defendants' motion and dismissed the case for lack of subject matter jurisdiction. 5 A.App. 1082. The district court found NRS 38.310 applicable, and the court rejected all of plaintiffs' arguments against dismissal. 5 A.App. 1082-94. As noted above, the district court found defendants' conduct to be reprehensible, and the court found that dismissal was neither fair nor just. 5 A.App. 1094. Indeed, the district court found that if concepts of fairness and justice were applicable, the court "would deny the Motion out of hand." 5 A.App. 1094:8-9. After concluding that defendants "clearly do not deserve the result they will receive," the district court gave defendants this result. *Id.*

SUMMARY OF ARGUMENTS

There are several compelling reasons for reversal. First, NRS 38.310 does not apply to defendants, because they are third parties acting contrary to the interest of the UOA and outside of any agency relationship with the UOA. Second, NRS

38.310 does not apply to actions relating to the possession and use of property. Every cause of action in this case involves contentions that defendants acted in derogation of plaintiffs' title and right to possess and use their units. Third, legislative history shows that NRS 38.310 was intended to apply to small disputes between homeowners and homeowners' associations, not to disputes where third parties committed fraud and other misconduct in an attempt to acquire all of the units in an association and shut it down.

Fourth, plaintiffs' lawsuit requested the district court to declare that some of the governing documents were unconscionable, and the district court agreed. Even if NRS 38.310 is otherwise applicable, dismissal should not be allowed where governing documents are unconscionable. Fifth, NRS 38.310 cannot be read as imposing subject matter limitations, and it cannot limit the subject matter jurisdiction established in the Nevada Constitution.

Sixth, even if this dispute implicated subject matter jurisdiction, defendants' conduct and words admitted the district court's subject matter jurisdiction, and a court can adjudicate a case when the parties admit that the court has subject matter jurisdiction. This is particularly true here, where (1) defendants themselves were the first to seek relief from the Nevada court system, never hinting that the disputes were governed by any mediation/arbitration requirements, (2) defendants expressly

conceded the district court's jurisdiction, and (3) defendants stipulated to resolve these disputes in district court.

Seventh, defendants litigated the case for years. Their pervasive discovery abuses and violations of court orders—in their attempt to avoid liability for their fraud and thievery—resulted in case-terminating sanctions. NRS 38.310 should not be interpreted to allow dismissal at this late stage. Further, waiver and estoppel should apply to preclude defendants' last-minute attempt to escape justice, after the district court already entered a judgment for nearly $8 million in compensatory damages.

STANDARD OF REVIEW

This appeal involves statutory interpretation and an order granting a motion to dismiss. Statutory interpretation is a question of law subject to de novo review. *Butler v. State*, 120 Nev. 879, 892, 102 P.3d 71, 81 (2004). An order granting a motion to dismiss is reviewed de novo. *Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009). Such an order is subject to rigorous appellate review in which every inference must be drawn in the plaintiff's favor. *Id.*

ARGUMENT

NRS 38.310 places a condition on actions involving CC&Rs. The statute provides:

1. No civil action based upon a claim relating to:

(a) The interpretation, application or enforcement of any covenants, conditions or restrictions applicable to residential property or any bylaws, rules or regulations adopted by an association; or

(b) The procedures used for increasing, decreasing or imposing additional assessments upon residential property,

may be commenced in any court in this State unless the action has been submitted to mediation or, if the parties agree, has been referred to a program pursuant to the provisions of NRS 38.300 to 38.360, inclusive, and, if the civil action concerns real estate within a planned community subject to the provisions of chapter 116 of NRS or real estate within a condominium hotel subject to the provisions of chapter 116B of NRS, all administrative procedures specified in any covenants, conditions or restrictions applicable to the property or in any bylaws, rules and regulations of an association have been exhausted.

2. A court shall dismiss any civil action which is commenced in violation of the provisions of subsection 1.

Under NRS 38.300(3), a "civil action" is "an action for money damages or equitable relief." The term does not include an action "relating to the title to residential property." *Id.*

A district court cannot dismiss an entire action if specific claims are exempt from NRS 38.310. *McKnight Family, LLP v. Adept Mgmt. Servs.*, 129 Nev. Adv. Op. 64, 310 P.3d 555, 558 (2013). Accordingly, a court must consider NRS 38.310 as to each cause of action asserted by plaintiffs. Further, because NRS 38.310 does not apply to all types of third parties, a court must consider whether NRS 38.310 applies to each particular defendant. See *Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 293, 183 P.3d 895, 898 (2008).

A. NRS 38.310 does not apply.

1. NRS 38.310 is not applicable because defendants are third parties.

Third parties do not get the benefits of NRS 38.310. In *Hamm*, the appellants purchased a home and an adjoining lot in Arrowcreek. According to the appellants, they were informed that CC&Rs did not require payment of fees on the vacant lot. After the appellants did not pay assessment fees on the vacant lot, respondent Nevada Association Services (NAS), a collection agency, notified the appellants that they were required to pay the fees. The appellants disputed the claim, and NAS, at the direction of the Arrowcreek HOA, filed a notice of delinquent assessment lien. In response, the appellants filed a complaint against the Arrowcreek HOA and NAS. The district court dismissed the action under NRS 38.310, due to the appellants' failure to submit to mediation or arbitration.

On appeal, the appellants contended that the portion of their claim that was directed at NAS, which is not a homeowners' association, was not subject to NRS 38.310. This court held that "if the collection agency acts as the agent of a homeowners' association and NRS 38.310 applies to the action against the homeowners' association, then that statute applies equally to the collection agency." *Hamm* at 293, 183 P.3d at 898. In other words, NRS 38.310 applies to a third party

only if it is the agent of a homeowners' association and the association itself would be within the statute's protection.

Here, Gage Village Development and AM-GSR were undeniably not agents of the GSR UOA. Accordingly, NRS 38.310 does not apply to them. Further, although MEI-GSR operated the rental program, it too is not an agent of the GSR UOA. In discussing the concept of agency, the *Hamm* court held: "An agency relationship results when one person possesses the contractual right to control another's manner of performing the duties for which he or she was hired." *Hamm* at 299, 183 P.3d at 902. The court concluded that an agency relationship existed "because Arrowcreek HOA hired NAS to collect the Hamms' alleged assessments and possessed the contractual right to direct NAS to record the lien on Arrowcreek HOA's behalf." *Id.* at 300, 183 P.3d at 902.

No evidence in this case proved that the UOA in any way controls MEI-GSR's activities, or that MEI-GSR was acting on the UOA's behalf when MEI-GSR was controlling the rental program fraudulently, and was stealing money from unit owners. In fact, the opposite is true. MEI-GSR's nefarious activities against unit owners was designed to drive unit values down and force owners to sell their units to MEI-GSR at rock-bottom prices. 3 A.App. 506. "A stated objective of GSR to purchase as many individually owned units as possible was so that GSR owned at least 80 percent of the condominium units, and it could then terminate the

Homeowners or Condominium Owners Association ("HOA")." 3 A.App. 506 (emphasis added). If successful, this would have resulted in MEI-GSR's ability to control "all condominium units, including those owned by individuals." *Id.*

In addition to MEI-GSR's activities aimed at terminating the UOA, the activities caused direct and immediate economic harm to the UOA. As noted earlier, MEI-GSR collected money from individual unit owners and never put the money into a UOA reserve account; instead, MEI-GSR simply stole the money and placed it in the Grand Sierra cage for gaming purposes. Additionally, MEI-GSR did not require GSR-owned units to pay required fees to the UOA. An internal email showed millions of dollars in money that GSR-related entities failed to pay the UOA for GSR-owned units. 3 A.App. 534, fn. 84 (expert report with reference to email showing $1,225,729 owed to UOA by Gage Village, and $1,782,932 owed to UOA by MEI-GSR).

MEI-GSR's plan to further its own economic interests, while ignoring the interests of the UOA, is fatal to any claim of agency. See *Martin Marietta Corp. v. Gould, Inc.*, 70 F.3d 768, 773 (4th Cir. 1995) ("when the agent is acting outside the scope of the agency relationship, the legal fiction that the agent and the principal share an identity of interest is destroyed"); *Grand Temple & Tabernacle v. Johnson*, 135 S.W. 173, 176 (Tex. Civ. App. 1911) (the relation of principal and agent, or of

master and servant, does not exist when the agent inflicts injury while acting outside of its authority and not in furtherance of the principal's business).

In summary, MEI-GSR's goals and activities were intended to terminate and destroy the UOA, not to act on the UOA's behalf or in the best interests of the UOA. No amount of debating skill can establish that MEI-GSR was the UOA's agent in MEI-GSR's plan to defraud unit owners and thereby terminate the UOA. Accordingly, MEI-GSR is not the agent of the UOA, and under *Hamm*, NRS 38.310 does not apply.[3]

Finally, even if defendants can somehow convince this court that they were agents of the UOA, NRS 38.310 would still not apply under *Hamm*, because most of plaintiffs' causes of action were not asserted against the UOA. Accordingly, under *Hamm*, those actions are not subject to NRS 38.310 and cannot be dismissed.

The remaining causes of action are also exempt. For example, the first cause of action for a receiver cannot be subject to arbitration because, absent a specific statute to the contrary, an arbitrator cannot appoint a receiver. See *Marsch v. Williams,* 28 Cal.Rptr.2d 402, 406-408 (Ct. App. 1994) (power to appoint receivers is unique and cannot be extended to arbitrators). Only a court can appoint a receiver.

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[3] Plaintiffs argued this point in their opposition to the motion to dismiss. The district court recognized the fact that plaintiffs made the argument, but the district court's order failed to decide the issue regarding MEI-GSR. 5 A.App. 1085-86.

NRS 32.010 ("A receiver may be appointed by the court in which an action is pending, or by the judge thereof"). NRS Chapter 38 does not vest arbitrators with authority to appoint receivers.

The district court found that the ninth cause of action, for an accounting, was moot. The tenth cause of action, to declare the agreements unconscionable, must be reserved for a judicial decision under NRS Chapter 116. If a contract is unconscionable and therefore unenforceable, there is nothing for an arbitrator to interpret or apply.

2. NRS 38.310 is not applicable because plaintiffs' claims are based upon possession and use of their property.

In *McKnight Family, LLP v. Adept Mgmt. Servs.*, 129 Nev. Adv. Op. 64, 310 P.3d 555 (2013), McKnight owned property in a housing community with an HOA. The HOA placed a lien on the property under NRS 116.3116, for unpaid assessments. The HOA sold the property, and McKnight filed a district court action against the HOA and the purchaser. The district court dismissed the complaint under NRS 38.310, because the parties did not participate in alternative dispute resolution.

This court held that the district court erred in dismissing the quiet title action. The court recognized that NRS 38.310 only applies to a "civil action," and another statute defines a "civil action" as excluding an action "relating to the title to residential property." *McKnight* at __, 310 P.3d at 558. The court then broadly

construed this exclusionary language, holding that "[a]n action is exempt from the NRS 38.310 requirements if the action relates to an individual's right to possess and use his or her property." *Id.* at __, 310 P.3d at 558 (emphasis added).

In the present case, every claim relates to plaintiffs' right to possess and use their properties. Defendants willfully and deliberately interfered with plaintiffs' rights to use and possess their property by renting units without permission, not disclosing to plaintiffs that units were being rented, comping plaintiffs' units for GSR gamblers far more often than governing documents allowed, and taking other steps with the deliberate goal of forcing plaintiffs to sell their units at drastically reduced prices, so that defendants could purchase them back and eliminate the UOA.

Every cause of action in the second amended complaint relates to possession and use of the Plaintiffs' units. 1 A.App. 71. For example, the district court made the following findings of fact:

- Unit owners must abide by the unilateral demands of MEI-GSR through its control of the Unit Owners' Association, or risk liens and foreclosure. 7 A.App. 1415(#129)
- Defendants purchased units devalued by their own actions, at nominal, distressed prices when owners were effectively forced to sell their units because revenue did not meet expenses. 7 A.App.

1415-16(#130). The devaluation caused by defendants was as much as $30,000 in less than a one-year time frame. 7 A.App. 1416(#131).

- MEI-GSR manipulated rentals to maximize MEI-GSR's profits and devalue units owned by the individual unit owners. *Id.*(#136).
- MEI-GSR has rented individual units for as little as $0.00 to $25.00 a night. *Id.*(#137). Yet MEI-GSR charged "Daily Use Fees" of approximately $22.38, resulting in revenue for owners as low as $2.62 per night for the use of their units. *Id.*(#138).
- By giving away the use of units owned by individuals, MEI-GSR received significant benefits over and above the room rental (gambling, food purchases, etc.). 7 A.App. 1416-17(#139).
- MEI-GSR rented individual owners' units to third parties without providing owners notice or compensation for the use of their units. 7 A.App. 1417(#140).
- MEI-GSR systematically endeavored to place a priority on the rental of defendants' rooms instead of the individually owned rooms. *Id.*(#141). This effectively devalued the units owned by individuals. *Id.*(#142).

- Defendants planned to purchase the devalued units at nominal, distressed prices when owners made insufficient revenue to cover expenses. *Id.*(#143).
- Some owners retained a third party to market and rent their units, but MEI-GSR systematically thwarted these efforts. *Id.*(#144 and 145).

Thus, plaintiffs alleged that defendants interfered with possession and use of plaintiffs' units. These allegations were incorporated into every one of plaintiffs' causes of action. Accordingly, none of the claims can be dismissed under the holding of *McKnight*, because they all "relate to" the use and possession of plaintiffs' units.

The district court also made these conclusions of law:

> MEI-GSR wrongfully committed numerous acts of dominion and control over the property of the Plaintiffs, including but not limited to renting their units at discounted rates, renting their units for no value in contravention of written agreements between the parties, failing to account for monies received by MEI-GSR attributable to specific owners, and renting units of owners who were not even in the rental pool. All of said activities were in derogation, exclusion or defiance of

the title and/or rights of the individual unit owners. 7 A.App. 1420(¶I) (emphasis added).

Because every cause of action relates to plaintiffs' possession and use of their units, NRS 38.310 is not applicable, and the district court erred by applying the statute.

3. NRS 38.310 is not applicable because it was never intended to apply in such cases.

The legislative history of NRS 38.310 demonstrates that it was intended to deal with "small and persistent squabbles," not complex disputes like this case. 5 A.App. 943 (noting that "there is indeed a clear need for ADR for the small persistent squabbles which plague large and small associations alike"). Indeed, the prime sponsor of the statute testified:

> Over the past year he has been privy to problems arising in the associations developed for the homeowners, by the homeowners. The associations have developed their own "constitutions" which are referred to as covenants, conditions, and restrictions (CC&R's). Although these associations have flourished and existed with encouragement, there are personality problems and management problems between the board and the residents. As a result, many lawsuits are being filed which could be resolved in some sort of dispute

resolution such as arbitration. Dispute resolution may bring about results in 30 to 45 days, rather than the years it takes lawsuit to proceed through District Court. 5 A.App. 906 (emphasis added).

Thus, the statute was intended for resolution of relatively minor disputes between HOAs and homeowners, not highly complex commercial litigation between hotel condominium investment owners and third parties, where the litigation involves massive discovery and claims for fraud, theft, accountings, receivers, declaratory relief and punitive damages.

At the same Assembly hearing, private citizens testified about relatively minor disputes that justify mediation/arbitration requirements, such as disputes involving: (1) not being able to attend HOA board meetings; (2) parking issues; (3) playground issues; (4) concerns about First Amendment free speech at board meetings; and (5) a fence dispute. 5 A.App. 906-09.

Thus, it is apparent that NRS 38.310 was never intended to apply to complex disputes such as this one, where third party entities acted exclusively against the interests of the association, and where the unit owners sued the third parties.

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4. NRS 38.310 is not applicable because this action was properly commenced in district court under NRS 116.1112(1).

Part of plaintiffs' claim against defendants was that contracts forced upon plaintiffs were unconscionable. The district court agreed, determining that "[t]he Unit Maintenance Agreement and Unit Rental Agreement proposed by MEI-GSR and adopted by the Unit Owner's Association are unconscionable." 7 A.App. 1420:26-28 (emphasis added).

Plaintiffs' claim regarding unconscionability could not have been submitted to arbitration or mediation under NRS 38.310. Pursuant to NRS 116.1112(1), only a "court" may find that a contract or clause of a contract is unconscionable, and, under the statute, only a "court" may refuse to enforce the contract. Neither an arbitrator nor a mediator is a "court." Thus, neither an arbitrator nor a mediator could have decided unconscionability in this case.

The district court's application of NRS 38.310 renders NRS 116.1112(1) a nullity. Instead, the only way the statutes can be reconciled is if NRS 38.310 applies unless a party claims the CC&Rs are unconscionable under NRS 116.1112(1). See *Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 826-27, 192 P.3d 730, 734 (2008) (statutes should be read in harmony with each other).

5. NRS 38.310 is not applicable because of the Reno Municipal Code.

The individual condominium units in this case are "commercial property" pursuant to §18.24.203.2690 of the Reno Municipal Code (RMC) and are therefore exempt from the provisions of NRS 38.310, which apply only to "residential property." Under RMC §18.24.203.2690, a "hotel-condominium is an establishment meeting the criteria for a '[h]otel' as set forth in this [t]itle, but subdivided into individual rooms or suites for separate ownership." A "[h]otel," in turn, is defined as "[a] building occupied or intended to be occupied for compensation, as the temporary residence for transient guests, primarily persons who have residence elsewhere." RMC §18.24.203.2680. On the other hand, NRS 38.310 applies only to "residential property."

Here, the units at the Grand Sierra Resort are indisputably hotel-condominiums pursuant to RMC §18.24.203.2690 because (1) they are "intended to be occupied for compensation, as the temporary residence for transient guests . . . who have residence elsewhere," and (2) they are individual rooms available for separate ownership (the subject condominiums). The CC&Rs state that the portion of the GSR used for the condominiums will be owned as "hotel condominium property," and the name will be "Hotel-Condominiums at Grand Sierra Resort." 2 A.App. 348. People who stay in the units are called "hotel guests"

in the CC&Rs, and each unit is called a "hotel unit."[4] 2 A.App. 350-51. Hotel units "shall be used for short-term transient occupancy." 2 A.App. 390 [also allowing longer-term occupancy only "if permitted by law," which was not permitted under the RMC].

RMC §18.24.203.2690 also defines a hotel-condominium as "a commercial condominium development for which the units are primarily used to derive commercial income from, or provide service to the public, and may not be used as a dwelling by an Owner for 28 days or more within any 12-month period." (Emphasis added.) Plaintiffs purchased condominium units as investments, with the understanding that they could not use their units as dwellings for 28 days or more in any 12-month period. 2 A.App. 309. In contrast, NRS 38.310 only applies to "residential property" in a common-interest community. Because the subject condominiums are "commercial condominium[s]," they cannot be considered "residential property" within the scope of NRS 38.310(1). Consequently, NRS 38.310 is not applicable.[5]

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[4] The GSR condominiums are not subject to the provisions of NRS Chapter 116B, as referenced in subpart (1) of NRS 38.310, because the condominiums were created prior to January 1, 2008, and are therefore not within Chapter 116B. See NRS 116B.290(3)(c), which exempts "condominium hotels" created before January 1, 2008.

[5] Plaintiffs' raised this argument in their opposition to the motion to dismiss. 2 A.App. 337-38. The district court failed to address the argument. 5 A.App. 1082-94.

6. Conclusion regarding non-applicability of NRS 38.310.

For the foregoing reasons, NRS 38.310 was not applicable, and the district court erred by relying on the statute and dismissing the case. If this court agrees, the court does not need to consider argument Parts B through D, below.

B. Subject matter jurisdiction is not implicated for NRS 38.310.

Even if NRS 38.310 is applicable, the statute does not impose subject matter jurisdictional limitations. Thus, doctrines such as waiver and estoppel can apply to preclude defendants from obtaining the statutory benefits.

1. Under the Nevada Constitution, the Legislature cannot limit a district court's subject matter jurisdiction.

Defendants contended, and the district court found, that NRS 38.310 imposes subject matter limitations, and that plaintiffs' alleged failure to seek arbitration or mediation deprived the district court of subject matter jurisdiction. 5 A.App. 1088-91. This was error. NRS 38.310 is not a jurisdictional statute, but instead involves justiciability. In other words, it imposes a procedural prerequisite to filing a civil action.

Subject matter jurisdiction is the court's authority to hear a particular type of case. *Reno Dodge Sales, Inc. v. State of Nevada DMV*, 2016 WL 3213593 (Nev. Ct. App., June 1, 2016; No. 67903). Federal and state courts can be vested with subject matter jurisdiction through different means. For example, only the United States

Congress can delineate subject matter jurisdiction of federal courts. Congress has this power through Article III of the United States Constitution. *Kontrick v. Ryan*, 540 U.S. 443, 452-53 (2004). Although states may follow this approach, some states, including Nevada, do not. In Nevada, our Constitution itself delineates district court subject matter jurisdiction. Nev. Const. art. 6, § 6. District court subject matter jurisdiction is defined by exclusion; it includes all cases excluded by law from the original jurisdiction of the justice courts. The Nevada Constitution then grants the Legislature authority to determine the subject matter jurisdiction of the justice courts by fixing the amount in controversy, the nature of the action, the penalty provided, or any combination of these factors. Nev. Const. art. 6, § 8. The justice courts are "courts of limited jurisdiction and have only the authority granted by statute." *Koller v. State*, 122 Nev. 223, 227, 130 P.3d 653, 655 (2006).

Accordingly, the Nevada Legislature can only limit district court subject matter jurisdiction by expanding the jurisdiction of the justice courts, or through the creation of the family courts. Therefore, NRS 38.310 should not be considered a limitation on district court subject matter jurisdiction.

2. NRS 38.310 deals with justiciability, not jurisdiction.

In the past, this court has occasionally characterized exhaustion of administrative remedies as a subject matter concept. E.g., *Rosequist v. International Ass'n of Firefighters*, 118 Nev. 444, 451, 49 P.3d 651, 655 (2002). But this court

has also recognized that this characterization is not correct, and the court has clarified that the failure to exhaust administrative remedies under a statute pertains to justiciability, not subject matter jurisdiction. *City of Henderson v. Kilgore*, 122 Nev. 331, 336, 131 P.3d 11, 15, n.10 (2006). The *Kilgore* court observed that *Rosequist* had described a failure to exhaust statutory administrative remedies as a subject matter deficiency, but in reality, "justiciability, and not jurisdiction, is at play." *Id.* at 336, 131 P.3d at 15. If a plaintiff has failed to exhaust statutory remedies, "[t]he district court is not divested of subject matter jurisdiction; instead, the matter is simply not ripe for the district court's review." *Id.* (emphasis added).

Shortly after *Kilgore*, this court reaffirmed *Kilgore* in *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 170 P.3d 989 (2007). The *Thorpe* court clarified that although past decisions held that failure to exhaust administrative remedies deprives a district court of subject matter jurisdiction, *Kilgore* changed the analysis and adopted a ripeness approach instead of a subject matter jurisdiction approach. 123 Nev. at 571, 170 P.3d at 993. Here, the district court's order recognized the existence of *Kilgore* but then failed to apply it. 5 A.App. 1088.

Despite *Kilgore* and *Allstate,* the district court relied heavily on opinions dealing with a plaintiff's failure to exhaust administrative remedies. 5 A.App. 1088-89. Although the district court cited *Thorpe*, the district court misread that opinion

as providing a basis for a subject matter bar. *Id.* Most of the other administrative review cases relied on by the district court were decided before *Kilgore* and *Thorpe.*

The Legislature cannot restrict subject matter jurisdiction of a district court judge. See *Landreth v. Malik*, 127 Nev. 175, 180-81, 251 P.3d 163, 166-167 (2011) ("the Legislature does not have the constitutional authority to limit the constitutional powers of a district court judge sitting in the family court division."). Other jurisdictions with similar constitutions are in accord. *In re Christian R. H.*, 794 N.W.2d 230, 234-35 (Wis. Ct. App. 2010) ("Because subject matter jurisdiction is conferred by the Constitution and not by act of legislature, it cannot be curtailed by state statutes."); *Ralph v. Dep't of Natural Res.*, 343 P.3d 342, 347 (Wash. 2014) (same).

Similar to this court's recognition in *Kilgore* that exhaustion of administrative remedies is not an issue rising to the level of subject matter jurisdiction, so too should the court hold that subject matter jurisdiction is not implicated when a plaintiff fails to allege compliance with NRS 38.310. Like almost every other defense, a defense based upon a plaintiff's failure to request arbitration or mediation should be a defense against which other judicial doctrines are applicable, such as waiver and estoppel.

Here, even if NRS 38.310 is applicable, plaintiffs' failure to request arbitration or mediation prior to filing suit cannot justify dismissal after everything

that had already occurred. This is particularly true where defendants themselves initiated the first litigation between the parties, where defendants never invoked arbitration or mediation before suing individual unit owners, and where defendants litigated the case for nearly four years without ever hinting that the statute applied.[6]

3. Admissions of facts showing jurisdiction are provided by defendants' conduct and the statements of defendants' counsel.

Even if parties cannot stipulate to confer subject matter jurisdiction, they can admit to facts that establish subject matter jurisdiction. As the Ninth Circuit has noted: "It is well settled that one may stipulate to facts from which jurisdiction may be inferred. While consent of parties cannot give the courts of the United States jurisdiction, . . . the parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon such an admission." *Verzosa v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 589 F.2d 974, 977 (9th Cir. 1978) (internal quotation

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[6] Defendants requested the district court to dismiss the case and to "set aside all prior orders (including those imposing attorney's fees and costs against the Defendants, including all Findings of Fact, Conclusions of Law and Judgments." 1 A.App. 123:1-3. Even if this court is somehow persuaded to affirm, the dismissal should not have the effect of unwinding the district court's orders and judgments entered prior to the dismissal. See *Olcott v. Delaware Flood Co.*, 76 F.3d 1538, 1557 (10th Cir. 1996) (despite lack of subject matter jurisdiction, the district court had jurisdiction based on the punitive nature of Rule 16(f) and Rule 37(b)(2), to enforce the sanction of $ 402,527.98 against the defendants.); see also *Ilan-Gat Engineers, Ltd., A.G./S.A. v. Antigua International Bank*, 659 F.2d 234, 239 (D.C. Cir. 1981).

marks and citations omitted); accord *Ferguson v. Neighborhood Housing Services, Inc.*, 780 F.2d 549, 551 (6th Cir. 1986) ("[t]he rule that jurisdictional facts which are admitted by the parties may establish subject matter jurisdiction over a case is a salutory [sic] one that promotes speedy and inexpensive litigation."); *Morse v. Morse*, 99 Nev. 387, 388, 663 P.2d 349, 350 (1983) (district court properly ruled that appellant was barred, or estopped, from challenging court's jurisdiction to entertain petition for adoption).

In the present case, defendants, through their conduct and words, repeatedly admitted that Nevada courts have subject matter jurisdiction, despite the fact that nobody had complied with NRS 38.310 (by requesting arbitration or mediation). For one thing, defendants were the first parties to seek redress through the court system. They sued individual unit owners in justice court, alleging breaches of CC&Rs and other governing documents, without alleging any compliance with statutory or contractual provisions calling for alternative dispute resolution procedures. They then expressly stipulated that all of the disputes between the parties would be resolved in the district court.

Defendants' counterclaim is another admission of the district court's jurisdiction. 1 A.App. 109. The counterclaim was expressly based upon CC&Rs and maintenance agreements. *Id.* The counterclaim alleged that individual owners

breached CC&Rs and maintenance agreements, causing more than $10,000 in damages. 1 A.App. 110.

The counterclaim even contained a cause of action for declaratory relief, alleging that CC&Rs and maintenance agreements were "valid and existing contracts," and asserting that "[a]n actual controversy has arisen and now exists between GSR and [individual owners] concerning their respective rights, entitlements, obligations and duties under the CC&Rs and UMAs." 1 A.App. 110-11. Defendants asked the district court to issue a declaratory judgment "determining the parties' rights under the CC&Rs and UMAs." 1 A.App. 111. Also, the counterclaim sought an injunction requiring unit owners to comply with the governing documents. *Id.*

The counterclaim sought the precise relief covered by NRS 38.310 (i.e., a claim relating to "interpretation, application or enforcement" of CC&Rs). Despite asking for such relief, defendants' counterclaim did not allege defendants' compliance with NRS 38.310 or contractual provisions regarding ADR. This establishes defendants' judicial position that the district court did have jurisdiction to determine such claims, even in the absence of allegations regarding compliance with statutory ADR requirements.

Later, defendants stipulated to adding AM-GSR as a new defendant to the action, after defendants removed all of their assets out of defendant MEI-GSR. 2

A.App. 336:22-24. And even later, defense counsel specifically and expressly told the district court that "[t]he Court retains jurisdiction" in this action. 4 A.App. 892:13.

Under these circumstance, defendants' course of conduct should be deemed admissions that the district court had subject matter jurisdiction over the action.

4. NRS 38.310, as a type of condition precedent, is not jurisdictional and can be waived or subject to estoppel.

Conditions precedent can be waived. See *Summa Corp. v. Richardson*, 93 Nev. 228, 234, 564 P.2d 181, 184 (1977). "Any inconsistent act, dealing, or expression of intent not to require the doing of a thing suffices to prevent a forfeiture based on the nonperformance of such thing." *Id.* Litigating a matter in district court can constitute a waiver of a right to arbitrate the same dispute if doing so has caused prejudice to the other party. *Nev. Gold & Casinos, Inc. v. Am. Heritage, Inc.*, 121 Nev. 84, 90-91, 110 P.3d 481, 485 (2005). "Prejudice may be shown (1) when the parties use discovery not available in arbitration, (2) when they litigate substantial issues on the merits, or (3) when compelling arbitration would require a duplication of efforts." *Id.* Moreover, a party's litigation conduct can result in the party being estopped from taking a certain position. See *Marcuse v. Del Webb Cmtys., Inc.*, 123 Nev. 278, 287, 163 P.3d 462, 468-69 (2007).

Unquestionably, defendants' litigation conduct was highly prejudicial to plaintiffs. The dispute was litigated for nearly four years, with plaintiffs incurring more than $1 million in attorneys' fees and approximately $400,000 in expert costs. 2 A.App. 335:1-2. As the district court's orders found, defendants disrupted the litigation and caused extensive delays resulting from their repeated violations of the rules and court orders. Therefore, a waiver occurred as a matter of law.

Defendants' assertion of NRS 38.310 is also entirely inconsistent with defendants' justice court lawsuits, the counterclaims, and defendants' participation in nearly four years of litigation while conceding jurisdiction and never questioning plaintiffs' compliance with ADR requirements. In *Boisen v. Boisen*, 85 Nev. 122, 451 P.2d 363 (1969), the wife filed for divorce, and the husband argued on appeal that the district court lacked jurisdiction because the wife was not a Nevada resident for the required time. This court rejected the argument and applied estoppel against the husband for two reasons. First, the husband had never asserted the jurisdictional issue during the divorce litigation below. Second, "the husband counterclaimed for a divorce asserting his claim assuming the jurisdiction of the court." *Id.* at 124, 451 P.2d at 364. His assertion of his counterclaim, coupled with his "complete acquiescence" to jurisdiction in the divorce litigation, "estopped him from raising the issue" on appeal. *Id.*

In the present case, defendants filed their own lawsuits against individual unit owners in justice court, seeking remedies arising out of the CC&Rs and other governing documents. Then, after the parties stipulated to litigate their disputes in district court, defendants filed a counterclaim, again seeking remedies (including declaratory relief and an injunction) directly arising out of the CC&Rs and other governing documents. This is nearly identical to *Boisen.* The district court in this case distinguished *Boisen* on the ground that the jurisdictional arguments were raised at different times in *Boisen* and in the present case. 5 A.App. 1092-93. The basic concept, however, is the same: estoppel can be applicable even for arguments that raise jurisdictional issues.

The district court in this case also rejected application of the doctrine of estoppel, because, in the district court's view, NRS 38.310 establishes a subject matter jurisdictional barrier to which estoppel cannot not apply. 5 A.App. 1091-92. The district court recognized that in *Gamble v. Silver Peak Mines*, 35 Nev. 319, 133 P. 936 (1913), this court held that a party can be estopped to raise a jurisdictional question. 5 A.App. 1091:2-4. In fact, *Gamble* held that although a jurisdictional question can generally be raised at any time, "it is also settled in this court that a party may, by his conduct, become estopped to raise such a question." *Gamble* at 319, 133 P. at 937. The *Gamble* court cited multiple instances in which parties were estopped from denying a court's jurisdiction. *Id.*, 133 P. at 137-38.

In this case, the district court distinguished *Gamble* on the ground that *Gamble* dealt with estoppel in the appellate context, not in the trial court; and in *Gamble* there was a final judgment, whereas in the present case there was not a trial (because of the case-terminating sanction). 5 A.App. 1091-93. This is a distinction without a meaningful difference. If estoppel can apply to a last-minute jurisdictional challenge on appeal, there is no reason why the estoppel doctrine should not also apply to a last-minute challenge (after a compensatory damages judgment but before a punitive damages hearing) in the district court.

The district court also analogized NRS 38.310 to statutes that require expert affidavits in medical malpractice cases. 5 A.App. 1090. The district court's analogy, however, is not applicable. Medical malpractice statutes deal with highly complex public policy considerations involving perceived needs of the medical community. *Zohar v. Zbiegien*, 130 Nev. Adv. Op. 74, 334 P.3d 402, 405-06 (2014). Medical malpractice legislation was the product of a delicate balancing of public interests relating to unique problems that the Legislature perceived regarding the so-called medical malpractice insurance crisis. With this backdrop, the Legislature passed laws designed to protect doctors from frivolous suits, and the affidavit requirement was an integral part of that effort. *Id.*

Despite prior cases holding that the absence of a medical malpractice affidavit renders a complaint void, recent cases have softened the strict application of affidavit

statutes. In *Zohar*, for example, an affidavit did not adequately identify all of the medical professionals who allegedly committed the malpractice. Notwithstanding this deficiency, the court held that the affidavit could be read together with allegations in the complaint, thereby curing deficiencies in the affidavit and saving the case. *Id.* at __, 334 P.3d at 405-06.

In *Baxter v. Dignity Health*, 131 Nev. Adv. Op. 76, 357 P.3d 927 (2015), the plaintiff filed a medical malpractice complaint that referred to an affidavit. The affidavit, however, was not attached to the complaint, in violation of the statutory affidavit requirement. Instead, the affidavit was filed the next day. The defendants promptly moved for dismissal, and the district court granted the motion. This court reversed. The court noted that under NRS 41A.071 (as it read at the time of the complaint), the district court "shall dismiss" an action "if the action is filed without an affidavit." *Id.* at __, 357 P.3d at 929. Nonetheless, this court read the statute with a level of forgiveness, holding that the plaintiff had effectively complied with the statute. *Id.* at __, 357 P.3d at 929-31. As such, the lawsuit was saved.

Thus, although this court's prior decisions strictly applied the medical malpractice affidavit statute, recent decisions are more forgiving. In any event, there is no medical malpractice affidavit opinion of this court in which the court approved dismissal of a malpractice action where the doctor (1) sued the patient first (in another court), (2) stipulated to jurisdiction, (3) filed a counterclaim against the

patient, (4) litigated against the patient for years before ever raising the affidavit issue, and (5) was the target of an order imposing case-terminating sanctions due to litigation abuse and a judgment for compensatory damages—all of which occurred before the doctor moved to dismiss due to the absence of an affidavit. Such a result would be unfathomable.[7]

Accordingly, NRS 38.310 is not jurisdictional. Doctrines such as waiver and estoppel can apply. Here, the facts establishing waiver and estoppel were undisputed and overwhelming. As a matter of law, waiver and estoppel apply, and defendants should have been barred from asserting the statute.

C. ADR requirements, even if jurisdictional, are trumped by defendants' egregious litigation abuses, the case-terminating sanctions, and entry of the judgment.

While the motion to dismiss was still pending, this court issued its unpublished Order of Affirmance in *North American Properties (NAP) v. McCarran International Airport*, 2016 WL 699864 (Nev., February 19, 2016; No. 61997).

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[7] At the present time there is a sworn statement requirement in NRS 38.325(3), similar to the medical malpractice affidavit requirement. Defendants' motion to dismiss argued for application of this sworn statement requirement. 5 A.App. 957. The district court did not rely on this statute, probably because it was enacted by the 2013 Legislature and it became law on October 1, 2013, long after plaintiffs had already filed their complaint and their amended complaints. Thus, the statute's sworn statement requirement simply did not exist when the complaints were filed. This is another reason why the district court's analogy to medical malpractice case law is inapt.

Plaintiffs brought the *NAP* decision to the district court's attention, for its persuasive value under NRAP 36(c)(3). 5 A.App. 1033-34 (points and authorities), 1039-48 (copy of *NAP* decision). Plaintiffs argued that the district court's case-terminating sanctions rendered NRS 38.310 inapplicable, and that *NAP* provided persuasive value for this point. 5 A.App. 1033-34. The district court's order failed to address this contention.

NAP was an inverse condemnation case. In such a case the plaintiff's ownership of the real property at the time of the taking establishes the plaintiff's standing to bring the suit. *Fritz v. Washoe County*, 132 Nev. Adv. Op. 57, 376 P.3d 794, 796 (2016) ("Takings claims lie with the party who owned the property at the time the taking occurred."). Standing impacts subject matter jurisdiction. *United States v. Hays*, 515 U.S. 737, 742 (1995); see also *Padilla Const. Co. v. Burley*, 2016 WL 2871829, *7 (Nev., May 10, 2016; No. 65854) ("[W]hether a party has standing is a question that goes to the court's jurisdiction"). Indeed, standing is perhaps the most important jurisdictional doctrine. *Hays*, 515 U.S. at 742.

In *NAP*, the plaintiff engaged in "egregious litigation abuses," primarily involving failure to disclose documents that would have shown the plaintiff's lack of ownership and, consequently, lack of standing. *NAP* Order at 2-3. After the documents showing lack of ownership came to light, the district court found that NAP's egregious litigation abuses justified case-ending sanctions, and the district

court therefore applied adverse inferences against NAP. After applying the adverse inferences, the district court then granted the County's motion for summary judgment. *Id.*

On appeal, the en banc court unanimously affirmed the district court's decision to impose the adverse inferences, and the court then affirmed the district court's decision to grant summary judgment. *Id.* at 5-10.

Because lack of standing is a jurisdictional requirement, documents showing NAP's lack of ownership and lack of standing should have resulted in immediate dismissal. This would have been an easy and quick result. After all, the lack of ownership established lack of standing, which in turn established lack of jurisdiction. Once the documents showing lack of ownership and standing came to the district court's attention, theoretically the district court would have lacked all power to do anything other than immediate dismissal of the case for lack of jurisdiction. Yet the *NAP* court did not hold that the district court should have immediately dismissed the case for lack of jurisdictional standing. Instead, the *NAP* court held that the district court properly considered NAP's egregious litigation abuses and the case-ending sanctions, and that the district court properly went forward to consider and then decided the County's motion for summary judgment. In other words, the litigation abuses and case-concluding sanctions essentially trumped the standing jurisdictional problem.

The result in *NAP* was consistent with sound principles of judicial administration and public policy. The same result should be applied here. A defendant should not be allowed to engage in repeated egregious litigation abuses for years, suffer case-terminating sanctions, suffer a multi-million dollar compensatory damages judgment, but then obtain dismissal and judicial absolution based upon a technical argument that was never raised in nearly four years of litigation. We respectfully contend that to hold otherwise would be an absurd application of NRS 38.310 and an absurd application of jurisprudence dealing with subject matter jurisdiction.[8]

D. Defendants cannot rely on contract arbitration clauses because they were waived.

In addition to relying on NRS 38.310's requirement for alternate dispute resolution, defendants' motion to dismiss also relied somewhat on ADR provisions in the governing documents (although the district court did not rely on these provisions in dismissing the case). E.g., 1 A.App. 123. In 2005, this court clarified the test for determining whether a litigant has waived its contractual right to pursue arbitration. The court held that "a waiver may be shown when the party seeking to arbitrate (1) knew of his right to arbitrate, (2) acted inconsistently with that right,

[8] Litigation conduct can also result in a waiver, as discussed in the next section of this brief.

and (3) prejudiced the other party by his inconsistent acts." *Nev. Gold & Casinos, Inc. v. Am. Heritage, Inc.*, 121 Nev. 84, 90, 110 P.3d 481, 485 (2005).

The present case is similar to *Principal Investments, Inc. v. Harrison*, 132 Nev. Adv. Op. 2, 366 P.3d 688 (2016), which recently dealt with "litigation-conduct waiver" involving contractual arbitration provisions. A payday loan company sued delinquent borrowers in justice court, then obtained default judgments. The borrowers subsequently sued the company in district court, alleging that the justice court lawsuits had not been served on the borrowers. In defending the district court case, the company asserted an arbitration provision in the loan contracts. This court held that the company's conduct in suing the borrowers in justice court constituted a waiver of the contractual arbitration provision. *Id.* at __, 366 P.3d at 697-98 (applying the three factors articulated in *Nev. Gold*).

In the present case, defendants unquestionably knew about the arbitration provisions, because the provisions were contained in the governing documents that defendants themselves drafted. E.g., 2 A.App. 277 (GSR Unit Rental Agreement ¶(d)); 2 A.App. 410 (CC&Rs ¶13.15). Further, as was noted above, defendants filed their own lawsuits against unit owners, without asserting the ADR provisions, and defendants actively litigated this district court case for nearly four years, including assertion of a counterclaim seeking enforcement of governing documents, without

ever asserting the ADR provisions. There is no doubt that defendants waived any contractual rights to arbitration or mediation.

The *Nev. Gold* court held:

> If [a] demand for arbitration were to be upheld, there would be nothing to keep any litigant with an arbitration clause from testing the judicial waters, and to do so for as long as he liked, even to the point where the case has arrived on the brink of resolution, and then nullifying all that has gone before by demanding arbitration.

Nev. Gold, 121 Nev. at 90-91, 110 P.3d at 485.

This is precisely what occurred here. Defendants tested the judicial waters all the way until case-terminating sanctions were imposed, their answer was stricken, and an $8 million judgment for compensatory damages was entered against them. On the brink of a hearing on punitive damages, they wanted to nullify everything that had occurred before they asserted a right to arbitration or mediation. The district court allowed them to do so, contrary to the sound public policy expressed in *Nev. Gold* and *Principal Investments*.

CONCLUSION

This is a rare case in which the district court expressly recognized the travesty of justice his order would achieve, but then he entered the order anyway. The dismissal order here cannot withstand appellate scrutiny under any standard or any

reasonable view of NRS 38.310. The dismissal must be reversed, and this case should be remanded for the punitive damages hearing that was contemplated when the district court entered the order of dismissal.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in Times New Roman in 14 point font size.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7)(A)(ii) because, beginning with the statement of the case [NRAP 32(a)(7)(C)] and excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 10,959 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to page and volume numbers, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: Oct. 5, 2016

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CERTIFICATE OF SERVICE

I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date Appellants' Opening Brief was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

Gayle Kern	Daniel Polsenberg
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Joel Henriod	

In addition, Appellant's 7 Volumes of Appendix were hand delivered to the Clerk of the Nevada Supreme Court on this date for filing and therefore electronic service was made in accordance with the master service list above.

I further certify that on this date I served a copy of the Brief, along with a disk of the 7 volumes of appendix, by U.S. Mail, postage prepaid, to:

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DATED: 10/5/16

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